EMPLOYMENT TRIBUNALS

Claimant: Mr M Khan

Respondent: Bank of New York Mellon (company registration number FC005522)

Heard at: Manchester **On:** 15-17 April 2024

Before: Employment Judge Phil Allen
Ms L Atkinson
Mr B McCaughey

REPRESENTATION:

Claimant: In person
Respondent: Mr K Wilson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims for detriment, unfair dismissal, unauthorised deduction from wages, breach of contract, and holiday pay, were not presented within the applicable time limit. It was reasonably practicable to do so. The claims for detriment, unfair dismissal, unauthorised deduction from wages, breach of contract, and holiday pay are therefore all dismissed.

2. It was just and equitable to extend time to consider the claims for direct disability discrimination and harassment related to disability and accordingly the Tribunal did have jurisdiction to consider those claims even though they were not presented within the applicable primary time limit.

3. The complaint of direct disability discrimination is not well-founded and is dismissed.

4. The complaint of harassment related to disability is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a level F, Intermediate Representative, Reconciliation from 1 April 2022 until 13 July 2022. He was dismissed during his probationary period. He has epilepsy, which the respondent agreed was a disability at the relevant time. He says he made a protected disclosure on 28 April 2022 when he provided information to the respondent's Peakon system. The claimant contended that: he was treated detrimentally and automatically unfairly dismissed as a result of having made the protected disclosure; he suffered direct disability discrimination and harassment related to disability; unauthorised deductions were made from his wages; he was not paid the holiday pay due; and he was dismissed in breach of contract. The respondent denied the claims.

Claims and Issues

2. Two preliminary hearings (case management) were previously conducted in the case, on 17 July 2023 and 19 October 2023. At both hearings time was taken to clarify the claimant's claims and to identify the claims which he was bringing. Following the second preliminary hearing, a list of issues was prepared and appended to the case management order (145). It was agreed by both parties at the start of this hearing, that the issues to be determined remained those contained in that list.

3. It was agreed/confirmed at the start of the hearing that only the liability issues would be determined at this hearing and not the remedy issues. However, it was also agreed (at the suggestion of the respondent's representative) that a short list of issues which were technically remedy issues, would be determined alongside the liability issues.

4. Appended to this Judgment is the list of issues to be determined (including only the remedy issues which it was identified would be determined at the same time as the liability issues).

5. The list of issues was not specific about the claim for unauthorised deductions from wages. The respondent placed reliance upon what was said in the case management order following the hearing on 19 October 2023 about other payments as outlining the claim which needed to be considered. That recorded (at paragraphs 24 and 25) (139) that the claimant said he was contracted to work 9 am to 5 pm each day, however he worked two to three hours per day extra, and he said that he should receive a payment for those extra hours. The order recorded that was where the dispute lay. The document did not record anything about an allegedly unpaid advance or disputes about tax deductions. We also noted that the claim form (8) explicitly referred to the claimant not having been paid for the overtime worked for the duration of the claimant's employment and not getting paid for overtime (but not to non-payment of an advance or any other deductions such as for tax or pensions).

6. When he entered his claim, the claimant had brought an ordinary unfair dismissal claim. That claim had been struck out as the claimant did not have

sufficient continuity with the respondent to pursue such a claim. Accordingly, we were not tasked with determining whether or not the claimant's dismissal was fair (as we would have been had he had two years' service). The only issues for the dismissal were whether the principal reason was a protected disclosure made by the claimant or whether he was dismissed because of his disability.

Procedure

7. The claimant represented himself at the hearing. Mr Wilson, a barrister, represented the respondent. The hearing was conducted in-person with both parties and all witnesses in attendance at the Tribunal in Manchester.

8. An Urdu interpreter attended the hearing throughout, appointed by the Tribunal. The interpreter provided his services to the claimant when needed and when interpretation was required. For the majority of the hearing, the claimant responded to the questions in English without interpretation. It was emphasised to the claimant that he must ensure that if he was at all uncertain about what was being said/asked or the answer he was giving, he should use the interpreter's services.

9. An agreed bundle of documents was prepared in advance of the hearing. The bundle ultimately ran to 482 numbered pages. We read only the documents in the bundle to which we were referred, including in witness statements, or as directed by the parties (each of them prepared a reading list on the first day). Where a number is referred to in brackets in this Judgment, that is reference to the page number in the bundle.

10. On the morning of the first day, the respondent added two documents to the bundle, to which the claimant did not object. The respondent also produced an additional document which the claimant said he had never seen. That was also added to the bundle (not numbered) after lunch on the first day. At the end of the first day the respondent provided one document which the Tribunal viewed electronically (so that the electronic signature and apparent hyper-link could be viewed). During the first day of hearing the Tribunal suggested that any outstanding payslips should be provided. Two additional pay slips were obtained and provided to the Tribunal at lunch time on the second day.

11. At the end of the week prior to the hearing, a letter had been sent to the claimant from the Tribunal at the request of Employment Judge Holmes, because the claimant's witness statement did not contain what was required. As a result, on 13 April, the claimant had produced a revised witness statement. The respondent did not object to the revised witness statement being relied upon in place of the statement previously provided.

12. The claimant also provided a witness statement from Mr Hasan Ali, someone who had worked for the respondent as an agency worker as a reconciliation clerk. At the start of the hearing, it was suggested that Mr Ali might be able to attend remotely to give his evidence (to which the respondent did not object), but after lunch on the first day it was confirmed that Mr Ali wished to provide his statement only and did not want to attend. As a result, we read Mr Ali's witness statement, but his evidence was given less weight because he did not attend and was not questioned.

13. Th respondent provided witness statements from three witnesses: Mr Karthik Rangaraj, VP Lead Manager Reconciliation Centre of Excellence (and the claimant's line manager from the start of his employment until 17 June 2022); Mr Craig Sharples, VP Lead Manager of the Reconciliation Centre of Excellence (and the person with line management responsibility for the claimant from mid-June until his dismissal); and Mr Martin Barron, Director-Head of Investment Operations in EMEA (and the person who heard the claimant's appeal).

14. After the initial discussion and during the morning of the first day, we read all the witness statements, the documents referred to in the witness statements, and the documents referred to in the reading lists.

15. On the afternoon of the first day and the start of the morning of the second day, we heard evidence from the claimant, who was cross examined by the respondent's representative, before we asked questions. During the remainder of the second day, Mr Rangaraj and Mr Sharples gave evidence, were cross examined by the claimant, we asked questions, and they were each re-examined. The Tribunal did not sit in the morning of the third day due to Tribunal arrangements which meant that we were not available to sit (and for which we apologised to the parties). We had an extended afternoon on the third day, starting at 1pm, and at the start of the afternoon of the third day we heard evidence from Mr Barron, who was briefly cross-examined, before we asked him questions.

16. After the evidence was heard, each of the parties was given the opportunity to make submissions. Each of the parties had provided written submissions during the morning of the third day. We took a break to read the submission documents (and the break was extended to ensure that the claimant had the time required to read the respondent's document). The respondent's representative then made brief oral submissions. The claimant also then made brief oral submissions which supplemented his document. Both were asked some questions during their oral submissions.

17. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

18. The claimant started working for the respondent on 1 April 2022. The claimant worked as part of the reconciliations team. The respondent primarily provided its training by way of shadowing and on the job training. The claimant and Mr Ali were highly critical of the training which the respondent provided.

19. We were provided with the claimant's contract (181). We were provided with the email which sent the document to the claimant and which the claimant accepted he had received. We viewed that email electronically. It had a hyper-link. The start of the contract said the following:

> "*This letter and the enclosed BNY Mellon Employee Terms (the "Employee Terms") set out the main terms and conditions that will apply to you if you accept the offer of employment"*

20. Clause 5.3 of the contract provided that the claimant's employment could be terminated at any time before the expiry of his probationary period by giving one week's notice.

21. We were provided with a copy of the respondent's employee terms. It was the claimant's evidence that he had never seen or read that document. At clause 9.2 that document said:

> "*On or at any time after the giving or receiving of notice to terminate your employment, the Company may, at its discretion, make a payment to you in lieu of notice in satisfaction of the balance of your notice period"*

22. We were provided with the respondent's performance improvement procedure (409). It provided a thorough and detailed process to be followed when addressing performance concerns. It also said (409), "*Where there are concerns during an employee's probationary period the procedure will not normally apply".* An abbreviated procedure was set out which would apply to concerns about employees who were within their probationary period (414).

23. It was Mr Rangaraj's evidence that there were issues with the claimant's performance and conduct from the start of his employment. As there were such issues, he contacted the respondent's HR advisers about the process for ending the claimant's employment in his probationary period. We were provided with a request made on 29 April 2022 (188) in which Mr Rangaraj referred to the claimant's job training having not gone well due to his lack of skills required to perform the role and the fact that he was struggling to perform the basic tasks that were given to him. He asked "*Please can you advise us on how to end the contract with Azhar*".

24. On 29 April the claimant was moved to a different task, which was considered to be simpler.

25. On 4 May Mr Rangaraj met with the claimant.

26. We were shown various internal messages which raised concerns about processes and procedures arising from the claimant's responsibilities. Those included an email from India. It was the claimant's case that Mr Rangaraj asked those others to make complaints about the claimant. Mr Rangaraj denied that he did so and said that they were genuine examples of issues being raised.

27. The claimant was not paid at the end of his first month of employment. We were shown messages which recorded that was because the claimant had not provided his bank details. The claimant was paid an advance. The issue was rectified by the time of the second monthly payment date.

28. It was Mr Rangaraj's evidence that the claimant's performance and attitude did not improve during May. The claimant's evidence was that there were some issues, but he believed only those which should be expected from a newly recruited employee. It was also his evidence that he worked longer hours than he was contracted to, both to keep up with the work required and to undertake mandatory training courses which he was required to do during his probationary period. There was a disagreement between the parties about the training provided to the claimant.

The claimant believed it was not sufficient. The respondent believed that on the job training was effective and it was stated in evidence that it had been sufficient for other employees.

29. On 20 May 2022 Mr Rangaraj noticed that the claimant was sat at his computer undertaking a video conference call. He asked the claimant what he was doing. The claimant informed him that he was doing an external mortgage advisor course. Mr Rangaraj informed the claimant that he should be working for the bank during his normal business hours. It was the claimant's evidence that it had been agreed in interview that he could continue to undertake the mortgage adviser course. The respondent denied that it had been.

30. On Thursday 19 May 2022 the claimant was invited to a probation meeting. The letter which did so was from Mr Rangaraj (240). The meeting was arranged for 24 May. The letter set out four specific ways in which it was said that the claimant was not performing to the standard expected. It set out two ways in which his conduct was of concern. It was stated that the meeting would be attended by Ms S Dequeker, employee relations. The claimant was told he was entitled to be accompanied. It was also stated "*If the conclusion is reached at the end of the meeting that your performance and conduct has not been satisfactory, I will make a decision which may result in your probation period being extended or in your dismissal*".

31. At 11.03 pm on Saturday 21 May the claimant emailed the respondent's HR department with a letter from his neurologist and said:

> "*I am Epilepsy patient as my neurology Doctor send me letters about my health condition and told me to provide this letter to HR Department.*
>
> *He discussed about my new job role and I mentioned him my new role in BNY Investment bank is related to stress and pressure and he told you to send you this letter to HR. Stress is not good for my health because its cause me Epilepsy. Kindly mention this to my relevant manager keep my health details in my profile as you are aware for my health"*

32. Mr Rangaraj was informed of the information which the claimant had provided regarding his health. The proposed meeting took place on 24 May. We were provided with notes (245). It was attended by the Employee Relations advisor, Mr Rangaraj and the claimant. It was conducted by Teams as the claimant was working from home (something of which Mr Rangaraj had been unaware). The notes recorded that the meeting started with Mr Rangaraj saying that he wished to discuss the claimant's medical condition and how he could best be supported. The notes recorded the claimant as explaining that he had had epilepsy for over four years. It was explained to the claimant that he was making mistakes on a regular basis. The claimant's medical condition was discussed. The notes said that the claimant was asked what kind of support could be provided in relation to his medical condition, and his answer had been vague and unclear, and he had referred to being part of the team and it being human-nature related. At the end of the meeting, it was made clear to the claimant that his performance and conduct had been unsatisfactory, and a decision may result in his dismissal in the coming days (albeit in fact no such decision was made).

33. Following the meeting, on 26 May, Mr Rangaraj sent an email explicitly referring to the discussion about the claimant's medical condition in the catch-up meeting and offering the claimant more support to help manage workload and performance (248)

34. Mr Rangaraj made the decision to make an occupational health referral. He confirmed that to the claimant on 26 May (248). A report dated 20 June 2022 was provided following a consultation (269). That said that the claimant had had no seizures in the past two years. The report recorded that it was the adviser's understanding that there were adjustments in place including reduced workload and a buddy to assist. The physician advised:

> "*In my view he is fit for this role without further adjustments and I do not consider that his performance issues are related to his medical condition"*

35. There was dispute in the evidence between that of the claimant and Mr Rangaraj. Mr Rangaraj's evidence was that the claimant under-preformed in his role and was given a very limited workload when compared to others. The claimant disagreed. It was the claimant's evidence that he was repeatedly called into meetings by Mr Rangaraj, which reduced further the time he had to undertake his tasks. He said he was shouted and sworn at. Mr Rangaraj denied that he did so. The claimant alleged the Mr Rangaraj told him he should leave the respondent. Mr Rangaraj denied that was true but did say that he may have asked the claimant whether he had the necessary skillset for the role he was employed to do.

36. The claimant, in common with other employees of the respondent, was asked to respond to some questions on a system called Peakon. We were provided with the claimant's answers (232). The key message relied upon by the claimant as being the alleged protected disclosure (235) was in response to "*Question: I'm given enough freedom to decide how to do my work*". The claimants reply/comment was:

> "*My contract is 9 to 5 and 1 hrs break but after I joined in BNY Mellon I have no freedom and almost working 10 hrs to 11 hrs with no break also break the health & safety law. Short break was given after finished the task. The management was not provided the basic (TLM) training program given to the employee"*

37. It was the respondent's evidence that the response was provided to relevant managers anonymously. Mr Rangaraj's evidence was that he could not first remember when he had become aware of the claimant's Peakon messages, but Mr Jones (his manager) had asked him whether he had seen them, and his evidence was that they had both suspected that the message was from the claimant because of the language used and his communication style. The claimant believed that the messages should have only been read by more senior managers and not those involved in direct line-management.

