Case No: 1402917/2021

EMPLOYMENT TRIBUNALS

Claimant: **Alan Davies**

Respondent: **1) Summit Chairs Limited**
2) David Simpson

Heard at: **Bristol ET** **On:** **5, 6, 7 and 8 June 2023**

Before:
Employment Judge: **Mr G. King**
Members: **Mrs C. Monaghan**
Ms S. Maidment

Representation
Claimant: Ms S. Crawshay-Williams
Respondent: Mr N. Henry

JUDGMENT having been sent to the parties on 26 Junes 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. By a claim form presented on 30 June 2021 the Claimant brought the following complaints:
    (a) Unfair dismissal;
    (b) Discrimination on the grounds of disability;
    (c) Breach of contract (relating to notice);
    (d) Unlawful deductions from wages.

Procedure

2. The Tribunal heard live evidence from the Claimant. The Tribunal also heard live evidence from Mr Simpson on behalf of the Respondent. The Tribunal

was assisted by a bundle of 396 pages. Where pages of the bundle are referred to in this judgment, the page number is given in [square brackets].

Background

3. The Claimant was employed by the First Respondent ('R1') from 1 September 2013 until 30 June 2021. The Claimant began working for The Respondent as an Operations Director.

4. The Claimant's contract was issued on 1 September 2013 [52]

5. The Second Respondent is and was at all material times the majority shareholder and Director of The First Respondent. The First Respondent and Second Respondent are collectively referred to as the Respondent.

6. The Respondent designs and manufactures chairs and seating. the Claimant's role was to bring systems and processes into the business. In July 2018, the Claimant was promoted to the role of Managing Director [236]. the Claimant's new job role required him to deal with the way directors interacted, to handle finance matters, to be involved in a "brand" marketing project [165] and HR [319]. In particular, he was appointed managing director to deal with the removal of a director who was a family member of the Second Respondent.

7. In 2018, the Claimant circulated a template of a proposed updated directors' service agreement. Nothing further happened to this proposed updated agreement.

8. In August 2014, the Claimant was diagnosed with Chronic Lymphocytic Leukaemia ("CLL"). The Respondent accepts the Claimant is disabled by virtue of CLL. The Claimant continued to carry out his duties apart from being absent from work for short periods of time, during which the Claimant was paid full pay.

9. On 18 March 2020, the Claimant was advised by his oncology team to isolate due to the Covid-19 pandemic. The Claimant was placed on the NHS clinically extremely vulnerable list. The Claimant continued to engage in strategic discussions around R's response to the Covid-19 pandemic.

10. On 20 March 2020, the furlough scheme was announced. The Second Respondent wanted to furlough staff members, including himself and the Claimant [89-92]. On 31 March 2020, the Claimant suggested he and the Second Respondent reduce their salaries to £3,125 gross, including furlough payments of £2,500. The Claimant suggested this could be implemented "for April and we decide on the furlough next week" [93]. The

Second Respondent asked the Claimant to ask his financial advisor for the best way to “temporarily stop” the pension contributions [93]. The Second Respondent later himself asked whether there was a way for him to “temporarily stop” pension contributions [96]. The Claimant stated, “Let’s work off that for April then confirm ongoing figures for May” [96].

11. On 17 April, discussions were had by email and telephone between the Claimant and Mr Simpson regarding the continuation of health care cover, which was costing the business over £20,000 per year [104]. The Tribunal does not make any findings as to whether it was agreed the cover would continue indefinitely or merely for one more year. The cover was renewed for the year 2020-2021.

12. On 20 April it was confirmed that Mr Simpson and the Claimant, along with other members of staff, would be furloughed, and this furlough would be backdated to 18 March.

13. Also on or around 20 April, Robert Butters became involved with the company in a more substantial way. Robert Butters is a long-term family friend of both Mr Simpson and Mr Simpson's partner, Debbie Hayden. Mr Butters is a finance specialist, working in America. He had assisted the company before but was brought in to assist with the financial aspects of the company. His services were free to the Respondent.

