EMPLOYMENT TRIBUNALS

Claimant: Mr G Braithwaite

Respondent: Richmond Villages Operations Limited

Heard at: Reading Employment Tribunal **On:** 8, 9, 12 to 15 August 2024, 16 August 2024 and 7 & 8 October 2024 (discussion days in chambers.

Before: Employment Judge George, Mrs A Brown, Ms H Edwards

Representation
Claimant: Mr R Braithwaite, claimant's brother
Respondent: Ms J Ferrario, counsel

RESERVED JUDGMENT

1. The complaints of :

   a. Unlawful detriment on grounds of protected disclosure contrary to s.47B Employment Rights Act 1996 (hereafter the ERA);

   b. Unlawful detriment on grounds of health & safety concerns (s.44 ERA); and

   c. Automatic unfair dismissal (s.103A and s.100 ERA)

   are dismissed on withdrawal by the claimant.

2. The complaint of breach of duty to make reasonable adjustments based upon alleged PCP1 (requirement to use a labelling gun up to and including August 2019) is dismissed on withdrawal by the claimant.

3. The unfair dismissal complaint is not well founded and is dismissed.

4. The complaint of discrimination for a reason arising from disability is not well founded and is dismissed.

5. The complaint of breach of the duty to make reasonable adjustments is not well founded and is dismissed.

6. The complaint of indirect disability discrimination is not well founded and is dismissed.

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

8. The complaint of breach of contract is not well founded and is dismissed.

9. For the avoidance of doubt, all complaints are dismissed.

10. The remedy hearing presently listed for 9 January 2025 is vacated.

REASONS

1. The claimant was employed by the respondent as a Laundry Assistant and Cleaner from 9 April 2019 to 11 November 2021. Following a period of conciliation which lasted between 26 January 2022 and 8 March 2022 the claimant presented a claim on 6 April 2022. The claim form bears a date stamp showing when it was received by the tribunal and then a second date stamp which appears to have been amended in manuscript. There were two case management hearings on 23 January 2023 (page 65) and 16 February 2023 (page 79). In both of those Employment Judge Shastri-Hurst noticed the apparent amendment of the date of presentation which appear to have been altered into a date in May.

2. We have the benefit of having the paper file available and were able to confirm to the parties from the internal communications retained on the paper file that, when the claim form was received, it was referred to a Legal Officer because there was no early conciliation certificate for the proposed second respondent (BUPA). They directed that the claim should be accepted against the first respondent only (Richmond Villages) by internal correspondence dated 19 May 2022. Our supposition is that the administration, in error, amended the date to the date of that direction. In fact there was no defect in the case as it was presented against Richmond Villages and it should be treated as having been presented on 6 April 2022. An in-time grounds of response was received on 29 June 2022.

3. The claimant described his impairment for the disability discrimination claim as Autistic Spectrum Disorder. It was noted by Judge Shastri-Hurst that he would need regular breaks and more time to process questions and provide answers when giving evidence. When he was giving evidence we had a 10-minute break every hour. It was made clear to Mr Gurney Braithwaite that he could request additional breaks whenever he wished either just to take time in the hearing room or to leave it if that was preferable. I reminded Ms Ferrario of the need to take his vulnerability into

account in the way that questions were phrased. This meant the questions were kept short and asked in an open way, avoiding tag questions. The aim was ensure that Mr Gurney Braithwaite should be able to give his own evidence and not feel any pressure to agree with what was being suggested to him. I assured him at the start of giving his evidence that we wish to know his own genuine views and recollections so if he did not remember what happened on a particular occasion it was fine to say so. I also made sure he understood that if he didn't agree with the suggestion, he should say so.

4. His brother was acting as his representative and presents as a competent individual. He was understandably anxious about his own lack of familiarity with legal concepts and processes. I took time to explain the procedure that would be followed during the hearing, the expectation that the tribunal has of what needs to be asked in cross-examination and, in due course, about what needed to be covered in closing submissions.

5. We have had the benefit of a joint Main Bundle of documents. Page numbers in that Main Bundle referred to as pages 1 to 467 in these reasons. Each party disputed the relevance of number of documents that the other side wish to rely on and, as directed by Judge Shastri-Hurst, had prepared separate supplementary bundles. The claimant's is referred to in these reasons as CB pages 1 to 863 and the respondent's as RB pages 1 to 86. We asked the parties at the start of Day 1 whether either side objected to the supplementary bundle of the other side going in evidence. Both sides stated that they were content that we should be able to read the material in both supplementary bundles and decide whether any was relevant to any of the issues to be decided. We did not therefore have to adjudicate on the admissibility of any of the contents of those supplementary bundles.

6. The root cause of the claimant's objection to the majority of the documents in the Respondent's Supplementary Bundle seemed to be a concern about whether documents sent by people directly employed by BUPA Care Services, or on BUPA headed notepaper could be regarded as genuinely acts done by on behalf of a different legal entity, Richmond Villages Operations Limited, which was the actual employer. The respondent in the present case (Richmond Villages Operations Limited) is owned by BUPA and some services are carried out on behalf of this respondent by individuals whose own employer is another company in the group.

7. For example, Mrs Collier is employed by BUPA Care Services Ltd but has done work for Richmond Villages Operations Limited. It was not necessary to go into the legal technicalities in detail in the hearing but, to take Mrs Collier as an example, she would be acting as agent for Richmond Villages Operations Limited in those circumstances. This respondent does not argue that any of the acts complained of by the claimant in the litigation were done by people for whom Richmond Villages is not responsible because they are employed by BUPA. The claimant does not appear to say that acts of individuals who are employed by a different legal entity in the group cannot be regarded as acts done on behalf of this respondent. The claimant raises a slightly different point that he found it

confusing to receive communications from a different legal entity. Setting that to one side it is clear that there are documents in the Respondent's Supplementary Bundle that the claimant needs to rely on as acts by his employer, despite the fact that they are written on BUPA headed notepaper; the dismissal letter at RB page 66 is a case in point. In those circumstances, it was necessary to admit the documents in the Respondent's Supplementary Bundle into evidence, subject to any cross-examination there might be in respect of individual documents that they did not represent the act of this respondent. In fact, that was never raised.

8. In addition to giving evidence in support of his case the claimant relied on the evidence of his brother and both adopted witness statements that had been prepared by Mr Rowan Braithwaite. They were cross-examined on them. Mr Rowan Braithwaite made a number of corrections to his before it was adopted but these were of a relatively minor nature. Two witnesses who had prepared statements in support of the claimant were taken as read: those of Mrs H Cook and Ms S Briggs. The respondent had sent to the claimant statements prepared on behalf of three witnesses. Dominic Kiewiet (the Deputy Manager at the Village) and Rebecca Collier (now Head of People) gave oral evidence and were cross examined upon witness statements that they adopted.

9. In advance of Day 1, the respondent applied for permission to rely upon the witness statement of James Bradford despite the fact that they had been unable to make contact with him and secure his attendance at the hearing. The claim had originally been listed to be determined at a final hearing in January 2024 but had been postponed because of the non-availability of the judge/tribunal. The claimant pointed out that the witness statement was as yet unsigned and could not therefore be relied on, without more, as representing the evidence that Mr Bradford would have given had he attended. As Mr R Braithwaite put it, since as it was unsigned, the statement of truth was not engaged and, in his mind, it was not a witness statement and could not even be considered to be hearsay evidence.

10. On the morning of Day 3 we informed the parties of our decision on the respondent's application to rely on the statement and provide our written reasons for that decision here.

11. Overnight between Day 1 and Day 2 the respondent had disclosed emails between Mr Bradford and Gurvinder Bains, - solicitor with conduct of the representation on behalf the respondent - which evidence that a draft witness statement bearing James Bradford's name (identical to that exchanged with the claimant) was sent to him for approval and then he sent an email stating that it was approved. The emails form part of a sequence and we found that they were reliable evidence that the statement was approved by the proposed witness even though not signed by him. We accept that the draft statement is the documentary hearsay evidence of James Bradford. That will be admitted into evidence as hearsay evidence but the weight given to it – particularly where the contents are disputed – will be affected by the fact that Mr Bradford has not attended to be cross-examined upon it.

12. The case was timetabled at the outset with a decision being taken for the claimant to start giving evidence at the beginning of Day 2. This had the advantage that he was completed by the end of the tribunal day and was not embargoed from discussing the case with his brother and representative overnight from one day to the next. It was necessary to start a little late on Day 3 to accommodate a personal appointment by a member of the tribunal and Mr Kiewiet was not available to give evidence on Day 4 so Mrs Collier was interposed. The original timetable had to be amended in part because Ms Ferrario needed longer than she had expected in order to cross-examine Mr Rowan Braithwaite, in part to accommodate Mr Kiewiet's availability and in part because Mr Braithwaite asked for preparation time between the end of Mrs Collier's evidence and the resumption of Mr Kiewiet's and then between the end of Mr Kiewiet's evidence and the start of submissions. The tribunal granted this request. We also had a Supplementary Bundle for Written Submissions which had collated the relevant regulations passed under the Health & Social Care Act 2008 and other parliamentary papers (referred to in these reasons as the Regs bundle).

13. The parties exchanged written submissions with the respondent's representative sending hers to the claimant on the evening of Day 5 and the claimant sending his shortly before the start hearing on Day 6. We heard oral submissions from them both and are grateful for their assistance. In these reasons, Ms Ferrario's submissions are referred to as RSUB and Mr R Braithwaite's as CSUB. In addition, there was a respondent's chronology and cast list which were not agreed documents.

14. As a consequence of the amended timetable, the tribunal decided that it did not have enough time to reach a decision on all issues and deliver oral judgement within the seven days allocated and reserved judgement. In fact it was not possible to conclude our deliberations within the seven days allocated and a further two days as discussion days and judgement writing were added. A provisional remedy hearing was listed before the parties departed on Day 6. As a result of our decision, this will not be needed and is vacated.

List of issues to be decided in the case

15. When he started his oral submissions, Mr Rowan Braithwaite - on behalf of his brother - withdrew a number of claims and those are dismissed on withdrawal (see within the judgment above). As a consequence there are some areas of disputed evidence, about which we do not need to make findings in order to decide the remaining issues in dispute. Those areas are:

    a. The use of the labelling gun;

    b. Whether the email of 1 April 2020 was actually sent;

    c. Whether it or the email of 12 May 2020 was a protected disclosure or communication of a health & safety concern

16. The claimant does rely on those allegations nevertheless as part of a pattern of the respondent allegedly not responding to his questions or concerns (see LOI 2.3.3). There is no positive evidence that the 12 May 2020 email was ever responded to.

17. Subject to those changes, the issues to be decided remain those clarified at the preliminary hearing on 16 February 2023. For convenience, they are found in the Appendix to this reserved judgment.

The Law applicable to the issues which remain to be decided

18. Once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

> "Section 98 Employment Rights Act 1996
>
> 1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>   a. the reason (or, if more than one, the principal reason) for the dismissal, and
>   b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> 2. A reason falls within this subsection if it-
>   a. Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>   b. Relates to the conduct of the employee,
>   c. Is that the employee was redundant, or
>   d. is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
> 3. In subsection (2)(a)—
>   (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
>   (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
> 4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-
>   a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>   b. shall be determined in accordance with equity and the substantial merits of the case."

<u>Discrimination arising from disability</u>

19. Section 15 Equality Act 2010 (hereafter the EQA) provides as follows:

> **"15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

20. Discrimination arising from disability is where the reason for the unfavourable treatment is something arising in consequence of disability. The example given in the EHRC Code of Practice on Employment (2011) (hereafter the EHRC Employment Code), is dismissal for disability related sickness. Another might be a requirement that an employee take annual leave to attend medical appointments for a disabling condition; they need regular absences for medical treatment in consequence of their disability and they are required to take annual leave to do that. It should not be forgotten that the treatment must be unfavourable nor that the defence of justification is available in claims of s.15 discrimination.

> "In considering whether the example of the disabled worker dismissed for disability-related sickness absence amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it."
>
> *EHRC Employment Code paragraph 5.6.*

21. The importance of breaking down the different elements of this cause of action was emphasised by Mrs Justice Simler in Pnaiser v NHS England [2016] I.R.L.R. 160 EAT at paragraph 31,

> "the proper approach can be summarised as follows:
> (a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant […].

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g)[…].

(h) Moreover, the statutory language of s.15(2) makes clear […] that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. […]

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

22. The Court of Appeal considered s.15 EQA in City of York Council v Grosset [2018] ICR 1492 CA and held as follows:

    a. On its proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability?

b. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant “something”.

c. The second issue is an objective matter, whether there is a causal link between B's disability and the relevant “something”.

d. Section 15(1)(a) does not require that A must be shown to have been aware when choosing to subject B to the unfavourable treatment in question that the relevant “something” arose in consequence of B's disability.

e. The test of justification is an objective one, according to which the employment tribunal must make its own assessment: see *Hardy & Hansons plc v Lax [2005] ICR 1565*, paras 31–32, and *Chief Constable of West Yorkshire Police v Homer [2012] ICR 704*, paras 20, 24–26 per Baroness Hale of Richmond JSC, with whom the other members of the court agreed. What is required is an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition. This is for the respondent to prove.

