EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. 8000388/2024

Final Hearing held in Dundee on 12 – 16 and 19 May 2025

Employment Judge A Kemp
Tribunal Member P Fallow
Tribunal Member J McCullagh

Mr C de Vere	**Claimant** **Represented by:** **Ms K Sharpe,** **Solicitor**
Hivemind Network Limited	**Respondent** **Represented by:** **Mr N MacDougall,** **Advocate** **Instructed by:** **Ms L Doci,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that

(i) The respondent did not directly discriminate against the claimant under section 13 of the Equality Act 2010;

(ii) The respondent did not discriminate against the claimant under section 15 of the Equality Act 2010;

(iii) The respondent did not make unlawful deductions from the wages of the claimant under section 13 of the Employment Rights Act 1996; and

(iv) The respondent was not in breach of contract.

The claim is therefore dismissed.

REASONS

Introduction

1. This was a Final Hearing into claims under sections 13 and 15 of the Equality Act 2010, section 13 of the Employment Rights Act 1996 and for breach of contract.

2. There had been a Preliminary Hearing held on 2 September 2024, after which further particulars of the claim were provided. There was then a Final Hearing fixed, but it was converted into a Preliminary on 12 November 2024 for reasons given in a Note issued after it. The Final Hearing was postponed and various case management orders made.

3. Also at that latter Preliminary Hearing, as it became, the Tribunal heard evidence on the issue of disability status. Whilst no written Note or Judgment was issued, the Tribunal determined that the claimant was a disabled person under the 2010 Act. The parties before us confirmed that that was so.

Issues

4. The parties had agreed a list of issues. Included within that were whether or not the respondent had actual or imputed knowledge of the claimant's disability and if so when that was, and potentially at least issues as to jurisdiction on the matter of timebar, as well as issues arising in relation to each of the three claims, and as to remedy.

Evidence

5. Evidence was given by the claimant, who also called his wife Mrs Hazel de Vere and Ms Angela Hill, and for the respondent Mr Lyndon Docherty, Mrs Ruth Walker, Mr Ben Dickie and Mr Ian Mason. The parties had concluded a Bundle of Documents, and a Supplementary Bundle, most but not all of which was spoken to in evidence. No Statement of Agreed Facts was provided.

Facts

6. The Tribunal found the following facts established, material to the issues before it. The Tribunal considered all of the evidence although not all was it considered relevant to those issues:

Parties

7. The claimant is Mr Christoper de Vere. His date of birth is 17 December 1970. He had a lengthy career in sales roles before joining the respondent.

8. The claimant is a disabled person under the Equality Act 2010 and was so throughout his employment with the respondent. He has rheumatoid arthritis. His condition affects his mobility, he suffers from pain, and he can become fatigued. His condition can be exacerbated by stress. Travel on public transport or by plane can cause him discomfort and pain by having to sit in a limited space for reasonably lengthy periods.

9. The respondent is Hivemind Network Limited. It is a company incorporated under the Companies Acts. It provides consulting services to businesses. It does so utilising third party contractors, who provide business services to clients of the respondent.

10. The respondent has about 15 employees. It works on a virtual basis, with its employees generally working from home, but having meetings in person from time to time. It contracts with around 2,000 contractors. It has clients which vary in number from about 6 to about 18 from time to time.

11. The respondent's Chief Executive Officer is Mr Lyndon Docherty. The claimant's line manager, the Chief Financial Officer and a member of the senior management team is Mr Ben Dickie. Other members of the senior management team were Mrs Ruth Walker and Mr Dave Clark.

Employment

12. The claimant was employed by the respondent as an Account Director with effect from 9 May 2022.

13. The claimant was provided by the respondent with a draft employment contract prior to his joining the respondent. The claimant discussed its

terms with Mr Ben Dickie of the respondent, one of its directors, in or around mid May 2022. Mr Dickie made general comments about the commission arrangement that was referred to in the draft contract. The claimant signed the contract electronically thereafter. The contract states that it is dated 16 May 2022.

14. In clause 2 the contract provided for a commencement of permanent full-time employment on 9 May 2022. Clause 4 provided that the employee would work for 40 hours per week as an Account Director. Clause 9 provided that "Payment paid to the Employee for the services rendered by the Employee as required by this Agreement ("the Payment") will include an annual salary of £60,000 GBP". Clause 10 provided that "This Payment will be payable at the end of the month while this Agreement is in force. "

15. Clause 11 further stated that "The Employee understands and agrees that any additional remuneration paid to the Employee in the form of bonus or other similar incentive compensation will rest in the sole discretion of the Employer and that the Employee will not earn or accrue any right to incentive remuneration by reason of the Employee's employment."

16. Clause 55 provided that "The Termination Date specified by either the Employee of the Employer may expire on any day of the month and upon the Terminate Date the Employer will forthwith pay to the Employee any outstanding portion of the wage, accrued vacation and banked time, if any, calculated to the Termination Date."

17. The contract included a term under the heading "Additional Terms" as follows:

> "61. Performance related sales commission of £60,000 is payable in addition to the salary. Commission is paid once work is delivered and approved by Hivemind clients."

18. The definitions in clause 63 included that

> " 'Termination Date' means the date specified in this Agreement or in a subsequent notice by either the Employee or the Employer to be the last day of employment under this Agreement. The parties

> acknowledge that various provisions in this Agreement will survive the Termination Date."

19. It was provided in clause 65 that headings were for the convenience of the parties and were not to be considered when interpreting the Agreement.

20. Clause 70 provided that

> "This Agreement constitutes the entire agreement between the parties and there are no further items or provisions, either oral or written. The parties to this Agreement stipulate that neither of them has made any representations with respect to the subject matter of this Agreement except such representations as are specifically set forth in this Agreement."

Up Time meetings

21. At the start of each day the respondent held an "up time" meeting, at which all employees were to attend remotely. Its purpose was as a general catch up and discussion of what was to happen that day.

22. During a few of those meetings the claimant made reference to his having arthritis. He did so as a passing reference to that. At others the claimant was asked about how he had been after travelling to an off-site meeting, and he said something to the effect that he suffered fatigue and discomfort.

Off-site meetings

23. The respondent arranged around four meetings per annum which its employees attended in person, held in Surrey. The respondent had a Travel Policy (which was not before the Tribunal). It sought to encourage travel by the cheapest manner for the respondent.

24. The claimant drove to the first such meeting. He did so as he considered that that would be the most comfortable method of travel for him. The claimant and Mr Dickie exchanged messages on 19 September 2022. When Mr Dickie enquired about the journey the claimant said that it had been "fine til I got out of the car", and then referred to his rear and hips

hurting. He did not mention arthritis. On 20 September 2022 the claimant referred to having had a terrible night's sleep but not the reason for that.

25. The claimant and respondent had discussions thereafter particularly in or around May 2023 with regard to travel for future meetings. The respondent sought to have the claimant travel by air, believing that that was the quickest and cheapest way to do so. The respondent through its employee Holly Stone stated that the respondent preferred him to travel by plane or train, and he did so by train for the second such meeting held in or around May 2023. The respondent did not wish him to travel by car as they believed that would have him not working for two days, and he had been reported as saying that he gained from claiming for fuel. They considered that air or train travel was cheaper.

26. The claimant and Mr Dickie exchanged messages on 15 September 2023 about travel to the next such meeting, in which Mr Dickie stated "up to you" meaning that the claimant could choose which way to travel. Mr Dickie stated that he thought that the claimant " should consider flying – an 8 hour drive is mental." The claimant drove to the next meeting. He exchanged messages with Mr Dickie on 19 September 2023. He did not mention arthritis. That was last such meeting he attended was in September 2023.

27. The respondent arranged a Christmas party in December 2023. It was to be held in person. On 30 November 2023 the claimant emailed Mr Dickie to state that he would not be able to attend due to "lurgi". At that Christmas meeting Mr Docherty said to a member of the respondent's network that the claimant was not present as it was cold and difficult for him to travel due to his arthritis.

Commission

28. Commission was paid on the profit earned by the company from work carried out for clients. The commission arrangements were specific to each member of the sales team. They were not committed to writing for any of the employees, including the claimant, save for the contract of employment.

29. For the claimant the basic structure for payment of commission was that once the work contracted for had been carried out and approved by the client, with the work then invoiced and paid, the contractor carrying out the work would be paid. A figure for gross profit earned by the respondent was then calculated, and the commission for the claimant then ascertained by a formula based on 30% with the resulting figure divided by one third. Mr Dickie messaged the claimant on 14 October 2022 to state that he wanted the claimant to earn six figures in commission that year.