14. Again on 20 April, an email was sent to the Claimant by Mr Simpson, in which it said "Debbie is acting MD" [113].

15. On 19 May, there was an email from Robert Butters to the Claimant [143], which stated that management meetings should take place, and set out seven points which related to duties that other members of the management team would be fulfilling.

16. On 1 October 2020, the Claimant received an email from the Second Respondent saying “the business can no longer afford to keep you employed… I hope we can arrive at an amicably negotiated agreement for termination of your employment” [155].

17. On 29 October 2020, the Claimant was signed off work with stress and in respect of knee surgery due to take place on 11 November 2020 [157-158].

18. On 31 October 2020, Robert Butters informed the Claimant his role was at risk of redundancy. He invited the Claimant to a consultation meeting on 2 November. The reasons for redundancy were [159]:

a. "Over the past 2 years Summit has not performed at a level to continue in business at the current revenue and cost structure
b. The current leadership is not driving the company forward and Summit is in serious risk of ceasing operations
c. The financial position of the company indicates that it will have to borrow funds at the end of the year to stay in business"

19. On 6 November 2020, the Claimant wrote a five-page letter [163-168], which he sent by email to Robert Butters. This letter has subsequently been agreed to have been a grievance letter. The Claimant said,

    "It is quite clear that my leukaemia has resulted in the need for me to shield during the covid crisis and this has resulted in me not being able to attend work. This has directly led to me being furloughed. I have been further marginalised as a result of this" [167]

    He also said:

    "…my absence from the business at various points relates to my chronic illness and my poor health which has led to my absence from the business; there has never been any issue raised with me about my performance. I do not believe that the role of Managing Director is redundant. I believe that the recent actions relate back to my illness and absence as a consequence of my recent ill-health… It appears to me that the company is in a rush to remove me from the business and replace me with someone who does not have an illness such as mine that I have suffered from for the last 6 years" [168].

20. On 7 January 2021, the Claimant attended a consultation meeting with Linda Satterley (Croner consultant) [287-297]. It was at this point that there was the first recognition of the Claimant's letter of 6 November as a grievance letter. The redundancy consultation period was paused while the grievance was dealt with.

21. On 14 January 2021, the Claimant attended a grievance hearing [190-208]. A grievance hearing report dated 21 January 2021 concluded the Claimant's grievance was primarily not upheld [182-189]. The report was adopted in its entirety by The Respondent in an outcome letter dated 29 January 2021 [211].

22. The Claimant submitted an appeal on 2 February 2021 [212].

23. On 17 Feb 2021, the Claimant attended a grievance appeal hearing [235-250]. An appeal outcome report dated 22 Feb 2021 concluded the Claimant's grievance was primarily not upheld [222-234]. The report was

adopted in its entirety by The Respondent in an outcome letter dated 25 February 2021 [252-253].

24. The Claimant attended redundancy consultation meetings with Ms Satterley on 1, 8, 17 March 2021 [298-311]. The consultation report [275 - 286] was submitted to Mr Simpson.

25. On 31 March 2021, The Respondent dismissed the Claimant and put him on garden leave for the remainder of his notice, ending on 30 June 2021 [331].

26. The Claimant did not appeal his decision [332].

Law

Unfair dismissal

27. An employer must show the reason for dismissing an employee (section 98(1), Employment Rights Act 1996 ("ERA")). That is the set of facts known or beliefs held in the mind of the decision-maker at the time of the dismissal which cause him to dismiss the employee (*Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA). Dismissal by reason of redundancy is a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act 1996.

28. A reasonable employer will "seek to see whether instead of dismissing an employee he could offer him alternative employment" (*Williams v Compair Maxam Ltd* 1982 ICR 156, EAT, p162).

29. Fair consultation "'involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely" (*The Respondent v British Coal Corporation, ex parte Price (No.3)* [1994] IRLR 72 (p75)) Those comments related to collective consultation duties (s.188 TULRCA) but have been applied in unfair dismissal cases see e.g. *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508, EAT.