23. The other potential defence is lack of knowledge of disability. This requires the respondents first to show that they did not know and could not reasonably have been expected to know that the claimant was disabled (constructive knowledge is discussed in the case of Gallop v Newport City Council [2013] EWCA Civ 1583 CA)

Breach of the duty to make reasonable adjustments

24. The obligation upon an employer to make reasonable adjustments in relation to disabled employees so far as it is relevant to this claim is found in ss. 20, 21, 39 and 136 and Schedule 8 EQA 2010.

a. By s.39(5) the duty to make reasonable adjustments is applied to employers;

b. By s.20(3) and Sch.8 paras.2 & 5 that duty includes the requirement where a PCP applied by or on behalf of the employer puts a disabled person, such as the claimant, at a substantial disadvantage in relation to his employment in comparison to persons who are not disabled to take such steps as are reasonable to have to take to avoid the disadvantage.

c. When considering whether the duty to make reasonable adjustments has arisen, the Tribunal must separately identify the following: the PCP (or, if applicable the physical feature of the premises or auxiliary aid); the identity of non-disabled comparators and the nature and extent of the substantial disadvantage: Environment Agency v Rowan [2008] ICR 218 EAT.

d. By s.21 a failure to comply with the above requirement is a failure to comply with a duty to make reasonable adjustments. The employer discriminates against their disabled employee if they fail to comply with the duty to make reasonable adjustments.

e. By s.136 if there are facts from which the tribunal could decide, in absence of any other explanation, that the employer contravened the Act then the tribunal must hold that the contravention occurred unless the employer shows that it did not do so. The equivalent provision of the Disability Discrimination Act 1995 (DDA 1995), which was repealed with effect from 1 October 2010 upon the coming into force of the EqA 2010, was interpreted in Project Management Institute v Latif [2007] IRLR 579 EAT in relation to an allegation of a breach of the duty to make reasonable adjustments to mean that the claimant must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. This requires evidence of some apparently reasonable adjustment which could be made.

f. Sch 8 para. 20 provides that the employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that the employee has a disability and is likely to be placed at the disadvantage in question.

25. It is clear from paragraph 4.5 of the Equality and Human Rights Commission (EHRC) Code of Practice Employment (2011) that the term PCP should interpreted widely so as to include “any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.”

26. The duty imposed on an employer to make reasonable adjustments was considered at the highest level in the case of Archibald v Fife Council [2004] IRLR 651 HL where it was described as being “triggered” when the employee becomes so disabled that he or she can no longer meet the requirements of their job description. In Mrs Archibald’s case her inability, physically, to carry out the demands of her job description exposed her to the implied condition of her employment that if she was not physically fit she was liable to be dismissed. That put her at a substantial disadvantage when compared with others who, not being disabled, were not at risk of being dismissed for incapacity. Thus the duty to make reasonable adjustments arose.

27. Lord Rodgers made the point, as appears from paragraph 38 of the report of Archibald v Fife Council, in relation to the comparative part of the test that the comparison need not be with fit people who are in exactly the same situation as the disabled employee. This was relied upon in Fareham College Corporation v Walters [2009] IRLR 991 EAT where it was explained that the identity of the non-disabled comparators can in many cases be worked out from the PCP. So there the PCP had been a refusal to allow a phased return to work and the comparator group was other employees who were not disabled and were therefore forthwith able to attend work and carry out their essential tasks; the comparators were

not liable to be dismissed whereas the disabled employee who could not do her job, was.

28. In Archibald v Fife Council, having posed the question whether there were any adjustments which the employer could have made to remove the disadvantage and when considering the adjustments which were made Lord Hope explained ([2004] IRLRL 651 at page 654 para.15) that,

> "The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies"

29. Furthermore (at para.19);

> "The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability."

30. The requirement on the employer is, in the words of s.20, to take "such steps as it is reasonable to have to take to avoid the disadvantage". The test for a breach of the duty to make reasonable adjustments is an objective one and thus does not depend solely upon the subjective opinion of the respondent based upon, for example, the information or medical evidence available to it.

31. The question of whether protection of pay or changes to pay can be the subject of a reasonable adjustment was considered by the EAT in G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820 when it was held that there was no reason in principle why pay protection should not be regarded as a reasonable adjustment; the question is always whether it is reasonable for the employer to have to take a particular step to alleviate a substantial disadvantage. Nonetheless, it would not be "an everyday event for an Employment Tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent" (Powell at para.60).

Indirect discrimination

32. Indirect sex discrimination, for these purposes, is where the employer applies a rule; a provision, criterion, or practice ("PCP"), to use the words of the Equality Act 2010, which does not on the face of it discriminate on grounds of disability between those to whom it is applied, but which puts, or would put, a group of people who share the claimant's characteristic generally (that of being disabled by reason of Autistic Spectrum Disorder) at a particular disadvantage and puts, or would put the claimant at that disadvantage.

Harassment

33. It is unlawful for an employer to harass an employee (see section 40(1) of the EQA). The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) 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.
> (2) …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a)the perception of B;
> (b)the other circumstances of the case;
> (c)whether it is reasonable for the conduct to have that effect."

34. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT (a race related harassment claim) at paragraph 22, Underhill P (as he then was) said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

35. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

36. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out further guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88 which is at the top of page 1324 in the ICR version of the case report]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider *both* (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the

> subjective question) *and* (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

37. In Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31, the EAT considered the meaning of "related to" within s.26 EQA and contrasted it to the test of "because of" within s.13 EQA,

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. … "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

Breach of contract

38. In the present case, the respondent relies upon a clause in the claimant's contract of employment which provides for a unilateral variation of his contract as contractually authorising the introduction of a requirement to provide a negative COVID-19 test result as a condition of being allocated any work shifts.

39. There can be situations where what appears to be a change in contractual terms is, in fact accommodated within the meaning of an existing term. In other cases, an express term in the contract of employment may give the employer the right to vary the contract unilaterally. Those terms tend to be construed restrictively and it is necessary to analyse whether the clause covers the variation introduced by the employer. Furthermore, such a clause cannot be utilised in a way which would conflict with the implied term of mutual trust and confidence.

Time Limits

40. The tribunal may not consider a complaint under ss.39 or 40 of the Equality Act 2010 which was presented more than 3 months after the act

complained of unless it considers that it is just and equitable to do so. The discretion to extend time for presentation of the claim is a broad discretion and the factors which are relevant for us to take into account depend on the facts of the particular case. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done. The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so.

41. The discretion in s.123 to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

Findings of Fact

42. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

43. The respondent provides long-term care to older people in 7 Care Villages across England. These comprise independent and assisted living suites and some leasehold properties. There are over 800 residents in the 7 Care Villages.

44. The claimant started his employment with the respondent on 9 April 2019 at the residential village operated by the respondent at Witney (referred to in these reasons as the Village). That followed an interview at which he was supported by an Oxfordshire Employment Services support worker. He was engaged on a six-month probation and his support worker had regular contact with him throughout the initial months of his employment, including by visiting him on site. He has Autistic Spectrum Disorder and had disclosed that condition in the application form for the position. It was also stated plainly on the reference provided for him by Oxfordshire Employment Services. There is therefore no doubt but that the respondent knew of this condition throughout the claimant's employment. The respondent accepts that the claimant was disabled within meaning of s.6 Equality Act 2010 at all material times by reason of Autistic Spectrum Disorder.

45. The claimant's contract of employment is at page 134. He was employed with one month's notice (page 136). The contract contains the following clause under the heading "Changes to your terms of employment"

> "We reserve the right to make reasonable changes to any of your terms of employment. You will be notified in writing of change as soon as possible within one month of the change."

46. On 21 October 2019 the claimant had been asked to vacuum the inside of a lift the lift was called and the doors closed on him (C paras.33 – 36). The act of the lift starting to rise when the vacuum cleaner was still plugged in seems to have caused an electrical short circuit which meant that claimant was trapped in the left until engineer released him. Mr Kiewiet was on duty and spoke to the claimant to see if he was all right or needed anything. He suggested that the claimant take a break and went to check on him. So far as Mr Kiewiet was aware, the claimant recovered and did not need anything further.

47. On 23 March 2020 the United Kingdom went into the first national lockdown as a result of the outbreak of the coronavirus pandemic. The claimant was classified as a key worker and continue to attend work to support essential work in the healthcare sector.

48. The first written communication about the prospect of widespread testing for coronavirus among the staff working at the Village, and in the wider BUPA group, dates from early May 2020 (page 200). On 1 May 2021 the Administration Manager emailed the claimant and informed him of government guidance that key workers could request to be tested for COVID-19 regardless of whether they were displaying symptoms or not (page 203). She provided information about how to book a test but emphasised that testing was not compulsory but was highly recommended for people who were displaying symptoms. A similar email appears to have been sent from the Administration Assistant on 5 May 2020 again emphasising that it was not compulsory to be tested.

49. The second email from the Administration Manager on 7 May 2020 informed staff about COVID-19 testing to take place two days later at the Village (page 205). The communication refers to a government commitment to offer a coronavirus test to every member of staff or resident in every care home and states

> "even if you have been previously tested (The only exception will be for anyone who has received test results back that are positive, and are self-isolating and at home)".

50. In accordance with the instructions, the claimant requested an appointment for a test between 9.30 am and 11.30 am on 9 May. Unfortunately, when he arrived the tests had not yet been delivered and he was asked to leave and return a few hours later. He found it worrying and disconcerting for something not to happen as he had been expecting it to. The last minute change made him anxious and he returned home. He thought that it was unreasonable for him to have to visit twice on a

non-work day and felt sufficiently anxious about the experience that he did not return to be tested on the afternoon of 9 May as requested. We note that the communication of 7 May 2020 does not say that the respondent's policy will be to require testing for coronavirus as a condition of being permitted to entire the Village or of being allocated work shifts.

51. Nevertheless, on the afternoon of 9 May 2020, the claimant's line manager (the Head Housekeeper) telephoned and asked the claimant why he had not had the test done. She then told him not to come into work on Monday, 11 May 2020 and that she would let him know when she could arrange for him to have a test and start work again (Claimant para.55).

52. The claimant states (C para:57) that he was not paid for 11 or 12 May 2020 and did not normally work on Wednesdays at that time. The Schedule of Loss does not appear to include a claim for those days' payment. He was contacted on 13 May 2020 and told to attend work the following day when he would be tested.

53. There is no indication before the 9 May 2020 abortive test (for example in the email booking an appointment) that the claimant was particularly worried about it. He seems simply to have booked an early slot. We think his criticisms of what happened (para:51 and 52 of his statement) are not things that he thought at the time although we accept that he may have been unsettled by a level of uncertainty about this announcement.

54. We remind ourselves that all of this took place a mere six weeks after the start of the national lockdown when a normal way of life had been overturned for everyone. Mr Kiewiet's description of a fast moving situation with changes in guidelines taking place - even during the course of a day - was very plausible and we accept it. It was a confusing and unsettling time for all. It must have seemed particularly unsettling for a person with the claimant's vulnerabilities. Nevertheless, he appears to have dealt with his uncertainties and booked for a test on 9 May. We reject the allegation that he was coerced into attending on 9 May 2020.

55. The claimant wrote an email on 12 May 2020 (Page 208) to the then Village Manager on the basis that the so-called offer of a coronavirus test was worded in a way that did not appear to leave room to opt out of testing. This email refers to an email of 11 May that we have not seen and refers to it saying "if you are currently fit for work, the test must be carried out as soon as possible or before the start of your next shift." The claimant set out his objections to invasive medical procedures and asked six questions about the legality of the requirement to undergo testing and some details about the test itself. He also asked whether the test would be regular going forward and what the consequences would be of not having the test.

56. The claimant did not receive a response to that email; there is not one in the bundle and none of the respondent's witnesses attested to one being sent. Despite those questions being outstanding, the claimant had another test on 14 May 2020. He argues that, in effect, he had the test under

protest and therefore that he had not given genuine and valid consent to be tested.

57. Unfortunately this test was not collected. We see from C para.72 that he was told before the test was undertaken that the results would be sent to his employer. He agreed to be tested apparently of his own volition and we find that there was nothing to alert the Head housekeeper, his line manager, to him being unhappy - on the assumption she did not see the email at page 208 that was directed to the village manager. This is sufficient, in our view, for Mr Braithwaite to have consented to the results being sent to the employer.

58. The claimant was therefore retested on 19 May but unfortunately the test result was inconclusive and he had to undergo a third test on 21 May which was negative and the results were received on 24 May.

59. It does seem to be the case therefore that there was no prior communication to the claimant about the consequences of refusing a test before 9 May 2020. He states that his pay was docked for two days wages on 11 and 12 May 2020 (Claimant para.57) but it is not easy to see from the payslip whether that was the case or not. It is not in his claim but he raises in his witness statement the question on what authority the respondent was able to deduct pay.

60. It appears that the respondent permitted the claimant to return on site once he was tested before the results came through. The claimant's account is that there was monthly testing but it appears from page 226 that, from the week commencing 6 July 2020, weekly testing was instigated. We see that the respondent introduced weekly emails from late May but the example we have seen does not contain anything directly concerning the weekly testing regime. There is therefore nothing in the documentary evidence before us dating from before July 2020 which explains any details of the policy such as would have answered the questions set out in the claimant's email of 12 May 2020.

61. On 25 September 2020, the claimant, the Head of Hospitality, Head Housekeeper and Mr Bradford met to discuss the claimant's decision not to agree to be tested for COVID -19. Two days prior to the meeting the claimant had met with the first two of these about day-to-day matters concerning interactions he had had with residents. There is no written communication to the claimant prior to this about the consequence of not been tested.

62. On the morning of 25 September 2020 Mr Bradford emailed the Operations Manager and said that the claimant had declined testing because he "feels the test is an 'invasion of his body'" (page 232). He was referred to the employee relations team and then had an exchange with EP of the BUPA HR team who explained that the risks of the claimant not been tested and asked if the claimant had been told "that we may need to place him on authorised unpaid leave if he does not participate in the test?" She also asks if there has been a risk assessment or if he has previously gone to Occupational Health. She states

"in terms of normal process it would be to place employees on unpaid leave if they refuse to take the tests and there is a standard letter you can issue however I appreciate this is slightly different. I therefore think we need to understand further around his autism, so if we have anything on file which can help then great, if not we may need to go to OH."

63. It seems that by 13.55 Mr Bradford had spoken to the claimant because he recorded in his email to EP at that time that there is no OH involvement or risk assessment currently and that he has explained "that he will be asked to take unpaid leave if he continues to refuse to take a test". The Village Manager records in the same email (page 230) that Mr Rowan Braithwaite had only confirmed autism the previous night in the text message. While Mr Bradford may personally not have known that the claimant has Autism Spectrum Disorder that had been disclosed within the application process.

64. EP recommended that

"to mitigate any risks if he still refuses to take the test today following your conversation then please say that he can go home today and use annual leave if necessary and that we will arrange a further meeting with him next week. For today though until we can gather more information if we send him home would need to be paid (annual leave)."