38. The claimant alleged that Mr Rangaraj took him to an interview room and told him that he was unhappy about the messages. Mr Rangaraj denied that he did.

39. It was Mr Sharples' evidence that he was not aware of the Peakon messages.

40. On 16 June there was a meeting with the claimant, attended by both Mr Rangaraj and Mr Jones. There were no notes of the meeting. An email was sent on 17 June in which Mr Rangaraj confirmed what had been discussed (267). The claimant was informed that his performance was not at the expected level as he was performing less than half of a full-time employee's role. There was a dispute about what was said about the claimant and his health in that meeting. The claimant alleged that certain things were said (at least it appeared that he may have alleged they were said in that meeting, the claimant's evidence was unclear and uncertain about in which specific meeting things were said). Mr Rangaraj denied that they were. The issue is addressed in more detail below.

41. In response to the email sent by Mr Rangaraj, the claimant responded with an email sent to Mr Sharples and Mr Jones in which he said there were some things from the meeting which he wished to escalate (266). Mr Sharples was employed in a role comparable to Mr Rangaraj after a recent promotion. The claimant complained about Mr Rangaraj. He alleged that when he had mentioned his epilepsy, he had been told that his health condition was his personal problem, and he did not care about his health. He said that Mr Rangaraj had shouted and used unprofessional language.

42. Mr Jones responded and said that he did not recognise the claimant's description of Mr Rangaraj. He explained that the claimant's health was of great concern to him, and he said he would like to see if they could improve the claimant's level of performance without in any way compromising his health. The email said that it had been agreed that Mr Sharples would be the claimant's main managerial point of contact from that point.

43. It was Mr Rangaraj's evidence that, after that date, he no longer line managed the claimant. He said it was not his decision to dismiss the claimant and he had no influence on the decision.

44. Mr Sharples' evidence was that when he managed the claimant, he believed that they had developed a strong relationship from a work perspective. The claimant's responsibilities were changed. It was Mr Sharples' evidence that the claimant would complete the matching exercise he was tasked with incorrectly and would make significant errors. It was his evidence that he also had concerns about the claimant's attitude and communication.

45. In a document dated 27 June 2022 the claimant raised a grievance (264). A grievance meeting was held with the claimant on 1 July conducted by Ms Hartwell (278). Notes were provided. In those notes, the claimant was recorded as saying that Mr Sharples was good and professional, and he had no issues with him. The claimant also confirmed that the overtime he said he had worked had not been approved and that by the time of that meeting he worked his hours but not overtime. When the claimant was asked about the unprofessional language which he said Mr Rangaraj had used, he said that he wished to retract his statement.

46. A probationary review meeting was arranged for 13 July. Mr Sharples' evidence was that he reviewed the occupational health report prior to the meeting. Ms Dequeker attended and took notes (300). Mr Jones attended. Mr Sharples went through examples of concerns which he had about the claimant's performance and

conduct. Mr Sharples said that additional concerns had been observed since 24 May meeting. The claimant said that with training and support he was confident that his performance could improve. Mr Sharples informed the claimant that it was the company's decision to terminate the claimant's employment by reason of poor performance and conduct. The claimant said it was shocking decision. He was given a letter and left the meeting. The claimant was clearly unhappy about this meeting and what he had been told.

47. In the termination letter of 13 July (301), Mr Sharples explained in some length the performance and conduct issues which had led to his decision. Dismissal was confirmed. It was explained that the claimant would be paid in lieu of one weeks' notice. The claimant's right of appeal was explained.

48. It was Mr Sharples' evidence that he made the decision to dismiss.

49. We were provided with an exchange of emails between the claimant and Claire Hartwell (EMEA Employee relations) between 13 July 2022 and 2 August 2022 about the payments made to the claimant (305). The claimant stated he had not received one month's pay in lieu of notice and he was informed that the notice due during the probationary period was one week. It was explained that had been paid in lieu in the July pay. It was also confirmed that the claimant had been paid in July the salary due for the nine working days from 1-13 July 2022, and for 5.5 days pro-rata holiday entitlement from 1 April to 13 July. In response, the claimant asserted that he had not been paid for two days booked holiday on 11 and 12 July (the email said June, but it was clear he meant July). Ms Hartwell responded to explain that holidays taken would not have been shown as separate lines on the payslip as they were included in the salary paid. In his final email, the claimant asserted that he was entitled to £8,000. That was a sum which he said HMRC had told him he should have been paid. When we asked the claimant why he believed he was entitled to eight thousand pounds for a period of employment of between three and four months on top of the pay received (on a salary of £22,000 per annum), the claimant was unable to explain the entitlement but re-confirmed that was what he said he had been told by HMRC.

50. In the outcome to the claimant's grievance of 29 September 2022 (374), Jane Lovibond (Vice President) concluded that the claimant was entitled to be paid for an additional two days' pay as a result of having worked on 15 April, 18 April and 2 June 2022 (all being bank holidays) for which he was entitled to a day off in lieu, in addition to double pay. Ms Lovibond recorded that the claimant had taken 3 May as a day in lieu, but therefore there was two days due. She recorded that two in lieu days were owed, together with fifteen hours of half pay.

51. We were provided with four payslips which covered the claimant's employment. On 27 May 2022 the claimant was paid £3,666.66 gross salary and some small amounts of overtime. After adjustments for income tax, national insurance, employers GPP and an advance (of £1,542.46) the payslip stated that the claimant was paid the set sum of £1,038.31. On 28 June 2022 (95) the claimant was paid £1,833.33 gross salary and £393.26 gross overtime. After deductions for income tax, NI and employer's GPP, he received net pay of £2,081.32. On 28 July 2022 (403) the claimant was paid gross salary of £761.54, a gross sum of £465.38 for holidays, a gross sum of £423.08 for PILON, and a gross sum of £22.60 as AVE

holiday. After deductions for income tax, NI and employers GPP, the net pay was £1,006.64. On 28 November 2022 (402) the payslip recorded gross holiday pay of £169.23 and overtime of £90.66, with net pay of £205.94 after deductions for tax and NI.

52. The claimant placed reliance upon a page which showed the sums he said he had received from the respondent (455). That showed payment of each of the net amounts recorded as having been paid by the respondent on the payslips on the dates of those payslips but did not show the payment made in advance.

53. When the claimant was cross-examined about the information provided on the payslip of 28 July 2022 about payments for holiday and pay in lieu of notice, he appeared to have neither previously read those parts of the payslip nor considered what they recorded. His answers referred to the November payslip and the absence of other holidays or pay in lieu of notice on that later payslip.