30. The respondent introduced [on a date not given in evidence] an online system by which those in the sales team, including the claimant, could access at any time the work from which they might earn commission. It provided the booking number for each piece of work, the name of the client, the date on which the work had been delivered by the contractor, and the payment status. If the work had been approved by the client and paid for it would state that it had been paid in full and the commission would then be due, the amount of it calculated and a figure for commission provided.

31. In or about January 2023 the claimant was provided by Mr Dickie with a new account to manage, for a client named Northern Standard. He was informed that his commission would be calculated on the excess over 90% of the average of the previous profits earned for that client, but otherwise with essentially the same structure for its calculation.

32. The commissions when earned by the claimant were paid to him monthly in arrears. The claimant's payslips set out a figure for salary, which was £5,000 per month gross, and a figure for commission when that had been earned, which varied month by month.

Complaints

33. Mr Dickie was aware of informal complaints made by some employees of the respondent about the claimant. In one, the claimant had posted a message on a site to which staff and others had access in reply to a message from another staff member. That message had a picture of a dog toy, and the person posting it stated something to the effect that it may look like a sex toy but was not. In reply the claimant posted a still image

from the BBC comedy Only Fools and Horses showing the character Del-boy Trotter beside a sex doll a message – don't worry Rodney we will say it is a dog toy. He did so in an attempt at humour. Not long afterwards in an Up Time call on or about 19 September 2023 the claimant made a comment about a car wash and used the words "soapy hand job", or similar. That was not an accurate quotation from a story in the Sun newspaper from about four years earlier. The claimant did so in an attempt at humour. At least one staff member complained about the comment to her manager Mrs Gwen Wilcox, who in turn emailed Mr Docherty about it the following day. She said that the comment "needs to be addressed" and "its been raised before a number of times for inappropriate comments and some inappropriate posts……".

34. The matter was referred to Mr Dickie who emailed the claimant that day stating "I've had a complaint raised about things said on an uptime call this week. As this is not the first time it has happened we need to go through a formal disciplinary process and hearing. I will look for a time on Monday to have this session with you and you can select a member of the team to have as your note-take/witness."

35. The claimant replied the next day stating "sure, no need for a note-taker".

36. Mr Dickie discussed matters further with Mrs Wilcox, and having done so decided that the issue could be addressed informally without any disciplinary process or hearing. He spoke to the claimant, on 25 September 2023 and informed him that the comment was inappropriate, and that the claimant required to be professional in his dealings or words to that effect.

37. The claimant emailed Mr Dickie on 25 September 2025 after the call, referring to stress, and stating that he was not making a complaint but making his "concerns a matter of record in case I find myself facing similar unfounded and apparently discriminatory accusations in the future." He referred to the complaint from someone in Mrs Wilcox's team, and that that was the second complaint, which he alleged might be malicious. He attached a copy of the message which he described as a meme, and accepted that he had used the phrase "soapy hand job car wash". He

admitted that his recollection of the story from the newspaper in 2018 was "slightly flawed". He thought that at worst he was guilty of poor geography as the story was from Stoke rather than Scunthorpe as he had thought. He did not consider that the nature of the complaints was trivial, and far tamer than some other comments.

38. Mr Dickie was very surprised to receive that message. He replied on 29 September 2023, apologising for any stress, referring to the team being more diverse and that "our culture and behaviours will need to change and mature too." He said that the respondent had demonstrated that it had supported him, but if he felt differently he was happy to discuss it.

Business development

39. In late 2023 and early 2024 the respondent pursued some initiatives to improve its business development. They included seeking to obtain business from new clients, to improve the number of such clients. Mrs Walker raised those initiatives with the claimant, who was not receptive to them or supportive of them.

40. During January 2024 the claimant sent Northern Standard an incorrect CV for a contractor to carry out new work for them. Mrs Walker became aware of the matter and indicated that the claimant should seek to avoid repeating that mistake. North Standard emailed the claimant about the contractor on 23 January 2024 stating that they had had an interview but wished to know if the respondent had another candidate to offer. The claimant replied to their query not by proposing another candidate but proposing the same candidate originally put forward but at a lower daily rate. Mrs Walker immediately raised that reply with Mr Dickie as she was concerned that it was the wrong approach as it had not given the client what they had sought. Mr Dickie agreed. The client later approached another company to source a contractor for that work, which led to a loss of profit for the respondent of a sum of the order of £50,000, and damage to their reputation with that client.

41. At around this time a client of the respondent [likely to have been North Standard although that was not clear from the evidence heard] called

Mr Dickie to state that it had lost trust in the claimant and they would not give further work to the respondent if he was involved in managing it.

42. On 7 February 2024 Mrs Walker contacted the claimant and asked him about freeing up time to be able to seek new clients. She did so as part of an initiative to seek to generate new business. The claimant said that he could do so for 2 days per week by working additional hours and arranging work differently. Mr Dickie later joined the conversation.

Termination

43. Mr Dickie and Mr Docherty had discussions about making changes in the respondent's sales team in the early part of 2024. At that stage there were two Account Directors, being the claimant and Mr Ian Donkin. They considered that one Account Director was required. Mr Docherty suggested that it would be appropriate to terminate the contract of Mr Donkin as he had a higher basic salary of £90,000, but he left the decision to Mr Dickie. Mr Dickie also discussed matters with Mrs Walker. Her view was that the claimant should be the person whose employment was terminated, having regard to the North Standard matter, complaints about the claimant, and his lack of positive response to business development initiatives, and limited work in securing new clients.

44. Mr Dickie decided that the claimant should have his employment terminated. He did so because he considered that the respondent had not handled the issue with North Standard appropriately, that there had been a number of complaints against the claimant from staff, including that which led to his verbal warning, and as the other candidate Mr Donkin was a better fit for future business development than was the claimant.

45. On 15 February 2024 Mr Dickie spoke to the claimant and informed him that his employment was being terminated. A transcript of that call is an accurate record of their conversation.

46. Mr Docherty at that time was in Italy with his family dealing with a personal family matter. He had not been fully engaged in company matters during that time. The claimant sought to call him to discuss his termination. He

returned a call from the claimant on 15 February 2024. A transcript of that call is an accurate record of their conversation.

47. On 19 February 2024 Mr Dickie wrote to the claimant confirming the termination of his employment, adding:

> "You will be paid up to and including the 8th March 2024. Salary and commission will be paid as normal in February and an additional payment will be made during the March pay run that will include; pro rata salary, holiday days accrued but not taken and any commission due on revenue booked up to and including 29th February. A final payment will be made in April 2024 to include commission due on revenue booked between 1st and 8th March 2024."

48. The letter also confirmed that the claimant required to complete a handover to Mr Dickie by 23 February 2024 and that the claimant was not required to work after that date. A reason for termination of employment was not given in the letter. Mr Dickie had been advised by an external HR provider that such a reason was not required where the employee was someone with short service.

49. On 20 February 2024 the claimant and Mrs Walker exchanged emails about a handover of work, and matters related to the forthcoming termination. She referred to commission, and her understanding that "everything that is delivered before 8 March you get paid on. " She added that a final payment might be made in April. The claimant did not respond to her email. Mrs Walker sent the claimant a further email on 21 February 2024 a further email confirming matters relating to handover and sending a similar message with regard to commission for work delivered up to 8 March 2024. The claimant did not respond to that message.

50. On 21 February 2024 the claimant emailed Mr Docherty. He stated that the call from Mr Dickie had been very unexpected. He stated that "it seemed I was being made redundant but no one has really given me a clear explanation….." He said that he would be happy to work to his last day as he had "really enjoyed working with everyone…." He referred to Mr Docherty being on holiday at the time. Mr Docherty did not respond.

Grievance

51. The claimant emailed a grievance document to Mr Docherty on 8 March 2024. Mr Dickie responded on 15 March 2024 and invited him to attend a meeting with Ian Mason as chair, with Ms Stone to take notes. The meeting took place on that date. The claimant attended. A minute of that meeting was taken by Ms Stone, which is a reasonably accurate record of the same. The claimant raised the issue of commissions and stated that Mr Dickie had confirmed on his contract of employment that he would continue to receive commission. There was a discussion on the terms of the contract the claimant founded on.

52. The claimant emailed Mr Mason on 21 March 2024 with further comments, and Mr Mason replied the following day. The claimant made further arguments in relation to commission. Mr Mason sent the claimant the minutes of the meeting on 19 March 2024.

53. On 7 May 2024 Mr Mason sent his decision letter on the grievance. Save for holding that no written notice was given as to reasons, and that complaint was partially upheld, the grievance was rejected.