65. Although the claimant states in his witness statement that his meeting with the 3 Managers took place shortly after he started work at 9.00 am, it seems more likely to us that it took place later sometime after the HR advice has been received. EP recommended a further meeting the following week. The claimant gave oral evidence that the first meeting in particular, when there were 3 managers, had made him feel very anxious. He stated that he hadn't been allowed to have anyone to come in with him although there is no evidence that such a request had been declined. It wasn't a formal meeting such as involves a statutory right to a companion. The claimant accepted that he held his ground and continued to say that he did not agree to having the test. He told us that his thinking was that he had "rights over my own body to decide whether or not to have the vaccines or testing and it just seemed like that was all out the window".

66. A further meeting was held on 28 September 2020, the following Monday. The claimant's account is that he arrived at work on 28 September and was told by his line manager that there was going to be another meeting and he was probably going to be sent home (claimant para.100 to 103). He may well, as he explains, have felt that the respondent was not balancing his needs with those of the residents. However, in all the circumstances at the time, we find it hard to see how the respondent could have allowed an untested employee to continue working in parts of the Village where they would be likely to have contact with residents who were in the most vulnerable categories. In September 2020 there was no vaccine available to those residents – the first were administered the following December. We do not doubt that the claimant felt anxious and as though he was being shamed but the respondent was in a very difficult situation.

67. The Head Housekeeper emailed at 15:55 (page 235) to Mr Bradford and the HR contact at BUPA to say that autism had been declared from the beginning, the claimant was still refusing to do a test, he had consented to complete the OH referral which she would complete the following day and that claimant was now using annual leave. She continues

> "personally, I think he is not far of (sic) having a breakdown with the way he is acting. He was receiving counselling from healthy minds but the funding stopped so he couldn't continue."

68. In response, the BUPA HR contact suggested arranging a meeting with the claimant and his brother and said

> "in terms of pay the normal stance would be unpaid for employees refusing to undertake a test however that is why we need to refer to OH to see how his autism may impact his decision-making et cetera. I will check the pay element with my manager as we may have to consider making an exception as this may be classed as a reasonable adjustment".

The suggestion for a meeting with Mr R Braithwaite was repeated the following day and it was also suggested "perhaps we need to have more of a welfare meeting with him".

69. We accept that these email exchanges are reliable evidence of what was done by the respondent's managers at this time. As a whole, they fit reasonably well with the uncontested parts of the chronology and with the documents the claimant accepts he received.

70. The evidence provided by the respondent to explain their policy on testing in around September 2020 is explained in Mrs Collier's statement (Collier para.3). She says

> "that he could not enter the Home without evidence of a negative test. I recognise that the policy may have conflicted with the claimant's beliefs, but the policy was in place to protect vulnerable service users to which we owed a duty of care. This was in order to ensure that our service users could be protected from the risk of COVID-19."

71. Mrs Collier goes on in her para 5 to say "I understand that the Claimant was given the option of using his annual leave until he felt well enough to resume testing. When his annual leave was exhausted, the claimant remained on unpaid absence. This was consistent with the treatment of other employees who had similarly refused to undertake testing."

72. She refers to page 292 which is part of a letter sent to the claimant by Mr Osborne (who succeeded Mr Bradford as Village Manager following the latter's departure on 6 October 2020). That letter is dated 9 December 2020. We accept her evidence that the policy was as in para.5 and about the reasons for it. It is consistent with in EP's email to the Village Manager dated 25 September 2020 (see para.63 above).

73. Mr Kieweit (DK para.5) said "as per all other employees who had refused COVID-19 testing, the claimant would have been informed that they would not be able to attend work at the Home without proof of a negative COVID test."

74. However there is no evidence that the claimant was told that until 28 September 2020. When he was tested in May 2020 he was allowed into the home once he had tested before he had proof of a negative COVID test. It is certain that the claimant was not being tested weekly after July 2020 despite that being the official practice (see GG's email page 241). That was the policy but it might not have been stringently applied until September 2020.

75. There is no reliable evidence that the standard letter referred to by BUPA's HR contact on page 231 was ever sent to the claimant. however page 244 is an email from her to those dealing with the claimant's case at the Village which attaches a letter that, according to the index of the Respondent Supplementary Bundle is that RB page 56. This draft letter and the emails from EP provide reliable evidence about what the respondent's policy on testing was. We accept the claimant's evidence that he never received a standard letter based on this template. There is an amended template in the hearing file (page 462) but it is unsigned and we accept that it was never sent to the claimant.

76. The effect on the claimant of the meeting of 28 September 2020 can be seen from the last paragraph of the Head Housekeeper's email on page 235. As his line manager, she would have had better knowledge of the effects of the claimant's Autism on him than any other member of staff at the Village. We remind ourselves that the claimant was supported in his role by Oxfordshire Employment for between six and seven months. The respondent unarguably had institutional knowledge of the challenges that claimant's condition posed for him .

77. On 29 September 2020 the Head of Housekeeping forwarded a completed OH referral to the BUPA HR contact (page 234) and the referral is found at RB page 44. The description in RB page 47 and 48 of the effects on the claimant of autism include that he "has to follow a strict routine otherwise it affects him" and "Gurney was supported with his anxiety by healthy minds. This has now stopped due to fundings."

78. The claimant did not sign the referral form (RB page 50). The respondents ask,

> "we therefore require advice on how we can proceed and whether the employees autism had any direct impact on his decision-making or understanding of this process." and
>
> "Please can OH advise whether there is any reason why the employee is unable to participate in the COVID testing or offer any alternative suggestions to this. It should be noted that the employee has previously undertaken a test but now refuses due to anxiety" (RB page 52)

79. We consider whether the claimant should have had a companion at the meeting on 28 September 2020. Although we accept that this was not a formal meeting under a formal policy it was a meeting which would change his status at work from present at work to involuntarily on authorised leave in circumstances where he would be required to use his annual leave entitlement and then be unpaid. He was and was known to be vulnerable. The meeting is held against a background of him being able to come into work for months without testing. He did not request a companion. They knew he had had counselling previously

80. The claimant's line manager observed after the meeting that he was "not far of (sic) having a breakdown with the way he is acting" and we accept that the claimant was very upset at being told that he could no longer come into work. His evidence to us was that he felt as though he'd been dismissed on that day and even if he wasn't it was the same effect because he wasn't being paid.

81. The claimant argues that there is an analogy with a meeting in July 2019. In his para 24 the claimant states that he asked for that meeting and asked for a companion at it in one of the disputed emails (page 190). We have considered the claimant's explanation that, at a later stage, when overwhelmed the circumstances he was going through he deleted a number of emails and suggest that the reason why he has been unable to find the email by which he sent this draft was that he deleted it at that time. Nevertheless there is no independent evidence that this draft email asking for a companion was ever sent.

82. A meeting did take place on 19 July 2019 and we have not heard oral evidence from the respondent about the reasons for it. We note that the claimant was still a probationer. Either way the claimant said he thought that the meeting of 19 July 2019 was a confidence boost.

83. The respondent's experience of the meeting of 19 July 2019 does not mean that they ought reasonably to have proactively offered the claimant a companion - such as his brother - on 28 September 2020. In the two days prior to 25 September 2020 the claimant had met with his line manager and her line manager about day-to-day matters. The Head Housekeeper knew the claimant best and our impression is that at this time they had a good relationship and the claimant felt comfortable talking to her. Even taking into account the claimant's vulnerability we accept that it was reasonable for the respondent to proceed without inviting a companion to attend on 28 September 2020. They did not have reason to think he would be particularly disadvantaged by the lack of a companion on that occasion.

84. There is conflicting evidence about whether or not Mr Rowan Braithwaite and the then Village Manager, Mr Bradford, did text and speak on the evening of 25 September 2020. On the one hand there is no reason why Mr Bradford should say in an email the following day that the telephone conversation had taken place if it had not. On the other hand there is no reason why Mr Rowan Braithwaite should say that it had not. It seems improbable that had the conversation had taken place, Mr R Braithwaite

would not have asked to be present at any subsequent meeting. We do not need to resolve this question but it certainly seems to be the case that rightly or wrongly Mr Bradford personally did not know that the claimant has Autistic Spectrum Disorder before 25 September 2020. Further, we note that, despite being informed subsequently that the respondent had known this throughout the claimant employment, he does not appear to have registered and retained that information. However, both the claimant's line manager and her line manager did have this information and, following the BUPA HR contact's advice, the respondent reacted appropriately by making an OH referral despite Mr Bradford's apparent lack of personal knowledge.

85. The BUPA HR contact's suggestion (page 233 to 234) was that a meeting should take place with the claimant and his brother present and ultimately that was done on 1 October 2020.

86. We have agreed to admit Mr Bradford's unsigned statement in evidence on the basis of an email confirming that he had approved it but he was not present to be cross-examined upon it and that potentially affects the weight to be given to it. However, there are contemporaneous emails from Mr Bradford which we accept accurately set out his then recollection of events.

87. His evidence about the meeting of 1 October 2020 is that he sent a contemporaneous email that is at page 238 (Bradford para 18). There are no notes or minutes of the meeting. Ms Mullis, the Head Housekeeper, was apparently present and took some but there is no evidence that these were converted into formal minutes. We find that the claimant's reasons for refusal to be tested were explained by him.

88. There is clear evidence in Mr Bradford's email (page 238) that it was communicated orally to the claimant on 1 October 2020

> "that he is to remain off work until a time he feels comfortable taking a test. This would normally be unpaid, however he will continue to use his A/L if he remains off next week."

89. We are satisfied that the consequences of not agreeing to regular COVID tests were explained to the claimant, namely that, in absence of a negative test, he would not be allocated work shifts but would be required to take annual leave and, once his annual leave had expired, would be placed on authorised unpaid leave. We accept that the policy as set out in draft template letter did provide for exceptions if there was deemed to be a valid reason for that refusal.

90. Mr Bradford in his para 18 said that the purposes of the meeting included the referral to OH - although the referral had already been completed. The claimant's evidence about this meeting includes at his para.115 that Mr Bradford gave him reason to think that there would be some movement on the situation. On his account, the meeting explored his reasons for refusal and suggested alternative ways in which it might be done to persuade him to have the test. A conversation about the contract seems to have taken

place and it appears that Mr Rowan Braithwaite asked whether the respondent was under a contractual obligation to continue to pay the claimant even if he went home. The claimant's recollection is that the response of Mr Bradford was that the employment contract had been drawn up before coronavirus pandemic and that BUPA would not be doing it if it was unlawful. There appears to have been some discussion about the reliability of information provided by the COVID tests. The claimant also states that his brother asked Mr Bradford if any risk assessments had been done in relation to the anxiety experienced by the claimant in relation to the tests.

91. Mr Rowan Braithwaite's recollection of the 1 October 2020, meeting is at his para 9 – 14 and it largely mirrors his brother's evidence. However he does say that when he himself said he thought they needed legal advice Mr Bradford suggested that "we should hold off on that as he thought that there would be "a movement" on the situation and he would get back to Gurney about it." Mr Rowan Braithwaite confirmed in oral evidence what he says in paragraph 15 that he was hopeful following the meeting that the respondent might recognise the difficulties caused by his brother's disability.

92. Mr Bradford left the village on 6 October 2020 and Mr Osborne took over.

93. It seems probable that there was a discussion both about the Village risk assessment and about an Occupational Health referral and assessment on 1 October 2020. It is improbable that Mr Bradford, knowing the purpose of the meeting included discussion of the OH referral, should not say during the meeting "we are waiting for an OH assessment". We think it's more likely than not that there was some mention of that process on 1 October 2020. That is consistent with the hope expressed in Mr Bradford's email of the same day that "we hope to have this appointment in the next two weeks". It that would also be consistent with the claimant and Mr Rowan Braithwaite feeling optimistic that something might change on the part of the respondent. The respondent would reasonably require some evidence from the Occupational Health assessment about the potential reasonable adjustments which could be considered and that expectation would probably give a feeling of optimism at that time.

94. Although both the claimant and his brother said in oral evidence that they did not understand the difference between a risk assessment and an occupational health assessment we think it likely that the respondent did enough to communicate the process of obtaining occupational health advice in 1 October 2020 meeting. It's possible that the claimant and his brother were so focused on their own questions about the accuracy of the testing and its usefulness and, understandably, upon the impact on the claimant of being unpaid that, as a matter of fact, they did not fully understand that an OH report might unlock reasonable adjustments. We are satisfied that the respondent probably made a reasonable attempt clearly to communicate what was being done and why in relation to that. Any lingering doubt we may have had about the lack of companion on 28 September 2020 is allayed by what happened at the meeting on 1 October 2020. The claimant may well not have been the best position to

understand everything he was told about the Occupational Health assessment and we find his evidence that, as a matter of fact, he did not understand to be truthful. However, the respondent would have every reason to think that between him and his brother they did understand what was planned and why.

95. On 7 October, the claimant's line manager asked for an update on how things are to proceed (page 242). The BUPA HR contact replied the same day (page 240 – 241) - the day after Mr Bradford left - that her advice had been to speak to the claimant again to see if he was willing to visit his GP to see if his GP can advise on any reasonable adjustments the respondent may need to undertake in order for the claimant to undertake the test (page 241). There is no evidence that this particular suggestion was ever made to the claimant. Later that day it appears from the Head Housekeeper's email at page 240 that the claimant called and said that his OH appointment would be on 19 October 2020 at 1:30 PM. The email also records a conversation between the claimant and his line manager where he repeated his decision not be tested and was told that he would go on unpaid leave which he apparently said he understood. No particular anxiety is recorded in that email.

96. On 15 October 2020 the Head of Hospitality had a telephone conversation with the claimant. She had a witness and Mr Rowan Braithwaite was present to support his brother. In an email sent following the conversation (page 240) she explained that she read out the Village's COVID risk assessment. This was produced by the claimant via his witness statement but we have not been taken to it in detail.

97. There was clearly some conversation in this telephone call about the arrangements for what we know to be the OH appointment which had been arranged for 19 October. The claimant and his brother say that they did not understand what the appointment was for; that they did not understand that it was an occupational health assessment to investigate what adjustments could be made to support the claimant. It was arranged to take place by telephone but Mr Rowan Braithwaite was due to be away from home and asked if it could be arranged to take place by Skype so that he could dial in. So far as we know there was no response to that request. The Head of Hospitality said she would investigate but no documentary evidence has been produced to suggest that that request was forwarded to OH. On the other hand neither the claimant nor his brother requested the appointment to be postponed to a date when Rowan Braithwaite could be present.