54. In his evidence, the claimant clearly drew a contrast between his treatment and that of agency workers who worked at the respondent. He highlighted that the timesheets of agency workers recorded the hours they worked and were completed so that they could be paid for those hours. He also referred to the fact that they were paid for holidays. The claimant appeared to have little understanding of the difference between the agency workers and an employee. For example, he did not appear to understand that holiday taken by an employee would not result in additional pay and a separate entry on a payslip, as the holiday taken would be remunerated within the normal salary paid. We did not hear any evidence or see any document which provided any basis for an argument that an employee was entitled to be paid for overtime in the same way as agency staff were remunerated for, or rewarded for, hours worked (which would, in any event, have been via the agency).

55. Following the termination of the claimant's employment, an HR investigation report was prepared by Ms Hartwell into the claimant's grievance dated 17 August 2022 (339). A grievance meeting was conducted on Teams on 13 September 2022 by Ms J Lovibond (374). She concluded that the claimant was entitled to certain additional payments (which were then paid to the claimant), as we have recorded, but did not uphold the other parts of his grievance. The claimant appealed. A telephone meeting was held on Teams on 19 October 2022, conducted by Mr Barron (from whom we heard evidence). Notes were provided (390). The appeal was not upheld. The outcome was provided in a letter from Mr Barron (396).

56. In the bundle of documents, we were provided with two ACAS Early Conciliation certificates which contained two slightly different versions of the respondent's name. One covered the period from 6 October 2022 to 11 November 2022 (480). That was not the certificate relied upon when the claimant entered his claim at the Tribunal. Had he done so (and assuming it was valid for this respondent), the claim would have been brought in time for events dating from 7 July 2022. The certificate upon which the claimant relied when entering his claim was one which covered the 16 November 2022 only (1). The claim was entered at the Employment Tribunal on 23 November 2022. As a result, the claim was only brought in time for events which occurred on or after 17 August 2022. No evidence whatsoever was given by the claimant which explained the reason why the claim was entered at the Tribunal later than it should have been.

57. During the claimant's evidence he informed us that, at some time prior to entering his claim at the Tribunal, he took advice from a solicitor, he went to the CAB (from whom he appeared to have received advice), and he spoke to ACAS. It was not clear from the claimant's evidence exactly when he had been advised by each of those advisors, save that it was not immediately before his claim was entered.

58. We heard a lot of evidence. This Judgment does not seek to address every point about which the parties have disagreed. It only includes the points which we considered relevant to the issues which we needed to consider in order to decide if the claims succeeded or failed. If we have not mentioned a particular point, it does not mean that we have overlooked it, but rather we have not considered it relevant to the issues we needed to determine.

The Law

Time limits/jurisdiction and discrimination and harassment claims

59. For the discrimination and harassment claims, section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

60. The key date is when the act of discrimination occurred. We also need to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. We must look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer (**Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530). One relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor (**Aziz v FDA** [2010] EWCA Civ 304).

61. If out of time, we need to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The other factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the case of **British Coal Corporation v Keeble** [1997] IRLR 336. Those factors are: the length of, and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any request for information; the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. Subsequent case law has said that those are factors which illuminate the task of reaching a decision, but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to

interpret it as containing such a list or to rigidly adhere to it as a checklist. That was said by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

62. **Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 confirms the breadth of the discretion available to us, but also says that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. The onus to establish that the time limit should be extended lies with the claimant.

63. The Employment Appeal Tribunal in **Concentrix CVG Intelligent Contact Ltd v Obi** [2022] 149 set out the correct approach to considering the just and equitable extension to incidents which together were a course of conduct, but which were out of time. We must both consider whether it is just and equitable to extend time for the whole compendious course of conduct and, if we decide that it is not, we must consider whether it is alternatively just and equitable to extend time in relation to each of the allegations in their own right.

64. In his submissions the respondent's representative also referred to the following authorities regarding time limits and the just and equitable extension: **Apelogun-Gabriels v Lambeth LBC** [2002] ICR 713, **Wells Cathedral School Ltd v Souter** EA-2020-000801 and **South Western Ambulance Service NHS Foundation Trust v King** [2019] UKEAT/0056/19.

Time limits/jurisdiction and the other claims

65. The time limit/jurisdiction rules for the claims for detriment as a result of having made a protected disclosure, automatic unfair dismissal, unauthorised deduction from wages, for holiday pay and for breach of contract, are different to those for discrimination and harassment.

66. The starting point is the wording of section 111 of the Employment Rights Act 1996. Section 111 (2) provides:

> **(2) Subject to the following provisions of this section an employment tribunal shall not consider a complaint under this section unless it is presented to the Tribunal –**
>
> **(a) before the end of the period of three months beginning with the effective date of termination, or**
>
> **(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably**

> **practicable for the complaint to be presented before the end of that period of three months.**

67. The period is, of course, extended by any period of ACAS Early Conciliation. Equivalent wording can be found in sections 11(4) and 48(3) of the Employment Rights Act 1996, Regulation 30(2) of the Working Time Regulations 1998, and (for the breach of contract claim) Regulation 7 of the Industrial Tribunals Extension of Jurisdiction (England and Wales) Order 1994. For the payment claims, the relevant date is the date when payment was due. For the detriment claims it is when the detriment occurred (or the last of a series of detriments). For the dismissal claim, it is when the claimant was dismissed.

68. Whether it was not reasonably practicable for the claim to be entered in time, is a question of fact for us to decide. Key to the question, is why the primary time limit was missed. We must apply the words of the relevant statute, that is whether it was not reasonably practicable. That does not mean: whether it was physically possible; or (simply) reasonable. Asking whether it was reasonably feasible to present the claim in time, is an alternative way of expressing the test (**Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119. In **Dedman v British Building and Engineering Appliances Ltd** [1973] IRLR 379 it was said:

> *"In my opinion the words 'not practicable' should be given a liberal interpretation in favour of the man. My reason is because a strict construction would give rise to much injustice which Parliament cannot have intended."*
>
> *"Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the* [time limit] *to pass by without presenting the complaint. If he was not at fault, nor his advisers - so that he had just cause or excuse for not presenting his complaint within the* [time limit] *- then it was 'not practicable' for him to present it within that time. The Court has then a discretion to allow it to be presented out of time, if it thinks it right to do so…"*

69. If an employee misses the time limit because he is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for him to bring the claim in time; but it is important that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made. If the employee retained a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee. The burden is on the claimant to show that time should be extended (**Porter v Bandridge Ltd** [1978] IRLR 271).

70. The respondent's representative also referred to **John Lewis Partnership v Charman** UKEAT/0079/11 and what was said in that case about internal appeals.

Protected disclosure claims

71. Section 43A of the Employment Rights Act says:

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

72. Section 43B says:

> **"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –**
>
> **(a) that a criminal offence had been committed, is being committed or is likely to be committed,**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered***"*

73. Section 43C provides that a disclosure to a worker's employer is a qualifying disclosure.

74. The word "*likely*" in section 43B requires more than a possibility or a risk that a person might fail to comply with a legal obligation or that health and safety is endangered, the information had to show that it was probable or more probable than not, that there would be a breach.