30. In *Dial-a-Phone v Butt* (EAT 0286/03), a senior employee was put into a pool of one. Her deputy was not put in the pool. The Claimant senior employee earned £23,500 more than the deputy and could do the deputy's tasks. The EAT upheld the ET's finding that, even if the Claimant had not raised the suggestion of doing the deputy's job and accepting the pay cut, the Respondent should have considered offering the Claimant the deputy's job and making the deputy redundant [§19].

31. In *Leventhal Limited v North* (EAT/0265/04), the EAT upheld the ET's decision that a dismissal was unfair where a senior editor had been placed in a pool of one. The Claimant had not been given the opportunity to say whether he would have accepted a junior colleague's role of editor and did not ask colleagues about voluntary redundancy. The EAT said that, whether or not the failure is unfair is a question of fact for the Tribunal, which will depend on matters such as: (a) whether or not there is a vacancy, (b) how different the two jobs are, (c) the difference in remuneration between them, (c) the relative length of service of the two employees, and (d) the qualifications of the employee in danger of redundancy. The EAT accepted that the employer's failure to take the initiative in considering the above matters rendered the dismissal unfair (§12).

Discrimination arising from disability

32. The elements of a discrimination arising from disability claim (s.15, Equality Act 2010) are: (1) the Claimant was subjected to unfavourable treatment; (2) there must be something that arises in consequence of the Claimant's disability; (3) the unfavourable treatment must be because of the something that arises in consequence of the disability; (4) the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

33. Disability need only be a significant influence or effective cause of unfavourable treatment (*Hall v Chief Constable of West Yorkshire Police* [2015] IRLR 893, EAT).

Direct disability discrimination

34. Section 13 of the Equality Act 2010 provides:

> S. 13.
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

35. In respect of a complaint of direct discrimination, the Tribunal must focus on the 'reasons why' The Respondent acted (or failed to act) as they did. That is because, other than in cases of obvious discrimination, the Tribunals will want to consider the mental processes of the alleged discriminator(s): *Nagarajan v London Regional Transport* [1999] ICR 877.

36. In order to succeed in any of his complaints, a Claimant must do more than simply establish that he has a protected characteristic and was treated unfavourably: *Madarassy v Nomura International plc* [2007] IRLR 246. There must be facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long-established legal guidance, including by the Court of Appeal in *Igen v Wong* [2005] ICR 931. It has been referred to as something "more", though equally it has been said that it need not be a great deal more: Sedley LJ in *Deman v Commission for Equality and Human Rights* [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a prima facie case.

37. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference could properly be drawn.

38. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that he or he was were treated less favourably than he or he would have been treated if they had not been a particular race, gender, religion etc: *Shamoon v RUC* [2003] ICR337. 'Comparators', provide evidential material. But ultimately, they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

39. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, also suffice. There were no such comments in this case.

40. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable / unfair

treatment. This is not an inference from unreasonable / unfair treatment itself but from the absence of any explanation for it.

41. It is only once a prima facie case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: *Madarassy v Nomura* [2007] EWCA Civ 33.

42. In respect of the Claimant's direct discrimination complaints, the Tribunal is ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant.

43. The outstanding matters relied upon by the Claimant as being less favourable treatment are set out in the List of Issues 14 above.

<u>Victimisation</u>

44. Section 27 of the Equality Act 2010 prohibits victimisation.

S. 27 Victimisation

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> > (a) B does a protected act, or
> >
> > (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> > (a) bringing proceedings under this Act;
> >
> > (b) giving evidence or information in connection with proceedings under this Act;
> >
> > (c) doing any other thing for the purposes of or in connection with this Act;
> >
> > (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
>
> (4) This section applies only where the person subjected to a detriment is an individual.
>
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

45. The Claimant does not need to show a comparator but she must prove that she did a protected act and that she was subjected to a detriment because she had done that protected act. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that

the protected characteristic or protected act had a significant influence on the outcome.