98. On 20 October 2020 the OH team emailed the claimant (RB page 57) inviting him to review the medical report. A link to the report has provided or he was invited to copy the link into his browser.

99. The claimant argues that this was an unhelpful way to send the report to him and he had been expecting something to be sent by hard copy. As at that date no request was made by him for communications to be sent by hard copy although it is something he subsequently asked for. Part of his complaint before this tribunal concerns the provision of payslips through

the company intranet and the respondent's knowledge in relation to that is potentially relevant here.

100. We accept that, as a matter of fact, the claimant had difficulty accessing the company intranet. His evidence is that he is quite capable of reading emails but overall not particularly proficient with technology. He certainly sends emails that he has drafted himself as well as those where the wording has been drafted by his brother. A workaround was adopted while he was attending work to enable him to obtain payslips; his line manager - the Head Housekeeper - accessed the system on his behalf and he would notify her when he wished to book leave, for example.

101. The claimant complains that once he was not permitted to go into work the workaround was not in place and the only methods he had of accessing his payslips was by logging onto the company intranet which he was unable to achieve. We see from page 247 that on 30 October 2020 the claimant telephoned the Village and asked about his pay. He was emailed the payslip for that month (page 367). He telephoned the administrator on another occasion on 14 July 2021 and requested 12 months payslips (page 368).

102. The fact that when he requested them he was emailed them is consistent with Mr Kiewiet's evidence that that would certainly have been done on request. There is no evidence that the claimant asked for it to be done every month as a matter of course. We are of the view that in the absence of such a request that was not a step it was reasonable for the respondent to have to take.

103.]In any event, the Occupational Health assessment was provided by an independent third party. We do not think there was a reason at the time for the respondent proactively to tell them to send the report to the claimant by any means other than the one they normally used.

104. Besides, the claimant's reasons for not accessing the report were his concerns that he hadn't answered the questions correctly and not a disability related lack of ease with technology. In oral evidence he said

> "No I didn't [*consent to occupational health sending the report to my manager*]. Because I wasn't happy with the fact … with my answers … that I gave the correct answers because I was left unaccompanied I was on my own. I wasn't sure what I was being asked to do. I wasn't sure what it was at that time. I wasn't happy about them having the answers when I wasn't sure what I was doing."

105. Later on he said, when asked about the HR request to set up a call about his letter of 11 November 2020

> "I say I wasn't happy about [*the report*] – it hadn't … I didn't understand … nothing explained to me properly about what each one was. Because hadn't been explained I wasn't happy with the answer I gave which is why I refused to give consent. Not doing it to be awkward but because I didn't understand and wasn't sure that my answers were correct"

106. We accept what the claimant says about how anxious it made him to answer questions in the OH assessment and that he did not fully understand as a matter of fact everything about the questions he was asked. But we think it probable that as a result of the conversations on 29 September when the referral was completed, 1 October when he met with Mr Bradford in the presence of his brother and 15 October that he must have known this assessment was an important step related to the respondent's decision about whether he could come into work. He stated that he felt that his brother should have been present on 19 October and that he would have felt supported had that been the case "he could have been background support basically".

107. In cross-examination he was taken to the details of the OH report which the claimant says he accessed for the first time in 2022 and which he stated he was reading for the first time in the hearing. At RB page 58 it is recorded that he told the OH therapist that he had been advised not to attend work because he did not want to be tested and explained the reasons for his refusal. Details of the anxiety and concerns he has about testing are set out on RB page 58 and includes anxiety while waiting for the results and delay in receiving the results. He appears to have discussed feelings of overwhelming anxiety at work and also anxiety that colleagues may have contracted coded during commuting. He was advised to arrange a GP review of his anxiety.

108. In one sense the OH recommendations are not relevant to our decision because it is common ground that consent was never given by the claimant for them to be disclosed and therefore they were not available to the respondent at the material time. The OH therapist recommended a meeting to discuss outstanding workplace concerns including whether there were any areas that could work in until his anxiety and concerns were resolved and he felt able to take the test. The report recommended a stress risk assessment.

109. The OH therapist rang and sent texts and left voicemail messages asking the claimant for consent to disclose the report to his employer. On 2 November 2020 (page 247) they asked the line manager to telephone the claimant to ask him to call OH. It appears that on 5 November 2020 this was done (page 256) by the Head of Hospitality who informed the BUPA HR contact, the OH nurse and Mr Osborne amongst others that her call went to voicemail and that she left a message asking him to approve the release of his occupational health report. A note was made (Page 261) that if there is no response by the end of 5 November 2020 then the Village would send a letter.

110. In oral evidence, when asked whether OH had left voice messages and sent him texts asking him to call them (as they told the BUPA HR contact on about 20 November 2020 - page 247), the claimant said he could not remember specifically. However he said he did remember the respondent telephoning him and knew they had requested to see "it". The OH nurse (See top of page 256) suggested that the claimant sent a brief email to OH on 5 November 2020 saying that he would "be corresponding fully with an email in due course". We have not seen the email from the claimant of 5

November 2020, but that piece of information fits with what happened next in the chronology and we accept that such an email was sent. The dates on which occupational health apparently attempted to contact the claimant are set out on page 257: 27 October, 28 October, 2 November and 5 November 2020. Taking the exchange of correspondence as a whole and given that the claimant did not disagree with the suggestion that he received contact by telephone asking for permission to see "it" – which we take to be the report – we accept that those attempts at contact took place.

111. It therefore seems to us that the reason the respondent did not send a letter asking for consent is that the OH nurse told the BUPA HR contact that they had received an email from the claimant to say that a substantive communication will follow.

112. The expected communication from the claimant was sent on 11 November 2020 (page 264). It sent signed by Mr Rowan Braithwaite "for and on behalf" of the claimant but was also signed by the claimant under the words "with the authority of". The claimant's evidence was that they had been talking about it between themselves and although drafted by Mr Rowan Braithwaite, on balance we accept that the claimant wished to be associated with the views expressed in this communication and others like it.

113. We can see that it was received and internally a decision was taken to set up a call to discuss a response (page 259). Mr Osborne has clearly understood that the letter includes a request not to call and to communicate via registered mail only (page 269)

114. The letter of 11 November and those which follow it on 18 November (page 274) and 30 November 2020 (page 287) were written when, at the very least, the claimant and/or his brother must have realised that there was an outstanding assessment of some kind following the telephone conversation of the 19 October. The claimant appears to have understood that an assessment personal to him was performed on that day but had decided not to agree to it being released because he wasn't sure what he had said. It may be that he had not shared with his brother the emails providing prior access to the report but Mr Rowan Braithwaite knew that some sort of assessment had taken place on 19 October. The eight-page letter at page 264 does not ask about it at all. There are 26 demands about the testing programme, the tests, and the medical qualification of those administering the tests. There are also questions about withholding pay, asking for an explanation about why doing so does not breach the Equality Act 2010.

115. The aforementioned withdrawal of consent to be contacted by telephone is at page 269.

116. We make every allowance for the febrile atmosphere in the country as a whole and for the claimant's anxieties and uncertainties. Nevertheless the tone of this correspondence, the words used and the unreasonable requests for the respondent to evidence things that cannot have been

within their knowledge or area of expertise would make it very difficult for anyone reading it to focus on the specific request for information. We note in particular points such as number 18 and 20 which, in effect, demand that the Village explain why they are using a test alleged to be not fit for purpose or that they demonstrate that SARS-COV-2 (otherwise known as COVID-19) has been proven to exist.

117. We are not making a judgement about the reasonableness of the questions. However, for an employer that operates residential care homes at that point in time when faced with risks to residents and staff – individuals who probably had conflicting vulnerabilities and concerns about the risks posed by the virus - demands such as these effectively require them to go behind government advice and that they could not do. They are in a regulated sector. Furthermore, answering unanswerable questions would have been a distraction at a time of chaos and great stress for all. This correspondence is part of the context within which the reasonableness of the respondent's actions needs to be judged.

118. Although Mr Osborne recognised in his 12 November 2020 email that the claimant had requested not to receive communication save by recorded or registered post and in hardcopy, it appears that emails continued to be sent to the claimant for a short while. The last was dated 24 November 2020. It is presumed that this is what forms the basis of the complaint of alleged excessive communication in November 2020.

119. There is one email dated 15 November 2020 headed "please see copy of letter that is being distributed today to residents" (page 272). Although it was addressed to the claimant it was a notification that two residents had tested positive for COVID-19. On 16 November 2020 (page 274) there was a reminder to complete a staff survey. On 17 November 2020 (page 275) under heading "URGENT - staff Covid testing" the claimant was advised that tests would be carried out on Monday of each week. On 24 November 2020 (page 282) the claimant's was sent notice of the Christmas rosters. It seems apparent from their contents that these were sent to all members of staff. The claimant through his brother wrote on 17 and 30 November 2020 to say that he regarded this communication as harassment.

120. All of these emails are general staff emails. They are not targeting the claimant.

121. Mr Osborne responded to the November correspondence from the claimant by his letter of 9 December 2020 (page 289). It is a relatively detailed letter that does on the face of it set out to answer the topics of concern raised on behalf of the claimant. It is criticised as including inaccuracies which, it is argued by the claimant, amounted to a barrier to communication and contributed to the breakdown in trust that meant effective communication between the claimant and the respondent did not happen. It is also argued by the claimant that the respondent was not genuinely trying to answer the questions but was merely covering their backs.

122. We reject that. We can see that Mr Osborne, amongst other things, explained the contractual situation setting out the change that has happened and the respondent's position that they are contractually entitled to ask the claimant not to attend work but not to pay him. He apologised for the delay in providing a detailed response and we can understand the wide-ranging questions would have required enquiries to be made in a number of different departments. Overall this was a very good letter trying to take the heat out of the correspondence and attempting to find out what more can be done to facilitate the claimant's return to work.

123. The consequences of refusing a test are set out at page 292. The respondent respects the claimant's decision not to be tested but restates the policy is

> "not to allow any working to enter the workplace unless they have a confirmed negative COVID-19 test we have created this policy in line with government guidance, to ensure the workplace is coded-19 secure, and for the protection of both staff and residents."

Mr Osborne states that this is not in breach of an express or implied term of the contract of employment.

124. This is restated on page 292 to be "we are not able to offer any of our employees paid shiftwork without having a negative COVID -19 test confirmed. But further up the same page under discussion of reasonable adjustments Mr Osborne says,

> "we referred you to Occupation (sic) Health to seek further guidance on how we could support you. As the time of writing, we have not received a copy of your Occupational Health report as we understand you have not provided your consent for the report to be released to us."

125. Both the claimant and his brother appear to have overlooked that statement. It did not trigger an enquiry by them to find out what was meant by an Occupational Health report if, as their evidence was to the tribunal, at this point they did not understand that one had been undertaken. Alternatively, if they did not understand the difference between that and a risk assessment they should have asked for clarification.

126. Although the claimant complains that there are inaccuracies in Mr Osborne's letter, they are relatively minor given the detail in the letter when taken as a whole. It is the claimant and his brother who have failed to focus on an important part of that letter that should have alerted them to the existence of the Occupational Health report, to the fact that the respondent needed the claimant's consent to obtain it and that the respondent was asking whether there were any more adjustments they could make. .

127. The next thing that happened was that on 28 January 2021 (see page 295) the Head of Hospitality wrote to ask whether the claimant was now

willing to engage in the testing programme. She also told him that the COVID 19 Vaccine was now available.

128. The response from the claimant to her (written on his behalf by his brother- page 298) asserts that it is not possible in the absence of various pieces of information for the claimant to give informed consent to being tested. The letter opens by saying that a response with greater detail would be sent to Mr Osborne. Mr Rowan Braithwaite stated in the hearing that there are parts of the letters that he is embarrassed by. We did not ask him to clarify exactly which sections he was referring to it as we have already said they are often accusatory in tone.

129. The legislative history of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (hereafter referred to as the 2021 Regulations) is as follows:

    a. 22 July 2021: approved by parliament and due to come into force on 11 November 2021;

    b. September 2021 – amendment or guidance supplementing the 2021 Regulations introduced self-certification of medical exemptions (Regs bundle page 8);

    c. 11 November 2021: the 2021 Regulations come into force;

    d. 6 January 2022: amended regulations extended the deadline by which employees should be double vaccinated as a condition of entry into residential care homes to 12 weeks after the date they were made, namely 1 April 2022 (Regs bundle page 15).

    e. 15 March 2022: the requirement for health and social care staff to be double vaccinated was removed.

130. By time of the hearing before us, the claimant and his brother accepted that, at time decisions were taken in respect of Mr Gurney Braithwaite's employment, the 2021 Regulations were due to come into force on 11 November. The respondent was making decisions based on the then current information and did not have reasonable grounds to anticipate that the mandatory vaccines would turn out to be a relatively short lived obligation.

131. The first vaccines were administered in the U.K. in December 2020 and in January 2021 the respondent circulated an information sheet seeking to help employees make an informed choice about whether or not to be vaccinated while encouraging them to do so (page 296).

132. Mr Osborne replied to the claimant's 4 February 2021 letter, having waited for the indicated greater detail which was not forthcoming on 1 March 2021 (page 302). He broke down the concerns into 10 particular types of query and answer them. He appears to have been doing his best to address the claimant's concerns again. This was not in any sense dismissive of the claimant's concerns. We note in particular in paragraph 8) where he replied to accusation of fraud and economic duress because of the tension between a requirement of a negative test to work in the

Village and the statement that the employee could decide whether to consent or not. He stated:

> "our policy does require all employees to confirm a negative test to be able to work in the village, and this policy has not changed. … there has been no change with regard to your absence from work and pay. In the absence of any medical documentation, such as a certified sick note from your GP, please note that you will not be eligible for any sick pay and your absence continues as authorized unpaid leave."