75. The necessary components of a qualifying disclosure are:

a. First, there must be a disclosure of information.

b. Secondly, the worker must believe that the disclosure is made in the public interest.

c. Thirdly, if the worker does hold such a belief, it must be reasonably held.

d. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B.

e. Fifthly, if the worker does hold such a belief, it must be reasonably held.

76. Unless all five conditions are satisfied there will not be a qualifying disclosure. Those steps are clear from the statute but were very clearly and helpfully summarised by HHJ Auerbach in **Williams v Michelle Brown AM** EAT/0044/19.

77. The first stage involves a consideration of whether there was a disclosure of information. The correct approach to the disclosure of information was set out in the decision of the Court of Appeal in **Kilraine v London Borough of Wandsworth** [2018] ICR 1850**.** In that decision they highlighted that, on occasion, an allegation could be so general and devoid of specific factual content that it would not be a disclosure of information. However, there is not a rigid dichotomy between an allegation and information.

78. It is necessary to consider whether the employee holds the belief that the disclosure tends to show one of the relevant forms of wrongdoing and whether that belief is reasonable. This involves subjective and objective elements. The test of what the claimant believed is a subjective one. Whether or not the employee's belief was reasonably held is an objective test and a matter for the Tribunal to determine.

79. In **Chesterton Global Ltd v Nurmohamed** [2018] ICR 731 Underhill LJ held that the same approach, involving both the objective and subjective elements, applies to the requirement that in the reasonable belief of the worker making the disclosure, it is made in the public interest. What is "in the public interest" does not lend itself to absolute rules. The broad intent behind the amendment to section 43B(1) to require a worker to believe that the disclosure was made in the public interest, was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle-blower. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

80. In his submissions the respondent's representative quoted at some length from the **Chesterton** judgment. We noted all that was said including the four relevant factors set out. Part of what he quoted was the following:

> "*I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract … may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never"*

81. The mental element required imposes a two-stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest; if so (ii) did he have reasonable grounds for so believing? The belief does not have to be the predominant motivation in making it (as motivation is different from belief).

82. In his submissions the respondent's representative also referred to the following cases regarding the law which applies to public interest disclosures: **Babula v Waltham Forest College** [2007] ICR 1026, **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, **Darnton v University of Surrey** [2003] ICR 615, **Dobbie v Felton t/a Feltons Solicitors** [2021] IRLR 679 and **Simpson v Canter Fitzgerald Europe** [2021] ICR 695.

83. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Under section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (where it is asserted that it was on the ground of having made a public interest disclosure). The employer must prove on the

balance of probabilities that the act, or deliberate failure, was not on the grounds that the employee had done the protected act.

84. In determining whether a claimant has suffered a detriment as a result of having made a public interest disclosure, the Tribunal must focus on whether the disclosure had a material influence, that is more than a trivial influence, on the treatment - **NHS Manchester v Fecitt** [2012] IRLR 64.

85. The correct approach is to place the burden of proof on the claimant in the first instance to show that a ground or reason (that is more than trivial) for detrimental treatment is a protected disclosure; then by virtue of 48(2) Employment Rights Act 1996 the respondent must be prepared to show why the detrimental treatment was done and if they do not do so adverse inferences may be drawn against them. Determining whether a detriment is on the ground that the worker has made a protected disclosure, requires an analysis of the mental processes (conscious or unconscious) of the employer acting as it did. It is, of course, not sufficient to demonstrate that 'but for' the disclosure, the employer's act or omission would not have taken place. The protected disclosure must have materially influenced the employer's treatment of the worker.

86. A worker is subject to a detriment if he is put at a disadvantage. The concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable worker might consider the relevant treatment to constitute a detriment.

87. It is also important to highlight that, in deciding whether or not a protected disclosure was made, or a worker was subjected to a detriment as a result, we do not need to decide whether the worker was correct when making the disclosure. It is not part of our role to determine whether or not the matter about which the worker blew the whistle was made out and (in this case) whether a criminal offence had been committed etc, or whether the health and safety of an individual had in fact been endangered.

88. For dismissal and section 103A of the Employment Rights Act 1996, the question is whether the principal reason for the dismissal was that the claimant made a public interest disclosure. When an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case. The employee does not have to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason.

Disability discrimination

89. The direct disability discrimination claim relies on section 13 of the Equality Act 2010 which provides that:

> **"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."**

90. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination

can occur and these include dismissal. The characteristics protected by these provisions include disability.

91. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

92. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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 sub-section (2) does not apply if A shows that A did not contravene the provision".**

93. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

94. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

95. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

96. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare, and that Tribunals frequently have to infer discrimination from all the material facts. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

97. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that a different employee without the disability would have been treated reasonably.

98. The way in which the burden of proof should be considered has been explained in many authorities, including: **Barton v Investec Henderson Crosthwaite Securities Limited** [2003] IRLR 332; **Shamoon v Chief Constable of the RUC** [2003] IRLR 285; **Hewage v Grampian Health Board** [2012] ICR 1054; **Igen Limited v Wong** [2005] ICR 931; **Madarassy v Nomura International PLC** [2007] ICR 867; **Royal Mail v Efobi** [2021] UKSC 33.

Harassment

99. Section 26 of the Equality Act 2010 says:

> **"A person (A) harasses another (B) if – (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of – (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."**
>
> **"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."**

100. The EAT in **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

101. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

102. In each case, even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask,

however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

103. When considering whether facts have been proved from which the Tribunal could conclude that harassment was on the prohibited ground, it is relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground, as the context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

Other claims

104. The claim for unauthorised deductions from wages was brought under section 23 of the Employment Rights Act 1996, relying upon the right under section 13 of the Employment Rights Act 1996 which provides that:

> "**An employer shall not make a deduction from the wages of a worker employed by him unless:**
>
> **(a) The action 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.**"

105. In practice we therefore needed to determine: whether the claimant was contractually due amounts which were not paid to him; whether the claimant was paid the same (or more than) he was entitled to in each payment of wages; and, if not, whether any deduction made from the payment of any wages, was otherwise authorised in one of the ways described and/or was reimbursement of an overpayment of wages. The respondent's representative referred to **Chief Constable of the Police Service of Northern Ireland v Agnew** [2024] ICR 51 regarding a series of deductions.

106. A breach of contract claim can only be brought in the Employment Tribunal if the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 applies.

107. When reaching our decision, we considered all that was said in both parties' submissions. The claimant's submissions focussed on the facts of the case rather than legal principles.

Conclusions – applying the Law to the Facts

Time limits and jurisdiction

108. We first addressed the time points set out in issue 1.3. That issue related to the claims for detriment as a result of having made a protected disclosure, automatic unfair dismissal for having made a protected disclosure, unauthorised deduction from wages, breach of contract, and regarding holiday pay. Whilst the provisions which apply to those claims can be found in different legal provisions as explained in

the legal section above, the tests regarding time and jurisdiction are materially the same and are those set out in issue 1.3.

109. The claim was not entered in the primary time limit which applied to each of those claims. For the protected disclosure detriment claim, the last date recorded on the list of issues was 17 June 2022. The claimant was dismissed on 13 July 2022. The last payment was due on 28 July 2022 at the very latest. The claim was entered at the Tribunal on 23 November 2022 with an ACAS Early Conciliation certificate referred to in that form which had a date of 16 November 2022 (only) for early conciliation. As a result, for claims which should have been brought within three months of the relevant date or payment date, none of the claims were brought within the three-month period required (even taking account of any extension for ACAS Early Conciliation).