Other matters

54. When work for a client is agreed with them, the contract between the client and respondent provides that there is either no requirement for notice to terminate, or that notice is up to two weeks. The respondent does not know what level of profit is earned by them until after the work is completed, the client confirms its satisfaction, and pays the invoice. At that point the contractor is paid, and the profit level can be ascertained. Clients who state that they may contract for a set period may not complete that period. Some clients challenge the work done, and the respondent may provide extra work or other steps to remedy the matter.

55. The claimant commenced Early Conciliation on 15 March 2024. The Certificate for the same was issued on 19 March 2024. The Claim Form for these proceedings was presented on 2 April 2024.

Submission for claimant

56. Ms Sharpe for the claimant made an oral submission which was on the basis of a written submission she also provided. In very brief summary she argued that the claimant's evidence should be preferred to that of the respondent. She argued that all of the claimant's claims should succeed, and that an award on the basis of the schedule of loss should be made in his favour.

Submission for respondent

57. Mr MacDougall also made an oral submission adopting his written submission, of which the following is again a very brief summary. He argued that the claimant's evidence, and that of his witnesses, should not be accepted, and that that of the respondent should be. He argued that the claim should be rejected in all respects, and the claim dismissed.

Law

Discrimination

58. The law relating to discrimination is found in statute and case law, and account may be taken of guidance in a statutory code.

(i) Statute

59. Section 4 of the Equality Act 2010 ("the 2010 Act") provides that disability is a protected characteristic.

60. Section 13 of the Act provides as follows:

> "**13 Direct discrimination**
> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

61. Section 15 of the Act 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."

62. Section 23 of the Act provides

"**Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of sections 13, 14 and 19 there must be no material difference between the circumstances relating to each case…."

63. Section 39 of the Act provides:

"**39 Employees and applicants**

(2) An employer (A) must not discriminate against a person (B) –

……..

(c) by dismissing B or

(d) by subjecting B to any other detriment."

64. Section 123 of the Equality Act 2010 provides

"**123 Time limits**

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

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable…….

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

65. Section 136 of the Act provides:

> "**136 Burden of proof**
> If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision."

66. Section 212 of the Act defines "substantial" as "more than minor or trivial."

67. The provisions of the Act are construed against the terms of the ***Equal Treatment Framework Directive 2000/78/EC***. Its terms include Article 5 as to the taking of "appropriate measures, where needed in a particular case", for a disabled person, "unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

68. The Directive is retained law under the European Union Withdrawal Act 2018, since renamed assimilated law by the Retained EU Law (Revocation and Retention) Act 2023.

69. There is a further matter to consider in relation to timebar, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar

during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

(ii) Case law

(a) Knowledge of disability

70. The issue of whether or not the respondent knew of the disability is an issue of fact, and arises for the claims under sections 13 and 15 of the 2010 Act. If the respondent did not know of the disability a direct discrimination claim is unlikely to succeed.

71. The separate issue of what has become known as constructive knowledge, which the respondent ought reasonably to have had, arises under section 15 and is one on which the onus falls on the respondent. In ***Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283*** the EAT held that the correct statutory construction of s 4A(3)(b) [the predecessor provision in materially the same terms as the 2010 Act] involved asking two questions;

> (1) Did the employer know both that the employee was disabled and that his or her disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then there is a second question, namely,
>
> (2) Ought the employer to have known both that the employee was disabled and that his or her disability was liable to affect him or her in the manner set out in the statute?

72. In ***IPC Media Ltd v Millar [2013] IRLR 707*** it was held that it is necessary to determine who the alleged discriminator was (ie whose mind is in issue and who, in an appropriate case, becomes 'A'. It was subsequently held by the EAT that the knowledge of one element of the organisation (eg HR or Occupational Health) is not automatically to be imputed to the manager actually taking action against the employee; if that manager lacks the

requisite knowledge, sub-s (2) may operate: ***Gallop v Newport City Council [2016] IRLR 395***. Separate acts can however amount to discrimination - ***Reynolds v CLFIS (UK) Ltd [2015] IRLR 562*.**

73. The provision asking whether an employer could be 'reasonably expected to know' means that an employer may be under a duty to make enquiries to establish whether a person is suffering from a qualifying disability. The Code of Practice at paragraph 6.19 gives the example of an employee who has depression and cries at times at work and says that it is likely to be reasonable for the employer to discuss with the worker whether their crying is connected to a disability and whether a reasonable adjustment could be made to their working arrangements.

(b) Direct discrimination

74. The basic question in a direct discrimination case is: what are the grounds or reasons for the treatment complained of? In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

75. Further guidance was given in ***Amnesty***, in which the then President of the EAT explained the test in the following way:

> "… The basic question in direct discrimination case is what is or are the 'ground' or 'grounds' for the treatment complained of. ……
> In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself……

> In other cases—of which ***Nagarajan*** is an example—the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the 'mental processes' (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in ***James v Eastleigh***, a benign motive is irrelevant … The distinctions involved may seem subtle, but they are real … There is thus, we think, no real difficulty in reconciling ***James v Eastleigh*** and ***Nagarajan***. In the analyses adopted in both cases, the ultimate question is—necessarily—what was the ground of the treatment complained of (or—if you prefer—the reason why it occurred). The difference between them simply reflects the different ways in which conduct may be discriminatory."

76. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions referred to further below) – as explained in the Court of Appeal case of ***Anya v University of Oxford [2001] IRLR 377.***

Less Favourable Treatment

77. In ***Glasgow City Council v Zafar [1998] IRLR 36***, a House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. The claimant must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

Comparator

78. In ***Shamoon v Chief Constable of the RUC [2003] IRLR 285***, also a House of Lords authority, Lord Nicholls said that a tribunal may sometimes

be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

79. The comparator, where needed, requires to be a person who does not have the protected characteristic but otherwise there are no material differences between that person and the claimant. Guidance was given in ***Balamoody v Nursing and Midwifery Council [2002] ICR 646***, in the Court of Appeal.

80. The EHRC Code of Practice on Employment provides, at paragraph 3.28:

> "Another way of looking at this is to ask, 'But for the relevant protected characteristic, would the claimant have been treated in that way?'"

Substantial, not the only or main, reason

81. In ***Owen and Briggs v Jones [1981] ICR 618*** it was held that the protected characteristic would suffice for the claim if it was a "substantial reason" for the decision. In ***O'Neill v Governors of Thomas More School [1997] ICR 33*** it was held that the protected characteristic needed to be a cause of the decision, but did not need to be the only or a main cause. In ***Igen v Wong [2005] IRLR 258*** the test was refined further such that it part of the reasoning that was more than a trivial part of it could suffice in this context: it referred to the following quotation from ***Nagarajan***

> "Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective

> cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."

82. The Court considered arguments as to whether an alternative wording of no discrimination whatsoever was more appropriate, and the wording of EU Directives. It concluded as follows:

> "In any event we doubt if Lord Nicholls' wording is in substance different from the 'no discrimination whatsoever' formula. A 'significant' influence is an influence which is more than trivial. "

83. The law was summarised in ***JP Morgan Europe Limited v Chweidan [2011] IRLR 673***, heard in the Court of Appeal. Lord Justice Elias said the following (in a case which concerned the protected characteristic of disability):

> "5
> Direct disability discrimination occurs where a person is treated less favourably than a similarly placed non-disabled person on grounds of disability. This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant's disability. In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short circuit that step by focusing on the reason for the treatment. If it is a proscribed reason, such as in this case disability, then in practice it will be less favourable treatment than would have been meted out to someone without the proscribed characteristic: see the observations of Lord Nicholls in ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285*** paragraphs 8–

12. That is how the tribunal approached the issue of direct discrimination in this case.

6

In practice a tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a prima facie case, ie if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason".

(c) Discrimination arising from disability

84. The EAT held in ***Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893*** that the requirement for knowledge under section 15 was not that the putative discriminator knew that something arose in consequence of the disability; once the discriminator knew of the disability, and objectively the something which caused the unfavourable treatment arose in consequence of the disability, the terms of the section were satisfied. That "something" did not need to be the sole or principal cause of the treatment, but required to be at least an effective cause, or have a significant Influence on, the treatment.

85. The Supreme Court considered this issue in ***Williams v Trustees of Swansea 2018 IRLR 306*** and confirmed that this claim raises two simple questions of fact: (i) what was the relevant treatment and (ii) was it unfavourable to the claimant? 'Unfavourably' must be given its normal meaning; it does not require comparison. It is necessary to identify the relevant treatment that is said to be unfavourable and then a broad view is to be taken when determining what is 'unfavourable', measuring the treatment against an objective sense of that which is adverse as compared with that which is beneficial. Treatment which is advantageous cannot be said to be 'unfavourable' merely because it is thought it could have been more advantageous, or, because it is insufficiently advantageous.