133. In effect, Mr Osborne pointed out to the claimant that if there is a reason why he should be certified unfit to work then were he to go to his GP he might then be certified eligible to received sick pay.

134. He then went on to say that he would be unable to address the concerns informally again and pointed the claimant to the formal grievance procedure and confidential 'Speak Up' service. He informed the claimant of how to approach the 24/7 confidential support line for mental health and financial wellbeing.

135. On 11 August 2021 Mr G Braithwaite was invited to attend the consultation meeting to take place on 16 August 2021 (RB page 62). The invitation was sent by recorded delivery (this is confirmed in the email dated 25 August 2021; page 316). It arrived in the post the following day (see the claimant's email at page 322). He didn't attend the meeting on 16 August 2021 or communicate in advance that he would not or could not attend. He confirmed in oral evidence that he had received the letter, he understood it and discussed it with his brother.

136. Mr Osborne set out the purpose of the meeting and the timetable to be followed in relation to the anticipated regulations including that they would discuss:

> "Our proposed approach to issuing notice of dismissal if, by 23 September 2021, you have not shared evidence that you are fully vaccinated or are medically exempt and have not secured an alternative role within Bupa which does not require you to be fully vaccinated."

137. The claimant's oral evidence that he read this letter and discussed it with his brother is supported by his email of 9 September (page 319). In that he asked for a copy of the letter regarding vaccine requirements. That was a reference to "following my previous letter" which had not in fact been sent to the claimant. It is now common ground that there are inaccuracies in this standard form letter dated 11 August 2021 and in the dismissal letter. The invitation to the consultation meeting was only three weeks after the regulations had been approved by parliament. The respondent was working within a short timescale which was dictated by the regulations themselves.

138. When making contact by the email of 9 September 2021, the claimant did not ask for an alternative date for a meeting – despite a later complaint that he only had one working day's notice. It was put to him that he had

given up on his employment with the respondent by this point. It is fair to say that his evidence about his intentions at this point in the Summer and early Autumn of 2021 was equivocal. On the one hand he agreed that he had given up: he described himself as bombarded with emails "it was coercion, I felt that I was being coerced … it was just non-stop; non-stop; non-stop. By this time it was too much and I had given up." On the other hand when it was suggested that whatever the Village might have done he would not have been interested he denied that, saying he would have gone back but also that at this stage it was all too much.

139. It is true, therefore, that the claimant's oral evidence included that set out in para.59 RSKEL. We were urged by his brother not to regard that as reliable evidence about the claimant's view and intentions at the time. Mr R Braithwaite vividly described the mental health challenges experienced by the claimant during this period but this was not explained to the respondent at the time. However, what the claimant did in September 2021 was consistent with that oral evidence about how he felt at the time.

    a. He told us that he felt as though he had been dismissed when asked not to attend work – "it amounted to the same thing because I wasn't being paid".

    b. Similarly in the email at 13 September 2021 – (page 321) he focused upon the inaccuracy in the letter of 11 August 2021 (concerning the lack of a previous letter) and the short notice; he focused on criticisms of the respondent rather than on the options the letter said were available to him.

    c. The lack of a request for a rearranged meeting is also consistent with his oral evidence that he had given up. The invite letter mentions possibilities of alternative employment, support, and mentions an exemption. It says that the meeting will be rearranged and that he could bring a companion.

140. Overall, the claimant did not engage with this process. That is consistent with him having formed the view that the respondent was obstructive. We accept that nothing they could have done from this point of time could have got him back to work. The claimant seems to be preoccupied with questions outside the respondent's remit (for example, questions about the safety of the tests). He probably felt the vaccine was being forced upon him in the same way as he felt about the testing. He focuses disproportionately upon points of minor detail and perceived failings – such as statement "my previous letter" and only one working day notice. The consequence was a failure to engage with the substance of the letter and the respondent's aims which were to have a meaningful consultation about what to do about the 2021 regulations which were about to come into force.

141. We have not been taken to detailed medical evidence from this period but accept Mr R Braithwaite's observations that the stress of the times and the impact of being at home had a detrimental effect on the claimant's mental health. As we said in the hearing, the complaints we are considering require us to adjudicate on the *respondent's* actions in the light of what

they knew or ought reasonably to have known about the claimant's position at the time - not to judge the *claimant's* actions.

142. We understand and are sympathetic to the claimant's fears. We do not intend to appear critical of him. However, the claimant's lack of engagement reinforces our view that realistically there was nothing more the respondent could have attempted which had a reasonable chance of getting the claimant to engage with a view to avoiding the consequences to him of the 2021 regulations.

143. We do not overlook the email of 15 September 2021 from Mr Osborne responding to the claimant's emails (page 324). That makes clear that he is more than happy to pick up a call about the mandatory vaccines, but also that "the process will not stop" and "any person that is not fully vaccinated will not be able to work at Richard Village". However we do not think that this email should be taken to negate the offer of alternatives set out in the email of 11 August 2021. By the time of the 15 September 2021 email, the respondent had been accused of "being deliberately obstructive, … withholding information … and is not acting in good faith." It's not surprising that Mr Osborne's response should be somewhat curt, in those circumstances.

144. At some point in mid-September 2021 a management direction headed "Mandatory vaccination consultation – manager updated W/C 13.09.21" was circulated (RB page 63). We think that it was probably sent prior to 20 September because it anticipates a conference call on the 20 September. Mr Kieweit had a clear recollection that it was sent by email; he was the Deputy Village Manager so it was not confined to the most senior managers in the homes. The direction explained that there was the possibility that colleagues could self-certify that they were exempt from the requirement for a vaccine, at least temporarily. The internal advice states

> "Over the coming days please speak to colleagues in your team who we are already reporting as medically exempt to let them know that we will need them to self-certify. We are currently in discussion with the DHSC about the possibility of us using our own self-certification form, rather than the one they have provided and we'll be in touch to confirm which form colleagues should use next week. In the meantime, if a colleague provides you with a completed form, please accept this and keep a record of it."

145. That doesn't apply to the claimant, because he was not then currently reporting as medically exempt. However it shows that the respondent's HR and management team were tracking legislative developments and reacting appropriately. The claimant's argument is that when the respondent knew there was a route for those who were medically exempt to self-certify as exempt from vaccination in order to avoid the consequences that they are not permitted to attend work there was a duty proactively to inform the claimant that this was something he should do and send him the requisite form. However, there is a reference to the prospect of medical exemption in the letter of 11 August – in essence nothing had changed by the management direction, save that the respondent had more information about the prospect of self-certification. The claimant did not assert that he was exempt but rather attacked the

requirement for vaccines itself. In those circumstances, we do not think there was an unreasonable failure by the respondent when they did not individually contact the claimant or send a template self-certification form to him prior to dismissal.

146. The dismissal letter is dated 23 September 2021 (RB page 66) and was signed by Mr Kiewiet who had little, if any, direct knowledge of the case and was merely called to the office to sign a letter as a matter of urgency in Mr Osborne's absence. The date of the 23 September was set in the consultation invite meeting as the date by which employees need to satisfy them that are exempt they are medically exempt. It stated that the effective date of termination was 10 November 2021.

147. It contains inaccuracies; it was signed by someone with no particular prior knowledge of the communications with the individual to whom it is directed. This was the application of a standard process to the claimant. In particular,

a. The claimant hadn't received a letter of 21 July 2021 which appears to have been part of the consultation;

b. He did not attend the individual consultation meeting let along two such meetings.

148. However, the dismissal letter also includes the following:

a. "We hope your circumstances change before 10 November"

b. Under "Retraction of Notice" it is stated,

> "If before 10 November 2021 , you either share evidence that you have received both doses of a COVID-19 vaccine or are medically exempt; or secure an alternative role within Bupa which does not require you to be fully vaccinated, your notice of termination of employment would then be retracted and your employment would continue. Please therefore ensure that you keep your manager informed of any changes, even if you have decided to get the vaccine following this letter and require support with this."

c. The respondent states that they will continue to help identify any alternative position.

149. Had the claimant or his brother searched online for information about medical exemptions, they would have found the information that people with autism are potentially exempt. They did do so but it is not clear to us that this was before the date of the dismissal letter.

150. The claimant argues that the inaccuracies in the dismissal letter meant that the assurances and options in it could not reasonably be relied. However, that is not a logical position to take. Furthermore, his dismissal of those options is consistent with him having given up months previously.

His oral evidence made that clear on more than one occasion so; despite his brother's concern that that evidence did not represent Mr Gurney Braithwaite's genuine view at the time, we are satisfied that it did.

151. A number of letters were then written by or on behalf of the claimant (page 334 – 4 November 2021; page 339 – 5 November 2021; page 341 – 9 November 2021). That letter sent on 4 November 2021 contains the following passage (page 335):

> "In this matter, the policy criteria or practice is imposing government regulations, in my case, without either accepting the self-exempt status or suggesting that I declare myself self-exempt as a reasonable adjustment. According to gov.uk, "until 24/12/21 you can self-certify that you are medically exempt if you work or volunteer in a care home". Therefore, I have been and am self-exempt up to and including 23/12/2021. Under the same gov.uk requirements I have also had a valid exemption to testing throughout the period of my unlawful (in the absence of the requested proofs to the contrary) suspension. Under the new government regulations please see highlighted below the specific exemption which you are aware applies to me:
>
> "The possible reasons for exemption are limited. Examples that might be reasons for
> medical exemption are:
>
> > People receiving end-of-life care where vaccination is not in the person's best interest
> > **people with learning disabilities or autistic individuals, or people with a combination of impairments where vaccination cannot be provided through reasonable adjustments**
> > a person with severe allergies or current available vaccines
> > those who have had an adverse reaction to the first dose
> > **other medical conditions could also allow you to get a medical exemption**
>
> As you are imposing a condition on my continued employment, you are under the obligation to identify reasonable adjustments. Failure to do so is potentially a breach
> of contract, negligent, a breach of section 15 of the Equality Act 2010 regarding unfavourable treatment on the grounds of disability, and of section 19 regarding discrimination by virtue of, or as a consequence of, my disability which prevents
> placing me at detriment by your actions."

152. The claimant asserted that he is self-exempt because of learning disability and autism. This was directly addressed by Mr Watson on 17 November 2021 (RB page 79 see also below) asking the claimant to complete a medical exemption self-certification form. He made the same request on the 24 November 2021 and the form was never completed. In the first place there is no reason we can think that the claimant would have set out that information in his pre-termination letter and not filled in an exemption form except that he had reached the point where he had given up on the prospect of continued employment. He did state that he asks for the contract not to be terminated but the overall level of allegations is out of all proportion to the limited nature of valid criticisms which could be directed

at the respondent. He demands evidence about the safety, validity and effectiveness of the vaccine program (page 339).

153. In the second place, the respondent responded appropriately by forwarding the necessary form within a reasonable period of time offering reinstatement and continuity of employment.

154. In the meantime, on 9 November 2021, Craig Watson from BUPA on behalf of the respondent, had suggested that an appeal meeting take place on 15 November 2021 as an opportunity to raise the claimant's issues and that this take place with Mr Rowan Braithwaite as the companion. This was probably written before Mr Watson had had sight of the November 2021 letters from the claimant and was simply a response to the email of 13 September.

155. The day before the termination of employment the claimant sent a formal grievance (page 343). This contained 36 separate points of complaints.

156. On 17 November 2021 Craig Watson responded to the letter dated 10 November amongst others (RB page 77) apologizing for the delay in replying (RB page 79). He apologized that the standard letters were not amended to reflect the claimant particular circumstances. As we have already said, he attached a copy of the medical exemption self-certification form which he asks the claimant to complete and return as soon as possible. He offered to reinstate the claimant's employment with continuous service, subject to the self-certification form being completed, and to open discussions about a return work. He asks the form to be completed by 22 November 2021. He also gave an extension of time for an appeal.

157. The claimant replied in another intemperate letter on 17 November 2021 (page 348). On 18 November 2021 Craig Watson paused processing of the termination of employment (RB page 81). On 22 November 2021 the claimant responded saying that he will need more time but repeated the need for the documents evidencing the validity of the respondent's approach to vaccination. He also withdrew consent to receive email correspondence. This made it so much harder for the respondent to deal with communications. The claimant had already stated that the offer to respond to the concerns was just a "tick box" approach.

158. Even given the claimant's vulnerabilities, the respondent could not be expected to wait indefinitely. When you put the chronology together the claimant was given every opportunity to engage with the process. Although the respondent's letters are not always completely accurate, that was understandable given the scale of the task they faced. Ms Collier said that of the approximately 10,000 employees, 200 notices of dismissal were sent. All would have been sent on 23 September 2021. The consultation process for all was taking place on the same timescales. We accept that there was pressure on those in the Villages and homes to ensure that there was a coordinated approach so that all affected employees nationally were dealt with in the same way on the same day. The

inaccuracies objectively are not material, they do not obscure the central messages about the options available to the affected employees

159. Mr Kieweit was challenged to explain why the home could not have continued with the claimant in employment but excluded from the home – as he had been since September 2020 when he had refused to be tested. He described that as

> "That's not a simple question to answer. We were holding [the claimant's] post. We went through process when the claimant had an opportunity to provide exemption certificate or other evidence. … The business can't just keep people on the books indefinitely."

160. A reasonable inference from that is that the respondent could not recruit permanently to the position if they were holding the post open. They would also have to deal equitably with the other employees in the same position. Overall approximately 200 dismissal notices were issued. Not all of the affected employees were dismissed in the end because some made different choices or provided evidence of valid exemptions. it would not have equitable to deal with the claimant differently, provided the respondent complied with any obligations under the Equality Act 2010, including by making any reasonable adjustments.

161. The respondent continued to attempt to get the claimant to engage with the task needed to save his employment even after the termination date. The correspondence by Craig Watson was exemplary in looking past the anger displayed by the claimant and attempting to get the correspondence onto a more positive footing. Ultimately this was unsuccessful and that was acknowledge by Mr Watson's letter of 24 November 2021 (RB page 84). In that he says that the documents will not be provided because the respondent is not challenging the validity of the regulations passed by the UK government and must act in accordance with the legal obligations on them. A final extension of the right to appeal was offered to 29 November 2021. The claimant did not actually appeal his dismissal (see Mr Watson's email on page 366).

