EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant: Mr David Graham

Respondents: Gravity Supply Chain Solutions Limited (1)
Mr Graham Parker (2)

AT A FINAL HEARING

Held: Nottingham **On**: 5 & 6 February 2024
(In Chambers on 7 & 20 February 2024)

Before: Employment Judge R Clark
Mr A Beveridge
Mrs E Lowe

REPRESENTATION
For the Claimant: Mr P Jackson, Solicitor
For the Respondents: Ms C Ibbotson of Counsel

JUDGMENT

The unanimous judgment of the tribunal is that: -

1. The claim of unfair dismissal **succeeds** against the first respondent only. The first respondent shall pay the claimant compensation in the sum of **£10,366.36**.

2. The claim of direct disability discrimination **succeeds** against the first and second respondents. The respondents are jointly and severally liable to pay the claimant further compensation assessed in the sum of **£66,904.57.**

3. The claim of victimisation **fails and is dismissed.**

4. The claim of unauthorised deduction from wages in respect of pay during the period of absence in September 2021 **fails and is dismissed.**

5. The claim of unauthorised deduction from wages in respect of secondary commission payable in December 2021 **succeeds.** No separate award of compensation is made as this is also compensated as an act of discrimination.

6. The claims of breach of contract **fails and is dismissed**.

7. The claim of accrued but untaken holiday pay **succeeds** against the first respondent only. The first Respondent shall pay the claimant compensation assessed in the sum of **£12,621**.

REASONS

1. Introduction

1.1 Mr Graham seeks compensation related to events leading to his dismissal which are said to be both unfair and discriminatory and engage other statutory claims. The claims were identified at a preliminary hearing in August 2022 as: -

a) Unfair dismissal;

b) Direct discrimination;

c) Victimisation;

d) Breach of contract;

e) Unauthorised deductions from wages; and

f) Accrued holiday pay outstanding at termination.

1.2 The tribunal apologises to the parties for the delay in this judgment being promulgated. Despite the short length of hearing, explaining our decision on all the interrelated issues that arose in the case has proved to be more demanding on time than was anticipated amongst competing pressures on judicial time.

2. The Issues

2.1 The hearing has dealt with both liability and remedy.

2.2 The parties submitted a list of issues although the format is a little unwieldy and the extent to which it was agreed was not always clear. Where disagreement was raised, it was not always then clarified or maintained. We have sought to answer the parties' list of issues with the following matters of clarification or qualification.

2.3 *Effective Date of Termination*. The list does not identify an issue with the effective date of termination ("EDT"), yet it is both fundamental to our jurisdiction to determine the breach of contract claims and its omission partly explains the content and structure of other parts of the

list of issues. The respondents say it is 30 May 2022. The claimant says it is 1 December 2021.

2.4 *Unfair dismissal*. The respondent had appeared to assert two reasons for dismissal without identifying the principal reason. On the day, Ms Ibbotson conceded that the dismissal was unfair albeit on a procedural basis. She abandoned reliance on redundancy, although the reasons seemed to expand to include the claimant's performance. An argument under s.123 of the Employment Rights Act 1996 was maintained that the relationship would have ended in March 2022 in any event because of the claimant obtaining alternative work in breach of an exclusive service term amounting to gross misconduct.

2.5 *Direct discrimination*. The claimant's alleged detriments concerning the dismissal at paragraph 11.4-11.6 of the list of issues were accepted by Mr Jackson as creating an artificial division and he accepted that it should be considered simply as the single act of dismissal.

2.6 There was discussion about whether the hypothetical comparator included in the list was appropriate by referencing the sickness absence of the claimant. We explained the forensic purpose of the comparator as a tool to identify if the protected characteristic had any material influence on the detriment in question. Moreover, it is a tool that does not need to be applied in every case. Where it is applied, there must be no material differences in the circumstances. That will mean the materiality of the comparison depends on the nature and circumstances of the detriment alleged.

2.7 At the material time, the protected characteristic in question was held by Mr Graham's wife. There is no dispute that she was disabled under section 6 of the 2010 Act from January 2019 at the latest, following her diagnosis of terminal stage 4 metastatic breast cancer. Equally, there is no dispute that the respondents had the necessary actual knowledge at all material times.

2.8 *Shares*. Insofar as the treatment of the claimant's shares manifested as claims or detriments or consequential losses, Mr Jackson confirmed the claimant did not pursue those. We were told there are presently no claims in any other jurisdictions of unfair prejudice or equivalent for which our findings of fact might have a baring.

2.9 *Victimisation*. The two acts relied on are each accepted to amount to protected acts. However, Mr Jackson accepted that the second played no material part due to its timing in relation to the alleged detriments, at least following the withdrawal of any allegations relating to the shares.

2.10 *Unauthorised deduction from wages.* Part of this claim relates to the payment of SSP between 15 and 30 September 2021 rather than full pay. It is accepted that the time limit runs from the relevant pay date of 27 September 2021, meaning the claim had to be commenced by 26 December 2021. As early conciliation did not start until 10 January 2022, the claimant will have to show it was not reasonably practicable to present a claim in time and that the further period to 20 March 2022 was itself a reasonable period.

2.11 *Breach of Contract*. There are three claims of breach of contract. The first two claims under the heading of "wrongful dismissal" were not clear. That is partly because we now understand they are premised on the two different EDT's. The first allegation goes to a contractual power to pay in lieu of notice. The second goes to the contractual power to place the claimant on 'gardening leave'. There is a standalone claim for breach of contract in

respect of the two commission payments which is pleaded as an alternative to a deduction from wages.

3. Preliminary issues

3.1 The claimant was initially employed by Gravity Supply Chain Solutions (HK) Limited, based in Hong Kong. In 2021 his employment transferred to the first respondent ("R1"). We are told that the first respondent is wholly owned by Gravity Supply Chain Solutions (HK) Limited. After reading into the papers, including the documents relating to the corporate restructure and associated share transfers, a question arose concerning what appeared to be a UK establishment registered in the same name as the first respondent. If that is the intended employer/respondent, it would appear not to be a legal entity but a branch office of Gravity Supply Chain Solutions (HK) Limited (an overseas company as far as UK company law is concerned). However, the bundle shows that there is also an entity registered in Honk Kong by that same name. At the time we understood the purpose of the new employment contract was, in part at least, to reflect the claimant's move back to the UK. Consequently, we raised this ambiguity with the parties. Theoretically, the answer could determine whether the claim named the correct respondent and may even have had implications for who Mr Graham was contracting with. In the event, neither party provided any further information nor was any application made. On that basis, we have proceeded on the basis of the claim as it is presented against the respondents as named above.

3.2 There were deficiencies in disclosure by the respondents which we return to. We note that the claimant had made a prior application for specific disclosure, but a duty judge had directed it be raised with us. That was problematic against the notion of a final hearing proceeding in this listing but reflected the late timing of the application. In the event, no order was sought from us beyond an invitation to take into account any disclosure deficiencies when considering the case and drawing inferences.

3.3 On the morning of the second day, Ms Ibbotson informed the tribunal there was some late disclosure going to commission that she had just received. We were told it had been prepared at the instruction of the second respondent and she was still considering it. We granted time for it to be digested and shared with Mr Jackson before any further applications were made to us. In fact, the material turned out not to be documents for disclosure, but a spreadsheet recently prepared by a third party attempting to analyse the claimant's entitlement to commission along with others, on the back of which his commission might be based. As that is in the nature of hearsay evidence, and further reinforced the contention that relevant documentation exists which has not been disclosed, we decided that it was a matter for her whether she disclosed this spreadsheet to Mr Jackson and whether he agreed to it being put before us. If he did not, we saw no basis on which it could be adduced without the author being called. In the event she did not seek to rely on it.

4. Evidence before the tribunal

Witnesses

4.1 For the claimant we heard from Mr Graham himself.

4.2 For the respondents we received two written witness statements from Mr Parker who speaks for both respondents. He has not attended. His written evidence has not therefore been adopted on oath or affirmation and has not been tested in questioning.

4.3 Ms Ibbotson applied to rely on Mr Parker's amended witness statements as civil hearsay and for us to give such weight to it as we considered appropriate in the circumstances. We agreed. A number of factors engage in our decision of the weight to apply. Firstly, that is not a single, universal decision across the entirety of the case. The weight will vary according to the issue, the extent to which it is in dispute and the extent to which it is supported by other evidence. However, the factors that generally apply in our determination are: -

a) We understand that there is an issue with Mr Parker's daughter's health in Singapore. This was raised in the recent applications to postpone this hearing but we cannot see it has been evidenced. Whilst we accept it at face value, we cannot meaningfully weigh it.

b) Notice of Mr Parker's non-attendance was not given to the claimant so as to consider if he should seek to compel him. Having said that, the claimant was aware of, and we understand opposed, the recent applications to postpone albeit it does not necessarily follow that, upon them being refused, he would then not attend.

c) Mr Parker had indicated business reasons would prevent him from attending in person as long as 18 months ago. That suggests his business interests were simply being given priority over this hearing and his intention not to attend was settled some time ago. A CVP hearing was refused at the time on the ground there was sufficient time to make the arrangements to attend. That seems to have been refused on the merits of the application, rather than any diplomatic complications of giving evidence from Singapore.

d) There is no explanation as to why neither respondent has sought to call any other witnesses of fact to speak to relevant matters in the absence of Mr Parker.

e) Mr Parker's witness statements each carry a signature under an old-style CPR statement of truth. The content of the statements differs. In part, it is wholly appropriate that they do as the second witness statement seeks to deal with matters we are told had been deliberately omitted from the first statement on the ground they were originally considered to be inadmissible until the claimant relied on them. However, the second statement also changes assertions of fact to some degree concerning the reason for dismissal. If we accept the written statements as hearsay, there is some conflict in what we understand to be his evidence on the matters that differ.

f) We do not have any information to understand the manner in which the witness statements were prepared.

4.4 As a general proposition, we are not persuaded that the reason for Mr Parker's non-attendance allows us to give any particular weight to his written evidence on contested matters. Moreover, when we add to the mix the fact that the respondents have clearly not conducted a reasonable standard disclosure search, the weight we can give to the written evidence has to reduce further as greater caution and circumspection is applied.

4.5 It follows that where there is a conflict of fact between what the absent Mr Parker says in his untested written evidence, and what Mr Graham says after being skilfully cross examined, we inevitably prefer the evidence of Mr Graham. That, however, is not to say we blindly accept everything Mr Graham says and blindly reject everything Mr Parker says. His

evidence is in a context arising from the contemporaneous documents which either support or cast doubt on the oral evidence. We have at all times considered Mr Graham's evidence in the light of the contemporaneous evidence in this way. Similarly, there are some aspects of Mr Parker's written evidence which can be accepted as being supported by the contemporaneous documentation.

Contemporary documentation.

4.6 We received a bundle running to 450 pages.

4.7 The claimant alleged that the respondent had not complied with its duty of standard disclosure, particularly in respect of matters relating to the commission claims. As we have said, that accusation did appear to have merit. There is next to no disclosure on the substance of the claimant's allegations about the commission scheme and how it operated despite it being a clear issue in dispute from the original ET1 claim. There are two levels of commission alleged. The primary commission due on his own sales, and a secondary, parasitic, entitlement based on the sales and commission of his team. Mr Graham has set out what he understands was due to him from his own knowledge of the sales he concluded in the relevant period. He is unable to quantify a case based on the secondary commission entitlement without the respondents' disclosure on the issue. The second respondent has given detailed accounts in his witness statements which deal with the basis on which he says the claimant is not owed anything beyond a few dollars under those schemes. He can only have put that together with the benefit of considering documentation going to that issue which has not been disclosed and is not before the tribunal.

Submissions

4.8 Both advocates made oral closing submissions supplementing written submissions. Each was explored further in questions from the tribunal on the law and the respective submissions of fact.

5. Primary Facts

5.1 It is not the tribunal's function to resolve each and every last dispute of fact between the parties but to make those findings necessary to resolve the issues before us and to place them in their proper context. In this section we deal with the primary finding of fact. We make further findings and draw inferences as each issue is analysed later in the reasons. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 The respondents' business is developing software for the supply chain sector. It operates through a group of companies across Asia, Australia, USA and UK. Where the identity of a discrete entity may be material to the point in evidence, and we are unable to identify the actual entity, we refer simply to "the business". The claimant was initially employed by Gravity Supply Chain Solutions (HK) Limited based in Hong Kong. In 2021 his employment transferred to the first respondent. The business was started in 2015. It was truly a "start-up". It had investment funding to develop a product. The claimant was recruited as part of the initial formation. To illustrate the early stage that he joined, he described himself as "employee number 6". By the time of the claimant's dismissal, it employed in the region of 50 people worldwide. It had its own dedicated HR manager, or at least it did by the time of the key events in this case from around August 2021.

5.3 When Mr Graham joined, he was Head of Business Partnerships from 25 November 2015. He reported to the CEO, the second respondent, Mr Parker. That role is, essentially, a sales role.

5.4 He was initially head hunted to work from Australia, where he then resided. We find Mr Parker quickly changed his mind and required the claimant to be based in Hong Kong after the post was accepted. Whilst that new location was imposed on him, Mr Graham appears to have been content with it and he and his family relocated. The nature of his work meant he covered the three time zones spanning UK, Hong Kong and Chicago.

5.5 At the time he joined, we find the company did not have a product to sell. Mr Graham made his first sales based only on PDF screen shots of what the product might eventually look like. We find the product was incomplete when it first went to market. The available development investment of around $40m had not been drawn down in full to develop a fully functioning product. Instead, it had been drawn in smaller tranches to develop the software in a piecemeal fashion. The result was an underdeveloped product which over the years led to early customers abandoning the product. This became relevant to this case as although we find customer relations and revenue retention were not within Mr Graham's sales responsibility, his skills and relationships would be repeatedly called upon to try to "smooth feathers" and encourage dissatisfied clients to stay. At times he was even asked to chase bill payments. We find that was in part because of Mr Parker's aversion to dealing with difficult discussions or matters of conflict. For example, we find Mr Parker instructed the claimant to dismiss a member of staff rather than do it himself. This was the only time that Mr Graham has dismissed anyone. Mr Parker's advice was not to make eye contact, say as little as possible, be quick and keep it cold.

5.6 We find the fact that revenues were affected by customers disengaging frustrated Mr Parker. We reject his written evidence, so far as he levels the responsibility for this with the claimant. At all times, we find the claimant and the sales team were delivering to *their* remit. Mr Graham was performing, and the issue Mr Parker had was simply a reflection of his own frustrations with the business's overall performance against his own idea of where it should be.

5.7 After the first year in post, the claimant became a minor shareholder holding 24,000 shares in Gravity Supply Chain Solutions (HK) Limited. His interest in the company therefore went beyond that of an employee and even the senior executive he was. His interest in the success of the business is seen in him being involved in some sort of capital call. Additionally, during the early years of the business, the members of the executive team were asked to take a temporary drop in pay in order to assist cashflow so other junior staff could be retained.

5.8 The employment relationship has been subject to written contracts of employment. We have before us the original Hong Kong contract with Gravity Supply Chain Solutions (HK) Limited. We also have the written contract with the first respondent, drawn with effect from April 2021, but signed by the claimant on 10 June 2021.

5.9 The purpose behind the change is not clear. We find there were discussions about the move between Mr Graham and Mr Parker which were focused on the change of currency, albeit the value of the salary remained the same. On the balance of probabilities, we find the written contract with the first respondent is not because of the change of location as it comes over two years after the relocation. On balance, it was for some other undisclosed reasons.

That might be to do with the plans for corporate restructuring which we have seen in the bundle, but neither party has particularly explained the reasoning to be able to reach a conclusion.

5.10 The relevant contractual terms engaged in the case before us start with clause 6, which, confusingly, is then misnumbered as 7, as are many of the initial clauses. They provide: -

> ***6. Exclusive Services***
>
> ***7.1 During the period of your employment, you are required to use your best endeavours to promote and act in the Company's interests.***
>
> ***7.2 You shall not, except as representative of the Company or with the prior written approval of the Company, whether paid or unpaid, be directly or indirectly engaged, concerned or have any financial interest in any capacity in any other business, organization, trade, profession or occupation (or the setting up of any business, trade, professional or occupation).***
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> ***7. Remuneration***
>
> ***8.1 The Company will pay you a basic salary of GBP 132,000 per annum.***
>
> ***8.2 Your basic salary will be paid equally on a twelve (12) month basis, paid monthly before the first of the following month.***
>
> ***8.3 Your remuneration and the below commission structure will be reviewed in January 2022 or in accordance with workplace laws.***
>
> ***8.4 The Company may at any time during your employment, or when you leave your employment, deduct from the salary or any other sum due to you including, without limitation, deductions in respect of any applicable laws or regulations, any overpayment of salary, bonus and/or allowance or any loan or advance.***
>
> ***8.5 Your salary during the periods of sickness will be in accordance with the terms set out in Clause 12.***

5.11 Clause 8 deals with commission. We have noted already the two levels of commission. That earned by the claimant's sales closed by himself, for which a rate would be paid and payment made at any of two points in the year between December and May, June and November, and the smaller commission of 0.90% on the commission earned by his team which would be paid in December of each year.

> ***12. Sickness Leave***
>
> ***12.1 If you are sick and unable to report for duty, you, or someone on your behalf shall inform the Company of your absence and the reason for your absence as soon as possible and by no later than 09.00AM on the day on which absence first occurs and on each subsequent day of absence unless a medical certificate has been provided. If you are absent for more than seven (7) days due to sickness, you are required to forward a medical certificate from a registered medical practitioner as proof.***
>
> ***12.2 If you fail to provide a medical certificate or to inform the appropriate member of the Company of your absence from work for reasons of sickness or injury as soon as practicable, the absence may be treated as unauthorized and remuneration for that period, including statutory sick pay, may be withheld Notice clause 21***
>
> ***21. Termination***

21.1 Either party may terminate this Agreement by giving the other party six (6) months' notice in writing or by paying salary in lieu of such notices.

