# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr M Brosnan** | **v** | **Coalo Limited** |

**Heard at**: Watford Employment Tribunal **On**: 12 June 2023

**Before:** Employment Judge George (sitting alone)

**Appearances**

**For the Claimant:** in person
**For the Respondent:** no attendance, having been given notice of the hearing.

## RESERVED JUDGMENT

1. The respondent was in breach of contract from 26 August 2021 onwards by reason of their failure to pay the claimant his full contractual sick pay entitlement.

2. The respondent discriminated against the claimant for a reason arising in consequence of disability by

    a. at formal absence meeting on 2 March 2020 failing to set a review period in breach of the respondent's management of absence policy;

    b. on 30 June 2021, asking the claimant to attend the second formal absence meeting on 16 July 2021;

    c. failing to include the claimant in the employee WhatsApp group;;

    d. reducing the claimant's pay to half pay from August 2021 onwards.

3. The respondent was in breach of the duty to make reasonable adjustments with effect from 27 March 2020 by

    a. a failure to provide the auxiliary aid of a lumbar support;

b. a failure to take steps recommended by occupational health namely a limit on lifting and pushing to 10 kg and, if possible, assistance from a colleague;

c. failure to provide access to an osteopath.

4. The respondent was in breach of the duty to make reasonable adjustments with effect from 1 December 2021 by a failure to consider amended duties including the above limits on lifting and pushing as recommended by the claimant's GP.

5. The claimant was unfairly dismissed by the respondent.

6. The respondent victimised the claimant by,

   a. failing to progress his grievance;

   b. failing to allow or to facilitate his return to work;

   c. dismissing the claimant.

7. The employment tribunal has jurisdiction to consider all of the complaints of disability discrimination (whether contrary to section 15 EQA or s.20 EQA) because they amount to conduct extending over a period and the claim was presented within three months of the end of that period.

8. The claims of unlawful detriment on grounds of protected disclosure and automatic unfair dismissal for the reason or principal reason of protected disclosure fail and are dismissed.

9. The claims of unauthorised deduction from wages succeed.

10. The claimant of holiday pay succeeds.

11. The respondent is to pay to the claimant compensation of **£134,411.83** calculated as follows:

| | | **Dismissal based compensation** | **Carried forward to final total** |
|---|---|---|---|
| **Compensation for discrimination and victimisation (EQA)** | | | |
| Injury to feelings | 15,000.00 | | |
| Interest on £15,000.00 @ 8% p.a. from 28.02.2021 to 12.06.2023 (835 days) @ £3.29 p.d. | 2,747.15 | | |
| Total injury to feelings incl interest | 17,747.15 | 17,747.15 | |
| Personal Injury | 7,000.00 | | |
| Interest on £7,000 @ 8% p.a. from 20 April 2021 to 12 June 2023 (784 days) | 1,202.85 | | |

| | | | |
|---|---|---|---|
| @ £1.53 p.d. | | | |
| Total personal injury incl. interest | 8,202.85 | | 8,202.85 |
| Financial Loss to date of hearing | | | |
| 67 weeks loss of earnings @ £602.48 (net of tax and N.I.) 25.02.22 to 12.06.23 | 40,366.16 | | |
| LESS income earned | (27,000.00) | | |
| Subtotal | 13,366.16 | | |
| Interest @ 8% p.a. on midpoint to 12.06.2023 (473 days) @ £2.30 p.d. | 1,087.90 | | |
| Past loss of earnings (incl interest) | 14,454.06 | 14,454.06 | |
| Future loss of earnings: | | | |
| 13.06.23 to 29.02.2024 @ £26.12 net per day. 262 days @ £26.12 net of tax and NI per day = | 6,843.44 | | |
| Loss of pension (see para.155 below) | 18,482.16 | | |
| Total Future Loss | 25,325.60 | 25,325.60 | |
| **Compensation for unfair dismissal** | | | |
| Basic Award | | | |
| Agreed figure | 5,139.00 | 5,139.00 | |
| Compensatory Award | | | |
| Loss of statutory rights | 500 | 500 | |
| SUBTOTAL compensation flowing from dismissal (ERA and EQA) | | 63,165.81 | |
| 25% uplift for s.207A TULR(C)A | | 15,791.45 | 2,050.71 |
| TOTAL compensation flowing from dismissal (ERA and EQA) subject to grossing up to take account of the incidence of income tax | | 78,957.26 | 78,957.26 |
| Excess of total compensation over £30,000 | | 48,957.26 | |
| Grossing up at higher rate of tax in y/e 05.04.24 of 40% (£48,182.26 X 0.6) | | 29,374.36 | 29,374.36 |
| **Holiday pay (calculated gross but to be paid after deduction of tax and NI by respondent)** | 4,555.98 | | |
| **Unauthorised deduction from wages/notice pay (calculated gross but to be paid after deduction of tax** | 1,827.15 | | |

**and NI by respondent)**

| | | |
|---|---|---|
| **Damages for breach of contract/failure to pay contractual sick pay (calculated gross but to be paid after deduction of tax and NI by respondent)** | 5,737.40 | |
| Subtotal wages claims | 12,120.53 | 12,120.53 |
| 25% uplift for s.207A TULR(C)A | 3,030.12 | 3,030.12 |
| Medical Expenses (not taxable) | | 676.00 |
| **Total Sum Payable** | | **134,411.83** |

12. I make a preparation time order in favour of the claimant in respect of the respondent's failure to comply with case management orders in Case No: 3322339/2021. The respondent is to pay to the claimant **£1,560.00**.

# REASONS

1. A summary of the procedural history of these proceedings is as follows:

    a. Following a period of conciliation between 2 September 2021 and 14 October 2021 the claimant presented Case No: 3322339/2021 (claim 1) on 20 October 2021 (page B: 1). The claim arises out of his employment at as a responsive repairs plumber for the respondent. His continuous employment started in September 2016. By his claim he complained of disability discrimination contrary to the Equality Act 2010 (hereafter the EQA). The disability relied on is a back condition and the types of discrimination complained of appear from the narrative to be an alleged breach of the duty to make reasonable adjustments and complaints about unfair treatment in management of disability related sickness absence including by reduction of pay.

    b. The respondent entered the grounds of response in time on 9 December 2021 the particulars of which are at page B: 23. The claimant was ordered to provide further information about his claim and on 15 March 2022, as is common in this region, a final hearing listing for three days was sent to the parties with case management orders (page B: 29). At the same time a preliminary hearing for case management was listed by telephone from 28 July 2022.

c. The claimant responded with the information he had been asked to provide on 2 April 2022 (page B: 36). Employment Judge Anstis had dismissed a claim for breach of contract which appeared in claim 1 on the basis that the Tribunal did not have jurisdiction to consider it because the claimant remained employed. On 2 April 2022 the claimant wrote asking for that decision to be reconsidered because in the meantime his employment had come to an end. No decision was made and the application is superseded by Claim 2.On the same date he applied to amend his original claim form to add a claim for victimisation, unfair constructive dismissal, detriment and automatic unfair dismissal on grounds of protected disclosure and unpaid wages (page B: 41).

d. The claimant resigned on 25 January 2022 on notice which expired on 25 February 2022. Following a further period of conciliation between 21 and 26 April 2022, the claimant presented Case No 3306413/2022 on 1 June 2022 (claim 2 - see page B: 56). This was acknowledged by the Tribunal on 29 June 2022 and sent to the respondent on the same day requiring a response by 27 July 2022 (page B: 54).

e. Claim 2 alleged that the claimant had suffered detriment on grounds of protected disclosures and had been forced to resign as a result "and therefore feel that I have been victimised." He complains of failure to pay sick pay and outstanding contractual wages, failure to deal with his grievance and, in essence, a failure to facilitate a return to work.

f. At the preliminary hearing in private by telephone in claim 1 on 28 July 2022 the claimant attended in person and the respondent was represented by Mr G Edwards, solicitor (page B: 80). Employment Judge Hawksworth confirmed the dates of the final hearing to be as previously listed namely 12 to 14 June 2023 and it is apparent from paras 8 to 11 of her order that the learned judge and the parties discussed claim 2. It was not listed for hearing on that occasion and it was acknowledged that the response in claim 2 had not yet been presented although it was due the day before that preliminary hearing. Judge Hawksworth stated that she had set a timetable anticipating that claim 2 would need to catch up with claim 1 and be heard at the same time but that there would be a further opportunity to consider this at a preliminary hearing listed as standard procedure in claim 2 once the grounds of response were received. The application to amend claim 1 was at that stage envisaged to be considered at the same time as case management of claim 2.

g. The list of issues in Judge Hawksworth's case summary are only those within claim 1.

h. No response was entered to claim 2. On 2 August 2022 the respondent applied for an extension of time within which to present its response without a draft ET3. This was refused by a legal officer

and that was communicated to the parties on 21 October 2022. Reasons were given in that letter (page B: 91). That letter informs the parties that, because the decision has been made by a legal officer,, the respondent may apply for the decision to be considered a fresh by Employment Judge. It does not appear that such an application was made.

i. On 30 May 2023 the respondent's representatives came off the record.

j. As is standard practice in this region, the parties had been sent a checklist six weeks before the date of the final hearing. It was notified to the Tribunal in the claimant's response to that checklist that the respondent has not complied with the case management orders. It is clear that the claimant had prepared an electronic file of documents for the final hearing as he explained in the checklist which was provided on 1 June 2023.

k. The Tribunal chased the respondent for their checklist on 2 June 2023 and one was provided on the same day with an attached appendix. In that the respondent states that they dispute the allegations and would like them to be put to proof and apologise for any inconvenience. They confirm that case management orders have not been complied with but seemed to suggest that the reason for that was that they had been refused permission to enter response out of time. That decision, of course, was only in respect of claim 2 not in respect of claim 1 so there is no good explanation for the failure to comply with Tribunal orders in claim 1. In the checklist they referred to non-specific "communication issues with our lawyers" while at the same time except that the fault is the responsibility.