46. In considering the burden of proof, the Tribunal referred to s.136 Equality Act 2010 and the guidance set out in the case of *Igen Ltd v Wong* [2005] IRLR 258, CA as approved in *Madarassy v Nomura International Plc* [2007] IRLR 246, CA. This guidance reminds the Tribunal that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

47. In considering whether the burden of proof has shifted, the Tribunal should not adopt an overly mechanistic approach but rather consider whether discrimination can properly and fairly be inferred from the evidence, *Laing v Manchester City Council* [2006] IRLR 748. A Tribunal will be setting an impermissibly high hurdle, however, if it asks if discrimination is the *only* inference which could be drawn from the facts, *Pnaiser v NHS England and Coventry City Council* [2016] IRLR 170, EAT.

<u>Burden of proof</u>

48. In cases where a Claimant is unable to establish a clear case of discrimination, he or she can shift the burden of proof onto the Respondent by establishing 'prima facie case of discrimination'. In these circumstances, it is for the Claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. It is possible to rely on a comparator or hypothetical comparator during this exercise. The employer's explanation should not be considered by the Tribunal at this stage (<u>*Igen Ltd (formerly Leeds Careers Guidance) v Wong*</u> [2005] ICR 931, CA).

49. If a Claimant is able to establish a prima facie case of discrimination, the burden of proof shifts onto the Respondent, who must prove on the balance of probabilities that its treatment of the Claimant was not because of the protected characteristic. The protected characteristic need not be the sole or main reason for the treatment, but must be an "effective cause" (<u>*O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School*</u> [1997] ICR 33, EAT).

Unlawful deduction from wages/breach of contract

50. Terms of a contract will only be enforceable if they are sufficiently clear and certain for the Tribunal to be able to give them meaning. Implied terms are those which parties are taken to have agreed by virtue of the circumstances in which the contract has been made or performed. Tribunals may imply a term into employment contracts by looking at the surrounding facts and circumstances, which may suggest the contract has been performed in such a way as to suggest that a particular term exists.

51. Under section 13 of ERA 1996, an employer is prevented from making an unlawful deduction from wages of a worker employed by him. Section 13(3) of the ERA 1996 provides:

    Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

52. Wages are "any sums payable to the worker in connection with his employment" (s.27(1), ERA 1996).

53. Deciding whether wages are "properly payable" will require the Tribunal to resolve any disputes as to the meaning of a contract (*Agarwal v Cardiff University* [2019] ICR 433, CA), including any implied terms (*Camden Primary Care Trust v Atchoe* [2007] EWCA Civ 714, CA). The Tribunal should adopt the same approach as that taken by the civil Courts in contract claims (*Greg May (Carpet Fitters and Contractors) Ltd v Dring* 1990 ICR 188, EAT), i.e. decide on the ordinary principles of common law and contract, the total wages properly payable to the worker on the relevant occasion.

54. The employer will be permitted to make a deduction if it is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract, or if the worker has signified in writing his agreement to the deduction (s.13(1), ERA 1996).

Deliberation

55. Beginning with the unfair dismissal, the Tribunal must consider if the Claimant was dismissed for a fair reason, within the meaning of s.98(2) ERA. The Respondent says that the reason was redundancy, or in the alternative, a business reorganisation in the interests of economy and

efficiency. The Claimant disputes that there was a genuine redundancy situation.

56. The Tribunal accepts the evidence of Mr Simpson that the Respondent was in a poor financial position, and had been so for a number of years. This was not a situation that arose purely because of the COVID pandemic but had been ongoing, with other factors such as Brexit it impacting on the profitability of the business. The Claimant was well aware of this, and suggested various cost saving measures, including some redundancies. The Claimant confirmed, at paragraph 84 his witness statement, the 12 redundancies were made and this was more than he had proposed. He was confirmed that he had knowledge of restructuring and discussed this with Robert Butters.

57. The Tribunal notes that Mr Butters was brought in to deal with financial matters, as this is his expertise. His services were free to the Respondent, as he is a long-standing family friend. The Tribunal accepts that, in a small company such as the Respondent, there would be a degree of overlap in the duties of all the managers. To the extent that some of Mr Butters responsibilities overlap with work that the Claimant had done, the Respondent was now getting the same work, or possibly even more expert work, for free.

