EMPLOYMENT TRIBUNALS

Claimant: (1) Mr P Martin and (2) Mrs E Martin
Respondent: Achieve Lifestyle Ltd

Heard at: Reading
On: 9 & 10 August 2023

Before: Employment Judge Shastri-Hurst,
Members: Ms B Osborne
Mrs C Bailey

Representation
Claimant: Mr P Starcevic (counsel)
Respondent: Mr S Hoyle (legal consultant)

RESERVED JUDGMENT

1. The first and second claimants' claims of ordinary unfair dismissal are well-founded and succeed;

2. The second claimant's claim of indirect discrimination is well-founded and succeeds;

3. The second claimant's claim of failure to make reasonable adjustments is well-founded and succeeds;

4. The first and second claimants' claims of breach of contract are well-founded and succeed;

5. The first and second claimants' claims of direct discrimination are not well-founded and fail;

6. The first and second claimants' claims of victimisation are not well-founded and fail;

7. The second claimant's claim of discrimination arising from disability is not well-founded and fails;

8. The first and second claimants' claims of automatic unfair dismissal (asserting a statutory right) are not well-founded and fail;

9. The first and second claimants' claims of automatic unfair dismissal (whistleblowing) are not well-founded and fail.

REASONS

1. Mr and Mrs Martin commenced working for the respondent on 4 March 2019 as swimming teachers. At that time, it was understood by all that they were casual workers; however, at a hearing on 16 January 2023, and by way of a reserved judgement dated 23 January 2023, it was held that both claimants were in fact employees of the respondent.

2. The respondent terminated the claimants' contracts of employment on 25 February 2021: the respondent relies upon the reason of gross misconduct as being the reason for dismissal.

3. The claimants went through the ACAS early conciliation process between 29 April 2021 and 24 May 2021. The claim form was presented on 23 June 2021. The response was presented on 23 May 2022, and all claims were denied and defended.

4. At the final hearing, we had the benefit of a bundle of 183 pages, as well as the witness statements of both claimants, and Hazel Aitken (CEO) and Keith Heal (Trustee) for the respondent: we heard live evidence from each of these four individuals. We also had a skeleton argument and chronology from Mr Starcevic. Both representatives made oral closing submissions.

5. We spent some time on the first morning ensuring that the list of issues produced by the parties covered everything required. That list is now set out below.

Issues

6. <u>Unfair dismissal</u>

    6.1 Do the claimants have sufficient qualifying service to claim ordinary unfair dismissal?

    6.2 What was the reason for the dismissal of each claimant?

    6.3 Was it a potentially fair reason within s.98 ERA? The respondent claims that the reason was conduct, in particular persistent demands for the respondent to misuse furlough payments, which was unethical behaviour casting doubt on the claimants' integrity and honesty. If so:

        6.3.1 Did the respondent genuinely believe that the claimants had committed the misconduct alleged?

        6.3.2 Was the respondent's belief based on reasonable grounds?

        6.3.3 Did the respondent carry out such investigation as was reasonable in all the circumstances?

6.3.4 Did the respondent adopt a fair procedure?

6.3.5 Was summary dismissal within the band of reasonable responses of a reasonable employer?

6.4 If it was a potentially fair reason, did the respondent act reasonably in treating it as a sufficient reason for dismissing each claimant?

7 Automatically unfair dismissal s.104 ERA

7.1 Was the reason for dismissal that the claimants asserted that the respondent had infringed a relevant statutory right, in particular the right to statutory sick pay ("SSP")

8 Automatically unfair dismissal s.103A ERA

8.1 Did the claimants disclose information to the respondent, which inthe claimants' reasonable belief was made in the public interest and tended to show (b) a person has failed, is failing, or is likely to fail to comply with a legal obligation to which he is subject within s.43B ERA? The claimants rely on the following disclosures:

8.1.1 that the respondent had failed, is failing or likely to fail to comply with its legal obligation to pay SSP;

8.1.2 that the respondent had failed, is failing or likely to fail to comply with its legal obligation not to discriminate against the claimants.

8.2 Was the reason or principal reason for the dismissal that the claimants had made protected disclosures?

9 1.4.S.13 direct discrimination.

9.1 Was Mrs Martin dismissed because of her disability?

9.2 Was Mr Martin dismissed because of disability, in particular because of his association with Mrs Martin's disability?

9.3 The respondent accepts that Mrs Martin was disabled by reason of her cancer diagnosis.

10. 1.5.S.15 unfavourable treatment because of something arising in consequence of disability. (Mrs Martin only)

10.1 Was Mrs Martin treated unfavourably by being dismissed?

10.2 Was that dismissal because of her absence from work?

10.3 Was that absence from work in consequence of Mrs Martin's disability?

10.4 The defence of justification has not been raised.

11. S.20 breach of the duty to make reasonable adjustments (Mrs Martin only)

    11.1 Did the respondent operate a provision, criterion or practice that placed Mrs Martin as a disabled person at a substantial disadvantage in comparison with persons who are not disabled? The PCP relied upon is the respondent's policy of only placing employees who have worked a certain amount of hours in December 2020 on furlough.

    11.2 The substantial disadvantage alleged to have been suffered is Mrs Martin not being placed on furlough.

    11.3 Did the respondent fail to take such steps as it is reasonable to take to avoid the disadvantage. Mrs Martin says that the respondent should have made the reasonable adjustment of placing Mrs Martin on furlough despite not meeting the required attendance in December 2020.

    11.4 The respondent has pleaded that it did not know of Mrs Martin's disability until it was notified on 26 January 2021.

12. S.19 Indirect discrimination (Mrs Martin)

    12.1 Did the respondent apply a policy, criterion or practice that placed Mrs Martin at a particular disadvantage compared with persons who do not share her protected characteristic.

    12.2 The PCP relied upon is the respondent's policy of only placing employees who have worked a certain amount of hours in December 2020 on furlough.

    12.3 The particular disadvantage allegedly suffered is Mrs Martin not being placed on furlough.

    12.4 The respondent has not raised the defence of justification.

13. S.27 Victimisation.

    13.1 Was the claimants' email of 26 January 2021, the grievance dated 28 January 2021, email dated 24 February 2021 and any telephone calls to the respondent at or around those dates protected acts?

    13.2 What is alleged to have been said in any phone calls?

    13.3 Did the respondent subject either claimant to a detriment by dismissing them?

    13.4 Did the respondent subject either claimant to that detriment either because the claimants did a protected act, or the respondent believed that the claimants had done, or may do a protected act.

14. Breach of contract.

14.1 Were the claimants entitled to notice of termination under their contract with the respondent and if so what was the period of notice?

14.2 Were the claimants dismissed without notice?

14.3 Has the respondent proved in relation to each claimant that he/she had acted in repudiatory breach of contract such that the respondent was entitled to terminate the contract without notice?

15. Remedy – Polkey

15.1 Is there a chance that the claimants would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

15.2 If so, should the claimant's compensation be reduced? By how much?

16. Remedy – contribution

16.1 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

16.2 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Law

Unfair dismissal – reason for dismissal

17. The relevant legislation is found at s98(1), (2) and (4) **ERA:**

> "(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) ...
> (b) Relates to the conduct of the employee
> (c) …
> (d) ...
>
> (3) 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."

18. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In Gilham and Ors v Kent County Council (No2) 1985 ICR 233, the Court of Appeal held as follows:

> "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness."

Unfair dismissal – fairness

Substantive fairness

19. Regarding conduct cases, the case of British Home Stores Ltd V Burchell [1978] IRLR 379 encompasses the relevant test for fairness:

20. Did the respondent have a genuine belief that the claimants were guilty of the misconduct alleged by the respondent?

21. If so, were there reasonable grounds for the respondent in reaching that genuine belief? and,

22. Was this following an investigation that was reasonable in all the circumstances?

23. In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) **ERA**, the Tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. Whether the Tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the Tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

Procedural fairness

24. Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) **ERA**. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy (the issue in Polkey is set out below).

25. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this may render a dismissal procedurally unfair.

26. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

27. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is, ultimately, a view to be taken by the Tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

Wrongful dismissal/breach of contract

27.1 This claim requires the Tribunal to perform a different exercise when compared to the test under s98 **ERA**. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?

27.2 This requires the Tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to summarily terminate the employment contract.

27.3 Unlike under a claim for unfair dismissal, regarding a wrongful dismissal claim, it is for the Tribunal to make findings of fact as to the nature and extent of the employee's conduct. The reasonableness of actions by the employer is irrelevant.

27.4 Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful – Enable Care and Home Support Ltd v Pearson EAT 0366/09

Interplay of s97(2) and s86(1) ERA

28. S86(1) ERA provides the statutory minimum notice period that must be given by an employer to an employee:

> "(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –
>
> (a) Is not less than one week's notice if his period of continuous employment is less than two years, ..."

29. S97 ERA provides as follows:

"(1) Subject to the following provisions of this section, in this Part "the effective date of termination" –

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

(2) Where -

(a) the contract of employment is terminated by the employer, and

(b) The notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),

For the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

(3) In subsection (2)(b) "the material date" means –

(a) the date when notice of termination was given by the employer, or

(b) where no notice was given, the date when the contract of employment was terminated by the employer.

(4) ..."

30. If an employee is guilty of gross misconduct which justifies summary dismissal, then the requirement to give the statutory minimum notice under s86 ERA does not apply. Therefore, s86 in that scenario does not operate so as to alter the effective date of termination.

31. The interplay of these two sections has implications in a case such as the index case where, without any additional notice period, the effective date of termination would mean that the claimants did not have the required two years' service under s108 ERA for an ordinary unfair dismissal claim.

32. In order to determine whether statutory minimum notice under s86 applies, it is necessary for the Tribunal to determine whether a claimant was in fact guilty of gross misconduct which justifies summary dismissal - Lancaster & Duke Ltd v Wileman [2019] IRLR 112. This is a preliminary jurisdictional issue, as the answer will dictate whether the claimants have a claim under s98 ERA or not. This is the same question that the Tribunal is required to answer in relation to the wrongful dismissal claim.

33. In the index case, whether or not the Tribunal finds that the claimants had two years' service also impacts the burden of proof in relation to the s103A

and s104 ERA claims. If the claimants do not have two years' service, the burden to prove that the reason for dismissal was automatic (and that therefore the Tribunal has jurisdiction) rests with the claimants. If it is found that the claimants do have 2 years' service, the burden of proof rests with the respondent – Maund v Penwith District Council [1984] ICR 143, CA

Protected disclosure - s43B ERA

34. A disclosure will only be protected when it satisfies three conditions:

    34.1 It must be a "disclosure of information";

    34.2 It must be a "qualifying disclosure". In other words, it must be a disclosure that, in the reasonable belief of the worker making it, is made in the public interest and tends to show (in this case) that a person had failed, was failing or was likely to fail to comply with any legal obligation; and

    34.3 It must be made in line with one of the six methods set out in ss43C-H *ERA.*

Disclosure of information

35. A practical example of the difference between a disclosure of information, and an allegation, was set out in Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. Placed in the context of a hospital ward, a disclosure of information would be "yesterday, sharps were left lying around", whereas an allegation would be "you are not complying with health and safety requirements". However, the disclosure should not simply be categorised into "disclosure of information" or "allegation". The key point is that a bare allegation, such as the example above, cannot amount to a disclosure of information. It is however possible for an allegation to contain sufficient information to be capable of tending to show a failure (or likely failure) to comply with a legal obligation (for example).

36. An enquiry, or request for information, as opposed to the supply of information, will not amount to a disclosure of information – Blitz v Vectone Group Holdings Ltd EAT 0253/10, Parsons v Airplus International Ltd EAT 0111/17.

Reasonable belief

37. The issue for determination is whether the words used by the claimant, in his reasonable belief, tended to show a failure (or likely failure) to comply with a legal obligation. This is both an objective and subjective test, requiring a tribunal to determine whether the claimant held the requisite belief and whether, if so, that belief was reasonable. This test will require the Tribunal to look at all the circumstances of the case: someone with professional or insider knowledge will be held to a different standard that lay persons – Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4. For example, the CEO of a supermarket will be held to a different standard than an employee who stacks shelves. The reasonable belief test in relation to "tending to show" is a fairly low threshold but does require a

claimant to have some evidential basis for her/his belief, as opposed to, say, unfounded suspicion. It is also not necessary for the belief to be correct, as long as it is reasonable in the circumstances in which the claimant finds themselves.

38. As put in Soh v Imperial College of Science, Technology and Medicine EAT 0350/14, there is a difference between "I believe X is true" and "I believe that this information tends to show that X is true". It is the latter, not the former, that is required here.

39. Regarding the requirement that the claimant had a reasonable belief that the disclosure was made in the public interest, it is important to bear in mind the purpose of making this addition to the legislation. Government added the need for reasonable belief that a disclosure is made in the public interest to avoid protection being received by employees raising private employment disputes (the effect of Parkins v Sodexho Ltd [2002] IRLR 109).

40. This again is a relatively low threshold. A list of factors for consideration as to whether it is reasonable to regard a disclosure as being in the public interest was provided by the Court of Appeal in Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731:

    40.1 The numbers in the group whose interests the disclosure serves;

    40.2 The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;

    40.3 The nature of the wrongdoing disclosed; and,

    40.4 The identity of the alleged wrongdoer.

Breach of legal obligation

41. The term "breach of legal obligation" has a fairly wide remit. It covers legal obligations set out in statute, secondary legislation and those deriving from common law. However, it will not encompass breach of guidance or best practice, or breach of any moral codes. There is no need for a claimant to give precise detail about the legal obligation in question, however there must be more than just a belief that something is wrong – Eiger Securities LLP v Korshunova [2017] ICR 561.

42. If on the facts the identity of the legal obligation is obvious, then a claimant need do little to specify the obligation further. If, however, the legal obligation at play is not obvious, it will be necessary for a claimant to provide some detail so that the Tribunal is satisfied that the concern is not simply about guidelines or morals, but is in fact a legal concern.

Assertion of statutory right

43. S104 ERA provides:

> "(1) 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—
>
> (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
>
> (b) alleged that the employer had infringed a right of his which is a relevant statutory right.
>
> (2) It is immaterial for the purposes of subsection (1)—
>
> (a) whether or not the employee has the right, or
>
> (b) whether or not the right has been infringed;
>
> but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
>
> (4) The following are relevant statutory rights for the purposes of this section—
>
> (a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal,
>
> (b)...
>
> (c)...
>
> (d)...
>
> (e)..."

44. Under s104(2) ERA, if the employee's claim is made in good faith, it does not matter whether or not he had the right or it was infringed. The caveat to a s104 claim is that the protection provided under s104(1)(b) is limited to cases where the allegation is that the employer had infringed a right: it does not cover possible or future infringements, or threats of infringement.

Reason for dismissal – s104/s103A ERA

45. A claim under s103A/104 ERA will only succeed when a tribunal is satisfied that the principal reason for dismissal was a protected disclosure/assertion of statutory right. "Principal" reason has been held to be the reason operating on the decision maker's mind at the time of dismissal, in other words, the primary reason – Abernethy v Mott, Hay and Anderson [1974] ICR 323. This is a question of fact, which requires the Tribunal to answer the question "*what consciously or unconsciously was the decision-maker's reason for dismissing?*".

46. In terms of s103A, when a claimant relies upon several disclosures, the question for the Tribunal is whether, taken as a whole, the disclosures were the principal reason for dismissal – El-Megrisi v Azad University (IR) in Oxford EAT 0448/08.

47. Furthermore, in Kong v Gulf International Bank (UK) Ltd [2022] IRLR 854, it was held that where a dismissal is due to the manner of the disclosure, or

some other fact about the disclosure, as opposed to the disclosure itself, then a claimant will not have been automatically unfairly dismissed. This has been referred to as "*the separability principle*". Simler LJ held that:

> "56...there may in principle be a distinction between the protected disclosure of information and conduct associated with or consequent on the making of the disclosure. For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity."

