EMPLOYMENT TRIBUNALS

Claimant: **Mr L Richardson**

Respondents: **Mr Paul Watson**

Heard at: **Newcastle Employment Tribunal**

On: **9th, 10th, 11th October and 14 November 2023**

Before: **Employment Judge Sweeney**
Lynn Jackson
Derek Cattell

Appearances
For the Claimant, In person
For the Respondent, Mr M Rahman

JUDGMENT having been given on **14 November 2023** and written reasons for the Judgment having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

The Claims

1. In these reasons, the Claimant is often referred to as 'C' and the Respondent as 'R'. At the commencement of the hearing, it was agreed that the Claims are as set out by EJ Smith in his case management summary of **15 May 2023**, namely:

Section 13 Equality Act 2010

a. Did R treat C less favourably because of disability by failing to pay him his contractual entitlements on time or at all?

Section 20-21 EqA failure to make reasonable adjustments

b. Did R fail to make reasonable adjustment, namely: did the lack of an auxiliary aid (a desk and chair) put C at a substantial disadvantage compared to someone without C's disability, that by having to stand or use a stool, it exacerbated his gout?

Unauthorised deductions

c. Did R make unauthorised deductions of wages from C's wages:

   i. from **08 November 2021** to **August 2022** ('the first salary deduction') by paying C £20,000 a year instead of £21,000 a year?

   ii. from **August 2022** to **29 December 2022** ('the second salary deduction') by paying C £10.58 an hour instead of the new agreed rate of £12 an hour}

   iii. From his final wages by failing to pay a bonus of £106?

   iv. In **December 2022** by deducting £330 in respect of an attachment of earnings order having been notified by the DWP that there had been a stop notice issued

Breach of contract

d. Was R in breach of contract by:

   i. Failing to pay a bonus of £106?

   ii. Deducting NEST pension contributions in November and December 2022?

Unfair dismissal

e. Was the Claimant constructively dismissed?

   i. If so, was the reason for dismissal that he had proposed to take shared maternity leave with his partner [note: this must be a reference to either paternity leave or shared parental leave] and therefore automatically unfair under section 99 ERA 1996?

Regulation 30 Working Time Regulations 1998: holiday pay on termination of employment

f. How much annual leave had accrued to the Claimant in the holiday year by the end of his employment?

g. How many days of that accrued leave remained untaken?

h. What was the daily rate of pay?

Findings of fact

2. The Respondent, Mr Paul Watson, operates a car repair garage. C commenced employment with R on **08 November 2021**. Although there was some uncertainty as regards his official job title, he was, we find, employed, essentially as the Reception Manager. This was, on the whole, an office-based role with the occasional venture into the workshop, to undertake some tasks such as 'remaps' (which involves altering the stings of a car's ECU tuning).

3. Prior to starting with R, C had worked for a company called Henson Motor group ("Henson's"). His partner, Leanne, also worked there. By **October 2021**, the Claimant was looking to leave Henson's and to work for the Respondent. On **06 October 2021**, he approached Mr Watson to see if there was a possibility of working for him [**page 209/359**]. On **23 October 2021**, he texted R to say that he was not going back to "*that shit show on Monday, so I'll start with you on Monday aye haha*" [**R210/359**].

4. C and R did meet the following week and R offered C a job. The first factual dispute that we had to determine was the salary or wage that Mr Watson agreed to pay Mr Richardson when he commenced employment. Mr Richardson contended that his agreed salary was £21,000 a year. R contended that the agreed salary was £20,000 a year.

5. We find, on a careful evaluation of the evidence, that R offered to employ C on £20k a year to be reviewed after six months

6. After they met, in the evening of Saturday **30 October 2021**, C asked R "*when do you pay the lads Paul mate just so I can sort finances out*?". R replied to say that he paid wages on either 28th of the month or the 7th whichever he preferred. C replied that 28th would be perfect. He added:

> "***Can you not level on 21k on the basis it sets my head straight that I'm further forward wage wise than I am at Henson's, then in 6 month we'll review****. I'm multi talented mate I'll strive to better your business in every way I know. Henson's will be shitting a brick that I'm leaving. I feel like I can speak to you Paul you're a top bloke and that will go a long way"* [**R211/359**].

7. It is clear from that text that C was looking to move R from a **lower** starting salary to a starting salary of £21k. Further, we infer from the words that he would be 'further on wage wise than at Henson's" that he was earning less than £21k at Henson's. That is the natural inference we draw.

8. R responded to say that he was at a party and that they would talk tomorrow. However, they did not in fact talk the following day, which was a Sunday. On Monday **01 November 2021**, C texted R: "*Alright bud hope you've not been hanging too much from ay party. I've left that shit show, I can start anytime after tomorrow just let me know bud cheers*."

9. It was agreed that C would start Monday **08 November 2021** and that the hours were 08.30am to 5pm. [**R213/359**]. Had C and R spoken on the Sunday, we would have

expected to have seen a text from him that day or shortly after then reflecting the conversation and including some recognition that R had moved to £21k. However, there was no such text exchange and there was no further text exchange or conversation about £21k. Therefore, we infer from those facts, that the offer and agreement was £20k, that Mr Richardson subsequently asked Mr Watson to move to £21k but that he did not respond to this. The Claimant then simply moved on, started work on the Monday **08 November 2021**, without raising the matter again (until much later as we shall come to). The payslips for C all show a gross monthly salary of £1,666.66, equating to a salary of £20,000 a year, reflecting the agreement that was reached.

10. At the time he started work, Mr Richardson was one of only three employees, the other two being Myles Junior Harrison-Smith, a technician and Jack Watson, an apprentice and R's son. A fourth employee, Dimitros Iliadis-Kypriotis, joined in about September 2022, as workshop manager.

11. Mr Richardson was never provided with a written contract or a statement of written particulars. Although he is a small employer, the statutory obligation to provide employees with a statement of written particulars applies to Mr Watson in as much as it applies to any other employer. R paid no regard to that responsibility.

12. The business, from what we can see, operates in a very casual, informal way. Whilst there may be much to be said for informality, the formal basic obligations on an employer are important. There is good reason for requiring employers to provide written statements of particulars of employment. It is to enable employees to understand the terms on which they are employed and it helps to avoid some of the avoidable disputes that emerged in these proceedings relating to Mr Richardson's agreed pay and his job title.

13. Looking back at matters objectively, C's employment did not get off to an auspicious start. At the end of his first day at work, he asked to be allowed to leave early on the second day to attend a meeting with his solicitor. This was regarding a driving offence committed at a time when he had been employed by his former employer, Henson's, something C had not mentioned to R prior to taking the job. R replied that it was not a problem [**R 5-6/359**]. That relaxed response from Mr Watson, as the evidence showed, was a typical response to statements from Mr Richardson that he was running late or last minute requests for time off.

14. Having left early on **09 November 2022**, C did not go to work on **10 November 2022** as he had to look after his child. On **15 November 2021**, he was late for work **R215/359**]. Nor did he attend work on **17 November 2021**. At 11.54 he texted R to say that he was going to court and that R should put the day down as a holiday [**R216/359**]. This signified a fairly cavalier approach to new employment, albeit at a time when personal stressors in Mr Richardson's life may well have been a contributing factor.

15. On **19 November 2021**, C sent his bank account details to enable R's accountant to process his wages [**R218/359**]. Even from his own perspective, C's employment had not got off to a good start. On **07 December 2021**, he texted R to say:

> "*I understand if you want to get rid of me Paul because I'd personally be concerned as well, however trust me soon as this shit passes you'll see what I can do for you. Sorry if I've let you down mate*." [**R224/359**]

16. On **15 December 2021**, C appeared before the South East Northumberland Magistrates' Court following which he was banned from driving for two years [**15/359**].

17. R could have reacted to this poor start and to C's own comment about getting rid of him by doing just that. However, he did not. He did not put C under any pressure. He did not raise any question of disciplinary proceedings, or fail to pay him for days not worked. On the contrary, on **24 December 2021**, R paid C a Christmas bonus. He texted C to say: "*put a little Christmas present in your bank. Thanks for the hard work*." C thanked R saying that it was much appreciated [**R230/359**].

18. On **12 January 2022**, C was on the verge of resigning because of his personal problems. He texted R very late in the evening:

> *"Hi Paul, I won't be back mate…. It's been an absolute pleasure working with you mate, very rare to come across a person like yourself. I'd appreciate if you could give me some time to sort things but I understand if not."* [**R234/359**].