58. The Claimant was also aware of the reorganisation. The email from Robert Butters to the Claimant at [143] says that there have been "a number of conversations with the management team along the lines we discussed last week". In the Tribunal's view, the only reading of this can be that Mr Butters and the Claimant had discussions about increasing responsibilities for the other members of the management team as set out in email.

59. Mr Simpson's evidence was that it became apparent to other members of the leadership team, long before it became apparent to him, that the role of MD was no longer needed. The Tribunal accepts the evidence that the Respondent to this day does not have anyone in the position of MD. The Tribunal accepts the evidence of Mr Simpson that Debbie Hayden was not fulfilling the full role of MD, and was supporting him personally. This is corroborated by the email of Robert Butters [143], in which he says "no title for Debs as it is generally more akin to a firefighter than a policeman".

60. The Tribunal find that this was a genuine redundancy situation, following a reorganisation on the grounds of efficiency and economy, and so the Respondent had a genuine belief that this was a fair reason to dismiss the Claimant.

61. The Tribunal there needs to look at whether the Respondent acted reasonably in all the circumstances, taking into account the size and administrative resources of the Respondent, in treating redundancy as a sufficient reason for dismissing the Claimant.

62. The Tribunal has considered whether there is adequate warning and consultation. The Tribunal accepts that the Claimant was first made aware that he was at risk of redundancy on 1 October 2020. The Claimant was not actually made redundant until the end of March 2021. There were redundancy consultations on 7 January 2021, 1 March, 8 March and 17 March. The Claimant asked for information throughout this process, and it was provided to him.

63. The Tribunal finds that there was adequate warning and consultation.

64. The Tribunal also has to consider whether the Respondent operated a fair selection process. In cross examination, the Claimant said that he did not have a dispute with the process, but that his case was that there was no genuine redundancy situation.

65. The Tribunal accepts the evidence of Mr Simpson that it was the role of MD that was redundant. The only other persons in the company who fulfilled a similar role was Mr Simpson. The Tribunal is not persuaded by the argument that Mr Simpson should have included himself in any pool for redundancy with the Claimant. Mr Simpson is the majority shareholder in the Respondent, and the Respondent is a family business started by Mr Simpson's father. Any process by which Mr Simpson were to cease to an employee but remain as a majority shareholder and director would have been meaningless.

66. The Tribunal finds that the Claimant was in a pool of one, and this was a fair pool from which to select potentially redundant employees.

67. The Tribunal then needs to consider whether suitable alternatives were considered to keep the Claimant in Employment. The Tribunal notes that the redundancy consultation was carried out by an independent external company, and the Tribunal accepts the findings of the report at [275]. At [282] the report confirms that a bump redundancy had been considered, and at [284] the report confirms that the Claimant had been given an opportunity to put forward any roles that he considered himself suitable for. The Tribunal has taken note of appendix 4, at [315], which shows that all four of the newly reorganised roles were considered for the Claimant. The Tribunal finds that the Respondent acted reasonably in concluding that, based on the Respondent's experience of the Claimant and his work within the Respondent, it was not believed by the Respondent that the Claimant

had sufficient breadth of experience to perform these roles adequately even with additional training.

68. The Tribunal has regard to the factors set out at paragraph 12 of the judgement of Lionel Leventhal Ltd v North. The Respondent was entitled to consider a range of factors, including the experience of the relevant employees. In the view of the Tribunal, adequate consideration was given to these factors, and this is demonstrated on [315].

69. The Tribunal therefore finds that suitable steps were taken to find suitable alternative employment for the Claimant.

70. When faced with a redundancy situation where no suitable alternative employment could be identified, the Tribunal is satisfied that dismissal was within the range of reasonable responses.

71. The Tribunal therefore concludes that the Claimant was dismissed for the fair reason of redundancy.

72. Turning to the matters of discrimination the Tribunal will deal first with the allegation of direct discrimination (s.13 Equality Act).