21.2 Notwithstanding the foregoing, the Company without prejudice to any remedy it may have against you, shall have the right at any time at its sole discretion to terminate your employment forthwith without giving notice or payment of salary in lieu of notice under any one of the following circumstances:

[..ten situations are then set out..]

21.3 The Company reserves the right to require you not to attend work and/or not to undertake all or any of your duties of employment during any period of notice (whether given by you or the Company), provided always that the Company shall contribute to pay your salary and contractual benefits for the duration of this agreement. You agree that your obligations under Clause 14 and of good faith, loyalty and fidelity survive the termination of this Agreement.

22 Company Policies

Together with the relevant Company Policies, this Agreement forms our contract of employment with the Company. You will abide by the procedures, policies and office practises, which may be updated from time to time, and any other directives of the company as may be given from time to time.

5.12 A staff handbook existed and contained various policies. We agree that the document we have been shown is focused on Hong Kong. It is entitled "version 1" and dated July 2021. We accept that Mr Graham was aware of the existence of a company staff handbook prior to this date and that they were included in recruitment information to staff all over the world. We also accept he was unable to recall seeing a date or version on what he recalled being the company handbook, in contrast to that in the bundle. On balance, we find that this is not the only handbook ever to exist. We have seen email correspondence in the bundle attaching what would appear to be a 2020 draft which may or may not be this document. However, so far as this handbook in the bundle is dated 2021, its content is consistent with that date. Similarly, so far as it purports to relate only to Hong Kong staff, it is certainly focused on Hong Kong and does not explicitly deal with other locations.

5.13 The significance of this document is that it is this document that Mr Graham located when he faced a challenge to his entitlement to sick pay and, having located this, he sought to interpret it and rely on it to support his belief that he was entitled to full sick pay.

5.14 The relevant provisions of the handbook are: -

4.0 Employment Contract

When joining Gravity, you will receive a formal employment contract. This sets out the terms and conditions of your employment. The contents of this handbook do not form part of the employee's contractual terms and conditions unless so specified in the employee's individual contract. If the terms contained in the individual contract differ from the contents in this handbook then the provisions in the employment contract will prevail.

4.1 Leave

Sick Leave

If you are absent from work through sickness or injury, you must notify your manager before 09.00 AM on the first day of absence. When notifying your direct manager, this should be done by a phone call or WhatsApp/SMS. Please also advise anyone else who may be affected by your absence (i.e. Cancel meetings. Advise colleagues if there are any deadlines that might be missed etc.). If you are not in the position to speak, please ask your family or friend to notify us on your

behalf. You must notify your manager on any other following day of absence unless you have a medical certificate for multiple days.

Sick Leave requests should be entered into Talenox. If you are sick for more than three days, please submit an appropriate medical certificate via Talenox. This is by a registered medical practitioner, registered Chinese medicine practitioner or a registered dentist attending the employee as an outpatient or inpatient in a hospital.

Entitlement of paid sick leave can be accumulated at two days for each month of employment for the first 12 months of employment, and four days for each month of employment thereafter. Paid sick leave can be accumulated up to a maximum of 120 days.

5.15 Whatever the position with other, or previous, handbooks, we find neither written contract expressly incorporates or makes reference to "a handbook". Each does incorporate policies to some extent and the only evidence we have of policies is what is contained in the bundle of a grievance procedure and a document entitled leave policies marked as "leave policies (HK)". Those leave policies appear to be the same as are in fact contained in what the respondent says is the Hong Kong handbook. The addition of (HK) would suggest on balance that it is directed either at those working in Hong Kong, or those employed by Gravity Supply Chain Solutions (HK) Limited. The claimant was, for most of his time in this business employed in Hong Kong and by Gravity Supply Chain Solutions (HK) limited. We are satisfied this applied to him throughout that time.

5.16 We turn to Mr Graham's personal circumstances. At the time he was married with a young Child. In January 2019 his wife was diagnosed with stage 4 metastatic breast cancer. The prognosis was terminal. She would sadly pass away in April 2022, shortly after Mr Graham was dismissed. At the time of the diagnosis, Mr Graham and his family were about to relocate to the USA and the plan was for him to lead the US sales operation for the business. We find there were clearly no concerns about his performance up to this time.

5.17 Mr Parker was promptly informed of the diagnosis. We accept it was Mr Parker that immediately suggested he return to the UK to support his wife's treatment. That is not what Mr Parker says in his witness statement but, in any event, that appears to have been a step Mr Graham welcomed and would in all probability have explored at some point if it had not been offered.

5.18 We are satisfied this was suggested by Mr Parker on a human level, thinking that was in the best interests of Mr Graham and his wife. Whilst we accepted Mr Graham's evidence of the spontaneous suggestion coming from Mr Parker, we cannot see that this was a calculated decision. However, whilst Mr Parker was clearly prepared for Mr Graham to relocate to the UK, it did come at a price. Mr Parker makes clear that from a business perspective it was "not ideal". The marketing team were based in Hong Kong. We find it also meant changes to the plans to develop the US sales. Although the move was on the face of it supportive, we find the implications to the business remained uppermost in Mr Parker's decision making about Mr Graham. It is that which we find sowed a seed of dissatisfaction in Mr Parker's mind, based on his own assumptions about what Mrs Graham's deteriorating disability would mean to Mr Graham and the business over time.

5.19 The practical implications happened quickly, within a few weeks. Shortly before the diagnosis, the plan had been for Mr Graham and his family to relocate to the US. Had the original plan taken place, the business would have paid for the relocation. When the plans changed for him and his family to return to the UK, Mr Parker again offered to pay the

relocation costs, but it seems in his mind that was now a loan rather than a business expense as it would have been and, shortly after Mr Graham returned to the UK, he was required to reimburse the costs of around £5,000. That further suggests to us that the circumstances of the return were not seen by Mr Parker as supporting the business in the way the move to the US was.

5.20 Mr Parker agreed that the Claimant could work what, on the face of it, appeared to be a flexible routine to meet the changing needs of his wife's care, and supporting his son. On closer examination, we find there was no adjustment at all. The offer was that Mr Graham worked the hours he needed to, so long as he engaged with business commitments, meetings and calls etc. We find the implication of working across different time zones meant his work commitments arose substantially at night. We find he remained committed to the business and his work not least because of his senior position, his own professional drive, and his equity interest. We find he would routinely begin his day around 6 am, deal with his son's school and wife's health care needs. He would attend to meetings and calls as necessary and would often be working through to the early hours of the morning, surviving on around 4 hours sleep. Board meetings were fixed for Singapore time meaning he would join remotely between from 11 pm UK time and finish at around 2 am.

5.21 Throughout the following two years, we find that Mr Parker's view of the claimant and his contribution to the business was informed by an assumption about Mrs Graham's deteriorating health. We find he continued to contribute to the business and perform in his role despite the increasing demands on him at home but we find any practical issue encountered by Mr Graham, such as communicating across time zones or his ability to travel, was seen to flow from Mrs Graham's ill health. During 2021, Mrs Graham's chemotherapy and other treatment became more intensive and more intrusive, and we have no doubt there was a commensurate effect on Mr Graham and, in turn, Mr Parker's view of his ability to devote his full attention to the business.

5.22 Mr Parker refers to having concerns about the claimant for some time prior to autumn of 2021. We reject that. We find he did not engage with Mr Graham about any concerns and, on balance, nothing that is now said to be a concern about Mr Graham was truly regarded as a concern. Nothing featured in any contemporaneous documents put before us. In contrast to this assertion, we find in January 2021 Mr Graham was promoted to the main operations board for his contribution to the business. We reject Mr Parker's written evidence that this was done only to keep a closer eye on the numbers. In that regard, we do not accept "the numbers" reflecting the claimant's performance and that of his team were poor. If they had been, for the many years that Mr Parker suggests, we do not doubt he would have brought about Mr Graham's exit from the business long before the events in this case.

5.23 The only aspect we are able to accept is the concession by the claimant towards the back end of 2021 that his focus on his wife was affecting his ability to give 100%. Despite that, we find the claimant continued to perform but suffered physically and mentally in working during the night when UK time coincided with the hours of his colleagues and customers, whilst dealing with the situation at home during the day. This is supported by the fact that he continued to generate additional income under the informal commission scheme in place, before it was formalised for him in the 2021 contract. The promotion already referred to in 2021. That he was still being called upon to assist with client retention issues outside his sales role.

5.24 Whilst we accept Mr Parker had his own subjective view that Mr Graham was not performing as he would have wanted, we do not accept that there was any objective material reduction in his performance to justify this view. We find these concerns were about the business performance and, to the extent that the business was not growing as fast as he wanted, that had arisen from his own unilateral promises of growth made to the investors. The reason for that growth not being achieved was because the plans were made without any realistic foundation or plan of how achievable they were. We find such growth as was achieved was being eroded further by customers leaving the respondent due to an underdeveloped product, and not Mr Graham's performance. His situation, and the belief that he was focusing on his wife's disability was the real reason Mr Graham would later be targeted.

5.25 In the absence of any objective evidence of a material drop in his performance or commitment, we conclude this view of the claimant was based on the knowledge of the course Mrs Graham's disability was taking.

5.26 The second respondent advances how Mr Graham apologised to the operations board for his poor performance on 6 August 2021. We note this is two days before the stress of dealing with his personal circumstances was about to reach breaking point. We find that was a reflection of those extreme personal circumstances at that time and not an acceptance that he had been failing.

5.27 There is no dispute that on 10 June 2021, the claimant signed a new contract of employment. It is said to be effective from 26 April 20221. We initially understood this was to reflect the move from Hong Kong to UK, but the delay of two years undermines that. We find Mr Graham had originally understood there would be no material change to his contract on relocating to the UK save that he would be paid in GBP Sterling rather than Hing Kong Dollars.

5.28 In fact, this contract made various changes to the original Hong Kong employment contract. First it removed the original equity performance plan, although that applied only after the first year and seemed to have been performed to completion under the original contract and explains how the claimant acquired his initial shareholding. Secondly, it formalised the two levels of commission. We find something along the lines of what was recorded had happened in practice on an informal and wholly discretional basis before then but, after April 2021, it was regularised in these terms. Thirdly, it reflects matters relating to the UK location and currency, including being governed by "the laws of the United Kingdom" and subject to the exclusive jurisdiction of "United Kingdom Courts". Perhaps the most significant change is that the legal entity employing the claimant changed from Gravity Supply Chain Solutions (HK) Limited to the first respondent. When that was put to the claimant during his evidence, it appeared that that was the first time he had appreciated there was a change in legal entity. Mr Parker has not explained in his written statements the rationale for that change from the business's position. We have referred already to the potential confusion because the UK establishment for Gravity Supply Chain Solutions (HK) Limited caries the same name as this a separate entity. We have been provided with the papers relating to the corporate restructuring of the group planned in 2022. We have been reluctant to do more than take note of their existence as neither party has given evidence on that in detail. Mr Graham's understanding of the corporate structure not sufficient to shed any light on this other than to say he did not appreciate he worked for a different employer. We are left with some doubt about the motive for the transfer at that time when the UK contract had operated

perfectly well for the first 2 years of the relocation to the UK but that is not something we cannot resolve on the evidence before us.

5.29 Whatever the reason for the differences between the two contracts, large parts of the two contracts remained the same. The sick pay provision in the new contract is materially identical to the old contract.

5.30 Over the summer of 2021, Mrs Graham's health deteriorated further, and the claimant's resilience eventually ran out. On 8th August 2021 everything came to a head whilst on a family visit for his wife and son to see his wife's family in Wales. We find this pressure of maintaining his work commitment at night, and his family situation during the day is what Mr Graham reflected in his concession in the witness box about it taking its toll. This pressure resulted in what the claimant describes as a breakdown. In the course of taking some time out, driving alone, and in what must have been an emotionally charged frame of mind, Mr Graham sent a WhatsApp to Mr Parker. It said: -

> ***Hi GP, can we have a one to one chat. I know that you're not happy with performance of our revenue growth, and that obviously has a reflection on how you feel about me and my performance. I've given everything I can possibly give over these nearly 6 years and I'm not sure I'm physically able to give anymore of myself without making myself more ill than I feel right now. If you want me to go then I'm probably ready as the energy I need to fight on along with the energy I need to look after [his wife and son] just don't balance, and you obviously know where my priorities need to be right now. Something has to give and at the moment it's my health that is at risk, and I can't risk not being around to look after [his son]. I'm feeling pretty emotional and mentally drained and just need to let you know where I'm at. I obviously don't want to leave and also don't want to leave you in the lerch but you also need to have everyone 100%, and right now I'm unable to give, especially trying to survive on 4 hours a day I'm trying to catch. I guess this isn't so much a cry for help but more a cry to put me out of my misery. I'm just not sure how much more I can give you.***
>
> ***Sorry to send this long message on a Sunday evening, but I've not been sleeping because of this and just needed to talk. I hope that you understand and that we can work something out to benefit us both. Available to talk if you want to.***
>
> ***DG***

5.31 We accept Mr Graham was at an extremely vulnerable point. We accept Mr Graham's understanding that any concern Mr Parker had expressed was about the business growth and not his performance personally. We find Mr Graham was reflecting the contribution he was able to make to that business growth. We find Mr Parker's close involvement with the claimant's work, to the point of micromanaging him, meant that we find he was aware Mr Graham was continuing to give fully to the business, but again it would have been clear that caring for Mrs Graham was obviously and increasingly a priority. We find he was aware that the deterioration in her health was only going to add to that and that the extra he wanted from Mr Graham was not going to be available.

5.32 Mr Parker responded to say he should take some time off and they would talk in the coming week. The message seems civil and supportive. It included making arrangements to divert and reorganise work and contacts and remove the claimant from any duties which Mr Parker described as reverting to him once he was back in the business. We find Mr Graham then took time away from work. Initially on leave, but this converted to sick leave which the GP would describe as "compassionate leave".

5.33 In fact, rather than supporting Mr Graham, we find Mr Parker executed what by then had been a long-held plan to fundamentally change the sales structure. That included recruiting to a new role of chief commercial officer. That post was something that the claimant had been advocating for. However, instead of it being an additional post, as Mr Graham had advocated, it was in effect instead of him.

5.34 Diverting emails appeared to be a benevolent step to release the claimant from the pressures of work by redirecting his emails but that initial indication to divert Mr Graham's work went further. We find Mr Graham's access to the work emails and network were changed and he was prevented from gaining access including for matters that he would need for his own personal affairs, such as to see payslips which he was unable to see from August/September onwards. On balance, we do not accept that this was about supporting him, we find this was all part of the wider plan to impose changes on his employment and remove him from his role, and potentially the business.

5.35 At the end of August, Mr Graham received his pay in full. He had been absent on sick leave for much of that month. He did not have access to his payslip. It was sent separately and simply shows full pay for the month.

5.36 About a month into the absence, on the 7 September 2021, Mr Parker created a WhatsApp group called "On Going Sick Leave". We reject his account in his witness statement suggesting it was set up by the HR manager. It says on its face it was set up by him. The members of that group were him, Ms Cai the relatively newly appointed HR manager and the claimant. Mr Parker sent a message to the claimant stating that the group had been created to keep the HR Manager up to speed and for the three of them to communicate more easily. We find the reason for the group was to engage with the plans Mr Parker had for the claimant's future employment. Mr Parker asked if Mr Graham could join a video call the following day to make him aware of "a couple of things to discuss".

5.37 Mr Graham replied the same day. We do not detect any issue arose from the idea of a WhatsApp group in these circumstances and the tone of the message appears relaxed. Mr Graham said he would be taking his wife to a hospital appointment at 8 am and would be free to call from then.

5.38 We find the Zoom conference took place on 8 September 2021 as planned. Mr Graham conducted it from his car in the hospital car park whilst his wife underwent treatment. From the outset, only the claimant and the HR manager had their cameras on. Mr Parker had only audio connection. This was the first time Mr Graham had met the new HR manager. We do not accept it was accidental that Mr Parker's camara was off. We accept, on balance, Mr Graham's retrospective analysis that it was because Mr Parker knew he was about to conduct a difficult conversation.