110. We then needed to determine whether it had been reasonably practicable for the claimant to have brought his claims within time. We were told that the claimant has undertaken a Masters degree. He is an intelligent individual. We heard that he took advice from a solicitor. He went to the CAB. He spoke to ACAS some time before the claim was entered. He could have used the usual on-line resources available to all to identify time limits and how to enter claims. We found in this case that any ongoing internal procedures made no material difference to this issue as it did not mean it was not reasonably practicable for the claimant to enter the claim in the time required. We found that it was reasonably practicable or reasonably feasible for the claimant to have entered those claims at the Tribunal within the time required.

111. As a result of that decision, we did not have jurisdiction to determine any of the claimant's complaints for detriment as a result of having made a protected disclosure, automatic unfair dismissal for having made a protected disclosure, unauthorised deduction from wages, breach of contract, or regarding holiday pay. Those claims could not succeed.

112. We then considered issues 1.1 and 1.2, which applied to all of the claimants' discrimination and harassment complaints.

113. The direct discrimination claim related to the claimant's dismissal, which occurred on 13 July 2022.

114. The harassment complaint arose from alleged comments made in mid-June, with the last date for those comments being 17 June 2022. Those comments were alleged to have been made by Mr Rangaraj. We found that the decision to dismiss the claimant was a decision made by Mr Sharples and not Mr Rangaraj. Mr Sharples made the decision based on the performance and conduct that he had observed. We found him to be a thoroughly reliable witness. We accepted his evidence. We noted the difference in the identity of the alleged harasser and the person we have determined made the decision to dismiss. One was a decision about performance, one was alleged harassment. We did not find that the harassment and the dismissal were together conduct extending over a period.

115. As a result, the claim was entered out of time for both the allegations of direct discrimination and harassment. For the direct discrimination the claim was entered

approximately one month late. For the alleged harassment, the complaint was entered approximately two months outside the time required.

116. We then needed to decide whether it was just and equitable to extend time for either or both of those complaints. We have already recorded that the claimant could have ensured that he was aware of time limits, and he could have entered the claim earlier within the time required. However, the matters to be taken into account for the just and equitable test differ from those which apply to the reasonably practicable test. Key is the balance of prejudice to the parties. There was very limited prejudice to the respondent as a result of the delay, the respondent having in practice been able to call evidence and defend the claims. The only prejudice was having to be able to defend the claims brought out of time. The delay was for a limited period of time, even for the harassment allegations. The respondent was able to call as witnesses the key people involved. The potential prejudice to the claimant of not extending time would have been significant as he would have been unable to have had determined his claims for harassment and discrimination. Balancing those factors, whilst being mindful of the importance of time limits, we found that it was just and equitable to extend time for the discrimination and harassment complaints. Accordingly, and as a result, we found that we did have jurisdiction to consider the claims for discrimination and harassment.

Protected disclosure

117. We then considered issue five, whether the claimant had made a protected disclosure. We did not need to do so because of our decision on time/jurisdiction, but having heard the evidence, we felt it appropriate to do so in any event. We needed to consider issue five (whether there was a protected disclosure) before considering issue two (whether the dismissal was automatically unfair because the principal reason was that the claimant had made a protected disclosure).

118. Issue 5.1.2 asked whether the claimant disclosed information, when he sent his email of 28 April 2022 to the respondent's Peakon email address? The message was the claimant's answer to the question whether he was given enough freedom to decide how to do his work (235). We found that he did. The message sent did include information in the answer which the claimant gave.

119. Issue 5.1.3 was whether the claimant believed that the disclosure of information which he made in that message was in the public interest? We found that he did not. We looked carefully at the message and what was said in it. It was clear to us that the disclosure made was about the claimant's own circumstances. He referred to "*my*" contract, what had occurred after "*I joined*" the respondent, and that "*I*" have no freedom. The claimant submitted that he made the disclosure for the betterment of the company and culture, because he said that the environment was toxic. He emphasised that when giving evidence at the hearing. We acknowledged that someone could disclose information about their own personal circumstances whilst also believing that it is more broadly in the public interest to do so. Based upon what was said in the message itself, we did not accept the claimant's evidence about why he made the disclosure or that he believed it was made for the betterment of the company or in the interests of others. The questions asked on the Peakon system focussed upon the personal experience of the responder. The claimant's answer was only about circumstances he had personally experienced. We did not find that the

claimant genuinely believed that what he was disclosing was in the public interest. As a result, the disclosure made was not a protected disclosure.

120. Even had the claimant in fact personally believed that what he was disclosing was in the public interest (which we have not found he did), we would not have found that to have been a reasonable belief considering the information which the claimant did in fact disclose (issue 5.1.4). We noted the respondent's representative's submissions based upon the decision in the **Chesterton** case and accepted they were correct and applied to this disclosure of information. As a result of the decisions we made, we did not need to consider issues 5.1.5 or 5.1.6.

Automatic unfair dismissal

121. Issue two asked whether the principal reason for the claimant's dismissal was that he made a protected disclosure. We have found that we did not have jurisdiction to consider that claim because the claim was not entered within the time required. We have also found that the disclosure made was not a qualifying or protected disclosure. The claim therefore could not succeed. However, even had we found that we could determine the claim and the disclosure was protected, we would not have found that the principal reason for the dismissal was the disclosure made.

122. We accepted Mr Sharples' evidence. It was his evidence that he dismissed the claimant because of the lack of performance and conduct, for the reasons Mr Sharples' explained (and detailed in his decision letter). We accepted it was Mr Sharples' own decision. He was unaware of the disclosure relied upon as having been a protected disclosure, and we accepted his evidence as true that he was not aware. The disclosure was not the principal reason (or any part of the reason) why Mr Sharples decided to dismiss the claimant.

123. There were some issues recorded within issue three which it had been agreed we would consider alongside the liability issues. As we have not found that the claimant was unfairly dismissed, it was not necessary for us to go on and determine those issues.

Breach of contract

124. Issue four addressed the claimant's breach of contract claim for notice. We have found that we did not have jurisdiction to consider that claim as it was not entered within the time required. However, we found that the claim itself would not have succeeded in any event. The claimant was entitled to one week's notice and was paid in lieu of one week's notice. The contract to which he agreed (181) expressly stated that it incorporated the employee terms set out in the other terms and conditions document. We were shown the email which had been sent to the claimant which clearly include a link to those terms. We accept that the claimant did not read the attached terms, but that did not mean that the terms did not form part of the contract of employment as a result of what was said on the first page of the main contract document. Within those terms, clause 9.2 provided that the respondent was able to make a payment in lieu of notice in satisfaction of the balance of the notice period. The respondent did make a payment in lieu of notice as clearly set out on the payslip of 28 July 2022 (403). As a result, the respondent did not breach the claimant's contract of employment when it paid the claimant in lieu of notice, even

though it did not give him the period of notice to which he would otherwise have been entitled.