l. The respondent is a company which is wholly-owned by Hounslow LBC (see para.19 page C:56). On 8 June 2023 the Interim Head of HR at Hounslow LBC wrote on behalf of the respondent with a counter schedule of loss stating,

> "the respondent… Does not accept that the matters set out by the claimant in case number 3322339/2021 and 336413/2021 (sic) occurred as alleged however it accepts that it is not in a position to defend the claims and as such, wishes to make representations as to remedy only.… We confirm that the respondent will not be appearing at the hearing but we ask that the attached submissions are placed before the judge."

m. On 8 June 2023, at the direction of Employment Judge Quill, the Tribunal set out some details of the above procedural chronology including that a response had been entered to claim 1 and that there had been a preliminary hearing in that case. It was further stated that no hearing had been listed in claim 2. The letter then continued,

> "it might be appropriate to strike out the response to [claim 1] so that the hearing proceeds without the respondent's participation (with written representations only). Is the respondent's email of 8 June agreeing that I should do that?"

n. Judge Quill also directed that the parties be asked whether the second claim should be heard at the hearing listed for 12 to 14 June 2023 because he said he was unclear whether the respondent was agreeing to that.

o. The Interim Head of HR wrote on 9 June 2023 as follows

> "yes, please accept this as confirmation that the respondent is not attending and struck out due to late response to Case Mgmt."

p. A counter schedule of loss was provided which the respondent wished to rely on. Following this Judge Quill on 9 June 2023 directed that the response to claim 1 be struck out because the respondent was not actively pursuing a defence, had failed to comply with case management orders and had conducted the litigation unreasonably. Judge Quill directed that the hearing proceed under rule 21 and reduced the time estimate to one day. He listed claim 2 to be heard at the same time. He gave the respondent permission to rely on their written submissions. The claimant responded to the counter schedule of loss.

2. The hearing before me therefore considered all of the issues in claim 1 and claim 2 on an undefended basis in the absence of the respondent and I took into account their written submissions. The claimant had provided an electronic file of documents and a hard copy of the same. The electronic file contained a total of 444 pages (including the index) and contains the document set out in the hyperlinked index. It was divided into four sections. Section A contained witness statements of the claimant and 2 supporting witnesses. His and that of both of his witnesses (his wife and his son) were adopted in evidence and I asked such questions in clarification seem to me to be necessary. Their witness statements are written in numbered paragraphs and where it has been necessary to identify particular passages I refer to them as C Para 1 to 47; JB paragraph 1 to 9 and CB para.1 as necessary. The witness statements were sent to the respondent in accordance with the Tribunal directions that this be done by 27 March 2023.

3. Section B of the electronic file contained the pleadings, the tribunal documents. Page numbers in that section are referred to in these reasons as B: 1 to 105. Section C contains the documentary evidence in the case and page numbers in that section are referred to as page C: 1 to 137. There are then 72 pages of remedy documents (Remedy page 1 to 72) and an additional documents section which include medical records which I refer to as AB page 1 to 107 as the case may be.

4. Even though the hearing before me proceeded on an undefended basis there were a large number of issues that I needed to consider before being satisfied that the claimant had made out his claim. There was a relatively large body of documentation to consider in what had become a one-day hearing. There was some procedural complexity that I needed to understand to satisfy myself that it was right to proceed in the respondent's absence. It seemed to me that they had made a conscious and informed decision not to attend. Then I took time to read the witness statements, schedule of loss and counter schedule of loss and some relevant documents. I heard evidence from the three witnesses from 2.00 pm onwards and it became necessary to reserve judgement. Competing judicial commitments and a period of leave have meant that this reserved judgement was not promulgated within the timescale that the Employment Tribunal aspires to. If

**Law applicable to the issues in dispute**

Constructive Dismissal

5. Section 95(1)(c) of the Employment Rights Act 1996 (the ERA) and s.39(7) of the Equality Act 2010 (EQA) make it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal.

6. In relation to non-discriminatory constructive dismissal, the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat themselves as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation, whether it was an effective cause of the decision.

7. Where a claimant alleges that they were unfairly dismissed because they resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for me in the present case is whether, viewed objectively, the facts found by me amount to conduct on the part of the respondent which is in breach of the implied term as

explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

8. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning then they were constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

9. Once they have notice of the breach, the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied.

10. An authoritative explanation of the last straw doctrine is found in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] IRLR 35, [2005] 1 All ER 75, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

11. The doctrine was more recently considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ gave the following guidance,

> "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> 1. (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
>
> 2. (2) Has he or she affirmed the contract since that act?

> 3. (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> 4. (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)[6] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)
>
> 5. (5) Did the employee resign in response (or partly in response) to that breach?
>
> None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy." (paragraph 45)

12. Once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98(4) ERA 1996.

13. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome.

14. The provisions of s.122(2) and 123(6) of the Employment Rights Act 1996 set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively which we are asked to use in the event that we conclude that the dismissal was unfair. This is for the respondent employer to prove and, since the respondent in the present case has not entered a response to the dismissal claim there is no evidence from them.

Protected disclosure claims

15. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and (for the purposes of the present case) is made by the employee in one of the circumstances provided for in s.43C ERA. In the present case, the claimant relies upon a

single communication made or alleged to have been either directly to his employer.

16. Section 43B(1), as amended with effect from 25 June 2013, so far as relevant, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
>
> (a)…,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e)…."

17. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, Sales LJ rejected the view that there was a rigid dichotomy between communication of information and the making of an allegation, as had sometimes been thought; that was not what had been intended by the legislation. As he put it in paragraphs 35 and 36,

> "35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [*Nurmohammed*], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

18. The structure of s.43B(1) therefore means that I have to ask myself whether the worker subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for the worker to hold that belief.

19. Similarly, I need to ask myself whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

20. The reference to Nurmohammed is to Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA, where the Court of Appeal gave guidance to the correct approach to the requirement that the Claimant reasonably believed the disclosure to have been made in the public interest at paragraphs 27 to 31 of the judgment. Those paragraphs can be summarized as follows:

    a. The Tribunal has to ask, first, whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and secondly whether, if so, that belief was reasonable.

    b. The second element in that exercise requires the Tribunal to recognize that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

    c. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking but only that that view is not as such determinative.

    d. The necessary belief on the part of the worker is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters.

    e. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.
    f. The essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

21. If the employee has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively.

Disability discrimination claims

22. The claimant also complains of a number of breaches of the EQA. Section 136 of the 2010 Act reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

23. This section applies to all claims brought before the Employment Tribunal under the EQA. By s.39(2) EQA an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment. By s.39(4) EQA an employer must not victimise an employee by dismissing them or subjecting them to any other detriment.

24. Section 15 EQA provides as follows:

> "15 Discrimination arising from disability
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

25. The structure of the obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EQA 2010.

26. By s.39(5) the duty to make reasonable adjustments is applied to employers. By s.20(3), that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage. By s.20(5), the duty includes the requirement to take such steps as it is reasonable to have to take to provide an auxiliary aid where, but for the provision of that aid, a disabled person would be put at a substantial disadvantage in relation to employment in comparison with persons who are not disabled.

27. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments. By Sch.8 para.20 an employer is not subject to the duty to make reasonable adjustments if they did not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the substantial disadvantage alleged.

28. Discrimination arising in connection with disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator.
>
> The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> *EHRC Employment Code paragraph 5.6*

29. The importance of breaking the test down into the statutory elements in that way was emphasised by Mrs Justice Simler in Pnaiser v NHS England [2016] IRLR 170 EAT at paragraph 31, relevant passages of which include,

> "the proper approach can be summarised as follows:
>
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. 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.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].

> (d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. […] the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
>
> (e) [...]
>
> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.
>
> (g) […].
>
> (h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]
>
> (i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

30. When it comes to justification the test under section 15(1)(b) of the EQA is an objective one, according to which the employment tribunal must make its own assessment: see Hardy & Hansons plc v Lax [2005] ICR 1565 , paras 31–32, and Chief Constable of West Yorkshire Police v Homer *[2012] ICR 704* , paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed.

31. It has been confirmed by the EAT in Land Registry v Houghton (UKEAT/0149/14) that the correct approach to justification of discrimination arising from disability is the same as to justification of indirect discrimination, namely the test propounded in Hampson v DES [1989] ICR 179. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

32. The respondent argues that they did not know and could not reasonably have been expected to know that the claimant was disabled prior to receipt of the OH report dated 16 March 2020. Constructive knowledge is

discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA. The key question is whether the employer had actual or constructive knowledge of the facts constituting the claimant's disability.

33. The equivalent of s. 136 of the EQA in the antecedent legislation was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

34. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include "any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions."

35. The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL. Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it is explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP. So there the PCP had been a refusal to allow a phased return to work and the comparator group was other employees who were not disabled and were therefore forthwith able to attend work and carry out their essential tasks; the comparators were not liable to be dismissed whereas the disabled employee who could not do her job, was.

36. In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained that,

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies."

37. Furthermore;

> "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

38. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

39. When considering whether or not a particular adjustment argued for by the claimant was reasonable or not the tribunal has to decide whether, at the time it is said that the step should have been taken but was not, there was a chance that it would have successfully avoided the substantial disadvantage in question. In Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10 the EAT held that the employment tribunal had been right to conclude on the facts found by them that there was a good prospect of that happening and therefore the burden of proving that the step in question would not have resulted in a suitable alternative post becoming available transferred to the respondent. However that case is authority for the proposition that "a" prospect would have been sufficient to make the adjustment a reasonable one to consider, although other factors are also relevant to whether or not it would be reasonable for the respondent to have to take it.