73. The Tribunal must consider whether the Respondent treated the Claimant less favourably than comparable employee when it dismissed him by reason of redundancy. A comparable employee must be one with no material differences in their circumstances as compared with the Claimant, other than the disability that the Claimant had.

74. The Claimant named comparators of Debbie Hayden and Robert Butters. The Tribunal does not consider these to be appropriate comparators. The Tribunal does accept that Debbie Hayden took a more prominent role in the business during the COVID pandemic. The Tribunal accepts the evidence of Mr Simpson that Debbie Hayden was personally supporting him during what was clearly a difficult time. The Tribunal accepts that her role was more akin to an executive assistant. The Tribunal also notes that Mr Butters was an external consultant, not employed by the Respondent, and was offering his services for free. While this does not automatically preclude him from being a comparator, the Tribunal finds that there are material differences in his circumstances to that of the Claimant.

75. The Claimant also relies on a hypothetical comparator, which is set out at paragraph 39 of the Claimant closing submissions. The comparator is said to be one who was not disabled and did not require expensive health insurance. The Tribunal disagrees this is the correct comparator. The correct hypothetical comparator would be a person without the Claimant's

disability, who was fulfilling the same duties as the Claimant, but who was required to isolate and also required expensive health care insurance. Requiring expensive health care insurance is not a disability. It may be something that arises out of a disability, but that does not fit within s.13 Equality Act.

76. The Tribunal finds that the Respondent did not treat the Claimant less favourably than a hypothetical comparator who did not have the Claimant's disability. The Tribunal finds that a person in the Claimant's situation would have been considered for redundancy whether or not they had a disability. The Claimant's disability was not an influencing factor on the decision to dismiss him. The dismissal was due to the fair reason of redundancy.

77. The Tribunal now turns to the s.15 claim. The Tribunal accepts that dismissal does amount to unfavourable treatment, has no employee would want to be dismissed. The Tribunal has to consider did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability. The Claimant contends that the treatment arose because of his continuing absence from the workplace and/or the requirement that he isolate from 18 March 2020.

78. The Tribunal accepts that the "something arising", was a requirement to isolate, and therefore be absent from business, and this did arise from the Claimant's disability, namely his cancer. The Tribunal must therefore consider if the unfavourable treatment was "because of" this "something arising".

79. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

80. As above the Tribunal has accepted that there was a genuine redundancy situation within the Respondent. The Tribunal also notes that, at the beginning of the Respondent's reorganisation for greater efficiency, the country was in lockdown. All employees were having to work from home. Further, throughout the period which has been the subject of this Tribunal, Mr Butters was based in the US and he was not able to attend the Respondent's worksite.

81. The Tribunal is not persuaded that inferences can be drawn that the Respondent held the Claimant sickness -related absence is against him. It is agreed that the Claimant never exceeded this contractual sick leave allowance and he was paid in full throughout any periods of sick leave. The Claimant was employed with the Respondent for six years following his

diagnosis with cancer, and this is not consistent with the company that takes a negative view of the Claimant's time spent away from the business.

82. The Tribunal is satisfied that the Respondent's reason for deciding to dismiss the Claimant was the fair reason of redundancy, and not because the Claimant was absent from the business due to his enforced isolation.

83. Turning to the claim of victimisation, the Tribunal is satisfied that the Claimant's grievance of 6 November 2020 amounts to a protected act. Further, the evidence of a Mr Simpson is that Mr Butters told him that the Claimant had referred to taking the Respondent to "an industrial Tribunal". The Tribunal is satisfied that the Respondent therefore believed that the Claimant may do a protected act.

84. The Tribunal must therefore decide if the Claimant was subjected to detriment or detriments, and if so, was this because the Claimant had done the protected act or may do the protected act?