Detriment

125. Issue six set out the issues in the claimant's claims for detriment as a result of having made a protected disclosure. We have found that we did not have jurisdiction to determine those complaints because the claim was not entered in time. We have also found that the disclosure relied upon was not a protected disclosure. As a result, we did not need to consider the detriments alleged and, in this Judgment, will not record the conclusions that we reached in the same detail as we would have done had we needed to do so.

126. In his submissions, the respondent's counsel submitted that: the claimant's performance in cross-examination demonstrated him to be an unreliable witness and that when the claimant was pushed to answer specific questions on details, it became clear that the claimant's recollection was at best hazy, and his evidence should be treated cautiously as a result; there were instances where it was clear that something had been 'lost in translation' or otherwise misconstrued by the claimant out of its original context or intention; that parts of the claimant's evidence were indicative of the claimant changing the narrative to suit what he perceived to be in his best interest at a given time; and that the claimant's recollection of dates was notably hazy. We agreed with all of those submissions. We found the claimant's evidence to be unreliable and, in many cases, lacking in specifics. It was clear that he could not recall the specific details of specific meetings, or even on occasion the meetings themselves. He could not give reliable evidence about the accuracy of the notes of those meetings.

127. Allegation 6.1.1.1 was that Mr Rangaraj took the claimant to an interview room to make him aware that he was unhappy with the claimant having raised his comments through Peakon. Mr Rangaraj denied that he had. We accepted that denial as truthful. We found that what was alleged did not happen.

128. Allegation 6.1.1.2 was that Mr Rangaraj made comments that the claimant should leave the employment of the respondent. Mr Rangaraj did talk to the claimant about whether the job was right for him, which was something Mr Rangaraj accepted. That was very different to what was alleged as being the detriment. Mr Rangaraj denied that he said what was alleged. We did not find that he said what was alleged. For the words he did say, Mr Rangaraj did not say them because the claimant had made the disclosure relied upon (nor were they influenced by it), it was said because of the claimant's performance in the role.

129. Allegation 6.1.1.3 was that Mr Rangaraj shouted and swore at the claimant. We did not find that he did, albeit we accepted that he might have raised his voice to the claimant. On this serious allegation we preferred Mr Rangaraj's evidence to that of the claimant. We also found the evidence about precisely what the claimant alleged had been said, to support the conclusion that we reached. In his evidence, the claimant alleged that Mr Rangaraj used an abusive word towards him which was a Hindi word ("*Banchood*"). We accepted Mr Rangaraj's evidence that it was not a word that he would use because he did not speak Hindi (he is a Tamil speaker). We

did not find it believable that Mr Rangaraj would have used a word directed at the claimant in Hindi when he was not a Hindi speaker.

130. Allegation 6.1.1.4 was that Mr Rangaraj monitored the claimant's laptop. There was no genuine evidence whatsoever that anyone had monitored the claimant's laptop.

131. Allegation 6.1.1.5 was that Mr Rangaraj had instructed the claimant's colleagues to monitor his work with a view to raising issues to get him into trouble. This related to the claimant's allegation that Mr Rangaraj had caused the numerous complaints about the claimant's performance to be raised, including those raised in an email from an employee in India. Mr Rangaraj denied this allegation. We did not find that he did what was alleged. We found the allegation made to be far-fetched and wholly implausible and we accepted Mr Rangaraj's clear evidence that he did not.

132. As a result, even had we found that the claimant was able to pursue his claims for detriment and that the disclosure relied upon had been a protected disclosure, we would not have found that the claimant was subjected to the detriments that he alleged, or that anything which did occur (as we found for 6.1.1.2) was as a result of the disclosure which he had made.

Disability discrimination

133. As was recorded at issue eight, the respondent accepted that the claimant had a disability at the relevant time by reason of epilepsy.

134. Issue nine was the claimant's direct disability discrimination claim. The less favourable treatment relied upon was dismissal. The claimant was dismissed. We found that the reason for the claimant's dismissal was his performance and conduct, as evidenced by Mr Sharples. As we have said, we accepted that Mr Sharples made the decision to dismiss, and it was his decision alone. We noted the comprehensive dismissal letter which he wrote (401) which went into great depth about the claimant's lack of performance (and conduct). We found that the claimant's disability did not have any influence on the dismissal decision.

Harassment

135. Issue ten addressed the claimant's allegations of harassment related to disability. What was alleged was that Mr Rangaraj said the things alleged in mid-June 2022. What exactly was alleged is set out in the list of issues at 6.1.1.1 to 6.1.1.5 (and we will not re-produce it here).

136. We looked at what was alleged in the context of the documentary evidence available to us about what occurred. In summary the position was as follows:

a. In the bundle of documents, we were provided with a lengthy note of a meeting which Mr Rangaraj had with the claimant on 24 May 2022 (245), which had also been attended by Ms Dequeker. That meeting followed on from the claimant informing the respondent about his epilepsy. What was said in that meeting appeared (in relation to the claimant's health) supportive and appropriate;

b. Following the meeting, on 26 May, Mr Rangaraj sent an email explicitly referring to the discussion about the claimant's medical condition in the meeting and offering the claimant more support to help manage workload and performance (248);

c. A referral was made to occupational health by Mr Rangaraj;

d. In the occupational health report, it was recorded that it was the adviser's understanding that there were adjustments in place including reduced workload and a buddy to assist; and

e. The email from Mr Rangraj to the claimant of 17 June (267), sent following a meeting the previous day, confirmed that Mr Jones had also attended that meeting. When the claimant subsequently made allegations about Mr Rangaraj's conduct, Mr Jones responded to say that he did not recognise the description of Mr Rangaraj and recounted what Mr Jones said he had said in the meeting that the claimant's health was of great concern to him, and he would like to see if they could improve his level of performance without in any way compromising his health.

137. We did not find that those documents suggested that Mr Rangaraj had acted as the claimant alleged. In particular, we found that what it was alleged Mr Rangaraj had said appeared not consistent with the fact that Mr Rangaraj had referred the claimant to occupational health.

138. For all of the alleged harassment, there was a direct dispute of evidence about what was said to the claimant in a meeting in mid-June. We have already explained our view of the claimant's evidence. On these allegations it was not entirely clear when exactly it was alleged the comments had been made, but to the extent it was alleged that they were made at the meeting of 16 June (recounted in the email of 17 June) when Mr Rangaraj's manager had also been present, what was alleged was entirely inconsistent with the documentary evidence. If, as appeared to be the case, it was alleged the comments had been made in a separate meeting with only the claimant and Mr Rangaraj present, the claimant's inability to provide precise evidence about when that had happened did not assist the credibility of his evidence. Mr Rangaraj denied that he said any of the things alleged. We did not find that Mr Rangaraj would have said what was alleged or did so on the occasion alleged. We preferred the evidence of Mr Rangaraj about these allegations to that of the claimant. Applying the burden of proof, we did not find that the claimant had shown what was required to shift the burden of proof in respect of the harassment allegations.

139. We would add that we also noted the content of the occupational health report of 20 June (269). That report stated that the claimant was fit for his role without further adjustment, and it said that the physician did not consider that the claimant's performance issues were related to the claimant's medical condition.

140. Had we found that Mr Rangaraj said the things alleged, we would have found that what was alleged was unwanted conduct (issue 10.2). What was alleged would have been found to have been related to disability (issue 10.3). As we have not

found that he said what was alleged, we did not need to go on and determine issues 10.4 or 10.5, nor did we determine issue 11.7.

Holiday pay

141. Issue twelve related to holiday pay. We have found that we did not have jurisdiction to determine a claim because the claim was not entered within the time required.

142. In his submissions, the respondent's representative set out a very clear and fully calculated account of the holiday accrued by the claimant, the amount taken, and the entitlement to pay in lieu which resulted on termination. We accepted his breakdown as being accurate (and will not reproduce it in this Judgment). His conclusion was that the claimant had, if anything, been slightly overpaid applying the calculation required under the Working Time Regulations.

143. The payslip of 28 July 2022 (403) showed that the claimant had been paid in lieu of annual leave by the very clear statement on the payslip about "*holidays*" and the payment made for it. It was also clear that, initially, the respondent had failed to pay the claimant in lieu of all of his entitlement to contractual holiday pay, as a further payment was made for holidays as recorded in the payslip of 28 November 2022 (402). That additional payment was made as a result of the decision of Ms Lovibond in the claimant's grievance (explained in her letter of 29 September 2022 (378)). That decision appeared to relate to contractual entitlement and not to entitlement under the Working Time Regulations. To that extent, the claim had some merit. However, once both payments in lieu of accrued but outstanding annual leave had been made, it appeared that the claimant had received the sums to which he was entitled.

144. It was for the claimant to prove that the respondent had failed to pay to him a sum due in respect of annual leave. The claimant did not do so.

Unauthorised deduction from wages

145. Issue thirteen, the last issue, was in respect of the claimant's unauthorised deduction from wages claim. That claim was not brought within the time required and therefore we did not have jurisdiction to determine it.

146. We have already explained how this claim had been recorded in the claim form and the case management orders. We therefore restricted our decision to the claim as it had been recorded in the case management order following the hearing on 19 October 2023.

147. In practice, the claimant's claim was that he was entitled to pay for the additional hours which he worked to fulfil his duties. He clearly contrasted his position with those engaged through an agency who it appears were paid based upon hours worked. The claimant was a salaried employee, so was not remunerated based upon the number of hours worked. We found that the claimant was not entitled to pay for additional hours worked unless those hours were authorised by the respondent (in advance). The claimant cannot simply claim that there was an unauthorised deduction from his pay because he in fact chose to work additional

hours for which overtime authorisation was never obtained. In any event, the claimant's evidence was so vague on this issue, that we could not have found that any specific deductions had been made and for what overtime he should have been paid (even had we found any such entitlement). He did not evidence any specific hours for which he arguably should have been paid nor did he evidence exactly what overtime he had in fact worked, as his evidence was vague, non-specific and changed during the hearing.

Summary

148. For the reasons explained above, we did not find for the claimant in any of his claims.

Employment Judge Phil Allen

10 May 2024

JUDGMENT AND REASONS
SENT TO THE PARTIES ON
20 May 2024

FOR THE TRIBUNAL OFFICE

Annex - The List of Issues

1. The issues the Tribunal will decide are set out below.

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 17 July 2022 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

- 1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
- 1.2.2 If not, was there conduct extending over a period?
- 1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
- 1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
  - 1.2.4.1 Why were the complaints not made to the Tribunal in time?
  - 1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unfair dismissal / unauthorised deductions/ unpaid holiday pay claim made within the relevant time limits? The Tribunal will decide:

- 1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension)?
- 1.3.2
- 1.3.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
- 1.3.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed.

3. Remedy for unfair dismissal

3.1 n/a

3.2 n/a
3.3 n/a
3.4 n/a
3.5 n/a

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

3.6.1 n/a
3.6.2 n/a
3.6.3 n/a
3.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.6.5 If so, should the claimant's compensation be reduced? By how much?
3.6.6 n/a
3.6.7 n/a
3.6.8 n/a
3.6.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
3.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.6.11 n/a

3.7 n/a
3.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Wrongful dismissal / Notice pay

4.1 What was the claimant's notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. Protected disclosure

5.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide whether the following was a qualifying disclosure:

5.1.1 By email on 28 April 2022, the claimant sent to the respondent's Peakon email address (which was for anonymous submissions), the following: 'My Contract is 9 to 5 and 1 hrs break but after I joined in BNY Mellon I have no

freedom and almost working 10 hrs to 11 hrs with no break also break the health & safety law. Short break was given after finished the task'

5.1.2 Did the claimant disclose information?
5.1.3 Did the claimant believe the disclosure of information was made in the public interest?
5.1.4 Was that belief reasonable?
5.1.5 Did the claimant believe it tended to show that:

5.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation;

5.1.6 Was that belief reasonable?

5.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

6. Detriment (Employment Rights Act 1996 section 48)

6.1 Did the respondent do the following things:

6.1.1 Between mid-June and 17 June 2022, did Mr Rangaraj

6.1.1.1 take the claimant to an interview room to make him aware that he was unhappy with the claimant having raised his comments through Peakon,
6.1.1.2 make comments that the claimant should leave the employment of the respondent,
6.1.1.3 shout and swear at the claimant,
6.1.1.4 monitor the claimant's laptop
6.1.1.5 instruct the claimant's colleagues to monitor his work with a view to raising issues to get him into trouble.

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

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

7. Remedy for Protected Disclosure Detriment

7.1 n/a
7.2 n/a
7.3 n/a
7.4 n/a
7.5 n/a
7.6 n/a
7.7 n/a
7.8 n/a
7.9 n/a

7.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

7.11 Was the protected disclosure made in good faith?

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

8. Disability

8.1 It is accepted that the claimant had a disability at the material times by reason of the impairment of epilepsy.

9. Direct disability discrimination (Equality Act 2010 section 13)

9.1 It is not disputed that the respondent dismissed the claimant.

9.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

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

9.3 If so, was it because disability?

10. Harassment related to disability (Equality Act 2010 section 26)

10.1 Did the respondent do the following things:

10.1.1 Did Mr Rangaraj around mid-June 2022 after being provided with a doctors note of 05 May 2022 informing him of the claimant's epilepsy and the need to work with him to remove stress from his work, say to the claimant words to the effect:

10.1.1.1 'you are an epilepsy patient, if anything happens to you then the respondent are not taking responsibility during the job'

10.1.1.2 'your epilepsy issue is your personal health problem, we do not care about your personal health problem'

10.1.1.3 'you have to leave this job because of your health issue'.

10.2 If so, was that unwanted conduct?

10.3 Did it relate to disability?

10.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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

11. Remedy for discrimination

11.1 n/a
11.2 n/a
11.3 n/a
11.4 n/a
11.5 n/a
11.6 n/a

11.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

11.8 n/a
11.9 n/a
11.10 n/a
11.11 n/a
11.12 n/a

12. Holiday Pay (Working Time Regulations 1998)

12.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

13. Unauthorised deductions

13.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?

14. Remedy

14.1 n/a