40. Victimisation is defined in s.27 to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Section 27 EQA provides:

> (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.

41. Victimisation claims are also subject to the statutory burden of proof as set out in s.136. This has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously

applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

42. When deciding whether or not the claimant has been the victim of victimisation, the I must consider whether he has satisfied me, on the balance of probabilities, that the incidents occurred as alleged and has also shown facts from which I could decide, in the absence of any other explanation, that the reason for the treatment was that he made a protected act as defined in s.27(2). If I am so satisfied, I must find that victimisation has occurred unless the respondent proves that the reason for their action was not the protected act.

43. I bear in mind that there is rarely evidence of overt or deliberate discrimination. I may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. I also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by disability we must have a sound evidential basis for that inference.

Time Limits

44. The time limits within which claims under the EQA should be brought are set out in s.123. At the relevant time, which is the date of presentation of the claim, the relevant parts of the section read as follows,

> "(1) [Subject to [the effect of early conciliation], proceedings] on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) …
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

45. With a claim of breach of the duty to make reasonable adjustments, where the claim is of an continuing omission, not of a continuing act or one-off omission, for the purpose of determining when time starts to run the employer is to be treated as having decided when he might reasonably have been expected to make the adjustment contended for: Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170 CA.

Law relevant to remedy issues

46. The law in relation to injury to feelings is well established. I remind myself of the case of Armitage, Marsden and HM Prison Service v Johnson [1997] ICR 275 EAT where it was said, among other things, that the awards for injury to feeling should be compensatory rather than punitive and that, on the one hand, they should not be so low as would diminish respect for the anti-discrimination legislation but on the other they should not be excessive. I should also remind ourselves of the purchasing power of the value of the award of everyday life and balance that with the need that awards for discrimination should command public respect.

47. The injury must be proved, my findings must be evidentially based and the injury for which compensation is claimed must result from the discrimination which has been proved: MOD v Cannock [1994] IRLR 509 and Alexander v The Home Office [1988] ICR 604.

48. The well-known case of Vento v. Chief Constable of West Yorkshire Police (No. 2) [2003] ICR 318 CA (followed in Da'Bell v. NSPCC [2010] IRLR 19 EAT) set out three bands or brackets into which it was said that awards of this kind could fall. Following the judgment in Da'Bell, which increased the levels of the bands to take into account inflation since the Vento decision, the lowest band was increased to £6,000, the middle band from £6,000 to £18,000 and the highest band, reserved for the most serious cases, £18,000 and above. In De Souza v Vinci Construction (UK) Ltd [2017] I.R.L.R. 844 CA, it was held that the 2012 Court of Appeal case which applied a general uplift to damages for pain, suffering, loss of amenity, physical inconvenience and discomfort of 10% should apply to awards of compensation for injury to feelings by the employment tribunal.

49. Previously decided cases should, in any event, not be regarded as particularly helpful as a guide to an award of damages because every case is fact specific. However, the ruling in the De Souza case means that that is particularly so in relation to reports of judgments which predate 1 April 2013 (because they predate the general uplift). Following the judgment in De Souza, the Presidents of the Employment Tribunals in England & Wales and Scotland have published Presidential Guidance by which the Vento bands are updated annually. The present claims were presented on 20 October 2021 and 1 June 2022.

50. The first claim complains of disability discrimination within employment. The applicable bands for that claim are found in the Fourth Addendum and are:

    a. £27,400.00 to £45,600 for the most serious cases;

    b. Between £9,100.00 to £27,400.00 for serious cases not meriting an award in the highest band;

c. Between £900.00 to £9,100.00 for less serious cases, such as an isolated or one-off act or discrimination.

51. The second claim complains of disability discrimination and victimisation culminating in an alleged constructive dismissal. The applicable bands for that claim are found in the Fifth Addendum and are:

a. £29,600.00 to £49,300 for the most serious cases;

b. Between £9,900.00 and £29,600.00 for serious cases not meriting an award in the highest band;

c. Between £990.00 to £9,900.00 for less serious cases, such as an isolated or one-off act or discrimination.

52. When considering the correct approach to the assessment of financial loss, the successful claimant is entitled to be compensated for the loss and damage which arises naturally and directly from the wrongful act: Essa v Laing Ltd [2004] IRLR 313, CA. As best as possible, the Tribunal must put the claimant into the position that they would have been in but for the unlawful conduct: Ministry of Defence v Cannock. It was also held in Essa v Laing that there is no need to show that the loss claimed was reasonably foreseeable, provided that a direct causal link between the act of discrimination and the loss can be made out. The discriminator must take their victim as they find them.

53. If it can be shown that psychiatric and/or physical injury can be attributed to the unlawful act then the employment tribunal had jurisdiction to award compensation: Sheriff v Klyne Tugs (Lowestoft) Ltd [1991] IRLR 481, CA. In assessing compensation, it is necessary to ask what would have occurred had there been no unlawful discrimination; if there were a chance that the losses would have occurred in any event then, in the normal way, that must be factored into the calculation of loss: Chagger v Abbey National plc [2010] IRLR 47, CA.

54. If the loss has been caused by a number of factors, in principle it is open to the Tribunal to reduce compensation so that it reflects only the extent to which the unlawful discrimination contributed to the employee's loss if there is a rational basis on which to apportion responsibility for those losses as between the different causes: Thaine v LSE [2010] ICR 1422, EAT and Hatton v Sutherland [2002] ICR 613, CA and BAE Systems (Operations) Ltd v Konczak [2018] ICR 1, CA. The Tribunal must take care, however, where there is a pre-existing health condition or vulnerability and where separate awards for alleged psychiatric injury and injury to feelings are sought, to avoid double recovery because the aim is to award compensatory damages.

## The Issues

55. The issues in claim one are set out in the case management order of Judge Hawksworth (B: 86). The claimant is complained of breach of the duty to make reasonable adjustments and discrimination for a reason arising in consequence of disability contrary to s.15 EQA.

56. The claimant accepted in the hearing before me that the application to amend claim 1 raised essentially the same issues as those found in claim two. Now that claim 1 and claim 2 are being heard together, it is not necessary to amend claim 1 in order for all of the allegations the claimant wants to rely to be decided. No order is therefore made on the claimant's application to amend.

57. I clarified the issues in claim 2 with the claimant as a result of which the following additional issues need to be decided.

    a. The claimant alleges that his grievance presented on 13 July 2020 one was a protected disclosure within the meaning of section 43B of the Employment Rights Act 1996 (hereafter the ERA). He also alleges that it was a protected act within the meaning of section 27(2) EQA. I therefore need to decide whether those allegations are made out.

    b. The claimant alleges that he has been victimised contrary to section 27 and section 39(4)(c) and (d) EQA by reason of the respondent subjecting him to the following detriments on grounds that he had complained in his grievance about disability discrimination:

        i. a failure to progress that grievance;

        ii. a failure to pay outstanding contractual sick pay;

        iii. a failure to progress his return to work; and

        iv. a failure to pay contractual wages.

    c. Alternatively, the claimant alleges that those were unlawful detriments on grounds of protected disclosures and claims under section 44 ERA.

    d. He states that the above detriments were the effective cause of his resignation and therefore that he was constructively dismissed which, by reason of his length of service, was a so-called "ordinary" unfair dismissal under s.94 ERA but also automatically unfair under s.103A ERA because the reason for the acts of the respondent in response to which he resigned was that he had made a protected disclosure.

e. Furthermore, he argues that his constructive dismissal was an act of victimisation on the basis that the grounds for the acts of the respondent in response to which he resigned included that he had complained about disability discrimination.

f. In order to decide para 57.d. and 57.e. above, I need to make findings about the reasons for the claimant's resignation.

g. The claimant also complained of disability discrimination within claim 2 which I understood to be a complaint that the respondent had failed to implement his general practitioner's recommendations for a return to work and therefore a breach of the duty to make reasonable adjustments. The complaint about failure to pay full pay during sickness absence, which I consider to raise a complaint of discrimination for a reason arising in consequence of disability contrary to s.15 EQA, is made within claim 2 in relation to the period of time following presentation of claim 1 but is, in reality, the same complaint as is already within claim 1.

h. In addition the claimant length of breach of contract and/or unauthorised deduction from wages in respect of the failure to pay contractual sick pay, unpaid wages, unpaid holiday pay and notice pay.

58. If I was satisfied on the issues relating to liability, the issues relating to remedy set out in section 5 of Judge Hawksworth's order would apply to any successful elements of claim 2 as much as to those in claim 1. Issue 5.5 raised the question of whether discrimination had caused the claimant personal injury, and in the present case, that required me to consider whether the consequences of any failure to provide reasonable adjustments (as set out in issue 4.6 of Judge Hawksworth's order) and/or the s.15 unlawful detriment included the injury the claimant experienced at work on 20 April 2021.

59. In claimant's schedule of loss at item 9 he complained that the unreasonable failure of the respondent to comply with their obligations under the case management orders meant that he had to incur costs of preparing documentation and he claims £1,560. This I took to be an application for a costs order or preparation time order under rule 76 ET Rules of Procedure 2013 and have considered it as such.

## Findings of Fact and conclusions on liability

60. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principle findings of fact, those necessary to enable me to reach conclusions on the remaining issues. In general, I found the claimant to be a credible witness who was doing his best to help the Tribunal and did not exaggerate or embellish his evidence.

61. I incorporate within this section my conclusions on the issues, applying the law as set out above to the facts which I have found. I follow this course in circumstances where the respondent has had their response struck out, has chosen not to attend and has limited their participation to submissions on remedy in order that I do not unnecessarily to the length of the judgment.

62. On 3 February 2020 the claimant experienced a re-emergence of a lower back injury which he attributes to an industrial injury sustained on 1 February 2019 which had led to periods of sickness absence in 2019 and treatment from an osteopath. Details of the earlier incident are in the occupational health report at page C: 40.