Conclusions

162. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

163. We will start by setting out our conclusions on the substantive issues. Given our conclusions on those, it has not been necessary to reach conclusions on most of the time limit issues. We have, for reasons we explain in para.216 below, dismissed the reasonable adjustments claim relating to the October 2019 lift incident but, in the alternative, had the claimant succeed on that particular complaint in isolation, we would have found the complaint to be out of time as set out below.

Unfair dismissal

164. Section 2 of the list of issues relates to unfair dismissal. First what was the reason or principal reason for dismissal? Was it a potentially fair reason within s.98 Employment Rights Act 1996?

165. Although the respondent argues (RSUB para.100) that the reason for dismissal was a genuine belief that continuing to employ the claimant beyond 11 November 2021 without him having the prescribed vaccinations would be unlawful, in fact what would be unlawful was deploying him in his role. Nevertheless, the respondent had a genuine belief that, after 11 November 2021 they would be unable to allocate any of the work that they had available for the claimant to do and which was within his job role without contravening the 2021 Regulations. This was because he had not provided evidence that he was fully vaccinated against COVID-19 or an acceptable self-certificate of exemption. The 2021 Regulations provided that a registered person such as the respondent "must secure that a person" such as the claimant did not enter the premises unless they have provided evidence of vaccination or exemption from the requirement to be vaccinated.

166. We are satisfied that this is some other substantial reason such as could justify the dismissal of an employee holding the position which the claimant held and, therefore, potentially a fair reason.

167. In their grounds of response, the respondent relies on as a breach of a statutory obligation (s.98(2)(d) ERA) and Mr R Braithwaite addressed us on this (CSUB para.10 to 17). We are of the view that the factual reason could be regarded as falling within either category. The factual reason remains the same. There was a relevant statutory obligation which prevented the claimant from carrying out his role, in the absence of satisfactory evidence of exemption. That could amount to a breach of a statutory obligation or to some other substantial reason.

168. The first specific point raises in the List of Issues by the claimant is that the 2021 Regulations were not in force. Ultimately, this argument was not pursued. In any event, we are satisfied they came into force on 11 November 2021. Throughout the period of consultation, dismissal to expiry of the notice period and the end of communications at the end of November 2021 there was a joint expectation that the 2021 Regulations would and did come into force on 11 November 2021.

169. The claimant relies on the first instance decision Case No: 2301025/2022 Trotman v The Royal Star & Garter Homes. The first instance decision of another Employment Tribunal is not binding upon us. We make our decision on the basis of the evidence we have seen. The chronology of the legislation provided in the Supplementary Bundle for Written Submissions makes clear that the 2021 Regulations were in force for the relevant time for this case as set out in para.129 above. The first instance tribunal on the facts available to it in Trotman found otherwise.

170. There was an exemption within the legislation which was potentially available to the claimant. It was not until 4 November, after the dismissal letter was sent, that the claimant set out the basis on which he would

potentially be eligible for exemption. The respondent then reacted appropriately. Although they sent their detailed response (RB page 79) after 10 November - and therefore at a point when the employment had been terminated – it included an open offer to reinstate the claimant with his continuous employment unaffected on receipt of a complete self-certification form. The claimant argues that an email from BUPA was confusing when his employer is Richmond Villages Operations Ltd. However there was no logical reason to think that this was not a genuine offer made on behalf of his employer; there was certainly no reason for the employer to think that the claimant would not regard it as such because it came from BUPA's HR function and not from individuals at the place of work.

171. Prior to 4 November, reasonable information about a possible exemption was provided in the standard form letters received by the claimant. He did did not make enquiries to the respondent about whether it applied to him. He had disengaged from the consultation process. He had made it a precondition of engagement with it that the respondent answer numerous questions about the vaccine and testing scheme which, realistically, the respondent was not in a position to challenge. Nevertheless, it did its best to answer the claimant's questions. In those circumstances, the amount of information provided by respondent about the potential exemption was that of the reasonable employer.

172. The claimant criticized the consultation process. Some of the steps were missed out in his case. He appears not to have been sent a letter in July 2021 which appears to have been part of the standard process. He was sent and received a letter dated 11 August 2021 inviting him to a consultation meeting on 16 August but which contained a minor inaccuracy because it stated that he had received that letter. As we set out in para.140 above, he criticized but did not engage with the process.

173. The respondent made an informal offer through email 15 September for him to call Mr Osborne and the dismissal letter made clear that the door was still open for conversation. The claimant had informed the respondent that email communication was unwelcome and that he wished only to be communicated with by recorded delivery. The respondent tried to respond to the lengthy points of concern which took time and the requirement for formal levels of communication restricted what the respondent could do. The claimant did not ask for the consultation meeting to be rearranged. We accept that the claimant had effectively given up on continued employment by the respondent and was focused upon attacking the regulations themselves and requiring the respondent to defend its compliance with them. The respondent was not in a position to deviate from the regulatory process imposed on them given that they were in a regulated sector.

174. As to LOI 2.3.3, on the face of it, these matters are not circumstances relevant to the fairness of the dismissal. There was no evidence that the email of 1 April 2020 was received by the respondent and the claimant withdrew the other complaints based upon it. The claimant also criticized the lack of response to his email of 12 May 2020 (page 203). In it 6 questions were asked about the COVID tests and it appears that Mr

Bradford, to whom the email was addressed, did not reply. However the email predates tests that the claimant subsequently agreed to undertake: see paras.53 to 58 above.

175. We do not see that there is any connection between this and the decision to dismiss. Besides it is not correct that respondent did not investigate the claimant's concerns. The chronology of September and October 2020 when the claimant was told to refrain from work and then met with Mr Bradford (accompanied by his brother) on 1 October 2020 together with referral to OH shows that the respondent took appropriate steps to understand whether claimant's disability impacted on his decision making in respect of COVID-19 testing.

176. By LOI 2.3.4 in effect it is alleged that the dismissal was outside the range of reasonable responses because the respondent did not investigate whether the claimant was actually a COVID-19 risk. This would require the respondent to go behind the 2021 regulations which had been passed by both houses of parliament. No employer in the respondent's position in a regulated sector would take such as step. Alternatively, when parliament has drafted legislation at a time of national emergency requiring certain groups of employees to be vaccinated if they were not exempt from vaccination then it cannot be said that no reasonable employer would carry out their own investigations about risk. The decision about where the balance of risk lies has, in effect, been taken at the level of parliament with the residual discretion being limited to whether satisfactory evidence is provided of exemption to testing or vaccination.

177. By LOI 2.3.5 it is said that the respondent did not make a decision about whether the claimant was exempt from testing or vaccination. It is the exemption from vaccination that is relevant for the dismissal. The respondent was required to received evidence that an individual was exempt from the requirement for vaccination. That is clear on face of reg.5 2021 Regulations. There is also the letter published on 15 September 2021 from the Department of Health and Social Care, or DHSC, (Reg bundle page 8) outlining how people will temporarily be able to self-certify that they meeting the medical exemption criteria. The management direction makes clear (RB page 63) that the home (indeed, probably the sector) was in discussions with the DHSC about whether their own form would be accepted, when completed, as evidence of self-certification. If the claimant is saying that the respondent should not have follow the DHSC mandated procedure in respect of the form that evidence has to take then again he is expecting the respondent, at a time of national pandemic, to go behind the legislative requirements imposed by parliament.

178. If, on the other hand, the claimant is saying that the respondent's attempts to secure his evidence of self-certification was outside the range of reasonable responses then we reject that – given all the circumstances. The claimant had refused permission to disclose his occupation health report in October 2020 which would have provided the respondent with more evidence on which they could have based their decisions. The respondent made several references to the position of medical exemption in the consultation invite and the dismissal letter. The correspondence

received from the claimant at the time of consultation and dismissal was argumentative and a barrier to effective communication. When the claimant did assert in detail the basis on which he was self-certifying as exempt, the respondent replied appropriately but it was reasonable for them to require completion of the necessary form.

179. For the unfair dismissal claim we taken the process as a whole and, as a whole, the respondent acted within range of reasonable responses in relation to the question of whether claimant was exempt.

180. Although the claimant argues that the appeal process was not lawfully and fairly done (LOI 2.3.6) he did not, in fact, appeal. What he did was put in a formal grievance. He also wrote several letters in approximately the last week of his employment. However Mr Watson, writing on behalf of the respondent on 9 November (RB page 71) stated that, nevertheless, he understood the claimant to be unhappy about aspect of his dismissal and invited him to a meeting which "will be considered as an appeal meeting" because a possible outcome of it could be that notice of dismissal was revoked. This offer was made on more than one occasion, extending the deadline for doing so and, even after the effective date of termination, pausing the dismissal process while that was done eventually to 29 November 2024. The claimant did not take up that opportunity. The correspondence from Mr Watson made clear that all that was needed from the claimant was to complete the self-certification form and he did not do that.

181. Stepping back, it was a very sad situation but we do not see what more the respondent could have done. The unfair dismissal claim is dismissed.

182. The complaints of automatic unfair dismissal (LOI 3 and 4) and detriment on grounds of protected disclosure (LOI 5 to 7) have been dismissed or withdrawn and we do not need to determine those issues.

Discrimination arising from disability

183. The allegation in LOI 8.1.1 is that a meeting was held with three managers present on 25 September 2020 "which was conducted in a hostile and intimidating way". We do not accept that it was conducted in a hostile and intimidating way. The allegation is not made out. The claimant possibly found the situation intimidating but the respondent's manager was not behaving in an intimidating way.

184. As to LOI 8.1.2 it is not true to say that the respondent did not allow the claimant any support from his brother at that meeting. They did not invite the claimant to bring his brother but they did not refuse any request for the brother to attend and therefore it is not made out on the facts.

185. As to LOI 8.1.3 the respondent did not, we find, suspend the claimant. Nevertheless telling the claimant he had to remain at home using his annual leave and then ultimately without pay was detrimental to him. After this meeting he was at this meeting he was told he should stay at home without pay after his annual leave expired.

186. As to LOI 8.1.4., dismissal is accepted.

187. LOI 8.2 asks whether the claimant's refusal to undertake testing arises in consequence of his disability. The respondent accepted this to be the case and in any event there is evidence to support that and we are satisfied that this element of the claim is made out. We also accept that the acts relied on are made out in part in that:

    a. the meeting on 25 September 2020 was held without the claimant's brother being present;
    b. the claimant was directed not to come to work and
    c. the claimant was dismissed.

188. The respondent accepted that each of the alleged unfavourable acts set out in LOI 8.1.1 to 8.1.4 were done at least in part because the claimant refused to undertake testing for coronavirus and that that refusal arose in consequence of the claimant's disability of Autistic Spectrum Disorder.

189. The issues to be considered then move on to whether there was a legitimate aim and whether the treatment complained of was a proportionate means of achieving it. The aim relied on is "to comply with the government guidance around COVID -19, and to protect its vulnerable users."

190. We have not been taken to specific government guidance concerning testing. By the time of dismissal there were the 2021 regulations the chronology for which are set out above. The claimant and his brother accepted that protecting vulnerable service users (those living in the Village) was a legitimate aim but argue that the actions taken by the respondent cannot be found to be a proportionate means of achieving that aim.

191. This was a realistic concession; it appears to be common ground that protecting vulnerable service users was or would have been a legitimate aim and we accept that. The residents of the Village were at an enhanced risk of illness, serious illness and, potentially, of dying as a result of exposure to COVID -19. Care homes were especially vulnerable and we have seen the communication from the respondent indicating the government were offering testing to all care home workers. The fact that government prioritised the testing of care home workers underscores the vulnerability and susceptibility of some of the residents.

192. In May 2020 the claimant was told there were available tests. We accept that a policy of excluding from the premises a person who declines to undertake a coronavirus test is apt to achieve the aim of protecting vulnerable users of the respondent's services.

193. In cross-examination of Mr Kiewiet and in contemporaneous documentation the claimant made a number of challenges to the tests used. As we said at the time, Mr Kiewiet is not an expert and was not able to give expert opinion evidence about whether a particular test was accurate and to what

confidence level. The respondent was using a government approved test in their homes and Villages. The incidence of false positives of the test used is irrelevant to whether using that test is capable of achieving the legitimate aim of protecting residents. The incidence of false negatives might be relevant but not the incidence of false positives. In fact, as was said in December 2020 (AO page 290), the respondent carefully balanced the rights of the individual against the importance of protecting their residents when introducing the testing regime.

194. A less discriminatory alternative to excluding the claimant from work might have been found, had the respondent had evidence to support making an adjustment to the policy in his case. The contemporaneous correspondence between the Village and the central HR function makes clear that the policy did permit for adjustments in suitable cases. For example, he could have been redeployed or authorised paid leave could have been considered. However in the absence of the OH report, the respondent did not have the evidence they needed to make adjustments. In addition to the contemporaneous emails, one of the things that was offered by Mr Osborne's letter of 9 December 2020 was whether any reasonable adjustments were asked for.

195. The respondent had no reason in advance of 28 September 2020 to offer to the claimant the prospect of a companion. The respondent appears to have tried to contact the claimant by telephone to obtain consent to the release of the occupational health report; certainly the OH therapist themselves made that attempt on a number of occasions.

196. As Mr Rowan Braithwaite argues, normal employment law – including any duty to make reasonable adjustments – applied during COVID times. The respondent had made an OH referral and a report had been written. Despite many attempts to contact the claimant to ask for his consent, he did not agree to the report's release and did not read it himself. We do not criticize the claimant for this; he was very anxious about his answers and seems to have been unwell during this period – to judge by his brother's description of how concerned he himself had been about the claimant's wellbeing. Nevertheless, the respondent cannot act on the basis of what they have not seen.

197. Also the employment relationship had reached a point where long letters asking a wide variety of questions was being sent by the brothers and the respondent was understandably spending resources dealing with that. Once the respondent had been told only to communicate in writing by recorded or registered mail, there was no mechanism by which a more informal approach, such as a phone call from the claimant's line manager, could reasonably have been attempted by the respondent.