5.39 We find Mr Graham was told that a decision had been made to engage a chief commercial officer. This was the first discussion about this. For a substantial part of the zoom meeting, the topics appeared to be positive. This appointment was something Mr Graham was keen on and had been advocating. We find achieving Mr Parker's growth plans clearly required this type of post and, by inference, indicates that the claimant was being expected to fulfil more than one role. The discussion about initial steps to approach people for the role were equally inspiring and exciting to Mr Graham. The conversation shows a sense of the news appearing positive and being well received. It then turns to the second part of Mr Parker's plan to impose a demotion on Mr Graham. We find this is unescapably directly linked

to Mrs Graham's cancer and the perception Mr Parker had of Mr Graham's ability to do the job he wanted doing. This link to Mrs Graham appears throughout the reasoning for the demotion. He says: -

> ***I think what we do is to come back to you, your situation, where you're at. A couple of things which have been on my mind for a long time now, moving up to when you actually went sick Dave. I sensed things were getting on top of you, I can sense things were, obviously I have to factor in your personal life, as I am really close to that situation. I could sense that things were getting on top of you …… We got to that point where we had to make some decisions [376]***

5.40 We find the reference to "I am really close to that situation" may be a reflection of the fat that Mr Parker had himself experienced the effects of a cancer diagnosis within the family which gives him insight into the demands that would place on Mr Graham and the reason for his decisions. Mr Parker puts the background and context in respect of Mr Graham's WhatsApp message from 8 August. Mr Parker says: -

> ***I knew then straight away that, yea, we were in trouble with you in that that regard. Not we are in trouble with you but you are in trouble. If we don't get to where we have got to and you take this time off etc. its only ever going to ….***

5.41 The transcript then struggles as the two talk over each other. The context leads us to conclude that what Mr Parker felt was "only going to" is, on balance, a situation that was only ever going to *get worse* and prevent the business getting to where we have got to get to. It is right to say that up until this stage of the conversation, Mr Graham had been hearing positives. He expressed a view that he was not surprised that Mr Parker had had to make that call and that he has to act in the best interests of the company. The two then discuss the steps taken so far to appoint to the role which, again, Mr Graham found exciting and optimistic. The demotion is then introduced as: -

> ***We need to drop your title out, we need to drop you back down to the level below and adjust that so that you can focus on you, focus on your family and I want to offer you, there are two options. You can come back full time or you can come back part-time……I can I just say something right here. There is no pressure for you to come back to the business, from a Gravity perspective. Only you can make that decision based on your personal situation, your health, mental situation etc. etc***

5.42 We find the final sentence, again on its face apparently supportive, is disclosing that Mr Parker's plans do not necessarily include the claimant in the business at all and this is directly linked to Mr Graham's personal situation, which can only mean Mrs Graham's deteriorating health. Mr Parker then introduces sick pay. He says: -

> ***However, there is one area that we have really go to make you aware of, its, we have never had this situation, well we have had this situation once before with one other employee. You have been off sick now for five weeks on full pay. We can't sustain that and under that full pay situation. Now, obviously the problem we got is, our problem is where we are at, the legality and a legal perspective relative to the contract and where it was issued we actually need to drop you down to statutory sick pay on UK.***

5.43 He then goes onto give an explanation of how sick pay works and some rather bold assertions about how the UK state benefits would then apply to pay for rent or mortgage. He explains his view of the first Respondents' policy on sick pay as: -

> ***"because we kind of do and we don't have a policy. Well what is it the policy [inaudible] standard is that we either pay full pay for a period of time or statutory sick pay and statutory sick pay varies from country to country. Like in Hong Kong it's like non-existent. Technically you get nothing after a period of time. In the UK there is standard, legal Government issued standard***

> ***sick pay tier basis and that's obviously what is built into your contract. So I just need to make you aware of that. You are signed off now until 14 September.***

5.44 We draw a number of inferences of fact from this passage. First, this is such a poor explanation of the legal basis of contractual and statutory sick pay in the UK that we cannot accept there had been any competent advice or research at this point. This was Mr Parker winging it to justify a decision he had made on other undisclosed grounds. Secondly, it seems to confirm Mr Parker's understanding the business *did* pay full sick pay. Thirdly, we infer that the only reason for changing the status quo is Mr Parker's increasing concern about what Mrs Graham's deteriorating health might mean to the business.

5.45 As the penny drops for Mr Graham, and he realises what is being proposed, he responds with an immediate panic that he could not afford to reduce to SSP. His income was the only source of income for the household. If that was to be imposed, he would have no choice but to return to work, whether he was able to or not. He indicated an immediate return to work. Mr Graham was now caught in the headlights. Mr Parker appears to have sensed this and says: -

> ***I don't want to force you back to work. That is not what this is about right, just check it out, because you might find that you can work something out and get the grants and get this and get that and still get the time that your doctor, you and the situation needs, right. This is not designed to force you back to work.***

5.46 Again, it is clear to us that "the situation" is Mrs Graham's disability.

5.47 If the return to work was only going to be a matter of about a week, Mr Parker was prepared to pay full pay for that. Mr Parker then turned to salary, saying: -

> ***we are going to have to address your package down, a tad as well mate, by taking that head of role away taking that pressure, that management piece away from you. It can be earned back. This is not fixed, this is not a long term [inaudible], take it or leave it can all be earned back.***

5.48 He then suggested a new salary of $120,000 US plus the commission package that sales managers get. We accept Mr Graham's evidence that, in the moment, he did not consider that the proposed salary was a substantial drop from £132,000 sterling. Whether it was deliberately expressed as US dollars to appear to soften that impact or not, it was not until after that Mr Graham was able to reflect and calculated the proposed drop was actually a pay cut of approximately 35%.

5.49 In the meeting, Mr Graham asked for the proposal to be emailed to him. We find he did not agree to the changes and, in fact, would never do so. Mr Parker then explored when Mr Graham was thinking of returning to work and the progress of counselling sessions Mr Graham was by then undergoing. Mr Graham described his days as consisting of: -

> ***"and just sort of, running the house, and managing [his wife] and [son] and right now.***

5.50 He talked about being able to get the sleep he probably needed all along and: -

> ***So something, regardless of [his wife's] situation something was going to give anyway, because it's just not sustainable, for anybody working the hours that I was working.***

5.51 On working hours, Mr Parker then explained the proposal to focus only on Europe and how: -

> ***"You will work in that time zone. There is no need to US and Australia, just let's get you to that 8.30pm till 6.00pm if we are doing Europe or 9.00pm till 6.30pm and that's it. There is no need to do anything outside of that time zone. If you said look I can do that but I can only do three days a week and two days at home with [Mrs Graham] or whatever. You tell me the hours or trades you want to work in that month and we will accommodate that.***

5.52 The terms of this new role came with other consequences to the scope and title. The entire changes are directly linked to Mrs Graham's disability. The following day, on 9 September 2021 the HR Manager, Ms Cai sent an email to the claimant it said: -

> ***Following up on our conversation, we have agreed and will implement the below for you, and we hope this arrangement can release a lot of the work pressures and all you more balance at home with the family during these times.***

5.53 She then set out two bullet points. The first confirmed the role and salary. The second confirmed the drop to SSP stating: -

> ***If your doctor and/or you decide you are still not fit to work and further extend your Sick Leave after 14 September 2021, we will have to move to SSP starting from 15 September in alignment with UK Employment law, which is GBP 96.35 per week. This would then be in place until your situation improves and you are confident and able to return to work.***

5.54 The email also confirmed that Mr Parker was still receiving Mr Graham's work emails and Ms Cai confirmed how there would still be no formal approaches to Mr Graham from within Gravity on anything work related. Once he was ready to return to work, a message would be agreed advising the change of structure.

5.55 Three points arise from this email. The first concerns the phrase "we have agreed" which was interpreted by Mr Graham to suggest he had agreed to the changes the previous day which he had not. Subsequent correspondence focused on this. We find his interpretation was not unreasonable but, we find, was mistaken. The word "we" appears to be a reference to a decision by her and Mr Parker although, as we found elsewhere, this is a settled conclusion, and the email is also consistent with this being the outcome. The second matter is the explanation of the purpose and rationale for the changes in context. We are satisfied the need for more balance "at home with the family during these times" can only be a reference to Mrs Graham's cancer. That puts into context the reference to "your situation" which we find is not a reference to being unfit for work. We have to infer from the surrounding matters it is a reference to Mrs Graham's deteriorating disability. The third is that although this would later be firmly recast as an offer, which could be accepted or rejected, it is clear to us and we find as a fact, that the change was a given. There was no option of continuing in the role Mr Graham currently had.

5.56 Mr Graham had in the meantime been attempting to identify the contractual basis on which he believed he was entitled to full sick pay. He identified a provision in the handbook relating to the accrual of full pay according to length of service. He relied on that in responding on 13 September 2023 and asserting his position that he had not agreed to the changes. His response is relied on in part as one of the reasons for dismissal, so we set out the relevant part in full: -

> ***You will recall of course that I was in a very emotional state at the time, the meeting having taken place with me in the hospital car park whilst my wife was undergoing surgery.***
>
> ***For the avoidance of doubt, these changes are not agreed by me.***

> ***With regards to my sick pay, you have also stated that I will need to be moved to SSP from 15th September, however, the employee handbook makes it clear that having been employed for nearly six years I'm entitled to a maximum of 120 paid sick days in any one year.***
>
> ***I would remind you that this is the first occasion I have ever had call to utilise the sick pay scheme.***
>
> ***I am very disappointed by the lack of support and understanding at what I am sure you will appreciate is an extremely difficult time for me.***
>
> ***In light of the above, I feel it necessary to seek professional advice and will respond in more detail once I have.***

5.57 Mr Parker responded briefly the next day. He expressed a hope the operation had gone well for Mrs Graham. He then declined to comment on the content other than that he would discuss with Ms Cai and respond in due course. He asked Mr Graham to confirm if he was returning to work on 15 September. To which Mr Graham explained that he was unable to see a doctor until 16 September. Ms Cai then responded saying: -

> ***we understand your situation and are keen to work out the best plan for you. Will you be available tomorrow or Friday your morning time for a follow up phone call with Graham and myself.***

5.58 In the event Mr Graham indicated he was not well enough to join that zoom call. On 20 September 2021 Ms Cai sent a further letter under the heading of "without prejudice". We checked with the parties the status of this letter. Both were content it was before us. This letter sets out the intention to pay only SSP. It says: -

> ***Many thanks for sending us over the latest Drs note. We are very sorry to hear of this extended leave period and confirm from A Gravity perspective that we understand, and that there is no pressure to return until you are fit and ready.***
>
> ***As discussed on our call on 8 Sep, 8.30am UK time, which was followed up with an email on 9 Sep and acknowledged by yourself, we will, effective 15th September 2021, move you to SSP as per the government regulations within the UK.***
>
> ***As you know, we offered to have another call with you concerning your last email, but unfortunately, you were unable to attend, which is fine and understood as to the reasons. However, we have no alternative other than to advise you of this change in your sick pay effective 15th September 2021. While you disagreed and announced to us that you were seeking professional advice (entirely within your rights), we have moved to this position as set out in our proposal dated on 9 Sep.***
>
> ***Both Graham and I remain at your disposal and available for a conversation when you feel you can do so. Again, there is no pressure from our side in this regard. We note that the latest Dr's note has signed you off returning to work up to and including 13th October 2021.***
>
> ***In the meantime, I continue to look at areas in Which Gravity can advise or help you during these times. I hope you were able to look at the various links for additional support that I sent over on 9 Sep. I have attached these again for your reference.***

5.59 We note Ms Cai considered Mr Graham's decision to seek professional advice as being entirely within his rights. Mr Graham emailed again on 20 September 2021. Once again, we set it out in full as the manner in which he raised his belief that he was contractually entitled to full pay is said to be one of the reasons for dismissal: -

> ***As I have already made clear nothing I said during the meeting on 8th September 2021 could possibly be construed as an agreement to vary the terms of my contract with Gravity.***

You reference "as per the government regulations within the UK 'but this with respect has nothing at all to do with the situation. I am advised that the SSP provisions deal with statutory minimum sick pay entitlements and don't override the contractual terms agreed between myself and Gravity pursuant to which I have a maximum entitlement to 120 days sick at full pay.

Further, I am advised that you cannot unilaterally vary the terms and conditions upon which I am employed be that in respect of role, salary, or sick pay entitlement.

Further, any proposed variation of my contract would require six month's notice to be given by Gravity.

It's extremely disappointing to be treated this way on the one occasion I have cause to exercise my sick pay entitlement.

If I am not paid my full pay in the September payroll with regret I will instruct my solicitor to commence debt recovery procedures against Gravity. I will also raise a formal grievance as I am advised that yours and Graham's actions to date amount to a fundamental breach of my employment rights.

I have to say that I am very surprised at the position that's being adopted by you both which seems designed to leave me with no alternative other than to take legal action to assert my rights when I should be focusing on restoring my health. Such action will inevitably result in significant legal costs being incurred which I would be looking to Gravity to pay when the Court find in my favour (as they will inevitably do so).

However, I really don't want it to come to that and with that in mind, I suggest that if you have any constructive proposals for resolving matters please detail these in writing so that I can consider them with my professional advisors.

5.60 There was no immediate response. Three days later Mr Graham followed it up with: -

I'm just following up with you both with regards to my email of Monday 20th Sept, so that I may find out if my salary will be paid in full on Monday as per my contract? I'm asking as I noticed a message popped up on my phone showing that my network password has been changed and I no longer can access the Gravity network.

I would appreciate your feedback

5.61 Ms Cai responded on 23 September 2021. She wrote: -

We have considered your email and our position remains that the contract you signed on 10 June 2021 does not entitle you to full sick pay for any period. Please see clause 12. To the extent you were entitled to 120 days paid sick leave whilst in Hong Kong, your current contract overrides any previous agreements. Please see clauses 2.1 and 28.

We sympathise with your current situation and that's why we have continued to pay you in full from 9 Aug. However, this was on a purely discretionary basis given the circumstances and it is not something we can continue to do.

With regard to our reference to the new position, this was an offer and you are within your rights to reject it. However, if you are happy to discuss a new working arrangement we would record this in writing and it can be implemented immediately once agreed. We are not aware of any need to provide six months' notice to a change of terms if you agree to them. Under the attached contract, we are required to give you one month's notice (please see clause 24.1) which we are happy to do and agree that we would still need your consent. However, if an agreement can be reached earlier that would suit both parties.

Therefore, if you remain unable to return to work we will pay you SSP subject to you fulfilling the relevant conditions. When you are ready to return to work, we very much look forward to seeing you and are happy to discuss a phased return on a part time basis as we suggested below or on

other terms, if that would help you. For the avoidance of doubt, if you do return on a part time basis you would be paid for the days you work and would receive your full time pay when you return to your normal working hours.

Also, Yes, we have removed all your work related access during your sick leave period. We hope you can stay away from work and get enough time with your families.

5.62 On 24 September 2021 Mr Graham set out his position once again. He drew attention to the discussion he had about contractual changes on return to the UK, he pointed out how the current contract was identical to the original in respect of sick pay terms. He explained why she and Mr Parker were simply wrong in their understanding of how SSP operated in the UK. He acknowledged the concession that the respondents could not vary his contract unilaterally. He expressly rejected the alternative role and a reduction in his salary or any variation to his contract. He set out that if they are imposed unilaterally, he would be left with no alternative than to raise a grievance. He then said: -

In such circumstances it seems to me that I will need to direct that grievance to the investors as clearly you will both he put in a conflicting position.

In addition, if I am not paid my salary in full on Monday I will be left with no alternative but to instruct my solicitor to take appropriate legal action to secure payment of any unlawful.

5.63 We find his reference to the investors was because there was no higher level above Mr Parker to which any grievance about his conduct could be raised.

5.64 On 28 September 2021, Mr Parker wrote back to the claimant. He sought to focus on the sick pay element, recognising that no changes to contract that had been offered have been accepted. He said: -

First, I must say I am somewhat bemused and disappointed that you feel we have had a conversation ever around the T&C's of your contract once you requested to move back to the UK. Let's also note this request to move to the UK was made by yourself, driven by the diagnoses of your wife during your time in Hong Kong. This was not a company decision, however I supported your request given the nature of the illness and your reasoning for returning to the UK. It is simply not the case that we ever had a conversation around the content of the employment contract, other than I advised you certain aspects of the package you were on in Hong Kong, would not be available to you in the UK. This you accepted.

To be clear for the reasons stated below, your current UK employment contract does not entitle you to full pay while off sick, it overrides all previous contracts and it is in line with other UK employees.

You moved to the UK knowing like everyone else in the UK you would be moved onto a UK contract, a contract governed by UK law, at no point in time have we ever suggested or agreed to continue your employment in one country while exercising the terms and conditions of a previous contract. I think it's also fair to say, we never at any point in time have discussed things such as sick pay/leave of absence not previously during your time in Hong Kong, or in the UK until now.

To be clear we have sought legal advice before and during these conversations, and we are very clear in our position, specifically relating to our obligations in terms of sick pay, both paid, and future requirements should leave of absence continue. During our call on 8th September 2021 (summarised in an email on the 9th September 2021), I asked you without any commitment or pressure from us, if you had an intended work return date, and you replied by saying ' I was planning to return on the 15th September, subject to the outside medical and counselling advice you were currently receiving'. As a gesture of goodwill, I extended your paid sick leave to accommodate this additional week. If you also recall, and as backed up in the summary I also offered without any request from yourself to return your annual leave used, and taken during

your period of absence as this coincided with sick leave pre and post the holiday, despite you actually going on holiday I made the offer to return you these days again as a gesture of goodwill.

While none of us want to be in this position, the company has paid you accordingly up to and including the 14th September 2021 in full, and for the period following up to and including 30th September 2021, the SSP as stipulated and governed by the UK law, and as per your employment contract. This has been paid in the normal manner on the 27th September 2021.

I can also confirm from the company position, all future sick pay for the remainder of this calendar year will be under SSP with the amount as determined under UK law.

I appreciate this won't sit well with you, however as a company we have the right to stipulate Sick Pay and also have the right to deal with this on a case by case basis, and at the discretion of the Board Of Directors.

You have also stated that you would contact our investors should we not agree to pay you in full for 120 days of sick leave. I am writing to formally request that you do not contact any of our shareholders, this is an internal matter, and as such will be managed by the company and its employees authorised to do so. If you wish to raise a formal grievance, please direct it to Lidy with a cc to me Graham Parker.

For your information Hemant Bhatt is aware of the situation, and has been from our decision to allow you to return to the UK onwards, and I have been keeping him fully up-to date on everything since. If, despite this request, you decide to contact our investors or shareholders regarding this issue, we reserve the right to initiate a formal disciplinary procedure which is not something we wish to do if it can be avoided.

We do hope you are starting to feel better and look forward to seeing you back at work soon when you are well enough.

5.65 We do not accept the contentions that the change of contract being related to the relocation to the UK can be accurate. If it was, there is no explanation as to why that change took over two years to put in place. The issue of contacting the investors is dealt with directly by Mr Parker. He instructed Mr Graham not to contact the investors and gives a route to raising an internal grievance. He gives notice that if he does contact the investors on this matter, it will be treated as a disciplinary matter. We find Mr Graham accepted that and did not contact the investors. We are not aware of any other communications from the claimant from which Mr Parker could have formed a view about the "manner" in which he raised the issue with the reduction to SSP.

5.66 We find on 27 September 2021, Mr Graham's pay was recalculated for August and September on the basis that SSP applied. Ms Cai sent an email explaining the implications of that for his September pay which was reduced by around £3000.