85. The detriments that the Claimant seeks to rely on are:
    a. his dismissal by reason of redundancy with effect from 30 June 2021
    b. his marginalisation and exclusion by David Simpson

86. The Tribunal has found that the Claimant was dismissed for the fair reason of redundancy. While a dismissal would amount to a detriment, the Tribunal finds that the driving reason behind the redundancy was a need to cut costs and make the business more efficient. The Tribunal is satisfied that the Claimant's protected act or the Respondent's belief that the Claimant may do a protected act were not a significant influence on the decision to dismiss the Claimant. The dismissal happened because the MD role was redundant.

87. The Claimant has raised that he felt less included in meetings once he was on furlough. He has also raised the issue that his email account developed a fault on 26 October 2020, and that Mr Simpson directed his IT provider not to fix the fault. The Tribunal notes that this is not pleaded as a separate detriment, but is used as an example of the Claimant's exclusion by Mr Simpson.

88. The Tribunal does find it significant that, even by the Claimant in evidence, this is a fault with the email that the Respondent decides not to fix, rather than a case where the Respondent intentionally removes the Claimant's email access. The Claimant was using his personal email address to deal with business-related issues, as can be seen on 20 May at [145] and 13 August at [153].

89. The Tribunal also finds that is significant that, at the times of the alleged marginalisation, the Claimant was on furlough. Both the Claimant and the Respondent said in evidence that they understood there were exceptions for directors on furlough, allowing directors to continue their fiduciary duties to the company, but they both agreed that furloughed workers should not be doing work for the company. Since the Claimant was able to communicate and indeed did communicate, with the Respondent regarding some of his director duties using his personal email, the Tribunal finds that instructing the IT providers not to fix a fault with the Claimant worked email, does not amount to marginalisation. The Claimant had no requirement to use his worked email, as he was on furlough at the time.

90. The Tribunal is sympathetic to any feelings of marginalisation and exclusion that the Claimant may have felt, but the Tribunal is of the view that these are feelings experienced by many who were on furlough and forced to isolate, through no fault of their own or anyone else. Being on furlough meant a life away from work and away from close contact with work colleagues, and the work the Claimant was doing in respect of his director duties was probably pushing the boundaries of what was permissible in the circumstances. The Tribunal can fully understand that what the Claimant might have been feeling felt "detrimental", but in terms of law, this was not a detriment that the Claimant had been *subjected to by the Respondent.* The Tribunal is further satisfied, if it is wrong the above point, that any detriment in respect of marginalisation was not because the Claimant had done a protected act or the Respondent believe the Claimant may do a protected act. It was linked to the diminishing role of the managing director.

91. Tribunal now needs to look at the claim of Breach of Contact and Unlawful Deductions from Wages.

92. The Claimant's contract is at [52]. The Tribunal will need to decide if the contract was varied from March 2020 (i.e. the pay in April's payslip). It confirmed, and both parties agree, that the Claimant's rate of pay was £6,666.00 per month. The Tribunal refer to this as the 'old rate'.

93. It is clear from the emails at [92] onwards that the Claimant is in discussion with Mr Simpson about how they can reduce costs, and one of the options is for the directors to take a pay cut. In cross examination, the Claimant said "I was the architect of that figure". That figure was £3,125 per month, and the Tribunal refer to this as the 'new rate'. The Claimant went on to say "but it was only meant to be temporary". Mr Simpson, in his evidence agreed that the measure was to be a temporary one. The question, therefore, is how temporary was this agreement meant to be. In other words, how long was it meant to last?

94. The Claimant's case, as per his written submissions, is that he only agreed to this deduction for April only (by April, we refer to the pay received in April, which would be for the majority of previous month). In the alternative, the Claimant says that it is implied that he agreed to this deduction only until business picked up, which by his projection [92] was going to take place in June that year. The Claimant's case on this reading is that the company will once again be making money in June 2020, and therefore the pay of June (actually paid at the beginning of July), should be on the old rate.

95. The Claimant appears to offer a third alternative case, which is that it was an implied term that the agreement would come to an end when the business was once again performing at a level that made it profitable, and that this is either in June 2020, when Mr Simpson increases his own pay from £3,125 to £4,315, or when there was sufficient money available for Mr Simpson to take a £10,000 loan from the company, which was in February 21.