86. In order to achieve the stated purpose, the concept of 'unfavourable treatment' will need to be construed widely, similar to how the concept of 'detriment' has been construed for the purposes of other anti-discrimination provisions although the two terms are not identical. The Code (at paragraph 5.7) indicates that unfavourable treatment should be construed synonymously with 'disadvantage':

> *"*Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably"

87. In ***City of York Council v Grosset [2018] IRLR 746****,* Lord Justice Sales held that

> "it is not possible to spell out of section 15(1)(a) a … requirement, 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".

88. The EAT held in ***Sheikholeslami v University of Edinburgh [2018] IRLR 1090*** *that:*

> "the approach to s 15 Equality Act 2010 is now well established and not in dispute on this appeal. In short, this provision 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? The first issue involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the 'something' was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence."

89. In ***iForce Ltd v Wood UKEAT/0167/18*** the EAT held that there could be a series of links but required that there was some connection between the something and the disability.

90. In ***Dunn v Secretary of State for Justice [2019] IRLR 298*** the Court of Appeal held that "it is a condition of liability for disability discrimination under s 15 that the claimant should have been treated in the manner complained of because the 'something' which arises in consequence of that disability". This will typically involve establishing that the disability or relevant related factor operated on the mind of the putative discriminator, as part of his conscious or unconscious mental processes. This is not, in this context, the same as examining 'motive'.

91. In ***Robinson v Department of Work and Pensions [2020] IRLR 884*** the Court of Appeal held it is not enough that but for their disability an employee would not have been in a position where they were treated unfavourably – the unfavourable treatment must be because of the something which arises out of the disability.

92. The EAT overturned a Tribunal's conclusion that the employer had constructive knowledge, because further enquiries could have been made, in ***A Ltd v Z [2019] IRLR 952*.**

Unfavourable treatment

93. In ***Williams v Trustees of Swansea University Pension and Assurance Scheme [2017] IRLR 882*** the Court of Appeal did not disturb the EAT's analysis, in that case, that the word "unfavourable" was to be contrasted with less favourable, the former implying no comparison, the latter requiring it. That was undisturbed by the Supreme Court when it later considered the case. The Equality and Human Right's Commission Code of Practice on Employment states at paragraph 5.7 that the phrase means that the disabled person "must have been put at a disadvantage." Reference to the measurement against an objective sense of that which is adverse as compared to that which is beneficial was made in ***T-System Ltd v Lewis UKEAT/0042/15.***

Justification

94. There is a potential defence of objective justification under section 15(1)(b) of the Act. In ***Hardys & Hansons plc v Lax [2005] IRLR 726****,* heard in the Court of Appeal, it was held that the test of justification under the statutory provisions then in force requires the employer to show that a provision, criterion or practice is justified objectively notwithstanding its discriminatory effect. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14*** applied the test set out in that case to a claim of discrimination under section 15 of the 2010 Act. It held that when assessing proportionality, while an employment tribunal must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

95. In ***Chief Constable v Homer 2012 ICR 704*** Baroness Hale emphasised that to be proportionate a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

96. The EAT held in ***Land Registry v Houghton and others UKEAT/0149/14*** that the Tribunal requires to balance the reasonable needs of the respondent against the discriminatory effect on the claimant. That was explained further in ***City of Oxford Bus Services Ltd v Harvey UKEAT/0171/18*** as follows

> "proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment……an employer is not required to prove there was no other way of achieving its objectives (***Hardys & Hansons place v Lax [2005] IRLR 726***). On the other hand, the test is something more than the range of reasonable responses (again see ***Hardys***)."

97. The Supreme Court summarised the law in relation to justification in ***Bank Mellat v HM Treasury (No. 2) [2015] AC 700***, and set four matters to consider – (i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right (ii) whether the measure is

rationally connected to the objective, (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

98. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of its reasoning, the tribunal was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the tribunal. The Court of Appeal in ***Grosset [2018] IRLR 746*** upheld this reasoning.

99. In ***Buchanan v Commissioner of Police of the Metropolis [2016] IRLR 918*** the claimant was dismissed for unsatisfactory performance after eight months of absence. He had been in a serious motorcycle accident whilst responding to an emergency call, and developed post-traumatic stress disorder which had prevented a return to work. The respondent accepted that the officer had been treated unfavourably because of something arising from his disability – namely his absence – but relied on the application of the Police Performance Regulations by way of justification. The EAT held that the Tribunal had erred in accepting justification on the basis that the police force's general procedure had been justified. The EAT drew a distinction between cases where A's treatment of B is the direct result of applying a general rule or policy, to cases where a policy permits a number of responses to an individual's circumstances. In the former the issue will be whether the general rule or policy is justified. In the latter, it is the particular treatment which must be examined to consider whether it is a proportionate means of achieving a legitimate aim.

100. That may be contrasted with the case of ***Browne v Commissioner of Police of the Metropolis UKEAT/0278/17*** in which the EAT held that the employment tribunal were entitled to find that the individual treatment of the claimant was justified because the employer had given the claimant

an opportunity to make representations asking for an extension of sick pay.

101. The Tribunal also had regard to and applied the guidance in relation to justification in indirect discrimination recently issued by the EAT in ***NSL v Zaluski 2024 EAT 8***, a case of indirect discrimination but where the test for justification is essentially the same, which emphasised the importance of carrying out a critical analysis. The Tribunal must form its own view of the working practices and business considerations involved.

102. Guidance on that issue is also given at paragraphs 4.25 onwards in the Code.

(d) Burden of proof

103. There is a normally two-stage process in applying the burden of proof provisions in discrimination cases, whether for direct discrimination or victimisation, as explained in the authorities of ***Igen v Wong [2005] IRLR 258***, and ***Madarassy v Nomura International Plc [2007] IRLR 246***, both from the Court of Appeal. The claimant must first establish a first base or prima facie case by reference to the facts made out. If he does so, the burden of proof shifts to the respondent at the second stage. If the second stage is reached and the respondent's explanation is held to be inadequate, it is necessary for the tribunal to conclude that the claimant's allegation in this regard is to be upheld. If the explanation is adequate, that conclusion is not reached. It may not always be necessary to follow that two stage process as explained in ***Laing v Manchester City Council [2006] IRLR 748*.**

104. Discrimination may be inferred if there is no explanation for unreasonable behaviour (***The Law Society v Bahl [2003] IRLR 640*** (EAT), upheld by the Court of Appeal at ***[2004] IRLR 799.***)

105. In ***Ayodele v Citylink Ltd [2018] ICR 748***, the Court of Appeal rejected an argument that the ***Igen*** and ***Madarassy*** authorities could no longer apply as a matter of European law, and held that the onus did remain with the claimant at the first stage. That it was for the claimant to establish primary facts from which the inference of discrimination could properly be

drawn, at the first stage, was then confirmed in ***Royal Mail Group Ltd v Efobi [2019] IRLR 352*** at the Court of Appeal, and upheld at the Supreme Court, reported at ***[2021] IRLR 811***. The Supreme Court said the following in relation to the terms of section 136(2):

> " s 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not 'there are facts etc'. I agree that this is what s 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras [20]–[23] above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case."

106. The Court said the following in relation to the first stage, at which there is an assessment of whether there are facts established in the evidence from which a finding of discrimination might be made:

> "At the first stage the tribunal must consider what inferences can be drawn in the absence of any explanation for the treatment complained of. That is what the legislation requires. Whether the employer has in fact offered an explanation and, if so, what that explanation is must therefore be left out of account."

107. In ***Igen Ltd v Wong [2005] ICR 931*** the Court of Appeal said the following in relation to the requirement on the respondent to discharge the burden of proof if a prima facie case was established, the second stage of the process if the burden of proof passes from the claimant to the respondent:

> "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive."

108. The Tribunal must also consider the possibility of unconscious bias, as addressed in ***Geller v Yeshurun Hebrew Congregation [2016] ICR 1028***. It was an issue addressed in ***Nagarajan***

(e) Jurisdiction.

109. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). All of the circumstances may be considered, but three issues that may normally be relevant in this context are firstly the length of and reasons for the delay, secondly prejudice to either party (particularly whether a fair hearing of the case is possible) and thirdly the prospective merits of the claim.

110. There is a divergence of authority in relation to the first aspect. There is one line to the effect that even if the tribunal disbelieves the reason put forward by the claimant as to delay it should still go on to consider any other potentially relevant factors, which can include the prospective merits of the claim: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, following ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.***

111. A different division of the EAT decided in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed. In ***Edomobi v La Retraite RC Girls School UKEAT/0180/16*** in which the EAT added that it did not

> "understand the supposed distinction in principle between a case in which the claimant does not explain the delay and a case where he or she does so but is disbelieved. In neither case, in my judgment, is there material on which the tribunal can exercise its

> discretion to extend time. If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay."