5.67 We find that the claimant attempted to return to work from 1 October 2021. At least, he presented himself as available to return to work. His last fit note says fit for work with adaptations from this time. We find, however, that the respondents did not reinstate his access to the work network or emails and never provided him with any work to do. He was paid full pay from 1 October 2021. The instruction was simply that he stayed at home and awaited a direction from Mr Parker.

5.68 On 5 October 2021 the parties held a further Zoom meeting. Once again, we have seen the transcript of this meeting. It opens with Mr Parker expressing his disappointment with Mr Graham's threat to seek legal advice and the idea of raising a grievance with the

investors which did not sit well with him. Mr Graham asks how he thought it was going to play out. Mr Parker answered: -

> ***given that we've obviously made a commitment to you, or a proposal to you. You've made a lot of threats against the company, and obviously now you're willing to come back to work.***

5.69 Mr Graham then stood his ground, firmly but professionally, referring to the first zoom call whilst in the car park of the hospital. He maintained a reasonable defence of his actions and his right to take the legal advice whilst his wife was having treatment. The two disagree. Mr Parker introduces a situation of a colleague leaving which he attributes to Mr Graham. For what it adds to the case, we find Mr Graham was not the cause of this colleague leaving and it flows in part from the fact that we find there was routinely a difficulty in sales staff being paid the commission they were due. This required them to chase payment and to argue the amounts due. In fact, we find Mr Graham and this colleague maintained contact and the colleague has assisted in supporting Mr Graham's claim. Mr Parker then put the position to Mr Graham: -

> ***But, yeah, we were going to have this conversation with you about your performance, about where we're at and about how things haven't been managed, or seeing it from our perspective, the teams haven't been managed well. And our offer still stands though, and I think right here, right now, the offer we made to you back on the 15th September, both verbally and then backed it up in the email summary, which I think you acknowledged that you were prepared to discuss with Lidy on a call today, and that offer still remains. We'll have the change of contract: you would just become the sales, and they're called Sales Directors, right? So just use the same terminology as what Matt would have been on, had he not resigned. So you'll be the sales director, and it can be either for UK or for Europe, that would be your choice. There'd be no extra remuneration for - if you're span covered into Europe, and you'll be on exactly the same Ts and Cs. Your working hours would reduce dramatically, obviously, if you're not being responsible then for the various time zones. You're not responsible for the sales team. That clearly hasn't worked out, and you would just be one of the team. And I have actually brought somebody into the business now, to become a Chief Revenue Officer. So he will be managing the entire sales structure, going forwards. So that offer still stands, as well as the opportunity for you to come back full time or part time, and that's pretty much where we're at, Dave.***

5.70 Mr Graham explores if the 6-month notice would apply to change his contract. Mr Parker confirms: -

> ***No, because we're changing your role, because the role is not suitable for you.***

5.71 And goes on to say: -

> ***Well, the second option is we just terminate you and restrict to the six months. So we just keep you employed for six months, but terminate your contract.***

5.72 He then confirmed Mr Graham's summary that the options are he leaves "being paid six months on garden leave, whatever" or take this reduced role. Mr Graham explains what that means to him. How he has not felt supported at the lowest point in his and his family's life, the one point when he needed support. Mr Parker accepted he was entitled to his opinion and that he was "fully up to speed and fully aware of your situation but suggested this was a business decision based on him being deeply disappointed with the business's performance. This obviously came as a surprise to Mr Graham who immediately responded with the fact there had been no disciplinaries, no issues and yet he had only recently been promoted to the executive board.

5.73 Faced with a settled intention to terminate his employment, Mr Graham sought to put a counter proposal on the table. He suggested taking the new role, albeit retaining his current salary, and that the two agreed he would look for another role with a view to leaving by agreement in the same sort of timescale. That was rejected by Mr Parker. The choice was put to him to be made in two days. The option was simply that he take the reduced role or be dismissed.

5.74 The nearest to the counter proposal that Mr Parker got was a discussion about what would happen if the claimant found another job. This showed Mr Parker laboured under some fundamental confusion about what garden leave was which would, in time, explain the further uncertainty Mr Graham faced about the respondents' decisions and which would leave Mr Graham unclear when his employment actually ended. Mr Parker said: -

> ***"if you come back in between time and say you've found another job, then we'll have a conversation about what's left in terms of that period, and then we'll decide what to do. Whether it's a direct release, or whether we ask you to stay, or whether you have to buy it back."***

5.75 And in the meantime: -

> ***"and do exactly what it is we want you to do"***

5.76 Mr Graham was directed not to do any work, but to give an answer by 11 October. On 9 October 2021, the claimant's trade union representative submitted a grievance on his behalf. It was sent to Mr Parker and copied in Ms Cai. The grievance complained that he was being treated differently and less favourably from others and was being victimised because he was supporting his ill wife. The grievance was said to include breaching his contract by paying him SSP, unlawful deductions from wages, breaching policy and procedures as well as the lack of formal consultation by attempting to unilaterally change the terms of his contract through bullying and harassment tactics.

5.77 We find that this grievance has never been addressed by the Respondents. It remains unheard. We reject Mr Parker's contention the grievance process was suspended by agreement. Nothing happened through October and November of significance. In the meantime, Mr Graham does not confirm his response to the choice imposed on him between termination and demotion. He continued to be paid full pay.

5.78 The next event is an email from Ms Cai on 1 December 2021. The covering email says: -

> ***"Dear Dave,***
>
> ***Trust you are well***
>
> ***We would like to terminate your employment with immediate effect" Enclosed the termination letter for your reference.***
>
> ***I'll send you the UPS label for laptop shipping shortly [145].***

5.79 The termination letter attached was also dated 1 December 2021 and was headed "Notification of dismissal with immediate effect". It says: -

> ***This letter is to notify you that Gravity Supply Chain Solutions is terminating your employment in accordance with clause 21.1 of your contract of employment dated 26 April 2021.***

Further to clause 21.3 of your contract of employment you will remain on garden leave and your employment will terminate on 31 May 2022. You are no longer required to attend work unless specifically requested to do so. You should therefore refrain from attending the offices or contacting or dealing with any of our officers, employees, workers, consultants, clients, customers, suppliers, agents, distributors, shareholders, advisers or other business contacts. However, you shall remain employed by Gravity Supply Chain Solutions and must be available during normal working hours to deal with any work-related matters that may arise. You shall therefore ensure that Graham Parker knows where you will be and how you can be contacted during each working day (except during any periods taken as holiday). You shall continue to receive your normal salary up to your final day of employment.

You have 12 days' holiday outstanding which will be paid in your final pay check.

If you have not already done so, you must return any property belonging to us still in your possession to us within 7 days of this letter.

The reason for your dismissal is that you breached the mutual term of trust and confidence by the manner in which you requested 120 days' sick pay earlier this year. In any event, the need for your current position has now ceased and we therefore believe that your role is now redundant.

We have offered you an alternative role on many occasions which you have refused.

Please note that you will remain bound by your contract of employment after the termination of your employment, including clauses 14-17 of your contract of employment in respect of Restrictive.

5.80 For reasons we explain later, we do not accept the first reason given, an apparently the principal reason for dismissal, was the genuine reason.

5.81 There was in fact no further material contact or clarification from either party. Mr Graham was paid his full salary in December 2021, January 2022 and February 2022.

5.82 We find the claimant began exploring alternative employment. We find he was contacted by what would become his new employer in December 2021. They agreed terms. He started work for that new employer on 1 March 2020 at a reduced annual salary of £120,000. We find the claimant was paid only until the end of February 2022. The respondent learned of this new employment at some point in March and although there is a pay slip for March, we accept he was not actually paid for that month.

5.83 On 30 May 2022, the day before the termination date after notice, Ms Cai sent an email to Mr Graham attaching a letter which communicated the decision to summarily terminate his employment with immediate effect. The reason was said to be discovering his new employment commencing during his notice period which was said to be in breach of his duty of fidelity. We find the claimant received that letter on the day it was sent and read it.

5.84 Turing to commission, we accept, on the balance of probabilities that the claimant was entitled to commission on sales concluded in respect of OOCL Logistics in the sum of $3,000; Havi Logistics in the same sum $3,000 and Stena NTEX in the sum of $1,600. The evidence is limited to Mr Graham's evidence based on his best recollection. This has been pleaded since the claim started. It was open to the respondent to address this in disclosure. It has not done so, albeit Mr Parker has provided a witness statement denying liability for those sums which can only be based on some undisclosed documents. We do not accept his untested evidence. Mr Graham's evidence is the only evidence that has been tested before us.

5.85 As to the parasitic entitlement to 0.90% of the commission paid to the sales team, Mr Graham is further fundamentally disadvantaged because the values of the commission paid to others is not something he would have his own recollection of, at least in the way that we have accepted of his own sales. He is entirely dependent on the disclosure from the respondent. It has failed to disclose documents relating to this. Mr Parker has purported to analyse the documentation in order to arrive at a figure of $28.35 owing. We suspect the figure owing to Mr Graham is significantly larger than this but in the absence of any other applications for us to take another course in response to the non-disclosure, we are limited to the evidence before us. Mr Graham was unable to give any rationale estimate of what this figure might be.

6. Discussion and Conclusion – The EDT.

6.1 There is no dispute that the respondent dismissed the claimant. There is a dispute arising from the ambiguity of the communication as to the EDT. Ambiguity can sometimes arise where the words used are themselves unclear. In this case, the ambiguity arises because the respondent has made two statements within a single communication. The meaning of each in isolation would be clear. It is when they are read together in the same communication that the ambiguity arises.

6.2 The EDT is a statutory concept. It is for us to make an objective assessment of when that happened. (**Fitzgerald v University of Kent at Canterbury CA [2004] ICR 737**). Neither party's prior discussions is determinative, and may not even relevant beyond the extent to which the underlying facts might inform the approach to an objective interpretation of the document. A termination is not an agreement, but the approach to objective determination of documents found in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1997] UKHL 28** provides some guidance by analogy, albeit we keep in mind this is a statutory concept we are determining, not a contractual term. That guidance includes what a reasonable person having all the background knowledge would have understood, where that could affect the language's meaning, but excluding prior negotiations. Deducing the meaning of words contextually, rather than literally but on the presumption that people do not easily make linguistic mistakes.

6.3 At this stage of the analysis, the competing dates are 1 December 2021, the date the communication was sent by email to the claimant, and 31 May 2021, the date contained in the letter. At a later stage of the chronology, there is no dispute that the respondent purported to terminate summarily within the notice period by an email dated 30 May 2022. If the employment was otherwise continuing to 31 May 2021, that will have been effective to bring forward the EDT by one day. If the employment in fact ended on 1 December 2021, it had no effect.

6.4 There are factors in the relevant documents that point to both dates. The 1 December date is consistent with: -

a) The covering email, which states "*we would like to terminate your employment with immediate effect"*.

b) The heading of the attached letter, which states "*notification of dismissal with immediate effect*"

c) Less directly, the calculation of accrued annual leave calculated to that date, rather than any reference to the later date of termination.

d) Also less directly, the reason for dismissal was said to be breach of mutual trust and confidence, which might be taken to lead to a dismissal without notice.

6.5 The 31 May 2022 date is consistent with: -

a) The express reference to a date of termination of 31 May 2022.

b) Less directly, the fact that the time between the date of the letter and the purported date of termination was 6 months, and consistent with the contractual notice period.

c) The express reference to clause 21.3. That is a provision dealing with the consequential rights and obligations following a decision to terminate the contract by either party. It is, in shorthand, a garden leave provision. Mr Graham has previously expressed his understanding that garden leave applies only when the employee ends the contract by resignation. Moreover, he has also previously expressed what seems to us to be a confused understanding of what garden leave actually is. Neither alters the effect of the contractual provision.

d) The express further explanation of the practical arrangements that would apply *during* the following 6-month period including the phrase “you shall remain employed by” and the continuing payment of salary “up to your final day of employment”.

e) That those arrangements included the salary and benefits continuing to be paid.

6.6 However, the opening paragraph of the letter engages with either date. At first blush, it appears contractually precise, proclaiming that the contract is terminated in accordance with clause 21.1. That precision evaporates upon consideration of clause 21.1. Whilst that clause is where one finds the mutual obligation to give 6 months’ notice of termination, which is consistent with the later date, it is also the clause which contains the express term of pay in lieu of notice. Indeed, the way it is drafted appears to give the employee as much right to insist on pay in lieu of notice as for the employer to impose it.

6.7 When trying to interpret the objective meaning of a contractual agreement, the subsequent conduct of the parties is usually irrelevant as being no more than the manifestation of their subjective interpretation. However, as an EDT can be determined by the conduct of the parties, we consider what in fact happened in execution of the dismissal letter does have relevance. Firstly, Mr Graham did not seek clarification, although we accept he was left unclear what the employer’s actions would be. We accept at the time the claimant read the letter at the start of December 2021, he did not know whether he was going to be paid all of his notice in one payment or not. Consequently, he did obtain new work and late commence this litigation. For its part, the first respondent did pay him his salary each month, albeit we find it was paid late on some occasions and only until February. The reason it ceased is itself because of a belief that the claimant was in breach of contract leading ultimately to it purporting to terminate his employment early during notice.

6.8 The prior discussions between the parties have limited relevance, and only insofar as they contain matters of fact that the reasonable person would be taken to know when making the objective interpretation of the document. That provides little assistance to us. For the later date, there is a prior expression of Mr Parker’s preferred approach that would keep the

claimant employed throughout his notice. For the earlier date, his comments give an unclear, bordering on confused, position as to whether termination would be in lieu of notice, with notice or with some sort of "buy back", whatever that is, if the claimant found new employment during notice.

6.9 We have seen inconsistencies in the way the respondent uses language to convey concepts that add to the confusion. First, Mr Parker's clarification in prior discussions that any termination would not be on garden leave, but then describing the circumstances that would apply in terms which appear to us to reflect the common understanding of what garden leave is. Similarly, Ms Cai made reference to dismissal with immediate effect twice, alongside an explicit reference to garden leave, the operation of which she then explained in a way consistent with Mr Parker's earlier explanation of something that he thought was not garden leave. We can entirely understand why the claimant says he was confused and unsure about his status. We have not heard from Ms Cai to explain what she meant by dismissal with immediate effect. As it refers to dismissal, rather than termination, it is possible she was referring to the decision being made without any further process, which is in fact what happened, but we would be speculating, and the distinction does not necessarily arise from the two words and, in any event, her covering email had used the phrase termination instead of dismissal.

6.10 There are persuasive arguments for either date being the EDT, but we have determined the objective interpretation of the effective date of termination is that it is 31 May 2022. The reason we prefer that is principally because that date is expressly identified as the date the employment would terminate, whereas the other contentions are derived indirectly from interpreting other factors and are potentially ambiguous. Similarly, the effect of how the parties' relationship would operate during that period is explicit and clear and does not come with the same ambiguity as the factors pointing to the other date. Although finely balanced, this is not a case where we have been left with such ambiguity as to what the document means to have to resort to any reliance on a presumption of construction against the author. We have concluded that the objective interpretation of the effective date of termination to be derived from this letter is 31 May 2021.

6.11 It follows that when the employer gave a second notice of termination with immediate effect on 30 May 2021, there was still an ongoing employment relationship in place. Although that correspondence purported to restrict the obligation to make payments from 1 March 2021, which in fact had been the case, the new date of termination can only be determined from the date of notice was given and received, subject to the reasonableness of the circumstances before it reasonably could have been read by the claimant (**Gisda Cyf v Barratt [2010] ICR 1475**). The notice was given by email on 30 May, and we found it was received and read that day. As it is notice of instant termination, and there is no ambiguity to resolve in that case, it takes effect when read.

7. The Breach of Contract claims.

7.1 We have determined the EDT issue first because of its significance to our jurisdiction to determine certain breach of contract claims. Our jurisdiction to consider a claim of breach of contract flows from the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**. By this order, our concurrent jurisdiction with the civil courts is tightly controlled and limited, even when engaged.

7.2 There are various conditions for a claim engaging jurisdiction contained in articles 3 and 5 of the order which are not an issue here. The issue in this case arises from the time limit provisions of article 7. It provides: -

> ***7. An Employment Tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented—***
>
> > ***(a)within the period of three months beginning with the effective date of termination of the contract giving rise to the claim,***

7.3 This has the effect of creating a time limit, before the end of which the claimant must present his claim. More than that, however, article 7(a) also prescribes the beginning of the employment tribunal's potential jurisdiction by the explicit reference to the start of the period for presenting a claim at the EDT. The consequences are strict. If a claim is presented after notice of termination has been given but before it takes effect, and even though the EDT may be clearly ascertainable at the time it was presented; and although there may be absolutely no prejudice at all to the respondent in defending such a claim, the result in law is that the jurisdiction for this tribunal to determine a claim of breach of contract has not, at that time, yet engaged (**Capek v Lincolnshire County Council [2000] EWCA Civ 181**).

7.4 The ET1 claim form in this case was presented to the tribunal on 20 March 2022. At that time, the EDT had not yet happened, as was the case in **Capek**. The effect in law is that the Employment Tribunal is unable to determine claims under the 1994 order. Whether that could be remedied is academic as there was no subsequent claim after jurisdiction was engaged, and no application to add a claim after the time limit expired but relying on the power to extend time. As that power is limited to a "not reasonably practicable test", that may explain why. Had we found the EDT to be 1 December, clearly the claims under the 1994 order could have proceeded.

7.5 For what it adds to our analysis, we note that the first allegation challenging the contractual power to pay in lieu of notice would have failed in any event if, in fact the claimant's EDT had been the December date as there clearly is a contractual power to pay in lieu of notice under clause 21.1. Similarly, had we jurisdiction to consider breach of contract following the latter EDT as we have found it, there would also appear to be contractual power to place the employee on garden leave under clause 21.3 in any event.

7.6 Finally, of the two commission payments claimed as breaches of contract, our conclusions below in respect of the secondary commission show it is a contractual right that was outstanding at the date of termination and would therefore make out an alternative claim of breach of contact, had that jurisdiction been before us. The claim for primary commission is less clear because the exact payment date cannot be ascertained with sufficient certainty to be able to say it was outstanding at the date of termination. In any event, we have concluded those losses sound elsewhere flowing from the discrimination claims.