Polkey

48. The decision in Polkey v AE Dayton Services Ltd [1987] UKHL 8 permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

49. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

50. The Tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, The Tribunal should not be reluctant to undertake the exercise just because it requires speculation – Software 2000 Ltd v Andrews [2007] ICR 825

Contribution

51. Under s122(2) ERA (Issue 4.8.1), the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the Claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of "culpable or blameworthy" applies to the s122(2) reduction question as to s123(6) ERA – Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09.

52. Under s123(6) ERA (Issue 4.8.2), the test is whether any of the Claimant's conduct prior to dismissal was "culpable or blameworthy" – Nelson v BBC (No.2) [1980] ICR 110, CA. This requires the Tribunal to look at what the Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of C's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56.

53. The EAT in Steen summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

    53.1 Identify the conduct which is said to give rise to possible contributory fault;

53.2 Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;

53.3 Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,

53.4 Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

54. Steen also indicated that a reduction of the basic award to nil would be a rare finding.

Direct disability discrimination – s13 EqA

55. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
>
> …
>
> (d) by subjecting B to any other detriment."

56. Direct discrimination is set out in s13 EqA:

> "(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."

57. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The Tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

58. In terms of the required link between the claimant's race and the less favourable treatment she alleges, the two must be " inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

59. The test is not the "but for" test, in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

60. The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding

circumstances into account.

61. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Discrimination arising from disability – s15 EqA

62. S15 EqA provides:

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

63. Under this section, no comparators required. The question is simply whether unfavourable treatment suffered by the claimant: in this context unfavourable treatment requires the Tribunal to consider whether a claimant has been disadvantaged. this requires an assessment against "an objective sense of that which is adverse as compared to that which is beneficial" - T-System Ltd v Lewis UKEAT/0042/15.

Because of something arising in consequence

64. First, it is necessary for the tribunal to identify the "something" that is said to be the cause of the alleged unfavourable treatment. Second, it is necessary for that "something" to have arisen in consequence of the claimant's disability. These are the two causal steps that are required by s15 EqA.

65. The Tribunal must determine what, consciously or unconsciously, acted on the mind of the alleged perpetrator. The relevant test is whether the "something" had a significant influence, or was an effective cause, of the unfavourable treatment – Pnaiser v NHS England [2016] IRLR 170. Motive is irrelevant under s15.

Respondent's knowledge

66. Under s15, the sole requirement of knowledge on the part of the respondent is knowledge of the claimant's disability. It is not necessary for the respondent to know that the "something" arose from that disability.

Indirect discrimination – s19 EqA

67. S19 EqA provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Provision, criterion or practice

68. The terms "provision, criterion or practice" ("PCP") are not defined within the legislation, and are to be given their ordinary meaning; they are broad and overlapping terms and should not be narrowly construed – Ishola v Transport for London [2020] EWCA Civ 112. A PCP can cover informal as well as formal arrangements.

69. The finding of a PCP is a matter of fact for the Tribunal – Jones v University of Manchester [1993] IRLR 218.

Application of PCP

70. The effect of a seemingly neutral PCP on persons who do not share the claimant's protected characteristic must be considered, regardless of whether the PCP is indeed applied to others or not.

Particular disadvantage

71. There is no need for the disadvantage suffered by the claimant to be "serious, obvious and particularly significant" - McNeil v Revenue and Customs Commissioners [2019] EWCA Civ 1112. it is sufficient for the claimant, because of their protected characteristic, to be disadvantaged in some form.

72. It is not necessary for every person who shares the claimant's protected characteristic to suffer the particular disadvantage relied upon by claimant. Neither is it necessary for a claimant to produce statistical evidence demonstrating a particular disadvantage.

Failure to make reasonable adjustments – ss20/21 EqA

73. Ss20/21 EqA provide:

> "20(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)…
> (5)…
> (6)...
> (7)...
> (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
> …
>
> 21(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
> (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

74. The first requirement of this claim is that there be a PCP. This matter is covered above, under indirect discrimination.

Substantial disadvantage

75. There is no requirement under ss20/21 for a comparator to be considered regarding the alleged disadvantage suffered – Sheikholeslami v University of Edinburgh [2018] IRLR 1090:

> "It is well established that the duty to make reasonable adjustments arises where a PCP puts a disabled person at a substantial disadvantage compared with people who are not disabled. The purpose of the comparison exercise with people who are not disabled is to test whether the PCP has the effect of producing the relevant disadvantage as between those who are and those who are not disabled, and whether what causes the disadvantage is the PCP. That is not a causation question … For this reason also, there is no requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances."

76. The definition of "substantial" is at s212(1) EqA, which provides that substantial means more than minor or trivial.

Reasonableness of adjustments

77. The ECHR Code of Practice on Employment (2011) sets out various factors that may be relevant when considering the reasonableness of any proposed adjustments:

- "whether taking any particular steps would be effective in preventing the substantial disadvantage;
- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources;
- the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
- the type and size of the employer."

78. There is no requirement that adjustment suggested by a claimant should remove the substantial disadvantage in its entirety – Noor v Foreign and Commonwealth Office [2011] ICR 695. The statute states that the reasonable adjustment should "avoid" the disadvantage. Therefore, a respondent will not avoid liability solely by demonstrating that the disadvantage would have been suffered even with the adjustment. If the adjustment would have acted to avoid the disadvantage, that is sufficient for liability to attach under ss20/21.

Respondent's knowledge

79. The knowledge required of respondents under ss20/21 is that they are aware that (a) the claimant is disabled and (b) that the claimant would likely be placed at the substantial disadvantage in question. The issue of knowledge covers both constructive and actual knowledge. In other words, as set out in Eastern and Coastal Kent Primary Care Trust v Grey [2009] IRLR 429, at para 11, a respondent will escape liability if it:

> "(i) does not know that the disabled person has a disability;
> (ii) does not know that the disabled person is likely to be at a substantial disadvantage compared with persons who are not disabled;
> (iii) could not reasonably be expected to know that the disabled person had a disability; and
> (iv) could not reasonably be expected to know that the disabled person is likely to be placed at a substantial disadvantage in comparison with persons who are not disabled."

Victimisation

80. S27 EqA sets out:

> "(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."

81. The relevant subsections in the present claim are ss27(2)(c) & (d).

82. Regarding "*doing any other thing for the purposes or in connection with this Act*", this is the catch-all provision. Under pre-Equality Act legislation, it was held that the requirement that something be done "*in reference to*" the Race Relations Act would be met if it was done by reference to that Act "*in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act*" – Aziz v Trinity Street Taxis Ltd and ors [1988] ICR 534∫.

83. In terms of "*making an allegation...*", although it is not necessary for the Equality Act to be mentioned, it is vital that the facts as set out by the claimant would be capable of amounting to a breach of that Act.

84. The meaning of detriment is set out above. For a detriment to be *because of* a protected act, it is necessary that it had a significant influence on the perpetrator, where significant simply means "more than trivial" – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931.

Findings of fact

85. Mr and Mrs Martin have been swimming teachers for some time. They often work for the same pools. Mr Martin, at the relevant time, also held the position as a teacher at a school, at which he had been for approximately five years.

86. Mr and Mrs Martin commenced working for the respondent on 4 March 2019 as swimming teachers. At that time, it was understood by all that they were casual workers; however, at a hearing on 16 January 2023, and by way of a reserved judgment dated 23 January 2023, it was held that both claimants were in fact employees of the respondent. The claimants' employment with the respondent terminated on 25 February 2021.

Policies and procedures

87. The claimants' contracts required either side to give one week's notice of termination of employment – [77]. Both contracts also made reference to a disciplinary and grievance procedure which were noncontractual. The contracts stated that those two processes "may be amended from time to time" by the respondent – [77].

88. We have the grievance policy in the bundle, but not the disciplinary policy. The grievance process sets out three stages; stage 1 is an informal stage at which a complaint should be raised with the employee's manager. Matters then normally progress to a formal grievance, or stage 2, which should be dealt with by a grievance manager more senior to the employee who raised the grievance. Finally, an employee has the right to appeal against the outcome of the grievance. This is stage 3, and is normally dealt with by a

manager more senior to the grievance manager and who has not previously been involved in the case – [99/100].