198. We do not blame the claimant for seeking to control the method in which he received information. He was, as we have said, probably more intensely affected by the stressful time in the country as a whole and particularly affected by concerns arising from loss of income and the loss of companionship, routine and self-confidence which comes from attending at work. Nevertheless, the only method of communication available to the

respondent was in formal letters attempting to allay the claimant's concerns in writing and this they did by two letters sent on 9 December 2020 and 1 March 2021.

199. In those letters they made genuine and substantive attempt to deal with the claimant's queries. They may not have all been answered in great detail. Some of the answers are challenged as being inaccurate. Nevertheless, at a time when the respondent was dealing with the day-to-day management of the village which had vulnerable residents and leaseholders, many of whom - as Mr Kiewiet said - would be dealing with their own anxieties, and was also consulting with other members of staff who needed time to make their own decisions about testing and then the vaccines, on the whole we think Mr Osborne's letters were reasonably comprehensive.

200. It was a sad situation but we accept that effective communication had broken down. That meant that the respondent could make no progress to understand the claimant's reasons for refusing to be tested, his state of health, and whether any adjustments could be made for him. The respondent could make no further informal overtures. The claimant was writing long letters challenging all aspects of the testing and the wider issues of the government's response much of which was effectively impossible to answer for this respondent. Keeping the claimant on authorized unpaid leave was a proportionate means of achieving the aim of protecting the vulnerable residents in all of those circumstances.

201. In relation to the s.15 EQA complaint based on dismissal, we focus only on matters prior to the dismissal which took effect on 10 November 2021. The first communication of substance from Mr Watson was on 9 November 2021 (RB page 71 see 180 above) which offered the claimant the opportunity to appeal – an offer first made in the dismissal letter itself.

202. The respondent did not dispute that the "something" relied on – the refusal to undertake COVID-19 testing, was at least part of the reason for dismissal. The proximate reason was in fact the refusal to be vaccinated and lack of evidence that the claimant was exempt. So the burden then passes to the respondent to show that dismissal of the claimant was a proportionate means of achieving a legitimate aim. As already explained, the legitimate aims are made out.

203. Dismissal was capable of achieving those aims because where the employee declined either to be vaccinate or to demonstrate exemption then removing them from employment would prevent any risk of them infecting the service users and prevent any risk that the respondent be in breach of the regulations. The question is whether dismissal was reasonable necessary. For that we need to consider the position objectively, balancing needs of the respondent and impact on the claimant of dismissal.

204. Impact on the claimant of dismissal was severe. He has autism, he is disadvantaged in the employment market as a whole, so losing this job was of greater impact on him than it would have been on someone without autistic spectrum disorder. The assistance and support he received at the start of his employment also leads to the inference that he would face a

challenge fitting into another workplace and that there are a more limited number of roles which are suitable for him. This severe impact has to be weighed up against the needs of the respondent when considering whether the action taken by the respondent was reasonably necessary.

205. We do not ignore that the consultation process involved letters which had some inaccuracies in them and that the claimant found that alienating. However, the history of the respondent's interactions with the claimant from September 2020 to the end of his employment need to be considered as a whole.

206. The respondent referred the claimant to occupational health as soon as it became necessary to exclude him from the workplace because of his stance on COVID-19 testing. The claimant did not agree to release the report. There was a period when the internal correspondence shows that the BUPA HR advised an informal approach to the claimant about the OH report and/or to invite him to go to his GP. That didn't happen because the claimant told OH therapist that he was going to reply substantively in writing.

207. When he did, it was first of the letters which required the respondent to justify following the law in relation to testing. We accept those letters and the subsequent requirement to the respondent not to communicate with the claimant save by recorded delivery prevented any further informal approach. The respondent, by Mr Osborne, sent two detailed letters doing its best to answer the questions. One such letter does flag up that they are waiting for the OH report. This does not lead to the claimant releasing it. Prior to that he had been chased for consent to release the report several times. This led to an impasse.

208. The imminent coming into force of the 2021 Regulations meant that the respondent had to act to break that impasse. Overall the consultation process was reasonable if not perfect. It clearly led to a number of other employees avoiding dismissal. Looking back now, it is easy to allege that dismissal was avoidable but at the time we think the respondent did all they reasonably could to avoid it.

209. Given the time pressures the respondent was acting under to give notice so that employment for potentially a couple of hundred people could be terminated before the legislation came into force, given that the opportunity to avoid the effects of dismissal was made clear – through medical exemption, inviting discussion about redeployment and the offer an appeal in the original letter – the dismissal by letter of 23 September 2021 to come into effect on 10 November 2021 before the legislation came into force on 11 November 2021 was reasonably necessary.

210. The s.15 EQA claim fails.

Breach of the duty to make reasonable adjustments

211. There are 10 alleged PCPs in the list of issues but the complaint based upon PCP 1 was withdrawn.

212. In relation to LOI 9.2.2 we are not satisfied that the email requesting support at this meeting was sent and therefore find that there was no one-off practice of requiring the claimant to attend a meeting on 18 July 2019 without support. There was a meeting on that date which the claimant attended on his own but he described it as providing a welcome confidence boost. Even if, in the absence of a request for a companion, it could be argued that there was a practice of holding the meeting without one, we find the claimant was not put to the substantial disadvantage alleged namely heightened anxiety and stress. Furthermore in the absence of a request for a companion in these circumstances proactively offering one was not a step that it was reasonable for the respondent to have to take.

213. In relation to PCP 3, it is true the respondent did not carry out a risk assessment following the claimant being trapped in the lift but this appears to have been a one off situation caused by the unfortunate circumstance that a lift was called from another floor while the claimant was cleaning it. We are far from convinced that so specific an alleged failure is properly within the concept of "policy, criterion or practice" – how broad that concept is. We do not find there was a such a PCP.

214. The incident happened. It undoubtedly caused the claimant anxiety, as well it might. He was treated sympathetically by the engineers who released him and by Mr Kieweit who came to check on him and sat with him outside afterwards. It is alleged that the claimant suffered heightened anxiety and stress as a result of the respondent not providing a stress risk assessment or occupational health assessment following this incident. There is no evidence that the absence of those investigations caused the claimant heightened stress and anxiety. He did not require any further assistance in relation to incident itself. His autism does not appear to have any link with the incident itself so we do not agree that it warranted an occupational health assessment.

215. If we're wrong about that there is nothing from which to find that a risk assessment or occupational assessment at that time, after the event, would have alleviated any alleged disadvantage of the incident. Mr G Braithwaite clearly remembers it as an unpleasant experience and, fortunately, there is no suggestion of repetition or of him considering that he was unsafe in what he was asked to do thereafter. Such an assessment is not a step which it would be reasonable to expect the respondent to have to take.

216. Furthermore, if we are wrong about that, this episode is clearly unrelated to the rest of the history and happened in October 2019; it was a one off incident. Any reasonable employee requiring a risk assessment or occupational health assessment following that incident would reasonably expect it to have been carried out well before the second anniversary of the incident. Time would have to start to run on or after 27 October 2021 in order for the claim to be in time. A claim based upon this October 2019 was not presented within three months of the act complained, it is not part of any continuing act and there has been no explanation of the reason why proceedings were not brought sooner such as might influence us to exercise discretion to extend time.

217. In relation to the email of 7 May 2020 regarding COVID testing (para.48), even if it was a PCP to inform staff of testing and even if the claimant suffered heightened anxiety and stress as a result of receiving it, it would not have been a reasonable step for the respondent to have to take not to send the email or to reword it. In fact, the evidence we heard leads to the finding that the claimant's stress was caused by the test being abortive rather than particularly by the letter explaining the testing pilot which was taking place in the Witney home. He was spoken to sympathetically by his line manager. The respondent did take steps to try to personalize the process. Otherwise the allegation is indistinguishable from the challenge to the testing policy itself (PCP 5).

218. The COVID testing policy started in May 2020 as a pilot and was made mandatory by the respondent from July 2020. However it does not seem to have been enforced against the claimant – at least not in the requirement for weekly testing – until September 2020. We accept that the claimant was put to the alleged substantial disadvantage. The adjustments suggested were that the claimant would not be required to stay at home (not be suspended), that he should not have been reduced to zero pay, exempt him from testing, and carry out a stress risk assessment and/or OH assessment.

219. In fact, there was a referral to Occupational Health and an OH assessment was done. There was no exemption from 28 September 2020 onwards from the requirement that employees needed a negative test to be able to enter the premises and attend work. The risk of close contact with service users and co-workers and the anxiety of those individuals could not otherwise be alleviated. Therefore simply waiving the requirement to test would not be a reasonable step for the respondent to have to take.

220. A different question is whether the respondent should have paid the claimant; should have put him on authorized paid leave. Our findings about the policy on this are at paras. 68 above. It's clear that there was the possibility that the claimant would not be required to be on unpaid leave as it may be classed as a reasonable adjustment. However, it would not a reasonable step for them to have to take without evidence that the claimant's autism (or related stress and anxiety) was impacting his decision making. Hence the referral to Occupational Health on 29 September 2020 (para.77 above). The Village Manager, then Mr Bradford, met with the claimant and his brother on 1 October 2020. They both had a lot of questions about the testing process and why it necessary which they felt were not satisfactorily answered. However, we think it is probable that there was a discussion about the Village risk assessment and an Occupational Health referral at that time (para.93 above).

221. It was not a reasonable step for the respondent to have to take, to do a stress risk assessment when an OH assessment was done. The claimant refused permission to release the OH report. The respondent took reasonable steps to encourage him to do so, given that there was then a breakdown in informal communications.

222. Mr Osborne's correspondence of sent by Mr Osborne which – there was nothing more the respondent could reasonably have ben expected to do until the claimant released the OH report. The suggestion that they should provide help and support is problematic given that they were respecting the claimant's wishes about method of communication.

223. Alleged PCP 6 is made out in that, the standard practice was for employees to have access to the payslips through the people portal, an online cloud-based system (see para.98 & 99 above). For whatever reason the claimant does appear to have struggled to obtain his payslips through that system. There is in fact little or no evidence that this was a disadvantage compared with people who do not have Autistic Spectrum Disorder but we accept that it caused him specific disadvantage of anxiety which is more than trivial and is greater then would be experienced by the population as a whole. However this issue relates to whether it was reasonable for the respondent to have to do send him payslips after he had been required not to attend work by email without being asked to do so. We reject that argument. The fact that when he requested them he was emailed them is consistent with Mr Kiewiet's evidence that that would certainly have been done on request. There is no evidence that the claimant asked for it to be done every month as a matter of course. We are of the view that in the absence of such a request that was not a step it was reasonable for the respondent to have to take.

224. PCP 7 is a complaint about the level of communication from the respondent in around November 2020. the claimant alleges there was a breach of the duty to make reasonable adjustments in respect of sending excessive emails, what the claimant regarded as excessive emails in November 2020. This seems to have been the result of a failure to take the claimant off the circulation list after his request for a period of approximately 10 days. It was a time of heightened emotion and it is not that we find that the claimant was not generally in a very distressed state in November 2020 or specifically made more anxious and experienced more pressure with every email that was received from the respondent. However objectively this is an entirely trivial administrative act that did not happen as quickly as the claimant wanted it to we do not think that it was a step that it would have been reasonable for the respondent to have to take to remove the claimant from the distribution list ceased email communications sooner than they did. Those communication ceased approximately two weeks after they were requested which in the circumstances seems reasonable.

225. PCP 8 alleges a practice of excessive communication in 2021. Averall, the respondent complied with the claimant's wishes as to method of communication. The respondent organizes its business so that BUPA, the parent company in the group, has a company which provides HR services and other management services to the individual companies running the residential homes and Villages. That is not an unusual state of affairs and it is not difficult to understand. It is in the nature of an internal consultancy. It does meant that some communications come from people who use a Richmond village email address and some from people who use a BUPA email address. But it would not be a reasonable step for the respondent to

have to take to constantly explain itself or re-write letters on a different headed notepaper when it is such a large organization.

226. PCP 9 complaints about a practice of short notice of the consultation meeting of 16 August 2021. The claimant may well have been disadvantage by short notice of the meeting but invitation letter itself invited the recipient to ask for it to be rearranged. In those circumstances, there was nothing more the respondent needed to do.

227. PCP 10: The respondent did not have the PCP or dismissing employees who refused the COVID-19 Vaccination. There was a PCP that the respondent would dismiss employees who refuse to have the COVID-19 vaccination and were unable to find alternative work or produce evidence of exemption. They did not apply the alleged PCP to the claimant. If the claimant was put to the alleged disadvantage by the PCP which was applied, there were not additional steps that it was reasonable for the respondent to have to take to avoid the disadvantage to him. They did mention that there was a medical exemption in the invitation to consultation meeting and the dismissal letter. In the correspondence from 9 November onwards, the claimant was invited to a meeting to discuss the situation and the respondent provided him with template exemption letter on 17 November 2021 after the claimant, only on 4 November, had set out the basis on which he claimed to be exempt. They paused the dismissal taking effect to give the claimant time to complete the form. The claimant did not complete the form. There was no further step that it would be reasonable for them to have to take.

Indirect disability discrimination

228. In our view the indirect disability discrimination claim fails because the claimant is unable to show the group disadvantage. He is cannot show that persons with whom he shares the protected characteristic of being disabled by reason of Autistic Spectrum Disorder in general would be put at the particular disadvantage of heightened anxiety, potential suspension or dismissal as a result of any of the PCPs relied on. For the indirect discrimination complaint those are the PCPs concerned with COVID-19 testing, the consultation meeting on 16 August 2021 and dismissal for failure to have a vaccine.

229. We do not think it right to infer from the claimant's own experience that people with Autistic Spectrum Disorder generally would be put to the particular disadvantage. Furthermore, many people who do not share the characteristic also experienced those particular disadvantages. We do not have the primary evidence from which to assess whether the impact on people with Autistic Spectrum Disorder of those PCPs was disproportionate.

230. The indirect disability discrimination complaint fails for that reason. If we are wrong about that, the respondent's actions were justified for much the same reasons as applied to justification of the s.15 EQA complaints (see paras.190 to 209 above).

Harassment

231. The first three allegations relate to the meetings on 25 September and 28 September 2020 and the decision to send the claimant home and asking to refrain from work without pay from 28 September onwards.