96. Whether a particular term should be implied into a contract is a question of law and, as such, can be challenged on appeal — O'Brien v Associated Fire Alarms Ltd 1969 1 All ER 93, CA. It must be emphasised that a Court will only look at the presumed intention of the parties at the time that the contract was made.

97. The Courts will not imply a term simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the Court can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the Court must be satisfied that:
    - the term is necessary in order to give the contract business efficacy
    - it is the normal custom and practice to include such a term in contracts of that particular kind
    - an intention to include the term is demonstrated by the way in which the contract has been performed, or
    - the term is so obvious that the parties must have intended it.

98. In view of the Tribunal, the conduct of the parties is key in looking at this issue.

99. There is regular email contact between Mr Simpson and the Claimant going from April into May. The Claimant at no point raises that he is expecting directors' salaries to be at the old level for the May payment. Emails between the Claimant and Mr Simpson referred to "may onwards" and the Claimant never challenges this.

100. The Claimant did not raise any issue of breach of contract or unlawful deductions from wages in any communication with the Respondent up to the point that he is told that the MD role is to be made redundant. the Claimant did not raise these issues in his grievance of 6 November. As part of the redundancy consultation, at [308], the Claimant says “I voluntarily took a salary cut”. He does not say at any point during the consultation that he is owed this money.

101. When asked in cross examination if he had ever raised these issues, the Claimant said he did, in an email to Mr Simpson, at [332]. Looking at this email, the payments that the Claimant refers to in respect of his notice pay and holiday pay, which he contends should be at the higher amount, i.e. the amount prior to the variation in the contract. At no point does the Claimant raise that he has been incorrectly paid since April 2020, or since July 2020, or that they should have been a renegotiation of his reduced salary at any point up until his dismissal.

102. The Tribunal is satisfied that this was not an express agreement to vary the Claimant pay for April only; nothing in the way the Claimant conducted himself during discussions with the Respondent around April or May supports this. Similarly, the Tribunal does not find that this was an agreement to vary the contract up until July, which the point that the Claimant predicted that sales would have picked up again. The evidence regarding the Claimant’s prediction is contradictory, with the Claimant saying his prediction did not come to fruition, Mr Simpson said that some elements of the Claimant’s prediction were correct. The Tribunal notes however that even if sales were at 50% for June, what was actually being compared here is June 2020 June 2019, where the company made a loss [DS 26]. Based on this, it would seem that even if the Claimant’s prediction was true, the company was still not profitable in June 2020. There is also nothing that the Tribunal can find in the agreement that says its duration is linked to sales only, nor can this be implied.

103. The Tribunal accepts Mr Simpson’s explanation that when he increased his salary, he did so because he had come off furlough and was now working again for the company. This, in the Tribunal’s view, it is entirely legitimate and reasonable explanation. The Tribunal further accepts Mr Simpson’s evidence that the £10,000 loan to himself in February 21 was a short-term loan to cover school fees and was quickly repaid. It was not an indication of the business was now functioning at a profitable level.

104. A based on the above, the Tribunal is convinced that, at the time the agreement for reduction salary was made, the intention was that this should last until there was an agreement to vary it again. Both parties envisaged

that this would happen at some point in the future, which is why the changes were repeatedly referred to as "temporary", but the Tribunal is satisfied that the variation to the contract in respect of the Claimant salary was in force throughout the period from when it was introduced until the Claimant left his employment.

105. The discussions around the pension payments of £400 per month are interwoven with the email correspondence at [92], and the Tribunal finds that the same principles applied in the agreement to stopping the pension contributions. For the same reasons as given above, the Tribunal finds the Claimant had agreed that there would be no contributions to his pension from April 2020, and this continued up until his employment ceased.

106. The claims in respect of breach of contract and unlawful deduction from wages in respect of both the Claimant being paid at the 'old rate' (which applies to salary deductions and holiday pay), and for the pension contributions therefore fail.

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Employment Judge G. King

Date: 6 August 2023

Judgment sent to the Parties on 24 August 2023

For the Tribunal Office

<u>Note</u>

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.