63. The invitation to a formal absence meeting (AB page 1) includes information about the claimant's sickness absence as recorded on the respondent's system in 2019. It appears that he had 15 days absence from 25 February 2019 for muscular-skeletal problems, and then absence for five days between 17 and 21 June 2019 for back and neck problems. In my view when the claimant started a period of sickness absence for low back pain in early February 2020, the respondent ought reasonably to have realised that this could well be a recurrence of the previous problem rather than a separate isolated incident.

64. Since I am of the view that they ought reasonably to have realised that the adverse impact of the previous bank condition on the claimant's ability to carry out day-to-day activities could well have recurred, it is my view that, when the 12-month anniversary of the start of the original period of absence for this condition came round on 25 February 2020, the respondent ought reasonably to have realised that this was a disabling condition.

65. The respondent has accepted that they had knowledge of the claimant's disability from 16 March 2020, the date of the occupational health report at page C: 40. That report gives the opinion that the claimant probably fulfils the test in the EQA and ought to be considered disabled within the meaning of s.6 EQA - whilst recognising that that is a legal and not a medical judgement. My conclusion is that the respondent had constructive knowledge of disability on 25 February 2020 because they ought to have realised that the claimant had a recurring condition which satisfied the test of long-term for that reason.

66. The claimant was called for a formal absence meeting on 2 March 2020 and an occupational health report was commissioned. The claimant argues in issue 3.1.1 that there was a breach of the respondent's management of absence policy in that no review period was set at this meeting and that part of the reason for that failure was the claimant sickness absence itself or the recording of the absence as due to 'normal' sickness rather than as an industrial injury. I accept the claimant's evidence that there was a failure to arrange a review, and that it was in breach of policy. In those circumstances the burden of disproving that the reason for the failure to review add nothing to do with either of those two disability related reasons transfers to the respondent because the failure to follow policy is something which could

lead to an inference of discrimination. The respondent has failed to discharge that burden having not adduced any evidence. The allegation that this was contrary to s.15 EQA is made out.

67. The occupational health professional was of the opinion that the claimant would be fit to return to work in the next 2 to 3 weeks. In fact he returned to work on 27 March 2020. The OH professional also recommended that there should be a phased return to work over the first 2 to 3 weeks back and this was done. Other recommendations were that there should be a workstation assessment in the claimant's car which he used to travel between jobs and that he should be provided with a lumbar support in the car. It was recommended that he should not be required to lift items weighing more than 10 kg or, if possible, should be allocated assistance. The OH professional did state that these adjustments would only be needed temporarily.

68. Despite the fact that it is noted on the return to work sheet that there should be a workplace assessment in the van this was never done and I accept the claimant's evidence that he was not allocated lighter duties and was not provided with a lumbar support.

69. The claimant does not complain of any specific incidents between this return to work and an incident on 20 April 2021. In his para.9 he states that he was carrying out work in a confined space to access pipework which involved removing a back panel from a corner basic unit in the kitchen using the actions of pushing and pulling which he states he had not been trained for. He also complains that no risk assessment of his work duties had been carried out since the respondent became aware of his disability.

70. Medical evidence at AB page 48 records the claimant consulting with his GP by telephone on 28 April 2021 where the problem was diagnosed as "acute back pain with sciatica" resulting from an injury a week previously. The medical evidence shows him having periodic consultations. He states in para.9 that he was referred to neurosurgeon for an MRI scan which has revealed injuries to 4 discs in his lower lumbar region. He states that he is waiting for surgery.

71. The claimant reported the accident as an industrial injury but it was recorded as sickness and a RIDDOR report was not made until 28 July 2020 one (page C: 74).

72. On 30 June 2021 the claimant was invited to a second formal absence meeting on 16 July 2021. That invitation alleged that a review of his absence in 2020 had taken place although it had not. The meeting was due to take place on 16 July 2021 but was postponed when, on 13 July 2021, the claimant presented a grievance (page C: 67).

73. The claimant argues that this was a protected act within the meaning of section 27 EQA. In the grievance he complains about failure to implement

occupational health report recommendations in particular lack of workplace assessment in his car and no lumbar support.

74. The claimant's case is that this grievance amounts to protected act because he brought up disability discrimination. He stated that it was a protected act because he brought up health and safety matters.

75. On the final page of the grievance at page C:68 the claimant says the following:

> "in terms of occupational health and safety practices across the company I have observed and inconsistent and unequal application of support for employees:
> - supply of PPE and additional support aids, e.g. if you of non-standard safety boots
> - additional work specific training (i.e.: part P electrical training)
> - manual handling training
> - return to work practices varies
> - risk assessment
> - accident and near miss reporting"

76. He stated that he felt the actions that have been taken since June 2019 have delayed the recovery of his lower lumbar region which culminated in him having a further accident work on 20 April 2021.

77. I accept that this amounts to a protected act under s.27(2) EQA because, although he does not expressly assert that he is disabled, the complaint of a failure to implement occupational health recommendations while seem to me to reasonably be understood as a complaint of failure to make reasonable adjustments. The narrative in the grievance refers to the long-standing nature of the back condition and the OH report did give the opinion that the claimant was disabled. This seems to me to be sufficient to amount to doing a thing in connection with the EQA and/or alleging a breach of the EQA.

78. I also consider that in the matters that he sets out and which are quoted at para.75 above – together with the repeated information that there has been a failure to implement OH recommendations and actions that culminated in his current injury amount to a communication of information which tends to show that the health and safety of an individual has been put at risk. That individual is the claimant himself. However the passage quoted above also states that he has observed inconsistent and unequal support for employees more generally.

79. Based on the findings I have made above, I find that the claimant had reasonable grounds for believing that that information intended to show that health and safety was being put at risk the question is whether he believed and had reasonable grounds to believe that the communication was in the public interest. It seems to me that to the extent that the claimant is communicating information about his personal situation that does not fulfil the test of public interest. However where the claimant communicates

information about in that inconsistent and unequal support for employees more generally in the company (which is a wholly-owned subsidiary of local council) that potentially fulfilled the public interest test. What I have seen no evidence of is that the claimant believed that making the statement was in the public interest. I cannot presume that he believed that to be the case and it is a necessary component of the communication being protected under Part IVA ERA (see para.20 above). The communication reads as a whole as a personal grievance, not a communication made in the public interest. It was not a protected disclosure and the claims under s.44 and s.103A ERA fail.

80. The claimant attended an in-person grievance meeting on 3 August 2021. He refers in his witness statement to being told that he had been excluded from a WhatsApp group because of sickness absence. That is an issue within the scope of claim 1 and I accept his evidence to that effect. Holding letters stating that he would receive information about the outcome to his grievance were received on 11 and 19 August 2021, 2, 10, 13 and 15 September 2021. By the 27 September 2021 (page C: 106) the claimant appears to have instructed solicitors to contact his employer and a Hounslow HR adviser writes in terms which appear to confuse early conciliation with progress on an internal grievance. The claimant told me that the solicitor's correspondence was covered by without prejudice privilege. The adviser wrote that ACAS had given all parties until 16 October 2021 to resolve the grievance. In any event, the HR adviser states that the respondent is looking into the grievance and the solicitors letter of 14 September 2021 and anticipate a further investigation meeting. They state they will endeavour to conclude the matter before 16 October 2021. Even though it may be the case that the respondent had mistakenly understood ACAS to have given a date for completion of the grievance when that was probably the standard end of the statutory early conciliation process, it would make sense for the respondent to seek to give an answer to the grievance before the early conciliation process concluded and the claimant came under pressure to decide whether to escalate matters to an Employment Tribunal claim.

81. The claimant had a meeting with the Interim Head of HR when he was accompanied by his trade union representative on 8 October 2021. Not only had the interim head of HR indicated on 17 and 28 September that there may be some progress with the claimant's grievance but the claimant had raised his belief that, his absence being due to an industrial injury, the NJC Green Book sickness scheme meant that it should be treated entirely separately to normal sickness and he should not have had his pay reduced to half pay on the basis that he had exhausted his contractual sick pay entitlement. As with the meeting on 3 August 2021, there appears to have been no outcome form the meeting of 8 October 2021 whether before 16 October 2021 or otherwise.

82. The claimant's contract of employment is at page C: 1. It is dated 30 August 2016 and at page C: 4 there is a provision for sickness absence, which states that "sick pay entitlements are set out on the council's intranet". It

also states that his terms and conditions of employment are in accordance with the conditions of service for the NJC for Local Government Services, also known as the Green Book. The claimant's employment was transferred to LFM360 Ltd, a wholly-owned company which, as I understand it, is or has become the respondent. The email informing the claimant of the transfer confirms (page C:8) that the sickness policy would transfer. I am satisfied that his entitlements by contract remained those in the relevant collective agreement.

83. The claimant has produced extracts from the Green Book at page C: 25. I accept that this demonstrates that he has a contractual entitlement to sick pay in respect of normal sickness and the same sick pay in respect of absence "through industrial disease, accident or assault arising out of or in the course of employment with the local authority." I accept that these terms remain terms of the claimant's employment by the respondent when it was transferred to them by means of the relevant TUPE transfer. I also accept that the claimant's description of the injury which led to the sickness absence from 20 April 2021 falls within the definition of an industrial accident. I accept that the respondent is in breach of contract by failing to pay the claimant sick pay in accordance with these terms following the industrial accident on 20 April 2021. When they reduced his pay to half pay on the basis that sick pay for normal sickness should be added together with the length of his absence due to industrial accident they were in breach of contract and that claim succeeds.

84. At the meeting on 8 October 2021 I find that the claimant expressed a desire to return to work in some capacity for the benefit of his mental health on lighter duties or, if not possible, redeployment.

85. The claimant was assessed not fit for work from 22 October to 23 November 2020 one (page C: 112). On 23 November 2021 his GP assessed him potentially fit for work with amended duties and the following qualification "light duties only. Needs to avoid heavy lifting, bending and driving long distances. Needs occupational health assessment." This was to remain the case until 21 December 2021. A repeat fit note was issued on 23 December 2021 to cover the period 21 December to 27 January 2022. (Page C: 124).

86. Although the claimant received some holding correspondence from the Interim head of HR, there was no concrete action taken either to progress the claimant's grievance or to manage his absence. A meeting was arranged for 26 November 2021 which was cancelled the previous day, much to the claimant's upset and frustration (page C: 120). The claimant asked for an explanation (page C: 121). I have not seen any response to that email. On 24 December 2021 (he claimant emailed the Interim Head of HR with a copy of the fit note issued to the previous day which stated the claimant was fit to return to work with amended duties. He asked the following,

"what consideration has been given with regard to these recommendations and what actions are proposed? To date I have had no consultation regarding this and have

not received any reply to my annual leave request emailed on 13 December 2021. I would be grateful if these issues can be addressed because I feel that this in action by Coalo Ltd is causing me further detriment on has not met my expectations."

87. The response from the Interim Head of HR states "I will follow up on this and revert." He states that "we were most recently responding to your ET1, which has been completed." He confirms that the claimant will be entitled to carry over the annual leave that he had requested on 13 December 2021 - in fact the claimant had also act asked to book his annual leave for 4 to 31 January 2022 so that he would be paid during that period when the respondent had taken the decision to pay only half pay

88. The claimant resigned when he received no further response to his email of 24 December 2021 in a letter at page C: 128. He cites deduction of his wages by failure to pay full sick pay on the basis that his absence was not at stated to be attributable to an industrial injury, failure to act on his GP's recommendations that he could return to work, cancellation of meetings and the failure to follow a fair process in relation to the grievance procedure. He resigned on notice stating that his last date of employment would be 25 February 2022. So far as I can see, there was no response to the resignation letter nor to the claimant's email request for unpaid wages his terminal payment.

89. Turning to the issues at page C: 87 I accept that the respondent did the following additional unfavourable acts:

    a. they failed to set review period in breach of their management of absence policy on 2 March 2020 (see para.66 above)

    b. on 30 June 2020 one they asked him to a second formal absence meeting which was a breach of their managing absence policy because he had not had a first formal meeting in the previous 12 months and should therefore only have been invited to a first such meeting

    c. they failed to include him in the employee WhatsApp group.

90. I find that the claimant's sickness absence from 20 April 2021 to the end of his employment arose in consequence of the back condition. The respondent has failed to lead evidence to explain why they recorded the claimant's accident sickness rather than as an industrial injury. However, on the balance of probabilities, it seems likely that this was in part at least due to the claimant being absent because of a back condition which had *recurred* in contrast to something novel. It does not seem to me to prevent injury being regarded as an industrial accident just because the incident exacerbated or provoked a relapse in a condition that was being managed. I accept the claimant's oral evidence that there is an industrial accident within the terms of the police even if the employee caused or contributed in part to the injury. I accept that the issues in para 3.2 are made out.

91. For reasons I set out in para.66 above and do not now repeat, I accept that the claim of s.15 discrimination arising in consequence of disability is made out in relation to the failure to set review period in March 2020. That incident is one on its own and I need to consider whether there is a continuing state of affairs which causes the Tribunal to have jurisdiction to consider it given that it occurred 18 months before early conciliation began.

92. The principal reason why the claimant was invited to an absence meeting was that he was absent due to sickness but the criticism of the respondent focuses on the decision to invite him for a second formal meeting rather than a first. I have accepted that that is in breach of policy and that seems to me sufficient to transfer the burden of disproving unlawful motivation to the respondent by means of cogent evidence. This they have failed to do. The respondent has also failed to demonstrate that their actions were a proportionate means of achieving a legitimate aim and therefore the section 15 EQA claim in relation to this act succeeds also.

93. As to the failure to include the claimant in the WhatsApp group, he explains in his para 13 that it had been created to communicate important information to employees (including in relation to health and safety). He says he was told by the manager tasked with investigating his grievance that he was not added because he was absent and took me to his notes of that meeting. This provides positive evidence that the reason for this act was his sickness absence. The respondent has failed to demonstrate that excluding him was a proportionate means of achieving a legitimate aim. Some employers do not contact employees at all during sickness absence for risk of exacerbating their ill health or bothering them with work-related matters at a time when they should be recuperating, but that cannot be presumed and in the absence of evidence put forward by the respondent I'm not satisfied that there was any justification for this.

94. It is evident that the reason the claimant's pay was reduced to half pay was that he was absent and that absence had been designated to be due to ordinary sickness. Since that act was in breach of contract it is not something the respondent can justify and this succeeds as a claim under s. 15 EQA as well.

95. I have already found that the respondent ought reasonably to have known the claimant was disabled from 25 February 2020 I accept that they had a PCP of the full duties of the response repair operative that been the role carried out by the claimant including the lifting, pushing and driving duties.

96. Furthermore, given the recommendations of the occupational health advisor, an auxiliary aid or lumbar support has been shown to be something that would be of assistance to the claimant to avoid the substantial disadvantage of aggravated back pain while driving. Given the occupational health recommendations, I accept that failing to allocate the claimant light duties temporarily on his return to work and - if possible - providing assistance from a colleague put to a substantial disadvantage in that by doing full duties he was susceptible to a deterioration in his lower lumbar

region. Although this recommendation was expected only to be in place temporarily, if it was not put in place at all and if the claimant's back condition and the impact on it of his day-to-day working duties were not reviewed by occupational health then the respondent cannot complain that they did not have actual knowledge that the risk of exacerbation continued and that the work practices in fact put strain on the claimant's back. They ought reasonably to have had that knowledge.

97. There was a gap of a year between the return to work and the April 2021 incident which triggered a period of sickness absence that subsisted until the claimant's resignation. As I say, in general, I have found the claimant not to be someone who overstates his difficulties. The April 2021 exacerbation of back condition was the second such recurrence and the respondent failed to assess the risks to the claimant particularly in relation to driving his van but also as recommended by his GP in July and August 2021.

98. In those circumstances I am satisfied that driving extended distances without a lumbar support, not having limits on heavy lifting and pushing and not having the assistance of a colleague was likely to make the claimant susceptible to a deterioration of his back even beyond a temporary period after his return to work in March 2020.

99. The respondent failed to take those steps. It is necessary for me to consider when they ought reasonably to have taken them by. The recommendations of the occupational health report of March 2020 ought reasonably to have been put in place on the claimant's return to work on 27 March 2020. Potentially this claim is out of time so I need to consider wehter the Tribunal has jurisdiction to consider it.

100. I also accept that the claimant was again at a substantial disadvantage following the recurrence of his back condition at the point when his GP certified him fit to return to work on amended duties. The respondent took no steps whatever to consult with the claimant about when he could return to work or with management about whether the amended duties could be accommodated and did not refer him for occupational health assessment despite requests in July and August 2021 and despite the GP certified him fit to return to work as from 23 November 2021. No evidence has been produced to suggest that that would not have been possible and I consider that the reasonable employer would have been able to facilitate a return to work within two weeks namely by 1 December 2021. The respondent's failure to do so is a further breach of the duty to make reasonable adjustments.

101. The claimant has shown that the respondent failed to progress his grievance. It was presented on 13 July 2021 and acknowledged reasonably promptly. Notes of the grievance meeting on 3 August 2021 are at page C: 79. The meeting was conducted by a senior operations manager. The notes of the meeting suggest that some key points of the grievance were discussed and at the top of the final page, the manager advises the claimant to expect correspondence from her which will advise him if the outcome will

be ready in five working days. As I set out in para.80 above, a series of holding letters were sent to the claimant with no commitment as to when the grievance would be completed and the claimant does not know what other investigations, if any, the senior operations manager conducted. He understands her no longer to be in the respondent's employment.

102. The respondent mistakenly seems to have taken the view that progress with the grievance overlapped with early conciliation. Given the short time limits that apply in the tribunal there is no criticism of the claimant for contacting ACAS. There was meeting with the council's Interim Head of HR (apparently provide HR support to the respondent) on 8 October 2021, but none of the correspondence from the Interim Head provides any outcome to the grievance or any indication of when that outcome will be available. The claimant's concerns about the grievance then start to overlap with his statement that he is fit to return to work on adjusted duties and there is no substantive response to that information either. The final communication is on 29 December 2021 from the Interim Head of HR who merely states that he will follow up all the claimant points and revert to him. He apparently did not.

103. This is not a total failure to progress the claimant's grievance because there was one meeting to discuss it but since that meeting failed to lead to any outcome at all, let alone signs of engagement with the claimant's concerns or proposals for a resolution, there might as well have been a total failure to progress it. I am particularly surprised at the lack of response by the respondent to an employee saying they are fit to return to work when, rightly or wrongly, that employee is on limited wages because of their absence and the employer does not have the benefit of their work. The total lack of engagement is extraordinary. The allegation of unreasonable failure to deal with his grievance is made out.

104. As I've already said, there has been a clear failure to progress the claimant's return to work. Given the financial impact on him of being reduced wages there is no doubt in my mind that a failure to engage with the circumstances in which the claimant could return to work against the background of the paused managing absence process was a repudiatory breach of contract. This is so even were it not the case that the respondent was already in breach of a contractual obligation to pay full pay.

105. I accept the claimant's evidence about the reasons why he resigned. All of the matters set out in his resignation letter were effective causes of his decision to resign on notice. He resigned in response to a repudiatory breach of contract by the respondent. There was an ongoing failure to deal with his grievance which reasonably undermined his faith in his employer's willingness to seek to solve his problems. There was then a failure to respond to the information that he was fit to return to work and no attempts were made to have a discussion with the claimant about what roles might be available. Whether individually or cumulatively these were breaches of the implied term of mutual trust and confidence entitling the claimant to resign in

response and consider himself dismissed. That dismissal was unfair in all the circumstances. The respondent has not shown any reason for it.

106. The constructive dismissal is also argued to have been in response to acts of victimisation and or protected disclosure detriment.

107. By reason of section 136 EQA if the claimant has shown facts from which, in the absence of any other explanation, it might be inferred that discrimination or victimisation took place the burden of disproving the unlawful motivation transfers to the respondent. This respondent on the face of it behaved in a completely unreasonable way by sending serial letters promising news of when the grievance might be resolved or stating it would revert to the claimant about his willingness and ability to return to work and then doing literally nothing. Unreasonable behaviour does not of itself transfer the burden to the respondent but unexplained unreasonable behaviour might. There has been no explanation from the respondent for their actions and I consider that the burden of disproving victimisation transfers to them. They have not demonstrated that the failure to progress the grievance and the failure to engage with the claimant about a return to work were not materially influenced by the fact that the grievance complained of disability discrimination.

108. I have found the failure to pay full sick pay because of an industrial accident to be an act of disability discrimination. I reject the argument that it was also an act of victimisation. It seems highly improbable that the respondent's decision to designate the incident of the 20 April 2021 and consequent absence as "normal" sickness absence rather than resulting from industrial accident was done after the presentation of the grievance on 13 July 2021 – despite the delayed completion of the RIDDOR. I therefore consider it highly improbable that it was done because of the grievance.

109. The other matter relied on as a detriment is an alleged failure to pay outstanding wages. This cannot have been a cause of the resignation because, as I understand it, it relates to wages due during the notice period. It seems probable that the claimant was not paid during is notice period because payroll had been told that he was absent through sickness and not entitled to contractual sick pay. His final payslip is at page C: 68 and the deducted salary and deducted tools allowance appear with the phrase "(Abs offset)".

110. One of the things I shall have to consider within the remedy issues is the likelihood that, had the respondent made reasonable adjustments by considering adjusted duties, the claimant would have returned to work at full pay and, if so, for how long. There is also the question of the extent to which he was entitled to full pay as contractual sick pay. Subject to my findings these might be reasons why the respondent should have paid him during this notice period but I reject the argument that a failure to do so was itself an act of victimisation.

111. I have concluded that the claimant did not make a protected disclosure. For that reason, the claims of unlawful detriment on grounds of protected disclosure and automatically unfair dismissal for the reason or principal reason of protected disclosure fail.

112. Some of the claims which I have found to be well-founded are based on things which happened more than three months before presentation of the claim. Taking into account the effect on time limits of early conciliation claims based on an act which took place before 3 June 2021 are potentially out of time. As I set out in paragraph 44 above, where there are a series of acts which are so linked as amount to conduct extending over a period then the act should be taken to have occurred at the end of that period.

113. I consider that the actions concerning management of the claimant's sickness absence in early 2020 and failure to make reasonable adjustments on his return to work with effect from 27 March 2020 are linked with the acts which date from June 2021 onwards. They are similar types of claims in that both periods of time involve breaches of the duty to make reasonable adjustments; both types of claim involved breaches of the management absence policy. There is an overall pattern of a failure to consider with due seriousness the recommendations of medical professionals which, in the case of the earlier failing, meant that the claimant had to work on without necessary adjustments being made and in the case of the later failing, meant that the claimant was not encouraged to return to work at all. I consider that this was conduct extending over a period and the claim was presented within three months of the end of that period because, in fact, the conduct continued over to the date of the claimant's resignation which falls between the presentation of claim 1 and the presentation of claim 2.

114. I shall consider below whether the claimant has demonstrated that the personal injury experienced in April 2021 flows directly from the failure to put a limit on his lifting and pushing or to ensure he had suitable assistance from a colleague in doing so.

**Conclusions on the Remedy Issues**

115. By his schedule of loss the claimant seeks the following heads of loss

    a. compensation for unfair dismissal of a basic award and compensatory award;

    b. financial loss flowing from the discriminatory act;

    c. medical expenses;

    d. compensation for injury to feelings;

e. damages for breach of contract in respect of unpaid contractual sick pay;

f. notice pay;

g. holiday pay in respect of annual leave accrued but not taken on termination of employment;

h. ACAS uplift for an unreasonable failure to follow the grievance code of conduct;

i. costs and/or preparation time order.

116. The claimant has not included the sum sought by way of compensation for personal injury within his Schedule of Loss but it was one of the issues identified for consideration by Employment Judge Hawksworth (issue 5.5). Furthermore, it is clearly raised within claim 1 that "I feel that the actions that have been taken to date by the company since June 2019 have delayed the recovery of my lower lumber region which resulted me having a further accident at work on 20th April 2021" (page B: 12). It seems clear that the claim form includes a claim for compensation for personal injury said to flow from the discriminatory actions of the breach of the duty to make reasonable adjustments.

117. Interest will be payable on compensation for discrimination and/or victimisation at the applicable rate and for the applicable period.

Breach of contract: failure to pay contractual sick pay and notice pay

118. This claim succeeds for the reasons I explain above. The claimant started a period of sickness absence for industrial accident related sickness on 21 April 2021. He was entitled to 6 months at full pay and 6 months are half pay. However, his employment ended before the end of that period. He should have been paid full pay until 20 October 2021 and then half pay until the expiry of his notice period approximately four months later.

119. The claimant has claimed the full 12 months (half at half pay) when calculating the compensation for breach of contract in the SOL. He has then given credit for the amount paid. He has additionally claimed one month's notice during which he was not present. This seems to me to be potentially double counting.

120. In order to achieve a more exact figure for the amount of underpayment of contractual sick pay, I have compared what the claimant should have been paid in a month with what he was paid in a month. He moved to half pay with effect from 11 August 2021 (page C: 77). He should have moved to half pay with effect from 21 October 2021. However, the reason he moved to half pay too soon was that he had already had 34 days "ordinary" sick pay at full pay out of a full entitlement of 130 days.

121. The fair way to assess compensation for breach of contract, in my view, is therefore to award 34 days' pay. The sick pay calculation seems to work on the basis of 260 working days in the year or 21.66 working days in a month. I therefore find that the loss to the claimant of a day's pay is £3655.00 ÷ 21.66 gross or £168.74 gross per day. His net monthly pay can be calculated (see Remedy page 57 for an illustrative payslips) as £3655.00 less tax and NI or as follows:

    £3,655.00 – (£478.80 + £347.50) = £2,828.70. When divided by 21.66 days per month this is £130.60 net per day.

122. As this is damages for breach of contract, I award 34 days @ £168.74 gross per day or the gross sum of £5,737.16. Had the respondent not been in breach of contract, they would have paid that sum over the period 21 April 2021 to 20 October 2021. The claimant would still have been entitled to half pay during his notice period and the unauthorised deduction from wages for the final month of his employment is £3,655.00 ÷ 2 or £1,827.15 gross. As this is not damages for discrimination, interest is not awarded.

    Compensation for unfair dismissal

123. The respondent agrees that the basic award is correctly calculated to be £5,139 (para.2.1.1 of the Counter Schedule of Loss – the CSOL).

124. He has claimed loss of statutory rights at £500. I award that sum. He had 5 years' continuous service, which is a considerable period, and, given his age, may not acquire such length of service before he retires. These factors cause me to award a slightly higher sum of £500 within the normal range of such awards, as claimed.

    Compensation for discrimination/victimisation: Personal injury

125. The respondent appears to argue that the Employment Tribunal has no jurisdiction to award compensation for personal injury (see CSOL para.2.1.4). This is incorrect. The Employment Tribunal has no jurisdiction to consider a personal injury claim (for example a claim that the employer has breached a duty of care as a result of which the employee has suffered foreseeable loss). That is the preserve of the County Court and High Court. When assessing compensation for discrimination, damages for personal injury can be awarded by the Tribunal where the personal injury flows directly from the discriminatory act. It is therefore important for me to consider whether the 20 April 2021 injury flowed directly from any of the discriminatory acts: the breach of the duty to make reasonable adjustments by failing to provide a lumbar support, failure to provide access to a company nominated osteopath and failure to put a weight limit on lifting and pushing for the claimant of no more than 10 kg and, if possible, assistance.

126. The claimant's evidence about the incident on 20 April 2021,which I accept, is as follows:

a. The claimant accepted that he had had issues with a back condition before; as far back as 2013 he'd slipped on ice and was off for a few weeks. However every time he had a flare up the recovering was longer. When working full time he had to manage his own problem but when it was the supervisor's duty to manage his work then it was not possible for him to do so.

b. The report of the MRI scan from 27 May 2021 (page C: 62) shows "degenerative changes with osteophytes" and specifies particular areas of weakness. Four "disc bulges" are identified.

c. He was asked about the passage in his grievance (page C: 69) where he states that he considers the actions of the respondent have delayed the recovery of his lumbar region which culminated in him having a further accident. He explained that he meant not referring him to the nominated osteopath (as had previously been an entitlement as an employee) and not following through the OH report.

d. The claimant accepted that there were degenerative changes and volunteered that things had slowly got worse from 2019 however he said that it wasn't managed properly and was of the view that had it been only the degenerative changes he would have been able to manage. Because the respondent had not provided lumbar support or a risk assessment of the work he carried out initially that had an impact over the longer term.

