EMPLOYMENT TRIBUNALS

Claimant: Carl Wheeler

Respondent: Association for Spinal Injury Rehabilitation and Reintegration ('Aspire')

Heard at: Watford Employment Tribunal
On: 22,23, 24, 27, 28 November 2023 (deliberations 18 & 19 December 2023 in chambers)

Before: Employment Judge Young
Members: Mrs J Hancock
Mrs A Brasnose

Representation
Claimant: Litigant in person
Respondent: Mr Pickett (Counsel)

RESERVED JUDGMENT

(1) The Employment Tribunal had no jurisdiction to consider the Claimant's claims for direct discrimination in relation to issues 2.1.3, 2.1.4 concerning the Claimant's first grievance, 2.1.1, 2.1.6, 2.1.10; whistleblowing detriment claim & health and safety detriment claim in relation to issues 6.1.1 & 6.1.2; unlawful deductions claim, Harassment related to the Claimant's disability; Victimisation in relation to issues 15.1.1 &15.1.2 and 15.1.3 in relation the Claimant's first grievance.

(2) All the Claimant's complaints for constructive unfair dismissal (ss 98 and 95(1)(c) Employment Rights Act 1996 (ERA), automatic constructive unfair dismissal (s100 ERA); in time Direct disability discrimination (s13 EqA); Indirect disability discrimination (s19 EqA); in time Victimisation (s27 EqA); in time Failure to make reasonable adjustments (ss 21 and 22 EqA); in time whistleblowing: detriment (s47B ERA); Breach of contract: Notice pay; Health & Safety: (i) in time detriment (s44 ERA); and (ii) automatically unfair dismissal (s100 ERA) are unfounded and dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a swimming teacher working two hours per week from 23 April 2019. The Claimant is disabled and was at all material times by reason of Autism Spectrum Disorder ('ASD') and consequent depression. During his employment, the Claimant raised two grievances in which he says he complained of unfair treatment related to his disability. Neither were upheld. The Claimant resigned from his employment on 3 September 2022. He claims to have been constructively unfairly dismissed. The Claimant contacted ACAS on 2 September 2022 for early conciliation. The ACAS early conciliation certificate was issued on 15 September 2022. The Claimant presented his ET1 claim to the Employment Tribunal on 16 September 2022.

Claims

2. The Claimant brings the following claims: Constructive unfair dismissal (ss 98 and 95(1)(c) Employment Rights Act 1996 (ERA); Direct disability discrimination: s13 Equality Act 2010 (EqA); Indirect disability discrimination: s19 EqA; Harassment related to the Claimant's disability: s26 EqA; Victimisation: s27 EqA; Failure to make reasonable adjustments: ss 20 and 21 EqA; Whistleblowing detriment: s47B ERA; unlawful deduction from wages: s13 ERA 1996; Breach of contract: Notice pay; Health & Safety: (i) detriment (s44 ERA); and (ii) automatically unfair dismissal (s100 ERA).

Issues

3. At the preliminary hearing on 12 July 2023, the issues in the case were agreed in Employment Judge Smeaton's order as set out in the annex to this judgment.

Hearing

4. The Tribunal received an electronic bundle of 612 pages including an index. They were provided with Claimant's typed witness statement and 4 Respondent typed witness statements. The Tribunal was given a reading list from which we read all the documents on the list.

5. Following application by the Respondent for a witness order for Ms Binder, Employment Judge Young ordered that the witness attend on Friday 24 November and Monday 27 November 2023. Following the agreed timetable it was agreed that Ms Binder did not need to attend on Friday 24 November considering Ms Binder's personal circumstances and could attend on Monday.

6. On day 1, the witness stand did not have the witness statements. The Tribunal ordered that the Claimant's witness statement be provided for the witness stand. Mr Pickett agreed to provide the witness statements for the next day and provide a cast list. Mr Pickett indicated that Ms Binder was not available to attend the Tribunal on the Friday and Monday but he was not making an application for the witness to attend the hearing on Monday only.

It was agreed that there were substantial gaps in the Claimant's evidence in particular in relation to the Claimant's holiday claim. It was agreed that as the Claimant was representing himself Employment Judge Young would ask the Claimant questions on his holiday pay claim and the Respondent would be permitted to ask his witness questions in chief to deal with the Claimant's additional evidence.

7. On day 2 the Tribunal received the witness statements for the witness stand and the cast list. The hearing adjourned at 14:52 because at 14:29 the Claimant got very upset visibly crying and shaking after being asked questions about taking time off during July 2022 when he found out his nan had passed away. The Claimant indicated that he could not continue.

8. Day 3, the Claimant arrived holding his side with a cotton wool ball plastered on his right forearm. Employment Judge asked the Claimant if he was ok and was he able to give evidence. The Claimant told the Tribunal that he had spent all night in A & E. Employment Judge asked the Claimant if there was anything else that the Claimant wanted to tell us. The Claimant did not respond. Employment Judge Young put to the Claimant that without any other information, the Tribunal would have to ask the Claimant to start giving evidence. The Claimant started to give evidence however, it appeared to Employment Judge that the Claimant was in some physical pain. Mr Pickett asked whether the Tribunal needed to explore why the Claimant was in A & E. Employment Judge Young asked if there was anything that the Tribunal could do, the Claimant shook his head. The Claimant continued to give evidence. At approximately 11:50 the Claimant made a loud ahhh noise with heavy breathing. Employment Judge asked the Claimant if he was ok to continue. The Claimant said that he was. After the lunch time adjournment between 12:37- 13:35, at approximately 13:43 the Claimant clutched his side and appeared to be in a lot of pain. Employment Judge Young asked the Claimant did he want to adjourn the matter or take a break. The Claimant said that he was in a lot of pain but he wanted to continue. It appeared to the Tribunal that the Claimant's pain came in waves and that when he continued to give evidence that the Claimant did not appear to be in significant pain.

9. On day 4- Ms Binder attended under a witness order.

10. On day 5 the final day of evidence, the Tribunal ran out of time to hear any oral submissions. The parties were given time to provide written submissions. The Claimant asked to have 7 weeks and Employment Judge queried 7 weeks. The Claimant then said he meant 8 days. The Respondent was given until 5 December and the Claimant was given the opportunity of an additional 10 days until 15 December at 17:00 as a reasonable adjustment to respond to the Respondent's written submissions.

Reasonable adjustments of the Claimant

11. At the start of the hearing on day 1 the Claimant was asked what reasonable adjustments could be made. Initially the Claimant only asked for breaks. However, the Claimant then said due to his anxiety things don't come out correctly for him when communicating. The Claimant asked that there be a pause after asking the question. The Tribunal agreed to accommodate as

much as was possible time permitting but told the Claimant if he remembered anything later he would be permitted to deal with in re-examination and suggested that he have a pen and paper with him on the witness stand so that he could record anything he wanted to tell the Tribunal.

12. We had regard to the equal treatment bench book and treated the Claimant as a vulnerable witness. Reasonable adjustments were made by rephrasing questions for the Claimant where it was clear that he was having difficulty in asking a question of a witness. The Claimant was given additional time to ask questions. The Respondent provided written submissions first and the Claimant was given an additional 10 days between receipt of the Respondent's submissions to respond with his own written submissions. The Claimant was given regular breaks throughout and when he requested.

13. Having heard the evidence, it was obvious to the Tribunal that the Claimant was often confused about the dates. The Tribunal told the parties that taking that into consideration we would make a reasonable adjustment where the Claimant alleged an event took place on a particular date and the Respondent agreed that the event took place we would not make adverse inferences in respect of the Claimant's credibility in respect of such issues.

Findings of Fact

14. Our findings of fact are made on a balance of probabilities. We have had careful regard to all the evidence that we have heard and read about. It is not necessary for us to rehearse everything that we were told in the course of this case in this judgment, but we have considered all the evidence in the round in coming to make our decision. All numbers in square bracket are page references to the bundle. Extracts from witness statement evidence is referenced by the last name of the witness and the @ sign, followed by the paragraph number of the witness statement.

15. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

16. The Respondent is a registered charity that supports people paralyzed by spinal cord injury and provides support to these individuals and the wider disabled community through the UK. Aspire is a disability confident leader [see Carlin@2] and employs 26% of its staff are disabled people. The disability leader accreditation is an online process that an employer can get if it fulfils the criteria which includes guaranteeing interviews to disabled applicants. The Respondent also supports other organisations to get their accreditation. Its customer base is 32% disabled. From 2019 the Respondent had between 120- 130 employees up to lockdown in March 2020. However, the Respondent didn't need seasonal staff which was the biggest fluctuating number during the lockdown period so the number of staff reduced. By 2022 the numbers went back up to 120-130 staff which

includes the seasonable staff.

17. The Claimant was employed as a part time swimming teacher and was based at Aspire Leisure Centre in Stanmore, the "Centre". The Claimant worked at a number of places as a swimming teacher not just the Respondent. The Claimant's line manager from April 2019 to September 2022 was Ms Lisa Binder who was the Swim Manager. Ms Binder left the Respondent on 23 September 2023. Ms Binder went on maternity leave in May 2021 and then the Claimant was managed by Ms Binder's maternity cover until April 2022 when Ms Binder returned from maternity. Ms Tasha Webster was Director of Operations and is responsible for operations systems, quality and personnel management. Mr Dean Tearle is the Centre Manager. Mr Brian Carlin is the CEO of the Respondent and has been with the charity for over 22 years. Mr Paul Parrish is the Director of Fundraising and Marketing for the Respondent.

Holiday

18. The Claimant was employed on a number of fixed term contracts throughout his employment. Some though not all of the contracts of employment were in the bundle. The Claimant was referred to all the contracts in his evidence and did not dispute the terms of the contracts. The Claimant in his evidence referred to a number of contracts before April 2022 which contained the same terms except of the hours of work. the Claimant also referred to his 19 April 2022 permanent contract as his contract of employment in his evidence. We find that the Claimant accepted the terms of all the contracts of employment in the bundle.

19. The Claimant carried out a few shifts as a casual worker at the start of April 2019. The Claimant's first fixed term contract commenced from 23 April 2019 and ended on 23 July 2019 [82-85]. This contract was signed by the Claimant on 24 April 2019. In this contract the Claimant was contracted to work weekly on Fridays for 3 hours. The Claimant's contract required him to take his annual leave during the school holidays [83]. In July 2019 the Claimant's contract hours increased to 8 hours 30 minutes per week. By December 2019, the Claimant was working 10 hours 15 minutes, and this was amended by request of the Claimant to drop Saturday teaching from contract and his hours were reduced to 8 hours 30 minutes. [319]

20. The Respondent's personnel policy dated June 2019 states that the holiday year runs from 1 April- 31 March [101], and this is repeated in the Respondent personnel policy dated April 2022 [373]. We find that this was the Claimant's holiday year.

21. The Claimant's second fixed term contract was between 2 September 2019-21 December 2019 [115-118]. This contract was signed by the Claimant on 15 July 2019. The Claimant's contract required the Claimant to work weekly on Monday for 2.5 hours and Friday for 6 hours. The contract required the Claimant to take all annual leave during the term time holidays [116]. The Claimant requested to drop hours of Saturday on 16 December 2019 [310]. Ms Webster made the change immediately.

22. The Claimant's evidence was that his contract was renewed between 6

January 2020 to 4 April 2020; that contract is on page 126 of the bundle [126-129]. In this contract the Claimant's hours were weekly Monday 2.5 hours and Friday 6 hours, and the Claimant was required to take all annual leave during the term time holidays [127]. Following April 2020, the Claimant's contract of employment was renewed. Due to the covid pandemic the Aspire Leisure Centre was closed from 26 March 2020 and reopened on 3 December 2020 and the Claimant was put on furlough from 19 December 2020 until 9 May 2021 [Binder@8].

23. There is a gap in the Claimant's contracts between April 2020-July 2020 contained in the bundle however, it is not disputed that the Claimant was on furlough in this period and was paid furlough in this period. In August 2020 the Claimant's hours were reduced to 6 hours due to COVID-19 restrictions. In October 2020 the Claimants' hours were amended by request to drop Monday teaching and reduced to 4 hours 15 minutes per week. We find that the Claimant was covered by the same contractual terms in his previous fixed term contract [126-129] during this period.

24. The Claimant's contract of employment was renewed again the following new school term, and the Claimant's fixed term contract ran from 1 September 2020- 21 December 2020 [183-185]. The Claimant's hours under that contract were Monday 2.5 hours, Friday 1.75 and Saturday 1.75. The contract repeated the condition that the Claimant was required to take holiday during the school holidays. [184] The Claimant was still on furlough in this period. In March 2021 the Claimant was contracted to 6 hours due to the COVID-19 restrictions but the Claimant's hours were amended by request to drop Friday teaching from contract and his hours were reduced to 4 hours 15 minutes [319].

25. By email dated 25 February 2021, the Claimant was offered additional hours from his previous contract of 4.15 hours increasing to 6 hours. This was during the period the Claimant was on furlough.

26. The Claimant had a contract from 12 April 2021- 2 August 2021 [248]. The Claimant refers to his contract being amended in his evidence. In this contract the Claimant's hours were weekly Monday 2.25 hours and Friday 1.75 hours, and Saturday 1.75 hours. The Claimant did not actually come back into the workplace until 13 May 2021.

27. The Claimant's fixed term contract of employment in this period required him to take all annual leave during the term time holidays. [249]. However, the Claimant admitted in evidence that he took 3 days annual leave in June 2021, and this is reflected in the Claimant's June 2021 pay slip [542].

28. By email dated 7 August 2021 the Claimant requested to not work Mondays the following term [346], so the Claimant's next contract of employment was from 1 September 2021- 21 December 2021 [347]. The Claimant worked only 2 hours 10 minutes in this contract [348] and the contract stated "*You are entitled to 5.6 weeks' holiday during each holiday year based on a full year worked. Your personal entitlement will be calculated according to the hours actually worked by you and you will be notified of this entitlement by The Director of Operations. You are not required to work during school holidays, including half terms, and you must take your annual leave*

entitlement during these times." [348]

29. The Claimant had a contract from 4 January 2022 until 2 April 2022 [350]. The Claimant's hours under that contract were weekly Saturday's 2 ¼ hour. The contract of employment stated, *"You will be paid for your hours worked at the rate of £14.52 [excluding holiday element] per hour in monthly instalments on or around the 15th day of each month.*" [350]. The contract did not set out what the holiday element of pay would be. We find none of the Claimant's contracts prior to 19 April 2022 actually set out what the holiday element of the hourly rate of pay was. We find that the Claimant agreed to take his holiday during the school holidays.

30. The Claimant started a salaried swimming teacher contract on 19 April 2022 [356-359]. The Claimant was employed from April 2022 in a permanent contract of employment for 2 hours and 5 minutes per week [357]. The new permanent contract stated, *"Your salary is £1,541.66 per annum payable in twelve equal instalments monthly on or around the 15th day of each month".* And "*This contract is term time only and holiday pay is calculated and included within your salary*".

31. Ms Webster gave evidence that the Claimant was paid rolled up holiday pay from the start of his employment with the Respondent until the end of his contract of employment on 2 April 2022. Ms Webster explained that the Claimant was paid on the 15th of each month for the previous 15 days of the last month and the 15 days in month. Ms Webster said there was no rolled up holiday pay under the Claimant's salaried contract of employment from 19 April 2022. Ms Webster said that the pay slips in this period 2019-2021 reflected this. The pay slip between pages 516- 551 show the holiday pay element of the Claimant's pay. Ms Webster explained that holiday pay was calculated on the basis of overtime and basic pay. On the pay slip "1.00" represented the basic number of hours of work the Claimant did in a month at the contractual hourly rate in accordance with his contract. The pay slips set out that the holiday pay for every month of basic pay at a percentage rate. However, Ms Webster did not state what this percentage rate of the hourly rate this was at any one time or how this was calculated. We find it was not possible looking at the pay slip to determine what the holiday pay element would be before 19 April 2022. The Claimant said he found the pay slip really confusing. We as the Employment Tribunal sympathize, with the Claimant's sentiment.

32. The Claimant was asked what holiday he asked for and took. The Claimant said that he asked for annual leave 3 weeks before Easter Break in 2019, in June 2019 and 2020 but did not state how many days or what day he asked for time off. The Claimant said he was refused the holiday and told to take it off in the school holidays. The Claimant provided no evidence of whether he did take days off in the school holidays. The Claimant said that he made requests for holiday and that was contained in the bundle. However, we were never pointed to the Claimant's holiday request, and we did not see any holiday requests in the bundle. The Claimant said that he wrote to the HR advisor Dawn about holiday pay and rate being confusing, but that correspondence was not in the bundle. No explanation was given as to why it was missing from the bundle. What we were pointed to was the Claimant's email to Ms Webster dated 11 May 2021 [267-268], where the

Claimant says he raised concerns with in his email. However, the only possible reference to holiday is where the Claimant states in the email *"I have also requested in the past with Lisa for me to have the time off and allowed once as it was at the end of term and it was deducted from my wage and I asked if I can take it as leave"* [267]. We find that the Claimant was legally represented when the bundle was being collated and so if the documents the Claimant made a choice for whatever reason not to include the documents if they exist in the bundle.

33. The Respondent said that the Claimant should have booked annual leave through the people HR [101] which was contained in the Respondent's policy. The Claimant said that he was not trained to use the system but he did check the holiday system and he could book any holiday. The Respondent said the reason for this was that he could not take any flexible annual leave. We find that the Claimant was permitted to take annual leave and was not prevented from taking annual leave but could only take annual leave in the school holidays. We don't accept that the Claimant requested annual leave 3 weeks before Easter in 2019 as this was before the Claimant started employment with the Respondent. The Claimant did not want to take annual leave in the school holidays but wanted to take leave during term time.

34. In evidence the Claimant said that he only believed he was not being paid his holiday from 2020 onwards. The Claimant said he did not do any research on holiday but he knew something was not right about how he was being paid. The Claimant said he sought legal advice on a legal advice line and was advised by a qualified solicitor in May 2021 about his holiday pay claim. The Claimant said that he was advised to send emails about his concerns and the legal advice line did not tell him about the time limits. The Claimant continued to speak to the advice line about various issues throughout his employment. He said he did not know about the time limits until he contacted ACAS in September 2022. However, we find that the Claimant was being advised by a solicitor in May 2021 and throughout his employment about his issues including his concerns about holiday pay and we find he would have been advised about time limits.

35. It is also notable that in the Claimant's first grievance on 13 May 2021 he does not mention he was refused holiday and could not take holiday. The Claimant said he did not mention anything about not being paid holiday or taking holiday because he did not want to create friction. We do not find the Claimant credible on this issue. There were multiple examples of the Claimant challenging Ms Webster's decisions before May 2021, in particular when the Claimant was not happy about wearing a face shield [189-193]. We find that the Claimant did not raise the issue of his holiday because he was content with the response that he had received from Ms Webster and accepted the Respondent's position.

36. The Claimant said he took 1 day in March 2022 which is reflected in the Claimant's March 2022 pay slip [550] but did not say what day in March. The Claimant's pay slips from April 2022 show that the Claimant is paid 12 equal installments until the termination date. We find there was no evidence of any deductions for annual leave in the Claimant's pay slips post April 2022. We also find that prior to March 2022 the Claimant did not specify

what days of annual leave he took or how much annual leave he took.

37. By email dated 21 March 2021, Ms Webster informed all the swimming teachers including the Claimant that they will now receive a pay rise from £16.50 to £18.50. Ms Webster did not say what element of the Claimant's new hourly rate of £18.50 is holiday pay in the email.[355] We find there is no transparency of the holiday rate at this point.

38. By email dated 26 March 2021, the Claimant emailed Ms Webster to complain "*I just looked at the advertisement on indeed stating £16.50 hourly rate and I'm getting £14.52 an hourly rate. I feel that I am undervalued for the role that I do for the business and the reduced hours. can you please clarify why I'm on this rate instead of £16.50 hourly rate."* We find that the Claimant's complaint was about his rate of pay not whether he was being paid holiday pay.

39. Ms Webster responded to the Claimant's email by email dated 27 March 2021. The Claimant was told by Ms Webster that his rate of pay included rolled up annual leave [484] of £1.48. There is no further response to this email in the bundle and we were not taken to any document where the Claimant responds around the time of the email to what Ms Webster said at the time. We find that the Claimant knew then in March 2021 that he was being paid rolled up holiday and he was unhappy about being paid a reduced rate of pay below £16.50. We find that Ms Webster responded to the Claimant's query within a reasonable period of time, but there is no pay slip where the Claimant was being paid £1.48 for holiday pay per hour in March 2021. The March 2021 pay slip does not show any holiday pay element [539]. There is no consistent evidence of what the holiday pay element of the Claimant's pay was at this time or any other time, or how it is calculated. However, we find that the Claimant did not take the matter further.

40. The Claimant raised the issue of rolled up holiday pay in his 4 August 2022 grievance again. The Claimant said that his rate of pay was advertised as £16, something per hour however it did not say that this included holiday pay in this rate in the advert. [432] The Claimant said in the second grievance meeting on 24 August 2022 that *"that's illegal because if you've got a permanent part time contract that's illegal"* [432]. We find that the Claimant did not complain that he was not being paid holiday pay.

41. Ms Webster told the Claimant in the 24 August 2022 second grievance meeting that *"your pay is now split evenly over 12 months because we moved you onto a permanent contract rather than a term time one."* [437]

42. Then Ms Webster explained *"There's no deduction made Carl it's say… let's say it's 10 hours of swimming teaching then you get 10 hours of holiday pay as well as an addition. So, it should show on two lines on your payslip."* [432]

43. We find the Claimant's complaint about rolled up holiday on 4 August 2022 was about his permanent contract not about holiday pay in his fixed term contracts. We find that from 19 April 2022, the Claimant was no longer being paid rolled up holiday pay. The Claimant would have been paid under

his fixed term contract until 15 April 2022 in the April 2022 pay slip and then for the period between the fixed term contract from 16-18 April 2022 in his 15 May 2022 pay slip. From 1 April 2022- 1 September 2022 the Claimant would have been entitled to 6 hours annual leave. The Claimant was paid during the summer holidays. The Claimant did not have any outstanding annual leave on termination.

Problems with Ms Binder

44. Ms Binder acknowledged in evidence that she knew about the Claimant's ASD because another colleague who the Claimant had told, informed Ms Binder a few weeks after the Claimant started in 2019. She said that she had no reaction to hearing the news and no concerns except that the Claimant had not mentioned it to her. She said that she would not openly discuss it with the Claimant unless he wanted to because it was quite personal. The Claimant disclosed his ASD diagnosis to Ms Binder [298] and Ms Webster by email dated 17 August 2021 [181] with his ASD diagnosis report attached [134]. There is a fuller diagnostic report in the bundle at pages 597 – 604, however, Ms Webster's evidence was that all the Respondent received on 17 August was the diagnosis letter. We accept Ms Webster's evidence on this point. When Ms Webster received the Claimant's email with the letter attached, the email had nothing in the body of the email. Ms Webster responded on 24 August 2020 to ask the Claimant if he felt that the Respondent should make any adjustments for him [181].

45. The Claimant said in evidence that he believed sending the diagnosis letter was him raising concerns. We note that in Ms Webster's email to the Claimant on 14 October 2020, she says *"Aspire is happy to make reasonable adjustments in the workplace but we cannot do that if the employee doesn't let us know what the problem is*" [188]. We find that this was an opening invitation which the Claimant could have responded to at any point in his employment. We note that at no point during the Claimant's employment did the Claimant mention any reasonable adjustments in respect of his consequent depression. We find there was no evidence that the Claimant requested any reasonable adjustments in respect of the Claimant's consequent depression. Sending a diagnosis letter is not raising concerns. The Respondent did not receive the report at 597- 604 until the disclosure for the Claimant's Employment Tribunal claim.

46. Ms Binder gave evidence that when they received the ASD diagnostic letter she asked the Claimant how he felt, she had already found out about the Claimant's ASD diagnosis before and there were no issues. Ms Binder said that the Claimant said he didn't want anything in place as the Claimant had been working there so long so why did anything need to change. The Claimant told her that he was happy to continue with nothing needing to change. Ms Binder considered whether to make reasonable adjustments but since the Claimant has said that he did not want any she did not want to treat the Claimant any different from any other teacher. Ms Binder said that there was no difference in the Claimant's behaviour before and after the diagnosis. She said that the Claimant would not come into the office for a chat or to collect an ipad, he distanced himself from everyone. Whilst we noted that Ms Binder struggled to remember matters that took place more than 2 years ago, we found Ms Binder to be an open and honest witness

and we accept Ms Binder's evidence on this point.

47. The Claimant said in evidence that he raised issues about the lack of support he received for disability in early 2020. However, the Claimant did not present any evidence of the issue he had that the Respondent had not provided support for. We find that the Claimant did not raise any concerns about lack of support regarding his disability by the Respondent.

48. The Claimant states in his written evidence in or around late-November 2020, the Claimant informally told Dean Tearle of his difficulties with Ms Binder and that he was being discriminated against because of disability. Mr Tearle denied being told anything about the Claimant having difficulties with Ms Binder in November 2020 but did recall a conversation in December 2020. Mr Tearle said that the Centre closed in November 2020, and he had an informal chat with the Claimant who would come into the Centre on Monday or Saturdays. Mr Tearle said he would be passing by and would say hello, and on one such occasion the Claimant spoke about problems with one of his other employers. But the Claimant did not mention anything about discrimination or differential treatment by the Respondent.

49. We found Mr Tearle to be an honest and forthright witness, there was no written evidence of the Claimant's allegation which we would have expected to see, as the Claimant had a tendency to email his grievances. The Leisure centre was closed in November 2020 and the Claimant did not say that he told Mr Tearle on the only Teams call in November 2020 this allegation. We do not accept that in or around late-November 2020, the Claimant informally told Dean Tearle of his difficulties with Ms Binder and that he was being discriminated against because of disability. We find that the Claimant did not tell Mr Tearle that he considered he was being discriminated against because of his disability in or around late November 2020.

50. On 7 December 2020, the Claimant says Ms Binder raised her voice at him in an abrupt and loud manner poolside. The Claimant did not provide any evidence of the words that Ms Binder used but said what she said was in a loud and abrupt manner. Ms Binder said that she recalls no conversation poolside on the 7 December 2020, however, she did recall an occasion when she spoke to the Claimant poolside asking the Claimant why he was late and denies that she shouted at the Claimant in a loud and abrupt manner. The recording on 14 December 2020 records that Ms Binder said she spoke to the Claimant on the Saturday 12 December 2020 poolside about his start times. The Claimant's evidence is that he tried to discuss issues of health and safety with Ms Binder on 11 December 2020 and the Ms Binder said to him on 11 December 2020 *"I am going to arrange a meeting with Dean about this in an angry tone"* [Wheeler@ paragraph 43]. The email dated 12 December 2020 suggests that this alleged conversation was the same occasion as Ms Binder tried to speak to the Claimant about his diving.

51. However, as the Claimant specifically referred to Ms Binder speaking to him in an abrupt manner and loud manner at the poolside as a separate incident on 7 December 2020 at 3:40pm in his evidence [see Wheeler @ paragraph 34] and has not explained what Ms Binder said to him on 7 December 2020 3:40pm, the poolside conversation on 12 December 2020 cannot be what

the Claimant is referring to. Ms Binder did say in evidence said that she might speak to the Claimant in a loud manner on poolside to make sure she could be heard on poolside when it is noisy. The Claimant agreed that it was noisy at the poolside.

52. We find that Ms Binder spoke to the Claimant about his lateness in a loud voice in order to be heard at the poolside on 7 December 2020. However, we do not accept that Ms Binder raised her voice in an abrupt manner.

53. On 15 December 2020, the Claimant was called to a meeting. The Claimant was told the purpose of the meeting was that concerns had been raised about his teaching of diving and that it was potentially putting pupils at risk. The Claimant referred to the meeting as taking place on 14 December 2021 in his witness statement [Wheeler @ paragraph 44], but also referred to the meeting in his first grievance dated 13 May 2021, as taking place on 14 December 2020. [289] However, there is an email from Ms Binder to Ms Webster and Mr Tearle explaining that she has had a complaint from Michelle about the Claimant's teaching of diving being unsafe [197] on 12 December 2020 [197]. In the email, Ms Binder asked for a meeting on the Monday which was the 14 December 2020. We find the meeting took place on 14 December 2020.

54. The meeting on 14 December 2020 was recorded by the Claimant [318] and was 32 minutes and 29 seconds. In the recording, Ms Binder puts to the Claimant that Michelle (another swim teacher) saw him teaching driving unsafe and she wanted him to explain how he taught diving and what he was doing. The Claimant denied he was putting the pupils at risk and repeatedly explained the process he undertook interrupting Ms Binder multiple times when she tried to respond in respect of the diving issue. Mr Tearle is heard asking Mr Wheeler if he understands the possible risks of teaching deep dives in the Aspire pool [at only 1.5m depth] and that diving can only be taught as shallow dives. Mr Wheeler claimed that he was doing no wrong and he could not be held responsible for pupils who occasionally 'get it wrong'. At the end of the meeting Mr Tearle said several times if Mr Wheeler was okay and had he understood the concerns being raised. He said yes and Mr Tearle said he would catch up with him again in a few days' time. There was nothing in the recording to suggest that the Claimant was being overloaded with instructions and given communications without time to process them. The Claimant gave evidence that the recording of 14 December 2020 was an example of how Ms Binder spoke to him. The Claimant said it was clear from the recording that the tone of Ms Binder's voice was not sincere. The only examples of criticism we heard evidence on regarding the Claimant's teaching was of the diving incident.

55. The Claimant said that Ms Binder subjected him to continuous remarks which unfairly criticized his swimming teaching from December 2020 until 4 June 2021. The only remark referred to by the Claimant in evidence was *"we could not have children diving"* [Wheeler@paragraph 35]. In the recording Ms Binder does not say to the Claimant we could not have children diving but talks about how to have the children dive safely. Ms Binder does not criticise the Claimant, but queries what and how the Claimant is teaching diving. But in the recording Ms Binder does say that she spoke to the Claimant on 12 December 2020 at poolside that the

Claimant is responsible for the children. In the recording the Claimant says that what Ms Binder said to him on the 12 December was not constructive. The Claimant also said that Ms Binder was consistently rude and obnoxious towards him [Wheeler@paragraph 26]. From December 2020- 13 May 2021 the Respondent Centre was closed so the Claimant did not have contact with Ms Binder. Ms Binder when on maternity leave at the end of May 2021 so she was not in work from the 1- 4 June 2021. The Claimant and Ms Binder were in the workplace at the same time from 2 December- 24 December 2020 and 13-31 May 2021. A period of approximately 2 months in an 18 month period. We find the only time that Ms Binder spoke to the Claimant about diving is in December 2020.

56. We found there was no continuous remarks as the Claimant and Ms Binder were not in the workplace at the same time for very long at all. Ms Binder had received a complaint from another swim teacher about the Claimant's teaching that was a health and safety issue, she did not criticize the Claimant's teaching in December 2020 but queried the Claimant's teaching. We find that Ms Binder did not say to the Claimant at the poolside on the 12 December that we could not have children diving as Ms Binder's concern was not about preventing the children diving but about the children's safety.

57. The Claimant contacted Ms Binder on Wednesday 6 July 2022 to tell her that his Nan died and that he needed the next 2 Saturdays off [399]. Ms Binder said no, it was too short notice for next Saturday, but the Claimant was permitted to have 23 July 2022 off.

58. The Claimant had given evidence that "*I find it difficult to read social cues. Nonverbal forms of communication like facial expressions, body language or tone of voice are more difficult for me to spot than for people who are not on the autistic spectrum*" [Wheeler@paragraph 7]

59. This is supported by the medical evidence in the diagnostic report dated 30 March 2020 *"It must be noted that Mr Wheeler has a tendency to misinterpret information and social cues, which can increase his anxiety, therefore making it difficult for him to effectively communicate with others.*"[603]

60. *"Mr Wheeler has expressed severe anxiety as a result of difficulties with employment. Furthermore, due to past events of being bullied at a young age, this may further precipitate his anxiety and difficulties to cope in social interactions*" [603]

61. We find that the Claimant's disability meant that he found it difficult to interpret non verbal forms of communication like the tone in which a person would say something. We find that this contributed to the Claimant's perception of Ms Binder's communication style which was not rude or obnoxious.

Soliciting Complaints

62. On 13 October 2020, the Claimant sent to Ms Webster an email with a letter from his GP saying that he is exempt from wearing a face covering [189]. Ms Webster responded to the Claimant asking him to confirm that this did

not affect him wearing a face shield in the water when he teaches. There was then a dispute as to whether the Claimant's exemption applied to face shields. In one of the Claimant's responses to Ms Webster on 13 October 2020, the Claimant refers Michelle another swimming teacher making a complaint to Ms Binder about the Claimant not wearing a face shield all the way down at the beginning of term in September 2020 [189 & 191].

63. On 12 December 2020, Ms Binder logged a complaint about the Claimant's teaching of diving [198]. This complaint came from another swimming teacher, Michelle. Ms Binder explained in the recording of the meeting on 14 December 2020 that Michelle said that on 5 December 2020 she observed that the Claimant was having the children swim towards and into other children diving. The Claimant denied this happened and argued with Ms Binder on the recording that he allowed the children to swim into children diving and that this was dangerous and endangered the safety of the children. In that recording, we find that the Claimant is adamant and is not prepared to listen to Ms Binder and constantly interrupts her. He does not listen to her response to his justifications, Ms Binder tries to explain to the Claimant in a calm manner why she is raising the issue of his teaching, but it is clear that the Claimant does not want to be criticised. Ms Binder is not abrupt or loud in the meeting and does not displaying any bullying behaviour in her tone or in her words. We find that Ms Binder's criticism was justified, and a discussion was necessary to ensure the safety of the children.

64. In any event, the Claimant did not give any evidence that Ms Binder asked Michelle to make complaints about his face shield or his method of teaching diving. In those circumstances we find that there was no solicitation of complaints by Ms Binder from Michelle. Even if Ms Binder had asked Michelle to complain about the Claimant, Ms Binder would have had to asked Michelle for her complaint before 13 October 2020, which is when the first complaint from Michelle is logged.

Health and Safety issues

65. Mr Tearle was the health and safety representative at the Respondent and his name was on the notice board as the health and safety representative at the Centre. In December 2020 the Claimant told Mr Tearle that he was asked to clean floats with chemicals, but he was not trained to use the chemicals and that he refused to use the chemicals to clean the floats. We noted that in the recording on 14 December 2020 the Claimant did raise this issue and also mentioned that there were chemicals in the changing rooms that were a risk to children and vulnerable adults. Those chemicals referred to were anti-bacterial sprays and these were boxed away. Mr Tearle told the Claimant at the time to wash the floats in pool water, he told the Claimant that he was right to refuse to use the chemicals and the Claimant should follow the training provided in the Swim England guidance for community swimming [169]. The Claimant had received the Swim England training by this time.

66. What the Claimant said was his disclosure to Mr Tearle on 2 December 2020 was "*I was not trained to use the chemicals there were trained teachers to use the chemicals. I was not trained to use the chemicals. I also made a point there was bleach in the disabled toilets because vulnerable*

adult not stored properly if vulnerable adult drink that consequences. I told Dean that when went downstairs as spoke to person at reception. The person behind reception which is not the right way of storing chemicals". The Claimant did not put this in his witness statement and his explanation for this was because the time frame to prepare for tribunal was quick.

67. We find that the Claimant did make a disclosure on 2 December 2020 to Mr Tearle that he was asked to use chemicals and he was not trained to use chemicals. The Claimant did mention the anti-bacterial spray but this was not on 2 December but was in the meeting on14 December 2020.

68. In the Claimant's claim form the Claimant said that Mr Tearle said to him "Dean the General manager said *"you use chemicals at home and it still the same". I replied "it is not the same as these are industrial chemicals and not home chemicals"*.[8] However, the Claimant did not put this to Mr Tearle in cross examination and it did not form part of the Claimant's evidence. We find that Mr Tearle did not say to the Claimant *"you use chemicals at home and it still the same". I replied "it is not the same as these are industrial chemicals and not home chemicals".*

69. The Claimant said he did not know that Mr Tearle was the health and safety representative and said he made his disclosure around Saturday 1 May 2021. Due to his health and safety worries, the Claimant refused to clean the pool floats with chemicals because he didn't have COSSH training and was concerned it was a health and safety issue. The Claimant said he spoke to Dean Tearle about this issue and Mr Tearle told to him not to use any chemicals just the pool water. Yet in oral evidence the Claimant said that Mr Tearle did not tell him to use pool water, he went quiet and told the Claimant he would come back to him, but he never did. The Claimant said he felt Dean Tearle was sort of dismissive of his health and safety concerns and did not explain what preventative measures were being taken for all the Swim Teaching staff moving forward. Mr Tearle denies this happened in May 2021 but says he was told about the disclosure in December 2020.

70. We accept Mr Tearle version of events and that there was no disclosure in May 2021. We find that the Claimant's evidence was inconsistent about what was said and provided no context as to why and how the issue was raised in May 2021. We find that the Claimant has his dates wrong and is just repeating the disclosure raised in December 2020. There was a health and safety representative at the Centre who was Mr Tearle and it was reasonably practicable for the Claimant to raise the issue with Mr Tearle as the Respondent's health and safety representative.

Staff training

71. The Claimant said that he was not provided with staff training and development. Ms Webster gave evidence that before the Claimant contract started in April 2020 the Claimant did a level 2 swim teacher qualification. We accept this evidence. Also, the Claimant accepted in evidence that he did attend COVID training. We noted that in the ASPIRE Covid 19 news update dated 6 November 2020 it stated that "*Training during lockdown – Please remember to take advantage of the many online opportunities if you are on the furlough scheme this month. It is perfectly acceptable to*

continue with your own professional development whilst you are not working." [195]. We find that the Claimant did see this update encouraging him to continue with professional development.

72. The Claimant's evidence was he acknowledged he was in the staff WhatsApp group and was provided with continuing professional development ('CPD') training opportunities sent to the WhatsApp group. However, he did not look at WhatsApp or historical WhatsApp messages but only looked at WhatsApp on the day he was working.

73. Ms Binder's evidence was that at every swimming teacher meeting she would tell the staff that the Respondent had an allowance for swim staff to do CPD and that she believed that she sent a link in the WhatsApp group [135-137]. She acknowledged that she would not go specifically to one teacher about training. The Claimant did not tell her that he only looked at WhatsApp messages on the day he was working, but Ms Binder's recollection was that the Claimant would respond to the WhatsApp messages, so that was not true. Mr Tearle gave evidence that the Claimant was sent information on staff training.

74. We find the Respondent did provide the Claimant with staff training and development opportunities during his employment. All swim teachers including the Claimant were given the same training opportunities.

Claimant's first grievance -13 May 2021 [287-289]

75. Following the end of the lockdown period the pool in the Centre was due to reopen on 9 May 2021. However, on 7 May 2021 the Claimant emailed Ms Webster and said he wanted to drop his hours on Friday with immediate effect [265]. We accept Ms Webster's evidence that it was too last minute to agree to in order to get cover for all the Friday lessons. The Respondent only changed contracts before the start of each term and the term time contracts were based upon the teacher availability. Ms Webster wrote back to the Claimant in response to his request on 10 May 2021 explaining that *"Your contract of employment is for Monday, Friday and Saturday - we need you for all those hours until at least the end of May, so you need to either continue with all the hours or give up all the hours - please advise which you would like to do."* [283] Whilst the Claimant said that Ms Binder asked him to resign, he did not say in evidence when she asked him to resign or what words she used or how if she was involved in Ms Webster's 10 May 2021 email. Neither was it put to Ms Webster that she sent the email on the instruction of Ms Binder. We find Ms Binder did not ask the Claimant to resign and even if the Claimant was relying on Ms Webster's email response of 10 May 2021 as being asked to resign, this was not a request by Ms Binder for the Claimant to resign but an enquiry by Ms Webster of whether the Claimant wanted to continue with his hours or not as it was only open for him to accept the whole contract or not. Ms Webster was more senior than Ms Binder and so it made no sense to us why Ms Binder would ask the Claimant to resign through Ms Webster which was the opposite of what the Claimant said his claim was.

76. The Claimant submitted a flexible working request by email dated 11 May 2021 to not work on Fridays [300]. On Friday 14 May 2021 the Claimant did

not turn up to work. After that Ms Webster amended the Claimant's contract of employment to remove hours of work on Fridays. [301]

77. By email dated 13 May 2021, the Claimant sent the Respondent a grievance. The Claimant alleges in this first grievance that he asked for 1 day off as a reasonable adjustment to study for exams but was not allowed to take it [288]. The Claimant referred to victimisation and disadvantage due to disability he also said he was entitled to flexible working time. The Claimant said in the grievance *"Mr WHEELER has suffered anxiety and has a great affect [sic] on his mental health and wellbeing. under the Equality Act 2010 Mr WHEELER should not be treated unfairly in a workplace. He should not be victimized, discriminated against or bullied in the workplace*." We find that this is a reference to disability discrimination under the Equality Act 2010.

78. In that grievance the Claimant complained that his hours had been unfairly reduced from 5 hours to two hours during COVID. However, other teachers had come out of COVID with more hours than him. He also outlined his troubled work history with Lisa Binder [288]. Mr Parrish was appointed the investigating officer for the grievance and met with the Claimant on 24 May 2021 [294-295]. Mr Parrish said that his meeting with the Claimant was over an hour and he was satisfied that the Claimant said all he wanted to say. Mr Parrish explained the next steps to the Claimant, and that he would speak to others mentioned in the grievance and would gather all the evidence before presenting it to Mr Carlin who would make the final decision. We accept his evidence on these points.

79. We find that the only reasonable adjustments the Claimant asked for in his grievance dated 13 May 2020 was time off to study exams. This was not related to his work and so was not a reasonable adjustment. But in any event the Claimant's contract was changed so that he could have Fridays off which he wanted to be able to study.

80. Ms Webster, Ms Binder and Mr Tearle were all interviewed about the Claimant's grievance. We find that all three were the appropriate people to interview. All three said in their grievance interviews that the problem with granting the Claimant's request not to work Fridays was that he only gave 1 week notice. Mr Tearle advised the Claimant that it was better to change hours at the end of term [302]. Ms Webster said that she had asked the Claimant about what reasonable adjustments were needed after being informed of the Claimant's ASD diagnosis, but the Claimant did not respond [301]. All three submitted relevant emails and documents to Mr Parrish in respect of the grievance.

81. Mr Parrish collated all the interviews and relevant documents and summarised the evidence and reported this to Mr Carlin. Mr Carlin said that he reviewed the minutes of the meetings and interviews (pages 294 – 304), copies of employment contracts and email communications with regard to those contracts (pages 82-91, 115 – 120, 123 – 129, 183 – 185, 245 – 253), an audio recording of a meeting between the Claimant, Dean Tearle and Lisa Binder and we accept his evidence on this point. We find that the investigation evidence in the outcome at pages 314-330 and the interviews at pages 294- 304 demonstrates there was a reasonable investigation into

the Claimant's grievance.

82. Mr Carlin heard the Claimant's grievance on 3 June 2021. The Claimant said that in this grievance Mr Carlin wanted to end the grievance meeting as he had another meeting to go to. The Claimant said that he had to ask for additional time and Mr Carlin did pause the grievance for 10 to 20 minutes, however, the Claimant regarded this was such a short extension that the Claimant still felt rushed. Mr Carlin gave evidence that there was one break of 10-15 minutes. We find that there was no fixed period for the meeting to take place, the fact there was an extension of time in the meeting indicates that there was an ability to extend the meeting.

83. Before the outcome of the grievance was delivered in the meeting on 3 June 2021. Mr Carlin explained the process to the Claimant and gave the Claimant an opportunity to explain his grievance. Mr Carlin gave evidence that there was nothing new that the Claimant added to his grievance and then they took a break before he gave the outcome. During the break, Mr Carlin reflected and reviewed the evidence and grievance itself before making a formal response to the Claimant. The Claimant did not appeal the grievance. The Claimant was sent the grievance outcome contained in an investigation report on 10 June 2021 [343-344 & 307-323]

84. Mr Carlin said that the Claimant's first grievance was the first one they had in 40 years of the charity. We find that the Respondent had no previous experience of dealing with grievances. There was no grievance policy as to how the Claimant's grievances would be dealt with regarding the provision of information.

85. The Claimant said that the grievance was mishandled and when the Claimant was asked to explain how the meeting was mishandled he said that it could have done with more transparency, without explaining what was not transparent about how the grievance was handled. We find that the grievance was not mishandled and was transparent.

86. The Claimant then said that the outcome was unfair as the focus was on protecting those named in the grievance. However, the Claimant did not point to why he said that the people named in the grievance were protected. We find that the outcome of the grievance was fair, and the process was a fair process as the Claimant had an opportunity to explain his grievance. There was nothing about the outcome to suggest that those named in the grievance were being protected.

87. The Claimant gave evidence that he did not do any research on disability discrimination but was advised by a qualified solicitor whom he had contacted through a legal advice line provided through insurance. The Claimant said that it was the solicitor on the legal advice line who help him format his grievance. The Claimant said that he couldn't remember when he first contacted the legal advice line, but he did ask for advice about reasonable adjustments for face coverings in July/August 2020. He said he spoke to the legal advice line throughout his employment when issues came up. The Claimant said that he did not bring a claim in the Employment Tribunal until September 2022 because he wanted to resolve matters internally first and that is what he told the advice line. The Claimant said that

the legal advice line told him to send emails about his concerns. The Claimant said the legal advice line did not tell him about the time limits regarding discrimination.

88. The Claimant continued to speak to the advice line about various issues throughout his employment. He said he did not know about the time limits until he contacted ACAS in September 2022. We find that the Claimant would have been advised about time limits in respect of the issues he raised regarding disability discrimination. The Claimant chose not to bring a claim because he wanted to resolve the issues internally.

Detriments

89. The Claimant says that on one occasion on a Friday in June 2021, Ms Binder, Mr Tearle and Ms Webster sent him to Coventry but not Mr Parrish. However, in cross examination the Claimant admitted that he was only talking about Ms Binder having sent him to Coventry on that occasion on a Friday at 5pm in June 2021. He was unable to give any other examples of occasions when Mr Tearle and or Ms Webster sent him to Coventry. The Claimant was also unable to specify what it was Ms Binder did that led him to believe that she was sending him to Coventry. Ms Binder's evidence was that she did not consider that she had any issues with the Claimant until he started to avoid her at some point and that he did not come into the office to say hello and he started to feel uncomfortable around her. We accept Ms Binder's evidence on this point. However, it is clear that by May 2022 on return from maternity leave, Ms Binder was avoiding speaking to the Claimant directly as she refers to previous conversations and miscommunications with the Claimant in an email dated 11 May 2022 to Mr Tearle [390]. We find that in 2020-2021 it was the Claimant who avoided Ms Binder not Ms Binder who sent the Claimant to Coventry. But in any event, Ms Binder was on maternity leave by June 2021 as she went on maternity leave at the end of May 2021. The Claimant did not challenge Ms Binder's maternity dates.

90. Mr Tearle denied that he sent the Claimant to Coventry in June 2021 and the Claimant did not question Ms Webster about the date in June when she was supposed to have sent him to Coventry or mention what Ms Webster did or didn't do to send the Claimant to Coventry. Ms Webster's evidence made it clear that she did not work on a Saturday [Webster @ paragraph 27].

91. Mr Tearle said that the Claimant did not work on Fridays in June 2021. Mr Tearle said that the Claimant had his headphones on most of the time when he saw him. Mr Tearle said that he would have only seen the Claimant 1 day a week as at that time the Claimant only worked on Mondays and Saturday and Mr Tearle did not work on Saturdays. The Claimant tried to change his evidence when cross examined to say that he meant to say Saturday not Friday. However, we find that the occasion where the Claimant says he was sent to Coventry on a Friday in June 2021 did not occur because the Claimant did not work Fridays in June 2021. We do not find the Claimant's evidence credible where the Claimant changed the allegation a number of times. We find that Ms Binder did not send the Claimant to Coventry even though she did work on Saturday on occasion as even on

the Claimant's changed evidence she was on maternity leave in June 2021 so would not have been at work on any Saturday in June 2021. Mr Tearle nor Ms Webster worked on Saturdays so would not have seen the Claimant and we find neither sent the Claimant to Coventry in any event.

Claimant's second grievance

92. By grievance letter dated 4 August 2022, the Claimant complained that he was subjected to a disciplinary even though he followed the policy and procedures for telling the Respondent that he was not able to attend work on 2 and 9 July 2022 due to RMT strikes. [402-404]. The Claimant's grievance letter says that the Claimant was treated differently and discriminated against but doesn't say why. The Claimant says in his second grievance that he was put at a disadvantage because of disability in respect of allegations of unauthorized absence. The Respondent didn't put in place reasonable adjustments and didn't care about with people with disabilities [403]. When the Claimant was asked about whether there was a practice of overloading employees with instructions in the grievance meetings and communications without allowing time to process them, the Claimant accepted in evidence that it was not a PCP.

93. Mr Parrish was the grievance manager who heard the Claimant's second grievance on 24 August 2022. Although, the Claimant said that he was told by Mr Parrish at the start of the meeting that *"Brian can't make it today, so tasha is taking minutes so I will be chairing*", the invitation sent on 22 August 2022 [417] does not say who would be chairing the meeting as both Mr Parrish and Mr Carlin were copied into the invitation. The invitation was sent by Ms Webster. There is no record in the transcript of the meeting of Mr Parrish saying that Mr Carlin was supposed to be chairing the meeting who was going to hear the second grievance. The Claimant admitted in evidence that he had never been told that Ms Webster was to be the chair of the grievance who he said was substituted as chair even though he had brought a grievance against her. The Claimant said he couldn't talk in the grievance meeting how his previous grievance had been treated because Ms Webster was there in the room [440] and he had not been told she would be there. He said that Ms Webster had some input during the grievance meeting, and it seemed to him that she had an influence on the grievance outcome. However, Mr Parrish gave evidence that Ms Webster was the note taker and that she had no influence on the grievance decision and the Claimant would have been told Ms Webster would be attending. We noted that it is clear from the transcript that Mr Parrish does ask Ms Webster to explain the Claimant's holiday pay. We find that whilst Ms Webster did have input in the grievance meeting, by giving explanations in respect of the Claimant's pay, her role was as the note taker and she did not have influence into the grievance outcome decision and was not the chair of the meeting.

94. The Claimant also complained that in the meeting that the Claimant needed counselling [8]. We note that the relevant part of the transcript it is recorded that the Claimant is crying. Then the transcript records Mr Parrish saying *"it sounds like the Employee Advice Line might also be very useful for you where you can talk away from Aspire to somebody who understands the pressures of working… of the working environment and you can just sound off as well to them and begin to talk some of this and and probably not the*

case that I should be talking about that in an grievance but it does sound to me like you're you know it's upset you and I think probably talking to Aspire doesn't help cos I think you see Aspire as being part of the problem." [428] followed by *"And that is just completely confidential, so nobody will get to hear of anything like that, but it allows you to talk a lot and get you know… and they are trained professionals who can help through you know you're having a tough time with work and how it makes you feel.".* Ms Webster says *"Did uhm did Dean give you the phone number for the Employee Advice Line?*" …. *"Or even outside work you know things that might not be work related uhm it's it's other person to err sound off to and err get some advice and coping mechanisms from."* [428]

95. Considering the transcript, we find that the Respondent did not say that the Claimant needed counselling in the meeting. It was entirely appropriate when the Claimant was crying and upset that they remind him of the availability of the advice line.

96. At the meeting the Claimant said *"It is it is not my place to say what they ca… what they should do what they should not do. It is down to the individual to decide how they're going to change.*" [427]

97. In the 24 August meeting the Claimant also said *"It's just the behaviour and the attitude and the respect, there's no respect.*" [427]

98. Ms Webster asks, *"What can we do to help you achieve that?"* The Claimant replies *"I've already spoken to Dean about that."* [430]

99. The Claimant asked for lessons to start later at 16:30 which he agrees is achievable. [430]

100. In the transcript of the grievance meeting on 24 August 2022, complained *"It was the way… how Lisa uhm shou shouted at me down the phone, how she uhm err how she talked to me on poolside in an angry manner. Uhm it it's just how I've been treated as a whole by a a line manager where I'm carrying out my err role as a swimming teacher err without being err scrutinised left right and centre. Err I don't scrutinise a manager how they do their jobs. So it's being being fair, setting boundaries, but there's no respect err from any of the management team. And my grievance has been dismissed [inaudible 5:03] I do not agree with that do not agree with that [inaudible 5:07] not going to uphold the grievance. So in the whole I I feel that Aspire's not really taking me seriously."* [422] We find that the Claimant's complaints about the first grievance were only about the outcome of the first grievance not about the process.

101. The Claimant said that the grievance meeting was on a fixed timetable and that he was not allowed to extend the length of the hearing. The Claimant did not ask for more time in the hearing or after the hearing. In the transcript. Mr Parris says *"Okay. Uhm I think in that case probably a good time to draw it to a close as we get… uhm if you think of anything else Carl can you drop me a line and we can add that to it. I think you've got my email address haven't you, you've been copied into everything."* The Claimant responds "yeah" [440] Then at the end of the meeting, Mr Parrish said *"Okay so I'll stop the recording now if everyone's happy"* and the Claimant agrees. [441]

We find that there was no fixed timetable, and that the Claimant was happy to end the meeting when it was suggested that it close.

102. By letter dated 25 August 2022, the Claimant's grievance is not upheld. Mr Parrish concluded that there was a clash with Ms Binder and that there had been no bullying. [442] In the outcome letter Mr Parris said "*I was part of the original grievance hearing, and it is my belief that your grievance was handled sensitively and taken very seriously."* [442]. We find that there was a thorough investigation into the Claimant's grievance and that the outcome of the grievance was fair.

Disciplinary

103. The Claimant did not attend work on 25 June 2022. The Claimant did contact reception on the day to explain that he would not be able to make it in, but reception did not pass the message on to Ms Binder or anyone else in management.

104. Ms Binder contacted the Claimant a number of times without any response before emailing the Claimant on 28 June 2022 to ask him why he was absent and if he was ok [396]. On 2 July 2022 the Claimant was 40 minutes late and did not contact the Respondent beforehand to explain why. The Claimant's evidence was that he was 1 minute late on 2 July 2022 [Wheeler@ paragraph 69]. Ms Binder's evidence is that it was only on Friday 24 June 2022 that he had called beforehand to say he was not coming in, the Claimant did not give her, or anyone notice that he would be late on 2 July 2022. The Claimant's oral evidence was that he accepted he was late by 40 minutes on 2 July 2022, but he did not think he should suffer a deduction of wages because when he started employment in 2019 he would always arrive 2 hours early or on time.

105. On 5 July 2022 the Claimant found out that his nan had passed away. The Claimant said that he was very close to his nan, however he did not tell any of the management of the Respondent of his closeness of relationship to his nan at that time. On 6 July 2022 the Claimant emailed Ms Binder and informed her that his nan had passed away and to ask for the next 2 ½ weeks off. [399] The Claimant was in fact requesting 9,16,23 July 2023 off as 23 July was the last day of term. The Claimant said that the reason he needed the time off was because he was in charge of organizing the venue for the funeral.

106. The Claimant said at paragraph 69 of his witness statement that he was 40 minutes late on 9 July 2022. In evidence the Claimant accepted that he was not in contact with the Respondent after 6 July and he did not attend work on 9 and 16 July 2022 and did not have permission to not attend work on 9 and 16 July 2022. He said that he did not know how to deal with the situation. The Claimant said that he should have been permitted leave. The Claimant said that Ms Binder was allow time off when she wanted so where is the fairness in that. The Claimant did not tell the Respondent about the closeness of his relationship with his nan until 4 August 2022 in his second grievance [402].

107. Before Ms Binder responded to the Claimant she spoke to Mr Tearle. Ms

Binder said that Mr Tearle said the Claimant did not need that amount of time off. Mr Tearle's evidence was that he spoke to Ms Binder, and she gave him the information about the request, he then spoke to Ms Webster who decided that the Claimant could have 23 July 2022 off but not the other 2 dates. Mr Tearle said he went back to Ms Binder to tell her of Ms Webster's decision. Mr Tearle's evidence was that the Claimant did not tell him of his close relationship with his nan. Ms Webster said it was her decision to only grant the Claimant compassionate leave for 23 July as that was the day of the funeral. The Respondent's compassionate leave policy applies to a dependant who is defined as partner, child, sibling or parent or someone who lives with the employee as part of their family [368]. The Claimant did not live with his nan [598]. The policy states *"All compassionate leave should be discussed with, can be granted by, and is at the overall discretion of the Director of Operations."* [367]

108. Ms Binder then sent an email response on 6 July 2022 a couple hours later telling the Claimant that he was only permitted to have 23 July 2022 off [398]. The Claimant was told in that email that his pay was deducted from Saturday 2 July 2022 as the Claimant was 40 minutes late to work. [398]. Regardless, the Claimant did not attend work on 9 & 16 July 2021. The Claimant subsequently admitted in the fact finding investigation meeting on 19 August 2022 that 23 July was not the day of the funeral, but 15 July 2022 was the date and that his reference to 23 July in his email was a typo. The Claimant's pay slips for July show a deduction from the Claimant's wages of £37.00 for unpaid leave [555]. We find that for 40 minutes on 2 July 2022 the Claimant was not at work and without authorization to be absent. However, there was no deduction for 40 minutes of pay from the Claimant's pay slip in July 2022. We find the deduction of £37.00 was in relation to the Claimant's absence from work on 9 July 2021.

109. The Claimant admitted in evidence that he did not attend work on 9 July 2022. In response to the query in cross examination as to whether he accepted that he did not have permission not to attend work on 9 and 16 July 2022 the Claimant said that there was a prior reason, and the Respondent was aware. The Claimant accepted that he only asked for time off for funeral arrangements and not for grieving.

110. We find that the Respondent was reasonable in not giving the Claimant the 9 and 16 July off for funeral arrangements and only 23 July. The Claimant only worked 2.5 hours on a Saturday and the funeral took place on Friday 15 July so there would have been no reason to give the Claimant time off for funeral arrangements on Saturday 16 July 2022. If the Claimant needed the time off for funeral arrangements on 9 July when he would have said that he needed 9 July off rather than 23 July 2022, but he did not.

111. We find that the Claimant' was absent on 9 & 16 July 2022 and these were unauthorised absences. Ms Binder made it clear to the Claimant in her email that he was to come to work on 9 July 2022 and he did not, and she did not give him permission to have 16 July 2022 off. The Claimant was neither willing nor able to attend work on 9 July 2022. The Claimant needed time off for his exams and was struggling with grief.

112. Mr Tearle was instructed to investigate the Claimant's absences as the

Claimant had made no contact with the Respondent since 6 July 2022 to explain his absences and was not returning contact made by Ms Webster, Mr Carlin and Ms Binder to find out why the Claimant had not attended shifts. Ms Binder had sent an email to Mr Tearle on 11 May 2022 explaining that Michelle and Harrison Hill, other swimming teachers were continuously covering 5-10 minutes of the start of the Claimant's lessons. Both Michelle and Harrison had to take the Claimant's lessons as well as teaching their own lessons.[390]

113. Ms Binder asked Harrison Hill to email Mr Tearle to ask him to explain the Claimant's lateness. By email dated 4 August 2023, Harrison sent an email to Mr Tearle explaining that the Claimant had been late nearly every Saturday that term varying from being 5 minutes to missing entire lessons without showing any appreciation for others covering his lessons. [460]. Mr Hill did not know about the Claimant's disability or that the Claimant had reported health and safety issues to Mr Tearle. The Claimant said that Ms Binder's request of Mr Hill to report the Claimant's lateness was Ms Binder soliciting complaints. However, we find that it was not. Ms Binder denied encouraging any staff members to make complaints against the Claimant. In evidence Ms Binder said that she had already told Mr Tearle about the lateness of the Claimant and was asking the swimming teachers to provide their version of events directly to Mr Tearle because some Saturdays she wasn't there, and she thought it was better that it came from them and we accept her evidence on this point. There was no reason for Ms Binder to solicit such complaints against the Claimant as she had already told Mr Tearle about the Claimant's lateness.

114. By letter dated 2 August 2022, the Claimant was invited to attend an investigation into the allegations of the Claimant's repeated lateness for work and non attendance work on 2,9,16 July 2022.[401] There was no reference in this letter to the Claimant being 1 minute late. We find that the Claimant's second grievance dated 4 August 2022 was a response to the invitation to the Claimant to an investigation meeting.

115. By email dated 4 August 2022, the Claimant was invited to attend an investigation fact finding meeting with Mr Tearle on 5 August [408]. The Claimant said he attended a meeting on 5 August 2022, but Mr Tearle did not turn up [409]. Mr Tearle said that he did not attend the meeting because the Claimant had not confirmed that he would attend the meeting. Mr Tearle sent the Claimant another invitation on 8 August 2022 [411] for the 19 August 2022 to which the Claimant confirmed he would attend on 11 August [411].

116. Mr Tearle gave evidence that as part of his investigation into the Claimant's absences, he spoke to a colleague of the Claimant's Sharon McCallum. Sharon told him that the Claimant had approached her on 2 July to ask her whether she would cover his shift for him for the remainder of the term which included the 3 following Saturdays of 9, 16 and 23 July 2022. The Claimant's evidence was that his request for cover from Sharon on 2 July 2022 for 3 Saturdays from 9, 16 and 23 July was because he had some essays to complete.

117. The Claimant attended the fact finding meeting on 19 August 2022 [456-

458]. Mr Tearle gave evidence there was no fixed timetable in respect of his fact finding investigation which was not a grievance meeting. Mr Tearle said that he did not overload the Claimant with instructions and communicate without allowing the Claimant time to process them. We considered the investigations notes and there is nothing to suggest that the Claimant was overloaded with questions. The Claimant does not say anything in the meeting that suggests he was overloaded. The Claimant is asked at the end of the meeting if there was anything else he wanted to add, and the Claimant does make additional comments. We accept Mr Tearle's evidence on this point and find that there was no overloading of the Claimant at this meeting. We find there was no mention at all of the Claimant being 1 minute late at the meeting.

118. At the meeting the Claimant said that he was not late for any of his lessons. The Claimant then blamed the lateness on management changing his start time to 4:20pm from 4:30pm. But then said he usually comes through the door at 4:20pm but does not sign in. [456] When asked about Harrison's comments on him starting the Claimant's lessons, he said that this was because Harrison is 'trying to move up the ladder' [457]. He went on to say that he previously attended work early and sat in the café so was owed time in lieu as he considered this was work. The Claimant admitted in the meeting that he did not attend work for any of his job for the 3 weeks of July 2022. [457-458]. The Claimant admitted in the meeting that he wanted the 3 weeks off because he was feeling stressed and exhausted from working at the Respondent and his nan passing away added to that [457]. At no point in the investigation meeting did the Claimant try to apologise or express regret for his absences.

119. In Mr Tearle's investigation summary [463] was that there was case to answer in respect of the unauthorised absences on 9 & 16 July 2022, as Mr Tearle view was that Sharon's email indicated that the Claimant had no intention of working on 9 & 16 before finding out his nan passed away. However, Mr Tearle found that there was no case to answer in respect of the Claimant not attending work on 25 June 2022 as this was due to the train strike. Furthermore, there was no further action to be taken in relation to the Claimant attending work late on 2 July 2022. Mr Tearle said in evidence that he accepted that the Claimant was late by 40 minutes on 2 July 2022 due to the train strike.

120. By letter dated 1 September 2022, Alex Rankin Director of Service sent the Claimant an invite to a disciplinary hearing for unauthorised absences [464]. We find that the 1 September 2022 invitation letter does not make any reference to an allegation that the Claimant was 1 minute late.

121. The Claimant sent an SAR dated 1 September 2022. By email dated 22 September Ms Webster told the Claimant that the documents requested in the SAR would be provided by post on a memory stick [483].

122. We find that the invitation to the fact finding investigation and the invitation to a disciplinary were entirely justified. The Claimant's lack of contact with the Respondent when he was absent meant that the Respondent had to investigate the Claimant's absences. The Claimant's explanation for his absences did not add up to the employer as the Respondent had evidence

that the Claimant wanted the time off before he found out about his nan. The Claimant did not say he wanted the time off for grief in the meeting or express any remorse for his behaviour. The Claimant admitted that he had been absent from work on those 2 occasions in the meeting.

Allegations of mishandling meetings

123. The Claimant said that the meeting on 14 December 2023 was an example of how the Respondent mishandled meetings. The Claimant said that in that meeting it was clear that Ms Binder's voice was not sincere. However, having listened to the whole recording we find that there was no examples we consider that Ms Binder's voice was insincere or there was any indication that the meeting was mishandled. there were no examples we heard of the Claimant being overloaded with instructions or communications without time to process them.

124. The Claimant says that in respect both grievances the Respondent was not ready to listen to his concerns, they didn't ask the right questions and they misunderstood, and they didn't try to get the right facts. The Claimant said that he was subjected to a hostile and upsetting environment because the Respondent had a practice of overloading employees with instructions without allowing them time to process them in the grievance meetings. The Claimant said that he spoke to Mr Tearle about Ms Binder overloading him and other staff with instructions. However, the Claimant gave no examples and admitted in evidence that there was no such practice. We find that there were no instances of Ms Binder overloading the Claimant or other staff with instructions.

125. The Claimant admitted in evidence that the second meeting was a thorough meeting he was given plenty of time to say what he wanted, he agreed that was the case for both grievance meetings. Mr Carlin gave evidence that at the first grievance meeting, HR were present. The Claimant was given an opportunity to give his account to ensure the Respondent heard from him. The Claimant was given the opportunity to appeal but did not appeal. Mr Carlin said that he received the bundle of evidence by Mr Parrish and reviewed all the evidence and also listened to the audio recording on 14.12.20. He said he reflected on the specific claims detailed and explained it in the meeting to the Claimant, he examined evidence before and during his conclusions. Mr Carlin said he reviewed the ACAS guidelines to ensure that the process was correct. He wanted to make sure that if there were lessons for the Respondent to learn then the Respondent would address those, and it would not be repeated. One of the Respondent's recommendations was that staff have training in respect of autism. Ms Webster gave evidence that in June 2021 shortly after a leadership meeting, Mr Carlin shared a link with leadership staff providing training on ASD from the Autism Society. We note that the investigation into the first grievance included a number of interviews with all the relevant people and emails detailing the events that the Claimant complained of.

126. We noted that the second grievance meeting went on for 72 minutes and the transcript of the recorded meeting demonstrated that the Claimant was given ample opportunity to put forward his grievance. The Claimant did not mention anything that he says that the Respondent should have

investigated that they did not or how questions should have been phrased. Mr Parrish who investigated the second grievance gave evidence that the outcome was not rushed and Ms Webster did not have any influence on the second grievance outcome. We accepted Mr Parrish's evidence. The Claimant also did not provide us with any explanation as to what it was that the Respondent misunderstood. We find that the Claimant was listened to, during his grievances and the Respondent did understand the Claimant's grievances and provided full and comprehensive outcomes to the Claimant's grievances.

Claimant's resignation

127. The Claimant resigned by letter dated 3 September 2022 [467-474]. The Claimant's letter of resignation refers to a large number of issues that the Claimant said he had throughout his employment. In the Claimant's resignation he said the reason for his resignation was being put through a disciplinary, a management asking the Claimant to resign and not being paid correctly. We find that the incorrect payment that the Claimant was referring to was the alleged failure to pay the Claimant holiday pay and the alleged failure to pay the Claimant to attend the grievance meeting in August 2022.

128. The Claimant's resignation letter said *"Aspire has said that they are going to put me though disciplinary or the conclusion that they have come to*" [469]. But the Claimant did not specifically mention the invitation to a disciplinary dated 1 September 2022. The Claimant said in evidence that he did not receive this letter, although his witnesses statement referred to receiving the letter [Wheeler@paragraph 97]. The Claimant said that his legal representatives wrote the paragraph 97 of the Claimant's witness statement, but he did not read that paragraph when he read and signed off his statement. The Claimant's evidence was that letter was "*the Respondent making good on their threat to discipline me for being one minute late to work. This was the last straw."* [Wheeler@paragraph 98] The letter was sent by email dated 1 September 16:36 with the letter and investigation summary by Mr Tearle and investigation notes as attachments. We find that the Claimant did receive the letter dated 1 September 2022 but for some reason he believed that he was being disciplined for being late for 1 minute and that is the reason why the Claimant resigned was because he believed he was being disciplined for being late for 1 minute.

129. On receipt of the Claimant's resignation letter, by letter sent by email dated 5 September 2022 Ms Webster wrote to the Claimant saying that Mr Carlin was prepared to meet with the Claimant to discuss the contents of resignation letter as a grievance appeal [606].

130. By letter dated 6 September 2022 [478] the Respondent accepted the Claimant's resignation and agreed to pay the Claimant for his attendance at grievance meetings and for an underpayment of 5 minutes over between April- July 2022.

131. By email dated 6 September 2020 the Claimant responded to the invite to a grievance appeal meeting. The Claimant claimed he was being forced to meet with Mr Carlin to attend an appeal but said he did not want any further

dealings with the Respondent. He said he had contacted ACAS and was prepared to negotiate a settlement.

132. During the furlough and lockdown period, the Respondent held catch up on Zoom with staff. Mr Carlin says these meetings were informal and voluntary [Carlin @ paragraph 7]. The Claimant's evidence was that he was not paid specifically for the grievance meetings and weekly meetings held on Wednesdays during the first and second periods of lockdown from March 2020 and November 2020 onwards. These meetings took place on 4th, 11th, 18th and 25th March 2020, 15th, 22nd and 29th April 2020; the 6th, 13th, 20th, and 27th May 2020; and 4th, 11th, 18th and 25th November 2020. The dates mentioned by the Claimant do not include the dates that the Claimant attended grievance meetings. Ms Webster's evidence is that the Claimant was told the procedure to claim for grievance meetings and he was aware of this procedure as he had claimed for meetings before. Ms Webster said that the reference to swim school admin on the Claimant's pay slip in December 2021 was payment for a meeting claimed [547].

133. The Claimant said that he should have been paid to attend the grievance meetings in his resignation letter and is specifically referring to the meetings in August 2022. The Claimant gave no evidence on what grievance meetings he says he was not paid for. The Claimant did attend the grievance meetings on 26 May and 3 June 2021, but Ms Webster said the Claimant did not make the claim in relation to attendance at grievance meetings [Webster @paragh 29]. Ms Webster sets out in her letter dated 6 September 2022 [479] that even though the Claimant did not make a claim under their process, the Respondent would pay the Claimant for the investigation meeting on 19 August and the grievance meeting on 24 August and the aborted grievance on 5 August 2022. We note there is a payment for Swim School Admin of £7.80 that would correlate with the time the Claimant attended the grievance meetings as well as the 5 minutes under payment for 9 weeks [556] The Claimant did not challenge Ms Webster's evidence on this point, and we accept Ms Webster's evidence. We find that the Claimant was not entitled to be paid for meetings that he attended voluntarily during covid and could not be paid for them as he was being paid furlough and so was not required to work. The Claimant has been paid for all the grievance meetings in August which he attended whilst employed by the Respondent by 15 September 2022. The Claimant did not apply to be paid for the grievance meetings he attended in May 2021 in accordance with the Respondent's process. Had the Claimant applied to be paid he would have been paid at the earliest in June 2021.

134. The Claimant was paid his full salary from 15 July to 15 August 2022 even though he did not work after 2 July 2022. The Claimant was paid for 2 July in his July pay slip [554]. There was a deduction of £37.00 from his July pay slip for 2 hours was attributable to the Claimant's non attendance at work on 9 July 2022. The Claimant said this was an unlawful deduction.

135. The Claimant did not work in August 2022 except to attend the investigation and grievance meetings in August 2022 for which he was paid in September 2022. The Claimant Schedule of Loss says that he is entitled to 6 hours holiday pay on termination of employment. The Claimant was paid for 6.94 hours at a rate of £18.50 in the August pay slip [555].

The Law

Time limits

(i) Reasonably Practicable

136. Section 48, Employment Rights Act 1996 (ERA) sets out the applicable provisions to the time limits in respect of whistleblowing detriment:

"(1A) A worker may present a complaint to the employment tribunal that he has been subjected to a detriment in contravention of section 47B"

(2) On the complaint under subsection (1A) it is for the employer to show the ground on which any actual deliberate failure to act was done

(3) An employment tribunal shall not consider a complaint under this section unless it is presented

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates all, where the act or failure is part of a series of similar acts or failures, the last of them, or complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such period as the tribunal considers reasonable in the case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

(4) For the purposes of subsection (3)

(a) where an act extends over a period, the date of the act means the last day of that period, and

(b) a deliberate failure to act should be treated as done when it was decided upon and in the absence of evidence establishing the contrary an employer shall be taken to decide upon failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

137. The reasonably practicable test applied to whistleblowing detriments is the same as for unfair dismissal as set out in the seminal decision of **Palmer v Southend on Sea Borough Council [1994] ICR 372**.

138. The burden of proving that presentation in time was not reasonably practicable falls on the Claimant. 'That imposes a duty upon him to show precisely why it was that he did not present his complaint' (Porter v Bandridge Ltd 1978 ICR 943, CA). Accordingly, if the Claimant fails to argue that it was not reasonably practicable to present the claim in time, the Tribunal will find that it was reasonably practicable (see Sterling v United Learning Trust EAT 0439/14).

139. The time limits in respect of deductions from wages is set out in section 23 Employment Rights Act 1996 ('ERA'), which says:

"*(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received."

140. The EAT provides guidance in the case Taylorplan Services Ltd v Jackson and ors 1996 IRLR 184, EAT on the question for Employment Tribunal deciding time limits for protection of wages claims. EAT set out the steps that need to be taken as (1) Is this a complaint relating to one deduction or a series of deductions by the employer? (2) If a single deduction, what was the date of the payment of wages from which the deduction was made? (3) If a series of deductions, what was the date of the last deduction? (4) Was the relevant deduction under (2) or (3) above within the period of three months prior to the presentation of the complaint? (5) If the answer to question (4) is in the negative, was it reasonably practicable for the complaint to be presented within the relevant three-month period? (6) If the answer to question (5) is in the negative, was the complaint nevertheless presented within a reasonable time?

141. Bear Scotland Ltd v Fulton and anor; Hertel (UK) Ltd and anor v Woods and ors (Secretary of State for Business, Innovation and Skills intervening) 2015 ICR 221, EAT, Mr Justice Langstaff sitting in the EAT, ruled whether there is a 'series' of deductions is a question of fact. There needed to be a sufficient factual and temporal link between the underpayments. This means that that there must be a sufficient similarity of subject matter, so that each event is factually linked, and a sufficient frequency of repetition.

142. This part of the Bear Scotland Ltd decision has been affirmed in the recent supreme Court decision of Chief Constable of the Police Service of Northern Ireland and anor v Agnew and ors 2023 UKSC 33. The Supreme Court said in Agnew that in answering that question of whether there has been a series of deductions where there is more than 3 months gap between 1 or more of the deductions, all relevant circumstances must be taken into account, including the deductions' similarities and differences; their frequency, size and impact; how they came to be made and applied; and what links them together.

(ii) Just and Equitable

143. Section 123 Equality Act 2010 sets out that time limits in respect of discrimination claims brought under the Equality Act 2010 ('EqA'). The section 123 EqA 2010 says:

"(1) [Subject to [[section 140B]]] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(c) the period of 6 months starting with the date of the act to which the proceedings relate, or
(d) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(e) conduct extending over a period is to be treated as done at the end of the period;
(f) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(g) when P does an act inconsistent with doing it, or
(h) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

144. The EAT in South Western Ambulance Service NHS Foundation Trust v King IRLR 168 EAT, establishes that where a Claimant wishes to assert that there is a continuing act or an act extending over a period of time, there must be findings made that there had been discriminatory acts committed by the Respondent in order to form part of an act extending over a period of time or a continuing state of affairs,

Constructive unfair dismissal

145. Section 95 ERA states: *"(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –(c) 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."*

146. Section 95(1) (c) ERA is colloquially referred to as constructive unfair dismissal or constructive dismissal. The Lord Denning in the long standing case of Western Excavation Limited v Sharp best summaries the test for constructive dismissal as "If the employer is guilty of conduct which is a

significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed." Thus, the question is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment.

147. The House of Lords in the case of Malik v Bank of Credit and Commerce International [1998] AC 20 established that it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: (See Malik at paragraphs 34h -35d and 45c-46e).

148. At paragraph 35c of Malik, Lord Nicolls sets out that the test of whether there has been a breach of the implied term of trust and confidence is objective) The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer. A breach occurs when the proscribed conduct takes place.

149. The Claimant must show that it resigned in response to this breach, not for some other reason. However, the breach does not need to be the sole or primary cause of the resignation; only an effective cause. (Nottinghamshire County Council v Meikle [2004] IRLR 703).

150. Langstaff J sitting in the Scottish division of EAT in Wright v North Ayrshire Council [2014] ICR 77 provides further clarity on the Meikle point, where he says *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause"* [see paragraph 20]

151. In Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR, the Court of Appeal approved the guidance given in Waltham Forest LBC v Omilaju (at paragraph 15-16). Both authorities give the following guidance on the "last straw" doctrine:-

"(1) The repudiatory conduct may consist of a series of acts or incidents some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: Lewis v Motorword Garages Ltd [1986] IRLR 157 (per Neil LJ p167C).

(2) In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is does the cumulative series of acts taken together amount to a breach of the implied term?

(3) Although the final straw may be relatively insignificant it must not be utterly trivial: the principle that the law is not concerned with very small

things is of general application. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term.

(4) The act does not have to have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

(5) The "final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

(6) The last straw must contribute, however, slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

(7) If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

(8) If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract s/he cannot subsequently rely on these acts to justify a constructive dismissal unless s/he can point to a later act which enables her to do so. If the later act on which s/he seeks to rely is entirely innocuous, it is not necessary to examine earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

(9) The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have cross the Malik threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the Malik term.

(10) Even when correctly used in the context of a cumulative breach, there are two distinct legal effects to which the "last straw" label can be applied. The first is the legal significance of the final act in the series that the employer's conduct had not previously crossed the Malik threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed threshold at an earlier stage, but the employee has soldiered no until the later act which triggers her/his resignation: in this case by contrast, the breaking of the camel's back consists in the employee's decision to

accept, the legal significance of the last straw being that it revives his or her right to do so.

(11) The affirmation point discussed in Omilaju will not arise in every cumulative breach case: "There will be such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed, in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect)." (per Underhill LJ).

152. Where the Claimant relies upon a breach of a grievance procedure as part of the claim for breach of the implied term of trust and confidence, the EAT in Abbey National Plc v Fairbrother [2007] UKEAT/0084/0 held that when considering a grievance procedure in the context of constructive dismissal, the standard against which it should be judged was 'the band of reasonable responses'.

153. In the case of Cantor Fitzgerald v Callaghan [1999] ICR 639, the Court of Appeal addressed the issue of pay and constructive dismissal:

". . . the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events. If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand, if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory".

154. If there is a repudiatory breach that result in a dismissal the Tribunal must consider the reasonableness of the dismissal in accordance with s98(4) ERA. And then finally, Tribunals must decide whether it was reasonable for the Respondent to dismiss the Claimant for that reason.

155. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.

The Burden of Proof in Discrimination cases

156. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why he has acted in a certain way towards another, in circumstances where he may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what he has done in a way which does not involve discrimination.

157. The burden of proof is set out at Section 136 Equality Act 2010 ("EqA"). The relevant part of section 136 EqA says: -

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

158. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of any other explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough.

159. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise. Could conclude means "a reasonable Tribunal could properly conclude from all the evidence."

160. As set out above, at the first stage the Claimant must prove "a prima facie case." Each case is fact specific, and it is necessary to have regard to the totality of the evidence when drawing inferences. Once the burden of proof has shifted, it is the second stage and is for the Respondent to show that the relevant protected characteristic played no part whatsoever in its motivation for doing the act complained of.

161. It is, however, not necessary in every case for the tribunal to specifically identify a two-stage process. There is nothing wrong in principle in the tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council [2006] IRLR 748 "If the tribunal acts on the principle that the burden of proof may have shifted and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever".

162. This approach to the burden of proof has been confirmed by the Court of Appeal in Ayodele v City Link and another [2017] EWCA Civ 1913.

Direct discrimination

163. Section 13 EqA sets out the statutory position in respect of claims for direct discrimination because of disability.

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

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

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

164. The comments of the Court of Appeal in Madarassy v Nomura International plc [2007] EWCA 33, albeit a sex discrimination case under the pre Equality Act 2010, Sex Discrimination Act 1975, are still very much applicable to direct discrimination under the Equality Act 2010.. Mummery LJ giving judgment says at paragraph 56, *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

165. It can be appropriate for a Tribunal to consider in a direct discrimination case, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

166. Failure to properly investigate a grievance will only give rise to a claim if the employer would have behaved differently in response to a similar complaint from an appropriate comparator — (see *Eke v Commissioners of Customs and Excise 1981 IRLR 334, EAT.*

Indirect Discrimination

167. Section 19 EqA 2010 sets out the statutory provision in respect of indirect discrimination as:

"(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.

(3) The relevant protected characteristics are—

[…]
disability;"

168. Baroness Hale in Essop v Home Office; Naeem v Secretary of State for Justice [2017] UKSC 27, [2017] IRLR 558, provides helpful guidance in approaching indirect discrimination claims which can be summarised as:

(1) indirect discrimination does not require an explanation of why a particular PCP puts one group at a disadvantage when compared with another.

(2) indirect discrimination does not require a causal link between the less favourable treatment and the protected characteristic (being concerned with 'hidden barriers which are not easy to spot').

(3) The reasons why one group may find it harder to comply with a PCP are many and various; they and the PCP itself are ultimately 'but-for' causes (in that if they are removed the problem is solved).

(4) There is no requirement that every member of the group sharing the protected characteristic be at a disadvantage – in Essop some BME/older employees will have passed the assessment, just as some women chess players will have done well in scoring.

(5) The factual disparity of impact (without the need for establishing its reason) can be established by statistical evidence (as the SDA 1995 and the RRA 1976 had made clear on their wording).

(6) It is always open to the Respondent to show that its PCP is justified. This is an essential part of the action for indirect discrimination, which should not be underplayed by Tribunals; it involves no stigma or shame on the employer relying on it as a defence.

Harassment

169. Section 26, EQA 2010 sets out the legislative framework for harassment:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B […..]

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

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are— ..disability;"

170. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT stressed that the Tribunal should identify the three elements that must be satisfied to find an employer liable for harassment: (a) Did the employer engage in unwanted conduct, (b) Did the conduct in question have the purpose or effect of violating the employee's dignity or creating an adverse environment for him/her, (c) Was that conduct on the grounds of the employee's protected characteristic?

171. In a case of harassment, a decision of fact must be sensitive to all the circumstances. Context is all-important. The fact the conduct is not directed at the Claimant herself is a relevant consideration, although this does not necessarily prevent conduct amounting to harassment and will not do so in many cases.

172. Richmond Pharmacology v Dhaliwal confirmed that not every comment that is slanted towards a person's protected characteristic constitutes violation of a person's dignity etc. Tribunals must not encourage a culture of hypersensitivity by imposing liability on every unfortunate phrase.

173. Mrs Justice Slade's comments on how a Tribunal should approach the words "related to the protected characteristic" are helpful in the EAT decision of Bakkali v Greater Manchester (South) t/a Stage Coach Manchester [2018] IRLR 906, [2018] ICR 1481 (EAT). She says, whilst it is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a Claimant – "related to" such a characteristic includes a wider category of conduct and as such requires a broader enquiry when making a decision. (See paragraph 31 (Slade J presiding)

174. Tribunals must not devalue the significance of the meaning of the words used in the statute (i.e., intimidating, hostile, degrading etc.). They are an important control to prevent trivial acts causing minor upset being caught in the concept of harassment. Being upset is far from attracting the epithets required to constitute harassment. It is not enough for an individual to feel uncomfortable to be said to have had their dignity violated or the necessary environment created. (Grant v Land Registry [2011] IRLR 748).

175. Considering whether there has been harassment includes both a subjective and objective element. Underhill J in Pemberton v Inwood [2018] EWCA Civ 564 summarised the position as follows: *"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))"*

176. Section 212(1) EqA says "*detriment does not, subject to subsection (5) include conduct which amounts to harassment."*

177. Section 212 EqA means that an action that is complained of must be either direct discrimination or harassment, but it cannot be both. Equally such an action cannot be both harassment and victimisation. It must be one or the other. This is because the definition of detriment excludes conduct which amounts to harassment.

Deduction from wages

178. The general prohibition on deductions from wages is set out at section 13 ERA which provides, as far as is relevant:

"(1) *An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision" in relation to a worker's contract, means a provision of the contract comprised –

(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

179. Under section 27 ERA, 'wages' means any sums payable to the worker in connection with his employment and covers any fee, bonus, commission, holiday pay or other emolument referable to the employment.

180. For a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question (New Century Cleaning Company Limited v Church [2000] IRLR 27, CA). To determine whether any sum is properly payable to an employee as part of an unlawful deduction from wages claim, the Tribunal can resolve any dispute as to the meaning of the contract relied on (Agarwal v Cardiff University and anor [2018] EWCA Civ 2084).

181. Where a contract of employment is an annual contract that provides for an annual salary to be paid to an employee, the Apportionment Act 1870 ("AA 1870") will apply. AA 1870 stipulates that the salary will be deemed to

accrue from day-to-day, by equal amounts daily. As such, an annual salary should be apportioned on a calendar day-to-calendar day basis, by treating each day as 1/365 of the annual salary. In accordance with s. 7 AA 1870, this will be the case unless the contract of employment "expressly stipulates" that no apportionment will take place or that accrual at an equal rate daily will not apply.

Rolled up holiday pay

182. The seminal decision of the European Court of Justice (ECJ) in the case of Robinson-Steele v RD Retail Services Ltd and two other cases 2006 ICR 932, set out the parameters of in which an employer may defend a claim for holiday pay when using rolled up holiday pay to pay a worker. The ECJ ruled, while the Directive does not expressly lay down the point at which the payment for annual leave must be made, entitlement to annual leave and to a payment on that account are two aspects of a single right. The ECJ concluded that rolled-up holiday pay arrangements cannot be lawful because as a health and safety right not paying workers holiday pay when they take holiday discouraged the taking of holiday and that rolled-up holiday arrangements amounted to a breach of Article 7(2), which provides that, except on termination of employment, the statutory entitlement of paid annual leave may not be replaced by an allowance in lieu. Notwithstanding, Article 7 did not preclude employers setting off genuine holiday payments paid under the rolled-up method against a worker's entitlement to payment when he or she actually takes leave. The burden is on the employer to prove such transparency and comprehensibility.

183. The EAT in Smith v AJ Morrisroes and Sons Ltd and other cases 2005 ICR 596, summarised how an employer might evidence transparency and comprehensibility (1) as the provision for rolled-up holiday pay being clearly incorporated into the contract of employment (2) the amount allocated to holiday pay being identified in the contract and preferably also in the payslip, and (3) records being kept of holidays taken and reasonably practicable steps being taken to ensure that workers take their holidays.

Detriment

184. Section 44. ERA sets out where an employee has been subjected to a detriment as a result of raising health and safety issues in specified circumstances:

"(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that— …..

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety."

(1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer done on the ground that—…… or

(b) in circumstances of danger which the worker reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger."

Protected Disclosures

185. Section 43A ERA provides that a protected disclosure is 'a qualifying disclosure' as defined by section 43B ERA.

186. To summarise: a qualifying disclosure is (i) *a disclosure of information* that (ii) *in the reasonable belief of the worker making it, is made in the public interest* and (iii) *tends to show that one or more of six 'relevant failures' has occurred, is occurring or is likely to occur*. The Claimant relies upon the relevant failures under section 43B (1) (b) & (d) ERA.

187. In determining whether the worker has made a protected disclosure that discloses information and is made in the public interest the worker must have a reasonable belief. The test of what is a reasonable belief is both subjective and objective. Subjective because the worker has the required belief as a matter of fact and on a subjective basis and objective because if they do have that belief, that their belief is a reasonable belief to hold on an objective basis.

188. Section 43B ERA sets out what the relevant failures are. Sub-sections 43B (1) and (5) say:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—…..
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject ……
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

189. A belief which is wrong still meets the requirements of section 43B ERA, provided it is reasonably held (Babula v Waltham Forest College [2007] EWCA Civ 174, CA).

190. The definition of a qualifying disclosure requires the '*disclosure of information which, in the reasonable belief of the worker, is made in the public interest*'. Disputes that are essentially personal contractual

disputes are unlikely to qualify (Millbank Financial Services Ltd v Crawford [2014] IRLR 18, EAT).

191. It is not sufficient that the Claimant has simply made '*allegations*' about the wrongdoer especially where the claimed whistleblowing occurs within the Claimant's own employment, as part of a dispute with his or her employer (Cavendish Munro Professional Risks Management v Geduld [2010] IRLR 38).

192. Under section 43B(1)(b) ERA there must be an actual or likely breach of the relevant obligation by the employer (Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT). The word 'legal' must be given its natural meaning.

193. The fact that the Claimant making the disclosure thought that the employer's actions were morally wrong, professionally wrong or contrary to its own internal rules may not be sufficient (Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT). The source of the obligation should be identified and capable of certification by reference for example to statute or regulation. 'Likely' means probable or more probable than not. It is not sufficient that the Claimant reasonably believed that the relevant disclosure of information tended to show that a person 'could' fail to comply with a legal obligation, or that there was a possibility or risk of non-compliance (Kraus v Penna Plc [2004] IRLR 260).

194. A Claimant wanting to rely on the whistleblowing protection before a Tribunal bears the burden of proof on establishing the relevant failure (Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT).

Detriments

195. It is for the Claimant to show that he was subjected to a detriment by an act or a deliberate failure to act by his employer or co-worker. A claim can only be made out if the Claimant shows he was subjected to the detriment on the ground that he had made the protected disclosure. The relevant test is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence, the treatment of the Claimant (Fecit & Others v NHS Manchester [2011] IRLR 111).

196. Section 48(2) ERA states that the onus is on the employer to show the ground on which the act or deliberate failure to act is done. The 'on the ground that' test focuses on the relevant decision-makers mental processes. The test is not satisfied merely because there was some relationship between the protected disclosure and the detriment complained of, or because the detriment would not have been imposed but for the disclosure (London Borough of Harrow v Knight [2003] IRLR 140).

197. The Court of Appeal decision in Jesudason v Alder Hay Childrens NHS Foundation Trust [2020] IRLR 374 stated '*It is now well established that the concept of a detriment is very broad, and must be judged from*

***the view point of the worker. There was a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment*'.**

Burden of proof in protected disclosure detriment

198. In a complaint of detriment, section 48(2) ERA provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done. This means that the burden shifts to the employer where the other elements of a complaint of detriment are shown by the Claimant.

199. Unlike the operation of the burden of proof under the Equality Act 2010, a failure by the employer to show positively the reason for an act or failure to act does not mean that the complaint of whistleblowing detriment succeeds by default. It is a question of fact for the tribunal as to whether or not the act was done 'on the ground' that the Claimant made a protected disclosure (Ibekwe v Sussex Partnership NHS Trust UKEAT/0072/14/MC).

Automatic constructive unfair dismissal on the grounds of health and safety

200. Section 100 ERA states:

"(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 principle reason) for the dismissal is that- ….

(b) being an employee at a place where there was no such representative or safety committee or

(c) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he believed were harmful or potentially harmful to health or safety ….

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger."

Failure to make reasonable adjustments

201. The duty to make reasonable adjustments is set out in sections 20 – 21 EqA 2010, and in Schedule 8 (dealing with reasonable adjustments in the workplace).

202. The pertinent parts of Section 20 say: -

"(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."

203. Section 21 EqA 2010 establishes that a failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

204. In the case of Secretary of State for Work and Pensions (Job Centre Plus) v Higgins [2013]UKEAT/0579/12 the EAT held at paragraphs 29 and 31 of the HHJ David Richardson's judgment that the Tribunal should identify (1) the employer's PCP at issue, (2) the identity of the persons who are not disabled in comparison with whom comparison is made, (3) the nature and extent of the substantial disadvantage suffered by the employee, and (4) identify the step or steps which it is reasonable for the employer to have to take and assess the extent to what extent the adjustment would be effective to avoid the disadvantage.

205. The statutory duty is for the Respondent to take such steps as are reasonable, in all the circumstances of the case, for it to have to take in order to avoid the disadvantage. The test of "reasonableness" therefore imports an objective standard (see Smith v Churchills Stairlifts plc [2005] EWCA 1220.)

Victimisation

206. Section 27 EqA 2010 sets out the relevant statutory provisions in respect of claims for victimisation.

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

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

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

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act."

207. Section 39(4) EqA provides that an employer (A) must not victimise an employee of A's (B): by subjecting B to any other detriment — s.39(4)(d).

208. The issue of causation is fundamental to proving victimisation. In the seminal case of *Nagarajan v London Regional Transport 1999 ICR 877, HL:*

The House of Lords ruled that victimisation will be made out, even if the discriminator did not consciously realise that he or she was prejudiced against the complainant because the latter had done a protected act.

209. Lord Nicholls put it like this in Nagarajan *"Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances".*

210. The Code explains that at paragraph 9.11- 9.12.

"9.11 Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.

9.12 There is no time limit within which victimisation must occur after a person has done a protected act. However, a complainant will need to show a link between the detriment and the protected act."

211. A considerable length of time may elapse between the protected act being done and the detriment being suffered. (See *Chambers v Abbey National plc ET Case No.2200567/98)*.

212. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (See West Yorkshire Police v Khan [2001] IRLR 830)

Submissions

213. Mr Pickett provided his written submissions by email on 4 December 2023 on behalf of the Respondent. The Claimant provided written submissions by email dated 14 December 2023 which were a response to the Respondent's written submissions. The Tribunal considered both submissions and were grateful for the assistance both submissions provided.

Analysis and Conclusions

Time limits

Issue 1.2.1: Were the discrimination and victimisation complaints conduct extending over a period?

214. The following issues that took place before 3 June 2022 include issues 2.1.1 which allegedly took place on 10 June 2021 when the Claimant received the outcome of the first grievance, 2.1.3 in respect of weekly meetings held on Wednesdays that last of which took place allegedly on 25 November 2020 is 18 months out of time, and the grievance meeting that took place

on 26 May 2021 which is 1 year out of time. In respect of issue 2.1.4 the decision not to make a reasonable adjustment in respect of failure to pay for attendance of the grievance meeting on 3 June 2021 which would have been paid on 15 June 2021 (the Claimant's pay date) at the earliest, if the Claimant had made a claim. This makes issue 2.1.4 approximately 11 months out of time. The practice of having fixed time meetings in respect of this same 3 June or 26 May meetings under issue 12.1.2, and failure to make reasonable adjustments at the meeting took place on 26 May 2021 under issue 13.5.2, are all 1 year out of time. The allegations in relation to Ms Binder's alleged conduct under issues 2.1.6 & 2.1.7, 2.1.10 are also 1 year out of time. Issues 2.1.10 & 14.1.1 are 17 months out of time. The victimisation detriment under issues 15.2.1 and one of the alleged solicitations took place before 13 October 2020 so are approximately 19 months out of time. Issues 15.2.2 and 15.2.3 in respect of the Claimant's first grievance are approximately 1 year out of time as both acts allegedly took place in June 2021.

Issue 1.2.2: Were the discrimination and victimisation complaints conduct extending over a period?

215. The Claimant did not argue or plead that any of the allegations of direct & indirect discrimination, harassment and or victimisation were continuing acts beyond 3 June 2022. However, we found that none of the acts alleged as discriminatory have been found to be discriminatory and so in those circumstances applying South Western Ambulance Service NHS Foundation Trust v King IRLR 168 EAT there were no continuing acts. So the direct discrimination, harassment and victimisation claims before 3 June 2022 are out of time.

Issue 1.2.4: If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

216. The first question the Tribunal must ask itself is why the complaints were not made to the Tribunal in time? The Claimant's evidence was he was receiving legal advice from a qualified solicitor in May 2021 who advised him about his first grievance. The Claimant would contact the legal advice line when he had issues throughout his employment. We found that the Claimant was advised about time limits and that the Claimant did not bring his discrimination claim at the time because he wanted to deal with the matter internally. It is also the case that the cogency of the evidence is significantly affected by the length of time that has transpired since the alleged acts took place. Some acts took place 2 years before the Claimant presented his claim. The Claimant has delayed significantly even though the Claimant knew about his discrimination claims in May 2021 having received legal advice and submitted a grievance.

217. The second question is in any event, is it just and equitable in all the circumstances to extend time? The Tribunal considers that it is not just and equitable for the following reasons. The Claimant had access to legal advice during the statutory time limits, so it was open to the Claimant to bring his claims in time, he chose not to. There was nothing preventing the Claimant from bringing his claim and nothing substantially changed between the expiring of the limitation period in relation to matters in December 2020 and

May 2021 and when the Claimant actually brought his claims in September 2022. Allegations of things said 2 years prior which have not been recorded makes it difficult to provide evidence and the witnesses particularly, Ms Binder struggled to be able recall events that happened nearly 2 years before the Claimant presented his claim. In this respect, we weighed the prejudice caused to the Claimant by not extending time and the Respondent by extending time. We consider that the prejudice to the Respondent outweighs the Claimant's prejudice. The Claimant still had a substantial number of claims that the Tribunal will determine. We conclude that it is not just and equitable for the Tribunal to extend time for the Claimant and the Tribunal therefore does not have jurisdiction to consider the Claimant's claims for disability discrimination under issues 2.1.1, 2.1.3, 2.4.1, 2.1.6, 2.1.7, 2.1.10, 13.5.2 (in respect of the grievance meetings in May & June 2021), harassment under issues 14.1, indirect discrimination under 12.4.2 and victimisation under issues 15.2.1, 15.2.2.

Issue 1.2.5: Were the detriment and unauthorised deductions complaints made within the time limits in s.48 and 23 of the Employment Rights Act ('ERA 1996')?

218. In respect of the alleged unauthorised deductions issue 10.1 is approximately 7 weeks out of time in relation to an alleged series of deductions with the last failure to pay holiday pay took place on 15 April 2022.

219. In relation to issues 6.1.1 & 6.1.3 they allegedly took place in June 2021 so are approximately 1 year out of time. In relation to Issue 6.1.2 one of the alleged solicitations allegedly took place some time before 13 October 2020 as the Claimant mentioned the complaint on 13 October 2020 so is approximately 19 months out of time.

Issue 1.2.5.2: If not (for the detriment claim), was there a series of similar acts or failures and was the claim made to the Tribunal within three months plus early conciliation extension) of the last one?

220. The detriments relied upon by the Claimant are in no way related to each other. They are not a series of similar acts or failures within the meaning of section 48(3) ERA. The Claimant being sent to Coventry by Ms Binder and Ms Webster and Mr Tearle is not related to any other acts that are in time. Neither is the allegation that Ms Binder solicited complaints this is not related to any act in time. Although the Claimant said that the complaint Michelle was solicited by Ms Binder this happened in October 2020. We did not find Ms Binder solicited a complaint by Harrison either. The complaint by Harrison happened in August 2022 and this event took place some 22 months later. They were not similar acts as they related to completely different issues. The obligation is upon the Claimant to have argued why it was not reasonably practicable for him to bring his claim. Whilst the Claimant has mentioned the reasonably practicable argument in his submissions he does not provide any reason why it was not reasonably practicable for him to bring his claim. We conclude that it was reasonably practicable.

Issue 1.2.5.3: If not (for the unauthorised deductions claim), was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

221. The last deduction in the series of Claimant's holiday pay claim was 15 April 2022 as this was the last payment under the Claimant's fixed term contract where there was rolled up holiday pay. From May 2019 the Claimant was paid under a permanent contract that had different terms regarding holiday as there was no longer a requirement to take annual leave during the school holiday and the nature of the contract was different as it was now a permanent contract. After April 2022 the Claimant did not take any annual leave. The Claimant was paid outside annual leave entitlement on termination of his permanent contract. We conclude that there was a series of deductions which ended on 15 April 2022 and the Claimant had 3 months less a day to bring his unlawful deduction claim for holiday pay. The Claimant did not do so and so his claim is out of time by 7 weeks.

Issue 1.2.5.4: If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

222. It was reasonably practicable for the Claimant to bring both his detriment claim and his unlawful deductions claim in time. There was nothing preventing the Claimant from bringing either claim. The Claimant's detriment claims are substantially out of time and whilst the unlawful deductions claim is 7 weeks out of time, the Claimant knew of his holiday claim as early as March 2021 and was receiving legal advice on it in May 2021 when he would have been in time to bring his claim. The Claimant chose not to bring the unlawful deductions claim. In respect of his detriment claims he was receiving legal advice throughout his employment from July/August 2020. We found that the Claimant would have received legal advice on all the time limits for his claims. There was no reason why the Claimant could not have brought these claims in time.

Issue 1.2.5.5: If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

223. As it was reasonably practicable for the Claimant to bring his claims in time, there is no need to consider whether it would have been in a reasonable period. But if we had found that it was not reasonably practicable we would have decided that the Claimant did not make the claim within a reasonable period.

Constructive unfair dismissal (s.95(1)(c) ERA 1996)

Issue 2.1.1: Did the Respondent mishandle the Claimant's first grievance, specifically fail to conduct any reasonable investigation into the grievance, focus on protecting those named in the grievance and reach an unfair outcome

224. There was no evidence that either Mr Parrish or Mr Carlin sought to protect the people named in the grievance. We found that Mr Carlin did reach a fair outcome based upon the evidence available. We conclude that the handling

of the Claimant's first grievance did not amount to a repudiatory breach of contract.

Issue 2.1.2: Did the Respondent mishandle the Claimant's second grievance, specifically fail to conduct a fair process, including by substituting the grievance chair for an individual the Claimant had previously raised a grievance about

225. We conclude that Ms Webster was not substituted for the chair of the Claimant's second grievance. The Respondent conducted a fair process as Ms Webster did not influence the outcome of the second grievance decision. We conclude that the handling of the Claimant's second grievance did not amount to a repudiatory breach of contract.

2.1.3: Did the Respondent fail to pay the Claimant for meetings that he was required to attend, specifically the grievance meetings and weekly meetings held on Wednesdays during the first and second periods of lockdown from March 2020 and November 2020 onwards

226. The Respondent did not fail to pay the Claimant for meetings he was required to attend. The Claimant was not required to attend the weekly lockdown meetings from March 2020 and November 2020. We conclude that there was no deduction of wages for the grievance meetings the Claimant was required to attend because either the Claimant failed to apply for payment according to the Respondent's process or the Claimant was paid in his September 2022 pay slip for the meetings he did claim for. In those circumstances there is no repudiatory breach of contract.

Issue 2.1.4: Did the Respondent fail to make reasonable adjustments to the grievance meetings to accommodate the Claimant's disability. Specifically, the Claimant says he was rushed through the hearings and not given enough time to properly express himself.

227. The Claimant did not provide any evidence as to what reasonable adjustments he says should have been made in respect of grievance meetings to accommodate his disability except in relation to the length of the meetings. We found that there was no PCP in respect of the length of the grievance meetings. We conclude without a PCP there was no disadvantage to the Claimant in the length of the grievance meetings, he was given an opportunity to have his grievances heard and they were heard. We determine that there has been no repudiatory breach of the Claimant's contract in respect of this issue.

Issue 2.1.5: Did the Respondent make unlawful deductions from the Claimant's wages on 2, 9 and 16 July 2022

228. We conclude that although there was a deduction to the Claimant's salary for 9 July 2022, this was not an unlawful deduction because the Claimant was not authorised to be absent, so was not contractually entitled to be paid as he was not able and willing to work on 9 July. We conclude there was no deductions of wages for 2 July. The deduction in the Claimant's July payslip was for 2 hours and was attributable to the Claimant's absence for 9 July and there was no deduction for the 40 minutes on 2 July. There was no

deduction for 16 July 2022 because the Claimant was paid the same salary for the last 15 days of July in his August pay slip as was his contractual entitlement. The only remaining deductions were not the subject of the Claimant's claim and related to the underpayment of 5 minutes in the Claimant's shift. These 5 minute underpayments were paid later in September 2022 before the Claimant presented his claim form.

Issue 2.1.6: In May 2021, through Lisa Binder, ask the Claimant to resign

229. We found that Ms Binder did not ask the Claimant to resign at any point whether through Ms Webster or otherwise. In those circumstances we conclude that there was no repudiatory breach of contract.

Issue 2.1.7: Did the Respondent from December 2020 until 4 June 2021, through Ms Binder, make continuous remarks which unfairly criticised the Claimant's teaching

230. The Claimant did not identify what remarks he was referring to but only mentioned one remark in his evidence that we found Ms Binder did not say. We took into account that the Claimant said that the recording of 14 December 2020 was an example of how Ms Binder spoke to him. The Claimant said it was clear from the recording that the tone of Ms Binder's voice was not sincere. The only examples of criticism we heard evidence on regarding the Claimant's teaching is of the diving incident. We found there was no continuous remarks as the Claimant and Ms Binder were not in the workplace at the same time for very long at all, approximately 2 months from December 2020- 4 June 2021. Ms Binder did not criticize the Claimant's teaching in December 2020 but queried how the Claimant taught diving by asking him to explain it, it was not unfair criticism. We therefore conclude there is no repudiation of the Claimant's contract of employment.

Issue 2.1.8: Did the Respondent fail to address concerns raised by the Claimant in early 2020 and during the first grievance about a lack of support for his disability

231. We conclude that as the Claimant did not raise any concerns in early 2020 about his disability there was no repudiatory breach of contract.

Issue 2.1.9: Did the Respondent fail to provide the Claimant with staff training and development throughout his employment. Specifically the Claimant says that, unlike other staff members, he was not offered the opportunity to attend CPD courses or attend other courses to extend his qualifications.

232. The Claimant was provided with staff training on at least 2 occasions, firstly in relation to qualifying for his level 2 swim teaching qualifications and secondly in relation to COVID 19 training during the pandemic. The Claimant admitted that he had received WhatsApp messages providing links to CPD development that he could do. We found that the Claimant was given access to the same training as the other swim teachers. We therefore conclude that the Respondent did not fail to provide the Claimant with staff training and development throughout his employment. That the Claimant was offered like other staff members, the opportunity to attend CPD courses

or attend other courses to extend his qualifications. We therefore conclude there is no repudiation of the Claimant's contract of employment.

Issue 2.1.10: Did the Respondent allow Ms Binder to speak to the Claimant in a raised voice and in an abrupt and loud manner

233. The only occasion that Ms Binder spoke in a loud voice was when she asked the Claimant about his lateness at the poolside on 7 December 2020. We considered that this was acceptable behaviour as it was because the poolside was a noisy environment and Ms Binder needed to speak loudly to be heard. Pursuant to this finding it is our conclusion that Ms Binder did not speak to the Claimant in a raised voice and in an abrupt and loud manner and therefore there was no repudiatory breach of contract.

Issue 2.1.11: Did the Respondent fail to pay the Claimant the correct holiday pay as a result of the Respondent's practice of 'rolling up' holiday pay

234. We do not accept that the Respondent did not pay the Claimant the correct holiday pay as a result of rolled up holiday pay. The Claimant had agreed throughout his employment to take his annual leave during school holidays including half term breaks up until his permanent contract in April 2022. Up until his permanent contract the Claimant has signed a number of his fixed term contract and agreed to all of them which all said that he would be paid for his hours worked at the rate of whatever was the hourly rate of pay at that time including the holiday element per hour. The terms of the Claimant's fixed term contract stated that the Claimant would be paid in monthly instalments on or around the 15th day of each month and that he was entitled to 5.6 weeks' holiday during each holiday year based on a full year worked and his personal entitlement would be calculated according to the hours actually worked by him. The Claimant did not complain that there were dates of holiday he took he was not paid for. The Claimant's objection was that the rate of pay he received did not say it included holiday pay. The only days holiday the Claimant said he took, we found he was paid for according to his payslip at the time. The Claimant did not take holiday in the previous years and so we conclude that it cannot be said that he was not paid holiday pay. We therefore conclude there is no repudiation of the Claimant's contract of employment.

Issue 2.1.12: Did the Respondent subject the Claimant to an unfair disciplinary procedure. Specifically the Claimant said that he was invited to attend a disciplinary hearing on the basis that he had been one minute late to work. The Claimant relies on this as the last straw

235. We have found that the Claimant was not invited to attend a disciplinary on the basis that he had been one minute late for work. The Claimant was invited to attend the disciplinary because he was absent from work on 2 occasions without excuse. We conclude that the Claimant was not subjected to an unfair disciplinary procedure. In the circumstances, it was reasonable for the Respondent to subject the Claimant to the disciplinary process where the Claimant admitted not attending work without permission, having tried to get time off before he knew about his nan's passing. The Respondent did not know about the relationship that the Claimant had with his nan when they instituted the fact finding investigation.

Mr Tearle did not believe the reason why the Claimant took time off was because of his nan. The Respondent had to find cover for the Claimant's lessons at short notice. The Claimant did not at any point apologize for his behaviour. The Claimant was not asking for time off because of grief. There was nothing unfair about the disciplinary process. The Respondent never alleged that the Claimant was 1 minute late to work in any event. On that basis the Tribunal concludes that there was no last straw as the Claimant put it.

Issue 2.2: Did the Respondent breach the implied term of trust and confidence by behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent

236. As there was no last straw, in accordance with Kaur it cannot be said to contribute to the breach of the implied term of trust and confidence. Furthermore, we have concluded that there were no repudiatory breaches of contract by the Respondent.

237. Although we concluded that individually the acts relied upon by the Claimant did not amount to a repudiatory breach of contract, we also have to consider whether accumulatively the Respondent's behaviour amounted to a breach of the implied term of trust and confidence. We conclude that it did not. Much of what the Claimant complained about simply did not happen. The only acts which we found happened that the Claimant relies upon in respect of the implied term of trust and confidence were that Ms Binder spoke to the Claimant in a loud voice when asking him about his lateness on 7 December 2020, the Claimant was not paid for his attendance at the grievance meetings on 26 May 2021 & 3 June 2021 when he was employed on a fixed term contract. Accumulatively these acts did not amount to a breach of the implied term of trust and confidence as the only reason the Claimant was not paid for his attendance at the grievance meetings in May & June 2021 is because he did not claim for them, and the only reason Ms Binder spoke to the Claimant in a loud voice was because it was noisy at the poolside. Both acts were reasonable having regard to the context.

238. We considered whether the Respondent's failure to provide transparency and comprehensibility of some holiday pay in the Claimant's pay slips was a repudiatory breach of the Claimant's contract of employment and we concluded that it was not. The Claimant did not complain in his claim that it was the confusion caused by not being able to work out what his pay was a repudiatory breach, his complaint to the Employment Tribunal was about what he considered to be deductions from his wages, not that he could not work out what his holiday pay was. Throughout the Claimant's written submissions, the reference to rolled up holiday pay is under the heading of unauthorised or unlawful deductions. When referring to what was a repudiatory breach, the Claimant's written submissions refer to "alleged irregularities in holiday pay".

239. In the Claimant's written submissions, the Claimant states under the title "Impact of Rolled-Up Holiday Pay:" that "*The claimant can argue that the way holiday pay was administered (rolled-up into regular pay) affected his ability to understand and exercise his rights to statutory holiday pay. This*

lack of clarity could have led to him not receiving the full benefit of his entitled holiday pay". However, at no point did the Claimant give evidence that this was his complaint. But even if we consider this as the Claimant's complaint, the Respondent's behaviour in failing to provide transparency and comprehensibility in holiday pay before April 2022 was not a repudiatory breach. The Respondent responded to the Claimant's queries about his pay in a reasonable time period in March 2021 and provided explanations about his pay in the meeting on 24 August 2022, this was not the behaviour of an employer seeking to destroy or seriously damage the trust and confidence between the Claimant and the Respondent.

Issue 2.3: Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

240. The Claimant said in his submissions that the reason his resignation was a result of "*continued unresolved issues and a work environment that he perceived as discriminatory."* However, we found that the reason for the Claimant's resignation was because he believed he was being asked to attend a disciplinary because he had been 1 minute late. The Claimant not being paid correctly was not a reason for the Claimant's resignation. The alleged incorrect holiday payments happened some 2 years ago before 3 September 2022 and the Claimant did not resign when he was aware of the rolled up holiday even when he was receiving legal advice about it. The Tribunal concluded that there was no breach of contract and so we determined that the Claimant did not resign in response to a breach of contract. In those circumstances we conclude that the Claimant was not dismissed by the Respondent unfairly or otherwise, but the Claimant resigned.

Issue 2.4: Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach.

241. Even if we are wrong about the Claimant's holiday pay claim and that was a breach of contract, we consider that the Claimant would have been found to have affirmed this breach. The Claimant would have been deemed to have affirmed the alleged breach because the Claimant was aware of the issue in March 2021. He was told in March 2021, that he was being paid rolled up holiday pay and he did not do anything about it until second grievance in August 2022 by then over a year had transpired without him mentioning it. The Claimant by his actions demonstrated that he intended to keep the contract alive as he agreed 2 additional fixed term contracts in the period September- December 2021 [347-349] and January 2022- April 2022 [350-352] and then a permanent contract on 19 April 2022 [356-359]. It clearly was not an issue for him as he was aware of his rights by May 2021 when he had legal advice. The Claimant had legal advice throughout the period where he disputed his holiday pay.

Wrongful dismissal

242. As we have concluded that the Claimant was not dismissed as result of the Respondent's repudiatory breach, it is the Tribunal's determination that the

Claimant was not wrongfully dismissed and as such is not entitled to any notice pay.

Protected disclosure (s.43B ERA 1996)

Issue 5.1: Did the Claimant make one or more qualifying disclosures as defined in s.43B ERA 1996? The Tribunal will decide:

243. The Respondent accepts in their written submissions that the Claimant made a protected disclosure on 2 December 2020 to Dean Tearle, his employer when the Claimant told him that he was being asked to use chemicals and that the Claimant reasonably believed the disclosure was in the public interest and that it tended to show a failing to comply with legal obligations, and/or that a person's health and safety was being endangered; and that that belief was reasonable. There was no reason for the Employment Tribunal not to accept the Respondent's concession.

Issue 6: was the Claimant subjected to detriments by the employer? (s.47B ERA 1996)

244. Since the Tribunal have found that the Claimant was not 'sent to Coventry' by all but one other member of staff or that Ms Binder solicited complaints about the Claimant from other staff or the Respondent failed to address the Claimant's grievances properly. It follows that we conclude that these were not detriments.

245. With the concession of a protected disclosure having been made by the Respondent the only question for the Tribunal was whether the Claimant having made a protected disclosure was subjected to a detriment because of his protected disclosure. The Tribunal has concluded that the detriments relied upon by the Claimant did not happen and therefore the Claimant was not subjected to any detriments as a result of making a protected disclosure. We found that Mr Tearle did not dismiss the Claimant's protected disclosure but took it seriously. There was no evidence that the Respondent in anyway retaliated against the Claimant because of his protected disclosure.

Health and safety detriment (s.44 ERA)

246. We conclude that the Claimant was not working at a place without a representative and in those circumstances s44(1) (c) ERA does not apply. Mr Tearle was the health and safety representative. Thus, the Claimant did raise his complaint with the appropriate representative although he did not know that. We agree with the Respondent that it was not open for us to consider section 1A although it would have been the better provision for the Claimant to have brough his claim under. We do not consider s44(1A) ERA because the Claimant did not plead nor give evidence to the effect that he believed himself to be in serious and imminent danger. In any event the detriments relied upon at issues 6.1.1- 6.1.3 did not take place and so we conclude that the Claimant was not subjected to any detriment as a result of raising health and safety issues with the Respondent.

Unauthorised deductions from wages

Issue 10.1: Did the Respondent make unauthorised deductions from the Claimant's wages and, if so, how much was deducted? The Claimant says that deductions were made throughout the course of his employment because holiday pay was 'rolled up' into his hourly rate.

247. We conclude that the Respondent has not proved that the Claimant's holiday was transparent and comprehensible. There is no detail of the actual holiday pay element of the pay rate in the contract of employment and there is little recorded evidence that is consistent with the pay slips. The 27 March 2021 email where Ms Webster tells the Claimant the holiday pay element is only correct at one point in time. The Claimant then received a pay rise in March 2022 and so the pay element changed and so it is difficult to track the holiday pay element. We received very little evidence from the Respondent as to what the actual holiday element of the pay rate was. However, we found that there were no deductions of wages in relation to holiday pay because the Claimant agreed to take holiday during the school holidays and did not provide evidence of day of annual leave he took for which he was not paid prior to 2022. The Claimant took 3 days of annual leave in 2022 and was paid for that holiday. If we are wrong and the Claimant was not paid for any holiday prior to April 2022, then even if the Claimant has a series of deductions resulting from the incomprehensible and nontransparent rolled up holiday pay, the last series in deductions was in the Claimant's 15 May 2022 pay slip [552]. The Claimant is out of time to bring a holiday pay claim as he needed to have contacted ACAS by 14 August 2022, but the Claimant did not contact ACAS until 16 September 2022. We conclude that the Claimant's unlawful deductions claim is not well founded and is dismissed.

Direct discrimination (s.13 EqA 2010)

248. Whilst it was the case that the Claimant was disabled at the material time by reason of ASD and long-standing depression consequent to ASD, the Claimant did not provide any evidence to suggest that it was because of his depression that he suffered any unfavourable treatment. The Claimant concentrated his evidence on his ASD as being the reason for the alleged unfavourable treatment. There were no facts upon which we could find that the things that we found did happen in issues 2.1.1-2.1.10 & 2.1.12 was because of the Claimant's disability. We found that Ms Binder did speak to the Claimant in a loud voice but that was not because of the Claimant's disability but because the poolside was noisy, and she raised her voice to be heard in the din. We therefore conclude that the Claimant was not subjected to unfavourable treatment as compared to a hypothetical comparator with no material difference to the Claimant other than his disability. We conclude that the Claimant's direct discrimination claim on the grounds of his disability is not well founded and is dismissed.

Indirect discrimination (s.19 EqA 2010)

Issue 12.1.1: Did the Respondent have a practice of overloading employees with instructions and communications without allowing time to process them

249. As the Claimant accepted in evidence that there was no PCP that he was overloaded with instructions in the grievance meetings and communications

without allowing time to process them we conclude that there was no PCP and this was not applied to the Claimant in the Claimant's grievance meetings.

Issue 12.1.2: Did the Respondent have a practice of requiring grievance hearings to be concluded with in a fixed timetable with no ability to extend the length of hearing.

250. There was no evidence there was a fixed timetable in respect of any of the grievance meetings or inability to extend the meetings as in the first grievance meeting there was an unscheduled 10-15 minute break requested by the Claimant and in the second meeting it was on for longer than an hour and the Claimant was asked if he it was good time to close the meeting and he agreed to that. We conclude that there was no PCP applied to the Claimant of a fixed timetable with no ability to extend the length of hearing. We conclude that the Claimant's indirect discrimination claim on the grounds of his disability is not well founded and is dismissed.

Failure to make reasonable adjustments (section 20 EqA 2010)

Issue 13.2: Did the Respondent have the PCP of overloading employees with instructions and communications without allowing time to process them and or requiring grievance hearings to be concluded with in a fixed timetable with no ability to extend the length of hearing.

251. The Tribunal's finding was that there was no PCP in respect of fixed timetables of grievance meeting as neither grievance was of the same length and the first grievance meeting on 26 May 2021 was extended in length as the request of the Claimant and at the second grievance meeting the Claimant agreed that he was content to close the meeting. It is therefore our determination that the Respondent did not have a practice of fixing the length of or inability to extend the length of the grievance meetings, so, there was no obligation on the Respondent to make reasonable adjustments as suggested by the Claimant under issues 13.1.1 & 13.1.2. The Claimant's complaint is not unfounded and is dismissed.

Harassment (s.26 EqA 2010)

Issue14.1: Did the Respondent through Ms Binder, speak to the Claimant with a raised voice and in an abrupt and loud manner at the poolside on 7 December 2020 at 3.40pm.

252. We have found this claim was out of time, but even if it was not we do not accept that Ms Binder raised her voice in an abrupt manner. The reason why Ms Binder spoke to the Claimant loudly was because it was noisy pool side. There are no facts upon which we could conclude that the reason why Ms Binder spoke loudly to the Claimant was related to the Claimant's disability. Thus, even if the claim was in time we would have found that it was not harassment related to the Claimant's disability and that there was nothing about what Ms Binder said to the Claimant or the manner in which she said it that meant its purpose or effect was a violation of the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Victimisation – s.27 EqA 2010

Issue 15.1: Did the Claimant do a protected act

253. The Respondent accepts that First grievance is a protected act. We consider that it falls under section 27(1) (d) in that in the grievance document the Claimant makes allegations of disability discrimination. However, the allegation that in or around late-November 2020, the Claimant informally told Dean Tearle of his difficulties with Ms Binder and that he was being discriminated against because of disability is not a protected act as we have found that it did not happen.

Issue 15.2.1: did the Respondent send the Claimant to Coventry' by all but one other member of staff

254. This issue was out of time but even if the claim was in time we would have concluded that it did not happen. The Claimant said that on one occasion on a Friday in June 2021, Ms Binder Mr Tearle and Ms Webster sent him to Coventry but not Mr Parrish. Mr Tearle said that the Claimant did not work on Fridays in June 2021. Mr Tearle said that the Claimant had his headphones on most of the time when he saw him. Mr Tearle said that he would have only seen the Claimant 1 day a week as at that time the Claimant only worked on Mondays and Saturday and Mr Tearle did not work on Saturdays. The Claimant tried to change his evidence when cross examined to say that he meant to say Saturday not Friday. However, we found that the occasion where the Claimant says he was sent to Coventry did not occur because the Claimant did not work Fridays in June 2021 and even on the Claimant's changed evidence Mr Tearle did not work on Saturdays so would not have seen the Claimant. Thus, there was no detriment.

Issue 15.2.2: did Ms Binder solicit complaints about the Claimant from other staff?

255. The Claimant refers to Michelle making a complaint about the Claimant not wearing a face shield all the way down in October 2020 [189]. He also complains that Michelle complained about him teaching diving. However, there was no evidence that Ms Binder asked Michelle or Harrison to make complaints and so we found there was no solicitation of complaints by Ms Binder from either Harrison or Michelle.

256. Even if Ms Binder had asked Michelle to make a complaint, Ms Binder would have had to ask Michelle before 13 October 2020 which would mean that was nearly 2 years before the Claimant brought his Employment Tribunal claim. In relation to the diving complaint this was made in December 2020. The Claimant does not argue that Ms Binder's solicitation of complaints was a continuing act. Furthermore, on the Claimant's own case the first protected act was in November 2020 which was after the complaint in October so that could not have been a detriment resulting from the protected act. In respect of the actual protected act which was the 13 May 2021 grievance this clearly post dated the complaint about the Claimant's teaching by Michelle some 6 months. In those circumstances we conclude

that there was no detriment. We have found there was no solicitation of the complaint of the Claimant's lateness by Ms Binder from Mr Hill, but even if there was a solicitation, there was no connection at all between the complaint and the Claimant's 13 May 2021 grievance. Some 15 months had transpired since the Claimant's first grievance and there was no evidence upon which we could infer that the protected act was connected in any way to the complaints against the Claimant, so we conclude that the 2 events are not connected in any way. This complaint of victimisation is therefore unfounded and is dismissed.

Issue 15.2.3: the Respondent failed to address the Claimant's grievances properly.

257. The Claimant said that in respect of both grievances the Respondent was not ready to listen to his concerns, they didn't ask the right questions and they misunderstood, and they didn't try to get the right facts. Mr Carlin gave evidence that at the first grievance meeting, HR were present. The Claimant was given an opportunity to give his account to ensure the Respondent heard from him. The Claimant was given the opportunity to appeal but did not appeal. Mr Carlin said that he received the bundle of evidence by Mr Parrish and reviewed all the evidence and also listened to audio recording 14.12.20. He said he reflected the specific claims detailed and explained in the meeting by the Claimant, he examined evidence before and during conclusions. Mr Carlin said that he reviewed the ACAS guidelines to ensure that the process was correct. He wanted to make sure that if there were lessons for the Respondent to learn then the Respondent would address those, and it would not be repeated. One of the Respondent's recommendations was that staff have training in respect of autism. Ms Webster gave evidence that in June 2021 shortly after a leadership meeting Mr Carlin shared a link with leadership staff providing training on ASD from the Autism Society. We note that the investigation into the first grievance included a number of interviews with all the relevant people and emails detailing the events that the Claimant complained of.

258. We noted that the second grievance meeting went on for 72 minutes and the transcript of the recorded meeting demonstrated that the Claimant was given ample opportunity to put forward his grievance. The Claimant did not mention anything that he says that the Respondent should have investigated that they did not or how questions should have been phrased. We found that the outcome was not rushed, and Ms Webster did not have any influence on the second grievance outcome. The Claimant also did not provide us with any explanation as to what it was that the Respondent misunderstood. As the Claimant was listened to, during his grievances and the Respondent did understand the Claimant's grievances and provided full and comprehensive outcomes to the Claimant grievances, we conclude that there was no detriment in the way that the Respondent dealt with the Claimant's grievances. The grievances were dealt with properly.

259. The Claimant was given ample opportunity to express himself in both grievances, the outcomes of both grievances evidence both Mr Parrish and Mr Carlin considered the proper evidence available and provided considered outcomes. This complaint of victimisation is therefore unfounded and is dismissed.

Automatic constructive unfair dismissal (s100(1) (c) ERA)

260. As the Tribunal has concluded that the Claimant has not been dismissed but resigned, it follows that we consider that the Claimant was not automatically dismissed because he raised a health and safety matter. If we are wrong about that, we conclude there was no causal connection between the Claimant raising health and safety issues and the Claimant's resignation. The Claimant raised the health and safety issue in December 2020 some 18 months before he resigned. The Claimant agreed to 2 fixed term contracts in that period and a permanent contract. It is clear the Claimant intended to continue the employment relationship. We therefore find the Claimant's claims for automatic constructive unfair dismissal unfounded and dismiss the claim.

Employment Judge Young

Dated 19 February 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 27 February 2024

FOR EMPLOYMENT TRIBUNALS

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

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annex

Agreed list of issues:

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 June 2022 may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in s.123 of the Equality Act 2010 ('EqA 2010')? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.2.5 Were the detriment and unauthorised deductions complaints made within the time limits in s.48 and 23 of the Employment Rights Act ('ERA 1996')? The Tribunal will decide:

1.2.5.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of/date of payment of the wages from which the deduction was made?

1.2.5.2 If not (for the detriment claim), was there a series of similar acts or failures and was the claim made to the Tribunal within three months plus early conciliation extension) of the last one?

1.2.5.3 If not (for the unauthorised deductions claim), was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.5.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.5.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Constructive unfair dismissal (s.95(1)(c) ERA 1996)

2.1 Did the Respondent do the following things?

2.1.1 Mishandle the Claimant's first grievance, specifically fail to conduct any reasonable investigation into the grievance, focus on protecting those named in the grievance and reach an unfair outcome

2.1.2 Mishandle the Claimant's second grievance, specifically fail to conduct a fair process, including by substituting the grievance chair for an individual the Claimant had previously raised a grievance about

2.1.3 Fail to pay the Claimant for meetings that he was required to attend, specifically, the grievance meetings and weekly meetings held on Wednesdays during the first and second periods of lockdown from March 2020 and November 2020 onwards [Claimant is to provide any further particulars of these meetings]

2.1.4 Fail to make reasonable adjustments to the grievance meetings to accommodate the Claimant's disability. Specifically, the Claimant says he was rushed through the hearings and not given enough time to properly express himself

2.1.5 Make unlawful deductions from the Claimant's wages on 2, 9 and 16 July 2022

2.1.6 In May 2021, through Lisa Binder, ask the Claimant to resign

2.1.7 From December 2020 until 4 June 2021, through Ms Binder, make continuous remarks which unfairly criticised the Claimant's teaching

2.1.8 Fail to address concerns raised by the Claimant in early 2020 and during the first grievance about a lack of support for his disability

2.1.9 Fail to provide the Claimant with staff training and development throughout his employment. Specifically the Claimant says that, unlike other staff members, he was not offered the opportunity to attend CPD courses or attend other courses to extend his qualifications

2.1.10 Allow Ms Binder to speak to the Claimant in a raised voice and in an abrupt and loud manner

2.1.11 Fail to pay the Claimant the correct holiday pay as a result of the Respondent's practice of 'rolling up' holiday pay

2.1.12 Subject the Claimant to an unfair disciplinary procedure. Specifically the Claimant said that he was invited to attend a disciplinary hearing on the basis that he had been one minute late to work. The Claimant relies on this as the last straw

2.2 Did that amount to a breach of the implied term of trust and confidence? The Tribunal will need to decide:

2.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

2.2.2 whether it had reasonable and proper cause for doing so.

2.3 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

2.4 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that he chose to keep the contract alive even after the breach.

3. Compensation for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the Claimant?

3.1.2 Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?

3.1.3 If not, for what period of loss should the Claimant be compensated?

3.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway?

3.1.5 If so, should the Claimant's compensation be reduced? By how much?

3.1.6 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

3.1.7 If so, would it be just and equitable to reduce the Claimant's compensatory award? By how much?

3.2 What basic award is payable to the Claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

4. Wrongful dismissal

4.1 What was the Claimant's notice period? The Claimant says it was three weeks

4.2 Did the Claimant resign in circumstances in which he was entitled to treat himself as having been summarily dismissed?

4.3 What notice pay, if any, is due to the Claimant?

5. Protected disclosure (s.43B ERA 1996)

5.1 Did the Claimant make one or more qualifying disclosures as defined in s.43B ERA 1996? The Tribunal will decide:

5.1.1 What did the Claimant say or write? When? To whom? The Claimant says that he made one disclosure, on 2 December 2020, to Dean Tearle (General Manager), that he was being asked to use chemicals despite having no COSH training and no knowledge of where the COSH sheets were.

5.1.2 Did he disclose information?

5.1.3 Did he believe the disclosure of information was made in the public interest?

5.1.4 Was that belief reasonable?

5.1.5 Did he believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation and/or that the health and safety of any individual had been, was being or was likely to be endangered?

5.1.6 Was that belief reasonable?

5.2 If the Claimant did make a qualifying disclosure, it was a protected discourse because it was made to the Claimant's employer

6. Detriment (s.47B ERA 1996)

6.1 Did the Respondent do the following things?

6.1.1 the Claimant was 'sent to Coventry' by all but one other member of staff

6.1.2 solicit complaints about the Claimant from other staff

6.1.3 fail to address the Claimant's grievances properly

6.2 By doing so, did it subject the Claimant to a detriment?

6.3 If so, was it done on the ground that he had made a protected disclosure?

7. Remedy for protected disclosure detriment

7.1 What financial losses has the detrimental treatment caused the Claimant?

7.2 Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?

7.3 If not, for what period of loss should the Claimant be compensated?

7.4 What injury to feelings has the detrimental treatment caused the Claimant and how much compensation should be awarded for that?

7.5 Is it just and equitable to award the Claimant other compensation?

7.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

7.8 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

7.9 Did the Claimant cause or contribute to the detrimental treatment by his own actions and if so, would it be just and equitable to reduce the Claimant's compensation? By what proportion?

7.10 Was the protected disclosure made in good faith?

7.11 If not, it is just and equitable to reduce the Claimant's compensation? By what proportion, up to 25%?

8.Health and safety detriment (s.44 ERA 1996)

8.1 Was the Claimant employed at a place where there was no representative or safety committee or, if there was, was it not reasonably practicable for him to raise the matter by those means?

8.2 If so, did the Claimant bring to the Respondent's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. The Claimant says that he informed Dean Tearle on 2 December 2020 that staff were being asked to use chemicals despite having no COSH training and no knowledge of where the COSH sheets were?

8.3 Did the Respondent do the acts at paragraph 6.1.1-6.1.3 above?

8.4 If so, was that because of the matters at 8.2 above?

9. Automatic constructive unfair dismissal (s.100 ERA 1996)

9.1 Was the reason or principal reason for the Claimant's dismissal the matters at paragraphs 8.1-8.2 above.

10. Unauthorised deductions from wages

10.1 Did the Respondent make unauthorised deductions from the Claimant's wages and, if so, how much was deducted? The Claimant says that deductions were made throughout the course of his employment because holiday pay was 'rolled up' into his hourly rate

11. Direct discrimination (s.13 EqA 2010)

11.1 The Claimant was disabled at the material time by reason of ASD and long-standing depression consequent to ASD.

11.2 Did the Respondent do the things identified at paragraphs 2.1.1-2.1.10 and 2.1.12 (not 2.1.11) above?

11.3 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.
If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated

The Claimant has not named anyone in particular who he says was treated better than he was.

11.4 If so, was it because of disability?

12. Indirect discrimination (s.19 EqA 2010)

12.1 A 'PCP' is a provision, criterion or practice. Did the Respondent have the following PCP(s)?

12.1.1 A practice of overloading employees with instructions and communications without allowing time to process them

12.1.2 A practice of requiring grievance hearings to be concluded with in a fixed timetable with no ability to extend the length of hearing.

12.2 Did the Respondent apply the PCP(s) to the Claimant?

12.3 Did the Respondent apply the PCP(s) to persons with whom the Claimant does not share the same disability?

12.4 Did the PCP(s) put persons with the same disability as the Claimant at a particular disadvantage when compared with persons with whom the Claimant does not share the same disability, in that:

12.4.1 The PCP(s) created a hostile and upsetting environment
12.4.2 The PCP(s) prevented effective communication of concerns during grievance hearings?

12.5 Did the PCP(s) put the Claimant at that disadvantage?

12.6 Was the PCP(s) a proportionate means of achieving a legitimate aim? The Respondent says its aims were:

12.6.1 [Respondent to include]

12.7 The Tribunal will decide in particular:

12.7.1 Was the PCP(s) an appropriate and reasonably necessary way to achieve those aims?

12.7.2 Could something less discriminatory have been done instead?

12.7.3 How should the needs of the Claimant and the Respondent be balanced?

13. Failure to make reasonable adjustments (section 20 EqA 2010)

13.1 It is not in dispute that the Respondent knew, or could reasonably have been expected to know, that the Claimant had the disability (limited to ASD, but not consequent depression).

13.2 Did the Respondent have the PCP(s) at paragraphs 12.1.1 and 12.1.2 above?

13.3 Did the PCP(s) put the Clamant at a substantial disadvantage compared to someone without the Claimant's disability, in that:

13.3.1 the Claimant was less able to comply with management instructions and was placed under undue stress;

13.3.2 the Claimant was not able to effectively communicate his grievances within the time allotted

13.4 Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was likely to be placed at the disadvantage?

13.5 What steps could have been taken to avoid the disadvantage? The Claimant suggests:

13.5.1 giving him instructions in a reasonable manner and with a clearer communication style, and giving him time to process the instructions;

13.5.2 conducting grievance hearings without fixed arbitrary timescales

13.6 Was it reasonable for the Respondent to have to take those steps (and when)?

13.7 Did the Respondent fail to take those steps?

14. Harassment (s.26 EqA 2010)

14.1 Did the Respondent do the following things?

14.1.1 Through Ms Binder, speak to the Claimant with a raised voice and in an abrupt and loud manner at the poolside on 7 December 2020 at 3.40pm.

14.2 If so, was that unwanted conduct?

14.3 Did it relate to disability?

14.4 Did it have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

14.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

15. Victimisation – s.27 EqA 2010

15.1 Did the Claimant do a protected act as follows? The Claimant relies on s.27(2)(d) EqA 2010 and, specifically:

15.1.1 In or around late-November 2020, the Claimant informally told Dean Tearle of his difficulties with Ms Binder and that he was being discriminated against because of disability.
15.1.2 On 13 May 2021, the Claimant raised a grievance by email.

15.2 Did the Respondent do the following?

15.2.1 the Claimant was 'sent to Coventry' by all but one other member of staff

15.2.2 solicit complaints about the Claimant from other staff

15.2.3 fail to address the Claimant's grievances properly

15.3 By doing so, did the Respondent subject the Claimant to a detriment?

15.4 If so, was it because the Claimant did a protected act?

16. Remedy for discrimination or victimisation

16.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

16.2 What financial losses has the discrimination caused the Claimant?

16.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

16.4 If not, for what period of loss should the Claimant be compensated?

16.5 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

16.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

16.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

16.8 If so, is it just and equitable to increase or decrease any award payable to the Claimant?

16.9 By what proportion, up to 25%?

16.10 Should interest be awarded? How much?