8. Unauthorised Deduction from Wages

Relevant Law

8.1 This is a claim under part II of the Employment Rights Act 1996. The claim is brought pursuant to section 23 alleging breach of section 13. So far as is relevant, section 13 provides: -

(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…

(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.

8.2 It is axiomatic that in a claim under part II of the Employment Rights Act 1996, the determination of the amount "properly payable" for the purse section 13 is based on some legal obligation to pay (***New Century Cleaning v Church [2000] IRLR 27 CA***). It is not limited to a contractual obligation, albeit in most cases the legal obligation behind what is properly payable will derive from a contract term.

8.3 So far as is relevant, section 23 provides that: -

A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 ….,

(b)…

(c)….

(d)…

(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, …

(b)…

(3)…

(3A)…

(4)Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Discussion and Conclusions – reduction of sick pay to SSP

8.4 This is the first of two distinct allegations of different deductions being made in different circumstances which fall to be considered individually. We do not consider them to be in the nature of a series of deductions as the circumstances of each are different and distinct and no such continuation has been argued.

8.5 This first allegation relates to the payment of statutory sick pay between 15 and 30 September 2021 instead of paying full pay. It can only proceed as a claim of unauthorised

deduction from wages because of our conclusions on the EDT and the consequence that has of removing any jurisdiction we might otherwise have had for breach of contract.

8.6 As a claim of deduction from wages, the claim was presented outside the primary time limit expiring at the end of December 2021. It was presented on 20 March 2023 following early conciliation which was itself not commenced until 10 January 2022.

8.7 We have concluded this is not a claim that can succeed in law because it was presented out of time. The power to extend time under section 23(4) is subject to the "not reasonably practicable test". The claimant has not addressed that test nor has it featured in the closing submissions from which we might be able to draw from the surrounding facts, the necessary evidence to reach a conclusion. That is despite time limits being identified as an issue in the case and the tribunal explicitly raising the implications for this particular claim at the outset. That, however, does not mean we ignore the issue. The claimant has given evidence generally and it may be that, within that evidence, there is a proper basis for us to conclude that it was not reasonably practicable to present the claim in time.

8.8 In support of that is, of course, the claimant's extreme personal and family circumstances at the time. In isolation that is something we would give particular weight to explain delay. Against that, however, are the facts that the claimant did have access to legal advice during the primary time limit and, in any event, had trade union input in October in circumstances that expressly identified the unauthorised deduction from wages. There was therefore both knowledge of the potential claim and what ought to have been competent advice available to progress it to a claim in time. Even the weight we can give to the extreme personal and family circumstances reduces as that situation was arguably worse by the time the claimant did in fact engage with early conciliation and yet it did not prevent the claim then being presented. Apart from our own attempts to analyse the potential evidence to extend time, there is no real basis for explaining why it was not an obstacle then, but was in the earlier months when the claim would have been in time. Consequently, even taking an extremely broad view of the evidence in its totality, we are unable to say there is a proper basis for concluding that it was not reasonably practicable to present a claim for deduction of wages in time.

8.9 Consequently, this claim has to fail on the jurisdiction point that it was presented out of time.

8.10 However, had it been in time it would appear to have merit. In short, the claimant was contractually entitled to full pay during periods of sick pay provided he complied with the necessary reporting conditions. We do not accept the respondent's contention that the contract does not provide for full pay. We take that view without recourse to consideration of the handbook otherwise relied on by the claimant at the time. The reason we conclude the contract does provide for sick pay is as follows.

8.11 There are two clauses dealing with pay during periods of sick pay. We have to consider the relationship between them. Clause 7 is headed "Remuneration", but then, confusingly, numbers the constituent clauses as 8.1 to 8.5. Clause 12 is headed "Sickness Leave". So far as clause 7 (or 8) is concerned: -

a) Clause 8.1 provides that the employer will pay the employee a basic salary of £132,000 per annum.

b) Clause 8.2 provides that it will be paid in 12 equal monthly instalments before the end of each month.

c) Clauses 8.3 and 8.4 can be ignored as they are immaterial to the present matter, dealing with annual review and a power to make deductions to clawback overpayments.

d) Clause 8.5 is relevant as it qualifies the preceding clauses by stating: -

"your salary during the periods of sickness will be in accordance with the terms set out in clause 12."

8.12 Thus far, the employee is contractually entitled to be paid in full, before the end of every month that the employment relationship subsists, in the sum of one twelfth of the annual salary. Clause 8.5 modifies the terms relating to payment of salary during periods of sickness absence making them subject to whatever Clause 12 provides. Pausing there, one might expect clause 12 to apply some form of limitation in the amount or duration of the payment of salary. It does not do that. Instead, it is limited to compliance with reporting conditions: -

a) Clause 12.1 imposes various obligations on the employee to notify their sickness absence and ongoing certification of continued absences.

b) Clause 12.2 then deals with the consequences of **not** complying with the requirements of clause 12.1 and provides that: -

"the absence may be treated as unauthorised and remuneration for that period, including statutory sick pay, may be withheld".

8.13 This does not automatically stop the payment of salary during sick leave, nor does it limit its duration, or cap it in any way. What it does is to give a power to the employer to withhold the payment of salary and no more. It does not deprive the employee of the right to receive their salary if the terms of clause 12.1 are complied with. Put another way, if there was no continuing right to receive remuneration as defined by clauses 8.1, 8.2 and 8.5, then there would be nothing to "withhold" under clause 12.2. That would be so whether clause 12.1 was complied with or not. Consequently, we interpret the contract in a way that does not limit the payment of full remuneration during a period of sickness absence beyond making it subject to compliance with the terms of clause 12.1. The consequence of breach is expressed as a discretion or power ("*may* be treated…*may* be withheld"). That is the only sense in which there is any discretion under the contract.

8.14 As there is no evidence that the claimant failed in his reporting obligations, there was no basis for withholding pay. Mr Parker and Ms Cai were wrong to assert that sick pay was discretional. Further, their assertions denying the incorporation of the handbook mean they have lost the limitation to 120 days sick pay that the terms in handbook would, if applicable, otherwise apply to periods of sickness absence.

8.15 We consider this interpretation is entirely consistent with the actions and language used by Mr Parker and Ms Cai when purporting to change the payment position in September 2021 to "drop Mr Graham's pay down to statutory sick pay only". If there was believed to have been a breach of clause 12.1, it is surprising that was not expressed as the reason. Consequently, the wages paid on the pay date of 27 September 2021 do appear to have been subject to a deduction from the payment that was otherwise properly payable and was a

deduction made without any prior authorisation. Had we considered we had jurisdiction to determine that specific claim, it would have succeeded for that reason. In any event, the decision not to pay the claimant full pay also arises in the discrimination claim before us.

Discussion and conclusions – Commission Payments.

8.16 This second element of the deduction claim is itself in two parts. The first is the claim for commission that the claimant was directly entitled to. The second is the claim for the secondary commission arising from the sales made by his team.

8.17 We start by analysing the contractual entitlement to commission based on the sales Mr Graham secured directly. We have accepted his evidence that he made those sales that he claims entitled him to commission. We have accepted his calculation of the commission due of $7,600. We do not have evidence of the pay date on which those payments were said to be due to be paid because of the flexibility in payment dates.

8.18 The starting point for any deduction from wages claim is the date on which the wages were said to be due. The due date for the payment of wages is as much an essential element of the analysis of what is properly payable, as the substance of the legal and factual entitlement to payment (***New Century Cleaning***). Whilst our findings of fact lead us to the conclusion that the claimant had become entitled to receive the commission on his own sales *at some stage*, we also concluded that the operation of the contractual scheme meant that the timing of the payments could be made at almost any time in the year. Neither the terms of the contractual scheme itself, nor the evidence we heard, provides a precise crystallisation date which is essential for us to be able to analyse whether what was properly due on *that* date was actually paid.

8.19 It follows that whilst we have reached conclusions which support the claimant's claim to the commission in the abstract, we cannot analyse the sums properly payable on any one of the pay dates during the employment and reach the conclusion that, on *that* pay date, the respondent not paying the commission meant that the sum paid was less than that properly payable.

8.20 That much of the claim of unauthorised deduction from wages must therefore fail insofar as it relates to the three direct sales for which Mr Graham was in fact entitled to primary commission to be paid in that half year. It does, however, arise as a consequential loss flowing from his dismissal in other claims.

8.21 The second part is in respect of the secondary commission based on the performance of the sales team. That is, 0.9% of the commission they themselves received on the sales they completed. It is in this respect that we concluded the employer was in breach of its duty of disclosure. The question was, what should we do about this breach as it left Mr Graham unable to reasonably quantify this part of his claim. There was no appetite on his part to postpone the hearing for any further disclosure. For our part there was no just or rational basis beyond what Mr Parker has provided to quantify what was payable. None was attempted by Mr Graham or Mr Jackson. We suspect the amount he would have received had his employment continued is substantially more than the $28.35 that has been conceded as owing by Mr Parker. Nevertheless, we are charged with determining a case on the evidence before us and the only evidence before us is the concession in that sum. Unlike the primary commission, which can be paid at anytime over the 12 months of the year, clause 8.1.1. of the contract shows this is payable in the December of each year. For that reason, we

are able to conclude that the pay the claimant received in December was subject to a deduction of $28.35 for which there was no prior authorisation.

8.22 There is no time limit issue arising from this pay date. Early conciliation was commenced within the primary time limit and the claim presented within time from the December pay date without recourse to the extension of time provisions.

8.23 This claim succeeds insofar as we record a declaration of the unlawful deduction from wages. As we have also found this to be a consequential financial loss flowing from the dismissal, we make a declaration only and the modest financial compensation is dealt with under that head of claim. In order to express an award in sterling, the best we can do is to take the midpoint of the exchange rate on the day it was due, that is 24 December 2021. On that date the exchange rate of US dollar to GBP sterling was 0.7461. We will express our judgment in the sum of £40.00 under the appropriate head of loss. We recognise the parties did not address us on this conversion rate but take the view we can take judicial notice of the exchange rate.

9. Direct Disability discrimination

Relevant law

9.1 We have set out the law rather more fully than we typically might. Whilst direct discrimination forms part of the staple diet for this jurisdiction, what is termed "associative" discrimination is less frequently seen. Likewise, how the Equality Act 2010 operates when a respondent does not call the decision maker, in particular the provisions under section 136, also requires particular consideration.

9.2 The claim is brought under section 39(2)(c) insofar as it alleges being subject to a detriment and section 39(2)(d) in respect of the dismissal. A detriment is any treatment of such a kind that a reasonable person would or might take the view that in all the circumstances it was to his detriment. An unjustified sense of grievance is not a detriment. **(Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.)**

9.3 So far as is material, section 13 of the Equality Act 2010 provides that: -

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

9.4 It is well settled that the formulation that direct discrimination against B occurs because of *a* protected characteristic, means it does not have to be a protected characteristic possessed by B. We have tried to avoid describing this as "associative discrimination" albeit it has been used as shorthand by the parties throughout this case. We avoid it because association, although often present, is not a constituent part of the cause of action and may misdirect our analysis. The concept of association may be better thought of as part of the factual matrix through which the necessary connection between the protected characteristic and the claimant's detriment is made out. All we are concerned with is whether the other person's protected characteristic was a material and significant reason for what happened.

9.5 As to what is necessary, Miss Ibbotson reminds us that "because of" means the protected characteristic explains the reason why it happens and relies on **Essop v Home Office (UK Border Agency) [2017] UKSC 27**. She reminds us that whilst it need not be the only reason (**London Borough of Islington v Ledale p2009] ICT 387**) it must contribute to

the treatment. We accept her submission that that means it must be something more than merely incidental to the background. She does not cite a particular authority for this proposition, but it is one that is regularly repeated. For example, in explaining the distinction between "reason why" and "but for". the EAT in **Amnesty International v Ahmed [2009] IRLR 884**, said how: -

> ***'The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.'***

9.6 The nature of the test was described by Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR 572** as: -

> ***'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 racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'***

9.7 In **Gould v St John's Downshire Hill [2020] IRLR 863** at paragraph 74 Linden J dealt with causation under Lord Nicholls' crucial question. He described the process as: -

> ***Where, however, there is an issue as to the alleged discriminator's reasons the court or tribunal is required to examine the evidence as to the mental processes of the alleged discriminator to identify what operated on their mind and caused them to decide to act as they did. That evidence will include the evidence of the decision-maker but it will also include the evidence as to the context in which the decision was made. The court will therefore examine all of the relevant circumstances of the case with a view to deciding whether the decision maker's professed reasons were their actual reasons.***

9.8 He went on, in respect of subconscious influence, credibility and secondary reasons for discriminating, saying: -

> ***76. Given that a prohibited characteristic may subconsciously influence a decision maker, this does not necessarily mean that the court or tribunal is merely deciding whether the evidence of the decision maker is truthful. As Lord Nicholls noted in the passages from Nagarajan which we have cited, the alleged discriminator may be mistaken in their denial that they acted on prohibited grounds because they have not appreciated that they were influenced by the protected characteristic or step. The honesty of a witness who denies that they acted on prohibited grounds is therefore relevant but it cannot, of itself, be decisive. This point was emphasised in Anya v Oxford University [2001] EWCA Civ 405, [2001] IRLR 377, [2001] ICR 847 CA where the Employment Tribunal had set out the relevant factual issues but had not reached reasoned conclusions on these issues or analysed the documentary evidence in the case, merely stating that it found the respondent's main witness to be essentially truthful and therefore accepted his evidence that he had not discriminated. Sedley LJ said at para [25]:***
>
> > ***'Credibility, in other words, is not necessarily the end of the road: a witness may be credible, honest and mistaken, and never more so than when his evidence concerns things of which he himself may not be conscious'.***
>
> ***77. If the protected characteristic did significantly influence the thinking of the decision maker then the reason why it did so is irrelevant.***

9.9 That final conclusion leads to a further important qualification on the test. That is that motive for direct disability discrimination is irrelevant. That can be seen from **Nagarajan** and Lord Nicholls dicta that: _

> ***'The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so?... the reason why the alleged discriminator acted on racial grounds is irrelevant'.***

9.10 As it is irrelevant to consider any explanation why the protected characteristic was a material part of the decision making, it follows that a good, positive, benign, or benevolent explanations for doing so do not prevent the treatment constituting direct discrimination. (see **Amnesty International).** The 'reason why' test therefore is simply why the respondent acted as they did. What, subconsciously or consciously was their reason. **(Khan v Chief Constable of West Yorkshire Police [2001] UKHL 48)**.

9.11 The two questions posed by section 13 of whether there was less favourable treatment and, if there was, the reason why that less favourable treatment happened are conceptually two separate issues and, in some cases, may be considered in two stages. In many cases, however, the two issues are intertwined as Lord Nicholls put it in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** when going onto to say: -

> ***employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.***

9.12 The protected characteristic in this case is disability. In the 29 years of jurisprudence in the area of disability discrimination, the distinction between the disability itself and the effect of the disability has at times led to tensions in applying the law of the day and analysing the 'reason why'. Under the 2010 Act, where the disabled person in question is the claimant, section 15 relieves that previous tension. Section 15 is not, on a literal reading of statute, available where the claimant relies on another person's disability. There is no submission before us to consider whether that domestic provision permits a broadening in scope of the literal words of section 15, as has happened with sections 19 and 27, in order to capture matters arising in consequence of *another's* disability, although we understand it was canvassed in an earlier preliminary hearing. It follows that under section 13, where the discrimination is said to arise because of another's disability, the mental process which causes the respondent or its agent to act in the detrimental manner must be materially influenced, even if only to some limited but material extent, by the other person's disability.

9.13 In claims of discrimination, the burden of proof starts with the claimant. He may be able to prove to the necessary standard that the protected characteristic was a material part of the reason why, and the case will succeed at that point. But it is well recognised how discrimination is rarely overt and, in any event, will often be subconscious. Consequently, the law provides that he does not need to go that far. All that is required is that he prove such facts as could entitle the tribunal to conclude the discrimination occurred, absent any explanation by the respondent. That may, and often will, engage inferences of fact being drawn from the primary findings of fact. At that stage, if we could conclude there has been discrimination, the burden then moves to the respondent to show that the protected characteristic played no part whatsoever. Section 136 provides: -

> ***(1) This section applies to any proceedings relating to a contravention of this Act.***

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

9.14 The phrase 'could decide' does not mean that the claimant satisfies his burden if a point is reached where discrimination is a mere possibly. Subconscious discrimination is almost always a "possibility". Instead, the claimant has to prove facts that are enough to satisfy the Tribunal that it could properly reach that conclusion, absent an explanation. Something in those facts must go further than a mere difference in treatment and difference in characteristic (**Madarassy v Nomura International Plc [2007] EWCA Civ 33)**. At this stage we focus on the facts supporting the contention, it will not include an explanation of the respondent, save to the extent to which inferences might properly be drawn at stage one in line with **Efobi v Royal Mail Group Ltd [2021] ICR 1263 and Igen Ltd and others v Wong [2005] IRLR 258**.

9.15 What amounts to that 'something more' must provide a proper basis for the tribunal to draw any adverse inferences and conclusions. We remind ourselves that unreasonable conduct, in itself, is not discriminatory (**Bahl v Law Society [2003] IRLR 640)**.