232. The facts we have found do not support the allegation that the meeting of 25 September was conducted in a hostile and threatening way nor the allegation that he was not permitted to have the support of his brother. We accept the claimant had some anxiety about the meeting but there was nothing particularly threatening about the way it was conducted and the respondent had no reason proactively to offer the support of the claimant's brother at the meeting on 28 September.

233. In any event, although the claimant wanted the respondent to behave differently, it is not reasonable objectively to regard that conduct as having the harassing effect. The claimant, with his vulnerabilities, may actually have experienced the meeting as intimidating but it is not reasonable for him to have done so in all the circumstances. The circumstances included the respondent's objectives of controlling so far as possible the risk that people coming to the home for work might be carrying coronavirus despite being symptom-free. In the circumstances of the pandemic even an imperfect testing system provided more information about how to control risk to the residents than no testing system or an inconsistently administered testing system. If they had simply permitted the claimant to continue to attend work without any test then that will increase the risk that the virus could enter the home.

234. LOI 11.1.4: it is not reasonable in all the above circumstances to regard dismissal as having the harassing effect. We refer to our reasons for concluding that dismissal was within the range of reasonable responses (paras:172 to 180 above) and a proportionate means of achieving a legitimate aim (paras:201 – 209).

235. The fifth allegation of harassment relates to the specific communication about testing on 17 November 2020 (page 273) to the staff generally that testing was to take place weekly on Mondays in future. This is one of the pieces of correspondence that postdate the claimant's request not to receive email communication. Although headed "Dear Gurney" it is obviously designed to be sent as a group communication. Although the claimant may have wondered why he received was receiving such communication when he had made clear his decision not to agree to testing, it is not reasonable objectively, even taking into account the claimant sensibilities, to regard it as meeting the high test of harassment set out in the statute. Furthermore, simply because it causes anxiety - which is a consequence of Autistic spectrum Disorder - that does not mean that the act of sending the email is related to the claimant's disability. Our conclusion is that it is not and this email was not an act of harassment.

236. In relation to LOI 11.1.6, four emails were sent in November 2020 following the date on which the claimant said he would not he withdrew consent to being communicated with save by hardcopy delivery or

registered post. We do not consider that correspondence to be excessive over the period 12 to 24 November 2020 but it was clearly unwanted. However the disability-related harassment claim in relation to this alleged act fails because those communications were clearly not related to disability. They may have had the harassing effect as a matter of fact because the claimant was under pressure and his condition means that he is susceptible to become very anxious but that is insufficient to mean that the conduct is related to the disability of Autistic Spectrum Disorder. Furthermore it is not reasonable to regard four emails in 10 days that are clearly round-robin emails sent to all staff as having the harassing effect and this particular complaint of harassment failed for that reason also.

Breach of contract

237. We turn to the breach of contract complaint. In order to determine this we ask ourselves the following questions

    a. What was the change to the contract that the respondent sought to introduce?

    b. The respondent relies on the contractual term which, on its face, permits them to make reasonable changes to the contract (see para.45 above). The next question is therefore whether this was a reasonable change and therefore within the reserved right to vary the contract by notifying the employee of that change.

    c. It is argued on behalf of the claimant that there was a failure to notify the claimant in writing as soon as possible and in any event within a month of the change and therefore the question arises as to whether in the circumstances of this case change with validly put into effect in the absence of such written confirmation. In other words should that contract and be written as meaning that without written confirmation the respondent has not validly varied the contract.

238. The change to the contract was to introduce a condition of being permitted to enter the workplace (and therefore of continuing to receive pay) that the employee should consent to be tested for coronavirus. It is clear from the respondent's actions in commissioning an occupational health referral and from the internal correspondence that that, in some circumstances, authorised paid leave was considered. In other words adjustments to the requirement could be considered which would ensure that the condition complied with employment law, specifically the Equality Act 2010. We think that because of the way it was clearly intended to be operated and because it permitted for those exceptions it was a reasonable change of contract. The wider circumstances of the business need to make the change have to be weighed in the balance when deciding whether it was a reasonable change. Those included the need to protect residents but also other staff members.

239. We are acutely conscious that, as drafted, the flexibility clause is potentially very broad and should be construed restrictively. However in

exceptional circumstances the respondent has to be able to take measures even if those are to the detriment of particular employees if those are required to protect the interests of other vulnerable groups.

240. Does the clause mean that the respondent has to notify the claimant in writing within a month of the change in order for it to be validly effected? We think that that is a different potential breach.

241. The claimant, as a matter of fact, understood from July 2020 onwards that testing was compulsory in general although an exception was made for him and he was apparently not required to test either monthly or weekly at that time. This is particularly the case when – according to the claimant – he was not paid for 11 & 12 May; those are the days he was told not to attend work until he had performed his first test.

242. The contract of employment is always subject to the implied duty of trust and confidence and the implied duty not to act capriciously. The breach of contract claim has not specifically alleged that either were breached. The claimant was notified orally on 28 September 2020 what the consequences for him would be and this is, potentially, when the change was enforced against him. The written explanation was given on 9 December 2020. It would have been better had this been notified sooner.

243. However, the same change was made to the contracts of all affected employees. The suspension of the claimant or the management instruction that he not attend work unless he had received a negative COVID-19 test was not done in breach of contract. The breach of contract claim fails.

_____

Employment Judge George

_____

Date 17 November 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19 November 2024

FOR EMPLOYMENT TRIBUNALS

APPENDIX – List of Issues

1. Time limits

1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 27 October 2020 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?

2. Unfair dismissal – s98 ERA

2.1. What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely that:

- 2.1.1. the respondent held a reasonable belief that to continue to employ the claimant after 10 November 2021 would have placed the respondent in breach of the Coronavirus legislation. and/or,
- 2.1.2. The claimant refused a reasonable management instruction, to be vaccinated against Covid-19.

2.2. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2.3. The claimant raises the following specific points:

- 2.3.1. The claimant does not agree that the Covid-19 legislation was in force at the time of his dismissal. Alternatively, there was an exemption within the legislation that meant vaccination was not required if there was a clinical reason;
- 2.3.2. There was no proper and lawful consultation process;
- 2.3.3. The respondent ignored and failed to investigate the contents of his emails of 1 April and 12 May 2020;

2.3.4. The respondent failed to show that the claimant was putting himself or others at risk;
2.3.5. The respondent failed to justly determine whether the claimant had reasonable and lawful excuse not to engage in testing and vaccination;
2.3.6. The respondent's appeal process was not lawfully and fairly done.

3. Automatic unfair dismissal (whistleblowing) - s103A ERA

3.1 *No longer needs to be decided due to claimant's withdrawal.*.

4. Automatic unfair dismissal (health and safety) - s100(1)(c) ERA

4.1 *No longer needs to be decided due to claimant's withdrawal.*

5. Protected disclosure – s43B ERA

5.1 *No longer needs to be decided due to claimant's withdrawal.*

6. Detriment (whistleblowing) – s47B ERA

6.1. *No longer needs to be decided due to claimant's withdrawal*.

7. Detriment (health and safety) – s44 ERA

7.1. *No longer needs to be decided due to claimant's withdrawal.*

8. Discrimination arising from disability (Equality Act 2010 section 15)

8.1. Did the respondent treat the claimant unfavourably by:

8.1.1. On 25 September 2020, requiring the claimant to attend a meeting, which was conducted in a hostile and intimidating way;
8.1.2. On 25 September 2020 – not allowing the claimant any support (from his brother) at that meeting;
8.1.3. On 28 September 2020 – suspending the claimant from work, and doing so without pay;
8.1.4. Dismissing the claimant on notice on 23 September 2020.

8.2. Did the following things arise in consequence of the claimant's disability:

8.2.1. The claimant's refusal to undertake the testing.

8.3. Was the unfavourable treatment because of any of those things?

8.4. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims to comply with the

government guidance around Covid-19, and to protect its vulnerable users. The Tribunal will decide in particular:

8.4.1. was the treatment an appropriate and reasonably necessary way to achieve those aims;
8.4.2. could something less discriminatory have been done instead;
8.4.3. how should the needs of the claimant and the respondent be balanced?

8.5. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

9.1. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9.2. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

9.2.1. *No longer needs to be decided due to claimant's withdrawal*;
9.2.2. PCP2 – the requirement that the claimant attend the meeting on 18 July 2019 without any support;
9.2.3. PCP3 – on or around 21 October 2019 not providing a stress risk assessment or occupational health assessment following an employee being trapped in a lift;
9.2.4. PCP4 – the sending of a blanket email on 7 May 2020 regarding covid testing;
9.2.5. PCP5 – the Covid-19 testing policy implemented from March 2020;
9.2.6. PCP6 – employees only having access to payslips online;
9.2.7. PCP7 – the number of communications from BUPA by email in around November 2020;
9.2.8. PCP8 – the level of communication from the re
9.2.9. PCP9 – only giving one working day's warning of the meeting on 16 August 2021;
9.2.10. PCP10 – dismissing employees who refuse to have the Covid-19 vaccination.

9.3. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

9.3.1. In relation to all PCPs, the claimant suffered heightened anxiety and stress; and specifically,
9.3.2. PCP1 –; *the claim based on PCP1 was withdrawn*
9.3.3. PCP5 – as well as generalised anxiety, the claimant has hypersensitivities to smell, sound, and touch, particularly in relation to his body, as would be required for the Covid-19 vaccine;
9.3.4. PCP6 – the claimant was not able to access payslips or anything on the online system;
9.3.5. PCP9 – due to heightened anxiety, the claimant felt unable to

attend the meeting on 16 August 2021;

9.3.6. PCP10 – being dismissed.

9.4. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.5. What steps could have been taken to avoid the disadvantage? The claimant suggests:

9.5.1. PCP1 – *complaint withdrawn*
9.5.2. PCP2 – permitting the claimant to have a companion in the meeting with him on 18 July 2019;
9.5.3. PCP3 – doing a stress risk assessment or occupational health assessment;
9.5.4. PCP4 – not sending the claimant the blanket email to all staff, or rewording it;
9.5.5. PCP5 – not suspending the claimant, and not suspending him on zero pay, applying an exemption to the requirement to be tested, providing help and support, doing a stress risk assessment, doing an occupational health assessment;
9.5.6. PCP6 – providing the claimant with sufficient help with the online system to overcome his issues with accessing payslips;
9.5.7. PCP7 – not contacting the claimant as frequently;
9.5.8. PCP8 – less communication, communication from the respondent rather than BUPA, or confirmation from the respondent that BUPA could communicate on their behalf;
9.5.9. PCP9 – giving the claimant more than one working day's notice;
9.5.10. PCP10 – not dismissing him, helping the Claimant with an exemption letter, or finding him an alternative position.

9.6. Was it reasonable for the respondent to have to take those steps and when?

9.7. Did the respondent fail to take those steps?

10. Indirect discrimination (Equality Act 2010 section 19)

10.1. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

10.1.1. PCP4 – the sending of a blanket email on 7 May 2020 regarding covid testing;
10.1.2. PCP5 – the Covid-19 testing policy implemented from March 2020;
10.1.3. PCP9 – only giving one working day's warning of the meeting on 16 August 2021;
10.1.4. PCP10 – dismissing employees who refuse to have the Covid-19 vaccination;
10.1.5. PCP11 – The respondent informing employees that testing was a choice, whilst also informing employees that they would not be able to come to work if not tested

10.2. Did the respondent apply the PCPs to the claimant?

10.3. Did the respondent apply the PCPs to persons with whom the claimant does not share the characteristic or would it have done so?

10.4. Did the PCPs put persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, in that

10.4.1. In relation to all PCPs, the claimant suffered heightened anxiety; and specifically,
10.4.2. PCP 5 – the claimant was suspended 28 September, without pay;
10.4.3. PCP11 – the claimant was dismissed.

10.5. Did the PCPs put the claimant at that disadvantage?

10.6. Were the PCPs a proportionate means of achieving a legitimate aim? The respondent says that its aims to comply with the government guidance around Covid-19, and to protect its vulnerable users. The Tribunal will decide in particular:

10.6.1. was the PCP an appropriate and reasonably necessary way to achieve those aims;
10.6.2. could something less discriminatory have been done instead;
10.6.3. how should the needs of the claimant and the respondent be balanced?

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

11.1. Did the respondent do the following things:

11.1.1. On 25 September 2020, requiring the claimant to attend a meeting, which was conducted in a hostile and intimidating way; 11.1.2. On 25 September 2020 – not allowing the claimant any support (from his brother) at that meeting;
11.1.3. On 28 September 2020 – suspending the claimant from work;
11.1.4. Dismissing the claimant on notice on 23 September 2020;
11.1.5. On 17 November 2020 – sending the claimant another demand for attending for testing;
11.1.6. The number of communications from BUPA by email in around November 2020.

11.2. If so, was that unwanted conduct?

11.3. Did it relate to disability?

11.4. 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?

11.5. 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.

12. Breach of contract

12.1. Did this claim arise or was it outstanding when the claimant's employment ended?

12.2. Did the respondent do the following:

12.2.1. Suspend the claimant without pay on 28 September 2020?

12.3 Was that a breach of contract?

13. Remedy

13.1. If the claimant was unfairly dismissed, if there is a compensatory award, how much should it be? The Tribunal will decide:

13.1.1. What financial losses has the dismissal caused the claimant?
13.1.2. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
13.1.3. If not, for what period of loss should the claimant be compensated?
13.1.4. 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?
13.1.5. If so, should the claimant's compensation be reduced? By how much?
13.1.6. If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
13.1.7. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
13.1.8. Does the statutory cap of fifty-two weeks' pay or £93,878 apply?

13.2 What basic award is payable to the claimant, if any?

13.3 If the claimant succeeds on his discrimination claims, should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

13.4 What financial losses has the discrimination caused the claimant?

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

13.6 Should interest be awarded? How much?

13.7 If the claimant succeeds on his detriment claims, what financial losses has

the detrimental treatment caused the claimant?

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

13.9 Is it just and equitable to award the claimant other compensation?

13.10 If the claimant succeeds on his breach of contract claim, how much should the claimant be awarded as damages?