89. The grievance policy states that a grievance manager, at stage 2, "will meet with the employee who raised the grievance and carry out a thorough and impartial investigation" – [97].

Lockdowns 1 and 2

90. In March 2020, the country went into lockdown due to the Covid-19 pandemic. This evidently led to many employers and employees suffering financially. The Coronavirus Job Retention Scheme ("CJRS") was put in place in order to support both employers and employees. Within that scheme was the ability to furlough employees. For any employees who were furloughed, the government would reimburse the employer for 80% of those employees' wages. The employer would still have to pay pension contributions, and national insurance contributions, as well as associated holiday pay, and the remaining 20% of employee wages (unless employees agreed to be paid 80%).

91. The country went through several lockdown periods, meaning that employees had to work from home where possible. Swimming pools were also closed. Evidently, employees who were not able to work from home (such as swimming teachers) were not able to work.

92. When the first lockdown occurred, four members of the Martin family were working for the respondent as teachers; Mr and Mrs Martin, and their two children, Christopher and Rhianne. The family had a joint email account, crepmartin@aol.com. Correspondence to and from that email account was understood by the respondent and the Martin family to be to or from all four members of that family. We understand that Christopher and Rhianne had individual email addresses as well.

93. During Lockdown 1, all four members of the Martin family were placed on the furlough scheme and paid 100% of their wages.

94. When the swimming pool reopened after that first lockdown, Rhianne did not return to teach there.

95. When Lockdown 2 was announced, those understood to be casual workers were sent an email by Ms Aitken, setting out that there is a net cost to the respondent for placing workers on furlough – [102]. The email also made clear that the respondent was facing financial hardship in light of the lockdowns, and that this hardship was evidently worse than the financial position at this stage of Lockdown 1.

96. Ms Aitken's email set out that workers would be included in the furlough scheme if they had "recently worked" for the respondent – [102].

97. During Lockdown 2, Mr and Mrs Martin and Christopher were all in receipt of furlough pay. However, this time round, they received only the 80% that the respondent could recover from the government.

December 2020

98. In November 2020, Mrs Martin was diagnosed with breast cancer. She underwent surgery on 1 December 2020, which thankfully appears to have been successful.

99. Mr Martin asked for leave from his school job for the week of Mrs Martin's operation. On 3 and 5 December 2020, Mr Martin covered Mrs Martin's shifts that she had booked in for the respondent.

100. On Monday 7 December, Mr Martin attended school as usual. However, his headmistress sent him home as it was understood that he may have been in contact with someone who had Covid-19. He did not receive a track and trace notification from the NHS, but did as his headmistress instructed and returned home, to isolate for a two-week period. This took him up to the end of term and the Christmas holidays.

101. Mrs Martin was provided with a fit note stating that she was not fit to work due to surgery from 16 December 2022 to 4 January 2021 – [104]. She provided this to the respondent. Mr and Mrs Martin did not inform the respondent of the reason for Mrs Martin's surgery at this time.

January 2021

102. On 13 January 2021, Ms Aitken sent an email to Mr and Mrs Martin at crepmartin@aol.com, regarding Lockdown 3 – [105]. That email set out the arrangements for furloughing staff during Lockdown 3.

103. For this period of lockdown, the criterion applied by the respondent was that casual staff would be furloughed (on 80%) if they had "demonstrated a frequency of regular working prior to closure"; the frame of reference used for application of this criterion was hours worked in December 2020. On this basis, Mr and Mrs Martin were informed that they had worked insufficient hours in December to be eligible for furlough for Lockdown 3.

104. Mr Martin telephoned Ms Aitken on 13 January 2021, to register his and his wife's upset at not being included within the furlough scheme this time round.

105. He followed this up with an email the following day, stating that both he and his wife felt the decision was unfair and setting out the reasons for their absence from work in December - [106].

106. In relation to Mrs Martin, it was stated that she had to have an operation on 1 December, which she had forewarned her manager, Hailey, about; Mrs Martin had told Hailey that she would be unable to work for two weeks following that operation. Mrs Martin had provided cover for all her classes in advance of this two-week period. She then provided a sick note to cover the period from 16 December 2020 to 4 January 2021 - [104].

107. In relation to Mr Martin, he set out that he was instructed by his headmistress on 7 December to self-isolate. He let Hailey know of this, and that he would

be unable to work until 17 December. He noted that confirmation of this was sought by the respondent from his school.

108. In summary, Mr Martin explained that they had no control over their absences in December and that, on their usual timetable, they would have been eligible for further payments in Lockdown 3.

109. Mr Martin concluded that email by stating "I said yesterday that I feel that we are an exception" and went on to explain that they were both good workers who had built up attendance of classes at the respondent, and who had never abused the holiday or time off systems at the respondent.

110. At this juncture, we notice that much was made by Mr Hoyle as to the reason why Mr Martin thought he and his wife were an exception. It was put to Mr Martin that he meant they were an exception due to their good service and attendance records. Mr Martin made it clear in his evidence that this was one factor, however another factor was that their absences in December were not of their own making. Mr Martin felt that this needed to be considered and made them an exception as well as their good records. We accept that evidence; we found Mr Martin to be a credible witness, although on some points he lacked clarity and was repetitive. We do, however, consider his evidence was clear as to what he meant by being an "exception". This interpretation is also consistent with an objective reading of his email of 14 January, taken as a whole. It is clear on the reading of that email that he was asking the respondent to consider their particular circumstances, those being their good service and the reasons why they were absent in December.

111. On 15 January 2021, Ms Aitken replied to Mr Martin stating they she would bring the matter to the Board of Trustees the following week - [107].

112. We have heard from Ms Aitken that there was a board meeting on 20 January at which Mr and Mrs Martin's eligibility to be included in the furlough scheme was discussed.

113. On 21 January 2021, Ms Aitken sent an email to Mr Martin explaining that she had discussed their situation with the Board of Trustees – [108]. She explained that the conclusion had been that Mr and Mrs Martin simply did not meet the criterion applied for eligibility for furlough pay. The reason given was that of financial difficulties experienced by the respondent.

114. On 26 January 2021, Mr Martin replied to Ms Aitken's email, having taken advice from the solicitors at the Institute of Swimming – [109]. In this email he disclosed to her the fact that Mrs Martin's surgery was in relation to a breast cancer diagnosis in November 2020, stating that their situation was therefore covered by the Equality Act 2010. He accepted that they should have communicated this reason to the respondent earlier but that the reason for not doing so was that Mrs Martin did not want anyone at Egham to know.

115. Just on this point, Mr and Mrs Martin's evidence was that they did not wish the respondent to know about Mrs Martin's diagnosis, as they were very concerned that Mrs Martin's mother would learn of her condition. They

wanted to do everything possible to protect her from that knowledge, given her age and her own ill-health.

116. Both claimants were cross-examined as to why they did not tell the respondent about Mrs Martin's cancer earlier. The Tribunal finds that anyone with a diagnosis of cancer must deal with it in any way they see fit. If Mrs Martin chose not to tell the respondent, that is entirely a matter for her. We in no way criticise her for not informing the respondent earlier.

117. Returning to the 26 January email from Mr Martin, it appeared to link Mr Martin's self-isolating to Mrs Martin's cancer ("the need for Paul to self-isolate took things to a different level (given Ellen's increased vulnerability)"). It is clear to us now, as confirmed by Mr Martin, that this was not the reason for his self-isolation. As set out above, we find he self-isolated following an instruction from his headmistress. We are satisfied that Mr Martin was not attempting to mislead the respondent in the wording of this email, but that it was just clumsily written. This finding is supported by the fact that the claimants were open in their grievance statement about Mr Martin's need to isolate being due to contact with a pupil, not Mrs Martin's vulnerability - [115]. Had Mr Martin been attempting to mislead the respondent, he would not have been transparent in this communication.

118. In this email, Mr Martin asked the question:

> "If Egham are still unwilling to grant him furlough, is there not a case for SSP?"

119. Mr Martin conveyed to Ms Aitken that their solicitor felt that, with the full background now known to the respondent, "there was more than enough reason to grant furlough" – [109].

120. This 26 January 2021 email is said to be:

    120.1 an assertion of statutory right for the purposes of the claimants' s104 ERA claim, regarding the comment about SSP set out above;

    120.2 a protected disclosure, tending to show a failure or likely failure to comply with the legal obligation to pay SSP, for the purposes of the claimants' s103A ERA claim; and

    120.3 a protected act for the purposes of the claimants' s27 EqA claim.

121. On 27 January 2021, Ms Aitken replied, attaching a copy of the grievance policy – [112]. She stated that:

> "As the informal approach [of the grievance procedure] has not been successful, please commence the procedure from Stage 2, whereby you are required to fully submit your grievance in writing".

122. In Ms Aitken's statement, she stated that she informed the claimants that they would need to raise a formal grievance which she would pass on to the Board of Trustees – [HA/WS/11].

123. In response to this, Mr Martin replied, asking for the email address of the grievance manager who would be handling their complaint – [112]. The following day, Mr Martin sent a grievance statement to Ms Aitken, asking her to forward it to the person who would be handling the grievance – [114].

124. The grievance itself is at [115-116]. This is also relied upon as being a protected act and a protected disclosure. In this grievance the claimants repeated the email of 26 January 2021, and added:

> "If any other month had been chosen to base the decision on whether to give us furlough, we would have qualified. Therefore, the fact that you have limited eligibility period to one month, puts Ellen at a disadvantage because of her disability and Paul because of his self-isolation due to him being in contact with a pupil who had Covid.
>
> …
>
> As far as I understand the Equality Act 2010, you cannot discriminate against someone who has some type of disability and this includes illness and the like. I know I have said this before but we were both unable to attend work due to reasons of illness (both possible and real) and no account has been made of this … The background to our absence has not been considered.
>
> …
>
> We would like to finish this letter by saying that this whole situation could be resolved by the [respondent] agreeing to pay us furlough"

125. Ms Aitken took this grievance along to the Board of Trustees meeting on 1 February 2021. At this meeting the Trustees were informed of the contents of the grievance, and the fact of Mrs Martin's cancer. The Trustees' view was that their criterion for eligibility for furlough was not affected by this new information. In Ms Aitken's own words in cross-examination;

> "Mrs Martin's illness never came into any of the decision-making. That is why it was never considered to be a factor in the decision-making".

126. On 2 February 2021, Ms Aitken responded to the claimants by email – [117]. She went through the history of the matter, explaining that the claimants' initial challenge to furlough pay by telephone and email on 13 January and Ms Aitken's response to it was the informal stage of the grievance process. The matter was then raised with the Trustees, and the unanimous decision was that the respondent was "not in a financial position to make changes to the criteria casual staff [sic] for inclusion into the Job Retention Scheme due to the burden of cost already being met by [the respondent] during closure". Finally, she said that, having brought the matter to the trustees' attention again, the decision remained unchanged and was final.

127. On 24 February 2021, Mr Martin sent an email to Ms Aitken – [118]. He complained that their grievance had not been looked at by anyone impartial, and stated that the respondent had not even followed its own grievance procedure. He asked for a formal grievance meeting to be held and that it be chaired by someone impartial, someone other than the Trustees.

128. Mr Martin made the point that the respondent seemed to be relying on the "floodgates" argument: that if the respondent paid Mr and Mrs Martin furlough pay, they would have to do the same for all casual workers. Mr Martin countered this argument, by stating that their situation must be unique but that no one had given it any consideration.

129. He again ended the email by saying "this matter could be amicably resolved by furlough being paid".

130. Ms Aitken says in her witness statement that, following this email and in light of the telephone conversation with Mr Martin, "the respondent now considered communications with the claimants quite threatening". Ms Aitken was asked what was threatening about the email of 24 February. Her answer was that it was the sentence "this matter could be amicably resolved by furlough being paid" – [118]. When pressed as to what she thought the claimants were threatening to do she agreed that those words potentially could be a threat to take their complaint further. Mr Heal in his evidence stated that he thought the claimants were threatening to bring a Tribunal claim.

131. This email, specifically the phrase "this matter could be amicably resolved by furlough being paid" is relied upon as being a protected act for the purposes of the claimants' s27 EqA claim.

132. The following day, 25 February 2021, the respondent sent Mr and Mrs Martin letters ending their work with the respondent – [119]. The letters stated as follows – [110/111]:

> "I write to regretfully inform you that your services as a casual swimming teacher with Achieve Lifestyle are no longer required, and this has resulted in your casual employment terminated [sic] with immediate effect."

133. That was the only correspondence the claimants received on the matter of their termination.

134. The claimants commenced the ACAS early conciliation process on 29 April 2021; this process concluded on 24 May 2021. The claimants' claim form was presented on 23 June 2021.

Reason for dismissal

135. It is the respondent's case that the claimants were dismissed for gross misconduct, namely a suggestion from Mr Martin that was deemed to be fraudulent by Ms Aitken and the Trustees ("the fraudulent suggestion"). Given that Mr Martin always communicated on behalf of both himself and his wife, the respondent took his suggestion to come from both of them. Therefore, Mrs Martin was dismissed for the same conduct as Mr Martin.

136. The fraudulent suggestion is set out in Ms Aitken's witness statement at [HA/WS/13]. She states that, on 2 February 2021, Mr Martin called her to discuss the rejection of their grievance. Ms Aitken's evidence is that Mr Martin:

> "Suggested that I should claim furlough pay for himself and [Mrs Martin], and that he would recompense any costs to the respondent".

137. During Mr Martin's evidence to us, it was put to him in cross examination that the telephone call including the fraudulent suggestion took place on 26 January 2021. It was then however pointed out that Ms Aitken's evidence had this call as being on 2 February 2021. On having clarified instructions with Ms Aitken, the respondent's case became that the fraudulent suggestion was made in a call on 24 February 2021.

138. The respondent's case, and Ms Aitken's evidence, on the telephone calls was inconsistent. From Ms Aitken's witness statement, it appears that there were telephone conversations on the following dates:

    138.1 14 January 2021 – [HA/WS/9];
    138.2 2 February 2021 – [HA/WS/13].

139. In cross-examination of Mr Martin it was suggested that there were two telephone calls between him and Ms Aitken. However, in her oral evidence to us, Ms Aitken told us that she had had at least three telephone calls with Mr Martin. She believed that telephone conversations had occurred on the following dates:

    139.1 13 January 2021;
    139.2 2 February 2021;
    139.3 24 February 2021.

140. In terms of the fraudulent suggestion, during her evidence, Ms Aitken clarified that what Mr Martin actually said to her was something along the lines of:

> "If you give me my £800, I will give you back the £50 it cost you to get the furlough, I can't see a problem with that".

141. These precise words were not put to Mr Martin, or Mrs Martin, nor do they appear in Ms Aitken's witness statement.

142. Ms Aitken's evidence changed from that of her witness statement in that, during her cross examination, Ms Aitken said that the fraudulent suggestion had been made in at least two conversations. That was her explanation for her entry into her notebook of "Paul Martin call (2) – give me my money" – [145] (detail of the notebook is set out below). This is contrary to her witness statement, in which she is clear that there was one call in which the fraudulent suggestion was made, and that this was in the call on 2 February 2021.

143. Mr Martin's evidence on this point, supported by that of Mrs Martin, is that no fraudulent suggestion ever took place. He accepted he had several calls with Ms Aitken, however as far as he was concerned they were always amicable. He highlighted the fact that Ms Aitken had never pointed out to him that, in her view, he had made a fraudulent suggestion. In fact, the written communications from her remained amicable throughout.

144. Ms Aitken kept a notebook during the Covid pandemic; she called it "her bible". We have in the bundle one page of this notebook – [145]. The original notebook was brought to the hearing and was available for inspection.

145. The page in question sets out various notes Ms Aitken made in relation to Mr and Mrs Martin's complaint and conversations she had with Mr Martin on the telephone. There are no dates on this page other than a reference to "Jan 21" on the right-hand side. There are many exclamation marks on this page and asterisks marking the comment "painful explaining". It is evident that Ms Aitken found Mr Martin conversationally difficult to deal with; she explained to us that she felt she was going round and round in circles with him. Having heard evidence from Mr Martin, it is fair to say that we noticed a certain amount of repetition in what he was saying to us. We can understand that, particularly in a position where there are two opposing views, Mr Martin's communication could be seen by the other party as frustrating.

146. The most relevant comments on [145] are:

> "Paul Martin call (2) give me my money -> WTF!
> Deception/money!!
> Cover furlough costs – No!
> …
> Concern
> - Asked to break the law
> - Corrupt practice
> - Blackmail window
> HMRC – what is the rule
> FLAGS = INTEGRITY/HONESTY
> …
> Dishonest Practices
> Integrity compromised!
> No further work"

147. We find that nothing said in any conversation between Ms Aitken and Mr Martin reached the level of a fraudulent suggestion. It may well have been that Mr Martin, in his desperation, suggested some way in which furlough could be paid to him and his wife ("the furlough request").

148. The respondent's allegation of gross misconduct is that Mr Martin "suggested that Ms Aitken should claim furlough pay for himself and Mrs Martin, and he would recompense any costs to the respondent" and that this "amounted to fraud and was for his financial benefit" and further that Mr Martin had "breached trust and integrity" – HA/WS/13.

149. We find that Mr Martin said something in that telephone call in a last-ditch attempt to get the respondent to place them on furlough.

150. We need not find exactly what was said as, taking the respondent's case on what Mr Martin said, that "he would recompense any costs to the respondent", we are not satisfied that Mr Martin had sufficient knowledge of the law around furlough to know that, if that was what he was suggesting, that would amount to fraud.

151. Having heard evidence from Mr Martin, it is clear to us that his grasp of the furlough scheme, and general employment rights, is vague at best. We find that any suggestion he made could not reasonably have been understood to be a deliberate or underhand attempt to circumnavigate any laws or guidance relating to the furlough scheme. He simply did not understand the scheme well enough, including who paid what under that scheme, and the amount of any cost to the respondent.

152. Therefore, even if Mr Martin had said what the respondent alleged he said, we find that he did not have the intent or understanding of the implications of what he was asking, and therefore did not act in such a way as to breach trust and integrity. Neither was this an act of fraud.

153. In terms of Mrs Martin – although we accept that Mr Martin acted for her, we find that, once again, Mrs Martin was not aware of the legal framework of furlough, or the legal implications of suggesting that the claimants pay anything back to the respondent, if that was in fact what was suggested.

154. We do however accept that Ms Aitken was genuinely taken aback by whatever it was that Mr Martin said. However, we find that her reaction was objectively unreasonable.

155. We note that the respondent set out what the costs to them were in the 10 November 2020 email at [102]. However, we accept that the claimants did not take in the meaning of this part of the letter: at that stage they were just satisfied that they were going to get furlough pay.

156. We find that, from the time of obtaining legal advice, the claimants followed that advice, parroting back to the respondent what they had heard from their legal advisors. We find that they did not have a firm grasp on their legal position at this point, in relation to furlough pay, and also statutory sick pay ("SSP"). We accept Mr Martin's evidence to us that SSP was mentioned as it "was advised to us by people who are smarter than me".

157. We have analysed the words that are now alleged to have been said by Mr Martin, namely "If you give me my £800, I will give you back the £50 it cost you to get the furlough, I can't see a problem with that". Firstly, we note that the figures appear to be plucked from thin air: having looked at the claimants' payslips, allowing for the fact that by Lockdown 3 the respondent was only paying 80% of wages, the cost to the respondent would have been solely the claimants' National Insurance contributions, totaling around £3 for each claimant. Secondly, there is nothing in that sentence that indicates an understanding that this would be in breach of any law, regulation, or guidance. We find that the words alleged equate to an attempt to figure out a way that the claimants could be paid furlough pay.

158. In fact it seems, from Ms Aitken's note on [145] of "HMRC – what is the rule", that she did not have a firm grasp on whether a suggestion of making a payment to the respondent would be a breach of any rules or laws. In her evidence to us she said that what was going through her mind was, if they had done what Mr Martin asked, would they have broken any HMRC rules, and where would it leave her and the respondent.

159. We find that Ms Aitken jumped to an unreasonable, irrational, although genuine belief that the claimants were seeking to get the respondent to act unlawfully. We therefore find that the reason for Mr and Mrs Martin's dismissal was, in part, Mr Martin's furlough suggestion.

160. We are not, however, satisfied that this was the only factor that weighed into the respondent's decision to dismiss. Mr and Mrs Martin were never told by Ms Aitken or anyone at the respondent that Mr Martin's telephone communication had been understood to be a fraudulent suggestion, that undermined their integrity and honesty and trust that their employer had in them. The most that was said to Mr Martin by anyone on this matter was Ms Aitken simply saying something along the lines of "that's not appropriate".

161. As set out above, we find that Ms Aitken was frustrated and annoyed at Mr Martin, for what she perceived to be his constant badgering and his going round in circles in his communication. As far as she was concerned, the issue around furlough had been dealt with. We find that this frustration was passed onto the Board, if not expressly, then implicitly, in the manner in which Ms Aitken communicated with the Board about the Martins. The Board became annoyed at Mr Martin's persistence, in the manner in which he was dealing with his complaint around lack of furlough pay.

162. We find further that the Board understood that the Martins did not have two years' service, and also thought that they were casual workers (not employees). The point about their understanding of employee status was made again at this hearing, despite the previous finding of Employment Judge Anstis, that the claimants were employees.

163. We find that the Board thought that it could terminate the claimants' contracts without any process, and without any risk of litigation.

164. We find that the combination of the unreasonable understanding of the furlough suggestion, the fact that Mr Martin was proving to be difficult, and the respondent's understanding of the claimants' employment status, were the reasons for the claimants' dismissal.

165. In terms of Mrs Martin's cancer, as Ms Aitken said in cross-examination;

> "...Mrs Martin's illness never came into any of the decision-making – that is why it was never considered to be a factor in the decision-making".

166. This evidence actually related to the decision as to whether to pay the claimants any furlough pay. However, we find that this was in fact true of all decision-making taken by the respondent in relation to Mr and Mrs Martin. The fact that Mrs Martin had cancer was considered irrelevant by the respondent.

Conclusions

<u>Length of service/wrongful dismissal</u>

167. In order to determine whether the Tribunal has jurisdiction to deal with the ordinary unfair dismissal claim under s98 ERA, it is necessary for us to determine whether or not the claimants were in fundamental breach of their employment contract. This requires us to consider the actions of Mr Martin, and by proxy Mrs Martin.

168. The respondent alleges that the claimants were in fundamental breach of their contract, by Mr Martin making a fraudulent suggestion.

169. We have found above, that Mr Martin did not make a fraudulent suggestion, or anything that could have been taken to be such. Further, he did not breach trust and integrity as suggested by the respondent.

170. In light of the facts as we have found them to be, we find that Mr Martin and therefore Mrs Martin did nothing to equate to a repudiatory breach of their contract of employment justifying summary dismissal. Mr Martin's furlough suggestion was not sufficient to amount to a fundamental breach of contract; it was innocent and innocuous.

171. This leads us to two conclusions. Firstly, the claimants were entitled to their statutory notice pay of one week. Therefore, the respondents were in breach of contract by not paying that figure. As such, the claimants' breach of contract or "wrongful dismissal" claim regarding their notice pay succeeds.

172. Secondly, due to the effect of s97(2) ERA, the claimants' period of service is extended by one week, meaning that the notice would have expired on 4 March 2021. As such, both claimants have exactly 2 years' service, meaning that the tribunal has jurisdiction to deal with their unfair dismissal complaints under s98 ERA.

<u>Reason for dismissal</u>

173. Given the fact that we have found that the claimants had two years of service, the burden of proof in relation to the reason for dismissal for the ordinary unfair dismissal claim, and both automatic unfair dismissal claims, is on the respondent.

174. In relation to the dismissal claim under the head of direct discrimination, unfavourable treatment, and victimisation, the burden of proof initially asks us to consider whether there is evidence from which we could conclude, in the absence of any other explanation, that the respondent had discriminated against the claimants. If that burden is met, then the burden shifts to the respondent to show that they have not discriminated against the claimants (s136 EqA).

175. Both claimants were asked the question as to why they thought they were dismissed. The claimants' answer to this question is of limited, if any, use to us: what we need to consider are the thought processes, motivations, and conscious or unconscious reasoning of those who made the decision to dismiss. Mr Hoyle made the point in submissions that this is a claim manufactured by the claimants' solicitors. We do not accept this. Lay persons frequently know or feel that they have been wronged in the course of their

employment, unsurprisingly without necessarily being able to pigeonhole their claims within the correct legislation. They quite rightly then seek legal expertise and advice from lawyers. It is the lawyers' job to then frame their clients' complaints within the most appropriate legal framework.

176. We have found as a fact that there were three reasons for dismissal:

    176.1 Ms Aitken's unreasonable understanding of the furlough suggestion;
    176.2 the fact that Mr Martin was proving to be difficult; and,
    176.3 the respondent's understanding of the claimants' employment status.

177. Below, we consider in turn each of the claims relating to dismissal.

Direct disability discrimination – s13 EqA

178. In considering the mindset of the decision makers, we conclude that Mrs Martin's cancer simply did not enter the respondent's mind. We have set out Ms Aitken's evidence in our findings of fact above, and have found that, to the respondent, Mrs Martin's cancer was simply irrelevant to its decision making in general.

179. As such, Mrs Martin's disability, and Mr Martin's association with that disability, were not the reason for their dismissal, in that Mrs Martin's cancer was not a significant influence on the respondent's decision-making.

180. The direct discrimination claims for both claimants therefore fail.

Discrimination arising from disability – s15 EqA

181. At the point at which the decision was made to terminate Mrs Martin's contract of employment, the respondent knew of her disability. The respondent had actual knowledge of Mrs Martin's cancer on 26 January 2021 - [112].

182. We have set out our findings as to the three reasons for Mrs Martin's dismissal in our findings above. We are not satisfied that her absences in December due to her cancer impacted on the respondent's decision to dismiss at all. We conclude that her December absences were not an effective cause of her dismissal.

183. We therefore reject this claim, and it fails.

Indirect discrimination – s19 EqA

184. We are satisfied that a PCP existed, in that the respondent implemented a policy that only those employees who had "demonstrated a frequency of regular working prior to closure" in December 2020 would qualify for furlough pay - [105]. This is clear from the wording of the 13 January 2021 email at [105].

185. The application of that PCP meant that Mrs Martin suffered a disadvantage, in that she was unable to attend work with the required regularity/frequency

in December 2020; she was unable to comply with the PCP. The ultimate consequence of this was that she was not paid furlough during Lockdown 3. Her inability to attend work was due to her cancer, and associated surgery.

186. We have to consider whether the PCP places the claimant at a particular disadvantage compared to those who do not share her disability.

187. We note the following evidence:

187.1 Mrs Martin was diagnosed with breast cancer in late 2020;

187.2 She was signed off as unfit to work due to surgery and recovery from 16 December 2020 to 4 January 2021.

188. We compare Mrs Martin's case to a group of people who have not been recently diagnosed with breast cancer. We consider that Mrs Martin's evidence that she needed a two-week period off work for surgery and recovery soon after diagnosis as evidence that those with newly diagnosed breast cancer are likely to need time off work for some form of medical procedure and recovery.

189. Compared to others without newly diagnosed breast cancer, we consider that she (and others sharing her specific protected characteristic) would be more likely to need time off work for medical procedures and recovery.

190. We therefore conclude that Mrs Martin was placed at the requisite particular disadvantage by the PCP.

191. The respondent has not raised the defence of justification, and so this claim succeeds.

<u>Failure to make reasonable adjustments – ss20/21 EqA</u>

192. As above, we are satisfied that there was a PCP in place.

193. Mrs Martin was placed at a substantial disadvantage, in that she could not comply with the requirement to work regular hours in December, due to her cancer, and related surgery. This ultimately meant that Mrs Martin did not receive furlough pay for Lockdown 3. We consider that, objectively, losing out on pay that would otherwise have been available to her is a substantial disadvantage; it is more than minor or trivial.

194. The reasonable adjustment suggested by Mrs Martin is that the respondent should have paid her furlough pay, and so in effect set aside the December requirement. It was also suggested by the claimants that the respondent could have used a different reference period, as opposed to just looking at December 2020 attendance.

195. We conclude that this would have been a reasonable adjustment to make, to pay Mrs Martin furlough pay. The respondent refused the claimants' request to pay furlough pay on the basis of the financial burden it would place on it - [117]. However, in fact there would have been a very limited cost to the

respondent, in the realms of £3 per month, given that, by this point, the respondent had agreed with other employees not to pay the 20% difference between furlough pay and full pay.

Respondent's knowledge

196. The respondent's case is that it did not have knowledge of Mrs Martin's disability until the email of 26 January 2021 - [109]. This, however, pre-dates the date on which it made its final decision not to pay Mrs Martin furlough pay. This decision took place on 2 February 2021 - [117]. Therefore, the respondent had the requisite knowledge of the claimant's disability at the point it made its final decision on this issue.

197. In terms of the respondent's knowledge that the PCP would likely place Mrs Martin at a disadvantage, we find that the respondent had the requisite knowledge by the time of its final decision. It was aware, by the time of Ms Aitken's email of 2 February 2021, that the claimant had been unable to comply with the PCP due to her disability and related surgery.

198. Therefore, at the time of making the final decision not to make reasonable adjustments, the respondents had the required knowledge.

199. Mrs Martin's claim of failure to make reasonable adjustments therefore succeeds.

Victimisation – s27 EqA

Protected act

200. The first question is whether the three alleged protected acts actually amount to protected acts at law.

201. The protected acts relied upon are:

    201.1 Mr Martin's email of 26 January 2021,
    201.2 The grievance statement, dated 28 January 2021; and
    201.3 Mr Martin's email dated 24 February 2021.

202. The suggestion that any of the telephone calls between Mr Martin and the respondent amounted to protected acts was not pursued by the claimants.

203. We are satisfied that the emails of 26 and 28 January 2021 are protected acts. In the 26 January email, Mr Martin disclosed that Mrs Martin had cancer and made specific reference to the EqA, suggesting that "with this background to our situation, there was more than enough reason to grant furlough". This is in our view clearly "doing any other thing...in connection with [the EqA]" as required by s27(2)(c) EqA.

204. In relation to the email of 28 January, it is specifically stated that "the fact that you have limited the furlough eligibility period to one month, puts Ellen at a disadvantage because of her disability" - [115]. This is a clear allegation that

the respondent has not acted in line with its obligations under the EqA, and so satisfies the definition of protected act under s27(2)(d) EqA.

205. Mr Martin's email of 24 February 2021 is a complaint in relation to the grievance process. It includes the words "this matter could be amicably resolved by furlough being paid". It is alleged that this is a threat of litigation, and therefore falls under s27(2). We are not satisfied that an objectively reasonable interpretation of Mr Martin's words is a threat of litigation. We conclude that nothing in the 24 February 2021 email constitutes a protected act.

Reason for detriment (dismissal)

206. We have found that there were three reasons for dismissal, as set out above. One of those reasons was the fact that the respondent considered Mr Martin to be frustrating, and a pain in his persistence regarding furlough pay and the grievance process.

207. The question then becomes whether it was the protected acts themselves, or the manner in which the protected acts were made, that led to the view that Mr Martin was difficult ("the separability principle").

208. We conclude that it was the manner in which Mr Martin raised his concerns, in other words the fact that he was tenacious in pursuing his complaints, and Ms Aitken's feeling that they were going round in circles, that led the respondent to be frustrated by Mr Martin.

209. Therefore, we find that it was not the protected acts themselves that was the reason for the decision to dismiss, but the manner of doing those protected acts.

210. The claim of victimisation is therefore rejected.

Ordinary unfair dismissal – s98 ERA

211. To the extent that part of the reason for dismissal was a conversation that was deemed to be gross misconduct, we will consider the **Burchell** factors. We remind ourselves of the conduct alleged by the respondent to have led to the claimants' dismissal – Grounds of resistance [38] paragraph 6.2.23:

> "the claimants' persistent demands of the respondent to misuse the furlough payments amounted to unethical behaviour, casting doubt on their integrity and honesty".

212. We have already accepted that Ms Aitken had a genuine belief that Mr Martin had made a fraudulent suggestion.

213. However, this belief was not based on reasonable grounds, following a reasonable investigation. The claimants never had the benefit of a hearing or meeting to discuss the allegations: the claimants were not even informed of the allegations against them. At no point were they confronted with the fact that Ms Aitken thought Mr Martin had suggested something that she deemed

to be a suggestion of fraud, or that his words were deemed to have cast doubt on their integrity and honesty.

214. The claimants therefore had no opportunity to explain themselves. In light of the actual words that Ms Aitken now says were used by Mr Martin, we do not accept that those words in themselves were reasonable grounds for holding the belief that Mr Martin was asking the respondent to misuse the furlough scheme, or that Mr Martin was guilty of unethical behaviour. No investigation was done to explore; firstly what precisely had been said, secondly what precisely had been meant by Mr Martin, and thirdly whether Mr Martin's intent had been blameworthy/fraudulent.

215. We therefore conclude that the dismissal was substantively unfair.

216. No procedure at all was followed. It was submitted by Mr Hoyle that, in the case where there is "persistent malcontent of the workforce", it would be futile to have a procedure. The index case is not such a case. Having seen and heard Mr Martin's reaction to this suggestion that he was asking the respondent to do something fraudulent, we find that he was truly shocked and surprised that he could be accused of such a thing.

217. We find that, had a disciplinary hearing and investigation been undertaken, Ms Aitken and the Trustees would not reasonably have been able to conclude that Mr Martin was making a suggestion of fraud, or that his behaviour was fraudulent or unethical. We conclude that the outcome of a fair process would have been that the matter had been an innocent misunderstanding.

218. Therefore a procedure in this case would not have been futile. The claimant's dismissal was procedurally unfair.

<u>Automatic unfair dismissal – s103A ERA</u>

219. It is the claimants' case that they made disclosures of information that, in their reasonable belief, was made in the public interest and tended to show that a person had failed, was failing, or was likely to fail to comply with their legal obligation to (a) pay SSP to the claimants and (b) not discriminate against the claimants.

220. The alleged protected disclosures relied upon for this claim are:

220.1 [113] email of 26 January 2021 – "If Egham are still unwilling to grant [Mr Martin] furlough, is there not a case for SSP?" (PD 1);

220.2 [112] email of 26 January 2021 - "Having taken their advice, we would like to impart the following information as we feel that this is relevant and is information you were not aware of and is covered under the Equality Act: the reason for Ellens surgery was that she had an operation for breast cancer" (PD 2);

220.3 [115] email of 28 January 2021 – "Therefore, the fact that you had limited the furlough eligibility period to one month, puts Ellen at a disadvantage because of her disability and Paul because of his self-

isolation due to him being in contact with a pupil who had Covid" (PD 3);

220.4 [118] email of 24 February 2021 – the full email is relied upon (PD 4).

221. Taking each protected disclosure in turn, and dealing with PD 1 first. This is a question. A question cannot amount to a disclosure of information. Therefore, we find that this was not a qualifying disclosure.

222. In terms of PD 2 this is simply the provision of information regarding the fact of Mrs Martin's disability. It is not information that tends to show that the respondent has failed, is failing, or is likely to fail their legal obligations under the Equality Act. PD 2 is therefore not a qualifying disclosure.

223. In relation to PD 3, this is a disclosure of information as opposed to just an allegation. The information that was conveyed was that the limiting of the furlough eligibility meant that Mrs Martin suffered a disadvantage because of her cancer. We conclude that Mr and Mrs Martin, reasonably believed that their words disclosed information about a breach of legal obligation.

224. In terms of the question of whether, in the reasonable belief of the claimants, these words at [115] were made in the public interest, we bear in mind the Chesterton guidance:

224.1 It is only the claimants' interests that are served by the disclosure, as opposed to any others within the work force;

224.2 The respondent was a small employer;

224.3 The wrongdoing disclosed was inadvertent as opposed to deliberate discrimination against Mrs Martin;

224.4 A disclosure of alleged discrimination is a serious matter, therefore the nature of the alleged wrongdoing is serious;

224.5 Despite being small, the respondent is also a charity, and therefore it has to account for how it uses its funds: its trustees are under fiduciary duties, including the ways in which the charity's funds are spent.

225. On balance, we conclude that the disclosure was not, in the reasonable belief of the claimants, made in the public interest. This was more of a personal complaint. Therefore, PD 3 is not a qualifying disclosure.

226. Finally, in relation to PD 4, there is no suggestion within this document of a breach of the obligation to pay SSP, or of the Equality Act. There is therefore no disclosure of information on [118] that, in the reasonable belief of the claimants, tended to show that a person had failed, was failing, or was likely to fail to comply with their legal obligation to (a) pay SSP to the claimants and (b) not discriminate against the claimants. POD 4 is therefore not a qualifying disclosure.

227. Therefore, we conclude that the claimants did not make any qualifying disclosures, and so the claim of automatic unfair dismissal due to whistleblowing fails.

Automatic unfair dismissal – s104 ERA

228. Here, the phrase relied upon as being an assertion of statutory rights is the sentence at [113]: "If Egham are still unwilling to grant him furlough, is there not a case for SSP?".

229. Under s104 ERA, it is a precondition that the assertion made be one that a statutory right has already been infringed at the time of the assertion being made.

230. Here, the sentence relied upon is a question. It is not a statement, or assertion, that the respondent has already failed to pay SSP, but a query as to whether SSP may be payable.

231. We therefore conclude that the sentence relied upon is not an assertion of a statutory right that is protected by s104.

232. The claim of automatic unfair dismissal because of the assertion of a statutory right therefore fails.

Polkey

233. There was a wholesale lack of procedure in this case. Mr Hoyle made the point that the claimants were dismissed on the respondent's understanding that they were still casual workers and that as casual workers they would not be entitled to a disciplinary process.

234. We do not understand this argument, given the stage of litigation we are now at. A tribunal has found, as a matter of law, that the claimants were employees. They were therefore entitled to a disciplinary process. One was not done.

235. As we have said above, we consider that a procedure would have made a difference. Had a fair and reasonable procedure taken place we conclude that no fair dismissal could have occurred. Therefore, there will be no reduction under this heading.

Contributory fault

236. Mr Hoyle relied on two points to argue that a reduction should be made for contributory fault of the claimants:

    236.1 the claimants withheld information about Mrs Martin's disability and "that muddied the waters";

    236.2 Mr Martin's conduct in correspondence and in telephone calls contributed to the state of affairs. Mr Hoyle posed the question "could [the claimants] have done something different?".

237. Whether or not the claimants could have done something different is not the test under s123(6) ERA. The test is whether any of their conduct was blameworthy.

238. We find the suggestion that the withholding of Mrs Martin's diagnosis "muddied the waters" to be disingenuous and misguided. At the time of the decision to dismiss, the respondent was perfectly clear that Mrs Martin had cancer, and that this was the reason for her surgery on 1 December 2020. In any event, we consider that initially withholding something so personal and sensitive as a cancer diagnosis could in no way be viewed as blameworthy.

239. Turning to Mr Martin's conduct, we have already found that he was not guilty of making a fraudulent suggestion that was intended to lead the respondent to commit fraud, or do anything illegal in any way. We conclude that nothing within the telephone conversations or email communications from Mr Martin amounts to blameworthy conduct.

240. Therefore we make no reduction for contributory fault.

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Employment Judge Shastri-Hurst

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Date 24 October 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 25 October 2023

FOR EMPLOYMENT TRIBUNALS