9.16 The two stages or the shifting burden, the factors to consider at each and the implications of an absent respondent witness to that task were considered in the Court of Appeal in **Efobi**, and have more recently been revisited in **Bennet v Mitac Europe Ltd 2020 EA-2020-000349-LA**, itself a case dealing with "associative discrimination". In that case, HHJ James Tayler set out a summary of the relevant propositions to be derived from the authorities. We set it out in full: -

(1) The standard of proof necessary to discharge the burden is the balance of probabilities;

(2) That is not altered by the reference to the requirement to establish that the treatment was "in no sense whatsoever" because of the protected characteristic. That requirement relates to the extent to which the protected characteristic need have been a cause of the treatment; it need only have been a material cause– the point made in Nagarajan;

(3) Similarly, the general requirement for "cogent evidence" to discharge the burden does not apply a standard of proof beyond that of the balance of probabilities. Nonetheless, it is an important point. It is the respondent that generally can provide evidence about the reason for the claimant's treatment. The shifting burden of proof was designed to assist claimants in discrimination claims because such claims generally require an analysis of the reasoning process of an employee, or employees of the respondent. The respondent will be able to choose what evidence to call about the decision-making process and it is likely to be the key evidence in deciding whether discrimination has occurred.

(4) While documentary evidence is likely to be important, because express evidence of discrimination is rarely available, much is likely to turn on the evidence of the decision maker(s). An important consequence of s136 EqA 2010 is that if the respondent chooses not to call the relevant decision maker it puts itself at considerable risk of an adverse finding, should there be sufficient evidence to shift the burden of proof, because it will face substantial difficulty in discharging the burden.

(5) The requirement for "cogent" evidence to discharge the burden should not be disregarded. It is guidance from the Court of Appeal, approved by the Supreme Court.

(6) The fact that a decision taker is not called to give evidence does not necessarily mean that the required cogent evidence cannot be provided. There may be compelling documentary

evidence or others might be able to give convincing evidence that they know the reason why the decision was taken. However, there should be a reasoned analysis of such evidence.

(7) It will usually be necessary to consider why a decision maker was not called to give evidence. There may be a compelling reason – a witness could be unwell or have died. Distance should not be assumed to be an insurmountable barrier to a witness giving evidence because an application can be made for a witness to give evidence by video, and could be made before the Coronavirus pandemic made it a commonplace occurrence. Where no reason or an unconvincing reason is given for the absence of the decision maker, particularly careful analysis is required of the evidence to determine whether, on balance of probabilities, it is sufficiently cogent to prove that the protected characteristic was not a material factor in the decision taken.

(8) On occasions parties choose not to call a witness because if the witness was called it is likely that their evidence would be damaging. That possibility should be borne in mind, particularly where the respondent is reticent to explain why a decision maker is not giving evidence.

(9) As the protected characteristic need only be a material factor in the making of the impugned decision, the fact that there is evidence that some other factor was the primary reason for the treatment complained of does not exclude the possibility that the protected characteristic was a factor in the treatment.

Discussion

9.17 The facts of the alleged detriments are not materially in dispute. In any event, we have accepted that the claimant did suffer a reduction in full sick pay to SSP between 14 and 30 September 2021; that he was told he would be demoted in pay and status; that his access to the network and emails was unilaterally cut and not restored; and that he was dismissed. Mr Jackson accepted our observations at the outset that the divisions within the stages of dismissal were artificial and could all be encompassed within the single concept of being dismissed. In fact, our findings of fact show that all the detriments short of dismissal flow from a single settled decision and are all connected, flowing from the same plan.

9.18 Nevertheless, we have to analyse the claims as presented under the structure of the Equality Act 2010. We are satisfied that the first three allegations do amount to detriments so as to satisfy section 39(2)(d) of the Equality Act 2010. There is no real challenge that the first act in respect of reducing sick pay amounts to a detriment. We have concluded it was not a discretional term as Mr Parker and Ms Cai asserted at the time but, even if it truly was discretional, the exercise of a discretion is itself capable of amounting to a detriment. The second allegation concerning the demotion was characterised at the time as an offer that was there to be accepted or rejected. We reject that analysis. The offer was always only an alternative to dismissal. We consider a reasonable person faced with that choice would consider the demotion was being imposed on them and that they had been put at a disadvantage. The third allegation concerning the access to the respondents IT systems was at times put as a benevolent act to provide space for Mr Graham to spend time with his family away from the workplace. We can see the scope for this type of step to be a benevolent act to support an employee and one which would not amount to a detriment. In this case, however, we consider it was not done for those reasons. It formed part of the overall plan of action to remove Mr Graham from his post. It was done unilaterally and without discussion; it amounted to more than merely diverting emails and had the effect of locking him out of access to the wider systems; it had the effect of disconnecting the claimant not only from work, but also access to matters he had a personal need to access such as policies, other contacts internally and his wage statements; he raised it with the respondent, in the context of payslips, and instead of granting access, the respondent merely forwarded a payslip

separately; it was not restored upon his sick leave ending. All those reasons support a conclusion that a reasonable person in those circumstances would consider themselves to have been put to a disadvantage. Finally, there is no dispute the claimant was dismissed.

9.19 We then turn to the analysis of why those things happened and whether Mrs Graham's disability played any material part in the decision making that brought them about. We start by restating that claims under this part of the Equality Act require the protected characteristic to be at least a material part of the reason why. We start by considering whether the primary findings of fact make it proper to draw inferences. We consider the respondents' choice of language at various meetings and in various correspondence compels us to do so. In particular: -

a) At the first meeting on 8 September, in the course of introducing his plans for changing Mr Graham's employment, Mr Parker says "*I think what we do is to come back to you, your situation, where you're at. A couple of things which have been on my mind for a long time now, moving up to when you actually went sick*" We found the reference to your situation was directly referencing his situation at home and the perceptions held of what Mrs Graham's cancer might mean to him and the business. Moreover, we infer it indicated a concern on the part of Mr Parker that Mrs Graham's Cancer was motivating his plans for the claimant's work long before Mr Graham was absent on sick leave.

b) Mr Parker introduced the proposal of the demotion as "*We need to drop your title out, we need to drop you back down to the level below and adjust that so that you can focus on you, focus on your family and I want to offer you, there are two options".* The context is such that there is no other way to interpret that than as a reference Mrs Graham's disability.

c) Mr Parker said "*There is no pressure for you to come back to the business, from a Gravity perspective. Only you can make that decision based on your personal situation, your health, mental situation etc. etc*". Again, it is clear to us that the personal situation is Mr Graham's cancer.

d) When dealing with the reduction in pay, status and responsibilities, Mr Parker said "*taking that pressure, that management piece away from you….. It can be earned back. It's just the basic would have to go down to replicate that sort of step down one, until we can get to a point when we can review it again and get you back up".* Not only is this linking Mr Parker's perception that the circumstances require him to he take work responsibilities away from the claimant in the context of his home situation, but it is put as a temporary measure. There is nothing in the respondent's contentions that the claimant was poorly performing elsewhere that admits the idea of resuming his work, responsibilities or pay at a later date. The only context in this case that could possibly change in the future, in a way that might mean the changes imposed were temporary, is Mrs Graham's disability. This belies a particular underlying insensitivity in the context of her terminal cancer.

e) Further direct connection to Mr Parker's perception about Mr's Graham's disability can be seen in how he proposed new working hours, saying *"There is no need to do anything outside of that time zone. If you said look I can do that but I can only do three days a week and two days at home with Jules or whatever. You tell me the hours or trades you want to work in that month and we will accommodate that"*

f) It is clear that Mr Parker and Ms Cai discussed the reasoning or otherwise shared a view of it being linked to Mrs Graham's cancer as her communications similarly disclose the connection. On 9 September 2021, Ms Cai put the proposals in writing in an email introducing them as "*we hope this arrangement can release a lot of the work pressures and allow you more balance at home with the family during these times*".

g) Ms Cai's email of 20 September 2021 concerning a postponed meeting date concluding with "*In the meantime, I continue to look at areas in Which Gravity can advise or help you during these times*".

h) Ms Cai's email of 23 September concerning his continued absence and the dispute about sick pay saying "*We sympathise with your current situation and that's why we have continued to pay you in full from 9 Aug. However, this was purely discretional given the circumstances"* and concluding with *"We hope you can stay away from work and get enough time with your families (sic)"*

9.20 We therefore consider we must infer from these primary facts that Mr Parker did have Mrs Graham's terminal cancer very much in mind when making the decisions that led to the detriments and then dismissal. Put the other way round, we are unable to properly explain reasons why we could not do so. Moreover, Mr Parker's own statements at the time show he was considering the claimant's situation long before Mr Graham commenced his period of absence meaning the later absence does not in itself provide the answer to the detriments. That is at a time during which we have rejected the contention there was any significant deterioration in the claimants' contribution to the business. From that we infer that from the moment Mr Graham and his family returned to the UK, Mr Parker's knowledge of Mrs Graham's terminal cancer was increasingly operating on his beliefs, perceptions and concerns as to what the inevitable deterioration in her health would mean to the business. That is not to say some of the thought process did not include some benign consideration of Mr and Mrs Graham's circumstances. We accept he seems to have suggested the return to the UK driven entirely by Mrs Graham's diagnosis, but it is also a change that he himself described as not being "ideal" for the business. That is where the seed of concern was sown. The further inevitable deterioration in her condition at some future point would inevitably lead to further demands on Mr Graham which would be in conflict with what Mr Parker expected from him, the growth plans and what it might cost the business.

9.21 We have come to the conclusion that the comments made and the inferences we can properly draw from them do mean the claimant has proved facts from which we could conclude Mrs Graham's disability was a material and significant reason for the respondent's actions. We therefore reject the respondents' submission that the burden has not shifted. The three detriments and the dismissal all flow from this underlying perception about what her disability will mean to the business. We are not entirely convinced that this is a case that requires the forensic device of a comparator to answer the questions of less favourable treatment and the reason why. The contemporaneous reasoning provides the link to the protected characteristic. To the extent we do, the identity of a hypothetical comparator was not fully advanced by Mr Jackson beyond expressing some unease with the respondent's formulation of the comparator which focuses on someone with Mr Graham's abilities, caring for a ***non-***disabled relative and being absent between 9 August and 30 September 2021 but that is the best definition we have.

9.22 Against that comparator, we are satisfied that the claimant has shown facts from which we could conclude that, for each allegation, he was both subject to less favourable treatment and that a significant material reason for it was his wife's disability. That is enough to shift the burden to require the respondents to show it was in no way whatsoever part of the reasoning. We have not heard from any witness for the respondents, but we accept that we must do what we can to examine the reasons that appear on the papers against the case it puts.

9.23 The first detriment alleged is the reduction of salary during absence from full pay to the level of UK statutory sick pay benefit. We are not satisfied the proposed comparator would have been treated the same as the claimant. The reasoning for the reduction does not flow from the absence per se, it flows from the prior concern about the situation the claimant faced at home and that this type of absence would arise at some point and be likely to be repeated or prolonged. The reason is the concern for what Mrs Graham's disability would mean for the business, including direct costs that were "not sustainable".

9.24 We reject the respondent's reasoning because it was based on two flawed assertions. The first that the sick pay scheme under the contract of employment was wholly discretional. The second that because the claimant was based in the UK, the terms of his employment were governed by the state benefit scheme for statutory sick pay. We have rejected both propositions in fact. The fact that the first respondent was able to accurately recalculate pay to correctly apply not just the rate of SSP by the terms of the state benefit scheme satisfies us we can rule out any simple misunderstanding on the part of Ms Cai or Mr Parker which, in any event, is not advanced as a reason. The fact that there are other UK based staff, and the respondents otherwise packaged the decision alongside a belief that the contractual scheme was discretional leads us to reject any contention that the respondent genuinely believed it was bound to follow the UK state SSP scheme. This is further undermined by the fact that Mr Parker would have continued to pay full pay if the absence was going to continue only for a further week or so and explicitly referenced his concern about "sustaining" full pay. That indicates that his concerns were forward looking which, in itself imports, a wider link to what it was that might trigger further or prolonged absences. That goes to support our conclusion that what was motivating Mr Parker was the longer-term implications arising from Mrs Graham's disability and managing the costs to the business. In fact, we have concluded that the contract was not discretionary and did provide for full pay but, even if the respondent was genuinely under the mistaken belief the scheme was discretionary, it still had to advance some justification for withdrawing the discretionary payment. We do not accept that alignment with SSP in the UK was a genuine reason. The contemporaneous meeting notes recorded Mr Parker's concerns he had had for some time, which supports the conclusion that the claimant's absence was not the start of this thought process. His perception as we have concluded was that the demands Mrs Graham's disability would place on Mr Graham were only going to increase and further impact on his negative perception of Mr Graham's ability to contribute to business growth and the costs to the business. We are therefore not satisfied that the documentary evidence shows the reasoning for not paying full pay was in no way whatsoever because of Mrs Graham's disability.

9.25 The second detriment alleged is the demotion. The respondents' case is that the comparator, someone with the claimant's abilities, caring for a non-disabled relative who took 7 weeks off would have been demoted as well. We reject that contention. The respondents' contention is based on the contention that Mr Graham was not performing. We have rejected that as a fact. It may be that the business was not growing as Mr Parker expected and had

promised to the investors, but we did not accept that fell to the claimant or his performance, especially when he had been championing the need for a Chief Commercial Officer to deliver the growth plans and covering the additional ground of the roles himself. The fact that Mr Parker packaged the reduction in the claimant's responsibilities and earnings as something that the claimant could return to in the future further undermines the contention that there was genuine concern about his fundamental capabilities as does his contention to the claimant that the job was now something that was "not suitable". We do not accept it was Mr Graham's fundamental professional abilities which are not suitable to the job. Instead, it was Mr Parker's perception that the job was not suitable for Mr Graham's home circumstances, faced with Mrs Graham's deteriorating disability.

9.26 We therefore conclude the respondent has not shown that the comparator would have been treated the same as the claimant. Nor has it shown that the difference in treatment was in no way because of Mrs Graham's disability.

9.27 The third detriment is in respect of cutting access to emails. The respondents' reason is said to be to allow him to spend time which his family, rest and recover. We have examined this carefully as it is a benevolent step that we accept many employers may take during a period of absence. If we accepted that we can easily see it being something that could displace the prima facie case and show the claimant was neither treated any differently to the comparator nor was the disability of his wife part of the reasoning. Indeed, it would even displace the existence of a detriment. However, we do not accept it was the reason. It arises as a step which was intrinsically linked to the range of other detriments that the employer had already decided on to demote or dismiss the claimant. It was a step taken unilaterally of any discussion with the claimant and the reasoning collapses when it was not restored upon the claimant returning to work. The motivation was to take over the claimant's contacts and work as, by then, Mr Parker had decided the claimant would not be returning to his role.

9.28 We therefore conclude the respondent has not shown that the comparator would have been treated the same as the claimant. Nor has it shown that the difference in treatment was in no way because of Mrs Graham's disability.

9.29 The final allegation is dismissing the claimant. The respondents' reasons justifying this have been mixed, inconsistent and changed over time which in itself is not a strong basis for them being accepted as genuine. It is also an allegation that goes hand in hand with the demotion detriment as we have concluded they were the two sides to the same coin. There was never a choice for Mr Graham to simply accept the demotion or not. The reality was the demotion was the alternative to dismissal. When that was refused, dismissal was the only result that would follow, as was made clear in the meetings. It is a consequence of Mr Parker's plans which he had in mind for some time before the issue was raised with the claimant, and even before he was absent on sick leave. It did not require any further decision making on the part of Mr Parker, nor do we accept that any further facts informed that decision.

9.30 The first reason advanced in the letter of dismissal on 1 December 2021 was a breakdown in trust and confidence because of the manner in which the claimant requested he be paid sick pay. We do not accept that that had any genuine bearing on the decision to dismiss. At best, it provided a diversion to mask the real reasons that had been decided upon long before the sickness absence started. The second reason was redundancy. Ms Ibbotson

did not seek to rely on it, at least as a reason in defence of the unfair dismissal claim, but in any event, we do not accept that that is made out as a genuine reason. The respondents' evidence did not allow us to conclude there was a diminution in the requirements for employees to perform work of a particular kind or what that particular kind of work was it says was reduced. If anything, the evidence we have shows the requirements stayed the same or increased. Of course, outside the context of the Employment Rights Act 1996, a genuine but mistaken belief in redundancy may be enough to show the operative reason was not the protected characteristic. However, we do not accept that was a genuine belief and, in any event, it does not show that the comparator would have been treated the same as the fundamental reasons for making the changes flow from the perception of what Mrs Graham's disability would mean to the business and its growth, and not sickness absence. It cannot be a defence to a discriminatory dismissal to rely on a discriminatory decision to make a post redundant. There is no distinction in the sequence of facts which separates a redundancy from the original decision to demote or dismiss the claimant.

9.31 Those are the only reasons relied on in the contemporaneous reasoning set out in the letter of 1 December 2021. In the course of arguing the case, and in Mr Parker's written witness statements, an additional reason is now advanced relying on the assertion of the claimant's poor performance. Again, we have rejected that the claimant was not performing adequately in his role, albeit he was clearly feeling the consequences of juggling the demands of both his work and the circumstances arising from his wife's deteriorating disability. More fundamentally, it was not a reason advanced at the time as a reason for dismissal meaning, for us to accept it was a genuine reason, we need to be satisfied why it was not relied on at the time. That is not explained. Mr Parker seeks to rely on earlier concerns about performance, but we have rejected them as a fact and such that there was a view about how suitable the role was for Mr Graham, it was based on the expectation of what Mrs Graham's disability would adversely mean to the business. It is also inconsistent with the respondent's plan to retain Mr Graham in the business, doing essentially the same role in a focused patch. We do not accept the difference between the roles, so far as they have been presented to us, demonstrates a sufficient distinction to explain and justify the alternative route of dismissal for poor performance. It is, however, consistent with something else about Mr Graham's circumstances which is perceived by Mr Parker as a concern and the answer to that is Mrs Graham. His reasoning explicitly justified the alternative role in order for Mr Graham to spend more time with Mrs Graham. For those reasons we cannot conclude that any of the reasons show the comparator would also have been dismissed, or that the dismissal was in no way because of Mrs Graham's disability.

9.32 To the extent that Mr Parker's motivation at times may have been based on benign presumptions about what was good for the claimant and Mrs Graham, that is not relevant to the analysis of the liability.