112. In ***Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801*** the EAT did not directly address those authorities but stated that, in relation to the issue of delay, "it is not always essential that the tribunal be satisfied that there is a particular reason that it would regard as a good reason".

113. In ***Rathakrishnan*** there had been a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal case of ***London Borough of Southwark v Afolabi [2003] IRLR 220***, in which it was held that a tribunal is not required to go through the matters listed in s.33(3) of the Limitation Act 1980 provided that no significant factor is omitted. That is an English statute in the context of a personal injury claim, which does not apply in Scotland, and is not relevant to the present case as a result. There was also reference in ***Rathakrishnan*** to ***Dale v British Coal Corporation [1992] 1 WLR 964***, a personal injury claim in England, where it was held to be appropriate to consider the plaintiff's prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. The EAT concluded

> "What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see ***Hutchison v Westward Television Ltd [1977] IRLR 69)*** involves a multi-factoral approach. No single factor is determinative."

114. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** the Court of Appeal held similarly:

> "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion."

115. That was followed in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which also discouraged use of what has become known as the ***Keeble*** factors, in relation to the Limitation Act 1980 referred to, as form of template for the exercise of discretion.

116. More recent cases have followed the ***Rathakrishnan*** line, such as ***Owen v Network Rail Infrastructure Ltd [2023] EAT 106*** *and* ***Concentrix CVG Intelligent Contact Ltd v Obi [2023] IRLR 35***.

117. In the Tribunal's view there remains a divergence in authority between these two lines, which Court of Appeal decisions have not determined conclusively. It considers that the first line of authority set out in ***Rathakrishnan*** is that which accords with the statutory definition, and is if not determined by at least supported by the Court of Appeal authorities referred to in the two most recent paragraphs. The Court of Appeal in ***Morgan*** commented on the issue of prejudice and whether the delay prevented or inhibited the employer from investigating the claims while matters were still fresh. In ***Adedeji*** the court stated that there would be prejudice if the evidence was less cogent, but also had the effect of requiring investigation of matters that took place a long time previously. In each case it stated that those were factors to be taken into account, but did not suggest that they were determinative issues.

118. The Inner House of the Court of Session held in the case of ***Malcolm v Dundee City Council [2012] SLT 457*** that the issue of whether a fair trial was possible was "one of the most significant factors" in the exercise of this discretion, in its review of authority. It referred *inter alia* to the cases of ***Chief Constable of Lincolnshire v Caston [2010] IRLR 327*** and ***Afolabi v Southwark London Borough Council [2003] ICR 800.*** In ***Malcolm*** the delay had been of the order of a month, but it is notable that whether a fair trial was possible or not was not considered to be a determinative issue, which I consider also supports the conclusion I have reached.

119. Where there is said to be some ignorance of the relevant law (in this case as to the time limit) the reasonableness of that lack of knowledge is a factor

to take into account - ***Bowden v Ministry of Justice UKEAT/0018/17, Averns v Stagecoach in Warwickshire UKEAT/0065/08*** and ***Adedeji*****.**

120. Issues of prejudice have been addressed above, particularly in ***Malcolm,*** and as to merits in ***Rathakrishnan*****.**

(f) The EHRC Code

121. The Tribunal also considered the terms of the Equality and Human Rights Commission Code of Practice on Employment, which in addition to the references above includes the following provisions:

> "*What if the employer does not know that the person is disabled?*
>
> 5.14
>
> It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.
>
> 5.15
>
> An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.
>
> **Example:** A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened.

> The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability…….
>
> **Substantial disadvantage**
>
> 6.15
>
> The Act says that a substantial disadvantage is one which is more than minor or trivial. Whether such a disadvantage exists in a particular case is a question of fact, and is assessed on an objective basis……
>
> WHAT IF THE EMPLOYER DOES NOT KNOW THE WORKER IS DISABLED?
>
> …….
>
> 6.20
>
> The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping the disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment."

Unlawful deduction from wages

122. There is a right not to suffer unlawful deduction from wages created by section 13 of the Employment Rights Act 1996 ("the 1996 Act"). There is a right to make a claim to the Employment Tribunal provided for in section 23. Wages are defined in section 27 of the 1996 Act as "any sums payable to the worker in connection with his employment including – (a) any fee,

bonus, commission, holiday pay or other emolument referable to his employment whether payable under his contract or otherwise…"

123. The Act can be used to challenge deductions from (or non-payment of) amounts which are not strictly payable under the contract but which are in the reasonable contemplation of the parties as being payable: ***Kent Management Services Ltd v Butterfield [1992] ICR 272***. There must however be some legal right to the payment in question, even if not contractual, as s 13(3) refers to a deduction from the wages 'properly payable': ***New Century Cleaning Co Ltd v Church [2000] IRLR 27.***

Breach of contract

124. Two decisions of the Inner House give guidance on how to construe a contract. The first is ***Ashtead Plant Hire Company Limited v Granton Central Development Limited 2020 CSIH 2*** in which the following guidance was given:

> "First, a contract must invariably be construed contextually. This is an elementary point. Language is inherently ambiguous, and in no serious field of discussion is it possible to reach an intelligent view on the meaning of a particular passage without placing that passage in context. We will return subsequently to the importance of context in a case such as the present.
>
> Secondly, the exercise of construction is objective: the meaning of any particular provision is what a reasonable person in the position of the parties would have understood it to be. This principle is inevitable. A contract has two (or sometimes more) parties, and it is obvious that its meaning cannot be determined by the subjective intention or understanding of one of those parties. The court must take an objective view.
>
> Two further principles of construction are important. First, in interpreting a contractual provision the court should adopt a purposive approach. What this means is that in construing a contract the court should have regard to the fundamental objectives that reasonable persons in the parties' position would have had in mind. Essentially, the central provisions of a contract

> should, in any case of doubt, prevail over the subsidiary clauses. The substance of the parties' agreement, construed objectively, should prevail over niceties of wording, and in particular over clauses that have not been well drafted. Secondly, in construing a contract a court may have regard to what is generally referred to as commercial (or business) common sense……."

125. The second is ***Network Rail Infrastructure Ltd v Fern Trustee Ltd 2022 SLT 997*** which included the following:

> "the court must strive to ascertain the intention of the parties by determining what a reasonable person, having the background knowledge of the parties, would have understood from the language selected by them (*Midlothian Council v Bracewell Stirling Architects 2018 SCLR 606* LP (Carloway), delivering the opinion of the court, at 615, following *Arnold v Britton [2015] AC 1619*, Lord Neuberger at para 15, cited in *Scanmudring v James Fisher MFE 2019 SLT 295*, LP (Carloway) at para [47]). The meaning of the words must be assessed having regard to the other relevant parts of the contract. If there are two possible constructions, the court is entitled to prefer one which is consistent with business common sense (*Arnold v Britton*, Lord Hodge at para 76; *Wood v Capita Insurance Services [2017] AC 1173*, Lord Hodge at para 11). The exercise involves balancing, on the one hand, the language with the factual background and the consequences of any alternative meanings on the other. "Textualism and contextualism are not conflicting paradigms" (*ibid* at para 13)."

126. The context of the present case is also relevant, that being that the respondent drafted the contract and sent it to the claimant as the prospective employee. The respondent was in the more dominant position in light of that. This is a contract of employment, and that is relevant to the construction of its terms.

Observations on the evidence

127. The Tribunal considered that **the claimant** was not reliable in several material aspects of his evidence. On a number of occasions he did not directly and candidly answer the question asked, or provided an answer that strayed well beyond the question. He often gave the impression of giving what he thought was helpful evidence for him rather than answering the question.

128. The claimant's evidence was to the effect that everyone knew he had arthritis and was disabled, but that was contradicted by the respondent's witnesses, who we considered were more reliable. It was we considered relevant that the claimant had not raised in terms that he was a disabled person with the respondent during his employment, either informally by way of email for example, or formally by way of grievance. He stated that he had been discriminated against when arrangements for an off-site meeting were discussed, but did not raise that at the time. When he raised matters with Mr Docherty on 15 February 2024 having been told that he had been dismissed by Mr Dickie he did not raise any allegation that Mr Docherty had been the person who decided dismissal and had done so for discriminatory reasons, but appeared to be hoping to retain his position. That did not appear to us to be consistent with the later allegations made against Mr Docherty, or that the respondent had discriminated against him on account of his disability.