19. C evidently changed his mind as he texted the following day at 11.03am to say that he was coming in after all [**R235/359**].

20. C's employment continued, albeit he continued to have sporadically poor timekeeping. Looking at events in 2022, there were many occasions when C texted R at short notice to say that he would not be in that day or the following day or that he would be arriving at work late or to request a holiday at short notice, or to look after his child or take his child to school or to hospital or to attend a probation meeting or a court hearing. We have identified 24 such occasions from the WhatsApp/text correspondence in the bundle from **04 January 2022** to **12 August 2022**.

21. On **02 February 2022**, C texted R to say firstly that he was running late and then that he would not be able to get to work because of pain in his foot, which he thought was either broken or a case of really bad gout [**R237/359**]. C worked from home from **02 February 2022** to **06 February 2022**. By then, he had recovered sufficiently to be able to go back into the workplace on **07 February 2022**. [**239/359**]. As it turned out, it was not gout that was causing the pain on that occasion but a fracture. C texted R on **16 February 2022**:

> *"On the phone trying to book an e-ray for today mate doctors said its not gout most likely a refracture told me to get a xray asap." In another text later that day, he added: "Been in the walk in most of the day mate. Got a xray, said I've refractured it in pretty*

much same place as last time, god knows how I've managed that... So I've been walking round with a fractured foot, no wonder I've been in agony."

22. C was advised to rest his foot after visiting the walk-in centre and was not able to make it into the workplace until **Friday 25 February 2022** [**R245 & 247/359**]. During this time he worked on putting together a new website for R's business [**R244/359**] for which R was to pay him separately. C returned to the workplace on **25 February 2022**, albeit on that day he texted R to say that he was running late as he had to drop his partner off in town **R247/359**]. The same thing happened on **02 March 2022**.

23. In **March 2022**, C raised with R the matter of payment for the work he had done on the website. Although no figure is stated in the documents, we infer that the amount of money that C asked for came as a real surprise to R. This can be seen from an email exchange on **02 March 2022**, where R says: "*no way I can pay that mate. Yes it's wicked but honestly thought it would be a couple of hundred since you work for us. And I have paid you for all your days off since u started. Will have a chat tomorrow mate*" [**page 248/359**] In C's response to that text he said that web sites are expensive, that he put a lot of time into it and that sites like that cost about £10,000.

24. On **14 March 2022**, C texted R to say that he suggested C pay a total of £3,600 at the rate of £300 a month [**R251/359**]. He asked for the first payment to be made immediately. R replied: "*sent £300 in mate talk tomorrow*".

25. At 3am on **16 March 2022**, C texted to say he would not be in that day as he had no sleep again due to what he referred to as his dysfunctional relationship with his partner. [**252/359**]. He suggested that R "*sack him off"* and that he would not blame him. Later that day, he texted R again to say that his partner had crashed her car and that he was stuck, not able to get to work. R responded at 19:46: "*not sure what you want me to say Lee. It's only a few working days we talked about your time keeping and the amount of sick days you have had since starting with us which I have paid you for. Let me sleep on this and I will call you tomorrow. Sorry for the late message*." [**R253/359**].

26. Despite C's poor timekeeping and despite this being the second time C had said that he would understand if R were to sack him, R did not. Nor did he raise the prospect of it.

27. On **23 March 2022**, C was late for work again. [**R253/359**]. He must have resolved the driving issue as his recent spell of lateness had been due to dropping his partner at central station.

28. On **28 March 2022**, C texted R saying: "*any idea what time the wages are going in mate? Just had loads debits come out and only have until 3pm. I think until their reversed. All going well at the garage mate hope ya feeling better*." [**R254/359**]. R replied that morning to say that the wages should now be in – and indeed they were. The following day, C tested positive for COVID and was unable to go to the workplace. However, C recovered sufficiently to go to work on Monday **04 April 2022**, which he did. However, in the

evening of **03 April 2022**, he texted R to say that he would not get in until about 10am as he had to take his child to the doctors at 9 and then take him home **[258/359]**

29. As it happened, C did not turn up for work on **04 April 2022**. He texted R at 09.09am to say that he had too much going on that day and would call him soon and explain. He had split up from his partner and was in the process of moving his things to his brother's place in Whitley Bay. He texted R to say "*don't know if I still have a job or not mate….".* He explained that he was waiting to find out from his partner if he can keep the car until after work tomorrow "if you want me back that is?" [**259/359**]. Thus, C was again recognising the possibility that R might (on C's own account, understandably) fire him. However, R did want him back or at least he did not put any pressure on C regarding his employment. Nevertheless, on **08 April 2022**, C texted R to say he would be late for work again that day [**259/359**].

Gout

30. C has over the years suffered with foot and ankle pain. In his oral evidence, which we accepted, the Claimant said that in **2017** or **2018**, he had experienced problems with what he later came to learn was gout. There is no reference in the medical records on page **R305/359** to any foot or ankle problems in **2017 or 2018.** We infer from this that the pain was nothing to the extent that he suffered in subsequent years. There was a flare up, again for about a week, in **June 2020**, when he was not able to bear any weight on his ankle and foot. Therefore, the adverse effects were substantial. That was when he was first diagnosed with gout [**page 304/359**]**.** He saw his GP again in **April 2022** with a further flare up. Blood tests were taken. The Claimant was prescribed colchicine and started on preventative medication, Allopurinil.

31. It is clear and obvious that during the flare up of gout in **April 2022** the Claimant was unable to walk. From the photo of his foot, that comes as no surprise [**R52/359**]. We find from C's evidence that the flare up in 2020 was of a similar magnitude. Each flare up lasted for up to a week. The Claimant described, and we so find, that the pain and swelling then goes away. He described the pain as being like "glass in your joints", resulting in "*excruciating pain which goes as quickly as it comes on*". As he put it, the pain passes when "*the uric acid fizzes out and you feel relief*". Before it passes, the pain is such that it keeps him awake at night and unable to bear much, if any, weight on his foot.

32. C texted Mr Watson on **19 April 2022**, sending him a photo of his foot and ankle [**R52/359**]. During this period of flare up, C worked from home [**R58/359**]. On **21 April 2022**, he texted R to say: "*doctor said its gout and quite severe mate. So been prescribed with alpurinol, no surprise really like my dad and brother suffer with it. Trying to do my best from home today mate. Any voicemails I'll sort out but watch out for questions on Monday*" [**260/359**]. By **22 April 2022**, he was able to put some pressure on the foot and the swelling was going down. He texted Mr Watson on Friday **22 April 2022**, to say that he should be okay to get to work by Monday **(25 April 2022).** He informed Mr Watson

that he was to go to his GP, Village Green, wallsend on **23 May 2022** for a blood test **[60/259]**.

33. On Friday **22 April 2022**, C texted R to say: "*Paul would there be any chance of getting that upsell cash today mate? Not sure what it's at the excel document is on the desktop. I'm proper skint, I'm sorry to ask made just that it would really help*." [**161/359**]. This 'upsell' forms the basis of one part of C's claim of unlawful deduction of wages claim, in respect of which he claims payment of **£106**.

34. There was no response from R. Therefore, C texted again that evening at 20.21 asking if he had got his message. R replied "*soz*" [**61/359**]. C then replied: "*ah right mate just you said middle of the month so it would help people get by until end of the month*", to which R responded "*Did I. sorry mate*." [**61/359**].

35. This exchange demonstrates the casual approach R takes to his business (or at least to his employer/employee) affairs. It also demonstrates, alongside many other WhatsApp messages, C's sense of urgency regarding his finances. There are sufficient exchanges referencing requests for wages to be paid immediately, to upselling and to finances generally, to enable us to find that C was becoming increasingly worried about his finances. This worry intensified as we get further into 2022 with the pregnancy of his partner.

36. On Sunday **24 April 2022**, C texted Mr Watson to say that, although his foot was 100 times better than it had been the past week, he was taking no chances walking on it. He said that he needed to rest it because hobbling around on it was doing it no good. He said that if it was still bad in the morning, he would do his best to work from home and should, in any event, be in by Tuesday (i.e. **26 April 2022**). [**64/359**] Mr Watson replied to say no problem, that health was more important than money. Yet again, R was putting C under no pressure and was understanding.

37. C returned, not on Tuesday, but on Thursday **28 April 2022 [261/359**]. He texted R to say he would not be able to do that much on his feet. As of **10 May 2022**, C was still having trouble with gout. He texted on **10 May 2022** asking R if he could bring some crutches for him [**263/359**]. Later that day, he said to R: "*it's not so bad when elevated so gonna keep it up all day*." C did not go into the office at all during this period. Instead, he worked from home, which he was set up to do. The only thing he could not do from home was speak to customers face to face [**264/359**]. However, this was not a problem for the Respondent and they did not require him to do so.

38. On **10 May 2022**, C texted R to say that he had been referred for an x-ray. He attached a photo of an appointment for **12 May 2022** at North Tyneside [**R69/359**].

39. C was able to get back into the workplace on **16 May 2022**. He was late for work again on the following dates:

- **18 May** and **23 May 2022** [**266/359**],
- **30 May 2022 [267/359**],
- **16 June 2022 [87/359],**
- **20 June 2022 [89/2022]**,
- **23 June 2022 [93/2022],**
- **03 July 2022 [103/359],**
- **05 July 2022 [105/359],**
- **19 July 2022 [119/359],**
- **12 August 2022 [128/359]**

40. On **28 June 2022,** C texted R at 11.34am to ask R to chase the accountant for wages **[97/359].** R did so immediately and C confirmed that they were paid at 11.50am that morning.

Bonus

41. C claims that he was contractually entitled to a bonus payment of £106, payable he says around August 2022. C says that there was an agreement that he would be paid around 15th of the month for actively promoting and offering certain items [**273/359**]. C says that the bonus was discontinued or stopped in July 2022. R says that there was no such contractual entitlement. We find R did put in place for a short time a trial scheme of some sorts for rewarding C and others for 'upselling'. However, it did not last.

42. We find that C pressed R to put in place some form of bonus scheme that would have paid him, and others, for upselling products of the sort set out by C on page **273/359**. However, it was not a contractual scheme and there was no legally binding commitment or agreement by R to continue any bonus scheme. By the time W told C in July 2022 that he was not going to pay any bonus going forward, C says he was by then entitled to a payment of £106. However, he has not established how he has come to that figure and we were unable to see how he got there. In evidence he said that it was 'maybe' for 4 x adblue and wipers. However, he was unsure.

Anxiety and depression

43. Before we come on to C's request for a pay review, we will set out our findings on another aspect of the claimant's claim related to disability discrimination and that concerns his anxiety and depression. C maintains that during his employment, he had mental impairment (anxiety and depression) which had a substantial adverse effect on his ability to carry out normal day to day activities.

44. By **July 2022**, C's partner, Leanne was pregnant. She had numerous pregnancy complications from **August/September 2022** which resulted in an early planned birth – their baby being born on **02 February 2023**. C shared the difficulties of the pregnancy with R, who was sympathetic and supportive. At some point between September and December 2022, C mentioned to R that he planned to take a couple of weeks off after

the baby was born but nothing more specific than that. R had no difficulties with this at all.

45. C was absent on sick leave for a couple of days in **August** and **November 2022** which he attributed to anxiety and stress. In his impact statement [page **R310/359**] he describes how, at its peak he struggled to communicate with his family, friends and colleagues and experienced low moods, where people viewed him as 'negative'. The medical records disclosed by the Claimant record very few entries: on **18 March 2013**, there is a reference to 'low mood'. Then there is a reference some four and a half years later, on **11 September 2017,** to 'anxiety with depression'. Other than that, there is no other reference. Dr Cheikh-Ahmed refers to him having been seen in **January 2023** (after the resignation) describing feelings of depression and increased stress, struggling with sleep and a racing mind.

46. Returning to the sequence of events, it was not until **July 2022** that Mr Richardson raised his salary with Mr Watson. On **11 July 2022**, C texted R to say that he had been sat working out finances with his partner (Leanne) that night who was, by this stage, pregnant. They were looking at combined monthly income – planning ahead to when she would be on maternity leave. He said:

> *"I'm actually quite shocked mate I think you need to speak to the accountant she's had me on the wrong wage for 9 month now! We agreed I'd review in 6 months (which has now passed by 2 month). I'm coming out with £1,666.66 before tax and generally £1,365 after tax. I should have been on £21k which would be £10.30 per hour and would mean that she's under paid by £750.06! I'm actually on 31p more than minimum wage mage which for my age and the jo I' doing I think is really quite shocking. A cleaner in a local shop is paid more… the lads at SAS are on 24k basic with a potential 9k bonus over the year…. This really needs looked at mate, the wage bracket for service managers…. Is between 28 and 35 grand. I feel really deflated after finding his out mate I thought it was a bit low what I was coming out with like but now I see why! Needs discussed with the accountant mate and this review needs to happen. I'm really struggling on this wage, I could get a job from home any time for no less than 23 k year and that would be doing something piss easy basic"* [**R110-111/359**].

47. It is clear from this message that C believed he deserved to be on more than £20k. It is likely, and we so infer, that the trigger behind his analysis, was the discussion with his partner, Leanne, about future income. We infer this from our primary finding that C, whilst always concerned about money, made no reference to his pay from the day he started working with R. It was only when his partner looked forward to the time when she would be on maternity leave and considering what hours she would be working and in what role, that C was compelled to look at the family finances, something he had not done since taking up employment with R.

48. Within two minutes of receiving C's text, Mr Watson responded: "*We agreed £20k and reviewed after 6 months mate*" [**R112/359**].

49. C replied five minutes later to say:

> "*We definitely agreed to be put on the same as Hensons mate which was 21k. As I originally asked for 23k and you said no you'll match hensons and then we'd have a review in 6 month. Either way mate I'm canny shocked at being literally on minimum wage for what I'm doing*."

50. That was not, however, what had been agreed. As we have found, C subsequently tried to negotiate R up to £21k and he did so because he would be further forward than with Henson's. He was not on £23k a year at Henson's. In any event, C and R spoke after this and agreed that from **August 2022**, C's pay would increase. Just as there was with the initial salary, there was a dispute between the parties as to what was agreed to be paid from **August 202**2. R says that the agreement was that C's pay was to increase to £22k a year. C contended that the agreement was not that he would be paid £22,000 a year but that he would be paid £12 an hour.

51. We have no doubt, and so find, that C, when asking for more money, pointed out to R that his annual pay of £20k equated to about £10.30 an hour. He based that on a rough and ready calculation which he had done using some internet website. In his WhatsApp message of **11 July 2022** [**page 111/359**] he referred to being on 31p more than minimum wage. It was not easy to see how he had arrived at this conclusion. NMW rate at that date was £9.50 an hour (for **April 2021 to March 2022**, it was £8.91). If C took his gross pay of £1,666.66 and multiplied by 12, divided by 52 and then divided by 37.5 (the number of hours he worked in a week) he would get £10.26. That would be 76p per hour more than NMW if the hours worked were 37.5. If he took his net pay, then that is not the correct way of going about it. C had, we find, considered that by translating his annual salary to an hourly rate, he was lowly paid. In contending for more pay, we find that he argued that <u>he ought to be</u> on about £12 an hour and said as much to R. However, R did not pay by the hour and C has not persuaded us that R agreed to such an arrangement.

52. We find that the agreement was in fact £22k – not £12 an hour - and that this was most likely agreed on **21 July 2022 [122/359**]. We accept R's evidence that he would not have agreed an hourly rate, as he pays an annual salary to his employees. Further, there was no talk of hourly rates when C first came to work. There was no reason for that to change. R is a small businessman, who did not pay much even to himself. C accepted that the business did not bring in substantial amounts of money. He recognised, in **December 2022,** that Mr Watson was struggling; and although that was some five months after **July**, no-one had suggested that the business had been doing particularly well back then only for it to decline by December. Further, if the agreement had been to pay the Claimant £12 an hour, we would have expected C to have been highlighting the number of hours he was actually working. It would mean that, if in a week, he had worked 50 hours, he would be entitled to £600 and so on. We do not accept that R would have or did agree to any such arrangement. Further, if the agreement had been a sum of money which equated to £12 an hour x 37.5 hours a week, that would have meant a weekly

salary of £450 a week, or £23,400 a year, a figure which no-one had mentioned and was significantly higher than the amount R had in mind when he first employed the Claimant.

53. We have to say that we were unimpressed by what we can only describe as an abject failure on the part of R to record and set out clearly the rates of pay (and other terms). Nevertheless, it would be wrong for us simply to infer from this failure to conclude that the agreement was as the Claimant maintains. True it is that a dispute like this was wholly unavoidable had R applied the merest semblance of responsible employer record keeping. Nonetheless, a dispute there was and we had to resolve it on the evidence. The clarity of communication was very poor. R's casual approach to matters of importance is regrettable. The Claimant was now in a heightened state over money, had convinced himself he was worth at least £12 an hour and did not fully take in what R had agreed to. Whilst we find in favour of R in that the agreement was to go to £22k, he must bear some responsibility for the dispute that ensued as he had failed, as an employer, to set out in writing the basic terms and contractual arrangements.

54. On **27 July 2022**, C asked for his wages to be sent that night. R did this [**125/359**].

55. In **August 2022**, there were some days when C was late for work and had to attend hospital at short notice to accompany his partner, whose pregnancy was progressing. On Sunday **21 August 2022**, C texted R to say that he would have to take Monday (**22 August**) off, asking for an emergency holiday [**R132/259**]. In the early hours of **23 August 2022**, he texted to say he would not be in tomorrow either (meaning that day) [**R134/259**]. The holiday was requested to enable him to fit carpets and prepare a room at home and take material to the tip.

56. On **25 August 2022**, C texted R to say that he had looked at his pay slip to see how much pension he was paying as he was going to cancel it. He said that "*the accountant cooked it up somehow… she's put me on £11.28 an hour it's supposed to be £12 an hour. When you speak to her can you ask how I cancel my nest pension as well…."* [**R 136/359**]. Although he did not express it, we find that C had arrived at the figure of £11.28 an hour as follows: £1,833.33 x 12 divided by 52 divided by 37.5 = £11.28. R replied within 10 minutes to say that £1,833.33 x 12 is 22k. He agreed to talk to C the next day [**R137/359**].

57. On **03 September 2022**, C texted R to say: "*Morning mate. I've worked out what my wage was missing and it's £93.26. Can you transfer it soon as please mate*." R responded later that day to say: "*Done mate*". [**R140/359**]. C contended this is consistent with the agreement being £12 an hour, that the difference represents roughly the extra he should have been paid in August to reflect an agreement of £12 an hour - otherwise R would have said something at the time. We considered this but concluded that it was equally consistent with R being careless with regards to such matters, and an example of him simply accepting that C's pay wage was short and agreeing to pay it for a quiet life. On balance, we find it was the latter.

58. It was during the first week of **September 2022**, or thereabouts, that R moved his place of business to new premises. They had been planning this move in August. At the old premises, C had a desk and a chair. He had this desk and chair at the time he had the flare up of gout in **April 2022**.

59. There was still work to be done on the new premises after they opened the doors at the beginning of September. They were still working on the reception area. A bench had been set up with stools, one of which was for C to sit at. The idea was that he would sit at the bench, meeting and greeting and doing his work. C asked for a desk to be placed in the reception area. He said it looked professional and he did not think that the bench and stool arrangement was professional. R's son, Jack, had a desk at home which R then arranged to be brought to the new premises. However, the desk was not placed in the reception area, where the Claimant worked. That was because the reception area was unfinished. Instead, it was placed in an adjacent office. Jack used the desk from time to time when not working on his main role as a mechanic. There was a dispute as to whether this desk was intended for Jack's use or for the Claimant's. We find that it was intended for C's use albeit not necessarily exclusively. Further, placing it in the office was a temporary measure, although it did not, we find, matter where the desk was.

60. Customers tend to drop their car off between 08.30am and 9am. That is the period when it is necessary to have the reception manned. When manned, C would be able to sit on a stool at a reception 'bench'. Once reception quietened down, C could, had he wished, carried out his other duties in the next office, at the desk, venturing out into the nearby reception as and when needed. R was not prescriptive on any of these things. He never told C he had to work at the bench or that he could not sit at the desk. It simply wasn't an issue for R. Further, there was no time in September through to December 2022 when C experienced any issues with gout. Nor was there any evidence that sitting on a stool would exacerbate C's gout. All there is, is an assertion to that effect by C.

61. On **12 September 2022**, C appeared in court again [**R150/359**]. Although the reason is unclear, we infer it was related to his driving offence.

62. On **27 October 2022**, C texted R to say: "*£12 per hour x 8 x 5 x 4; take away £143 tax; £73 pension; £104 NI; total £1,600 for October. £101.07 short in September."* [**R160/359**].

63. The following day, **28 October 2022**, at 08.54am, C texted R to say that he had been pulled over, that someone had "*grassed*" him so they (the police) have been on the look out for his car. This was a reference to the Claimant driving whilst disqualified [**R233/359**], something R was aware he had been doing.

64. On **03 November 2022**, C texted R to say that he had "*sorted out that dea shit*". Setup a direct debit so the accountant doesn't need to do anything with it anymore they are gonna send out another letter to confirm" [**R165/359**]. DEA stands for 'Direct Earnings Attachment'.

65. On **22 November 2022**, C texted R asking him to send over £300 for the website [**R176/359**]. This was a reference to the additional work, outside the scope of his employment contract, that C had been doing for R in developing R's website. R replied later that evening to say he had transferred the money, adding "*times are hard at the min so need to have a chat tomorrow*" [**R177/359**]. C's financial worries were building.

66. On Saturday **26 November 2022**, C texted R as follows: "*looked at me payslip for Monday and it's wrong again mate did you not speak to the accountant yet*?" [**R179/359**]. The Monday was **28 November 2022**, the day his next wages were to be paid.

67. On **26 November 2022**, the National Employment Savings Trust ('NEST') wrote to C as follows:

> "*You told us on **26 November 2022** that you want to stop your employer, Prestige Motorworks, making contributions to your Nest retirement pot.*
>
> *On 26 November 2022 we wrote to Prestige Motorworks to ask them to stop making these contributions.*
>
> *Prestige Motorworks should make contributions to your retirement pot until the date we complete your request to stop making contributions.* [**page 298/359**]

68. On **27 November 2022**, NEST wrote to R's accountant informing her that C had requested R stop making contributions for him when the next earnings period starts after effective date of contribution cessation [**R298/359**].

69. On Monday **28 November 2022**, C texted R asking what time his wages were going in. He then sent another text as follows:

> *"£12 per hour x 8 x 5 x 4*
> *Take away £143 tax*
> *£73 pension*
> *£104 NI*
> *Total £1,600 for November*
>
> *I've stopped me pension now like so next month won't need to pay any contributions what ever they were"*

70. C had been paying 4% of his pay into the NEST workplace pension.

71. In **November** and especially in **December 2022**, C's partner had been undergoing scans and tests related to her pregnancy. C was understandably concerned for her and for his unborn child. He was also dealing with the aftermath of his arrest and conviction for driving whilst disqualified, which was of course entirely his own fault. He was also feeling under pressure financially as his partner would be taking maternity leave in due course. He was also convinced and concerned that he was being underpaid and undervalued at

work. This cocktail of different pressures was now taking a toll on him. He was like a pressure cooker. The pressures and sense of being underpaid would soon lead him to explode, when under the influence of alcohol.

72. On **06 December 2022**, R texted C saying:

> "*mate just forget about the website from now on"*. C replied: "*hope you don't think I deliberately suspended the web site because you didn't pay the 20 hosting mate. The 300 that you pay off the remaining balance every month is nothing to do with the 20 that's for the actual server hosting cost which goes to the hosting provider. So the 300 was literally sent straight to the gardener and I've been completely skint since the 29th last month so I didn't even have money spare to pay the hosting for you or I would of until you squared it up if I'm honest I forgot about it with 300 being sent instead of 320*." **[R186/359**]

73. On **08 December 2022**, C texted R to say that he had a probation appointment the following day [**R187/359**]. On the morning of **13 December 2022**, he again texted to say that he had a further probation meeting that afternoon [**R188/359**].

74. On **14 December 2022**, C texted R saying:

> "*Hello mate, have you managed to pull anything else in this week? I am fucked this week like, we have no shopping, no fuel, I calculate the website money into our monthly bills until it's paid off and it's a week before Christmas mate. We are supposed to have the bairn at the weekend and planned breakfast with Santa, but haven't a bean mate. Also the web hosting payment needs made for last month and this month, its £40. Hate to even ask mate, I really do but it's touch and go for us at the minute, Leanne is on maternity reduced part time hours. Wouldn't ask but we are in the same boat mate. I know your struggling and wouldn't even ask if I really didn't need it. Works out at £260*" [**R191/359**].

75. R responded shortly after this message:

> "*Absolutely no chance Lee. I paid myself £500 last month and won't be paying myself this month. Sas is now on stop as haven't paid October bill of £6,000 never mind November's bill. Sorry*" [**R/191/359**]

76. After another text from C, R replied: "…*unless things pick up asap then we all out of a job*." We find that by this stage, R was becoming concerned that he was paying out £300 every month for the website and that he was not getting value for money. Business was not doing particularly well and R himself was not taking home much by way of income from the business. On **16 December 2022**, C texted R asking whether wages were going in on **23 December**. On **18 December 2022**, he texted in the evening to say that his partner was to have a scan the next morning at 11am.

77. On **22 December 2022**, at 6.20pm C texted R to ask him if he could put his wages in that night rather than the next day [**R194/359**]. R replied to say that he couldn't as wages

were set for the next morning. Later that evening, C texted R again to say that it was his birthday tomorrow, not to mention Christmas and that he has a '*bairn ready to drop'*. He said "*I need my wage paid in after 12am tonight as it would be with all businesses*." [**R194/359].** R responded: "*Lee, wages are paid tomorrow*". C responded to say "*tomorrow what time tho? I need to know mate, otherwise it's going to fuck up my whole say*."

78. C's wages were, in fact, paid shortly after midnight. At 01.16 on **23 December 2022**, C texted R: "*Paul my wage is way off. Supposed to be 1600, 1342??? Wtf*." [**R195/359**].

79. R made a deduction from C's pay that month of **£174.03** in respect of the DEA. That was the second deduction made in accordance with a DEA notice sent to R by the DWP. In fact, the first notice had been sent on **08 May 2022** identifying a total amount to be recovered from C's net pay of **£811.98** [**R302/359**]. That notice was not actioned in **May, June, July, August or September 202**2. On **25 September 2022**, the DWP wrote again to say that they had not had an expected DEA payment from R [**R301/359**]. R was reminded that he had a legal responsibility to make the deductions [**R301/359**]. Despite this, no deduction had been made in October. The first deduction made in compliance with the order was made from November's pay in the sum of **£165.96**.

80. On an unspecified day in **December 2022**, as R accepted in cross-examination, C and R discussed what holidays he had remaining in that holiday year, which ran from 01 January to 31 December. It was agreed that he had 1 day's holiday outstanding. He was entitled to 28 days holiday and had taken 27. On a gross salary of **£22k,** a day's rate of pay equated to **£84.62** (£22k / 260 working days).

81. C contacted the DWP on **23 December 2022**. He then texted R at 13.49 to say that the DWP was going to call him. He said that he had set up a payment plan and that they had sent R a stop letter to say do not take any money. [**R195/359**]. An employee from DWP called R. She explained to R that C had put in place a payment scheme, which he had been unaware of at the time. As a result of that, W paid back **£165.96** to C. However, W had not received a 'stop' letter from DWP and C has not provided one.

82. On **28 December 2022**, C texted R again to say that his wage was still wrong, that he had been sent **£1,508.75** and that it was supposed to be **£1,600**. He added that he had cancelled his pension a couple of months back and so it should be **£1,670**. He said that it was touch and go at the minute and he would be at hospital all day the next day. He mentioned that his baby was to be premature, his financial burdens and added that it was an extremely stressful time and the last thing they needed was to be stressing about money. R replied "*Mate you have had days off left right and centre and I have paid you for them. We are struggling at work also*" [**R196/359**]. That message from R and R's failure to respond to a further two texts at 17.57 and 20.34 from C provoked C into a reaction which he has come to regret. He resigned his employment on **28 December 2022**, leaving a series of voice messages on R's phone which were abusive towards R, in which he threatened to take R down. Extending the metaphor to its conclusion, the

pressure cooker had exploded. He had been drinking heavily and we accept Mr Watson's evidence that C was drunk. R was genuinely shocked and upset by the messages

83. On **30 December 2022**, C sent R a very long text [**R198/359 – 200/359**]. R replied tersely "*Lee I told you to stop the website. £165 was put in your bank on 28th. I wish you all the best in the future*." [**R200/359**]. That **£165** was a reference to the £165.96 deducted in accordance with the DEA in **November 2022**. He sent a further lengthy text referring to employment tribunal and court actions. Among other things C said: "*you knew I was taking paternity leave at the start of January as the baby is being born in January for health conditions and not growing and you've sacked me via text message, no phone call nothing knowing I was going on paternity leave to get out of having to make any more payments*." [**R202/359**].

84. R replied at 18.02 that evening. At the end of the message he said: "*do not message me again. Next time I hear from you it through your solicitor*" [**R203/359**]. C did reply [**R203/359-205/359**]. Among other things he said: "*It was agreed that I could work from home, which I have been doing*".

85. On **31 December 2022**, C texted R saying he was raising a formal grievance [**R207/359**]. Among other things, C said: "*please provide me with copies of signed return to works for any events of unpaid leave due to sickness (Gout*)." The same day, C started the process of instituting proceedings in the ET by contacting ACAS. He was issued with an EC Certificate on **04 January 2023** and presented an ET1 on **17 January 2023**.

Relevant law

Constructive dismissal

86. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94. Section 95(1)(c) provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is **entitled** to terminate it without notice by reason of the employer's conduct. This is known as 'constructive dismissal'.

87. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' Accordingly, the 'conduct' must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment: **Western Excavating (ECC Ltd) v Sharp** [1978] I.C.R. 221, CA. It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract*:* **Woods v WM Car Services (Peterborough) *Ltd*** [1982] I.C.R. 693, CA. In determining this factual question, the tribunal is not to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair) but must simply consider objectively whether there

was a breach of a fundamental term of the contract of employment by the employer. Pay (wages) is, of course, a fundamental term of an employment contract. It is essential to the wage/work bargain that the employer pay the employee the agreed wage. An employer who pays less than the agreed contractual wage – in addition to potentially falling foul of the ERA 1996 wages provisions – is highly likely to have repudiated the contract.

88. In many cases, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. That is expanded upon in a well-known passage from the judgment of the EAT (Browne-Wilkinson J) in **Woods v WM Car Services (Peterborough) Limited** [1981] I.C.R. 666.

"It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee .... To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

89. It is enough that the employee resigned in response at least in part, to fundamental breaches of contract by the employer. The fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: **Meikle v Nottinghamshire County Council** [2005] ICR, CA. It follows that once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon: **Wright v North Ayrshire Council** UKEATS 0017/13 (27 June 2013); **Abbey Cars West Horndon Limited v Ford** UKEAT 0472/07.

90. The final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. In other words, the final incident may not be enough in itself to justify termination of the contract by the employee. However, the resignation may still amount to a constructive dismissal it the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'. The last straw must itself contribute to the previous continuing breaches by the employer. The act does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial***:*** **Omilaju v Waltham Forest London Borough Council** [2005] IRLR 35.

Leave for family reasons

91. Section 99 Employment Rights Act 1996 provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or
(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to--

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave
(bb) shared parental leave
(c) parental leave
(ca) paternity leave

[**among others**]

92. By virtue of regulation 29 Paternity & Adoption Leave Regulations 2002, an employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if:

(a) The reason or principal reason for the dismissal is of a kind specified in paragraph (3)

(b) One of the reasons in paragraph (3) of regulation 29 is: a reason connected with the fact that the employee took or sought to take paternity leave(29(3)(a)).

Reason for dismissal

93. In a case of constructive dismissal, the reason for dismissal is the reason for which the employer fundamentally breached the contract of employment. In a case of unfair dismissal where the employee was employed for less than two continuous years, he must prove that the reason for dismissal was the automatically unfair reason: **Smith v Hayle town Council** [1978] I.C.R. 996, CA. If a prescribed reason is established, the tribunal must find the dismissal unfair. If there are multiple reasons, the tribunal has to be satisfied that the prohibited reason is the principal reason.

Disability

94. A person is disabled for the purposes of the Equality Act 2010 if they meet the definition in section 6 of the Act:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

95. To amount to a disability the impairment must have a 'substantial adverse effect' on the person's ability to carry out normal day-to-day activities.

96. People with some conditions experience periods of remission and good health during which they would not be able to satisfy the definition of disability. To ensure that such people are protected provides that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have that effect if the effect is 'likely to recur'. *Likely to recur* means that 'it could well happen' (para 2(2), Sch 1, EqA) — see para C3 of the Guidance on the Definition of Disability (2011). The Guidance states that the effects are to be treated as long term if they are likely to recur beyond 12 months after the first occurrence (see para C6). This is to ensure that the total period during which a person has an impairment with recurring effects is at least 12 months. The question for the tribunal is not whether the impairment itself is likely to recur but whether the substantial adverse effect of the impairment is likely to recur. The Guidance states that the likelihood of recurrence should be considered, taking all the circumstances of the case into account, including what the person could reasonably be expected to do to prevent the recurrence (see para C9).

97. In assessing the likelihood of a claimant's impairment recurring — and thus qualifying as 'long-term' — an employment tribunal should disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing: **McDougall v Richmond Adult Community College** 2008 ICR 431, CA.

Direct disability discrimination

98. Section 13 EqA 2010 provides that:

(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*.

99. Person 'B' in section 13 is often referred to as 'the statutory comparator'. It follows from the wording of the section that the statutory comparator must not share the claimant's protected characteristic.

100. In addition to this, **section 23(1) Equality Act 2010** provides that:

(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.

101. This means that the comparator must be someone in the same position in all material respects as the claimant, save only that he is not a member of the protected

class: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337 HL. This does not mean that the circumstances of the claimant and the comparator must be identical in all respects. Only those circumstances that are 'relevant' to the treatment of the claimant must be the same or nearly the same for the claimant and the comparator (see also paragraph 3.23 of the EHRC Code of Practice on Employment 2011).

(c) In **Shamoon**, Lord Rodger said:

> ***"….the 'circumstances' relevant for a comparison include those that the alleged discriminator takes into account when deciding to treat the claimant as it did".***

102. A circumstance may be relevant if an employer attached some weight to it, when treating the person as it did. In **Macdonald v Ministry of Defence v Governing Body of Mayfield Secondar School** [2003] I.C.R. 937, HL, Lord Hope held that:

> ***"All characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator".***

103. This principle applies whether the comparator is an actual or hypothetical comparator: **Shomer v B and R Residential Lettings Ltd** [1992] IRLR 317, CA. Where there is no actual comparator, it is incumbent upon the Tribunal to consider how a hypothetical comparator would have been treated: **Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting** [2002] I.C.R. 646, CA.

104. Where a complainant relies on a hypothetical comparator, the 'circumstances' of the comparator must be constructed. When considering whether the employer would have treated the comparator any differently from the claimant, it may draw inferences from (among other things) the treatment of a person whose circumstances are not sufficiently similar to warrant them being treated as an actual comparator. Although not actual comparators, their circumstances may be sufficiently similar, and their treatment such, as to justify an inference that the Respondent would have treated a hypothetical comparator in similar circumstances to the claimant, more favourably.

105. Therefore, in cases where the identify of the comparator is in issue, a tribunal may find it helpful to consider postponing the question of less favourable treatment until after it has decided why the treatment was afforded to the claimant. If it is shown that the protected characteristic had a causative effect on the treatment of the claimant, it is almost certain that the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the characteristic played no part in the decision making, then the complainant cannot succeed and there is no need to construct a comparator: see **Law Society and others v Bahl** [2003] IRLR 640, EAT (Elias J, as he then was).

106. An employer can be liable for discriminatory treatment in circumstances where the decision maker in relation to the claimant is different to that in the comparator's case. The mere difference in identity of decision makers is unlikely to constitute a material

difference for the purpose of section 23 EqA: **Olalekan v Serco Ltd** [2019] IRLR 314, EAT.

sections 20-21 Equality Act 2010: failure to make reasonable adjustments:

107. Section 20 sets out the duty:

> (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) ……
> (4) ……
>
> (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.

Knowledge of disability and disadvantage

108. In considering whether the employer can be said to be subject to a duty to make reasonable adjustments, the Tribunal must consider the knowledge of the Respondent. The law is clearly articulated in **Department of Work and Pensions v Alam** [2010] IRLR 283. The employer is not under a duty to make reasonable adjustments if it did not know or could not reasonably have known:

a. That the employee was a disabled person, and

b. That he was likely to be placed at a substantial disadvantage by the relevant PCP

Burden of proof

109. Section 136 EqA, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.

110. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had harassed B, it must so conclude unless A

satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International pl**c [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

Unauthorised deductions from wages: section 13 Employment Rights Act 1996

111. Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of Part II of the Employment Rights Act 1996 as a deduction made by the employer from the worker's wages on that occasion. Section 13 ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless it is required or authorized to be made by virtue of a statutory provision or a relevant provision of the worker's contract.

Time in which a complaint of unauthorised deductions must be brought

112. This is governed by section 23 ERA 1996. Leaving aside extensions of time for early conciliation, the complaint must be brought before the end of the period of three months beginning with the date of the payment of the wages to which the deduction was made. Where the tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period, it may consider the complaint if it is presented within such further period as the tribunal considers reasonable. It is for the complainant to satisfy the tribunal that it was not reasonably practicable.

Claims for breach of contract

113. A claim may be brought under the ET's Extension of Jurisdiction Order 1994 in respect of a claim of an employee for the recovery of any sum within article 3 of those regulations.

Discussion and conclusions

The question of disability

114. The first question we addressed was whether the Claimant satisfied us that he was, at the time of the alleged discrimination, disabled within the meaning of section 6 EqA. The claim of disability discrimination was put on two bases:

a. Direct discrimination, in respect of which C relies on the mental impairment of anxiety and depression,

b. Failure to make reasonable adjustments, in respect of which C relies on the physical impairment of gout

115. Following Employment Judge Smith's orders of **15 May 2023** C sent a document entitled 'confidential medical report'. This was at **page R304-315/359**]. Although this has the appearance of being a report from C's GP it is not. We accepted his evidence that he was simply drawing together the information available to him into his statement or thoughts and that he was not intending to mislead the tribunal. Although it says that the report was dated **14 June 2023**, that is a reference to the date of the GP letter at page **304/359**. However, anyone reading that document would reasonably conclude that it was a report from Dr Cheikh. It is drafted in the third person. The Claimant did not explain, when he sent it, that he was merely drawing everything together in his own statement.

Gout

116. In what is in essence his impact statement, C refers to having had foot and ankle pain over the years with the first reference to any significant issues being in **April 2020** where he says he was unable to walk due to foot pain. He struggled to gear weight and walked with difficulty. He goes on to say as follows:

> *"In August-December 2022, he was provided with a bar stool instead of adequate seating arrangements at work, causing pressure with weight bearing not being able to place feet on the ground, as no desk was provided and he was working form a bench top. He had 7 consecutive days of sickness due to Gout and attended his workplace with crutches in April 2021"*

117. We noted on [**page 304/359**] Dr Cheikh-Ahmed confirms that C was first diagnosed with gout in **June 2020** and that he saw his GP again in **April 2022** with a further flare up. Blood tests taken then disclosed raised urate levels (which indicates increased risk of gout flares moving forward. The Claimant was first prescribed colchicine and then started on preventative medication, Allopurinil. This resulted in a reduction in his urate levels. The doctor confirms that during his flares of gout, C was complaining of foot and ankle pain and swelling and that he h ad pain on weight bearing which is common in gout. He was advised to reduce his alcohol intake and dietary changes (e.g. eating less seafood and red meat). The doctor recorded that given his history of gout flares and his urate level, C would be at increased risk of further flares of gout when compared to the general population.

118. From this we were able to say that, at least as of **June 2020** there was a diagnosis of gout. He was not able to bear any weight on his ankle and foot in June 2020 for about a week. During that period of a week, he suffered from a physical impairment which had a substantial adverse effect on his ability to carry out normal day to day activities, namely standing, walking and sleeping. However, based on the information available at that stage it could not be said then that it was 'likely to recur'.

119. There is no suggestion that C had any issues thereafter until April 2022. As we have found, for a period of a week or so, he suffered from a physical impairment which had a substantial adverse effect on his ability to carry out normal day to day activities, namely standing, walking and sleeping.

120. Applying the legal principles, we were required to ask whether (at the date of the alleged discrimination, namely sometime in the period **September** to **December 2022**) C was a disabled person. In other words, given how C put his case, whether it could at that stage be said that the substantial adverse effect of the gout was likely to recur - could it well happen that C would in the future, for a period of about a week or so, have severe difficulties standing or walking and that the pain would keep him awake at night? We must answer this so by disregarding any medication or treatment (i.e. we must look at the deduced effects) but also having regard to what the Claimant could reasonably be expected to do to prevent the recurrence (such as alter his diet and alcohol intake). We must also disregard events taking place after the alleged discriminatory act but prior to the tribunal hearing.

121. We noted that in **December 2022**, the Claimant was drunk when he rang Mr Watson and resigned. It does not appear that he was heeding advice to reduce his alcohol intake, at least not at that time. Nevertheless, in light of the fact that the Claimant had flare ups and considering the GP records that C is at a higher risk of flare ups in future, as indicated by the results of his blood tests indicating raised urate levels, we conclude that, certainly by May 2022, the substantial adverse effects described in paragraph 124 above were likely to occur over a period of more than 12 months, meaning that by reason of his gout, the Claimant was a disabled person from **May 2022**.

Anxiety and depression

122. We were not so satisfied by the Claimant's case on anxiety and depression. The evidence adduced by C as regards his anxiety and depression and the effects there of was very scant. Dr Cheikh-Ahmed records a 'diagnosis' of anxiety and depression' back in September 2017. However, there is no suggestion that this is a diagnosis of clinical depression. Of course, we were fully aware that to qualify as a disability, there is no requirement for such a diagnosis. However, the presence of a clinical diagnosis would have assisted the Claimant. It is not uncommon for GPs to refer to anxiety and depression in terms of 'diagnosis' rather loosely, without meaning clinical depression.

123. Looking more widely at the evidence, the Claimant's medical records record a single occasion of him reporting anxiety with depression, on **11 September 2017**. In the Claimant's impact statement on page **R312/359**, he refers to having been prescribed Sertraline 50mg a day in **2021-2022,** which is a low-level maintenance dose – it is the lowest dose. There is no reference to this in the medical records, albeit Dr Cheikh-Ahmed, in his letter of **14 June 2023** [**R304/359**] says 'previously he has taken anti-

depressants'. C said that he had taken Sertaline for a couple of months but they did not work and made matters worse.

124. As to the effects of anxiety, the Claimant, in his impact statement said that when anxious, he suffered with lack of sleep, that his mind races thoughts when feeling anxious. He said that his partner had numerous pregnancy complications from **August 2022** which resulted in an early planned birth – his baby was born on **02 February 2023**. He was absent on sick leave for 2 days in **August** and again in **November 2022**. At its peak he struggled to communicate with his family, friends and colleagues and experienced low moods, where people viewed him as 'negative'.

125. We bear in mind the life events and stresses associated with a complicated pregnancy. That was, we conclude, having an adverse impact on C's stress levels and coping abilities. It was coupled by money worries and the worries associated with his driving conviction.

126. He has not satisfied us that at the time he had suffered from a mental impairment which resulted in long-term adverse effects. The reference to 'low mood' back in 2013 was so far back and so devoid of context that we could not find any underlying condition or issue as of 2017. We conclude that he had episodes of low mood and disturbed sleep but there was very little evidence of the effects on day to day activities beyond sleep. Even then, there was little evidence. The evidence suggested a six month spell during which the Claimant experienced high levels of stress through life events, which had an adverse effect on his mood and outlook on life. He has not satisfied us that, in the period August to December 2022, the adverse effects (such as they were) were, in any event, likely to last at least 12 months or that the effects were likely to recur. We do not doubt that C suffered with his mental health. However, he has to establish by evidence that the adverse effects were on his ability to carry out normal day to day activities **and** that the effects were long term within the meaning of the legal principles referred to in the relevant law section above. He has not done so.

127. As C was not disabled by reason of anxiety or depression, his complaint of direct discrimination (i.e. that R subjected him to a detriment by failing to pay him his contractual entitlements on time or at all because of disability) fails. We would add, that even if C had satisfied us that he was at the time disabled by reason of anxiety and depression, this claim would have failed in any event. Firstly, the Respondent did not fail to pay him his contractual entitlements on time. His salary was always paid on time, and sometimes ahead of time. Therefore, he failed to make out that critical factual issue which was fundamental to his complaint. Further, as to what the 'contractual' entitlements were, we have found that he was paid the contractually agreed salary at all times. Therefore, the claim of direct discrimination fails and is dismissed.

Failure to make reasonable adjustments

128. This claim is about C's gout. The next question we had to consider was whether R knew or could reasonably be expected to have known that the Claimant was a disabled person within the meaning of the Act. That is a different question to asking whether R knew C had gout. Mr Watson did know that C had gout. He told us that in his evidence and it was clear from the WhatAapp messages between C and the Respondent.

129. The law requires the knowledge to be knowledge that the employee satisfied the constituent parts of the definition: a physical impairment, which has substantial and long term adverse effects on ability to carry out normal day to day activities.

130. R knew that there was a physical impairment. Mr Watson knew that C was unable to walk or stand. He knew the pain was keeping C awake at night and that the gout had substantial adverse effects on his ability to carry out normal day to day activities while the flare up endured. What he did not know was that the substantial adverse effects were likely to recur.

131. Therefore, we conclude he did not know that C was a disabled person. But that is not the end of the matter. He must satisfy the Tribunal that he could not reasonably be expected to know that the substantial adverse effects were likely to recur. This requires us to ask what would have happened if he had taken the simple step of asking C's GP for a medical prognosis. Although he is a small employer, he still has employer responsibilities. It is not an onerous task of seeking the view of a GP. We note also that R's wife is a GP. Without divulging confidences, he could have inquired of his own wife as to whether it merited a view from C's doctor. Had he sought the GP advice, which he ought reasonably to have done in **April 2022**, he would probably have had a response within a month or so, say by the end of **May 2022**. He would then most likely have learned that C's urate levels were raised, indicating an increased likelihood of recurring flare ups. He would have learned that he had a flare up in **June 2020** and would have been in a position reasonably to know that C was a disabled person. Although he is a small employer, he is not excused from making such inquiries as are reasonable in the circumstances.

132. Therefore, C was a disabled person and R ought reasonably to have known this by the end of **May 2022**.

133. The next question then was whether the lack of a desk and chair (auxiliary aids) put C at a substantial disadvantage compared to someone without gout. That is the essence of C's complaint of disability discrimination. It is at this point where we conclude that the complaint of failure to make reasonable adjustment must fail and be dismissed. We were not satisfied that the duty to adjust arose in that R did not know and could not reasonably be expected to know that C was at a substantial disadvantage by the absence, <u>in reception</u> of a desk and chair. There was a stool on which C could take the load off his feet. In addition, had the need arose, R would have had no objection to C working at the desk in the office (Jack's old desk). R did not require C to be sat at the bench. The only time he needed to be at the bench was when receiving a customer,

usually at the beginning of the day. There was no suggestion from C that he was unable to do this or had any difficulty in doing this.

134. Further:

a. When C worked at the old premises he had a desk and chair, yet his gout flared up then. Indeed, it was probably the worst flare up he had had. This does not suggest any link between the flare up and the nature of the chair on which C had been sitting. That does not assist C in showing a connection between the absence of a desk and chair and the exacerbation of his gout, as is claimed in these proceedings.

b. In any event, we found that C was not, in fact, required to sit at a stool throughout his shifts. He could have carried out most of his shift from the desk in the office (Jack's old desk).

c. Further, C has led no evidence that by sitting on a stool (whether for all of his shift or for part of his shift) that his gout was or would have been exacerbated. It does not automatically follow that by sitting on a stool he is bearing weight. His feet would be resting on a bar, not bearing down on the bar. There is no medical or other evidence that this would have exacerbated his gout in any way.

d. Further, from October 2022, in any event, C worked from home following having been caught driving whilst disqualified. This was agreed to by R and continued right up to termination of employment. Therefore, the nature of the chair/stool was academic in this period. C was by then unable to get to work for other reasons associated with his driving offences and whether in the office or in reception was unable to put the chair to use.

e. Finally, we found that when C's gout flared up he was unable to walk. Essentially, he was unable to get into the office to sit on any kind of furniture. If it were to flare up in the future he would either take time off or would work from home, either of which R was comfortable with. There was no question of him being put to any disadvantage therefore by having to come to work to sit on a stool.

135. In short, the lack of a desk and chair – even if that were the reality - did not put him to a substantial disadvantage. The reality was it was never an issue for R, a relaxed employer, where C sat.

Automatically unfair dismissal claim

136. The first question we had to consider was whether C has established that he was (constructively) dismissed. He must prove that R repudiated the contract of employment. Further, as his complaint is one of automatically unfair constructive dismissal under section 99 ERA, he must also prove that the reason or principal reason that R repudiated the contract was that he sought to take paternity leave. In fact, he put it on the basis that

he sought to take joint maternity leave, but there is no such concept, and we took him to mean paternity leave (or arguably shared parental leave, for which similar protection is given under regulation 43 Shared Parental Leave Regulations 2014, where the employee sought to take or the employer believed that the employee was likely to take shared parental leave).

137. C has not proved that R repudiated his contract of employment. He has not made out on the evidence that his wages were late or wrong. He has not proved that any other conduct of the Respondent was an act of repudiation – for example, the deduction of money in respect of the Attachment of Earnings Order, or any issues regarding deductions in respect of his pension or the non-payment of a bonus. It is for him to show that R conducted himself without reasonable or proper cause, in such a way as to seriously damage or destroy the relationship of trust and confidence. He has not done so.

138. Even if he had established any repudiatory breach of contract, C would then have to prove that the reason for the breach was that he had sought to take paternity or shared parental leave or that the Respondent believed that he was likely to take shared parental leave.

139. There is nothing in C's witness statement that even touches on this issue. In cross examination he asked Mr Watson if he was aware that he was to take joint maternity leave, to which W replied no. That is unsurprising as there is no such concept. However, as we found, the most that had been said was that C was going to take two weeks off when the baby was born.

140. In light of the fact as we have found them, namely that R was very relaxed and accommodating about affording C paid time off work we infer that R would not have been concerned in the slightest by the prospect of C taking any time off work following the birth of his baby. It simply was not an issue for R. It is simply fanciful to maintain that anything that happened between C and R was in any way connected with any proposed absence in 2023 and we are entirely satisfied that there was no such connection.

The money claims: unlawful deduction / breach of contract claim

141. There were four parts to these claims:

i. from **08 November 2021** to **August 2022** ('the first salary deduction') by paying C £20,000 a year instead of £21,000 a year.

ii. from **August 2022** to **29 December 2022** ('the second salary deduction') by paying C £10.58 an hour instead of the new agreed rate of £12 an hour.

iii. Failing to pay a bonus of £106

iv. In **December 2022** by deducting £330 in respect of an attachment of earnings order having been notified by the DWP that there had been a stop notice issued (pursued as a breach of contract claim / a claim under the 1994 extension of jurisdiction Order).

'The first salary deduction'

142. C had to establish that he was contractually entitled to a salary of £21k when he joined and that on each payday he was paid less than was properly payable. In light of our finding that the amount properly payable was **£20,000** and that in each month in the period **08 November 2021** to **August 2022** C was paid the contractually agreed amount, this claim must fail.

'The second salary deduction'

143. C had to establish that he was contractually entitled to a salary of £12 an hour from **August 2022** and that on each payday in this period he was paid less than was properly payable. In light of our finding that the amount properly payable was **£22,000** a year (and not £12 an hour) and that in each month in this period, C was paid the contractually agreed amount, this claim must also fail.

Bonus payment of £106

144. Although we found that there was a trial bonus scheme in place for a short period of time, we also found that this was not a contractual scheme. C's claim was that before it ended, he was entitled to a payment of **£106**, payable on **15 August 2022**. Therefore, on a claim of unlawful deduction of wages, he would have to establish that:

a. That amount was properly payable on **15 August 2022** but was not paid,

b. That the claim was brought within 3 months (plus early conciliation) of the date of the deduction and if not, that it was not reasonably practicable for it to have been made within that time limit.

145. Time expired on **14 November 2022** – before the EC process was started. Therefore, C does not get the benefit of the extension of time provisions for Early Conciliation. We heard no evidence or submissions as to why it was not reasonably practicable to have presented a claim within three months (and it is for the claimant to establish this). Indeed, we are satisfied that it was reasonably practicable. There was nothing that we could see that stood in the way of the claimant presenting a claim within the relevant period. Therefore, this unlawful deduction of wages claim fails as it is out of time and the Tribunal has no jurisdiction to consider it.

146. In any event, C did not establish on the evidence that he was contractually entitled to a payment of **£106**. Therefore, considering this claim as a breach of contract/claim in debt (as opposed to a statutory claim), the result is the same, in that C has not established by evidence that the debt was owing.

DEA, attachment of earnings order claim

147. C argued that the Respondent unlawfully deducted the monies in relation to the DEA. The difficulty with this claim is that the Respondent was under a legal obligation to deduct the monies following notification. Although it is right that R had a conversation with someone from the DWP following which he made a repayment to C, the issue is whether R acted unlawfully at the time he made the deductions. We are satisfied that he did not. There was a deduction but R had at the time acted with statutory authority to make the deductions. It may have been different had C produced a letter from DWP instructing R to ignore its previous correspondence before the deduction had been made but we never saw such a letter and R did not receive one. This claim too, must fail and be dismissed.

Breach of contract

148. C pursues a claim of breach of contract by virtue of R deducting pension contributions in **November and December 2022**. This is to do with his NEST pension. It was not until **26 November 2022** that NEST confirmed to C that it had been asked to contact his employer to cease pension contributions. NEST wrote to R on **27 November 2022.** That was too late for the November pay and the letter was specifically stated to apply to the next pay round (i.e. in **December 2022**). In **December 2022**, no pension was deducted in accordance with the NEST letter. Therefore, to the extent that it was alleged R was in breach of contract by deducting pension in **November 2022**, this fails as the cessation did not apply until **December 2022**, and in **December 2022,** no pension was deducted.

Holiday pay claim

149. The final claim was one under regulation 30 WTR 1998. We found that that the holiday year was January to December; that 28 days had accrued and that the Claimant had 1 remaining day's holiday to take. This was not contested by R when he was cross examined by C. Further, R, as an employer, should be able to produce records showing when holiday was taken, what remained outstanding and what amount, if anything, was due to an employee on termination of employment. This is another area of employer responsibility in which R has shown himself to be lacking and were found his evidence to be very unsatisfactory.

150. As C has established that he was entitled to payment of 1 day's pay on termination of employment, by virtue of the WTR 1998 and as this was not paid, the claim under Regulation 30 WTR succeeds. The Claimant is awarded the gross amount of £84.62, equating to one day's pay.

Section 38 EA 2002

151. Having succeeded on that one claim, that raises the applicability of section 38 EA 2002. That is because a claim under regulation 30 WTR 1998 is a claim listed in Schedule 5 of that Act.

152. We must make an award of the minimum amount (2 weeks wages) unless there are exceptional circumstances making it unjust or inequitable to do so. Mr Rahman submitted that it would be unjust as had it just been that one claim, the Respondent would not be here. That is possible, although had it been the only claim there may well have been a short hearing relating only to that claim. In any event, R could have admitted the claim from the outset but did not.

153. There is, we conclude nothing exceptional here. We recognise that R is a small employer but he is still subject to the statutory obligation regarding the provision of written particulars of employment. It is not an onerous obligation. Had he provided C with such a statement, this would have avoided many of the disputes in these proceedings regarding rates of pay and. Had one been provided before these proceedings, R would not have been exposed to the risk of any award under section 38.

154. We **must** award the minimum amount. There is no option on this. It is mandatory. We do accept, however, that R was a fair employer towards C and was extremely accommodating to him, although C did not recognise by the time he came to leave his employment. Therefore, we do not consider it just to award the higher award. The minimum amount equates to a sum of **£846.16**.

155. Adding that amount to **£84.62** (in respect of the holiday pay claim) amounts to a total payment of **£930.78**. That is the order we make.

Employment Judge **Sweeney**

Date: 15 January 2024