9.33 It follows that, in respect of all four allegations, the operation of section 136 has meant the claimant has established facts from which we could conclude that Mrs Graham's disability was a significant operative reason on the relevant decision making that led to him being treated less favourably. In all cases we have rejected the respondent has shown that the detriments and dismissal were in no way whatsoever because of her disability. As a result, the legal effect of the final provision of section 136(2) is that we **must** conclude that the contravention occurred.

10. Victimisation

Relevant law

(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.

10.1 Protection is lost if the circumstances of the protected act amount to it being done in bad faith.

Discussion

10.2 There is no dispute that the grievance of 8 October 2021 was a protected act under section 27(2)(d) of the Equality Act 2010. We are satisfied it was made by an agent of the claimant, on his instructions and on his behalf so as to be treated as his act. We are equally satisfied that it was done in good faith.

10.3 The claimant originally relied on 5 detriments done because of doing that protected act. The first three detriments related to aspects of the dismissal process but, as with the direct discrimination claim, Mr Jackson has agreed that they can all be consolidated into the single act of dismissal. The second detriment is said to be failing to ensure payment of the commission. The final detriment relating to shareholding has not been maintained.

10.4 The cause of action for each rest in section 39(4)(c) and (d), mirroring the cause of action for direct discrimination under section 39(2). Again, there is no dispute the claimant was dismissed. We are satisfied that not being paid commission in circumstances when it was reasonably believed the payments were due amounts to a detriment in that a reasonable employee could hold the view they are being put at a disadvantage.

10.5 The provisions of section 136 of the Equality Act 2010 apply to proving a claim of victimisation under section 27 as much as a claim of direct discrimination under section 13. It is sufficient that the claimant proves facts from which we could conclude that the protected act played a material and significant part in the decisions behind the detriments or dismissal.

10.6 The central theme of the grievance is breaching his contract by paying him SSP, unlawful deductions from wages, breaching policy and procedure as well as the lack of formal consultation by attempting to unilaterally change the terms of his contract through bullying and harassment tactics". Those are the factual issues which the grievance alleges amount to contraventions of the Equality Act 2010 so as to qualify as a protected act.

10.7 Ms Ibbotson submits the causal connection is unlikely as the possibility of termination had been raised at a stage prior to the protected act. That is a fair point to advance. although it relies on two underlying premises. One is that the earlier event is the only cause for the

detriment. We take the view that if a later protected act material contributes to course being taken resulting in a detriment/dismissal, that is enough although it may have had to enlarge or bring forward the detriment. The second premise is that the reasoning, and the reasoning discussed at the earlier meeting, are accepted as the reason for the dismissal.

10.8 The analysis in this case is not straight forward. If we accepted the reason for dismissal was in any material way the manner of requesting full sick pay as asserted by the respondent, there would appear to us to be a sufficient causal connection. As a protected act, the grievance itself formed a key part of the process, and therefore "the manner", of Mr Graham asserting he was entitled to full sick pay and that the respondent had failed to pay it to him. As that is a reason relied on by the first respondent for the dismissal, we are unable to articulate why, if that was the reason, the claim of victimisation relating to dismissal would not be made out. That reason appears to be the respondent's principal reason for dismissal but in the context of a claim of victimisation, it only needed to be *a* material and significant part of the reason why. This much of the claim of victimisation would therefore succeed if it truly were the reason.

10.9 However, we have rejected that that was the true reason. We have considered whether it is sufficient for the claim to be made out where a reason for dismissal, though not a genuine reason, establishes the causal link to the protected act. We have decided that cannot be the correct approach. If we reject that was actually a reason for dismissal, dismissal cannot therefore be because of the protected act. The fact that this reason was, on our findings, advanced as a smokescreen to the inevitable consequence of dismissal, as Ms Ibbotson identified had been intimated before the grievance, does not establish liability. This is a claim which stands in the alternative to the direct discrimination claim and if the dismissal had been found to be because of the reason given by the employer, it would have succeeded.

10.10 For that reason, on our findings of fact and rejecting the respondents' reasoning, this claim must fail.

10.11 The second detriment is in respect of the payment of the two types of commission. We have concluded that this must fail also for lack of any prima facie case that the grievance, as the protected act, could be the reason why this was not paid. Our reasons are that there is evidence of inconsistent payment dates and employees having to chase for payment; the grievance does not explicitly reference commission and there is no other aspect of the surrounding circumstances that allow us to draw inferences to link the grievance to the decision to dismiss; On balance, the payment would have been made had the claimant remained employed and therefore the reason for non-payment is because of the prior dismissal of the claimant and the non-payment of both types of commission naturally flows as a loss from the dismissal.

11. Unfair dismissal.

11.1 The claim of unfair dismissal is conceded, albeit on a procedural basis. The first respondent's principal defence is to limit losses on the basis that the claimant's employment would have terminated in any event in March 2022 as a result of him taking the new employment which, it says, amounted to gross misconduct. Despite the concession of liability being based on procedural failures, it is not put on the basis that a fair dismissal would have occurred by that date and there is no case run in parallel that the claimant's conduct contributed to his dismissal.

11.2 As to reasons for dismissal, the same submissions are made as in defence of the discrimination claim. We have rejected those as being the genuinely held beliefs. Indeed, the third reason relating to the claimant's performance was not articulated in the contemporaneous reasons for dismissal in a letter which amounts to the written statement of the reasons for dismissal and is admissible under s.92(5) of the 1996 Act in so far as its contents is relevant to an issue in any subsequent proceedings. In any event, the reasoning given in that letter advanced two reasons. For the purpose of this statutory claim, there has been no attempt to identify the principal reason as between the reasons asserted. The secondary reason suggested in the written statement of redundancy is no longer relied on. The remaining reason relating to the manner of requesting full sick pay would, if accepted as genuine, appears to us, on the construction of the wording in the letter, to be the principal reason.

11.3 We have in any event rejected that that reason was genuine. Had it been, that would have led to an analysis of whether that was a potentially fair reason. In that regard, we accept as a matter of principle that "the manner" in which something is done is capable of being severed from the underling thing itself being done. It is a distinction we are well used to analysing in claims of detriment for making protected qualifying disclosures. Just as in those cases, however, the authorities require a tribunal to be alert to artificial distinctions being erected. In this case, when alleged "the manner of" is properly analysed, it amounts to requesting to be paid what Mr Graham believed to be contractually due, asserting it was his contractual right, including it in a grievance explicitly referring to a deduction from wages, stating he had taken legal advice on the issue, and threatening legal action if it was not repaid.

11.4 We struggled from the outset to understand why the factual basis relied on by the respondent in what appears to be its putative principal reason would not then engage section 104 of the Employment Rights Act 1996 and render the dismissal automatically unfair. Section 104 of the Employment Rights Act 1996. Section 104(2) makes clear that it is immaterial whether the right does exist or has been infringed. The claimant's belief in the right was reasonably held. The fact that the claimant, in his attempt to rationalise and argue why he had the right relied in error on the Hong Kong Handbook does not prevent his assertion being protected. In any event, we have concluded he had the right by construction of the contract.

11.5 The contention that the factual reason relied on by the respondent was said in its pleaded response not to be for "conduct", did not help our understanding of what it was about "the manner" that destroyed trust and confidence. After considering the evidence in totality, we remain of a view that that reasoning would in any event have engaged s.104.

11.6 As it happens, nothing turns on that. The reason does not engage the minimum basic award under section 120 which would have increased the award slightly. We do not need to be concerned about the statutory cap on compensatory awards under section 124 as the financial loss flowing from dismissal is recovered under the Equality Act 2010 and, in any event, is well under the applicable cap. It does not even engage to release the statutory effect of a protected discussion, to the extent there was one, on the basis of it not applying to automatic unfair dismissals as the claim has been conceded in any event.

11.7 The respondents' further submissions go principally to the question of remedy under section 123(1) of the Employment Rights Act 1996. In short, it was that there are no losses

as the claimant would have been fairly dismissed for gross misconduct on or around March 2022 as a result of commencing new employment without consent. It is not necessary to consider that argument under the claim of unfair dismissal as we have not made a compensatory award for financial losses under the 1996 Act. The reason for that is because we have found the dismissal also to be discriminatory. That is not to say Ms Ibbotson's challenge to continuing financial loss beyond March 2022 is not addressed. The same submission applies in essentially the same context of a just and equitable compensatory award for financial losses flowing from claim of discrimination and we consider it there in the under the principles established in **Chagger v Abbey National plc [2009] EWCA Civ 1202.**

11.8 As such, the only awards we make under section 123 is the notional sum for loss of statutory rights which we award in the sum claimed of £450. To that we add the basic award of £5139 calculated on the basis that the claimant had 6 completed years' service all of which were worked above the age of 41 thus entitling him to 1½ weeks' pay for each. His weekly pay was in excess of the statutory cap which, at the material time was £571. (6 x 1.5 x £571).

11.9 The only part of the award which can be adjusted under section 207A is the notional figure for loss of statutory rights.

12. Accrued Annual Leave.

12.1 There is no dispute between the parties that, as of 1st December 2021, the claimant was owed 12 days' outstanding holiday pay which was agreed to be paid in the final 'paycheck'. No issue was taken in agreeing to pay that figure that the leave year renewed on 1 January. We infer also that the fact that there was an outstanding entitlement could have led the employer to require the claimant to take annual leave during notice, but it did not do this. We find that accrued leave was calculated to the date of the notice of dismissal and did not take into account the continuation of the employment relationship originally to 31 May 2022, but then brought forward by a day to 30 May 2022.

12.2 The claimant's contract entitled him to 25 days paid annual leave per annum in a leave year running from 1 January. The Working Time Regulations 1998 entitle him to 4 weeks and a further 8 days, equating to 28 days per annum for a 5-day week. That equates to 2.33 days accrued per calendar month. The total period from 1 December 2021 to 30 May 2022 is a further period of 179 days. The employer made a payment in June 2022, albeit the basis of the calculation is not set out, but it equates to approximately 2.4 weeks or 12 days, consistent with the original termination letter. Credit will be given for the sum of £6,092.30 gross (or £4,122.43 net) paid in June 2022 for annual leave.

12.3 We find that additional period of employment to 30 May 2022 amounted to 0.49 of a full leave year (179/365). That equates to 13.73 days which we round to 14 days (There is, in any event, a relevant agreement in the contact to round to the nearest full day). Whilst there is no evidence of leave being taken in the reference period. There were 6 UK bank holidays which in most cases we consider should be treated as being taken and paid whilst pay was being paid in order to satisfy the calculation on the working time regulations entitlement. They fell on Christmas Day, Boxing Day and New Year's Day. We would similarly have discounted the public holidays falling on Good Friday, Easter Monday and May Day but as the respondent had ceased to pay the claimant by this time, we retain them in the accrued total outstanding at termination. The proportionate accrued entitlement of 14 days less the 3 bank holiday dates leave 11 days outstanding for the additional period through to termination.

Together with the agreed 12 days up to 1 December 2021, the total accrued is therefore 23 days.

12.4 As we are basing the accrued entitlement on that arising under the Working Time Regulations, we convert that into weeks. The claimant's contract expressly defined working hours as a 5-day working week, Monday to Friday to arrive at 4.6 weeks.

12.5 The claimant's gross weekly pay as at the date of termination was £2,531.64 (£132,000 / 52.14). The accrued but untaken leave due on 30 May 2022 was therefore a gross figure of £14,645.54. Credit has to be given for the £6,092.30 gross paid in June 2022 leaving a further gross payment due of £5,553.24.

13. REMEDY FOR DISCRIMINATION

Financial losses

13.1 We start with additional findings of fact in respect of pecuniary loss.

a) Mr Graham was earning £132,000 per annum or £11,000 gross per calendar month. His monthly income was steady at £5567.88 net including his own contribution to pension of £550 per month.

b) He obtained new employment from 1 March 2023.

c) Mr Graham accepts he has mitigated his loss insofar as his income in the new employment increased to £150,000 gross per annum from April 2023, meaning he limits his claim for loss of earnings to 13 months.

d) During the intervening 13 months, we accept his new role paid £120,000 gross per annum or £10,000 per calendar month. There was on the face of it a monthly gross loss of £1,000. However, we find his new monthly net income varied initially from month to month as his tax position settled and he resumed pension contributions after the first three months, this time at £400 per month. However, his total net earnings in that reference period amounted to £78,669.52. In only one of those 13 months, that is March 2022, did his net pay actually fall below the level of the net pay he would have earned in his old employment, and even then, only by around £40.

e) Mr Graham does not account for any bonus in the new role and does not claim any loss of bonus in the notional period of loss.

f) Mr Graham's schedule of loss calculates the net pay in the new role in the abstract and without explanation of the arithmetic or relevant factors. This annual net salary is put in the net sum of £72,953. (Which would extrapolate to £79,032 over 13 months). The figure of loss he arrives at in his schedule of loss is £7,268.16 for a 12-month period (which we extrapolate to £7,873.84 for 13 months). Again, it is without evidence of how the figure is arrived at and does not explicitly address the actual net position under the old role.

Discussion

13.2 Despite the undisputed fact the new role paid £12,000 less per annum *gross* than the old role, the evidence of the net pay during the 13-month period shows that the claimant

actually earned £78,669.52. We then have to compare that to the notional lost net income of £5567.88 per month and it is clear that results in a notional net pay for the period of £72,382.44 (13 x £5567.88) which is less than the figure actually earned in mitigation. It follows that even if it were correct to account for the reduction in contributions to his personal pension over the reference period of £3,150, that would reduce the net earnings in the new role to £75,519.52 which is still at a level in excess of the notional loss of earnings. Consequently, we are unable to find that Mr Graham has shown a financial loss, in respect of his basic earnings.

13.3 We are invited to conclude that financial losses would stop in any event in March 2022 when the respondent says the claimant would have been fairly dismissed for breaching his duty of fidelity to the respondent. If that were made out in principle, it seems to us the time by which a dismissal would have taken effect is likely to have been the time that the respondent did in fact take action in response and terminate the contract within the notice period one day earlier, on 30 May 2022. However, we do not accept that the underlying premise is made out. To stand up, it requires us to conclude that the respondent was not itself acting in a way which was discriminatory, unfairly or in breach of contract and if that were made out, there would be no recoverable financial loss flowing anyway. The claimant's actions in March 2022 that form the basis of this submission flow directly from the position the respondent put him in by its actions and decisions, man of which have been found to be discriminatory and unfair. It starts with the initial remote meeting in the hospital carpark when Mr Graham was informed of the proposed changes to his contract of employment. Had that not happened, we do not accept that the claimant would have taken the new role in March 2022. Put in terms of **Chaggar**, the respondent has not shown evidence to persuade us that there was a 100% chance that the employment would have terminated then, or for that matter in May 2022 and looking at the evidence in the round, does not entitle us to reach that conclusion. Had those discriminatory actions of the employer not happened, the personal situation the claimant was otherwise in was such that we can conclude there would have been zero chance of the claimant leaving for new employment in or around March 2022, especially in view of the situation at home around that time.

13.4 Having said that, when we look at the total reference period to March 2023, we would have to conclude that there was *some* chance that he would have voluntarily chosen to look for new employment. Part of that flows from the fact that we accept it is unusual to be able to conclude 0% or 100% chance as we have earlier in the year. We also know that the Claimant's personal circumstances changed fundamentally during that year which could conceivably have led to decisions about his work. We would apply a reduction of 20% to any ongoing loss of earnings flowing from the dismissal. However, because we have found those losses claimed are not made out on the evidence of income and mitigation of loss, this adjustment is academic only.

13.5 There is, however, direct financial loss flowing from the fact that the commission was not paid. Had he not been dismissed, we are satisfied that would have been paid to Mr Graham in the sums found to be due during the reference period, albeit perhaps belatedly in line with the evidence of needing to chase payment. Those are in the sum of $7600. The US dollar to sterling exchange rate at the date of dismissal of 0.76 approximates to a figure of £10,000.

13.6 There is also the deduction from wages in September 2021. But for the discriminatory reduction from full pay to SSP, the claimant would have received a net payment of £5,567.88.

In fact, he received a net payment of only £2,471.15. The measure of loss is the short fall of £3,096.73.

Non-financial loss and damage

13.7 There is no dispute in law that recovering compensation for injury to feelings actually suffered is available to the claimant in respect of the direct discrimination claims. (sections119(4) and 124 of the Equality Act 2024)

13.8 We have been guided by the significant cases in this area. In particular, **MOD v Cannock [1994] IRLR 509** so far as the award is compensatory not punitive and the tortious principles of compensation apply. To **Prison Service v Johnson [1997] IRLR 162** on the approach to valuing damages. We have of course had regard to **Vento v The Chief Constable of West Yorkshire Police [2003] IRLR 102** and the three bands of seriousness of injury. The valuation of those bands is subject to annual increase which directs us to the relevant presidential guidelines which, in this case, is for the year from April 2021. The appropriate value of the bands in this case is, therefore:

a) £900 to 9100 for less serious cases.

b) £9,100 to £27,400 for serious cases.

c) £27,400 to £45,600 for the most serious cases.

13.9 Mr Graham claims injury to feelings at the very top of the top band, implying the injury is of the most serious nature. By the example given in Vento, that would be the type of injury one might expect to be seen after a long campaign of discriminatory conduct or harassment. Mr Graham has not addressed injury to feelings at length in his witness statement but does conclude with two paragraphs summarising the effect of the respondents' actions on him at, what he describes as being at a time when his personal situation was such that he was "least able to defend himself" and the effect on his feelings being "considerable". We accept his account which we find is consistent with contemporaneous comments made by him and, in any event, is not inconsistent with the surrounding circumstances and the type of injury we might expect to follow discrimination of this nature.

13.10 For example, in respect of the proposed reduction in sick pay he expressed to the employer how extremely disappointing it was to be treated that way on the one occasion he had cause to exercise his sick pay entitlement.