127. I conclude that it is more likely than not that there was an increased risk to the claimant that he would be working in a way that was unsafe for his back because the respondent did not comply with their duty to make reasonable adjustments to his duties by limiting lifting and pushing and by supplying him with a lumbar support for his car. From his oral evidence, it sounds as though he would get support when he could arrange it informally but was not in control of which jobs he was allocated. It is more likely than not that, had a review been arranged (the s.15 EQA claim), had the adjustments been made, then active management of the claimant's condition would have taken place and there would not have been that increased risk. Ultimately, he was working in a confined place which, as he said, had not been surveyed, he was accessing a waste pipe from within a cupboard instead of having a carpenter remove the cupboard first and, as he said in his statement, he injured his back due to the awkward position he had to be in. The original report describes this as a 'minor injury' but the description includes "At the time I felt a sharp pain and then some discomfort but not to the point where I needed to stop work immediately.. but the pain increase throughout the evening and today which has left me incapacitated" (AB page 30). This is broadly in line with the claimant's description of being left in severe pain.

128. However, although that injury did, I accept, flow directly from the failure to comply with the duty to make reasonable adjustments in particular, it was an exacerbation of an existing condition rather than a new problem. The

claimant has provided some medical evidence. As of January 2022 he was waiting for surgery (AB page 33). He is described by the neurosurgeon as having had intermittent symptoms until the back spasm on 20 April 2021 from which time he has associated bilateral sciatica. "Physiotherapy, osteopathy and extensive exercises" mean that the symptoms have improved to a moderate level but there are flareups. He told me that he could not afford the time off work because the surgery involves 6 to 8 weeks' recovery and, as he's had started a new job, he has postponed the surgery. He does a lot of yoga and is managing his back condition with diet and exercise. His new role involves walking all day which is less strain on his back than the physical aspects of the role with the respondent. He struggles with bending. He was formerly involved in sports, particularly rugby although his evidence was that the earlier problems in 2019 were what caused him to have to stop that particular sport. Impact of running really hurt his spine.

129. I find that this description from the January 2022 letter from the neurosurgeon is evidence to which I should give considerable weight. This exacerbation described is the effect to the claimant of the back injury in April 2021 which flowed directly from the respondent's failure to make reasonable adjustments as I have already explained. In terms of prognosis, the recommended treatment is decompression surgery and there is no evidence before me that suggests any further deterioration of the back condition would be likely to happen spontaneously and therefore be attributable to the April 2021 injury.

130. The Judicial College Guidelines for the assessment of General Damages in Personal Injury Cases 16th edition considers the range of awards for particular back injuries at page 42 and following. I have considered the descriptions of minor injuries and moderate injuries. Minor injuries are said to include "less serious strains, sprains, disc prolapses, soft tissue injuries, or fracture injuries which recover without surgery." Considerations relevant to whether an award is in higher or lower bracket include the extent to which ongoing symptoms are of a minor nature only, the impact on the individual's ability to function including work and the extent of any treatment required. By contrast the moderate injuries on page 43 even in the lower of the two brackets will apparently usually involve "prolonged acceleration and/or exacerbation of a pre-existing back condition, usually by five years or more, or prolapsed discs necessitating laminectomy or resulting in repeated relapses."

131. Although the claimant has not undertaken surgery as at the date of hearing that is the planned form of treatment and I was not presented with evidence of the prognosis following surgery. The fact that surgery contemplated and the descriptions of the ongoing problems overall as moderate are factors which are not generally present in those injuries described as minor in the guidelines. However the description I quote of factor commonly present in moderate injuries sound more severe than are apparently present in the claimant's case.

132. I am of the view that this back exacerbation is more closely aligned with the descriptors in the minor category. I need to be conscious of the importance of not awarding overlapping compensation because there will be an award for injury to feelings which will compensate the claimant for many of the psychological effects of his injury. Taking that into account, I am of the view that the second band of awards on page 45 of the JC Guidelines is the appropriate band. It covers a range from £4,350 to £7,890. I consider this exacerbation of the pre-existing back condition to fall towards the upper end of this and award £7000 for the personal injury flowing from the 2020 acts of disability discrimination.

133. Interest will be awarded on this sum at the rate of 8% from 20 April 2021 to the date of the hearing 12 June 2023.

Financial loss caused by discrimination/victimisation: loss of earnings and pension loss

134. By the date of the hearing, the claimant has obtained employment at a lower rate of earnings and has produced relevant payslips. He confirmed the truth, not only of the Schedule of Loss (Remedy page 9 – hereafter the SOL) but also of the response to the respondent's CSOL.

135. Any compensation for financial loss flowing from the dismissal would be calculated from the date employment came to an end: 25 February 2022. The claimant started new work on 28 March 2022 which requires him to work additional hours to bring up his earnings to the point where his gross weekly pay with his new employer is £750.00 where it was £843.46 with the respondent. He is working 4 more hours per week to earn that money. There are additional travelling and expenses and he tries to do overtime to increase his wages.

136. Other than the recent job, since resignation he has only had work for about 2 weeks for a neighbour but it was a lot of driving which physically he was unable to cope with and that has a negligible effect on his earnings. He has addressed in his response to the CSOL the allegation that he was earning as a sole trader t/a Warmcare Heating and Plumbing Solutions. He states, and I accept, that he stopped trading in November 2015 when he started work for the council and the final tax return was submitted in April 2016. He has giving up his CORGI registration. He finds the plumbing work physically too much of a strain on his back.

137. Other arguments raised by the respondent in relation to financial loss are:

    a. Future losses claimed over 7 years are too remote;

    b. Financial losses should be limited to 3 months from termination on the basis that the claimant has failed to mitigate his loss;

    c. Any reduction in earning capacity due to injuries fall under "the remit of a personal injury claim, rather than an Employment Tribunal

claim." For the same reason, they dispute that it is right to award the medical expenses.

138. I have explained above why I accept that the personal injury does flow from the discriminatory acts and why compensation should be awarded by that. By the same reasoning, the claimant is entitled to be compensated for reasonable medical expenses which he has incurred in order to treat the back condition where they have been necessitated by the exacerbation which occurred from 20 April 2021. I award £600.00 for osteopath fees and £76.00 for medication.

139. If he had not resigned would his employment have come to an end in any event? This is not an argument put forward by the respondent but it seems to me that general principles requires the claimant to prove his loss – including that he would have remained in employment with the respondent until normal retirement age.

140. When asked this question, he drew my attention to his request for redeployment to be considered when he was in the grievance hearing and stated that "there were a lot of jobs there available but the respondent had a policy of not promoting internally". It seems to me that there must be an appreciable risk that the claimant would not have remained in employment in this role with the respondent in any event given that he has a back condition that was pre-existing. It seems to me that there is a real prospect that either a back spasm would have occurred notwithstanding proper support from the respondent or that limiting the claimant to not lifting anything that weighed more than 10 kg without assistance was not an adjustment the could be made long term. The claimant explained that wash hand basins way in the region of 25 kg and is a plumber he would be expected to lift those or ought to carry toilets. Those sorts of activities injury to his back.

141. The claimant appears to have had an exacerbation of his back condition approximately every couple of years. Of course the most recent one I have found to have flowed from the failure of the respondent to manage his back condition at work appropriately which is the essence of the breach of the duty to make reasonable adjustments claim in this case.

142. I think it unlikely that the claimant would have remained in employment full-time with the respondent until a normal retirement age of 67 years given the variables which were likely to mean that it his back would deteriorate such that he had to stop work as a plumber even if adjustments were made and was not optimistic that the respondent would be able to redeploy him. As I have said another variable is whether the respondent would have been able to accommodate the limitations on duties on a long-term basis. Another might be if the claimant were to consider part-time working to reduce the impact of work and travel on his back. Taking into account all of these variables I conclude that had the claimant not resigned in response to the act of discrimination and victimisation his employment would be likely to have come to an end in any event by about the end of February 2024, two

years later. His loss of earnings therefore will not extend beyond 29 February 2024. This is 262 days. His daily net rate of pay with HCA Healthcare is the weekly rate put forward by the claimant in his SOL of £562.50 ÷ 5 = £112.50. His continuing net loss per day is therefore £26.12.

143. Remoteness of loss is argued for by the respondent but that is not a concept that comes into consideration when assessing compensation for discrimination. It is for the respondent to prove that the claimant has failed to mitigate his loss. The claimant found alternative employment a little more than a year after the end of his employment the respondent and I accept that he had to change career in order to do so. He has very nearly extinguished his loss of earnings. However there is a significant reduction in the value of his pension in the new employment.

144. His new employer contributes 4% to his defined contribution pension but because there is such a short period of time till his retirement he would only get £850 annuity on retirement from the pension pot accumulating in this defined contribution scheme. He did not have a document in the bundle about that because he could not join the pension scheme until he had completed his probation period of six or seven months and therefore has not yet received documentation concerning the expected benefits. I accept his oral evidence about them. He will join the pension scheme at the end of September 2023.

145. The claimant has a defined benefit pension from his employment with the respondent. The calculation based on the payslip at remedy page 57 shows that the notional contribution of the respondent to the pension was 22% of gross pensionable salary. The employer's pension contribution for the year to date as a percentage of the pensionable pay amounts to 21.7% and I have rounded up to 22% which is what the claimant understood the contribution to be.

146. The question of assessment of mitigation of loss is approached by considering what steps it would have been reasonable for the claimant to take to find alternative employment and what would the consequences have in terms of earnings obtained as a result. I see no evidence to suggest that the consequence would have been anything other than it has been and do not find that the claimant has failed to mitigate his loss.

147. The claimant has proved past loss of earnings from 26 February 2022 to 12 June 2023 at the rate of £843.46 gross (or £602.48 net) per week. There has been no failure to mitigate his loss and the figures for income earned in alternative employment set out in the SOL are accepted.

Pension Loss

148. The claimant was born on 17 January 1963 and therefore has a normal retirement age of 67 years and reach a state pension age on 17 January 2030. He claimed further loss of earnings on the basis that he would have remained in employment for a further 7 years until retirement, presumably

on 17 January 2030. He has calculated the value of his pension loss is £84,305.55 after giving credit for the less generous pension to which he is entitled under his new employment.

149. The respondent has not included pension loss in their calculation at CSOL para.2.1.3. of financial loss but argue that the claimant's losses should be limited to 3 months from the effective date of termination so, presumably, would argue that the loss of pension should be assessed as the notional employer's contributions during that 3 month period.

150. A guidance document call "Principles for Compensating Pension Loss" has been produced for use in the Employment Tribunal and I take that (4th Edition 3rd Revision 2021), and the Basic Guide which summarises the princciples into account.

151. As is stated in the Basic Guide, sometimes it will be appropriate to assess the pension loss caused by loss of a DB (or defined benefits) scheme based on employer contributions. An example might be where the Tribunal finds that the claimant would not have remained in that employment for very long, so the pension loss is small. However, as states in para.5.33 of the Principles "As a rule of thumb, six months would very likely be a short period; twelve months would probably still be short; 18 months and above would probably not be short." There might be other cases where there is a potentially significant quantifiable loss and such an example is where an employee loses employment relatively close to their retirement age, has been unable to mitigate their loss by finding employment with a DB pension. In principle, the present case is the sort of borderline situation where the effects of both methods should be evaluated to ensure the claimant is properly compensated, particularly when payments into the DB scheme after the claimant was 60 years of age would have had a greater impact upon his end pension than during the years prior to that age.

152. The claimant had been paying into the DB pension administered by West Yorkshire Pension Fund since 6 September 2016 (Remedy page 22). He has produced estimates of what his pension would be on the assumption that he remaining in employment earning £44,214.73 per year (Remedy page 23). Those show that, had he remained in employment until 16 January 2030, he would be entitled to a pension of £11,892.13 per annum.

153. By contrast, his deferred benefits from that scheme (now that he is no longer paying into it) are set out on Remedy page 29 to be £5,418.76 p.a.. One can see from the exponential increases in value of the pension on Remedy page 23 how remaining in the respondent's pension plan for even one or two more years would have increased the pension available. He has been told that his DC scheme will lead to an annuity of £853 per annum. Had he even stayed in employment with the respondent for one further year (until his 60th birthday), his annual pension would have increased by more than that. However, the figures are not available for the value of his DB pension, had he paid into it until 29 February 2024 and given the exponential way the benefits accrue any attempt to estimate what it might be is too inaccurate to be fair.

154. In those circumstance, I conclude that the fairest approach on the evidence available to me, given the conclusion I have reached about how long the claimant's employment would have lasted, is to calculate pension loss on the basis of the loss of contributions. If the claimant considers, having investigated with his pension provider what the annual pension would be had he remained in employment until 29 February 2024, that this undervalues his claim then he should consider applying for a reconsideration, bearing in mind the time limits for doing so are 14 days after this judgment is sent, unless an extension of time is applied for.

155. His pensionable pay with the respondent was £3,687.82 per month and the contribution was £803.84 per month. Two years of that notional contribution would amount to £19,262.16. His earnings in new employment are £3,250.00 gross per month so a 4% contribution for the period 1 September 2023 to 29 February 2024 will be £780.00. Giving credit for that sum the difference in contributions would mean a loss of £18,482.16.

Holiday Pay

156. I accept the claimant's evidence that he had carried over 20 days holiday (see also page C:127 which seems to accept that). He therefore had 27 days' leave accrued but not taken on termination of employment. I order the respondent to pay the sum of 27 X £168.74 gross or £4,555.98 which is to be paid after deductions for tax and NI.

Injury to Feelings

157. The claimant describes the impact of the experience upon him in para 47 of his witness statement as leaving him a shadow of his former self

> "constantly feeling emotional with irrational outbursts of anger towards family and friends for no apparent reason, along with this I lost all confidence in my own abilities."

158. Within the body of his email he describes feeling completely exasperated and extremely depressed at the failure of the respondent to listen to his attempt to return to work in some capacity following his GPs certificate that he was fit to return to work with adjusted duties on 23 November 2021. He felt let down following meetings with those responsible for HR for his employer and by receipt of the grounds of response which asserted that his claim was unparticularised – at a time when his employer was sitting on a particularised grievance. The grounds of response is simply a holding response with no details whatever and an application for strike out or deposit orders. To my mind, the particulars of claim were not unparticularised; there were three pages of information attached to them. Admittedly it was in narrative form but that is not at all unusual for a self-representing party and the claim was quite easily understood as demonstrated at the preliminary hearing. What I accept upset the claimant is that the respondent stated they didn't understand his claim when, at the

same time, they were supposed to be responding to his grievance which set out the details that they appeared to say they did not have.

159. The claimant's wife, Joanne Brosnan gave evidence which I accept that her husband had changed from being "a very outgoing and optimistic person" to being withdrawn. She describes how around June 2020 her husband's mental and physical health began to deteriorate and he complained of sleepless nights due to stress and physical pain.

160. This appears to have been before the April 2021 injury following which she describes in becoming "observably frustrated" and says began to impact the family. From the summer of 2021, when the situation appeared uncertain, she describes the claimant being very unsure about the outcome and becoming very depressed and withdrawn which continued she says towards the end of 2021.

161. Mr Ciaran Brosnan gives evidence about an occasion when the respondent came to retrieve his father's work vehicle in May 2021 during his long term sickness absence however this whilst part of the background is not a specific allegation in the case.

162. I have concluded that the claimant has shown that his injury to feelings should be compensated by an award in the middle bracket. I have considered whether I can divide the injury to feelings into pre-dismissal and dismissal related awards and, if not, how to approach the fact that the two claims straddle the annual uplift to the Vento bands.

163. My conclusions on the discrimination and victimisation amount to a series of acts lasting over the period March 2020 to the end of employment on 25 February 2022. The claimant experienced increasing frustration with the poor management of his condition and, in particular, from April 2021, the failure to give any resolution to his grievance. The loss of sporting activities he described do not appear to stem either from the April 2021 injury or from the psychological impact of the discrimination and victimisation. I can well imagine the feelings of abandonment and exasperation caused by the lack of engagement with his attempts to return to work coupled with the financial strain that remaining off work (on half pay) caused to him and his family. The claimant was particularly upset that, despite his grievance, the respondent claimed through litigation that they did not know the details of his complaint.

164. By August 2021, the inactivity was having an impact on the claimant's mental health (AB page 74). He reported to his GP on 25 October 2021 that this was getting him down, causing stress, he suffered mood swings and his sleep was affected. Happily, now that he has found alternative employment which he enjoys, by the time of the hearing, was much more positive. I am confident that, with the resolution of the Tribunal proceedings, he can put this episode behind him.

165. That narrative of growing frustration, feelings of loss of confidence and low mood grew until the claimant resigned. It is not possible to distinguish the

psychological impact of the events in claim 1 from that of those in claim 2. Although the claimant has not succeeded in all of his claims, the acts of the respondent about which he complained have, for the most part, been found to be unlawful under the EQA. I do not consider the fact that some of the frustration was due to a breach of contract to mean there is a logical reason to discount any award of injury to feelings on that account but have it in mind when assessing compensation.

166. I assess the appropriate award as being in the second quartile of the middle band. The mid-point in the 4th addendum was £18,250. The mid-point in the 5th addendum was £19,750. Taking into account that there has been an increase in the applicable range during the period of the two claims but also having in mind the purchasing power of money in real terms as well as my findings that this was discrimination that continued over a period of time and involved the loss of employment, I conclude that it is just & equitable to award the sum of £15,000. Interest will be awarded at 8% from the midpoint between 2 March 2020 and 25 February 2022 (namely 28 February 2021) and 12 June 2023.

ACAS uplift

167. The ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) provides that following a grievance meeting the employer should decided on what action to take and communicate that to the employee without unreasonable delay (para.40) and should allow the employee to take the grievance further if it is not resolved (para.41). The total failure to communicate any outcome to the claimant or, apparently, to decide it, is – in the circumstances explained above – an unreasonable failure to comply with the Code.

168. Although there has not been a total failure to comply with the code in that a grievance investigation was started, from the claimant's perspective there was no benefit whatever to the process. Even following his resignation citing this failure as a reason for losing trust in his employer there appears, so far as I have been told, to have been no attempt by the employer to complete the grievance or to ask the claimant to reconsider.

169. I consider it just & equitable to increase the compensation awarded by 25% because of the seriousness of the employer's default in this regard.

Preparation time order

170. As Judge Quill said when striking out the response to Case No: 3322339/2021, the respondent has behaved unreasonably in their conduct of the litigation. They have failed to comply with Tribunal orders. This engages the power under rule 76 ET Rules of Procedure 2013 to consider whether or not to award costs in favour of the claimant. I consider that it is just to do so. The claimant has been put to expense that he should not have had to bear had the respondent complied with the orders of Judge Hawksworth. I make a preparation time order and order them to pay the

sum of £1,560.00 to reimburse the claimant for expense which he has proved were incurred (see Remedy page 69 to 72).

Grossing up

171. The first £30,000 of the award of damages does not attract tax but the balance should be grossed up to take account of the incidence of tax on the award so that the claimant will receive the full benefit of his award. His recent payslips from HCA Healthcare show that his rate of tax appears to be the standard rate and I am not aware that he has income from any other source. His full personal allowance will be used before tax deducted from earnings in his employment. His new job pays an annual salary of £39,000 gross p.a. In the financial year ending 5 April 2024, the personal allowance is £12,570 and income is taxed at 20% up to £37,700.00. The claimant is therefore a higher rate tax payer and where tax is payable on the award for compensation for loss of employment it will be taxed at the higher rate of 40%. The parties may apply within the usual time limits for reconsideration if they consider that the grossing up calculation in the judgment is inaccurate.

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Employment Judge George

Date: …7 September 2023 ……..

Sent to the parties on:
7 September 2023.

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For the Tribunal Office