129. The claimant alleged in evidence that he had told Mr Dickie specifically that he spelt out that he was disabled in about May 2023. That was not what he had pled in the Further Particulars, however, and it was refuted by Mr Dickie. It was also not we considered likely to be possible to reconcile that with the exchange about travel to the September 2023 off site meeting, when the claimant did not mention either disability, or arthritis, or that Mr Dickie was aware of each of those, but concentrated on matters of cost and time.

130. There are other issues where his reliability at the least is a material concern. For example, he did not raise with Mrs Walker when emailing her in February 2024 about termination arrangements, and before they took effect, the alleged agreement reached with Mr Dickie before signing the contract that commission would be earned for 12 months after termination,

or that the 90% threshold for North Standard had been agreed no longer to apply, even though twice she raised her understanding of commission arrangements.

131. He made in his pleaded case and in his evidence a series of allegations against the respondent as a company, and Mr Docherty, Mr Dickie and Mrs Walker as individuals, which the evidence did not support. They included that Mr Docherty had orchestrated the dismissal, but the evidence was clear that Mr Docherty had wished to terminate the other Account Director simply as his salary was higher than that of the claimant. The claimant's position was actively disproved in that regard. He alleged that both Mr Dickie and Mrs Walker had ostracised him, but there was no evidence of that, on the contrary there was evidence of them engaging with him and supporting him. He alleged that Mrs Walker was cold and hostile but the written record of how she handled the North Standard issue, caused by the claimant making firstly a mistake on the CV, which she treated with a very light touch, and then not giving the client what they asked for which again she treated lightly despite concerns over loss of business, which took place, shows the contrary.

132. Similarly the claimant alleged that Mrs Walker had been at fault over North Standard, but her evidence was that she did not do anything on that account at that time, and we accepted that. The claimant did not articulate what he thought she had been at fault for. What was also instructive in our view was that there was very little cross examination of Mrs Walker, and not on these points. In our view the only fault in relation to North Standard was that of the claimant, and his attempt to deflect it on to her was entirely unwarranted. These and other allegations the claimant made were we considered not reliable at best.

133. The claimant's email to Mr Docherty of 21 February 2024 was we considered inconsistent with his allegations. He accepted there that redundancy was the background to his dismissal. He said in effect that he had enjoyed working for the respondent. The tone of the message was entirely different from the allegations made in the Claim, not least those against Mr Docherty himself.

134. We therefore rejected large tracts of the claimant's allegations, and his evidence, as unreliable. It did appear to us that he did not understand the complaints about him or the criticisms of others, and assumed that the reason for dismissal was an unlawful one, with disability being the only one he was able to think of. His evidence that he was not at fault for two complaints, one about a message with a still from a BBC comedy, and the other a comment he made which he accepted in a later message was not an accurate quotation from a newspaper, was we considered simply wrong. The two messages were wholly inappropriate in a professional work environment. It is unsurprising that at least one female member of staff complained. The claimant's view that that was malicious was indicative of a complete absence of understanding on his part. Mr Dickie however handled it in a considerate way, with a verbal warning and no formal disciplinary process.

135. For reasons we address below we did not accept his evidence as to the basis of commission arrangements. The commission issue was however determined principally as a matter of the construction of the contract, discussed below, although on the issue of what Mr Dickie had said before signing the contract we preferred Mr Dickie's evidence to that of the claimant, having regard to the concerns over reliability summarised above.

136. **Mrs de Vere** and **Ms Hill** gave evidence we considered reliable in part, but not wholly. That is because firstly Mrs Hill did take the claimant's side, perhaps unsurprisingly, about the two messages referred to above, a matter raised by Mr MacDougall in submission and correctly so in our view, and secondly Mrs Hill worked with him for a limited period of time, had only been present at one event in person at which the claimant also attended, and it appeared to us that some of her evidence was likely to have been influenced by discussion with the claimant and that she had been summarily dismissed herself, again as Mr MacDougall raised correctly in submission. There were however elements of the evidence both gave that we considered to be reliable, and were accepted such that findings in fact were made above.

137. **Mr Docherty** was we considered a credible and reliable witness. He gave generally clear and candid answers to questions. He did not recall some

details, for example what had been said at particular meetings which we concluded was because of the passage of time and as he did not consider it of significance at the time. We concluded from all the evidence that it was probable that the claimant had said either to him or in his presence something about suffering arthritis, and that Mr Docherty had made the comment at the Christmas party Ms Hill referred to. That was however in the context that the condition did not appear materially to affect the claimant, and had no real impact on his work. It was we considered material that Mr Docherty suggested that the claimant be the one retained, and Mr Dickie took another approach. We accepted the evidence Mr Docherty gave on that, and it cuts across entirely the various claims made by the claimant that he had been seeking to prejudice the claimant because of disability.

138. **Mrs Walker** was we considered an obviously credible and reliable witness. She gave her evidence in a very measured manner, and we accepted it. It was we considered material that she had handled the issues with North Standard with, as indicated above, a very light touch. She spoke to a comment that the claimant had made which affected her personally, but about which she had not complained at the time. Although that comment had not been put to the claimant in cross examination and we did not consider it as against the claimant, it was to Mrs Walker's credit that she in a sense simply shrugged it off at the time, and did not let it affect her interactions with the claimant. That is an example of her being far from the cold and hostile person the claimant alleged of her. She rejected the various allegations made by him and put to her in cross examination in entirely convincing terms.

139. **Mr Dickie** we considered to be a credible and reliable witness. He gave we considered entirely honest and so far as he was able to accurate answers. He accepted that he had known of the claimant having arthritis, albeit mentioned in passing. He was however surprised to read the allegation that he was disabled, which he had not understood was the position. More generally if he could not remember a detail he said so even where that might have been to his disadvantage. He explained firstly about the alleged agreement for commission to be paid 12 months after

termination, stated that he would not have done so, although he did not have a full recollection of the discussion, and said that that kind of comment would not have taken place at the inception of the relationship when the focus would be on success, not termination. We considered that to be credible and a matter of common sense. He denied that the North Standard 90% threshold had ever changed, although he accepted that there had been a discussion about a review after a year, and that that review had not taken place. He explained about the exchanges over travel to offsite meetings in an entirely clear and convincing way. He explained how he had handled the complaint against the claimant, and denied that that was affected by disability of which he was unaware. He denied ostracising the claimant, but explained how busy he had been at work, not least when Mr Docherty was absent because of a family matter.

140. On the reasons for termination he explained his views clearly and convincingly. He did not consider that the claimant had handled the North Standard matter properly. He took into account that the claimant had had complaints by staff more than once, with the latter one leading to a verbal warning, and he did not consider that the claimant was the better for as to future business development in light of his less than enthusiastic reaction to Mrs Walker's proposals. It is, as Ms Sharpe pointed out in submission, true that he thought that he spoke to her on this after the dismissal meeting and she had said in evidence it was before, but we did not consider that that point of difference was material or caused us to doubt the evidence each gave.

141. **Mr Mason** gave evidence we regarded as credible and reliable. He did not have a role in matters during employment, but addressed the grievance the claimant made. It is certainly true that that grievance could have been handled better, with for example the reason for dismissal given in the decision letter as well as other details, but there is limited evidential value in a case such as the present from matters arising after termination. This is not an unfair dismissal case.

Discussion

(i) Knowledge of disability

142. The Tribunal concluded that although the claimant had referred to his having arthritis, possibly to rheumatoid arthritis, and that that made travel on public transport more difficult with discomfort, that that was, in all the circumstances, not sufficient to inform the respondent that he was disabled under the Act. Having arthritis does not make a person disabled. More is required to meet the terms of section 6 and Schedule 1. We concluded that they did not in fact know that he was disabled. All of the respondent's three main witnesses stated that they were surprised when that was raised, and we accepted their evidence. We did not accept the claimant's evidence, and his allegations on that in paragraphs 21 and 22 of the Further Particulars document, as to what Mr Docherty is alleged to have said. We considered that that was most unlikely given all of the evidence we heard.

143. We then considered whether the respondent ought reasonably to have done so. In a sense that means whether they were put on notice sufficiently that they ought to have enquired further. The onus in this regard falls on the respondent to show that it could not reasonably be expected to know that the claimant was disabled. We considered that they had discharged it, and that it was not the case that the respondent ought reasonably to have known that the claimant was disabled. The impact at work was very limited indeed, in effect it was only an issue when one set of discussions took place over travel to an off-site meeting in June 2023, and from what we infer were very limited discussions after such meetings when he was noted to be fatigued or in discomfort.