13.11 During the meetings to demote him, he expressed "so, yeah, that you can understand my shock and my dismay, and my disappointment in how I felt I was being treated after nearly six years of giving everything". And "So part of that was in - part of that was in shock, Graham". And "Because I - for me, what I'm going to struggle with, and I'm sure you would, too, is I really don't feel supported. So at the mo-…at my lowest of what's going, what's happening here - and you know this, and you've been through this before in your own family life - at the one point when I've really needed support, it's not been there. And that's the thing that hurts the most, really not feeling like I'm supported. And I know it's a business and you have to run a business, but you also need to… When you employ people, and when you put a contract in place, there's a responsibility to look after the wellbeing of those people, regardless. That's your responsibility, as an employer…."

13.12 We therefore accept that there is evidence before us of injury to feelings. This is not a case where no award should be made. That then requires us to engage with the assessment of the seriousness of that injury and value it within the relevant guidelines.

13.13 In that exercise we have had regard to the fact that the duration of the claimant's exposure to the discriminatory acts occurs over a number of months, from early September 2021 until termination in December. The discrimination is repeated and clearly had an impact on his preparedness and ability to engage with the employer at times. The assessment of seriousness takes this beyond the sort of injury we would expect to see after a one-off event of discrimination.

13.14 We have also considered the implications flowing from the fact that the claimant was in a particularly low emotional state at the time of the discrimination. A discriminator that adds to an existing injury to feelings may only be liable to compensate for the added injury caused. Conversely, a discriminator that causes injury to feelings in someone at a time that they are particularly vulnerable to suffering a more serious injury will be liable for the whole of the injury flowing naturally from the discriminatory acts, even if the extent and seriousness of it is more than might have been anticipated.

13.15 We do not consider the claimant's low emotional state at the time the discriminatory acts started can be said to be in the nature of injury to feelings such that the respondents' discriminatory acts can be said to have merely aggravated or exacerbated a pre-existing state of injury. That is not to say his emotional position is not a relevant factor. We are satisfied that he was in a particularly vulnerable position and likely to be more adversely affected than might otherwise have been the case. In other words, his inherent 'resolve' or his ability to withstand the discriminatory acts he suffered was reduced. Injury in any context is a relative diminution in an aspect of human existence. The extent to which it is diminished is the measure of injury. The fact that the claimant was vulnerable, and the fact that he may reasonably have anticipated support from his employer, as he highlighted at the time, adds to the relative measure of his injury and we are satisfied makes it more serious.

13.16 In valuing the injury, we have sought to strip out the situation with Mrs Graham's deteriorating condition. It is not irrelevant, because it provides the background context for the injury to the claimant, but we acknowledge we must be careful to remain focused on the injury to Mr Graham caused by the discriminatory acts that we have power to compensate for, and not allow sympathy for the claimant's situation to influence that assessment.

13.17 There is little evidence of the effect on personal life. Much of Mr Graham's actions at the time were clearly driven by necessity and we don't doubt he was 'running on autopilot'. Nevertheless, we can infer the inherent difficulties he faced in coping at home without the support of an employer added to the injury at a time that he really could have done with having others support him.

13.18 Against that, there are factors which mitigate the seriousness of the injury. Whilst the duration of the exposure to discrimination was over an extended period, the duration of the ongoing consequences was relatively short. Mr Graham was able to find, secure and succeed in new employment relatively quickly. We have already acknowledged that a large part of that will have been driven by necessity, but he was able to do it as a fact at a time in his life when personal situation could not have been worse. We consider the move away from gravity and putting that behind him was actually a positive process allowing him to focus on a new future. There is also an extent to which concluding the litigation marks the end of the

closure process. We therefore treat the injury to feelings as being concluded by March 2022 save for residual effects during the time the case that the respondent has defended has taken to conclude. That is not to say those residual effects are minimal. We observed clear distress when Mr Graham gave evidence and was required to revisit the events of late 2021, albeit he also presented as reserved and stoic. So far as we can ever plot the course of an injury to feelings from onset to recovery, we consider it gravest at the initial shock of realisation what his employer was doing, that is maintained through to 2022 when it begins to resolve, largely due to Mr Graham's own stoicism and determination to move on with new employment. It was residual thereafter.

13.19 The discrimination played out in private although it must follow other senior employees must have been aware of what Mr Parker was planning. Nevertheless, this is not a case where any public ridicule or exposure can be said to substantially aggravate the injury so as to support a suggestion of very serious injury. Similarly, the injury to feelings has not had any obvious effect on the claimant's ability to secure future employment or his long-term choices of industry or sector or career generally.

13.20 We do not consider this is a case where we have to engage with divisibility of injury. This is a single injury, made more serious over time by further acts of discrimination. There are no other causes for that single injury. Whilst there are two respondents, the first respondent acts through the second and is a respondent as a result of the statutory form of vicarious liability under the 2010 Act.

13.21 Doing what we can to assess the injury to feelings in all its respects, we are unable to accept the claimant's submission that this injury sits in the top band, still less at the top of it. Whilst the general circumstances of the case might lead us to expect that any injury might be of the most serious type, the assessment of compensation has to be based on the evidence of injury. We do consider the injury overall is properly classed as serious and that it is therefore appropriate to compensate within the middle band. We consider the injury exceeds the less serious categorisation of injury, typically arising in cases where discrimination is a one-off event. We have considered an early post-Vento case of **Voith Turbo Ltd v Stowe [2005] IRLR 228** which suggests dismissal is so serious that it should not be treated as a one-off event for the purpose of Vento. Whilst the reasoning appears to focus on the manner of the discrimination, it may be better understood as reflecting the type and seriousness of injury that is likely to be suffered following a dismissal. We remind ourselves that the injury in any particular case may be more or less serious than that which is to be expected by the discriminatory conduct itself.

13.22 We then have to consider where in the band the assessment should fall. Neither party referred to quantum cases and, in any event, such other reports are unlikely to be of assistance unless the injury suffered in that other case was fully articulated.

13.23 We consider this case should be assessed in the upper half of the band because of the particular vulnerability of Mr Graham at the time of the injury meant the measure of injury was more serious. We also take into account it was an injury that was added to, and that Mr Graham was exposed to it over a number of months. The midpoint of the relevant band is £18,250 and the top £27,400. We would have considered the injury to be towards the top of that band had it not been for the evidence that its effects were relatively short-lived. We readily accept Mr Graham's actions in early 2022 to find, secure and start new employment as successfully as he did will have been driven my necessity, but we cannot ignore the fact

that he was able to do that successfully despite the treatment by the respondent. That indicates a process of putting the injury behind him, reducing to residual whilst the case concluded. Insofar as injury to feelings can have a recovery, this was close to it. We consider that must reduce what might have been the assessment for injury flowing from the acts of discrimination themselves, up to dismissal, which we set at £20,000, subject to any additional award for aggravated damages.

Aggravated damages.

13.24 Mr Jackson claims aggravated damages of £12,000.

13.25 Our approach to aggravated damages has been directed by consideration of the key authorities of **Alexander v Home Office [1988] 2 All ER 118]; Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT; HM Land Registry v McGlue UKEAT/0435/ 11/RN: HM Prison Service v Salmon [2001] IRLR 425.**

13.26 We take the view that an award of aggravated damages in discrimination cases before the Employment Tribunal will not always be a necessary head of damage. That is because an award of aggravated damages is itself in the nature of injury to feelings and, despite requiring some form of high handed or oppressive conduct by the employer to engage in the first place, the award remains wholly compensatory in nature. What is required is an assessment of *additional* injury because of that conduct. The reason it is often not needed is because, where the aggravating conduct occurs within the act of discrimination itself, we are able to fully compensate for the injury to feelings in any event without having to engage in additional assessments. That removes the risk of double counting and over-compensating for the same injury.

13.27 For those reasons, we consider it is unnecessary to engage with the first and second 'gateways' identified in **Shaw** concerning the manner of discrimination or the motive for it. However, there is one aspect which we consider does properly engage the scope for additional injury and an award of aggravated damages and that is in respect of the third typical 'gateway' identified in **Shaw** and, indeed, **Salmon**, namely the subsequent conduct of the employer following the discriminatory acts. This is a situation that can arise in employment cases where the subsequent conduct is not, in itself, discriminatory but has added to the employee's injury.

13.28 In this case there are two matters that arise after the dismissal decision has been put into effect. The first is that the claimant was left without any work or contact with his colleagues and effectively trapped waiting for Mr Parker to direct something that never happened. We accept there was some uncertainty on his part about his status throughout this period. This was not unreasonable for him to hold based on the termination correspondence and surrounding circumstances, including the absence of a route of appeal. That uncertainty remains unreasonable for him despite our conclusion on the termination date. That is because of Mr Parker's own inconsistency about what would actually happen in practice to bring the relationship to an end. Those matters left Mr Graham reflecting on what had happened and asking what had made them believe they could treat him that way. Secondly, the employer then chose to dismiss the claimant again, summarily for finding new employment. The scope for him being given notice which would terminate on him finding new employment was something the claimant had put to Mr Parker in the course of the termination meeting which Mr Parker had left unresolved within his inconsistent explanation of the termination process. In the event, when the first respondent learned of, or at least suspected,

the new employment in March 2022 it ceased paying the claimant which was something the claimant would have been content with as a formal conclusion to the relationship. When the employer eventually executed the summary dismissal, it did so at a time which has the effect of bringing forward the date of termination by only one day.

13.29 We are satisfied those two factors do engage aggravated damages as both carries the sense of that high handed or malicious nature necessary. Compensation, however, has to be based on the added injury to feelings they caused. In that regard we consider the first added more than the second matter bringing forward the dismissal. By this time the claimant was settling into his new employment well, albeit whilst having to deal with the recent death of his wife for which his new employer was supporting him well. The evidence suggests his focus was now elsewhere. The isolation over the first month or so post termination does, however, add to the injury to feelings. It is not in itself a discriminatory act, so the additional injury has to be compensated under this head.

13.30 We do consider it is appropriate to make an award for aggravated damages, but we do not consider the figure of £12,000 claimed can be justified. There are three reasons for substantially reducing any award for aggravated damages. The first additional injury is a small part of the injury overall. The second is that Mr Graham was turning his focus to obtaining new employment which was itself part of the process of moving on from the events with these respondents. If matters ended there, those alone would place aggravated damages more realistically in the region of £4,000. The third is that there is a risk of a substantial degree of overlap between the circumstances of these actions and the injury that flows from the discrimination, and particularly the dismissal, itself. For that reason, we consider we have to heavily discount our assessment.

13.31 Our final award for injury feelings, expressed in accordance with the format advocated in **Shaw**, is £22,000 of which £2,000 is for aggravated damages.

Adjustments under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992

13.32 The claimant claims an uplift in his compensation of 25% pointing to failures of the respondents to engage with the relevant code of practice, in this case that is the Code of Practice 1 relating to discipline and grievance.

13.33 Section 207A(2) provides that: -

> ***If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—***
>
> > ***(a)the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,***
> >
> > ***(b)the employer has failed to comply with that Code in relation to that matter, and***
> >
> > ***(c)that failure was unreasonable,***
>
> ***the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%***

13.34 The applicable proceedings are defined in schedule A2 which includes the claims before us.

13.35 There is no real dispute that there were substantial procedural failures, and it is on that basis that the unfair dismissal claim was conceded. The initial pleaded defence that the code does not apply to redundancy cases evaporates on the respondent abandoning that reason. We consider the breach in respect of the dismissal decision to be all but wholesale to the expected stages in the Code. It is right to say there were two meetings, but neither was in the nature of the meeting that is envisaged by the Code. It is also right to say that the dismissal decision was at least put in writing, but it comes out of the blue, with reasons that have not been articulated as concerns previously and without reference to a right of appeal at a time when the claimant was locked out of the respondent's IT system. At the heart of the code is encouraging employers to adopt a process to engage with the employee about their concerns in a way that is fair and allows any resulting decision to be based on both side's contentions, evidence and responses. That did not happen. We are satisfied that the failures were unreasonable.

13.36 In addition, the breach of the code arises in a second context insofar as the claimant clearly raised a grievance relevant to the circumstances which was ignored by the respondent. Indeed, Mr Parker accepts it was not progressed, suggesting it was suspended by agreement in the context of other discussions.

13.37 We do not consider we have power to make two adjustments because there are relevant failures of both the discipline and the grievance parts of the code, nor would be consider it to be appropriate. They are both intertwined in a single state of affairs. The extent and nature of those failures in total leads us to conclude that the maximum of 25% is an appropriate and just figure by which to uplift the relevant heads of loss.

13.38 Not all heads of loss are caught by the uplift. The basic award for unfair dismissal is excluded by section 124A of the Employment Rights Act 1996. We could have excluded the award in respect of the sick pay as this arises before the application of the disciplinary part of the code. However, we have decided it should be included in the uplift. Although we have found this issue was part and parcel of Mr Parker's overall plan for the claimant which culminated in dismissal, the reason for including it in this analysis is because it formed a central part of the claimant's grievance which was not progressed or considered or resolved by the respondent, save to the extent that it was then adopted as the putative principal reason for dismissal.

13.39 The effect is that the total award of £46,278.97, all but the basic award of £5139 is uplifted. (£41,139.97 + 25% = £51,424.96).

Interest

13.40 We are required to consider the application of interest under the **Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996**. In short, that requires us to apply 8% interest to the award to the date of the decision. In the case of awards of injury to feelings, that is from the date of the discriminatory act. In the case of other awards, that is from the mid-point. We are not permitted to adjust the rate of interest but are permitted to adjust the period of interest under regulation 6 where it is appropriate to avoid serious injustice.

13.41 With that in mind, we have taken the date of 1 December 2021 as the date of the discriminatory act for all losses except the reduction to SSP, which starts with 27 September 2021. We also consider the end date should be the date of our final deliberations to avoid

any further delay in promulgating the decision. That limits the period to 20 February 2024. That is a period of 811 days. The mid-point being calculated on 406 days. For the sick pay loss, the mid-point provides a period of 438.

13.42 It is only the claims that succeeded under the Equality Act 2010 to which interest is attached. That means we do not apply interest to the compensation for accrued holiday pay, to the basic award for unfair dismissal or the notional compensatory award for loss of statutory rights.

13.43 The figure for injury to feelings of is £27,500 (£22,000 x 25%). Although injury is caused from the earlier events, the gravamen is the dismissal, and the injury is assessed in the round from that point. We therefore start the period in which interest is applied from the date of dismissal. Interest on that amounts to £4,888.22. (27,500 x 8% / 365 x 811)

13.44 The figure for relevant pecuniary loss from the date of dismissal is £12,550. Interest on that amounts to £1,116.78. (12550 x 8% / 365 x 406)

13.45 The figure for relevant pecuniary loss in respect of sick pay from 27 September 2021 is £3870.91. Interest on that amounts to £371.61. (3870.91 x 8% / 365 x 438)

Grossing up

13.46 The total award exceeds £30,000 and is caught by the provisions of Chapter 3 of part 6 of the Income Tax (Earnings and Pensions) Act 2003. The claimant's annual income exceeds £125,140 such that he will be subject to income tax at a marginal rate of 45%. To give effect to the sums awarded, we must gross up that much of the award that exceeds the statutory allowance so that the incidence of taxation results in the claimant receiving the awards intended.

13.47 The sub-total after uplift and interest of £62,940.57 is in excess of the £30,000 allowance, leaving £32,940.57 to be grossed up. The formula to uplift proportionately is X / (100-45) x 100. Applying this increases the balance to £59,891.94. Adding back the £30,000 allowance results in a grand total of £89,891.94.

13.48 However, because the total liability of the two respondents is distinct, we have expressed these figures in the judgment so that the first respondent is solely liable for the basic award of £5,139, the notional award of loss of statutory rights of £450 and the accrued holiday pay of £5553.24. Applying the individual results of any uplift and interest they are £5139, £562.50 and £6941.55 respectively. They total £12,643.05 before grossing up for which the first respondent only is liable. Both respondents are jointly and severally liable for the remainder of £50,297.51 but it is necessary to split the effect of grossing up across those two figures so that the second respondent is not held jointly and severally liable for a disproportionately high part of the effect of grossing up. (that is, his individual liability would otherwise include some element of grossing up of the awards for which he is not liable).

13.49 As the first respondent is liable for all, we apply all of the £30,000 allowance to the claims that both respondents are jointly liable for of £50,297.51. The balance of £20,297.51 grosses up to £36,904.57 plus adding back the £30,000 results in £66,904.57.

13.50 As all of the allowance is used in that first calculation, the amount remaining of £12,643.05, for which the first respondent only is liable, is grossed up in full to £22,987.36. The overall grand total therefore remains at £89,891.94 but, this way, the first respondent is

responsible for all losses, the second respondent is jointly and severally liable only for those losses that attach to him.

13.51 For the purpose of the judgment, the individual awards against the first respondent are shown notionally grossed up in their individual sums to £9,343.64, £1,022.73 and £12,621.00.

Summary Table

Head of loss	Unadjusted award	207A uplift @ 25%	ITF interest	Other interest	
UDL Basic award	£5,139	N/A	N/A	N/A	
UDL compensatory award	£450	£562.50	N/A	N/A	
Loss of earnings	£0	£0	N/A	£0	
Loss of primary commission	£10000	£12,500	N/A	£1116.78	
Loss of secondary commission	£40	£50	N/A	£4.45	
Injury to feelings (including aggravated damages)	£22,000	£27,500	£4888.22	N/A	
Accrued Holiday pay	£5,553.24	£6,941.55	N/A	N/A	
Shortfall in sick pay	£3,096.73	£3870.91	N/A	£371.61	

Totals					
Basic award	£5,139				
Uplifted awards		£ 51,424.96			
Interest (ITF)			£4888.22		
Interest (other)				£1488.39	
Sub Total					£62,940.57
Grossing up £32,940.57 (£62,940.57 – 30,000) at marginal rate of 45% = £59,891.94 Or an additional					£26,951.37
Grand total					£89,891.94

EMPLOYMENT JUDGE R Clark

DATE 7 May 2024

JUDGMENT SENT TO THE PARTIES ON

…09 May 2024……...….

AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL