Case Number: 1400597/2019
1400598/2019

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	and	**Respondents**
Mrs N. M. K. 'Alo' Brake (1)		**Chedington Events Limited (1)**
Mr Andrew Brake (2)		**The Chedington Court Estate Limited (2)**
		Dr Geoffrey Guy (3)
		Mr Russell Bowyer (4)

Held at: Exeter **On: 5, 6, 8, 9, 12, 13, 15, 16, 19, 20, 22, 23, 28 June 2023 (Tribunal and Parties) 14, 21, 26, 27 June (Tribunal reading days) 31 July 1,2,3,4 August 2023 (Tribunal Deliberation)**

Before: Employment Judge Smail
Mr C. Williams
Mrs V. Blake

Appearances
Claimants: Mrs Brake for both Claimants
Respondent: Mr D. Reade KC and Mr M. Palmer (Counsel) instructed by Stewarts

RESERVED JUDGMENT

1. The claims of both Claimants are dismissed.

REASONS

1. Mrs Brake was employed by the First Respondent as manager. The First Respondent was called Sarafina Properties Limited ('SPL'). That company was incorporated in July 2015 and was acquired by the Second Respondent on 17 February 2017. The Second Respondent is owned by

Dr Guy and his wife. They, together with Russell Bowyer, are the directors of the Second Respondent. The Second Respondent is an investment vehicle for Dr Guy and his wife. Separately they own Chedington Court in Dorset as their home. Dr Guy has other business interests, also. These include a motorbike company called Motorcorsa Limited and a hotel in the Spanish Pyrenees. SPL was principally a luxury weddings and events business. The venue and onsite accommodation were available as part of the service.

2. Dr and Mrs Guy bought SPL and its asset West Axnoller Farm not just to acquire the wedding business but more particularly to develop an Equestrian Centre. Dr Guy's daughter is a professional show jumper. The family wanted to develop a world class facility for the sport. Of particular interest at West Axnoller Farm was the potential for the development of the indoor arena.

3. Mr Brake was employed by the Second Respondent as 'Facilities and Land Manager' at West Axnoller Farm. West Axnoller Farm was, we understand, the first Estate bought by the Second Respondent. Subsequently, Lower Chapel Marsh Farm was added to the portfolio, also in connection with the development of the Equestrian Centre. The former Olympian Australian show jumper, Chris Burton, was going to move his operation from the South East to Dorset.

4. Sarafina Properties Limited changed its name to Axnoller Events Limited ('AEL') on 18 July 2017. It changed its name again to Chedington Events Limited subsequently.

5. Throughout their working association with the wedding business, Mrs Brake was concerned with the organisation and administration of the events, while Mr Brake attended to the land and buildings.

6. In terms of the pursuit and conduct of litigation, Mr Brake has delegated his role to the Claimant. He has always delegated to her decisions on business and legal matters. In order to protect his wife's health, he has asked the Tribunal appropriately for extra breaks or an early finish.

7. Mrs Brake, as has been acknowledged by all, including HHJ Paul Matthews, is herself a formidable advocate. She has an impressive intellect and deals with the challenges of her disability in a courageous way. This is not a case where there has been an imbalance of representation, where considerable allowance needs to be made for 'litigants in person'. The Tribunal could not have a fuller understanding of fact and law.

8. Perhaps as an unfortunate consequence of Mrs Brake's legal acumen, this is only one aspect of a substantial series of litigation between the parties. Most of the extent of this is described in the Judgments of HHJ Paul Matthews in the High Court, extensive reference to which is made below.

THE ISSUES

9. The Claimants presented their claims on 22 February 2019.

10. Mrs Brake brings claims of general unfair dismissal; automatic unfair dismissal for the reason or principal reason that she made protected disclosures; detriment on the ground that she had made protected disclosures; disability discrimination under various heads: direct, discrimination arising from disability, harassment, victimisation, failure to make reasonable adjustments. A series of incidents are put forward many of which under multiple headings.

11. The agreed issues in the case brought by Mrs Brake are at Appendix 1 below. Not all of these are relied upon in Mrs Brake's concluding submissions. With hindsight the issues could have been pruned more effectively. If we do not deal with a particular issue fully or at all, that is because it was not live at the end of the case, or it is subsumed in a finding on the issues generally.

12. Mr Brake brings claims of general unfair dismissal, automatic unfair dismissal for the reason or principal reason that Mrs Brake made a protected disclosure also on his behalf, claims of disability discrimination by association with Mrs Brake's disability, in particular direct discrimination, harassment and victimisation.

13. The agreed issues in the case brought by Mr Brake are at Appendix 2. Once again, with hindsight the issues could have been pruned more effectively. If we do not deal with a particular issue fully or at all, that is because it was not live at the end of the case, or it is subsumed in a finding on the issues, generally.

14. The Claimants' concluding submissions tell us what issues remain live at the end of the Hearing.

15. Given that many acts of discrimination are recycled under a number of heads of discrimination, also as protected disclosure detriments, we focus on the reason-why for the alleged factual act of discrimination or detriment. The reason-why will point to liability if any.

THE HEARING

16. We heard evidence from Mrs Brake, Simon Windus, Paul Maple and Mr Brake for the Claimants. For the Respondents we heard from Dr Guy, Jo Hague, Russell Bowyer and John Hatchard. We had primary bundles of documents totalling 2759 pages and supplemental bundles from the Claimants and the Respondent.

THE LAW

17. We set out here the primary applicable statues but also some particular points of law that have arisen in the course of the case.

Unfair Dismissal

18. The test for unfair dismissal is set out in s. 98 of the Employment Rights Act 1996. The First and Second Respondents rely on 'some other substantial reason' namely complete loss of trust and confidence/irretrievable breakdown of the employment relationship.

> **98 General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) In subsection (2)(a)—
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b)shall be determined in accordance with equity and the substantial merits of the case.

19. It is axiomatic that the Claimants have to be employees and have 2 years continuity of employment. The First and Second Respondents assert that the Claimants were not employees of SPL prior to the acquisition of it by the Second Respondent. Furthermore, they assert that it is the subject of an issue estoppel that Mrs Foster could not contract on behalf of SPL because she was a nominee for the sole beneficial owners of SPL, namely the Brakes.

20. As Mrs Brakes submits, if it is right that the company was hers and her husband's over that period, they could contract on behalf of SPL. However, as a matter of fact, did the Brakes enter into a contract of employment during the Sarafina period?

21. As to issue estoppel: we conclude that it was a necessary ingredient of the possession proceedings to determine Mrs Foster's nominee status. It was not, however, an essential ingredient to determine Mr and Mrs Brake's employment status. That is so even though Mr Brake's claim to be an assured agricultural tenant was also rejected.

22. If a director is going to enter into a contract of employment with his/her own company, what needs to be shown? Mr Reade submits there needs to be a contract which is a contract of employment.

Claims under the Equality Act 2010

Direct Discrimination

13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if—

(a)on a comparison for the purposes of section 13, the protected characteristic is disability;

Harassment

26 Harassment

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)A also harasses B if—

(a)A engages in unwanted conduct of a sexual nature, and

(b)the conduct has the purpose or effect referred to in subsection (1)(b).

(3)A also harasses B if—

(a)A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b)the conduct has the purpose or effect referred to in subsection (1)(b), and

(c)because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

Victimisation

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

Failure to make reasonable adjustments

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid

Burden of Proof

136 Burden of proof

(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.

Associative Discrimination

23. This concept is central to Mr Brake's claim. It seems settled law that Mr Brake can claim direct discrimination, harassment and victimisation by reference to Mrs Brake's disability. See EBR Attridge Law LLP v Coleman [2010] IRLR 10, EAT, and Thompson v London Central Bus Co [2016] IRLR 9, EAT.

Causation and Discrimination

24. It is a significant issue in this case as to whether any discrimination contributed to the decision to dismiss. We have sought guidance from Harvey on Industrial Relations as to the position when more than one reason might explain an event. We have taken into account this guidance:

(iii) More than one reason

[274.07]
The reason for the conduct complained of might be more complicated than simply saying it was 'because of' the relevant protected characteristic. That, however, need not be fatal. The protected characteristic in question need not have been the sole

reason for that conduct: *Owen and Briggs v James [1982] IRLR 502, CA*. The question is whether it was an 'effective cause', see *O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*, *[1997] ICR 33, EAT* and *O'Donoghue v Redcar and Cleveland Borough Council [2001] EWCA Civ 701*, *[2001] IRLR 615*. In *Nagarajan v London Regional Transport [1999] IRLR 572, HL*, Lord Nicholls said:

"Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

[274.08]
It may be important to look beyond the immediate cause for the conduct in question: see *Rees v Apollo Watch Repairs plc EAT/23/93*, *[1996] ICR 466*, where the superficial reason for Ms Rees' dismissal was because her replacement during her maternity leave was considered to be more competent. This, however, was not the underlying reason, which was Ms Rees' absence on maternity leave, which had led to the employer's preference for the replacement worker.

Protected Disclosure

43AMeaning of "protected disclosure".

In this Act a "protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

(1)In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, **[F2** is made in the public interest and **]** tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

47B Protected disclosures: detriment

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

[**F2**(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Irretrievable breakdown as some other substantial reason

25. The First and Second Respondents rely on Gallacher v Abellio Scotrail Limited UKEATS/0027/19/SS, a decision of Choudhury J. In that case a dismissal, the reason for which was irretrievable breakdown in relationships, was found to be fair even though there was no procedure

over and above the communication of the decision to dismiss. Per Choudhury J:

> This was a case involving two senior managers who needed to be able to work together effectively in order to deliver what the business required at a critical juncture. The Tribunal considered that the Claimant was not interested in retrieving the relationship at the time: see [255]. That conclusion was supported by, amongst other matters, the findings that neither individual had trust and confidence in the other; that the Claimant had been "*truculent*" towards Ms Taggart in relation to the recruitment issue; that the Claimant had been unable to put matters behind her and move on; that longstanding issues between them remained unresolved even at 11 March 2017; and that Ms Taggart genuinely believed that there was an irretrievable breakdown in relations.

Reference was made to the acknowledgment in Polkey where Lord Bridge stated as follows:

> "It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under s.98(4) may be satisfied."

Protected Act and Good Faith in victimisation.

26. The Respondent relies on HM Prison Service v Ibimidun [2008] IRLR 940 (EAT). There the Claimant, having won one an ET claim for racial discrimination, and having received £28,000 compensation, then proceeded to bring multiple claims. The purpose behind the subsequent claims, as found, was to harass the Prison Service into settling. Whilst numerous (potential) protected acts were made, they lost protected status because they were not made in good faith. Their purpose was to harass. The former provisions on victimisation under the Race Relations Act 1976 applied:

> s.2(1) by virtue of s.2(2), which provides: 'Subsection (1) does not apply to treatment of a person by reason of any allegation made by him if the allegation was false and not made in good faith.'

27. Guidance as to the correct approach for the Tribunal to follow in assessing bad faith was provided in Saad v Southampton University Hospital [2018] IRLR 1007 (EAT). HHJ Eady QC (as she then was) held –

> When determining whether an employee has acted in bad faith for the purposes of s 27(3) EqA, the primary question is whether they have acted honestly in giving the evidence or information or in making the allegation. As observed in *Fenton*, the issue is not the employee's purpose but their belief. That is not to say that the existence of a collateral motive could never lead to a finding of bad faith – not least because it is impossible to foresee all scenarios that might arise – but the focus should be on the question whether the employee was honest when they gave the evidence or information or made the allegation in issue. If the evidence, information

> or allegation was false, that does not mean the employee acted in bad faith, although it may be a relevant consideration in determining that question (the more obviously false the allegation, the more an ET might be inclined to find that it was made without honest belief). Similarly, the employee's motive in giving the evidence or information or in making the allegation may also be a relevant part of the context in which the ET assesses bad faith. The ET might, for example, conclude that the employee dishonestly made a false allegation because they wanted to achieve some other result, or that they were wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because they had some collateral purpose in making it. Motivation can be part of the relevant context in which the ET assesses bad faith, but the primary focus remains on the question of the employee's honesty. The determination of bad faith is for the ET: it is the ET that hears the evidence of the complainant and is best placed to undertake the necessary assessment.
>
> In the present case, the ET had erred in its approach. By simply reading across from its findings relevant to the protected disclosure claim, it failed to engage with the specific questions raised by s 27(3). It made no express finding as to whether the allegation was false. More significantly, it failed to tackle the specific question raised by the bad faith requirement under s 27(3); whether the claimant had been honest in making the allegation in issue. By finding that he subjectively believed the allegation to be true, the ET had determined that it was his genuine belief and, although he might have had an ulterior purpose in raising the allegation, he had not made it dishonestly – he genuinely believed it to be true. On the ET's findings, therefore, the claimant made an allegation that Mr Tsang contravened the EqA in the genuine belief that this was in fact true. In those circumstances, whilst his ulterior purpose might have been relevant to any question of remedy, it was not sufficient for a finding of bad faith. A finding would be substituted that the claim was made out as regards the decision to refuse to let the claimant return to work.

28. If bad faith is being alleged the elements of bad faith have to be put to the person said to have made the Protected Act. We have been referred to Kalu and Ogueh v University Hospitals Sussex NHS Foundation Trust 2022 EAT 168, a decision of HHJ Auerbach. He gave this guidance:

> 36. So, while it is correct that the denial that the collective grievance was a protected act did not at that point include an assertion that it was done in bad faith, the later paragraphs expressly did so. Although the assertion appears in the paragraphs dealing with the claimed protected acts, the actual communications relied upon as protected acts and as protected disclosures were identical. Reading the pleading as a whole, this was, in my view, sufficient to put the claimants on notice that the respondent was advancing a bad faith case in relation to the collective grievance for the purposes of both the protected-disclosure detriment complaints (where it would only be relevant to remedy, should it arise) and the victimisation complaints. No further detail was required. "Bad faith" in this context just means "dishonest", in the sense of not believing the allegation to be true.
>
> 37. I turn to the other strand of ground 1, being the contention that it was a procedural irregularity for the tribunal to find that the claimants were in bad faith, as that specific contention was not put to either of them in cross-examination. To determine this ground requires a consideration of (a) the relevant principles of law; (b) the particular issue in this case on which this ground bites; and (c) what actually happened at the hearing.
>
> 38. As to the law on the procedural point, I was referred to a number of authorities, but a lengthy doctrinal exegesis in the present decision is not necessary. It is not always the case that it is wrong for a tribunal to consider and determine a point that has not been put in cross-examination. But, given the seriousness of an allegation of dishonesty, if the bad faith finding was a material part of the tribunal's reasoning,

> then it would be unfair to the claimants, if the point had not in the course of their cross-examinations, in substance, been fairly put. See: Secretary of State of Justice v Lown [2016] IRLR 22 at [49] – [51]; City of London Corporation v McDonnell [2019] ICR 1175 at [50].
>
> 39. Turning to the substantive law, in order for a claimant to succeed in a complaint of victimisation the tribunal must find both that they did a protected act and that they were subjected to a detriment because they did that act. The bad faith point goes to the first question, as an allegation which would otherwise amount to a protected act will not do so if it is false and made in bad faith. The bad faith question concerns the state of mind of the claimant, and in particular whether they were dishonest in the sense that they did not believe in the truth of the allegation they were making.
>
> 40. A different point relates to whether the treatment complained of was "because" they did that act. That turns on the motivation of the respondent in doing the thing that is claimed to be the act of victimisation. In some cases, the respondent may assert that what motivated it was not that the claimant did the protected act as such, but what it knew or believed to be his particular motivation for doing so. In Saad at [40], HM Prison Service v Ibimidun [2008] IRLR 940 was cited as an example of that. However, Saad at [49] cautions against attaching weight to the motivation of the claimant when considering whether he was in bad faith for the purposes of a victimisation complaint.
>
> 41. In summary, evidence of the claimant's motivation for doing the claimed protected act, or what the respondent believed it to be, may be relevant when determining the respondent's motivation. But in order to establish bad faith for the purposes of deciding whether the act was a protected act, the focus should be on the distinct question of whether the allegation was one which the claimant did not believe to be true. Where that distinct issue is material to the respondent's case, and then the tribunal's decision, a claimant needs to be fairly cross-examined upon it as a distinct matter.

29. It was not expressly pleaded in the Re-Amended Response that the communication of 3 November 2018 was not a protected act because it was made in bad faith. That it was a protected act was denied in general terms. Mrs Brake was cross-examined on the document to suggest it was being deployed as a threat. It was not put to her that she did not believe that 'I feel that since I told you about the kidney thing, that we have been increasingly marginalised and excluded.'

<u>Directors as Employees</u>

30. This relates to the consequences of the finding by HHJ Matthews that SPL was held by Saffron Foster as a nominee for the Claimants. Therefore, were the Claimants employees during that period?

31. Harvey on Industrial Relations tells us that directors of a company are not as such employees of the company. By virtue of their appointment they become officeholders. A director may however enter a service agreement with the company and thereby potentially become its employee as well as a director of it. A service agreement with a director may be express or implied. The courts seem prepared to say, Harvey tells us, that there is a presumption of a contract of employment if the director is required to work full-time for the company in return for a salary. Income tax and national

insurance would be evidence of that. We know the Claimants did not pay any of those.

32. Mr Reade submits that yes directors can be employees, but Mr and Mrs Brake did not enter into a service agreement, express or implied.

Illegality

33. Indeed if there were implied service agreements, not a penny of income tax was paid by them in this period, and so the question of illegality arises. Harvey on Industrial Relations tells us –

> Where a contract of employment is operated by the parties as a fraud on HMRC and the employee knowingly receives his remuneration without deduction of PAYE, a court or tribunal will generally refuse to enforce the contract. However, this is not automatic; the question in every case is whether the employee's claim arises out of or is so clearly connected with the illegality that the court cannot permit the recovery of compensation without appearing to condone the illegality (see *Hall v Woolston Hall Leisure Ltd [2000] EWCA Civ 170*, *[2000] IRLR 578*, *[2001] ICR 99*). The degree of participation of the employee is critical.

34. In Patel v Mirza [2016] UKSC 42, a leading authority on illegality, Lord Toulson said

> **[109]** The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.

and later

> **[120]** The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

Issue Estoppel

35. Per Lord Keith in Arnold v National Westminster Bank plc [1991] 2 AC 93, an issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.

36. In Virgin Atlantic Airways v Zodiac Seats UK Ltd [2014] AC 160, Lord Sumption said '(3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

FINDINGS OF FACT ON THE ISSUES

A. What is the continuity of employment of the Claimants?

37. The Second Respondent purchased the single share in Sarafina Properties Limited (SPL) for £7,067,002 on 17 February 2017. It is common ground that Mrs Brake was employed by the First Respondent between 17 February 2017 and 30 November 2018 when she was dismissed with the balance of her 9-month notice being payable in lieu. Mrs Brake claims that she is entitled to add the period of alleged employment with SPL, namely 23 January 2016 to 17 February 2017, thus giving her over the 2 years continuity of employment required for bringing a claim of unfair dismissal.

38. Mr Brake was employed by the Second Respondent between 17 February 2017 and 30 November 2018 when he was dismissed with the balance of his 9 month notice being payable in lieu. He alleges that his period of employment with SPL needs to be added to his continuity, namely between 23 July 2015 and 17 February 2017.

39. The Respondents urge upon us that these matters are the subject of an issue estoppel. HHJ Paul Matthews said this in the Possession Proceedings, [2022] EWHC 365 (Ch) (25 February 2022):

> *Employment by Sarafina*
>
> 193. The question arises whether the Brakes were employed by Sarafina prior to the sale to Chedington in February 2017. As to this, Mr Brake was asked in cross-examination whether he was employed by Sarafina during this period. He answered:

> "I think must have been because I know that at the end of it there was some document called settlement or something like that which presumably deals with employment."
>
> I may say that several times in his evidence, Mr Brake made the point that he never dealt with legal or business matters, but left all of this to others such as Mrs Brake or the accountant. His evidence showed how hazy he was about formal matters of this kind. So I do not think I can place much weight on his statement that he and his wife were employed by Sarafina.
>
> 194. Moreover, a number of documents were put to Mr Brake in cross-examination (day 14, pages 24-28) which satisfy me that they were not so employed. Indeed, one of them is an email from Mrs Brake dated 18 January 2017, which says baldly: "Dear Stuart, I can confirm that we were not employed [by Sarafina]". This was a response to an email enquiry from Stuart Ritchie (The Brakes' accountant) in January 2017 to Gary Salter (Chedington's accountant), copied to Mrs Brake, in which he asked,
>
> "I assume, but please confirm, that I should also not record [Mr and Mrs Brake] as having any form of employment with Sarafina Properties Limited for the year ended 5 April 2016."
>
> 195. Of course, this evidence does not relate to the period after April 2016. But that enquiry was made in January 2017, and there is nothing significant to suggest that the position changed thereafter before the sale. In addition, there is an email from Mrs Brake to Dr Guy dated 27 March 2017 which was put to Mr Brake in cross-examination, and in that email she said "We have not paid PAYE for a long time and that is why I put net on the Heads of Terms originally. I have not paid tax for years and years. …" If the Brakes had been employed by Sarafina they would have been in the PAYE system.
>
> 196. In the result, I find that neither Mr nor Mrs Brake was ever employed by Sarafina before its sale to Chedington in February 2017.

40. HHJ Paul Matthews also found that Mr Brake was not an assured agricultural occupant, a status that the Respondent submits requires employment status.

41. In terms of an understanding of the ownership history of West Axnoller Farm and the businesses run from it, it is instructive to refer to the Possession Proceedings. HHJ Paul Matthews introduced the matter as follows, all of which we adopt as factual:

> '5. In September 2004, the first defendant (then Mrs D'Arcy, but whom I shall call by her current name, Mrs Brake) acquired the Farm, near Beaminster in Dorset, from local landowners, the Vickery family (who continued to have substantial landholdings locally). This property included a substantial dwelling-house known subsequently as Axnoller House. Just outside the southern boundary of the Farm, on the other side of the private lane leading to the Farm, lies another, smaller residential property known as West Axnoller Cottage (the "cottage"). In July 2002 a Mr and Mrs White had purchased the cottage from the Vickery family and were living there when Mrs Brake bought the Farm.
>
> 6. In 2006 Mrs Brake began to operate a holiday letting business at the Farm, subsequently joined in partnership in 2008 by her husband, the second

defendant ("Mr Brake"). Mrs Brake borrowed money from bankers Adam & Co in 2006, secured by a first legal charge on the Farm. The financial crisis of 2008 made it impossible to obtain further bank finance to expand the business being carried on at the Farm. The defendants therefore looked for an outside investor.

The "Stay in Style" Partnership

7. In February 2010 Mr and Mrs Brake ("the Brakes") entered into a partnership with a limited partnership called Patley Wood Farm LLP ("PWF"), whose principal was Mrs Lorraine Brehme ("Mrs Brehme"). The partnership (known as "Stay in Style") was to carry on the business of providing luxurious weekend and other breaks, and hosting events such as weddings. The Brakes contributed the Farm as partnership property, although still subject to the charge to Adam & Co to secure existing borrowings. With funds contributed by Mrs Brehme through PWF, on 8 April 2010 the partnership acquired the cottage, the legal title to which was transferred to the Brakes and Mrs Brehme jointly, who were registered as proprietors. At first the cottage was used as accommodation for a housekeeper and then for a personal assistant (Simon Windus) and his family. After they left in 2012 it was used (inter alia) for the Brakes and Mrs Brake's young son Tom D'Arcy to stay in when the main house was let.

8. Differences arose between the Brakes on the one hand and PWF on the other, as partners in Stay in Style. In accordance with the partnership agreement, these were referred to arbitration, which ended on 21 June 2013 with an award in favour of PWF, and the dissolution of the partnership. Following a failure to pay orders made against them for costs in the arbitration, the Brakes were adjudicated bankrupt on 12 May 2015. Mr Duncan Swift was appointed trustee in bankruptcy with another person, who later retired and was not replaced. The partnership itself subsequently went into administration (in 2016), and then into liquidation (in 2017).

The Sale of West Axnoller Farm

9. In October 2014 Adam & Co, the bank which had lent money to Mrs Brake against the security of the Farm, appointed receivers under the Law of Property Act 1925. After marketing the property, the LPA receivers sold it in July 2015 to a newly incorporated company, Sarafina Properties Limited ("Sarafina", or "SPL"), said to be a corporate vehicle for the Hon Saffron Foster ("Mrs Foster"), a daughter of the third Lord Vestey, as well as a friend of Mrs Brake. Sarafina did not purchase the wedding and events business of the partnership. It was not the receivers' to sell. But Sarafina honoured existing bookings, and continued in the same line of business, albeit that, as explained below, for the first six months, Mrs Brake was restrained by injunction from working in it.

The involvement of Dr Guy

10. In February 2017 the company was sold to The Chedington Court Estate Ltd ("Chedington"), and on 18 July 2017 its name was changed to Axnoller Events Limited ("AEL"). It is the claimant in this claim. Chedington is a company owned by Dr Geoffrey Guy ("Dr Guy") and his wife Mrs Kate Guy. I refer to Dr Guy, Chedington and AEL collectively as "the Guy Parties". Mrs Brake was employed to continue to run the wedding and rental accommodation business as before.

11. However, relations between the parties unfortunately broke down, and on 8 November 2018 notice by letter was given to each of Mr and Mrs Brake of the termination of their employment. This also gave notice to them of the termination of any licence to stay overnight in Axnoller House and required them to move their possessions to the cottage by 30 November 2018. The

> Brakes did not do so, but continued to stay in Axnoller House. These various events led both to proceedings in the employment tribunal against Chedington and others by each of the Brakes ("the Employment Claims"), and proceedings in the County Court (later transferred to the High Court) by AEL against the Brakes and Tom D'Arcy to recover possession of the Farm ("the Possession Claim"). The latter is the claim the subject of this judgment. (Tom D'Arcy was later removed as a defendant to this claim.)
>
> The Cottage
> 12. Following this, in January 2019, Mr Swift as trustee in bankruptcy entered into a transaction with the liquidators of the partnership in relation to the cottage, to acquire the liquidators' rights in it. Chedington entered into back-to-back transactions with Mr Swift in order to acquire those rights. The Brakes allege that Chedington and Mr Swift acted collusively, implementing "unlawful arrangements to create the false appearance that Chedington had acquired title to the cottage". Chedington subsequently took possession of the cottage, the Brakes say unlawfully. They therefore commenced eviction proceedings against Chedington ("the Eviction Claim"). Those proceedings are the subject of the judgment being given simultaneously with this one. So, the position on the ground currently is that the Brakes are in occupation of the house, but seek possession of the cottage, whereas Chedington is in occupation of the cottage, and its subsidiary AEL seeks possession of the house.'

42. HHJ Paul Matthews made findings on the period around and following the acquisition of the farm by SPL in July 2015. It is worth pointing out that this matter was directly before the Learned Judge in that case. He listed the issues and the matters for determination as follows:

> 31. The issues for trial in the Possession Proceedings, as stipulated by Appendix 3 of the order of Mr Justice Marcus Smith dated 31 March 2021 (but following the subsequent abandonment by the Brakes of the section 149(6) claim), are as follows:
>
> > 1. Do the Brakes have an irrevocable licence to occupy Axnoller House and the Arena (the indoor covered arena with temporary stables which is part of the Land), and to make use of other parts of the Land identified as the Grazing Land and the Access Ways?
> >
> > 2. Do the Brakes have a licence to occupy Axnoller House and the Arena, and to make use of the Grazing Land and the Access Ways, which is not revocable before 17th February 2022?
> >
> > 3. …
> >
> > 4. Do the Brakes have a licence to occupy Axnoller House and the Arena, and to make use of the Grazing Land and the Access Ways, which has not yet been
> > terminated?
> >
> > 5. Does Mr Brake have an assured agricultural occupancy of Axnoller House?
>
> 32. This means that I shall have to consider, amongst other factual matters arising on the pleadings:
>
> > 1. What the relationship was between Mrs Foster and the Brakes at the time of the acquisition of West Axnoller Farm in 2015?

2. What if any assurances were given by Mrs Foster to the Brakes at that time about the occupation by the Brakes of Axnoller House?

3. If such assurances were given, did the Brakes rely on them?

4. What did Dr Guy know of the Brakes' occupation of Axnoller House in 2016-17?

5. What if any assurances were given by him to the Brakes at that time?

6. If Dr Guy gave any such assurances, did the Brakes rely on them?

43. On the relationship between the Brakes and Mrs Foster he drew the following conclusion:

> *Conclusion on nomineeship*
> 149. In reaching my conclusion on the factual question whether Mrs Foster was a beneficial owner or a nominee for the Brakes, I bear in mind the unsatisfactory evidence of the Brakes, the omission to call Mrs Foster, the lack of weight that I place on Mrs Foster's hearsay statements, and the many and cogent indicators that Mrs Foster was indeed a nominee. I am particularly struck by the evidence that Mrs Brake has used Alice Wyatt as a "front" for herself, and that the invoice for incorporation of SPL was addressed to Ms Wyatt. I find particularly eloquent the facts that Mrs Brake ran the company and the business without any reference to Mrs Foster, and negotiated the sale of both to Chedington on her own. I am further struck by the fact that it was Mrs Brake and not Mrs Foster (notwithstanding what she says in her witness statement of 6 November 2019) who decided what to do with the net proceeds of sale (£3 million for the Brakes, £100,000 for Mrs Foster), and above all the terms of the emails passing between Mrs Brake and Mrs Foster on the day of completion. Taking the evidence as a whole, I have no doubt whatever that Mrs Foster was simply a nominee for the Brakes, and that Sarafina was really their company.

44. The Tribunal has considered further evidence on the issue of employment status. It is indeed a striking feature that Mr and Mrs Brake did not pay any income tax during the period Mrs Foster was the nominal owner of SPL. This also came up following acquisition when a query arose on the accounting for private health insurance. No declaration had been made on a form P11D for health insurance as a benefit in kind in respect of the Mrs Foster period.

45. Mrs Brake told us that she took payments from the business as she needed them, albeit she insists after 23 January 2016 when a freezing injunction, to which we shall return, expired. These had been placed for accounting purposes in a loan account. The correct accounting for this was thrown up as an issue upon the acquisition of SPL by the Second Respondent. An option was that Mr and Mrs Brake be treated as employees. They were advised by Milsted Langdon a firm of accountants, as follows:

> **From:** Rob Chedzoy
> **Sent:** 19 January 2017 09:21
> **To:** Enquiries Axnoller; Gary Salter

Cc: Tim Close
Subject: RE: Andy and my income in the year to April 2016

Morning Alo

As discussed when we met, as I understand it, the accounts currently reflect the fact that you have not been employee or director of Sarafina Properties Ltd, and have not taken a salary.

The current planning for the sale involves splitting the sales proceeds between the shares and a compensation payment to be paid directly to you. The intention is that Saffron will gift funds across to you at some point following the sale.

As mentioned in my recent letter, one of the risks associated with the gift of cash from Saffron is the possibility that HMRC could argue that the transfer is "employment related", and remunerating you for services provided over the period.

You could therefore:

i) Avoid taking any salary at all, and therefore ensure that you have no employment relationship with the business, which may potentially make it harder for HMRC to attack the transfer from Saffron, or

ii) Take a salary, and be named as an employee on the payroll, and in the event of HMRC queries, argue that you have been fully remunerated for your role, implying that the subsequent gift is a personal one.

As with the other decisions you are having to make in relation to this deal, there is no "right" answer. You may well become an employee of Sarafina in the future under Dr Guys ownership, and the HMRC rules are widely drawn enough to consider a future employment in assessing whether, in their view, a particular payment should be subject to PAYE.

Overall, my feeling is that it is likely to be marginally safer to avoid taking a salary at this stage. From a disclosure perspective, you will remain at arm's length from the company in terms of payroll and employment, which I would suggest is helpful.

If you avoid taking a salary, the loan could be repaid following the deal, using proceeds which you have received tax free or via Saffron at 10%. The cash would obviously come from your own pot (out of sales proceeds), rather than from the company's pot, however.

Could you let Gary and I know which you prefer?

Best wishes

Rob

And again on 26 January 2017:

Clearing the loan

Noted re timing – this can be paid whenever you are ready, or following the sale if Dr Guy agrees.

You mentioned that Dr Guy would be injecting funds into the company to assist with cash flow. If a salary is paid, the PAYE and NIC liability is payable by the company and will significantly reduce the cash he has paid into the company.

If Dr Guy was to increase the share sale price by £90k, the additional funds would be received by Saffron / you at a 10% tax rate. The net of tax amount could be paid back into the company by you to repay the loan. The cash ends up back in the company, which is controlled by Dr Guy. This is more tax efficient, and would enable you to sidestep an employment connection with the business, but would need Dr Guys agreement.

46. As at 1 February 2017 Dr Guy assumed that the loan the Brakes had from the company, at least as per the accounts, would be converted into appropriate PAYE and NIC paid out. He stated later, however -

> The shares arise from their role in a quasi-partnership where I believe it had always been Saffron's intention to include them as partners/shareholders at the correct time. The risk sharing that they have undertaken exceed by far that which could be expected from employer/employee relationship.

47. In the event, the parties decided to have the loan account paid off as though any payments to the Brakes did not happen. Mrs Brake submits that in that event no income tax was due. Dr Guy was aware of this solution. Whilst he tells us, and we accept, that he was unaware that the Brakes would receive £2.5M from the acquisition, he did know that there would be some gift from Saffron Vestey to the Brakes. On 1 February 2017 he emailed his accountant, Mike Butler and his solicitor, John Hatchard as follows:

> Gentlemen
>
> I have this morning, I believe, persuaded Alo to keep any financial arrangement between them and Saffron on a private and personal basis. I.e. a gift over 7 years etc. She has confirmed that through the warranties they will of course indemnify TCCEL for any liabilities arising from such arrangements.
>
> Alo will discuss this Saffron to confirm but I suspect that his will be the chosen route.
> Regards
>
> Geoffrey

48. During part of the Mrs Foster period the Brakes were bankrupt. This was between 12 May 2015 and 11 May 2016. Mrs Brake suggested she had a letter from HMRC that they could work without paying tax or national insurance over that period. The correspondence produced does not confirm that. In fact, the correspondence says they must declare the income.

49. Further, on 11 February 2015 the Brakes were prevented by way of an injunction from entering into or carrying out any agreement to provide services directly or indirectly with any purchaser or prospective purchaser of the Farm and/or Cottage or enter into any agreement or arrangement which involved an option to buy or lease the Farm and or Cottage back from a purchaser or potential purchaser. That injunction was obtained by Patley Wood Farm llp, which was the corporate vehicle of Mrs Brehme in the failed partnership. Patley Wood Farm was a creditor of the Brakes in a sum over £800,000. This led to their bankruptcy. That injunction was varied on 6 July 2015 to mean that the Brakes could not work for the first 6 months of Mrs Foster's 'ownership' of the farm in respect of the farm or any business operated therefrom. SPL having bought the farm on 23 July 2015 means the injunction ceased to have effect from 23 January 2016.

B. Disability and knowledge

50. It is common ground that at all material times Mrs Brake was a disabled person and the Respondents knew that. Mrs Brake has had a kidney transplant for over twenty years. In addition, Mrs Brake underwent a double mastectomy and was in hospital for around 3 days in March 2017. She continued to work from her hospital bed.

51. In October 2017 Mrs Brake informed Dr Guy that she had had an acute mediated rejection of her transplanted kidney and had been put on a treatment of steroids. In November 2017 Mrs Brake told Dr and Mrs Guy that she had some form of Tacrolimus toxicity causing malabsorption, resulting in significant weight loss and a number of hospital visits.

> *Geoffrey, I am in hospital. I have had a biopsy and after 17 years I have my first episode of acute rejection. They are on top of it and I have been hit hard with intravenous steroids which have reduced the size of the graft considerably over night. I feel very well this morning and I am looking forward to coming back to Axnoller on Saturday morning. It seems the alteration in the immunosuppression to allow for chemo eventually allowed my immune system to attack the kidney. Good news in one way as usually it is reversible.* 😊😂 *I have not told anyone except Sherryl and Simon as Tom does not know. X*

52. It is Mrs Brake's case that from the point she disclosed the detail of these serious health issues to Dr Guy, he began to treat her differently. There are no emails or minutes of a meeting that is said to have taken place on 6 February 2018 between Dr Guy and Mrs Brake when Mrs Brakes' health was discussed. Mrs Brake alleges that Dr Guy described her health as being on a "knife edge" and that he needed to think about a "succession plan". Dr Guy did not recall using such terms but did remember expressing his concerns, given that Mrs Brake was facing potential complete rejection of her kidney graft. He accepted in cross examination that he suggested she appoint a "deputy". It was common ground that Dr Guy had asked what help and support he could provide and that Mrs Brake had said she did not need any adjustments given her existing flexible work arrangements and autonomy to go to appointments when needed.

53. Around April 2018 Mrs Brake discussed with Dr Guy that her kidney condition was now considered chronic and that only 20% of people in her position keep the transplant for 5 years. In an exchange of emails on 4 & 5 May 2018 Mrs Brake wrote formally to inform Dr Guy of her health condition in case reasonable adjustments needed to be made. He responded asking her to give thought as to what type of adjustment she had in mind. Her response was that she was fine, she just wanted him to be fully informed.

> Thank you for your email. My email to you was really just a courtesy and not in any way "loaded". We have recently had a cleaner who after working for us for circa 11 days went off sick with depression. She is on probation and has now had 4 weeks or so off and has had herself signed off for another 3 weeks. When I took legal advice about what to do

about it, I was told that as she had not had the courtesy to tell us that she suffers from depression that we could not be expected to make any reasonable adjustments to her work to help matters. In other words, it is right and proper that an employee informs the employer of matters that may affect his or her work health wise.

So I am fine, thank you. I work flexible hours so I tend to go to doctor's appointments on my days off. I just wanted you to be fully informed as I have been in your position.

C. Alleged Marginalisation in the Performance of Mrs Brake's role

54. This general allegation is not as specific as some. The following matters arose in evidence and might be analysed here.

Christmas Bonus payments

55. Mrs Brake did not receive a bonus payment in December 2017 when other staff were paid a bonus. In the purchase agreement for SPL it was anticipated that Mr and Mrs Brake would receive a bonus based on performance criteria to be agreed after March 2018. The contract terms described entitlement to a profit sharing annual bonus although not yet specified in detail in a schedule. On 11 December 2017 the question of whether Mr and Mrs Brake should be included in the Christmas bonus pay run was raised by Jo Hague to Dr Guy. Jo Hague was Dr Guy's bookkeeper who worked on a contract basis prior to the appointment of Mr Bowyer as Finance Director. Dr Guy's response was that they were not included because they had negotiated a higher basic and bonus which were not payable until after March 2018. That is a non-discriminatory, lawful explanation.

Health Insurance

56. in early April 2018, Jo Hague was preparing the year end accounts and queried why the health insurance premium had risen from £253 to £805 per month. This prompted a terse reply from Mrs Brake:

> Dear Jo
>
> Our health insurance has gone up for 2 reasons:
>
> 1. I decided to add Simon and Sherryl to it.
>
> 2. My cancer claim has no doubt increased the premiums (I suspect that is the main reason).
>
> As far as I am aware I am in charge of management decisions at Axnoller and I made the decision to add Simon and Sherryl to the insurance. I would appreciate it if you would not act as if you are here to police me and the decisions that I, make. You are not. When I agreed to run this for Geoffrey it was on the basis that I ran it and I do so to the best of my ability and to his benefit. I do not cheat. I appreciate that you sometimes think that you are just doing your job, but frankly you go too far and the ill feeling you

> cause (and not just with me) is counterproductive and not good for business.
>
> Best wishes
>
> Alo

In her reply, Jo Hague reminded Mrs Brake that health insurance was a P11D benefit that needed to be allocated to individual employees and that the company had received a fine the previous year for late filing of that return. She explained the necessity of this level of detail (p726):

> This is by no means trying to police the management decisions made by you, purely trying to ensure that the requirements of the company are dealt with.

57. Mrs Brake objected to the bulk health premium being allocated to the "loan account". After a number of email exchanges and an intervention from Dr Guy regarding the tone of Mrs Brakes emails to Jo Hague, the individual premiums were obtained by Mrs Brake from Vitality and sent to Jo Hague (P731). Dr Guy wrote:

> I have just seen your exchanges with Jo about health insurance. Jo has bona fide reasons for enquiring and is in no way policing you. Your comments were unfair and unwarranted and I should be most grateful if you could respond less adversarially to her accounting enquiries. I rely heavily on Jo compiling as much accounting information as possible so as to avoid this having to be done by Old Mill with a concomitant increase in my costs.

Shelving of projects

58. The claimant states that the changes made to the timing of capital projects was part of a planned diminution of her role resulting from her disability. From the meeting notes written by Mrs Brake re 11 April 2018 meeting with Dr & Mrs Guy and Mr Brake, projects that were not going to be progressed in 2018 were the "tree houses" and the joint venture New Co. There was also a question on whether Mr Brake would be overseeing the building of a house at Lower Chapel Marsh Farm. 'New Co.' was conceived by Mrs Brake as an investment vehicle for joint investments with Dr and Mrs Guy. It was never incorporated. In the event the focus switched to Looke Farm into which Dr and Mrs Guy were to invest part of their pension. That would have involved a very substantial investment by Dr and Mrs Guy on a scale in relation to which it is absurd to speak of marginalisation.

Seeking to appoint others to take over the claimant's role

Henry Nayler-Ternent & Nadia Hassan

59. At the meeting on 6 February 2018 between Mrs Brake and Dr Guy (no minutes of this meeting remain), he made a suggestion of Henry coming to spend time shadowing Mrs Brake during the summer. Henry worked for Dr

Guy running their ski lodge in Spain. During the summer season Henry worked at festivals. However, Mrs Brake did not agree that his presence would be useful or a support. Her evidence was that she felt Dr Guy was grooming a replacement for her by getting him to learn the ropes of the wedding business. Dr Guy wanted to offer Henry some work over the summer and wrote to him to that effect on 10 February 2018. Henry was a young seasonal employee of whom the Guys were fond. Dr Guy was keen to provide some work experience. This work experience was far short of any apprenticeship that would be required successfully to run the high end wedding and events facility. He was not being prepared to take over Mrs Brake's role.

60. At the meeting on 11 April there was a suggestion that Henry could shadow Gordi the caterer which Mrs Brake agreed to set up and Dr Guy confirmed this to Henry in an email on 27 April 2018.

61. In fact, Mrs Brake hired Nadia, Mrs Dagnoni's daughter in the summer of 2018 as an Event Planner, unbeknown to Dr and Mrs Guy.

Mandy Paynton

62. A friend of Mrs Guy introduced Mandy Paynton to Mrs Brake in January 2018 with a view to her being a housekeeper for Green Cottage. Green Cottage is a house in Sherborne which at one point was being proposed for an addition to the events accommodation portfolio. The claimant viewed this as interference in her running of the wedding business and an attempt to take over another part of her responsibility because they thought she would not be around. In the event, Green Cottage did not become part of the available accommodation, Sherborne being considered to be too far away from Axnoller.

Russell Bowyer

63. It is Mrs Brakes' case that the appointment of a Finance Director with overall responsibility for business development, suppliers and contractors was a diminution of her role because of her disability. On 1 May 2018 Dr Guy appointed an Executive Recruitment Agency to search for a Group Finance Director. The person specification stipulated the background and skill set required for this position:

> We are looking for a high calibre and commercially driven finance professional who possess excellent interpersonal and communication skills and who will quickly forge and maintain a close working relationship with the entrepreneur and his family. First class business acumen and the ability to understand the business, and its people, and how to maximise its potential will be essential.
>
> Candidates will ideally be qualified accountants with a breadth of experience including setting up and running robust financial controls across a group of varied operating businesses. Previous exposure to providing guidance on tax planning, trusts, charitable donations and investments will be of interest as will experience of

> acquisitions and the development of new revenue streams. This experience is likely to have been gained with a privately-owned business, ideally a small group, and preference will be given to candidates who have previously worked for High Net Worth individuals.
>
> The emphasis of the role is hands-on, and it will require someone who can respond quickly and positively to new ideas with concurrent projects to manage. There will be the need to be accurate, diligent, organised and tenacious with excellent IT skills. Confidentiality and discretion are essential.
>
> Above all the incoming Finance Director should embrace the opportunity to work with a highly successful entrepreneur and his family as they focus their energies on developing a modern country estate, located in a beautiful corner of rural Dorset, and providing long term financial security for future generations.

64. Mr Bowyer was appointed in July 2018 and it was Dr Guy's intent that managers of the group companies e.g. Axnoller Events Ltd and Motorcorsa Ltd, would report to the Finance Director and no longer to him. In cross examination Dr Guy accepted that he did not consult the claimant about this change in structure. Dr Guy's rationale for making this appointment was the need to centralise systems and oversight of all business activities as he invested in and expanded the business of Chedington Court group companies of which Axnoller Events Ltd was a small part.

65. It was agreed by Dr Guy that initially Mrs Brake was involved in looking at business development opportunities for Chedington Estate (separate from the proposed Joint Ventures with Dr and Mrs Guy). However, the expansion of the Group's interests exceeded that which was envisaged for Mrs Brake. We are satisfied that the proposed role was on a scale significantly different from the Claimant's role. Dr Guy's experience of working with Mrs Brake was that she should be left free to develop the weddings and events business. She did not have the background in finance and accounting suitable for the role of a Group Financial Director, which would include preparing accounts for tax purposes. Whilst she had a background in the City, she was not a qualified accountant. Her attitude to tax, for example, was not that of a qualified accountant trying their best to comply with tax liabilities. Dr Guy wanted one senior person to oversee his financial interests. That was not a discriminatory position.

66. Mrs Brake's contract indicated that she had responsibility for the running of SPL including the choice of suppliers and hiring/firing. In May 2018, Dr Guy had sent a terse email to Mrs Brake about not wanting her to change longstanding suppliers and tradesmen to Chedington. There is little documentary evidence of this other than Mr Bowyer querying the addition/change of a wine supplier. These are all internal operational matters only, however.

67. In July 2018 following concerns over price setting and invoicing for furniture at Axnoller by Mrs Brake, Dr Guy made clear that he wanted all accounts to be administered by Russell Bowyer with a central purchase order processing. Mrs Brake's note of this seems to summarise what parties

have said in evidence about centralising administration of the Chedington Group:

> You began by explaining that you had employed Russell Bowyer as Group FD so that he could prepare the Group to be in a state that it could receive an investment of £30M to £50M. Part of this means that you will centralise the accountancy and administrative functions within the Group so that you had one set of policies, contracts, insurances etc. Russell would be in a quasi-MD role with you as Chairman. In practical terms as far as I am concerned you said that this would not really affect what I do, except that you may change the insurers, where appropriate centralise ordering but that in terms of the suppliers to the venue like Gordie and employees like Simon and Sherryl etc. that this would still be under our management. I asked you whether Simon's job would change and you said that he would remain as my PA but would perhaps be doing more of that and less of other things that would be centralized. You were concerned that some of the elements of your plan to centralise would not sit well with me in particular. I assured you that as far as I was concerned that as long as the measure of success was fair, that I was happy to work to whatever agenda that you and Kate set. As far as Andy and I are concerned we just need to know what you want from us and what your aims are so that we can help you to realise those objectives.

Visibility of expense allocation

68. Notes written by Mrs Brake following a meeting with Dr and Mrs Guy, Jo Hague and Mr Brake on 4 June 2018 indicate a discussion about accounting matters. Dr Guy advised that the categorisation of expenditure between Axnoller Events, TCCEL and LCMF would be the responsibility of Dr Guy and his accountants Old Mill. This followed on from an email sent by Dr Guy to Mrs Brake on 3 June 2018 stating his intent was to "stop this continued allocation bickering". Mrs Brake expressed concern that this might affect the profitability of the wedding business, on which her performance was judged.

> I propose therefore to keep out of the allocation of expense except in so far as the management accounts are concerned. I will continue to allocate only the expenses that directly relate to the wedding / events business for Jo to record in the management accounts and then Jo can take over from there and decide with you where ultimately to allocate all expenses. You can therefore assume that If anything is wrongly allocated that I have nothing to do with it.

Mrs Brake complains that this marked a departure from her role and rendered it impossible to do her job. She points to her contract:-

> 4.2.3 Responsibility for the day to day running of all of the bank accounts of the events business, all payments and receipts and all functions necessary to facilitate the running of the business.

69. It was explained to us by Dr Guy and Mr Bowyer that there is a difference between management and statutory accounts. Statutory accounts have to reflect a true and fair view of the expense to the business. For example,

given that the First Respondent also owns the land of the Farm, expenses that might otherwise be paid by other members of the Group may nonetheless be more accurately be accounted for by the First Respondent. Mr Brake's earnings being a case in point. He was employed by the Second Respondent holding company but he worked substantially on the land and buildings of West Axnoller Farm, an asset of the First Respondent. This is a non-discriminatory explanation.

Restricting access to the 2nd and 3rd respondent's account system

Xero accounts software

70. It was Mike Butler of Old Mill accountants that first suggested the introduction of Xero to improve the management of accounts at Axnoller in January 2017, prior to the purchase by Dr Guy of SPL. In July 2018 Russell Bowyer started to get Xero up and running across all the business groups in the Second Respondent group with support from Simon Windus (the Claimant's PA) for the data from the First Respondent. Mr Windus was given access to Xero on 14 August 2018. On 31 Oct 2018 Mrs Brake was given access to Xero. The management accounts were not yet completed. On 1 Nov 2018 there was an exchange of emails between Mrs Brake and Russell Bowyer with questions on certain entries - she described the system at first sight as "user friendly and a "good start" but was concerned that she did not have her normal sight of management accounts.

71. That she did not have access to the management accounts for 5 months was largely down to the introduction of Xero. Mr Windus, Mrs Brake's assistant, had access throughout the period to the data. On 2 November 2018 Mrs Brake said it was 'no one's fault' that there had been a delay.

D. The Looke Farm Joint Venture (and implications for the Brakes' employment).

72. During 2018 Mr and Mrs Brake drove around the local area looking at farms that were for sale, described by Mr Brake as "window shopping". They wanted to move to their own estate. They had first seen Looke Farm on one such drive past but the price of £5.45m put it outside their personal resources. They had, of course, been 'given' £2.5M on the acquisition by the Second Respondent of SPL.

73. In early August 2018, Mrs Brake discussed Looke Farm with Dr and Mrs Guy with a view to a purchase of the whole farm as a joint venture. On 8 August 2018, Mrs Brake confirmed to the agents that they wished to view the property on 14 August.

74. On or around this time Dr Guy had authorised the placement of an order from Monarch for new stabling at Axnoller Farm. This was part of the

upgrade that he had been discussing for some months with Mr and Mrs Brake.

75. At this same time in early August plans were underway for the development of the equestrian centre at Lower Chapel Marsh Farm (LCMF). The delay in planning permission gave rise to Dr Guy requesting the speedy removal of Mr Brake's horses from Axnoller stabling to allow Chris Burton to temporarily house his horses there before a move to LCMF. On 10 August 2018 Mrs Brake suggested upgrading the stables in two stages to avoid having to move the horses immediately but Dr Guy advised that he wanted Monarch to install all the stabling in one go. Mrs Brake explained that they would not have their horses looked after by anyone else and Dr Guy put forward a number of suggestions to accommodate this. This was followed by a further email from Dr Guy suggesting Wellwood or temporary stables as a workable alternative.

> Not wishing to have anyone else look after your horses does therefore increase your urgency to find suitable accommodation for horses and yourselves. What about erecting temporary stables? The ones used at competitions throughout the season may come at a very reasonable price over winter.
> Another option would be to take a complete block of stables in a nearby yard and put your groom into look after the horses. Does the yard where we sent Baillie have space?
> Martin Clunes has some lovely stables across the road. Let's see if we can find a sensible solution.

76. On 11 August 2018 Mrs Brake advised Dr Guy, that having not been able to find a farm close to Axnoller for them to live, stable their horses and continue their commitment to work at Axnoller, they had widened the search area and this brought Looke Farm into consideration. On 14 August Mr and Mrs Brake took Dr and Mrs Guy to view Looke Farm and drove around the acreage property in a Land Rover.

77. Following a discussion with Dr and Mrs Guy on 16 August 2018, Mrs Brake confirmed to the agent an offer of £5.45m for the whole of Looke Farm as cash buyers. (P1037) The plan was for Dr and Mrs Guy to buy 370 acres of the land through their pension fund with Mr and Mrs Brake using the money gifted to them by Mrs Foster from the sale of SPL to buy the remaining 50 acres and farm buildings. Dr and Mrs Guy were using their pension fund for this purchase. In cross examination Dr Guy referred to this arrangement as entering into an arm's length partnership with Mr and Mrs Brake to purchase Looke Farm.

78. On 24 August 2018 Mrs Brake confirmed by email to Dr and Mrs Guy how she envisaged the transition to Looke Farm and her firm intention that neither she nor Mr Brake would be leaving their jobs:

> We are committed to living at Axnoller for as long as it needs us. As far as continuing to do our jobs, we can do that in the usual way that most people do even when we move to

> Looke Farm and have no intention of leaving our jobs. There may be a rejig or Andy in particular in terms of his primary responsibilities, but we can talk about that on Tuesday. The cottage is there until you decide you have another more urgent need for it, and we can always stay over when needed at any time. Clearly, it will take some time to make Looke Farm habitable enough for us, but we would look to start straight away to convert buildings for the horses. I would envisage that if we could exchange within 4 weeks of receiving the contract from them, we would look at negotiate early access to convert the grain building into stables and the large building where the straw was into an indoor.

79. On 10 September 2018 Dr Guy set out in detail to Mrs and Mr Brake how he wished their working arrangements to change following the Looke Farm purchase.

> We are prepared (through our pension) to purchase about 370 acres with its own curtilage and title and hold it long enough to give you the time and opportunity to play out a range of options. This should allow you two to optimise your returns in your investment. I think we should limit our holding period to five years though.
>
> As it will be the Pension that makes the purchase our advisors will need a clear understanding of the purchase with appropriately amended curtilage and title, the income on the investment and any arrangement with you for exit in whole or part. As we are connected parties this will be much scrutinised and may cause issues for the Pensions practitioner.
>
> …
>
> Maintaining the wedding campus and continued involvement on the cross country should strike a reasonable balance for you to spend appropriate time on the Looke project. Again with this in mind I will want to agree a new contract with you to ensure we have captured correctly these eventualities.
>
> The two new contracts will also help settle the "connected parties" issues that I wish to address. I really do not want to be entering into a multi-million pound venture with "employees", it would be far better all round to establish a working collaboration with business "partners". As you begin to ramp up your commitment in time and focus on the Looke project, I am comfortable to have Russell and my TCCEL team to manage more day to day operational activities and ensure a smooth transition to our new working arrangements. Having this planned out and agreed in advance will allow you the freedom to commit as much time and resource as you need for the project and us to be able to plan well ahead the resources we should redeploy, engage and allocate.

80. This concerned Mrs Brake and she voiced this to Russell Bowyer who alerted Dr Guy via email on that same day. Dr Guy responded to Russell Bowyer reconfirming his concerns about doing such a deal with employees.

> Exactly the reason I sent it just to her and Andy. She is hoping that she and Andy can stay on full salary whilst developing their new business. I have pointed out that they are connected parties if employees and this does not sit well with name (sic) to enter into a multimillion-pound venture with “employees”. Also the pension administrators will want to see a fully arm’s length arrangement of it is to buy the land. Leave this one with me for a round or two.

81. Mrs Brake responded to the issue of changing their contractual terms of employment on 30 September, sending Dr Guy copies of their unsigned contracts of 2017 and putting forward a suggestion on what could be written into the Looke Farm purchase agreement to alleviate concerns.

> As part of the land agreement, we could agree that we will then renegotiate the terms of our relationship once and if planning permission is granted. At least then we would have a good idea of how things will pan out. We understand that there could be a perceived tension in making an investment which in some way involves employees, however in reality because of the way this is being structured, your pension fund would be investing in a distinct piece of land on a separate title to our holding with a guaranteed upside and protected downside. It is not that we would be going into a business as Partners as such at this stage.

82. Dr Guy responded on that same day advising that he did not wish to mark time for 18 months whilst planning permission was being sought and wanted finality on changes to Mr and Mrs Brakes employment contracts from the outset of the purchase deal.

> Your e-mail seems to suggest that you and Andy wish to continue to work under the current terms on my payroll which could then be modified sometime in about 18 months when your project becomes more consuming. Whilst I can see that this would suit you both it will not suit me to mark time waiting for such plans to evolve.
> Kate and I are very happy to help you and Andy build on the value you have achieved from our purchase of Sarafina even though this ties up considerable funds for modest potential gain for us. During the transition to your new project we will continue to provide you both with income and accommodation so as to minimize financial worries for you as far as is reasonable. You have your plans and dreams but so have I and for this reason will need to have agreement on all these matters from the outset.

83. On 9 October 2018 Mr and Mrs Brake attended a meeting with Dr and Mrs Guy to discuss a number of issues including the purchase of Looke Farm and particularly the concern Mrs Brake had regarding the change in employment status. Her notes of the meeting summarise her concerns:

> We pointed out that we had found a contract farmer for Looke and that whether Andy was managing on your land as your agent at Looke or at Axnoller he would still be working for you. You acknowledged that my job was really not going to change very much. We are therefore still unclear how our contracts should change and as it is you who would like to make a change, please would you be kind enough to let us know how and what you would like to change? I can see that there are some terms in our contracts (those giving us control over the building work etc) which you may well want to vary or removed? Also, you mentioned that you may want us to be self-employed? The initial advice I have received is that we could not do that until the time when we were indeed devoting a significant of our working time to the Looke project or working for other people.
> Something that is really keeping me awake at night is my health insurance for example. What would happen to that?

84. The first draft of a proposed sale agreement for Looke Farm was put together by Mrs Brake and sent to Mr and Mrs Guy on 23 September 2018. There were a number of iterations of this draft agreement with questions

and comments raised by both Mrs Brake and Dr Guy. Mr and Mrs Brake wanted covenants on the land to be purchased by Dr and Mrs Guy that prevented any future purchaser from using the land other than for arable agriculture or grazing; that restricted the erection of buildings on the land; that prevented shooting or gaming without the express permission of the Brakes.

85. On 14 October Dr Guy sent back a marked-up version of the agreement raising a number of issues including the covenants being too restrictive, how the deal would be executed and the change to their employment status. A final version of the draft agreement was sent by Mrs Brake to Dr Guy on 15 October 2018. As Dr Guy did not immediately respond this was sent again to him by Mrs Brake on 16 October indicating that they were under pressure to exchange contracts before 22 October 2018.

86. Dr Guy replied to Mrs Brake on 16 October indicating that the draft agreement looked fine in principle, and he would send it to his lawyer, John Hatchard and to his Pensions practitioner. That same day Mrs Brake had met with her solicitors to progress the deal with local searches and details of the shooting licences at Looke Farm. The advisors to both Mr & Mrs Brake and Dr and Mrs Guy continued to work on the deal and its structure during the latter half of October.

87. On 19 October 2018, Dr Guy met with Mr Brake at Looke Farm to walk the boundaries of the land he would be purchasing. As a result of this visit on 22 October Dr Guy requested that Mr Brake look into three specific issues

> A) Site of potential yard for the 370 acres
> B) Tighter boundary for the restrictive covenants,
> C) check in Land used for shooting and restrict shooting to say 20 days per year.

Mr Brake described Dr Guy as being on ‘very poor form’ during the site visit.

88. Mrs Brake responded to this on the same day indicating that A) and B) should be considered resolved by amendments she made to the agreement. Her proposal to resolve the shooting rights was to redraw the boundary of their proposed land parcel to include all of the woodland area. This area of woodland contained the pheasant pens and the land either side of it would be used to drive the pheasants towards the shooting parties.

> I think we have dealt with A) the site of a potential yard. It is a very good flat spot with a large hedge grown already, so it would shield from view a potential yard.
>
> As far as B) is concerned this should really be covered by A). The restrictive covenants currently only state that there should be no building in plain sight of the farm, the site for the potential yard is not in plain sight and there should be no need

> for any other buildings for that sort of acreage. I have amended the clause to reflect this.
>
> In terms of C) We have no intention of falling out with our neighbours and it would be our intention to allow Jim [Wild] to continue in some form and work with him should he need to relocate partially to another part of his 3000 acre holding. However, we can see that it could potentially lead into an awkward situation for you. We will redraw the boundary of what we are prepared to buy to avoid that eventuality. This will include the lower value woodland, leaving you with better land. I am sure you understand that we must have control of the shooting rights over the land as it is us and our horses who will live there and will have to manage matters on the ground should they get out of hand.

89. On 25 October Dr Guy was still looking for a detailed plan of the boundary changes to address the shooting rights issue and made clear that he would not pay more than the average price of £10,000 per acre in answer to Mrs Brake's suggestion to increase the price per acre of his portion if they paid less for the woodland.

90. During the latter half of October there was significant activity to try and get the furniture at the Axnoller properties onto the main asset register of the Chedington Estate. This resulted in Mrs Brake suggesting that Dr and Mrs Guy do not buy furniture from her going forward. On 1 November 2018 Dr Guy responded to this indicating his thoughts on the impact of her stance on furniture on the Looke Farm purchase. Dr Guy wrote -

> So as to avoid any further upset it may, as you say, be better to restart the furnishing from scratch. Judging by the tone of your subsequent e-mail I suspect the quicker we get on with agreeing the final details of your move to Looke the better all round. With that in mind I cannot brief the Pension practitioner until I have a plan of the proposed land to be purchased. You need to provide the definitive plan. We then need to agree the steps you laid out in your e-mail last week regarding the step wise process of your move and your service contracts to provide you with income and accommodation over the next 12 months.

91. On 26 October there were email exchanges between Dr Guy, John Hatchard and Mrs Brake regarding Dr Guy's concern over the shooting rights. Dr Guy wrote -

> You and we are buying Looke Farm. You and we are splitting it up and you will be altering arrangements with the Wilds. This does affect us as the Wilds are friends and thus I do need to know exactly what is planned and what the impact will be on the Wilds. At present though I am blind on the way you now wish to partition the land. This is probably the most urgent issue at present as I am unable to advise the Pension administrator as to exactly what it is buying.

In response Mrs Brake explained that they needed self-determination on this issue and to have control of the shooting rights.

> Our intentions are not to stop Jim shooting and we will draw up a license with him for a period of time to see how it goes. It may be absolutely fine; but we don't know. We do not want to alienate him, and we would work with him but with respect we cannot

> have that aspect of control taken out of our hands. I am sure you understand that. You are unaffected by the shooting in any way as you will not be living there.
> I will send you the new map in a moment, but you need to trust us here and allow us to have self-determination. This is why we are doing this after all. I will let you have a copy of the shooting licence once drafted but it is likely to be very similar to the one he has at the moment with the Pikes. The reason we are prepared to buy more land (although it will stretch us) is to have the control of the shooting rights. We cannot buy the additional land and then not have control anyway.
> I do hope this explains.

92. Also on 26 October 2018, Dr Guy sent an email envisaging fixed term employment for the Brakes only. That would also preserve Mrs Brake's health insurance.

93. On 1 November 2018 Dr Guy attended a Board of Governors meeting at Leweston School where both he and Mrs Wild were governors. In a letter written on 8 November 2018 at the request of Dr Guy, Mrs Wild confirmed that she had initiated a conversation with Dr Guy about the land sale of Looke Farm. This is important in relation to the proposed covenants.

> Since it had become common local knowledge that you were acquiring Looke Farm, I asked if I could briefly discuss our long-term interest in purchasing some or all of the land after the Leweston meeting.
>
> Given our historic land purchasing problems, I commented that we would not buy land with attached covenants. I gave you a copy of the map that we had submitted along with one our failed bids for a portion of the woods and land during the summer. Your only comment was that if it were possible in the future to sell us some land, you would do so at cost. I commented 'That would be wonderful". We then turned to the state of the biotechnology industry, in which we both have a strong interest.
>
> I would like to reiterate that we had never discussed Looke Farm prior to our meeting on November 1st.

In cross examination Dr Guy stated that Mrs Wild's comment that they would not buy land with covenants impacted on his decision to require that there be no covenants in the purchase agreement for Looke Farm. He viewed the Wilds as the most likely future purchaser of some/all of the 370 acres he was buying.

94. On 2 November 2018 Mrs Brake sent Dr Guy a new map redrawing the boundary between their land and the acreage to be purchased by Dr and Mrs Guy. This showed the inclusion of the additional woodland that Mr and Mrs Brake would purchase. Mrs Brake continued to negotiate on the price of the woodland acreage.

> As you will have seen I have sent a map outlining the new area that we would like to purchase as well as that we had already outlined. The woodland is really not worth more than £5000 per acre and as a percentage of the whole it makes our bit quite a lot more expensive. You have almost all of the best of the arable land which would trade at well above the £10,000 per acre. The average was meant to be £10,000 which included areas like the woodland and the water meadows. We will have to buy

> the land back from you at a profit in accordance with the formula anyway. Can we therefore agree that we will pay £7500 per acre for the woodland which is still above market?

95. On 3 November Dr Guy responded to Mrs Brake indicating his preparedness to purchase the land at Looke Farm but not with the proposed covenants and not with the redrawn boundary allowing Mr and Mrs Brake to purchase the additional woodland. He invited Mr and Mrs Brake to Chedington on 6 November 2018 to discuss his offer on the land deal, the changes to their employment status, the horses and Axnoller House.

> Further to walking the land with Andy and being able to make an informed view of the proposed land purchase I have now had an opportunity to review your revised boundary plan and valuation proposals.
>
> Our position is that we prefer the initial plan and to keep the woodland in our allocated portion. Although you will no doubt occupy part of your property as a principal private residence this is a business venture and cannot be viewed in any other way than that.
>
> We are prepared to purchase this land to enable you to complete the purchase of the farm buildings and approximately 50 acres for development. We are not, however, prepared to grant you covenants nor any element of control over the land we purchase. The disposition of our purchased land will be decided solely and entirely by Kate and I. We will of course be mindful of your stated aims and objectives and will be as helpful as possible to assist you in achieving them.
>
> Please consider this offer carefully as I am not prepared to modify it. Please come to Chedington at 1pm on Tuesday to discuss this, your ongoing service agreements, Axnoller House and your horses.

96. Mrs Brake expressed her sadness and concerns at this response from Dr Guy, articulating in her email that she felt that he did not want them anymore. She was still looking to sort this out and do a deal that would enable everyone to move forward. She requested the presence of John Hatchard, the Guys' solicitor, at the meeting as someone with knowledge of the deal for Looke Farm.

> We are so so sad about how things seem to be spiralling into what could be a very negative situation for us all.
>
> We don't want that In preparation for the meeting on Tuesday, it is worth recording that it is you who has decided that you don't want us anymore.
>
> I feel that since I told you about the kidney thing, that we have been increasingly marginalised and excluded. Recognising that it is pointless to try to make someone like you or want you, we have reacted to the sudden pressure put on us to move our horses so you could move your new project on. Previously you had told Andy there was no rush and it was only when the planning was delayed that you suddenly decided the horses had to go, so that you had a backstop position for Chris and Bek. To enable you to do that we went for Looke Farm on the premise that you had agreed to a deal that gave us control over the land. You sent the agreed contract to

> John, we got surveys done etc etc. You then decided to use our desire to do that deal to renegotiate our employment contracts. Although I have told you that nothing about Looke will change our ability to perform our contractual arrangements with you. The truth is it no longer suits you to have us here. We are, in your opinion of little further value. We have done nothing wrong, Geoffrey. Nevertheless and so that this doesn't become stupid, we are prepared to do a deal with you so that we can all move forward positively. That deal cannot however involve us having no control over the land that surrounds us. We won't agree to that. I hope and don't think it is what you meant? I wonder whether your new interest in the woodland is because you think you can sell it on for more leaving us with no control at all if our lives are made hell by the shooting?
> We would like John to be at the meeting on Tuesday or at least on the phone. He is your lawyer but we feel he would be good person to have there as he has knowledge of the original deal and the land deal for Looke and we like him very much. We have always believed that you are a gentleman and that Kate is a kind person who recognises right from wrong. I hope we can sort this out.

Dr Guy's evidence under cross-examination concerning this period in the chronology.

97. Dr Guy was concerned by the reference to 'the kidney thing' in Mrs Brake's email of 3 November 2018. There had been no reference to the kidney disease since May 2018 when there had been discussion of reasonable adjustments with Mrs Brake's conclusion that none were necessary. He was surprised, therefore, that the matter had been alluded to the. We see his response in his email of 5 November 2018 set out below in which he expressed surprise at Mrs Brake's position and reminded them they had the right to raise a grievance, which if raised would be investigated fully. He did see Mrs Brake's email as a threat that 'things were getting difficult for us'. He said later in evidence that because of Mrs Brake's email, he was concerned Mrs Brake was 'starting a course of action that would be difficult'.

D. The Meeting of 6 November 2018

98. There are various accounts of the meeting. We reproduce them so as to provide an overall picture of what is likely to have happened. It is common ground that this was a difficult meeting. As we know, Mr Hatchard was there at the suggestion of Mrs Brake even though he is the Guys solicitor. He took notes during the meeting and then wrote accounts up later that day. One in relation to Mrs Brake, another in respect of Mr Brake:

> **Re: Alo Brake**
>
> Present: Dr GW Guy, Mrs K M Guy, Mrs A Brake (Alo), Mr A Brake Esq (Andy) J R Hatchard
>
> Note from J R Hatchard (JRH)
>
> 1. JRH attended the meeting at Chedington Court, on the invitation of Alo Brake, to discuss the possible investment in and

purchase of land at Looke Farm by Dr G W Guy and Mrs K M Guy as the trustees of their pension fund.

2. Dr Guy made clear that for good reason the pension fund trustees could not invest in and buy land at Looke Farm. Alo said that Dr Guy and Mrs Guy had gone back on their word.

3. Following a discussion regarding the past discussions in respect of Looke Farm, both Alo Brake and Andy Brake became very angry.

4. Alo had repeatedly stated her position, based on the previous discussions, that she had to have control, referring to control on several occasions of the land for the proposed development of Looke Farm. Dr Guy explained that the original discussions regarding the investment in Looke Farm occurred before he had walked the land. Once he had walked the land with Andy Brake, it became clear that the control covenants requested by the Brakes were unreasonable and he had informed the Brakes of his position. Alo spoke about their wish to terminate the shooting over the land and was plainly insistent upon the requirement for control covenants.

5. JRH stated his view that the Pension would not be able to sanction a deal with the covenants and restrictions requested by the Brakes. Dr Guy reiterated this. Alo became agitated and angry when Dr Guy made clear that his position had not changed, namely that there would be no investment in and purchase of land at Looke Farm. Alo said Dr Guy and Mrs Guy had gone back on their word and could not be trusted.

6. Andy Brake had stood up and shouted aggressively at Dr Guy. Despite Alo's request that he sit down, Andy had declined to do so. Alo then stood up and was patently very angry and upset.

7. Dr Guy expressed his concern and worry in respect of an email from Alo to him and Mrs Guy over the weekend and invited Alo to consider whether she did wish to lodge a grievance with Dr Guy, as her employer, and to think carefully about this and to respond by next Tuesday, 13 November 2018. Alo replied that, in her view, there had been a change of mind set on the part of Dr Guy and Mrs Guy, despite the success of the Axnoller wedding business. Alo asked how she could raise a grievance when there was no grievance procedure for the Axnoller wedding business. Dr Guy recalled that Alo had dealt with such grievances from staff and there must be a grievance procedure and JRH reiterated this. Alo said that the grievance procedure was for the staff and not for her, as the manager, and there was in effect no grievance procedure for a grievance to be made to Dr Guy, as her employer. JRH asked Alo to calmly and gently reflect and decide.

8. Dr Guy made his way to the door to escort Andy and Alo out. Alo lingered in the study and, as JRH was moving towards the entrance hall, JRH overheard Alo accusing both Dr Guy and Mrs Guy of being bullies. Alo made clear that she would take advice and take matters further and that both Dr Guy and Mrs Guy should be very concerned about this.

Re: Andy Brake

Present: Dr G W Guy, Mrs K M Guy, Mrs A Brake (Alo), A Brake Esq (Andy) J R Hatchard

Note from J R Hatchard (JRH)

1. JRH attended the meeting at Chedington Court, on the

invitation of Alo Brake, to discuss the possible investment in and purchase of land at Looke Farm by Dr G W Guy and Mrs K M Guy as the trustees of their pension fund.

2. Following a discussion regarding the past discussions in respect of Looke Farm, both Alo Brake and Andy Brake became very angry.

3. JRH stated his view that the Pension would not be able to sanction a deal with the covenants and restrictions requested by the Brakes. Dr Guy reiterated this. Alo became agitated and angry when Dr Guy made clear that his position had not changed, namely that there would be no investment in and purchase of land at Looke Farm. Alo said Dr Guy and Mrs Guy had gone back on their word and could not be trusted.

4. Andy Brake shouted at Dr Guy "you are not a man of your word and a man who does not stick to his word is not worth speaking to, Mr. Come on we are off'. Andy Brake had stood up and shouted at Dr Guy in a very aggressive and threatening manner.

5. JRH stood up too. JRH was very concerned that Andy might become physically aggressive, as Andy's fists were clenched and the tension in the room was tangible.

6. Alo invited Andy to sit down, which he declined to do. There followed a discussion regarding an email from Alo Brake to Dr Guy during the weekend and Alo's right to bring a grievance. At the end of the discussion, Dr Guy and then Andy left the study. JRH followed Andy out of the study and into the hall. JRH stood with Andy to ensure that he did not approach Dr Guy, in case he became more aggressive and he might become violent.

99. Mrs Guy wrote an account shortly afterwards. Mrs Brake has suggested this was more accurate than the others albeit not accepting in its entirety:

Kate Guy's notes of meeting at Chedington Court Tuesday 6th November.

Alo and Andy arrived just after Ipm. I opened the front door to them - Andy carried in a large bag of cushions, refusing help from me and dispensing with his usual greeting - a social kiss - indeed he did not even make eye contact. Alo also dispensed with usual pleasantries, though was more courteous- The bag of cushions is for Green Cottage (a property we own in Sherborne which Alo had furnished for the company) and I asked if she still had a key *for GC* which she confirmed she did, so I said we had better have it back at some point. They went info Geoffrey's office - appeared pleased to see John whose presence at the meeting Alo had requested, and greeted Geoffrey.

I asked about refreshments - both asked for coffee, though Andy was not pleasant even about that - 'coffee' - (no please!). After a bit of chat with John about rugby, the meeting got going about 1.15pm.

Geoffrey explained that having walked the land at Looke Farm he had explained to Andy at the time that their proposed covenants would not be reasonable as they would inhibit the shooting by the neighbours. Alo started to get very agitated and said we had gone back on our word. She said the shooting happened 'every single day' with beaters and guns swarming all over the land - she had heard this from Steve, whom I believe is the vendor from Looke.. She questioned why Geoffrey was not willing to let her and Andy buy the woodland - 'what difference does it make to you Geoffrey? Why do you support your friend Jim Wild over us?' Alo spoke about the need to have 'control' many times. When John Hatchard and then Geoffrey said the pension would not be able to buy the land, Alo said I have an email from you saying you would buy it. Alo said we were not sticking to our word and we could not be trusted. Andy shouted (still sitting down) 'Right I've heard enough, you are not a man of your word -come on we are off. Andy then stood up. Alo was very obviously angry. Andy stood then started in a very aggressive and threatening manner to shout 'a man who does not stick

to his word is not worth speaking to - Mister, come on we are leaving' (to Alo). Alo said 'sit down - we have lo get this sorted'. His behaviour made me feel very anxious.

Geoffrey said 'there is another matter we need to discuss - your email over the weekend that gives us some concern'. Alo said 'if ought to'. Geoffrey started to explain about the grievance procedure that Alo said would not apply to her as she was the Manager.
I stood up lo let Andy pass - the men followed, John saying to Alo please think carefully and consider your health.
Once the men had gone into the hall, Alo started saying to me 'you are bullies, though in disguise - if you don't get your way you bully people. Nerys told me things'. Nerys was our previous housekeeper who was a neighbour of Sherryl, the Axnoller housekeeper. She had little direct contact with Alo. I said I didn't know what she was talking about.
I stayed in the room while they left. It was 1.35.

These are the facts as I remember them.

100. Dr Guy wrote:

Alo and Andy Broke arrived at Chedington Court at about 1pm on 6th November and were met at the front door by Kate and lead into my study where I and John Hatchard were waiting.

Alo seemed nervous but extended a courteous greeting. Andy avoided eye contact appeared very stern and needed to be encouraged to shake hands.

We all sat and exchanged pleasantries with the discussion mostly between Alo and John about rugby.

Kate provided refreshments and as is usual when Alo comes a plate of fresh soft fruit and dates had been prepared for her. The meeting got underway in earnest after about ten minutes.

Alo launched immediately into criticism of Kate and I for having gone back on our word relating to our e-mail of 3rd November where we had offered to purchase the 370 acres at Looke Farm but without covenants nor controls in favour of the Brakes.

Alo went into a long explanation as to why the project required them to have "total control" over the all the land we were to purchase and that we had agreed to all of this. She waved a print out of an e-mail from me.

In a rather demeaning way she said that we preferred to side with "your friend Jim Wild" instead of them. I explained that the initial discussions about an agreement occurred prior to walking the land, I further stressed that once I had visited the land with Andy, I had told him in no uncertain terms that there were a number of features of the agreement that were unnecessary or unreasonable. The discussion then focused mainly on their intended ban on shooting on the land and why we would not agree for the land involved to be purchased by them. Alo made claims that there was shooting "every single day" and that the shooting parties and the trailer in which they are conveyed were "all over the land". (I considered at that time that Alo was reiterating the view she had shared in an e-mail on 3rd Nov in which she said "our lives are made hell by shooting"). At some point, Alo declared she was going to do a deal with Jim Wild.

Alo declared crossly that there was no deal to be done.

During this part of the discussion John Hatchard also pointed out that he felt that the Pension would not be able to sanction a deal with these covenants and restrictions, which I reiterated.

Alo again spoke about us not sticking to our word and that we could not be trusted.

> At this point having remained silent throughout the preceding discussion Andy said in a very cross and angry manner. "I've heard enough. You're not a man of your word who cannot be trusted. That's if we're off. [he rose from his seat] "come on we're off'.
>
> He then got up and squared up to me pointing his finger directly at me and in angry and very raised voice said "A man that does not slick to his word is not worth talking to, Mister." and made for the door.
>
> Andy brushed past Kate and Alo said words to the effect of "Andy that's not helping sit down we need to gel this sorted"
>
> I was fearful that an altercation may occur. John Hatchard had risen from his chair as well and looked very concerned and made a calming comment.

101. And then relating to mention of 'the kidney thing':

> I then said to Alo that before they left there was an important matter we wanted to raise. Alo had stood up, but then sat back down. Andy remained standing. I said that over the weekend she had sent an e-mail which gave us cause for concern. She retorted very rudely in a threatening way "it ought to"
>
> I then told Alo that that if she had a grievance related to her e-mail then she should follow the Axnoller Grievance Procedure and inform us by mid-day next Tuesday (13th Nov) I said that I assumed that Axnoller Events Ltd had a grievance procedure because Alo had told us fast year that she had used it with a member of staff. Alo in a very angry and agitated way, in a raised voice, declared that procedure "was for staff not for me I am the manager" I reminded her that that as an employee at Axnoller she was subject to the same procedures. I added that if the procedure was not in place, then we would use a generic recommended procedure and we will send it to her.
>
> The meeting broke up in an exceedingly charged atmosphere. I went out to the entrance lobby to escort Alo and Andy out through the front door. There was a delay and I could hear that John and Kale were still talking with Alo and / or Andy. I didn't hear what was said between them as they were still in the study or inner lobby.
>
> They stormed out and I closed the door. There was no opportunity to discuss the other issues I had wanted to discuss with Alo and Andy, namely their horses and their stay at Axnoller House.

102. Mrs Brake sent an email in these terms at 19.47 on 6 November 2018 with the Brakes' version of the meeting:

> Geoffrey began by saying that he no longer wanted to buy the land attaching any restrictive covenants to it or with any right for Andy or I to determine anything in relation to the shooting rights or its sale etc. He said that he did not want to be responsible for "closing down" Jim Wild's shoot as to do so would be socially embarrassing. He also said he would not allow us to purchase the woodland to mitigate our position. This despite the fact that we had already agreed that we could buy what we wanted in the first place.
>
> I reminded Geoffrey that we had met at Looke Farm and agreed the deal in

> principle on the 14th of August and made our needs clear; that it was he who had suggested a ratchet on the buy-back option to us. On the back of that agreement we had made an offer to the vendors on the 24th of August. I had shortly thereafter drawn up a contract which had gone back and forth to Geoffrey and had finally been agreed and sent to John Hatchard on the 16th of October and that on the 23rd of October John Hatchard had written to our solicitors to confirm the terms of agreement and to forward the contract as agreed. We had spent considerable sums on surveyors, lawyers and planning advisors etc. as a direct reliance on that agreement and to our detriment. I asked Geoffrey if he wanted to take the deal for himself. He said that he did not.
>
> I said that we could not agree to the deal on the basis of having zero control over the land or the shooting or being able to buy what we wanted to buy in the first place as it was that control that we went into the deal for with him for in the first instance. I said I would find other ways of funding the land and therefore doing the deal. I said that we should leave as there was nothing more to discuss with him.
>
> Andy became quite upset at Geoffrey going back on his word and told Geoffrey so. He said we should leave.
>
> As we were about to leave Geoffrey brought up the fact that I had complained at the way we have been excluded, marginalized and our contracts ignored since I had told Geoffrey about the prognosis of my illness. Geoffrey said that I had to come back to him with a formal grievance if I wanted to by the 13th of November. He has emailed since.
>
> Alo and Andy Brake

103. We find, on the balance of probability, that Mrs Brake said to the Guys that they were not sticking to their word and could not be trusted. She said they were bullies. She said that they should be concerned about her grievance. Mr Brake said that Dr Guy was not a man of his word. He then stood up and shouted angrily at Dr Guy, pointing his finger, that a man who does not stick to his word is not worth speaking to. Mr Hatchard and Dr Guy feared that a physical altercation might happen. It did not.

104. Earlier that evening Mrs Brake had responded to the offer of a grievance that had been made at the meeting on 6 November by Dr Guy:

> Dear Geoffrey
>
> I am in the process of writing up a summary of our meeting today.
>
> Principally, we came to discuss a personal matter that had nothing to do with work with you today. Looke Farm. However, at the end of the meeting you decided to bring up the matter that I had complained about in respect of our feelings regarding the way we feel that we have been treated since I told you about the prognosis for my illness. The ACAS code of practice which you have just sent says that if it is not possible to resolve a grievance informally
>
> then a formal complaint should be made to your manager (if it is not that manager who is the subject of complaint) (section 32). Given that I do not have a manager other than you, it seems that I cannot make my complaint to you by the 13 th of November but we will seek advice and come back to you.

105. Dr Guy had repeated the offer in an earlier email:

> Dear Alo and Andy,
>
> I am writing to confirm our discussions today regarding your right to raise a grievance.
>
> If you do wish to raise a grievance, I ask that you send your grievance to me by 12pm on 13th November. The grievance should be in writing and give full details of your concerns. If you raise a grievance, we will follow the ACAS Code of Practice, which is attached to this email. Normally, myself as your manager would hear the grievance. If your grievance relates to any treatment you believe you have received from myself or Kate, the grievance will be heard by an external consultant.
>
> I look forward to hearing from you.

That, of course, is textbook in terms of employment relations practice.

106. Also on 6 November, at 20.25, Mrs Brake emailed Dr Guy to confirm what he said in the meeting, namely that he had no intention of trying to take over the Looke Farm deal for himself.

107. On 7 November 2018 at 19.30 Mrs Brake emailed Dr Guy suggesting he had negotiated a side deal with the Wilds in respect of acquiring Looke Farm. Dr Guy stated in answer in an email on 7 November at 21.17 that in fact had the meeting on 6 November continued, they would have discussed the possibility that the Wilds were willing to take the Guys place in the proposed venture. Dr Guy goes on to say:

> 'We have no intention of pursuing any of the land nor property at Looke Farm whatsoever.'

108. Mrs Brake further objected on 8 November at 8.25 that it seemed that the Guys were discussing the proposed venture with the Wilds when the dealings were confidential between the Brakes and the Guys. On 8 November 2018, at Dr Guy's invitation, Sarah Wild wrote purporting to confirm that on 1 November 2018 she and Dr Guy had discussed the possibility that in time Dr Guy sell to the Wilds his interest in the land at Looke Farm. Dr Guy had said this would be done at cost, should it be possible to sell. Mrs Wild made it clear that she would not buy the land with the covenants proposed by Mr and Mrs Brake. The Wilds were the owners of the land neighbouring Looke Farm. They facilitated a pheasant shoot on their neighbouring land.

109. It seems to the Tribunal that if Dr Guy was willing to proceed with the Looke Farm project on 6 November 2018 at all, it was on the basis that the covenants were not included. However, that was unlikely to be acceptable to the Brakes. It is possible that he had given up on the idea by then, anyway. Statements made by him at the meeting on 6 November that there would be no investment are consistent with that. Whatever the position, it was down neither to Mrs Brake's disability nor her 3 November

email. It was down to covenants which were perceived to be too restrictive for the saleability of the land. Dr Guy's intention had always been to sell the land after a 5 year investment. It was of course the Brakes' hope to be in position to buy the Guys' interest within that time. Dr Guy, however, had consulted/been consulted by the Wilds also.

Trawling for Evidence

110. On 4 November 2018 Dr Guy asked Colin Maddock for file notes of run-ins with Mrs Brake. Dr Guy said he had a 'crunch meeting' with Mrs Brake on the 6th: 'a short account of the encounters would be helpful'. Dr Guy also asked for details of a run-in with Andy at Lower Chapel Marsh Farm and copies of recent rude email exchanges with Andy and/or Alo. Mr Maddock is the Estate Manager of the Second Respondent, described by Dr Guy as his 'righthand man'.

111. Colin Maddock emailed Dr Guy on 9.27am on 6 November describing how Andy Brake had behaved with a contractor looking at the water supply in Lower Chapel Marsh Farm. The contractor had walked away, apparently, because he found Mr Brake's behaviour insulting and offensive.

112. On Tuesday 6 November 2018 at 9.44am Dr Guy followed this up requesting Mr Maddock to relay to Dr Guy details of an encounter with Mrs Brake when she was particularly abusive, asking him to report the exact language used.

113. Mr Maddock responded at 10.03 with details of the 'toilet tank incident' involving Mrs Brake:

> An angry Alo phoned asking me if I had instructed the groom to empty the toilet tank and put the Lorry on charge, I tried to explain as to what had happened, but she was not going to let me speak and started to rant at me, saying that I had no right to ask their member of staff to help as he worked for them. She followed this up by saying she and Andy were fucking fed up with me, always saying that I was carrying out what Geoffrey and Kate had asked me to do, and running to you both telling tells, she suggested that I should fucking grow some balls and be a bloody man?! That nobody bloody liked me at Axnoller, because I was rude, arrogant, and I fucking drove around as though I owned the place. She carried on with her rant by saying that I am not committed because I am don't working long hours like Andy does, on challenging her to as to what hours I worked, she replied with a barrage of expletives and saying that she knew what time I left work each day?

114. On the afternoon of 6 November 2018, Dr Guy reported on the meeting to Mr Bowyer. He wrote:

> Dear Russell
>
> Lasted 25 mins. Sort of says it all!
>
> It was awful. Andy lost it completely. Alo threatened us with breach of agreement re

> Looke and "we should be concerned" about the "pushing them out because of her illness claim"
>
> Managed to advise her that if she wishes to follow a grievance procedure then she must do so by mid day next Tuesday. Mentioned that she should follow the Axnoller Events grievance procedure. She declared it was for staff not her as the manager!
>
> Andy's outburst meant we didn't get into horses and Axnoller House. We will send e-mails today re the grievance and another one re the horses and house furniture.
>
> We will commence disciplinary proceedings against both next Tuesday and suspend them.
>
> If you have any other toxic e-mails or accounts of her conduct please send them on.

115. It is significant that at that stage a disciplinary process involving suspension was envisaged.

116. In response to Dr Guy's request for toxic emails, Mr Bowyer wrote on 6 November at 22.35:

> I have to say that I really enjoy working with the team at Motocorsa, at Chedington Court and at Hobbs, but I really don't like working with Alo. She is an extremely difficult person to work with. I'm forever treading on egg shells, having to second guess what I say to her, what I write to her in an email or ask her about. It takes very little for her to flip to swearing, shouting or using bullying tactics and aggression to get her own way. She also uses passive aggression too, for example saying things like 'You may not realise it but you are offending me'….
>
> Her behaviour towards her work colleagues is selfish and unthinking. Her comments and the upset she causes filters to the other team members, and she has no sense of the consequences of her behaviour or actions.
>
> This may not help, but I thought you may wish to add my thoughts to your file.

Dismissal Letters

117. Mr and Mrs Brake were dismissed on 8 November 2018. The alleged basis was breakdown of trust and confidence. The essence of the alleged reason in Mrs Brake's case was –

> To state that Kate and I cannot be trusted is a very serious accusation to make, especially in view of the fact that you are a Manager of Axnoller Events Ltd and I am your manager and a director of the company who employs you, Axnoller Events Ltd. Our relationship as employer and employee was already under pressure due to your reluctance to relinquish control over all matters relating to Axnoller Events Ltd which made it difficult for me in my capacity as director and employer, and my representatives to have visibility over the running of the business. Your insistence on

> having complete control over the use of Looke Farm indicates that you have difficulty trusting in and working with myself and my representatives. If you are unable to trust me, your manager and employer, I cannot see how our employment relationship can continue.
> Your position at Axnoller Events Ltd has therefore, become untenable due to a breakdown in trust and confidence between us. It is, therefore, with regret that I have to terminate your employment as a result of the breakdown in trust and confidence.

118. And in respect of Mr Brake, Dr Guy observed that his reaction in the meeting of 6 November to the fact that the Guys could not accept the Covenants was extreme and threatening, enough to make him, Kate and John Hatchard fear for their safety. Mr Brake's behaviour and reaction were described as excessive and completely unacceptable. It was said that Mr Brake had behaved in this way to staff in the past. Dr Guy said he had lost confidence in Mr Brake's ability to behave appropriately.

> You made it clear during the meeting on 6 November that you do not trust me, your manager and employer. I have lost trust in your ability to behave appropriately towards me as your manager and employer or towards my staff and to continue to properly and adequately perform your role of Facilities and Land Manager. Your position at Axnoller Events Ltd has, therefore, become untenable due to a breakdown in trust and confidence between us. It is, therefore, with regret that I have Io terminate your employment as a result of the breakdown in trust and confidence.

119. The Brakes were instructed to vacate Axnoller House by 9 November 2018. They were permitted to occupy the Cottage in the meantime. The horses were to be removed by 30 November. They were required to vacate all property belonging to the Respondents by 30 November 2018. They would be dismissed with effect from 30 November and the balance of their 9-month notice was to be paid in lieu by 27 November 2018.

Protected Disclosures

120. The Claimants allege that the following amounted to protected disclosures.

a) "In early 2018…questions over accounts produced for [AEL] by Jo Hague …[concerning] expenses attributable to [R2] being allocated to [R1]…This had the effect on paper…not eligible for such treatment…The Claimant told Jo Hague of her concerns in this respect, making it clear that it amounted in her eyes to tax fraud."

b) "On 1 November 2018…concerned that the issue of misallocated expenses had not been addressed and was continuing, [C] emailed [R4] to question why he was still claiming back VAT for non Axnoller Events expenses."

c) "On 3 November 2018, [C] again questioned [R4] on what she considered to be inappropriately allocated expenses."

d) "On 3rd November 2018, [C] wrote to [R3] on behalf of her and her husband to tell him that she felt that since telling him about her illness earlier in the year, that both her and her husband had been marginalised and their jobs eroded."

The First Alleged Disclosure

121. The background to this stretches back to July 2017 when the Claimant made challenges to the bookkeeper, Jo Hague's, treatment of accounting entries, in particular whether items were treated as expenses or capital investment. The Claimant wanted items such as soap dispensers, toilet brushes and flowers to be treated as capital expenditure. Jo Hague was reluctant to do this because the items could not sensibly be regarded as holding their value over time. She escalated the matter to Kate and Geoffrey Guy.

122. The matter of allocation of expenses to the accounts of the First Respondent was an ongoing issue for Mrs Brake. Her fundamental concern was the profitability of that company. She did not want expenses allocated to the profit and loss account if either the expenses could be capitalised or posted against another Company. A particular example arose on 3 June 2018 when the issue of who should pick up the expenses claimed by Henry Nayler-Ternent. Dr Guy emailed this:

> 'I want to stop this continual segment allocation bickering. At the end of the day I and our auditors will decide on the appropriate allocation of income and expenses at a group level. Best just to process now those things of which one has first hand knowledge and we can think about nominal and inter company charges later. If you have direct supervision of a cost then it goes in your books. This is good practice from an internal audit point of view. I do not want to spend my time approving costs that have been managed elsewhere.
>
> If you have any bona fide items that you feel ought to be allocated differently then save them up until end of month numbers and we can agree or not on them in one go not item by item'.

123. We see the issue was discussed between the Claimant and Dr Guy on 4 June 2018.

> As promised a roundup of what we discussed at our meeting last Monday.
>
> Accounting matters:
>
> 1. You informed us that the categorization of expenditure as between Axnoller Events Ltd., TCCEL and LCMF etc would be something that you and your accountants Old Mill would decide upon and deal with between yourselves.

2. I expressed concern that this may affect the profitability of the wedding/events business and that I was being judged on its performance. You reassured me that this was not the case and that for the purpose of management accounts and tracking how the wedding/events business was performing that we would continue to categorize the expenses as between those that are the direct costs of the wedding/events business and those that are not.

3. I propose therefore to keep out of the allocation of expense except In so far as the management accounts are concerned. I will continue to allocate only the expenses that directly relate to the wedding / events business to it for Jo to record in the management accounts and then Jo can take over from there and decide with you where to ultimately to allocate all expenses. You can therefore assume that If anything is wrongly allocated that I have nothing to do with it!

4. You asked for an ex vat trading and cashflow projections for the next year. I will prepare the revenue side and hand to Jo who can prepare the expenses side (with my Input) and then she can produce a budget for you.

The Second Alleged Disclosure

124. On 1 November 2018 Mrs Brake emailed Mr Bowyer in these terms:

Date: Thursday, 1 November 2018 at 18:55
To: Russell Bowyer <russell@chedingtoncourt.co.uk>
Subject: RE: Invitation to join Axnoller Events Limited

Hello Russell

I have had a quick look at the VAT report.

I like Xero it seems very user friendly.

A couple of questions;

Green Cottage expenses seem to be in the Axnoller VAT return. Should they be given that we have now decided it is to be TCCEL?

The Range Rover Fuel should be a TCCEL expense also I believe?

Do you not pay the VAT on the prepaid income? Or am I misunderstanding the final bit where it says no vat? Perhaps you pay the vat when you recognize the sale? Sorry if that is a stupid question.

Best wishes Alo

On 1 Nov 2018, at 23:04, Russell Bowyer <russell@chedingtoncourt.co.uk> replied:

Hi Alo,

The Green Cottage items are remnant charges that need to be recharged.

Who uses the Range Rover?

VAT is paid when the income is invoiced and received. The prepaid income is entered in the P & L in the month of the wedding, but the VAT will have been paid when it was originally invoiced.

Regards, Russell

To which Mrs Brake replied on 2 November 2018:

Dear Russell
The Range Rover is used by Andy who is a TCCEL expense at the moment. Also I think the car itself is a TCCEL car.
It was just that we are reclaiming VAT back on Green Cottage items that I was raising it with you as it is to be recharged and I'm not sure whether TCCEL is VAT registered yet? Maybe it is and I am not up to date.

Thanks for explaining Prepayments; of course, it is how we used to do it anyway.
I looked at the P&L briefly and noticed items billed as maintenance etc that are actually capex which I can list for you. There are also items in there that need to be recharged (Green Cottage).
I am pretty worried about the maintenance costs. Having had no management accounts or visibility of these costs as they have accumulated until yesterday for 5 months (no one's fault) I had not appreciated that they were so large.

Can we have a chat about all of this at some stage please. As it stands and notwithstanding what Geoffrey may want to negotiate going forward, it is my job to manage the business and I am doing it blind. That said, access to Xero is a good start so thank you for arranging that.

Best wishes

Alo

The Third Alleged Disclosure

125. The Claimant sent this on 3 November 2018 at 18.30 to Mr Bowyer.

From: Alo Brake
To: Russell Bowyer
Cc: Simon Windus
Subject: Xero
Date: 03 November 2018 18:30:14

Dear Russell

I have been having a look at the P&L now that I have access.
Can you explain the £176,000 of administrative salaries put against the business as well as the £38,000 of ones that are in as a direct cost of sales?
What is that £176k made up of? Am I being dense? It's obviously no problem to me

what you choose to charge to the business but I thought it might be an error?

Best wishes

Alo

126. On 5 November 2018 Mr Bowyer replied:

Hi Alo,

The wages is what has been paid to the staff at Axnoller, but it does also include Andy's recharged wages too from TCCEL.

The split to cost of sales is allocating some of the house-

keeping etc to above the line. Regards, Russell

127. In evidence Mr Bowyer told us he did not understand that the Claimant was alleging a breach of civil or criminal duty. Had he done so, he would have escalated to Dr Guy and the Second Respondent's accountants and/or solicitors, and indeed his professional body. He thought these were internal enquiries about allocation.

The Fourth Disclosure

128. This was made on 3 November 2018 also, some 10 minutes before the third alleged disclosure. We have quoted the email in full above under 'Looke Farm'. The core of it was that since informing him about 'the kidney thing', they had been marginalised and excluded; there was pressure to move the horses; and attempt had been made to renegotiate the employment contracts. Despite that they were prepared to do a deal.

129. Dr Guy replied as follows on 5 November 2018:-

We will discuss the points you have raised regarding Looke farm, control over the land and your horses at the meeting tomorrow, therefore, I don't propose to go into those points now. I must, however, reply to your comment that you and Andy believe that you have been marginalised and excluded since you informed me about your kidney failure.

Kate and I are very concerned that you and Andy feel that you have been marginalised and excluded. We are also very surprised to hear that you believe that any such treatment is related to your kidney problems.

We were very concerned for you when you suffered from acute renal failure at the beginning of the year and have supported you throughout your hospital treatment and recovery process. Whenever we offered to help, you were determined to work and carry on as normally as possible and although Kate and I never expected you to do so, we admired your determination. It was a huge relief to us both to see that you had made a remarkable recovery by September.

Any position I have taken in relation to our negotiations on Looke is completely unrelated to your health problems. As I have said from the outset, our proposed investment in Looke was conditional on it being an investment as business partners, you and Andy ceasing to be employed by Axnoller/Chedington and providing any continuing services to Axnoller/Chedington on a service agreement basis. Looke is an opportunity for you to grow your own business and it is reasonable for Kate and I to take steps to protect a £3. 7m investment and our interests in the land.

I have considered my and Kate's treatment of you and Andy in 2018 and since you became my employees in February 2017 and I have difficulty recognising your view that you and Andy have been marginalised and excluded. You are both, however, entitled to raise grievances if you believe that you have been mistreated. I would like to reassure you that, should you decide to raise grievances, they will be investigated fully.

I look forward to

seeing you both

tomorrow. Kind

regards,

Geoffrey

DISCUSSION AND CONCLUSIONS ON EVENTS PRIOR TO AND INCLUDING THE DISMISSALS

Protected Disclosures

130. The first three disclosures may be taken together. The Claimant's position on all of these accounting matters was that the profitability of the First Respondent should not be understated in the accounts. She was not disclosing information that a criminal offence was being committed or that the Respondents were breaching any civil obligation. That was not the purport of her interventions. She regarded the Events business as hers and believed that her performance would be adjudged on its profitability. Her interventions did not tend to show that a criminal offence was being committed or that any Respondent was breaching a civil obligation. Rightly, they were not taken to be such by the Respondent.

131. Accordingly, the first three disclosures were not protected disclosures. If we are wrong about that, they did not cause any of the detrimental steps taken by the Respondents against the Claimants. None of the alleged detriments were on the ground that the First Claimant had made interventions on how to account for matters concerning the First Respondent. The reason or principal reason for their dismissals was not that either. We state the reason below.

132. The fourth alleged disclosure is also put forward as a protected act for the purposes of victimisation. We address that below. For the purposes

of protected disclosure, however, it is our conclusion that it fails on the public interest element. Assuming that Mrs Brake was making a disability discrimination disclosure, she was not making it in the reasonable belief that she was acting in the public interest. It was made the private interests of Mr Brake and herself in advance of the meeting on 6 November 2018.

Qualifying Service

133. The Tribunal concludes that the Claimants were not employees of the First Respondent prior to 17 February 2017 when acquired by the Second Respondent. The Claimants expressly declined to be employees prior thereto. They were the de facto directors of the First Respondent, as HHJ Matthews found. They did not enter into any contract of employment or service agreement.

134. Further, they intentionally did not pay tax and national insurance during the periods prior to the acquisition by the Second Respondent such that any contract of employment for the period between 23 January 2016 and 17 February 2017 (as alleged for Mrs Brake) or between 23 July 2015 and 17 February 2017 (as alleged for Mr Brake) would be tainted with illegality and so unenforceable for the purposes of unfair dismissal.

135. Mrs Brake has put before us the well-known authorities on employment status. They are not as germane as they are in non-director cases. Given the finding on nomineeship, we have looked at it from the question whether de facto directors entered into contracts of service, express or implied. We give our findings above on that.

136. The Tribunal does not rule that the issue of employment is the subject of an issue estoppel. It recognises that the matter of nomineeship between Saffron Foster and the Brakes is. The issue of employment within the meaning of the employment legislation was not fully argued before HHJ Matthews as it has been here. It would not be just in those circumstances to invoke an estoppel.

137. Accordingly, the Claimants do not have 2 years' continuity of service and are not entitled to claim unfair dismissal.

The reason for the dismissal

138. If we are wrong about that, then the reason for dismissal was as contended by and as shown by the First Respondent – some other substantial reason namely complete loss of trust and confidence in the Claimants/irretrievable breakdown of the relationship. This is because the Claimants stated that they did not trust Dr Guy in the meeting on 6 November 2018 following disagreement about Dr Guy's position on the Looke Farm proposal. The Directors reasonably believed that the Claimants had said this and that Mr Brake had behaved in a threatening

manner. The reason or principal reason was not, we repeat, that Mrs Brake made any protected disclosure on her own behalf or (in the case of the fourth alleged disclosure) also on behalf of Mr Brake.

139. If unfair dismissal could be claimed, the appeal would likely be found unreasonable because Mr Bowyer was not independent. He had been a source of information to be used by the Directors against the Brakes prior to the dismissal letter. He wrote the following on 6 November 2018 following the unfortunate meeting:

> I have to say that I really enjoy working with the team at Motocorsa, at Chedington Court and at Hobbs, but I really don't like working with Alo. She is an extremely difficult person to work with. I'm forever treading on egg shells, having to second guess what I say to her, what I write to her in an email or ask her about. It takes very little for her to flip to swearing, shouting or using bullying tactics and aggression to get her own way. She also uses passive aggression too, for example saying things like 'You may not realise it but you are offending me'….
>
> Her behaviour towards her work colleagues is selfish and unthinking. Her comments and the upset she causes filters to the other team members, and she has no sense of the consequences of her behaviour or actions.
>
> This may not help, but I thought you may wish to add my thoughts to your file.

140. He also wrote this:

> **From:** Russell Bowyer
> **Sent:** 01 December 2018 09:47:55
> **To:** Geoffrey Guy; Kate Guy
> **Subject:** Whilst I think about it
>
> Hello Geoffrey and Kate,
>
> Sorry to disturb you both.
>
> Whilst I think about it and after Jo asked concerned yesterday evening; 'does Alo know where we live.'
>
> Would it be prudent to take out directors and officers insurance on Monday for both Axnoller Events and TCCEL. You never know what they may try and Jo is concerned about what she may try against me personally. This would make me feel more comfortable too.
>
> Especially after seeing this letter from Andy's doctor. They will probably now know it was me that reported them to the police. They will be out to destroy me like they are you and her words to Sheryl of the same.

Thank you.

Regards, Russell

141. Mr Boywer went through a process and came to conclusions some of which an independent appeal chairperson may well have arrived at. However, a finding of procedural unfairness would, accordingly, be likely, if the Claimants had continuity of employment. Mr Bowyer was not independent. Very substantial reductions for Polkey (fair dismissal would have resulted anyway) and for contributory fault (conduct at the 6 November 2018 meeting) would have been pursued by the First and Second Respondents at a remedy hearing, had one been appropriate. It would have been argued, with force, that at the end of the day, the First and Second Respondents amount to a family business with a small number of employees. If the relationship is reasonably regarded to have irretrievably broken down, it is difficult to see how it would have survived more than a few days longer than it did.

Protected Act for the purposes of the victimisation claim

142. The Respondent has submitted that the email of 3 November 2018 was not a protected act because the reference to 'the kidney thing' involved false allegations made in bad faith. The difficulty with this submission is at least 2-fold:

(a) The Respondent did not plead bad faith;
(b) The Respondent did not cross-examine Mrs Brake along the lines that she did not believe the allegations (see Kalu and Ogueh v University Hospitals Sussex NHS Foundation Trust 2022 EAT 168 above).

They did cross-examine her along the lines that she raised the matter by way of threat. That does not mean that she raised it in bad faith in the sense that she did not actually believe it herself. We find that the 3 November email did amount to a protected act in raising matters which could be allegations of disability discrimination.

143. Similarly, insofar as the message was sent on behalf of Mr Brake, he was not cross-examined along the lines that he did not believe it to be true.

Disability Discrimination

144. Mrs Brake's disability is of course conceded by the Respondent.

145. At paragraph 15 of the issues in terms of the claim under section 15 of the 2010 Act the matter arising from disability relied on is 'the perceived

limitation in her ability to undertake her role in the medium to long term'. It has always been Mrs Brake's position that there was no limitation on her ability to undertake the role. Whilst when she was in hospital, Dr Guy did consider the possibility of a need for a deputy, that was not repeated after she left. Mrs Brake herself raised the question of whether reasonable adjustments were needed and then proceeded to say none were. The matter arising as pleaded is rejected on the balance of probability.

146. It was stated on a few occasions in the hearing by Mrs Brake that if she behaved inappropriately in the 6 November 2018 meeting (which she denied) then it would have arisen from her medication. We reject the notion that the Claimant has proved that it arose from her disability or her medication that she would allege Dr Guy was not a man of his word and could not be trusted. That position had no relation to her disability at all.

147. It is sensible to approach this by dealing with the specific allegations of unfavourable/less favourable treatment to determine whether there is any prima facie case that these are linked to disability.

Marginalising Mrs Brake in the performance of her role

148. We make detailed findings above under this heading. Mrs Brake does not establish a prima facie case that she was being marginalised because of her disability. She was given freedom of decision-making (aside from how to present income and expenditure in the accounts) in the operation of the First Respondent's events business. That did not change. There was a period when the Claimant was tasked with business development projects working with Dr Guy. That did subside as the business grew and Dr Guy perceived the need to bring in a properly qualified Finance Director. She always had free reign over the weddings business.

Seeking to appoint others to take over the Claimant's role.

149. The most significant appointment was of Russell Bowyer the Finance Director in July 2018. He did not take over the Claimant's role; his responsibilities were wider. He was to be responsible for the professional, efficient and profitable management of the various commercial activities for the Chedington Group. The group included the motorbike and hotel business abroad. His duties included having accounts responsibility for the Chedington Group. The Claimant was not qualified to take on these responsibilities. She may have had an aspiration for greater responsibility. Mr Bowyer's appointment had no relationship with the Claimant's disability. It was down to the expansion and extent of Chedington interests including but beyond the First Respondent.

Restricting Access to the Accounts System

150. This is to do with the introduction of the Xero accounts system. Mr Bowyer developed this with the assistance of Simon Windus. He was Mrs

Brake's assistant. There was no intentional restricting of access for Mrs Brake. No management accounts were created for 5 months as the change in systems was introduced. There is no link with the Claimant's disability at all.

Seeking Amendments to her terms and conditions of employment

151. This relates to Dr Guy's position that if he was going to have his pension fund invest £3.7 million in the Looke Farm project, then there would need to be a renegotiation of their association. His view was that the Claimant would be developing her own interest in the new site. She told us, indeed, that she had plans to develop the site into something like Lord and Lady Bamford's Daylesford site. That is an organic farm shop with retail outlets. It made sense that Mrs Brake would be spending considerable time on that project. Any involvement with the First Respondent's events business would likely change. As he wrote on 5 November 2018 –

> Any position I have taken in relation to our negotiations on Looke is completely unrelated to your health problems. As I have said from the outset, our proposed investment in Looke was conditional on it being an investment as business partners, you and Andy ceasing to be employed by Axnoller/Chedington and providing any continuing services to Axnoller/Chedington on a service agreement basis. Looke is an opportunity for you to grow your own business and it is reasonable for Kate and I to take steps to protect a £3. 7m investment and our interests in the land.

152. It is fair to say that Dr Guy did see the opportunity of changing the employment relationship with the Brakes to the Chedington Group's advantage alongside the Looke Farm project. Mrs Brake had difficult relationships with colleagues.

153. The point is none of this had any relation to Mrs Brake's disability.

Making enquiries of Mr Maddock in an attempt to substantiate a dismissal

154. Dr Guy did seek examples from Mr Maddock prior to the 6 November 2018 meeting of poor behaviour of the Brakes. Dr Guy knew the meeting was important and he foresaw change in the employment relationship. He did want ammunition to force a change. This was down to the proposed Looke Farm venture and also a response to the difficult relationship Mrs Brake had with colleagues. None of this was down to her disability.

Manufacturing a reason to dismiss the Claimants/taking the events of 6 November 2018 as a reason to dismiss the Claimant

155. It is plain that the meeting on 6 November 2018 was an important meeting for the future of the relationship between the parties and the Looke

Farm project. The First, Second and Third Respondents' view of the way that meeting unfolded, and their conclusion that there had been an irretrievable breakdown of the relationship based on a complete loss of trust and confidence was reasonably held. They did not manufacture the words and conduct of Mr and Mrs Brake that day. None of this had any relation to Mrs Brake's disability.

Giving no opportunity for discussion before dismissing the Claimant/the reason for dismissal

156. In his email to Mr Bowyer following the meeting on 6 November 2018, Dr Guy stated that the Brakes would be suspended the following Tuesday (13 November) and disciplinary proceedings commenced. That imports being invited to a meeting. That did not happen.

157. Further, the possibility of a grievance on disability discrimination was envisaged. Dr Guy mentioned it in emails on 5 and 6 November 2018, and we remind ourselves that Mrs Brake wrote this on 6 November

> Given that I do not have a manager other than you, it seems that I cannot make my complaint to you by the 13 th of November but we will seek advice and come back to you.

The possibility of a grievance remained live. In the event, however, Mrs Brake did not submit a grievance. One was possible, however, at the time of the dismissal.

158. We know that the 7 and early 8 November 2018 were taken up with exchanges on whether the Wilds had influenced the course of events.

159. The question for us is whether Mrs Brake's email of 3 November mentioning 'the kidney thing' and the potential grievance about the allegation of disability discrimination was an effective cause of the decision to dismiss without a disciplinary procedure and dismissing before a grievance could be raised.

160. In his witness statement, Dr Guy says this at paragraph 151:

> Between 6 and 8 November, I reflected on the Brakes' behaviour. I considered that the words spoken by the Brakes, and their general conduct at the meeting, as well as the comments made by Alo in her email communication afterwards had seriously diminished the trust and confidence between Kate and I and the Brakes and damaged our relationship with them. I did not see how the employment relationship between TCCEL and CEL and Andy and Alo respectively could continue. The relationship was irretrievably damaged by their behaviour and how they sought to represent our position on Looke as being dishonest.

161. We have set out the dismissal letters above in which much the same was said. We know that at approximately 15.00 on 8 November 2018

Dr Guy emailed colleagues informing them that he had dismissed the Brakes.

162. We have to decide whether Mr and Mrs Brake were dismissed because Mrs Brake had made a protected act, the grievance first raised in the 3 November 2018 email. We have reminded ourselves that where multiple reasons are in play, the fact of the grievance would have to be a 'significant influence' on the decision. We have deliberated on this at length.

163. Dr Guy told us in evidence that he regarded Mrs Brake raising the grievance as adopting 'a course of action that would be difficult'. It was on the agenda for the 6 November meeting and was briefly discussed. However, on 5 November he had set up a grievance timetable to deal with the grievance. Mrs Brake was to reply by 13 November. We know that Dr Guy then decided to dismiss Was it a significant influence that she had raised the grievance?

164. On the balance of probability, the reason that Dr Guy decided to dismiss on the grounds that there had been an irretrievable breakdown in the relationship was because of Mr and Mrs Brake stating they no longer trusted him and his wife, that he was not a man of his word, and that he and his wife were bullies. Furthermore, Mr Brake had expressed this view angrily, shouting and finger-pointing. Dr Guy did not reach the position that there was an irretrievable breakdown because Mrs Brake had raised a grievance. He reached it because of the collapse of mutual trust. That Mrs Brake used the grievance as a threat did not help ('You ought to be concerned about it'). It was not the grievance itself, though, that lead to the view there was an irretrievable breakdown. The grievance could have been dealt with as a grievance. The grievance was not necessarily a strong one. We know that Mrs Brake did not consider any reasonable adjustments were necessary for her work. She had conducted her work notwithstanding her disability. What could not be dealt with were the allegations that he and his wife could not be trusted. Those allegations displaced all other issues. We accept what Dr Guy tells us at paragraph 151 of his witness statement. He shows that discrimination played no role whatsoever, if he needs to.

165. The Looke farm proposal, in reality, had supplanted the primary employment relationship. The Guys' pension fund was putting in £3.7 Million. The Brakes were putting in approximately £2 Million. Trust was central to that proposal, as it was to employment.

FINDINGS OF FACT AND DISCUSSION IN RESPECT OF EVENTS POST DISMISSAL

166. It is under this head that Mrs Brake's victimisation claim and Mr Brake's claim of victimisation by association remain in focus.

Pursuing Possession Proceedings Against the Claimants/Expecting Mrs Brake to move to a property unsuitable for her medical needs/Interfering with the Claimant's occupation of Axnoller House and facilities for her horses

167. It was a term of the dismissal letter that the Claimants vacate Axnoller House by 9 November 2018 and move back to Axnoller Cottage. It was an express term of the contract of employment that notice could be given by payment in lieu. By 30 November 2018 they had to move all belongings out of any property or land owned by the First or Second Respondents.

168. The Claimants refused to vacate Axnoller House. It has subsequently been found that they trespassed there for 3.5 years. The decision to commence proceedings had no relationship with disability or any protected act. It was down to the Claimants having no right to reside there. They had no rights of occupation in Axnoller House. They had no right to keep their horses on the Farm post 30 November 2018.

169. The Cottage has proved less straightforward. A ruling at first instance confirmed the Respondents' view that the Claimants had no rights over the Cottage and rejected the Claimants' position that they had been unlawfully evicted. On appeal, that has been set aside, and the consequences of that ruling are yet to be determined. However, the reason for the eviction, which took the form of changing the locks while the Claimants were unlawfully occupying Axnoller House, was neither disability nor protected act. It was the belief held by the Respondents that the Claimants had no right to occupy the cottage.

170. The Respondents had the right to ask the Claimants to leave Axnoller House. There was no obligation on them to ask her to move to 'a property suitable for her medical needs'. The Cottage, in any event, has not been shown to be unsuitable. The Claimants regularly occupied it when weddings were not taking place. The Claimants could have moved elsewhere. We know they had substantial funds.

171. The reason why there was hard fought property litigation was because Mr and Mrs Brake refused to leave Axnoller House.

172. The reason why there was an unsavoury encounter between Mr and Mrs Brake and security guards trying to protect the Cottage, was because the relevant Respondents believed they had the right to evict the Brakes from the cottage. The Tribunal saw a bodycam video of this incident. The security guards did offer to recover any medication Mrs Brake wanted. She did not take them up on that. Her claim of harassment in that regard fails on the facts.

173. None of the reason why here was the Claimant's disability or the protected act.

Instigating and/or contributing to an unwarranted and malicious disciplinary investigation against the Claimant.

174. On 15 November 2018 Gill Craik, an HR Consultant, was instructed by solicitors acting for the First and Second Respondents to investigate disciplinary allegations against the Claimants. The context was that the Claimants each had a 9 month notice clause. Their dismissals for irretrievable breakdown had been by notice for 3 weeks on garden leave and in respect of the balance of 8 months and 1 week there was a promise of payment in lieu.

175. The Respondents did not want to make payment in lieu. Hence instigating disciplinary investigation with view to curtailing the payment in lieu obligations.

176. The Respondents' position before us was that we should not explore the detail of this matter. If there was an unfair dismissal, then at the provisionally timetabled remedy hearing we would be shown the detail for the purposes of Polkey and contributory fault reductions. The Craik investigation related to events subsequent to the dismissal or matters discovered subsequently to the dismissal. The details were not relevant to us, it was submitted.

177. Further, the Claimant had reserved the right to bring a breach of contract claim for short notice and non-payment of monies in lieu to the County Court by reason of the £25,000 cap. That was another reason for not going into the detail.

178. However, for present purposes, we find no prima facie relationship between the instruction of Gill Craik and the Claimant's disability or protected act. The instruction was down to a belief on the part of the Respondents that they had grounds for not paying 8 months and 1 week's notice.

179. From the letter of instruction dated 15 November 2018 we see that the matters for investigation by Gill Craik included:

(a) The agreement between Mrs Brake and Allen Computer Services Limited on data use.
(b) Use of company funds to pay the Council Tax on West Axnoller Cottage.
(c) Attempts to transfer the insurance on a car between a company policy and the Brakes' personal policy.
(d) Breach of garden leave conditions.
(e) Refusing entry to company property.
(f) Informing other staff that they (the Brakes) will not vacate Axnoller House by the termination date.

(g) Removing (by Mr Brake) stone from employer's site without permission.

And later added:

(h) Inappropriate and aggressive behaviour on the part of Mrs Brake towards Sherryl Dagnoni, the AEL housekeeper.

(i) Mr Brake causing damage to the lawns of Axnoller House.

180. There was a further investigation into the Claimants' employment conducted by Lorna Townsend who was first instructed in February 2019. The brief was wider than Gill Craik's and included attempts to discover after-acquired facts relating to the Brakes' period of employment. Dr Guy in a letter to the Brakes on 19 December 2018 described the Craik report as the 'interim' report and indicated that there would be a further report. This was at the same time as withholding any further payments in lieu.

181. Mr Bowyer instructed Lorna Townsend on 18 February 2019 to consider the following matters:

> The First investigation revealed several areas of concern regarding the Brakes' alleged conduct during their employment, including:
>
> 1. As regards Alo Brake, her conduct as Manager of AEL, in particular:
> a. Overcontrolling manner in the running of the business, which prevented the directors of AEL/TCCL from having visibility over AEL's business and finances;
> b. Misuse and/or misappropriation of company funds and/or property;
> c. Financial irregularities in the allocation of expenses;
> d. Lack of consideration for the welfare of staff and contractors, including bullying and harassment of subordinates and third parties.
> e. Failure to comply with her own duties as senior manager.
>
> 2. As regards Andy Brake:
> a. Aggressive behaviour towards staff and third parties, including bullying and intimidation; b. Misuse and/or misappropriation of company funds and/or property;
> c. Damage to company property;
> d. Running her own horse breeding business in company property.

182. For the same reasons, the hearing before us did not determine the issues contained in the Townsend report. Likewise, however, for present purposes, we find no prima facie relationship between the instruction of Lorna Townsend and the Claimant's disability or protected act. The instruction was down to a belief on the part of the Respondents that they had grounds for not paying notice in lieu.

Appeal

183. We have already found that had the Claimants the right to claim unfair dismissal, the dismissal would have been procedurally unfair given Mr Bowyer could in no way be said to be independent. They do not have that right, however.

184. Mr Bowyer was not appointed to hear the appeal because the Claimant had sent the email of 3 November 2018. He was appointed because he was the only director other than Dr and Mrs Guy. The Respondents, we know, ought to have instructed an outside consultant.

185. Would a hypothetical comparator have been treated any differently? Would the appeal of someone who had been dismissed on the basis of a perceived irretrievable breakdown, and who was not disabled, be referred to an outside consultant? We do not find so.

186. Was the protected act a significant influence on the decision to ask Mr Bowyer to hear the appeal? We do not find so. The belief behind the dismissal was irretrievable breakdown of the relationship. Mr Bowyer was asked to hear the appeal because he was the only Director not present on 6 November.

187. The essence of the irretrievable breakdown was the collapse in trust following a failed financial (multi-million) joint venture in respect of Looke Farm. Disability or protected act did not, in truth, come into it.

188. It was a procedural error to ask him to sit on the appeal in fairness terms, but that error would have been made had disability or protected act not been relevant to the circumstances of the dismissal.

189. The error of appointing Mr Bowyer would sound in unfair dismissal terms but not discrimination ones.

190. Mr Bowyer did deal head on with Mrs Brake's assertion that the disability or the 3 November email was the reason for the dismissal. He thought he did so in good faith. He wrote the following:

> The reason for your dismissal was, or was connected to, your disability and because Dr Guy allegedly knew that you were in the process of raising a grievance in relation to alleged discriminatory treatment
>
> I have looked at correspondence between you and Dr Guy to check if you had raised a grievance or were in the process of doing so at the time you were dismissed. I see that you first mention on 3rd November that you felt you had been increasingly marginalised and excluded since you had told Dr Guy about your kidney problems (your email of 3rd November at 18:20), but you provide no details of the alleged marginalisation and exclusion. You next mentioned that you felt you had been discriminated against in an email dated 9"' November, the day after you were notified of the decision to dismiss you.
>
> I also note that Dr Guy wrote to you on 5th and 6th November and then again on 14th November offering you the opportunity to raise a grievance. Dr Guy also mentioned your

right to raise a grievance at the end of the meeting on 6th November. I see that you did not raise a grievance before your employment terminated on 30th November or since.

The first time you provided details of alleged acts of discrimination was via your statement dated 8th January 2019. I have discussed your allegations with Dr Guy and Mrs Guy and am satisfied with their explanations, as follows:

• The Guys were very concerned about your health. They were supportive to you during and after a meeting on 4th May 2018 when you informed them about the impact of chemotherapy on your kidney function. Dr Guy was aware that you would be concerned about the running of AEL should your kidney fail. He suggested you rest and tried to reassure you that the business could still operate whilst you were resting. He suggested finding someone to deputise you to help reduce the stress on you and offered a budget of £20,000 to upgrade West Axnoller Cottage ('the Cottage'), which you said was your residence at the time, io make it comfortable for you to rest and recover. You used over £6,900 of this budget to purchase some curtains for the Cottage, but did not make any other improvements to the Cottage.

• The Guys often checked up on you during your employment and, in particular, offer your kidney function deteriorated in 2018. They made it clear that you could rest and take as much lime off as necessary to allow you to recover, however you always played your illnesses down and insisted on working throughout. Email correspondence between you and the Guys in March 2017 and May 2018 show the Guys' level of concern for your welfare, offers of help and your insistence on carrying on as normal.

• There was no attempt to take over the decision-making process at AEL or to marginalise you after the Guys became aware of your kidney problem. In particular, I am satisfied that:

o the suggestion of having Mr Naylor-Ternent shadow you al AEL was not an attempt to replace you. The intention was for him to shadow you so he could learn more about the business. Mr Naylor-Ternent would not have been able to take on the role of Manager at AEL in any event, as he already held several other positions within and outside the Group;

o Mrs Guy's suggestion to use Mandy Patton as housekeeper for Green Cottage was motivated by her wish to help a friend find work.

o As a director, Dr Guy had the right to decide on who should attend meetings, however there were no meetings that you should have attended or were excluded from.

o You were allowed to perform your role of Manager of the wedding business as before and no attempt was made to lake over the operational duties you performed.

o It was Dr Guy's idea io convert the end of the Arena info rooms for the wedding business and he asked for your assistance in putting a proposal together. Dr Guy was not satisfied with your proposal and became more involved with the project.

o Dr Guy did discuss the possibility of involving you in estate development for The Chedington Court Estate, however he did not take this proposal further in light of his concerns over your management and negotiating style and your treatment of staff and contractors.

o Dr Guy did not remove allocation of expenses between AEL and TCCL from you and give it to Ms Hague. As explained above and accepted by your solicitor, you were not responsible for deciding on allocation of expenses. Ms Hague was and did this before and after you informed the Guys about your kidney problems. By email dated 9"' June you accept that Ms Hague could decide with Dr Guy whether to allocate expenses to AEL and TCCl.

o The decision to centralise control over the financial and administrative functions of the Group was unrelated to your health. The reasons for this decision are made clear in Dr Guy's email to you of 3rd October, namely the expansion of the business from just a wedding venue, and the different investments made by Dr Guy including the development of an equestrian centre. By email dated 12 th October, you confirmed you were happy with Dr Guy's proposals and that you were willing to work to any agenda set by Dr Guy. it is also clear that Dr Guy intended you to manage the stay and accommodation for attendees of equestrian events. This indicates that Dr Guy was not trying to exclude you.

> □ No part of your role was allocated to me. Please see my comments above regarding my role within the Group. You also allege that the meeting of 6th November was a trap and Dr Guy had already decided to dismiss you before the meeting because of your allegation in your email of 3rd November that you had been discriminated against. You rely on the emails between Colin Maddock and Dr Guy dated 4th and 5th November. Dr Guy explained that your email correspondence over the weekend of 3rd and 4th November seemed to indicate that you were preparing for confrontation. Dr Guy decided to review recent events in an effort to determine what you may have been referring to in your emails. I am satisfied that Dr Guy reached the decision to dismiss you on the basis of how matters transpired at the meeting on 6th November and that his communications with Mr Maddock were unrelated to your health or any allegations that you had been discriminated against. I have found no evidence to suggest that you were dismissed because of you suffering from a disability or because Dr Guy allegedly knew that you were in the process of raising a grievance in relation to alleged discriminatory treatment now alleged to have arisen from the reference by you that you had a disability. For the reasons given under "first ground of appeal" above, I am satisfied that the reason for your dismissal was the breakdown in trust and confidence between you and the Guys.
>
> I, therefore, do not uphold this ground of your appeal.

191. We do not necessarily say Mr Bowyer acted in bad faith. We do say he should not have been asked to perform that role as a matter of fairness. He was not independent. He was not independent because of his prior involvement in events and his negative disposition towards the Brakes. That said, an independent chair of an appeal may have come to at least some similar conclusions.

Otherwise Orchestrating a Campaign against the Claimants

192. The Brakes complain about a number of matters that fall under this general heading in the list of issues. Not all of these are developed in the Brakes' closing submissions. We have endeavoured above to focus on the claims they clearly are pursing.

193. In any event, there is no prima facie link between any of the post dismissal actions taken by the Respondents and Mrs Brake's disability or protected act. Those steps relate to the fact that the relationship had terminated and that the Brakes refused to vacate Axnoller House as instructed. As stated, it has been found that the Claimants trespassed in Axnoller House for 3.5 years. Further, the Respondents believed they were entitled to change the locks of the cottage. That view was upheld at first instance although it has successfully been challenged on appeal to the extent that it was ruled a court order was necessary first. Those are matters outwith these proceedings.

Health Insurance: reasonable adjustment?

194. Here Mrs Brake makes a claim of failure to make a reasonable adjustments. She says the First Respondent should have kept paying her

private health insurance post dismissal in what would have been her notice period. It is important to point out that the Company health insurance Mrs Brake suggests should have continued post dismissal was not related to treating her disability. The kidney problems, regrettably, were pre-existing conditions. They were treated on the NHS.

195. Assuming that it was a PCP to terminate health insurance upon dismissal, did that place Mrs Brake at a substantial disadvantage compared with a non-disabled person? Bearing in mind the insurance would not cover pre-existing disability-related matters, in our judgment the Claimant does not establish that. If we are wrong about that, then bearing in mind the Claimant's own financial resources, it would not be reasonable for the Respondent to continue funding the insurance in the circumstances of the Claimants' departures. The claim fails.

Mr Brake and Associative Discrimination

196. As Mrs Brake fails to establish or the Respondent shows that its acts or omissions were not tainted by disability or protected act, then so Mr Brakes' claims of associative discrimination fail, also. He does not succeed, further, on independently establishing a claim based on associative discrimination or harassment. The explanations for events lie elsewhere.

SUMMARY OF KEY CONCLUSIONS

Protected Disclosures

197. The first three disclosures may be taken together. The Claimant's position on all of these accounting matters was that the profitability of the First Respondent should not be understated in the accounts. She was not disclosing information that a criminal offence was being committed or that the Respondents were breaching any civil obligation. That was not the purport of her interventions. She regarded the Events business as hers and believed that her performance would be adjudged on its profitability. Her interventions did not tend to show that a criminal offence was being committed or that any Respondent was breaching a civil obligation. Rightly, they were not taken to be such by the Respondent.

198. Accordingly, the first three disclosures were not protected disclosures. If we are wrong about that, they did not cause any of the detrimental steps taken by the Respondents against the Claimants. None of the alleged detriments were on the ground that the First Claimant had made interventions on how to account for matters concerning the First Respondent. The reason or principal reason for their dismissals was not that either. We state the reason below.

199. The fourth alleged disclosure is also put forward as a protected act for the purposes of victimisation. We address that below. For the purposes of protected disclosure, however, it is our conclusion that it fails on the public interest element. Assuming that Mrs Brake was making a disability discrimination disclosure, she was not making it in the reasonable belief that she was acting in the public interest. It was made the private interests of Mr Brake and herself in advance of the meeting on 6 November 2018.

Qualifying Service for unfair dismissal

200. The Tribunal concludes that the Claimants were not employees of the First Respondent prior to 17 February 2017 when acquired by the Second Respondent. The Claimants expressly declined to be employees prior thereto. They were the de facto directors of the First Respondent, as HHJ Matthews found. They did not enter into any contract of employment or service agreement.

201. Further, they intentionally did not pay tax and national insurance during the periods prior to the acquisition by the Second Respondent such that any contract of employment for the period between 23 January 2016 and 17 February 2017 (as alleged for Mrs Brake) or between 23 July 2015 and 17 February 2017 (as alleged for Mr Brake) would be tainted with illegality and so unenforceable for the purposes of unfair dismissal. Further, the absence of a record of paying tax and national insurance is itself evidence of no contract.

202. Accordingly, the Claimants do not have 2 years' continuity of service and are not entitled to claim unfair dismissal.

The reason for dismissal

203. If we are wrong about that, then the reason for dismissal was as contended by and as shown by the First Respondent – some other substantial reason namely complete loss of trust and confidence in the Claimants/irretrievable breakdown of the relationship. This is because the Claimants stated that they did not trust Dr Guy in the meeting on 6 November 2018 following disagreement about Dr Guy's position on the Looke Farm proposal. The Directors reasonably believed that the Claimants had said this and that Mr Brake had behaved in a threatening manner. The reason or principal reason was not, we repeat, that Mrs Brake made any protected disclosure on her own behalf or (in the case of the fourth alleged disclosure) also on behalf of Mr Brake.

204. If unfair dismissal could have been claimed, the appeal would likely be found unreasonable because Mr Bowyer was not independent, however cogent some of his findings.

Protected Act for the purposes of the victimisation claim

205. The Respondent has submitted that the email of 3 November 2018 was not a protected act because the reference to 'the kidney thing' involved false allegations made in bad faith. The difficulty with this submission is at least 2-fold:

(c) The Respondent did not plead bad faith;
(d) The Respondent did not cross-examine Mrs Brake along the lines that she did not believe the allegations (see Kalu and Ogueh v University Hospitals Sussex NHS Foundation Trust 2022 EAT 168 above).

206. They did cross-examine her along the lines that she raised the matter by way of threat. That does not mean that she raised it in bad faith in the sense that she did not actually believe it herself. We find that the 3 November email did amount to a protected act in raising matters which could be allegations of disability discrimination. Similarly, insofar as the message was sent on behalf of Mr Brake, he was not cross-examined along the lines that he did not believe it to be true.

Disability and the Protected Act played no factual role in the decision to dismiss

207. On the balance of probability, the reason that Dr Guy decided to dismiss on the grounds that there had been an irretrievable breakdown in the relationship was because of Mr and Mrs Brake stating they no longer trusted him and his wife, that he was not a man of his word, and that he and his wife were bullies. Furthermore, Mr Brake had expressed this view angrily, shouting and finger-pointing. Dr Guy did not reach the position that there was an irretrievable breakdown because Mrs Brake had raised a grievance. He reached it because of the collapse of mutual trust. That Mrs Brake used the grievance as a threat did not help ('You ought to be concerned about it'). It was not the grievance itself, though, that lead to the view there was an irretrievable breakdown. The grievance could have been dealt with as a grievance. The grievance was not necessarily a strong one. We know that Mrs Brake did not consider any reasonable adjustments were necessary for her work. She had conducted her work notwithstanding her disability. What could not be dealt with were the allegations that he and his wife could not be trusted. Those allegations displaced all other issues. We accept what Dr Guy tells us at paragraph 151 of his witness statement.

The Subsequent Property Litigation

208. This had nothing whatsoever to do with disability or protected act. It had everything to do with the fact that Mr and Mrs Brake refused to vacate West Axnoller House. That led to a 3.5 year trespass.

The Subsequent Employment Investigations

209. These had nothing whatsoever to do with disability or protected act. They were down to a belief by the Respondents that they had cause not to pay the considerable notice payments otherwise due.

The root cause of the fall out between the parties

210. This was the fall out around the significant commercial proposal to invest in Looke Farm. This led Mr and Mrs Brake to say they had no confidence in Dr Guy, whom they accused of not acting in good faith. The relationship, including the employment relationship between the parties, thereby came to an end. That had nothing to do with protected disclosures, protected acts or disability.

211. The ongoing events post dismissal similarly have that root cause, compounded by the refusal of Mr and Brake to vacate Axnoller House for 3.5 years. They are not linked to Mrs Brake's disability or email of 3 November 2018.

Employment Judge Smail

South West Region 25 September 2023

Judgment sent to the parties on
26 September 2023

APPENDIX 1

NIHAL MOHAMMED KAMAL BRAKE

Claimant

-and-

1. **CHEDINGTON EVENTS LIMITED**
2. **THE CHEDINGTON COURT ESTATE LIMITED**
3. **DR GEOFFREY GUY**
4. **MR. RUSSELL BOWYER**

Respondents

REVISED LIST OF ISSUES

References to the paragraph numbers of the Claimant's Amended Particulars of Claim dated 27 April 2020 are shown as '[*number*]'.

Preliminary issues

Qualifying service

1. When did C's employment with R1[1] commence?

2. C contends that it commenced on 23/01/2016. R1 contends that the C's period of qualifying employment with R1 commenced on 17/02/2017. R1 and R2 will rely upon its case relating to the unlawful scheme in relation to the status of the employment relationship prior to 17/02/2017 and as to remedy (if so required).

3. Consequently did C sufficient qualifying service within the meaning of section 108 of the Employment Rights Act 1996 ("**ERA 1996**") to pursue her claim of 'ordinary' unfair dismissal?

Whether or not C is disabled person?

4. It is admitted that the nature of C's medical conditions means that she has a disability within the meaning of section 6 of the Equality Act 2010 ("**EqA 2010**").

5. The Respondents make no admissions as to C being susceptible to stress or any other behaviourial trait as a result of any prevailing medical condition as the Respondents have no specific information as to her medical position(s) including her treatment regime and/or medication.

6. Consequently, is there a link between stress and the exacerbation of a renal condition and can the C's treatment regime and/or medication have an effect upon the C's behaviour as alleged?

Disclosures qualifying for information

7. Did C make disclosures of information qualifying for protection within the meaning of section 43B(1) of ERA 1996 by reference to her conveying to the named persons the following:

[1] Previously called Sarafina Properties Limited and, most recently, Axnoller Events Limited.

e) "*In early 2018…questions over accounts produced for [AEL] by Jo Hague …[concerning] expenses attributable to [R2] being allocated to [R1]…This had the effect on paper…not eligible for such treatment…The Claimant told Jo Hague of her concerns in this respect, making it clear that it amounted in her eyes to tax fraud*." **[17]**;

f) "*On 1 November 2018…concerned that the issue of misallocated expenses had not been addressed and was continuing,* [C] *emailed* [R4] *to question why he was still claiming back VAT for non Axnoller Events expenses*" [**22**];

g) *"On 3 November 2018,* [C] *again questioned* [R4] *on what she considered to be inappropriately allocated expenses*" **[23]**;

h) "On 3rd November 2018, [C] wrote to [R3] on behalf of her and her husband to tell him that she felt that since telling him about her illness earlier in the year, that both her and her husband had been marginalised and their jobs eroded." **[24]**

8. If C did convey some or all of the information set out at sub-paragraphs 7(a) to 7(d) above:

a) Did C have a reasonable belief that the information disclosed tended to show that either a criminal offence had been committed or was likely to be committed within the meaning of section 43B(1)(a) of ERA 1996 or that R1 to R4 had failed to comply with their legal obligation "*to account for expenses properly and honestly."* **[42]** within the meaning of section 43B(1)(b) of ERA 1996 (see sub-paragraphs 7(a) to 7(c) above);

b) Did C have a reasonable belief that the information disclosed (i.e. that since telling R3 about her illness earlier in the year that both she and her husband had been marginalised and had their jobs eroded) tended to show that R1 to R4 had failed to comply with their legal obligations within the meaning of section 43B(1)(b) of ERA 1996 to comply with the Equality Act 2010 or that the health or safety of any individual has been, is being or is likely to be endangered within the meaning of section 43B(1)(d) ERA 1996.

c) Were the conveyances of information allegedly made by C in the reasonable belief that they were in the "*public interest*".

Dismissal

9. What was the reason for C's dismissal? R1 contends that C was dismissed or the reason of a breakdown in the trust and confidence which was required to be reposed in her by AEL and thereby falling within the meaning of section 98(1)(b) of ERA

1996 as being some other substantial reason. C contends that she was dismissed for a discriminatory reason falling within section 13 and/or section 15 of EqA 2010 or for the reason of her making a protected disclosure within the meaning of section 103A of ERA 1996.

10. If C was dismissed for a fair potentially reason falling within section 98(1) of ERA 1996; was the dismissal fair or unfair within the meaning of section 98(4) of ERA 1996? C challenges the procedural fairness of her dismissal by reference to allegations[2] that:

    a) "*No fair process was undertaken…*" before she was dismissed;

    b) The director nominated to hear the appeal was "…*clearly partisan*" and C was denied access to "…*data which she considered relevant to her appeal points…*";

    c) C was "*unreasonably*" refused the right to record the appeal hearing which "*effectively deprived*" her of *"…the hearing to which she was entitled…*";

    d) The appeal had been "…*prejudged*…" by reference to the fact that C and her husband had been required to vacate Axnoller House which was the subject of legal proceedings issued by R1;

[2] See paragraph 57 of C's Re-Amended Particulars of Claim

e) The Appeal outcome letter "…*failed to adequately address* [C's] *key concerns…*" and the appeal was "…*not undertaken in good faith*…".

11. If C was not dismissed for the potentially fair reason identified by R1 as falling within section 98(1) of ERA 1996, was C dismissed for the reason or the principal reason of:

a) Her disability contrary to section 13 of EqA 2010; or

b) Her making of a disclosure qualifying for protection (as set out in paragraphs 7 and 8 above) contrary to section 103A of ERA 1996; or

c) R1 to R4 considering that she was a "…*a liability owing to her health condition, the Respondents took to be indicative that* [C] *would in the longer term not be able to undertake her role.*"[3] and the same amounted to R1 to R4 doing something which was unfavourable treatment and was arising in consequence of C's disability contrary to section 15 of EqA 2010;

d) R1 acting in consequence of C's "*…reaction…"* which was something arising in consequence of her disability namely "…*the side effects of high steroid-based medication; being mood swings, mania and shortness of temper*.." **[53]** contrary to section 15 of EqA 2010.

Claims of unlawful discrimination

Dismissal

12. Was C dismissed in breach of sections 13 and/or 15 of EqA 2010 – see sub-paragraphs 11(a), (c) and (d) above.

13. If R1 to R4 unlawfully discriminated against C by reason of something arising from her disability contrary to section 15 of EqA 2010 as set out in sub-paragraphs 11(c) and (d) above, can R1 to R4 show that their treatment of C was a proportionate means of achieving a legitimate aim in accordance with section 15(1)(b) of EqA 2010?

Additional allegations of unlawful treatment

14. Was C unlawfully discriminated against by R1, R2, R3 and R4 by reason of unfavourable treatment because of her disability contrary to section 13 of EqA 2010 by reference to the allegations set out in sub-paragraphs 5~~9~~8(a) to (t) of the Re-Amended Particulars of Claim (R1 to R3 adopting C's precise description of the alleged treatment) as follows:

(a) marginalising the Claimant in the performance of her role;

(b) seeking to appoint others to take over the Claimant's role;

(c) restricting access to the 2nd & 3rd Respondent's accounts system;

(d) seeking amendments to her terms and conditions of employment;

(e) manufacturing a reason to dismiss the Claimant;

(f) instigating and/or contributing to an unwarranted and malicious disciplinary

investigation against the Claimant

(g) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case against the Claimant;

(h) taking the events of 6th November 2018 as a reason to dismiss the Claimant;

(i) giving no opportunity for discussion before dismissing the Claimant;

(j) pursuing possession proceedings against the Claimant;

(k) expecting her to move to a property unsuitable for her medical needs;

(l) interfering with the Claimant's occupation of Axnoller House and facilities for her

horses and/or orchestrating a campaign against the Claimant as set out in paragraphs 32- 33;

[Paragraphs 32 - 33 of the Amended Particulars of Claim state:

> 32. In the period immediately following the Claimant's dismissal, the Respondents have acted in a particularly unpleasant and obstructive manner towards the Claimant and her husband, despite the Claimant, her GP and solicitors making clear the implications on the Claimant's health. This has included:
>
> a. On or around 9 November 2018 preventing access to personal as well as work emails even when access has been required for the purposes of appealing the decision to dismiss;
>
> b. Also on or around 9 November 2018 viewing the Claimant's personal emails and
>
> using information gathered from that process to further their alleged interests,

including the assertion of rights denied by the Claimant in respect of property

owned by the Claimant and her husband and in matters involving the Trustee in

Bankruptcy;

c. On or around 15 November 2018 fitting cameras to track the couple's movements

both outside and within the properties occupied and continuing to monitor their

movements and/or continually retain their ability to do so;

d. On or around 15 November 2018 changing the locks to facilities required for the

care of their horses and continuing to restrict access to their horses;

e. From 18 December 2018 onwards allowing their agents to interfere with the care of, or assert rights over, their horses and those belonging to friends of the On Claimant and her husband;

f. From 3 December 2018 onwards demanding that they move their horses from the

grounds despite there being nowhere else for them to be kept and threatening to

destroy the horses otherwise;

g. On or around 18 January 2019 onwards forcibly preventing access to West Axnoller Cottage;

h. attempting to gain access to West Axnoller Cottage and Axnoller House by breaking and entering;

i. Continuing to prevent access to personal belongings stored at West Axnoller Cottage including but not limited to medication;

j. Allowing security personnel and other agents and employees of the Respondents to be aggressive and veRussell Bowyerally and physically abusive towards them;

k. Most particularly as regards (j) above, on or around 18 January 2019 allowing the security personnel occupying the cottage to assault the Claimant to such an extent that she will require corrective surgery to her shoulder as a direct result of the assault upon her;

l. On or around 21 June 2019 making false or misleading allegations to the police

which resulted in the Claimant's husband being arrested.

33. On or around 19 January 2019 the respondents authorised and enabled the removal of boxes of personal papers and correspondence from West Axnoller Cottage without the Claimant and her husband's permission. In addition to this the Respondents allowed the security guards to distuRussell Bowyer their sleep by driving past the property in the dead of night leaving the couple sleep deprived and accusing the Claimant without cause or reason of theft and damage to property. Such action on the part of the Respondents has resulted in the Claimant and her husband successfully seeking an injunction – and costs – in their favour in order to preserve their peaceful enjoyment of the disputed premises and facilities pending final hearing.]

(m) refusing to provide the Claimant with access to her personal emails and other data

relevant to her employment and appeal;

(n) refusing the Claimant entry to West Axnoller Cottage to collect belongings;

(o) being obstructive in their stance to her appeal;

(p) prejudging her appeal and instigating unjustified and partisan post-termination

investigations via Gill Craik & Birketts LLP;

(q) terminating her access to her private health insurance as set out at paragraphs, 17

to 38 above, and by:

(r) putting in place unreasonable conditions on her notice as listed in her letter of dismissal dated 8th November 2018 and, on the Claimant being unable to comply, failing to pay PILON; and

(s) conducting litigation in respect of possession and insolvency related to the termination of employment and the issues arising in a particularly aggressive and unpleasant manner resulting in numerous successful applications for costs; and

(t) conducting themselves in such a way as to result in the civil courts providing injunctive relief in favour of the Claimant and her husband.

such episodes amounting to an continuous act or series of acts against the Claimant.

15. Was C unlawfully discriminated against by R1, R2, R3 and R4 treating C unfavourably because of something arising in consequence of her disability, namely "…*the perceived limitation in her ability to undertake her role in the medium to long term…*" **[59]** contrary to section 15 of EqA 2010 by reference to the allegations set out in sub-paragraphs 5~~9~~8 (a) to (t) of the Re-Amended Particulars

of Claim (R1 to R3 adopting C's precise description of the alleged treatment) as set out in paragraph 14 above?

16. In relation to matters alleged in paragraphs 14 and 15 above which are said to amount to unlawful discrimination, C confines her allegations against R4 to those sub-paragraphs set out in paragraph ~~60~~ 59 of her Re-Amended Particulars of Claim namely *paragraph 14 (a), (c), (f), (k), (l), (o), (p) and (q)* above.

17. If R1, R2, R3, R4 did unlawfully discriminate against C contrary to section 15 of Eq 2010, can they, in relation to any finding of unfavourable treatment, show that the treatment was a proportionate means of achieving a legitimate aim?

Victimisation

18. C relies upon her communication to R3 on 3 November 2018 [24] as constituting protected act (the "Protected Act") for the purposes of section 27 of EqA 2010.

19. By reason of the Protected Act, did R1, R2, R3 and R4 subject to C to a detriment by acting or failing to act in accordance with the allegations set out in sub-paragraphs 5~~9~~8(e) to (t) of her Re-Amended Particulars of Claim (R1 to R4 adopting C's precise description of the alleged treatment) as follows:~~?~~

(e) manufacturing a reason to dismiss the Claimant;
(f) instigating and/or contributing to an unwarranted and malicious disciplinary investigation against the Claimant

(g) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case against the Claimant;
(h) taking the events of 6th November 2018 as a reason to dismiss the Claimant;
(i) giving no opportunity for discussion before dismissing the Claimant;
(j) pursuing possession proceedings against the Claimant;
(k) expecting her to move to a property unsuitable for her medical needs;
(l) interfering with the Claimant's occupation of Axnoller House and facilities for her
horses and/or orchestrating a campaign against the Claimant as set out in paragraphs 32- 33;

[Paragraphs 32 - 33 of the Amended Particulars of Claim state:

32. In the period immediately following the Claimant's dismissal, the Respondents have acted in a particularly unpleasant and obstructive manner towards the Claimant and her husband, despite the Claimant, her GP and solicitors making clear the implications on the Claimant's health. This has included:

a. On or around 9 November 2018 preventing access to personal as well as work emails even when access has been required for the purposes of appealing the decision to dismiss;

b. Also on or around 9 November 2018 viewing the Claimant's personal emails and

using information gathered from that process to further their alleged interests,

including the assertion of rights denied by the Claimant in respect of property

owned by the Claimant and her husband and in matters involving the Trustee in

Bankruptcy;

c. On or around 15 November 2018 fitting cameras to track the couple's movements

both outside and within the properties occupied and continuing to monitor their

movements and/or continually retain their ability to do so;

d. On or around 15 November 2018 changing the locks to facilities required for the

care of their horses and continuing to restrict access to their horses;

e. From 18 December 2018 onwards allowing their agents to interfere with the care of, or assert rights over, their horses and those belonging to friends of the On Claimant and her husband;

f. From 3 December 2018 onwards demanding that they move their horses from the

grounds despite there being nowhere else for them to be kept and threatening to

destroy the horses otherwise;

g. On or around 18 January 2019 onwards forcibly preventing access to West Axnoller Cottage;

h. attempting to gain access to West Axnoller Cottage and Axnoller House by breaking and entering;

i. Continuing to prevent access to personal belongings stored at West Axnoller Cottage including but not limited to medication;

j. Allowing security personnel and other agents and employees of the Respondents to be aggressive and veRussell Bowyerally and physically abusive towards them;

k. Most particularly as regards (j) above, on or around 18 January 2019 allowing the security personnel occupying the cottage to assault the Claimant to such an extent that she will require corrective surgery to her shoulder as a direct result of the assault upon her;

l. On or around 21 June 2019 making false or misleading allegations to the police

which resulted in the Claimant's husband being arrested.

33. On or around 19 January 2019 the respondents authorised and enabled the removal of boxes of personal papers and correspondence from West Axnoller Cottage without the Claimant and her husband's permission. In addition to this the Respondents allowed the security guards to distuRussell Bowyer their sleep by driving past the property in the dead of night leaving the couple sleep deprived and accusing the Claimant without cause or reason of theft and damage to property. Such action on the part of the Respondents has resulted in the Claimant and her husband successfully seeking an injunction – and costs – in their favour in order to preserve their peaceful enjoyment of the disputed premises and facilities pending final hearing.]

(m) refusing to provide the Claimant with access to her personal emails and other data
relevant to her employment and appeal;
(n) refusing the Claimant entry to West Axnoller Cottage to collect belongings;

(o) being obstructive in their stance to her appeal;
(p) prejudging her appeal and instigating unjustified and partisan post-termination investigations via Gill Craik & Birketts LLP;
(q) terminating her access to her private health insurance as set out at paragraphs, 17
to 38 above, and by:
(r) putting in place unreasonable conditions on her notice as listed in her letter of dismissal dated 8th November 2018 and, on the Claimant being unable to comply, failing to pay PILON; and
(s) conducting litigation in respect of possession and insolvency related to the termination of employment and the issues arising in a particularly aggressive and unpleasant manner resulting in numerous successful applications for costs; and
(t) conducting themselves in such a way as to result in the civil courts providing injunctive relief in favour of the Claimant and her husband.
such episodes amounting to an continuous act or series of acts against the Claimant

20. In relation to matters alleged in paragraph 18 and 19 above which are said to amount to unlawful victimisation contrary to section 27 EqA 2010, C confines her allegations against R4 to those matters set out in paragraph 6~~0~~1 of her Re-Amended Particulars of Claim namely paragraph 19 (f), (o), (p) and (q).

Harassment on grounds of C's disability

21. Did R1, R2, R3 and R4 harass C by engaging in unwanted conduct relating to her disability which had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for C contrary to section 26 of EqA 2010 by acting in accordance with the allegations set out at paragraph 5~~9~~8 of her Amended Particulars of Claim~~?~~:

(a) marginalising the Claimant in the performance of her role;
(b) seeking to appoint others to take over the Claimant's role;
(c) restricting access to the 2nd & 3rd Respondent's accounts system;
(d) seeking amendments to her terms and conditions of employment;
(e) manufacturing a reason to dismiss the Claimant;
(f) instigating and/or contributing to an unwarranted and malicious disciplinary investigation against the Claimant
(g) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case against the Claimant;
(h) taking the events of 6th November 2018 as a reason to dismiss the Claimant;
(i) giving no opportunity for discussion before dismissing the Claimant;
(j) pursuing possession proceedings against the Claimant;
(k) expecting her to move to a property unsuitable for her medical needs;
(l) interfering with the Claimant's occupation of Axnoller House and facilities for her
horses and/or orchestrating a campaign against the Claimant as set out in paragraphs 32- 33;

[Paragraphs 32 - 33 of the Amended Particulars of Claim state:
32. In the period immediately following the Claimant's dismissal, the Respondents have acted in a particularly unpleasant and obstructive manner towards the Claimant and her husband, despite the Claimant, her GP and solicitors making clear the implications on the Claimant's health. This has included:
a. On or around 9 November 2018 preventing access to personal as well as work emails even when access has been required for the purposes of appealing the decision to dismiss;
b. Also on or around 9 November 2018 viewing the Claimant's personal emails and using information gathered from that process to further their alleged interests, including the assertion of rights denied by the Claimant in respect of property owned by the Claimant and her husband and in matters involving the Trustee in Bankruptcy;

c. On or around 15 November 2018 fitting cameras to track the couple's movements
both outside and within the properties occupied and continuing to monitor their movements and/or continually retain their ability to do so;
d. On or around 15 November 2018 changing the locks to facilities required for the care of their horses and continuing to restrict access to their horses;
e. From 18 December 2018 onwards allowing their agents to interfere with the care of, or assert rights over, their horses and those belonging to friends of the On Claimant and her husband;
f. From 3 December 2018 onwards demanding that they move their horses from the grounds despite there being nowhere else for them to be kept and threatening to destroy the horses otherwise;
g. On or around 18 January 2019 onwards forcibly preventing access to West Axnoller Cottage;
h. attempting to gain access to West Axnoller Cottage and Axnoller House by breaking and entering;
i. Continuing to prevent access to personal belongings stored at West Axnoller Cottage including but not limited to medication;
j. Allowing security personnel and other agents and employees of the Respondents to be aggressive and veRussell Bowyerally and physically abusive towards them;
k. Most particularly as regards (j) above, on or around 18 January 2019 allowing the security personnel occupying the cottage to assault the Claimant to such an extent that she will require corrective surgery to her shoulder as a direct result of the assault upon her;
l. On or around 21 June 2019 making false or misleading allegations to the police which resulted in the Claimant's husband being arrested.
33. On or around 19 January 2019 the respondents authorised and enabled the removal of boxes of personal papers and correspondence from West Axnoller Cottage without the Claimant and her husband's permission. In addition to this the Respondents allowed the security guards to distuRussell Bowyer their sleep by driving past the property in the dead of night leaving the couple sleep deprived and accusing the Claimant without cause or reason of theft and damage to property. Such action on the part of the Respondents has resulted in the Claimant and her

husband successfully seeking an injunction – and costs – in their favour in order to preserve their peaceful enjoyment of the disputed premises and facilities pending final hearing.]

(m) refusing to provide the Claimant with access to her personal emails and other data
relevant to her employment and appeal;
(n) refusing the Claimant entry to West Axnoller Cottage to collect belongings;
(o) being obstructive in their stance to her appeal;
(p) prejudging her appeal and instigating unjustified and partisan post-termination investigations via Gill Craik & Birketts LLP;
(q) terminating her access to her private health insurance as set out at paragraphs, 17
to 38 above, and by:
(r) putting in place unreasonable conditions on her notice as listed in her letter of dismissal dated 8th November 2018 and, on the Claimant being unable to comply, failing to pay PILON; and
(s) conducting litigation in respect of possession and insolvency related to the termination of employment and the issues arising in a particularly aggressive and unpleasant manner resulting in numerous successful applications for costs; and
(t) conducting themselves in such a way as to result in the civil courts providing injunctive relief in favour of the Claimant and her husband.
such episodes amounting to an continuous act or series of acts against the Claimant.

22. In In relation to matters alleged in paragraph 21 above which are said to amount to unlawful harassment, C confines her allegations against R4 to those matters set out in paragraph ~~60~~ 59 of her Amended Particulars of Claim namely as set in paragraph 21 (a), (c), (f), (o) (p) and (q) above.

Failure by R1 and R2 to comply with its duty to make adjustments

23. C alleges that by "…*terminating her access to private health insurance…"* R1 and R2 applied a provision, criterion or practice of *"…terminating an employee's benefits including private health insurance by paying in lieu of notice*" **[67]** which put her at particular disadvantage when compared with a person who is not disabled. The particular disadvantage is alleged to be the disruption of continuity of care, additional cost in purchasing private medical cover and causing stress which exacerbated C's underlying renal condition.

24. C further alleges that the reasonable adjustment which R1 was under a duty to apply was "…*to continue funding the private health insurance policy until the end of the Claimant's notice period*." **[68]**.

25. Did R1 fail to comply the requirements in relation to its duty to make adjustments contrary to section 21 of EqA 2010 by ceasing to continue funding C's private health cover after the termination of her employment and its decision not to pay make payments in lieu of her notice?

Detriments contrary to section 47B of ERA 1996

26. If C made disclosures qualifying for protection under section 43B(1) of ERA 1996, did R1, R2, R3 and R4 subject to C to any detriment contrary to section 47B of ERA 1996 by reference to any act or any deliberate failure to act in terms of those

matters alleged by her at sub-paragraphs 598 (a) to (t) of the Amended Particulars of Claim, as set out below:

(a) marginalising the Claimant in the performance of her role;

(b) seeking to appoint others to take over the Claimant's role;

(c) restricting access to the 2nd & 3rd Respondent's accounts system;

(d) seeking amendments to her terms and conditions of employment;

(e) manufacturing a reason to dismiss the Claimant;

(f) instigating and/or contributing to an unwarranted and malicious disciplinary investigation against the Claimant

(g) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case against the Claimant;

(h) taking the events of 6th November 2018 as a reason to dismiss the Claimant;

(i) giving no opportunity for discussion before dismissing the Claimant;

(j) pursuing possession proceedings against the Claimant;

(k) expecting her to move to a property unsuitable for her medical needs;

(l) interfering with the Claimant's occupation of Axnoller House and facilities for her

horses and/or orchestrating a campaign against the Claimant as set out in paragraphs 32- 33;

(m) refusing to provide the Claimant with access to her personal emails and other data

relevant to her employment and appeal;

(n) refusing the Claimant entry to West Axnoller Cottage to collect belongings;

(o) being obstructive in their stance to her appeal;

(p) prejudging her appeal and instigating unjustified and partisan post-termination investigations via Gill Craik & Birketts LLP;

(q) terminating her access to her private health insurance as set out at paragraphs, 17

to 38 above, and by:

(r) putting in place unreasonable conditions on her notice as listed in her letter of dismissal dated 8th November 2018 and, on the Claimant being unable to comply, failing to pay PILON; and

(s) conducting litigation in respect of possession and insolvency related to the termination of employment and the issues arising in a particularly aggressive and unpleasant manner resulting in numerous successful applications for costs; and

(t) conducting themselves in such a way as to result in the civil courts providing injunctive relief in favour of the Claimant and her husband.

such episodes amounting to an continuous act or series of acts against the Claimant.

27. In relation to matters alleged in paragraph 26 above which are said to amount to detrimental treatment, C confines her allegations against R4 to those sub-paragraphs set out in paragraph 6~~0~~1 of her Amended Particulars of Claim namely paragraph 26 *(a), (c), (f), (o), (p) and (q) above).*

Claim under section 38 of the Employment Act 2002

28. Did R1 fail to give a written statement of employment particulars to C contrary section 38 of the Employment Act 2002?

Remedy (if required)

29. What is C's financial loss and what compensation for financial loss is she entitled to recover in the event of her being successful in any of her complaints?

30. If C was unfairly dismissed by reason of her making a protected disclosure or her dismissal was unlawful contrary to section 13 or section 15 of EqA 2010, should any reduction of her compensation be made to take account of:

    a) The fact that if her dismissal was procedurally unfair that the adoption of a fair procedure by R1 would have resulted in her dismissal in any event; and/or

    b) Her actions contributing to R1's decision to dismiss her; and/or

    c) Her participation in the unlawful scheme in the context of the principles set out in the case of W Devis & Sons Ltd v Atkins.

31. Is C entitled to an uplift of any compensation awarded by the Employment Tribunal in circumstances that there is a finding that R1 has failed to comply with the relevant parts of the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).

32. Is C entitled to any award of compensation for injury to her feelings or by way of aggravated damages in the event of her being successful in any of her complaints?

33. What award of damages (if any) is the C entitled to on account of her alleged personal injury suffered as a result of the alleged discrimination?

34. What interest (if any) is C entitled to recover on her damages for discrimination.

35. Is C entitled to 2 or 4 weeks' pay if R1 is shown to have failed to provide her with a statement of employment particulars?

DAVID READE QC

MARTIN PALMER

~~**13 February 2023**~~

12 June 2023

APPENDIX 2

ANDREW YOUNG BRAKE

Claimant

-and-

5. CHEDINGTON EVENTS LIMITED
6. THE CHEDINGTON COURT ESTATE LIMITED
7. DR GEOFFREY GUY
8. MR. RUSSELL BOWYER

Respondents

REVISED AGREED LIST OF ISSUES

Preliminary issues

Qualifying service

36. When did C's employment with R2 commence?

37. C contends that it commenced with R1 on 23/07/2015. R2 contends that the period of qualifying employment commenced on 17/02/2017. R2 will rely upon its case relating to the unlawful scheme in relation to the status of the employment relationship prior to 17/02/2017 and as to remedy (if so required).

38. Consequently did C have sufficient qualifying service within the meaning of section 108 of the Employment Rights Act 1996 ("**ERA 1996**") to pursue his claim of 'ordinary'[4] unfair dismissal?

Whether or not C's wife is disabled person for the purposes of C's associative discrimination claim?

39. It is admitted that the nature of C's wife's (Nihal Brake) medical conditions means that she has a disability within the meaning of section 6 of the Equality Act 2010 ("**EqA 2010**").

40. The Respondents make no admissions as to C's wife being susceptible to stress or any other behaviourial trait as a result of any prevailing medical condition as the Respondents have no specific information as to her medical position(s) including her treatment regime and/or medication.

41. Consequently, is there a link between stress and the exacerbation of a renal condition and can the C's wife's treatment regime and/or medication have an effect upon the C's wife's behaviour as alleged by C's wife in her grounds of claim (Case No.: 1400597/2019)?

Disclosures qualifying for information

[4] C separately pursues a claim for dismissal under S103A ERA 1996 and additional claims involving the

42. Did C's wife (on behalf of C and herself) make a disclosure of information qualifying for protection within the meaning of section 43B(1) of ERA 1996 by reference to her conveying to R3 the following:

    i) *"On 3rd November 2018, [C] wrote to [R3] on behalf of her and her husband to tell him that she felt that since telling him about her illness earlier in the year, that both her and her husband had been marginalised and their jobs eroded."*[5]

43. If C's wife on his behalf did convey some or all of the information set out at sub-paragraph 7(a) above:

    d) *Did C have a reasonable belief that the information disclosed (i.e. that since C's wife had told R3 about her illness earlier in the year that both she and C had been marginalised and had their jobs eroded) tended to show that R1 to R4 had failed to comply with their legal obligations within the meaning of section 43B(1)(b) of ERA 1996 to comply with the Equality Act 2010 or that the health or safety of any individual has been, is being or is likely to be endangered within the meaning of section 43B(1)(d) ERA 1996.*

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circumstances of his dismissal under provisions of the Equality Act 2010.

[5] See paragraph 18 of C's Amended Particulars of Claim dated 27 April 2020

e) Was the conveyance of information allegedly made by C's wife on his behalf made in the reasonable belief that they were in the "*public interest*".

Dismissal

44. What was the reason for C's dismissal? R2 contends that C was dismissed or the reason of a breakdown in the trust and confidence which was required to be reposed in him by R2 and thereby falling within the meaning of section 98(1)(b) of ERA 1996 as being some other substantial reason. C contends that he was dismissed for an associative discriminatory reason falling within section 13 EqA 2010 or for the reason of his wife, Nihal Brake, making a protected disclosure within the meaning of section 103A of ERA 1996.

45. If C was dismissed for a fair potentially reason falling within section 98(1) of ERA 1996; was the dismissal fair or unfair within the meaning of section 98(4) of ERA 1996? C challenges the procedural fairness of his dismissal by reference to allegations[6] that:

f) "*No fair process was undertaken…*" before he was dismissed;

g) The director nominated to hear the appeal was "…*clearly partisan and conflicted*";

[6] See paragraph 41 of C's Re-Amended Particulars of Claim

h) C was "*unreasonably refused the right to attend the appeal hearing when he and his chosen companion* [C's wife] *were fit to attend*";

i) The appeal had been "…*prejudged*…" by reference to the fact that C and her husband had been required to vacate Axnoller House which was the subject of legal proceedings issued by R1;

j) The Appeal outcome letter "… *was clearly drafted by the Claimant's* [sic] *solicitors purely as a defence to the faults identified. Accordingly the appeal was not undertaken in good faith"*.[7]

46. If C was not dismissed for the potentially fair reason identified by R2 as falling within section 98(1) of ERA 1996, was C dismissed for the reason or the principal reason of:

e) C's association with his wife by reference to the protected characteristic of her disability contrary to section 13 of EqA 2010; or

f) The making of a disclosure on his behalf by C's wife qualifying for protection (as set out in paragraphs 7 and 8 above) contrary to section 103A of ERA 1996.

Claims of unlawful discrimination

[7] See paragraph 41 of C's Re-Amended Particulars of Claim

Dismissal

47. Was C dismissed in breach of sections 13 of EqA 2010 by reference to the complaints set out in sub-paragraph 11(a) above? C relies upon a hypothetical comparator for his complaint set out in sub-paragraph 11(a) (disability associative direct discrimination).

Additional allegations of unlawful treatment

48. Was C unlawfully discriminated against by R1, R2, R3 and R4 by reason of unfavourable treatment because of his association to his wife who has the protected characteristic of her disability contrary to section 13 of EqA 2010 by reference to the allegations set out in sub-paragraphs 42~~3~~ (a) to (o[8]) of his Amended Particulars of Claim (R1 to R4 adopting C's precise description of the alleged treatment) as follows:~~?~~

(a) marginalising the Claimant in the performance of his role;

(b) seeking to appoint others to take over the Claimant's role;

(c) manufacturing a reason to dismiss the Claimant;

(d) seeking amendments to his terms and conditions of employment;

(e) instigating and/or contributing to an unwarranted and malicious disciplinary investigation against the Claimant;

[8] See paragraph 43 in the Re-Amended Particulars of Claim

(f) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case against

the Claimant;

(g) taking the events of 6th November 2018 as a reason to dismiss the Claimant;

(h) giving no opportunity for discussion before dismissing the Claimant;

(i) pursuing possession proceedings against the Claimant;

(j) interfering with the Claimant's occupation of Axnoller House and facilities for his horses

and/or orchestrating a campaign against the Claimant as set out in paragraphs 25 & 26;

[Paragraphs 25 and 26 of the Amended Particulars of Claim state:

25. In the period immediately following the Claimant's dismissal, the Respondents have acted in a particularly unpleasant and obstructive manner towards the Claimant and AB. This has included:

a. On or around 9 November 2018 preventing access to personal as well as work emails even when access has been required for the purposes of appealing the decision to dismiss;

b. Also on or around 9 November 2018 viewing AB's personal emails and using

information gathered from that process to further their alleged interests, including

the assertion of rights denied by the Claimant in respect of property owned by the

Claimant and her husband and in matters involving the Trustee in Bankruptcy;

c. On or around 15 November 2018 fitting cameras to track the couple's movements

both outside and within the properties occupied and continuing to monitor their

movements and/or continually retain their ability to do so;

d. On or around 15 November 2018 changing the locks to facilities required for the

care of their horses and continuing to restrict access to their horses;

e. From 18 December 2018 onwards allowing their agents to interfere with the care of, or assert rights over, their horses and those belonging to friends of the On Claimant and her husband;

f. From 3 December 2018 onwards demanding that they move their horses from the grounds despite there being nowhere else for them to be kept and threatening to destroy the horses otherwise;

g. On or around 18 January 2019 onwards forcibly preventing access to West Axnoller Cottage;

h. attempting to gain access to West Axnoller Cottage and Axnoller House by breaking and entering;

i. Continuing to prevent access to personal belongings stored at West Axnoller Cottage including but not limited to medication;

j. Allowing security personnel and other agents and employees of the Respondents to be aggressive and verbally and physically abusive towards them;

k. Most particularly as regards (j) above, on or around 18 January 2019 allowing the security personnel occupying the cottage to assault the Claimant to such an extent that she will require corrective surgery to her shoulder as a direct result of the assault upon her;

l. On or around 21 June 2019 making false or misleading allegations to the police

which resulted in the Claimant's arrest.

26. On or around 19 January 2019 the respondents authorised and enabled the removal of boxes of personal papers and correspondence from the cottage without the Claimant and AB's permission. In addition to this, the Respondents allowed the security guards to disturb the Claimant and AB's sleep by driving past the property in the dead of night leaving the couple sleep deprived and accusing the Claimant without cause or reason of theft and damage to property. Such action on the part of the Respondents has resulted in the Claimant and AB successfully seeking an injunction – and costs – in their favour in order to preserve their peaceful enjoyment of the disputed premises and facilities pending final hearing.]

(k) refusing to provide the Claimant with access to his personal emails and other data relevant to his employment and appeal;

(l) refusing the Claimant entry to West Axnoller Cottage to collect belongings;

(m) being obstructive in their stance to his appeal;

(n) prejudging his appeal.

as set out at paragraphs 12–-28 above, and by:

(o) putting in place unreasonable conditions on his notice as listed in his letter of dismissal dated 8th November 2018 and, on the Claimant being unable to comply, failing to pay

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such episodes amounting to an continuous act or series of acts against the Claimant.

49. In relation to matters alleged in paragraph 13 above which are said to amount to unlawful discrimination, C confines his allegations against R4 to those sub-paragraphs set out in paragraph 44 of his Amended Particulars of Claim namely paragraph 13 *(a), (e), (j), (l), (m) and (n) above.*

Victimisation

C relies upon his wife's communication to R3 on 3 November 2018[9] as constituting a protected act (the "Protected Act") for the purposes of section 27 of EqA 2010.

50. By reason of the Protected Act, did R1, R2, R3 and R4 subject C to a detriment by acting or failing to act in accordance with the allegations set out in sub-paragraphs 45(a) to (k) of his Amended Particulars of Claim (R1 to R4 adopting C's precise description of the alleged treatment) as follows:

> *(a) actively seeking a reason to dismiss the Claimant or otherwise manufacturing such a reason;*
>
> *(b) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case*
>
> *against the Claimant;*
>
> *(c) instigating and/or contributing to an unwarranted and malicious disciplinary*
>
> *investigation against the Claimant*
>
> *(d) taking the events of 6th November 2018 as a reason to dismiss the Claimant;*
>
> *(e) giving no opportunity for discussion before dismissing the Claimant;*
>
> *(f) putting unreasonable obligations on the Claimant in the letter of dismissal dated 8th November 2018 including an unreasonable timeframe to vacate the family home of 14 years;*
>
> *(g) pursuing possession proceedings against the Claimant;*

[9] See paragraph 18 of C's Re-Amended Particulars of Claim

(h) interfering with the Claimant's occupation of Axnoller House and facilities for his horses and/or orchestrating a campaign against the Claimant as set out in paragraphs 25 & 26 of the Amended Particulars of Claim;

> [Paragraphs 25 and 26 of the Amended Particulars of Claim state:
> 25. In the period immediately following the Claimant's dismissal, the Respondents have acted in a particularly unpleasant and obstructive manner towards the Claimant and AB. This has included:
> a. On or around 9 November 2018 preventing access to personal as well as work emails even when access has been required for the purposes of appealing the decision to dismiss;
> b. Also on or around 9 November 2018 viewing AB's personal emails and using information gathered from that process to further their alleged interests, including the assertion of rights denied by the Claimant in respect of property owned by the Claimant and her husband and in matters involving the Trustee in Bankruptcy;
> c. On or around 15 November 2018 fitting cameras to track the couple's movements both outside and within the properties occupied and continuing to monitor their movements and/or continually retain their ability to do so;
> d. On or around 15 November 2018 changing the locks to facilities required for the care of their horses and continuing to restrict access to their horses;
> e. From 18 December 2018 onwards allowing their agents to interfere with the care of, or assert rights over, their horses and those belonging to friends of the On Claimant and her husband;
> f. From 3 December 2018 onwards demanding that they move their horses from the grounds despite there being nowhere else for them to be kept and threatening to destroy the horses otherwise;

g. On or around 18 January 2019 onwards forcibly preventing access to West Axnoller Cottage;
h. attempting to gain access to West Axnoller Cottage and Axnoller House by breaking and entering;
i. Continuing to prevent access to personal belongings stored at West Axnoller Cottage including but not limited to medication;
j. Allowing security personnel and other agents and employees of the Respondents to be aggressive and veRussell Bowyerally and physically abusive towards them;
k. Most particularly as regards (j) above, on or around 18 January 2019 allowing the security personnel occupying the cottage to assault the Claimant to such an extent that she will require corrective surgery to her shoulder as a direct result of the assault upon her;
l. On or around 21 June 2019 making false or misleading allegations to the police which resulted in the Claimant's arrest.

26. On or around 19 January 2019 the respondents authorised and enabled the removal of boxes of personal papers and correspondence from the cottage without the Claimant and AB's permission. In addition to this, the Respondents allowed the security guards to disturb the Claimant and AB's sleep by driving past the property in the dead of night leaving the couple sleep deprived and accusing the Claimant without cause or reason of theft and damage to property. Such action on the part of the Respondents has resulted in the Claimant and AB successfully seeking an injunction – and costs – in their favour in order to preserve
their peaceful enjoyment of the disputed premises and facilities pending final hearing.]

(i) refusing the Claimant entry to West Axnoller Cottage to collect belongings;

(j) being obstructive in their stance to his appeal;

(k) prejudging his appeal.

51. In relation to matters alleged in paragraph 15 and 16 above which are said to amount to unlawful victimisation, C confines his allegations against R4 to those matters set out in paragraph 46 of his Re-Amended Particulars of Claim as follows from paragraph 16 *(c), (h), (i), (j) and (k)* above.

Harassment on grounds of C's association with his wife and the protected characteristic of her disability

52. Did R1, R2, R3 and R4 harass C by engaging in unwanted conduct towards C relating to his association with his wife who has the protected characteristic of her disability which had the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for C contrary to section 26 of EqA 2010 by acting in accordance with the allegations set out at paragraph 4~~3~~6 of his Amended Particulars of Claim~~?~~ as follows:

(a) actively seeking a reason to dismiss the Claimant or otherwise manufacturing such a reason;

(b) making enquiries of Mr Maddocks in an attempt to substantiate a dismissal case against the Claimant;

(c) instigating and/or contributing to an unwarranted and malicious disciplinary investigation against the Claimant

(d) taking the events of 6th November 2018 as a reason to dismiss the Claimant;

(e) giving no opportunity for discussion before dismissing the Claimant;
(f) putting unreasonable obligations on the Claimant in the letter of dismissal dated 8th
November 2018 including an unreasonable timeframe to vacate the family home of 14 years;
(g) pursuing possession proceedings against the Claimant;
(h) interfering with the Claimant's occupation of Axnoller House and facilities for his
horses and/or orchestrating a campaign against the Claimant as set out in paragraphs 25 & 26 of the Amended Particulars of Claim;

[Paragraphs 25 and 26 of the Amended Particulars of Claim state:

25. In the period immediately following the Claimant's dismissal, the Respondents have acted in a particularly unpleasant and obstructive manner towards the Claimant and AB. This has included:

a. On or around 9 November 2018 preventing access to personal as well as work emails even when access has been required for the purposes of appealing the decision to dismiss;

b. Also on or around 9 November 2018 viewing AB's personal emails and using

information gathered from that process to further their alleged interests, including

the assertion of rights denied by the Claimant in respect of property owned by the

Claimant and her husband and in matters involving the Trustee in Bankruptcy;

c. On or around 15 November 2018 fitting cameras to track the couple's movements

both outside and within the properties occupied and continuing to monitor their

movements and/or continually retain their ability to do so;

d. On or around 15 November 2018 changing the locks to facilities required for the

care of their horses and continuing to restrict access to their horses;

e. From 18 December 2018 onwards allowing their agents to interfere with the care of, or assert rights over, their horses and those belonging to friends of the On Claimant and her husband;

f. From 3 December 2018 onwards demanding that they move their horses from the

grounds despite there being nowhere else for them to be kept and threatening to

destroy the horses otherwise;

g. On or around 18 January 2019 onwards forcibly preventing access to West Axnoller Cottage;

h. attempting to gain access to West Axnoller Cottage and Axnoller House by breaking and entering;

i. Continuing to prevent access to personal belongings stored at West Axnoller Cottage including but not limited to medication;

j. Allowing security personnel and other agents and employees of the Respondents to be aggressive and verbally and physically abusive towards them;

k. Most particularly as regards (j) above, on or around 18 January 2019 allowing the security personnel occupying the cottage to assault the Claimant to such an extent that she will require corrective surgery to her shoulder as a direct result of the assault upon her;

l. On or around 21 June 2019 making false or misleading allegations to the police

which resulted in the Claimant's arrest.

26. On or around 19 January 2019 the respondents authorised and enabled the removal of boxes of personal papers and correspondence from the cottage without the Claimant and AB's permission. In addition to this, the Respondents allowed the security guards to disturb the Claimant and AB's sleep by driving past the property in the dead of night leaving the couple sleep deprived and accusing the Claimant without cause or reason of theft and damage to property. Such action on the part of the Respondents has resulted in the Claimant and AB successfully seeking an injunction – and costs – in their favour in order to preserve

their peaceful enjoyment of the disputed premises and facilities pending final hearing.]

(i) refusing the Claimant entry to West Axnoller Cottage to collect belongings;
(j) being obstructive in their stance to his appeal;

(k) prejudging his appeal.

53. In ~~In~~ relation to matters alleged in paragraph 18 above which are said to amount to unlawful harassment by way of association, C confines his allegations against R4 to those matters set out in paragraph 4~~4~~7 of his Re-Amended Particulars of Claim and as set out above at paragraph 1~~8~~3 *(a) (e), (j), (l), (m) & (n)* above.

Claim under section 38 of the Employment Act 2002

54. Did R2 fail to give to C a written statement of employment particulars contrary section 38 of the Employment Act 2002?

Remedy (if required)

55. What is C's financial loss and what compensation for financial loss is he entitled to recover in the event of him being successful in any of his complaints?

56. If C was unfairly dismissal, should any reduction of his compensation be made to take account of:

    d) The fact that if his dismissal was procedurally unfair that the adoption of a fair procedure by R1 would have resulted in his dismissal in any event; and/or

e) His actions contributing to R2's decision to dismiss him;

f) His participation in the unlawful scheme in the context of the principles set out in the case of W Devis & Sons Ltd v Atkins.

57. Is C entitled to an uplift of any compensation awarded by the Employment Tribunal in circumstances that there is a finding that R2 has failed to comply with the relevant parts of the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).

58. Is C entitled to any award of compensation for injury to his feelings or by way of aggravated damages in the event of her being successful in any of his complaints?

59. What interest is C entitled to recover on any damages for discrimination.

60. Is C entitled to 2 or 4 weeks' pay by way of compensation if R2 is determined to have failed to provide him with a statement of employment particulars?

DAVID READE QC

MARTIN PALMER

~~**13 February 2023**~~

12 June 2023