144. He did not in terms say that he was disabled, and when he gave oral evidence to the effect that he had – to Mr Docherty – we did not consider that credible. It was not pled in the Further Particulars document, despite that being detailed in its terms. That the claimant did not say that he was disabled under the Act is not determinative, and is not a requirement, but he did not, and nor did he have for example periods of absence from work. He carried out his work largely from home, and there was no appreciable effect on how he did so. When he mentioned arthritis, as we accept he did, that was in passing. When there was a discussion with Mr Dickie about travel to the off-site meeting he mentioned an effect of travel, but did not

seem to overplay it, saying that he was going for a drink, nor did he say that it was because of arthritis. He mentioned not having a good night's sleep, but did not say why.

145. Whilst in his own mind the claimant may have thought it obvious, and that everyone knew, the basis on which that proposition was put forward was in our view not established in the evidence. On the contrary, we consider that the respondent's witnesses were genuine in their evidence of surprise when that issue was raised later, and that they had not had the kind of indicator that ought to have put them on notice and made further enquiries. Having regard to the statutory test and the Code of Practice we considered that constructive knowledge had not been established.

(ii) Direct discrimination

146. We considered the claims of discrimination if we were wrong on knowledge. We address firstly the claim under section 13 as that arises under the Act first, although the claim was presented in submission initially on the basis of section 15. There are similarities in the arguments for each, but they require separate consideration.

147. We did not consider that the claimant had established a *prima facie* case of direct discrimination. The facts on which he sought to rely were somewhat flimsy from his pled case, but many of them were simply contradicted by the evidence we heard. It is true that the respondent did not give written reasons for termination, but the claimant did have some reasons given to him orally both by Mr Dickie and Mr Docherty in calls, and he also set out his understanding as to redundancy in his later message to Mr Docherty. Whilst he may have disagreed with the decision, and the respondent did not explain to him fully why he rather than the other potential candidate had been chosen, he at least knew that the essential reason was the true one, being redundancy. The respondent needed one less Account Manager.

148. It is surprising that the respondent did not plead what the reasons were in its Response Form. That however is insufficient to establish a *prima facie* case in our view. The respondent did not know that the claimant was disabled, nor consider that as a possibility, and we concluded that neither

consciously nor subconsciously could disability have been any part at all of the reason for dismissal.

149. But even if he had established such a *prima facie* case such that the onus shifted to the respondent, we concluded that it had established that disability played no part whatsoever either in the decision to dismiss him, or the discussions around travel to the off-site meetings. We accepted the evidence of Mr Dickie, Mr Docherty and Mrs Walker in this regard. The decision-maker was Mr Dickie. The decision was effectively one of redundancy, in circumstances where there were two candidates considered for it. Mr Dickie chose the claimant for the reasons set out above, but where in our view the way that the claimant had handled the North Standard matter was not as Mr Dickie considered it should have been, was a significant factor. He had good reason for that. Put simply the claimant did not do what the client had asked. We inferred from all the evidence that it was North Standard which was the client who had said that in effect they did not want the claimant to work on their account – although from the evidence Mr Dickie gave that was not specifically confirmed. It does however appear to us to be likely from the surrounding circumstances. There were also the complaints by staff, which the claimant had not reacted to as Mr Dickie had expected, and how he had addressed business development matters in the past, as well as how he was anticipated to do so in the future. He did not know that the claimant was disabled, and had no reason to think that he might be. The respondent has established that neither consciously nor subconsciously did or could disability have affected that decision in any way.

150. It is true that the matter was not handled as well as it might have been, and the reasons given at the time were somewhat limited. The claimant was wrong to say that they were not given, as some were by both of them, in two calls as referred to above, together with the claimant's email also referred to above. That the claimant did not regard it as sufficient or reasonable is not the point. The claimant argued that the real decision maker was Mr Docherty, and that each of Mr Docherty and Mr Dickie said that the other was that. Mr Dickie did not specifically say that the decision-maker was Mr Docherty, although one reading of what he said might have

inferred that. In fact it is entirely clear that Mr Dickie was the sole decision maker. Mr Docherty said specifically that Mr Dickie had done so, and that is accurate. It was also clear from the evidence of Mrs Walker, as well as that of Mr Dickie himself.

151. Whilst the matter was as stated not well handled, that does not infer discrimination of itself. There requires to be something that connects the decision to the protected characteristic in some way. Even if there is unreasonable conduct that is not sufficient. There was no evidence we accepted that could connect the decision to disability. It also appears to us that Mr Dickie was to be accepted when he said that he did not wish to add salt to the wound when speaking to the claimant by explaining why the redundancy had been decided on. In simple terms Mr Dickie was trying to be as gentle as he could be when dismissing the claimant, and he clearly did not enjoy making that call from the hesitating nature of his words during it as the transcript captures. That we consider explains any lack of fuller reasons for dismissal given at the time.

152. It is also true that the letter of 19 February 2024 did not set out any reason for dismissal. But it did state the dismissal, and the claimant did not ask for written reasons to be provided, save when he raised a grievance. The outcome letter of that grievance was also not as clear and candid as it might have been, but as has been noted this is not a claim of unfair dismissal. Such considerations also do not of themselves show that there was any discrimination. In our view it is clear that there was none.

153. The argument for the claimant required there to be a thread running from the discussion in May 2023 about travel to an off-site meeting, where the policy was to do so as cheaply and quickly as possible (albeit that no policy in writing was before us), which is unsurprising for any company, through to progressing a disciplinary matter without good reason in September 2023, to ostracising the claimant and then engineering his dismissal in March 2024. That is in our view entirely incredible, quite apart from it not being in accordance with the evidence we accepted.

154. There was a little evidence from the claimant that his role was advertised such that it appeared that he sought to argue that there was no real

redundancy. That was not explored in cross examination, but in any event it is clear that the respondent sought a different kind of person in what was described as a vertical sales role, meaning in a particular business area, and that they were seeking someone to be more proactive on the generation of new business in such a vertical role. In so far as that matter was properly before us, we did not consider that the claimant's position had any merit.

155. In our view it is clear that a hypothetical comparator, being someone in essentially the same circumstances as the claimant who was not disabled as he was, would also have been dismissed. The claim of direct discrimination is therefore dismissed.

(iii) Discrimination arising out of disability

156. Ms Sharpe explained the argument in her submission, which is similar to the thread to which we have just referred. It was based initially around the discussions in about May 2023 concerning the off-site meeting and the travel arrangements. She built on that by alleging that following and because of that Mr Dickie commenced a disciplinary hearing process, that senior managers then ostracised the claimant, and that there was a dismissal engineered by Mr Docherty.

157. The difficulty with the first matter is that it arose so long before Early Conciliation commenced. It was far out of time. We did not consider that it was part of conduct extending over a period. For the reasons given above we did not consider that the claimant's evidence on the further matters said to be part of that conduct extending over a period was to be accepted, such that each element of the alleged conduct was not established. More fundamentally the disciplinary hearing the second matter in the thread was not commenced without cause. There clearly was a cause to do so. The claimant had taken an initial message, and made it more sexualised in what he described as a meme. That the still he used came from a BBC comedy does not remove its character as sexualised, and inappropriate although he argued that as it came from that source in effect it could not be objectionable. That ignores both context at work, and the comment he added.

158. The comment the claimant later made was also sexualised, and based on a mistake of recollection from an article, as he accepted in a later email. It was far from the error of geography the claimant there said it was. It was simply inappropriate in a work setting, and that one at least of the staff complained about it is far from a surprise. There was no evidence of malice as the claimant had raised, it was simply one member of staff at least raising it with a manager, who then passed it on in the context of there having been other such issues raised before. Not all of them had been raised with the claimant at all, but were known to the staff concerned. Mr Dickie handled it in a manner which benefitted the claimant as it was not taken to a formal hearing, and only a verbal warning given.

159. There is simply no relationship whatsoever between that and the earlier discussions over travel. It is clear from Mr Dickie's messages of 15 September 2023 that he left the claimant to decide the method of travel to that meeting. He did not insist on the claimant travelling by air or train, and the basis of the claimant's argument it appears to us disappears.

160. There was evidence to contradict the suggestion of ostracisation, the third matter in the thread, and we rejected the claimant's position on that. He was not ostracised.

161. The dismissal was for the reasons explained by Mr Dickie. Disability had no impact on that whatsoever. None of these latter three matters could possibly fall within the terms of section 15. There is therefore no basis for any conduct extending over a period.

162. In so far as the claim solely about the discussions over travel in May 2023 being discriminatory under section 15 is concerned considered that the circumstances could fall within the section. The circumstances were essentially that the respondent wished to have travel conducted efficiently both as to time and cost. That policy was one applied to the claimant, as to others. But long distance travel caused problems for the claimant as a result of his disability, and train or plane caused him more discomfort than did travel by car. There was no argument for the respondent as to objective justification raised in submission.

163. But we did not consider that it was just and equitable to allow what would be a very late claim to be heard. There was no adequate explanation in our view for not commencing the claim timeously, which would have required Early Conciliation by about August 2023, when in fact it was commenced in mid March 2023. As that was late by over six months against a statutory period of three months the delay is significant. The period of conciliation did not affect the timebar calculation, and the claim was presented on 2 April 2024, extending the delay somewhat further.

164. There was no real explanation for that delay save a vague suggestion from the claimant that to raise such a matter would lead to termination. No basis for that view was we considered properly established in the evidence. It was simply an assertion. It was very hard indeed to square with the terms of the claimant's email to Mr Dickie in September 2023 when he did not raise a complaint, but in effect laid down a marker. That drew a gentle response from Mr Dickie, which is entirely inconsistent with the suggestion that to raise a grievance, in effect to complain, would lead to termination. The claimant raised no formal grievance at the time, nor did he raise it informally, from the evidence we heard. That is not fatal to the claim, but one of the factors to consider. There was no positive submission as to prejudice, but we consider that there was a degree of prejudice from having to consider matters in light of what is a material level of delay. In all the circumstances it not being just and equitable to allow the claim late to that extent the Tribunal does not have jurisdiction to consider it.

165. The claim under section 15 is therefore dismissed largely on its merits, and separately as to jurisdiction for the issue of travel in or around May 2023.

(iv) Unlawful deduction from wages

166. We required to consider whether the commission the claimant claimed was payable under the section. We concluded that it was not. This is essentially an issue of construction of the contract.

167. The contractual term about commission, clause 61, was somewhat simplistic. It did not specify the period of time for commission, how it would be calculated, and simply gave a figure of £60,000. It did however state in

the second sentence that the commission was paid once the work was approved by the client. That was therefore one condition for it becoming payable. But it was not the only one.

168. The contract must be read as a whole, and in its context. Clauses 9 and 10 combined include, we consider, commission as part of the Payment, with that being paid during the period of the Agreement. Payment therefore ceases when the contract terminates. Clause 70 is the entire agreement clause, and its terms are fairly straightforward. They cut across any argument the claimant had about Mr Dickie saying that commission would be paid after termination for 12 months, even were such a comment to have been made, which we did not consider was the case as addressed below. Clause 11 states in effect that bonus or other incentive arrangements, of which commission we consider is clearly included, are discretionary.

169. Reading the terms of the contract as a whole we consider it to be clear that commission was not payable beyond the termination of the contract. For commission to have been payable as the claimant contended that would have been required to have been stated that specifically within the body of the contract. The contract did not do so. In our view, purely as a matter of construction of the contract, it did not have the meaning the claimant argued for.

170. We did not consider separately that the construction the claimant argued for would accord with business common sense within the context of an employment contract. The claimant was an Account Director. There was evidence given of two types of sales person, a “hunter” who secured new clients, and a “farmer” who managed existing clients. The respondent wished their Account Directors to be both, although the claimant’s evidence was to the effect that his role was to manage existing contracts. The claimant’s evidence on that point we did not consider reliable. Given the small size of the company and the evidence as a whole, it was in our view far more likely that the respondent wished him to be both, and that he was aware of that.

171. The claimant was very largely, if not solely, a farmer, using such a term. The only new clients he spoke to in evidence were those from existing client corporate groups. It would make no business common sense in the employment context to pay commission to the claimant for 12 months after termination when he would not be farming the work for such clients, with another employee doing so, with the work then being delivered, approved and paid for.

172. We also noted how matters proceeded in practice. The evidence was that the claimant could for a material period during his employment access an online system with real time sight of the status of each booking of work. It was when the client approved the work and paid the invoice that that was noted on the system, and the commission became payable. He was not paid commission prior to the client paying, the contractor being paid, and profit being calculated. Work originally booked might change, the client might not be satisfied with delivery and other factors could intervene such that it was only at the end of the process that profit could be ascertained and commission worked out. The claimant did not challenge that during the period of his employment. He had sight not only of that system but also payslips providing for payment of commission monthly in arrears. That does not appear to us to be consistent with the evidence he gave of what Mr Dickie is alleged to have agreed before the contract was signed.

173. The claimant argued that the contract was to be construed *contra proferentem*. Whilst it is not a contract which can be described as a model of clarity we did not consider, having regard to the full terms of the contract and how to construe it as addressed in the authority referred to above, that there was ambiguity such that that principle operated. That was so even although this was a contract of employment, and the respondent the dominant party in that context. For the reasons given above we considered that the construction was sufficiently clear from the full terms of the contract that commission was not payable for matters delivered (and then approved and paid for by the client) after termination.

174. In so far as the issue is relevant we did not accept the claimant's evidence that Mr Dickie had agreed shortly before the contract was signed that the claimant be paid commission for 12 months after termination, and that he

had referred to clause 63(h) in doing so. In our view in any event that particular clause is of no effect when the other terms of contract make clear that the provisions on payment, including commission, do not survive termination. Whilst it may not be entirely clear which clauses survive termination, with some doing so, clauses 9, 10 and 61 are we consider clearly ones that do not.

175. We also did not accept the claimant's evidence that Mr Dickie had agreed to the removal of the 90% threshold for the North Standard commission. Mr Dickie denied it, and we accepted that. For the reasons set out above we did not consider the claimant's evidence reliable on this and other key aspects. We did not therefore consider that the arrangement set out in the transcript of the call in January 2023 with Mr Dickie had been varied.

176. Having regard to all of the evidence we concluded that the claimant's evidence on these matters was not reliable, and we preferred that of Mr Dickie and Mr Docherty. We consider that there was no commission payable to the claimant earned after the date of termination. There were in our view no unlawful deductions from the claimant's wages. The claim of unlawful deduction from wages fails as a result.

(v) Breach of contract

177. For the same reasons, we consider that the claim of breach of contract which was pursued in the alternative fails.

Answers to List of Issues

178. For completeness the Tribunal answers the issues from the parties' agreed list is as follows:

Disability Discrimination

Knowledge of Disability

1. Did the Respondent know or ought reasonably to know that the Claimant had a disability, namely, Rheumatoid Arthritis? No
2. If so, when did the Respondent know, or ought reasonably to have known, that the Claimant had the disability? Not applicable

Direct Discrimination on the grounds of disability - section 13 Equality Act 2010

1. Does the Claimant have a real comparator? If so, who are they? None was put forward
2. Was the Claimant treated less favourably than the real comparator? Not applicable
3. If there is no real comparator, can the Claimant show that they were treated less favourably than someone else would have been treated (hypothetical comparator)? No
4. Was the Claimant dismissed because of his disability, namely, Rheumatoid Arthritis? No
5. On 20 September 2023, did the Respondent inform the Claimant that a disciplinary process would be required and if so, was it because of his disability, namely Rheumatoid Arthritis? Yes as to the informing the claimant, but it was not because of his disability
6. Did a disciplinary process take place? No
7. If so, did the disciplinary process amount to less favourable treatment because of the Claimant's disability, namely Rheumatoid Arthritis? Not applicable

Discrimination arising from disability – section 15 Equality Act 2010

1. Did the Respondent treat the Claimant unfavourably by dismissing the Claimant because of something arising in consequence of the Claimant's disability, namely Rheumatoid Arthritis? No
2. On 20 September 2023, did the Respondent inform the Claimant that a disciplinary process would be required in light of a complaint the Respondent received regarding the Claimant's conduct? Yes
3. Did invoking the disciplinary process amount to unfavourable treatment because of something arising in consequence of the Claimant's disability, namely Rheumatoid Arthritis? No
4. Following the Claimant's email of 25th September 2023, raising concerns about the disciplinary process, did the Respondent subject the Claimant to unfavourable treatment because of something arising in consequence of the Claimant's disability, namely Rheumatoid Arthritis? No

5. Did the disciplinary process amount to unfavourable treatment because of something arising in consequence of the Claimant's disability, namely Rheumatoid Arthritis? No, although there was a verbal warning issued without a disciplinary hearing it was not because of something arising in consequence of the claimant's disability
6. If so, did the treatment amount to a detriment? Not applicable
7. If so, what was that detriment? Not applicable
8. Was the unfavourable treatment a proportionate means of achieving a legitimate aim? Not applicable

Jurisdictional Time Limit in relation to Disability Discrimination Claim

1. Are the Claimant's claims in respect of disability discrimination made within the time limit provided in section 123 of the Equality Act 2010? Not in so far as any claim from in or around May 2023.
2. Specifically:
    a) Were the claims made to the Tribunal within three months of the acts complained of? Not that claim
    b) If not, was there conduct extending over a period? No
    c) If so, were the claims made to the Tribunal within three months of the end of that period? No. In so far as the matter is raised, it was not just and equitable to extend jurisdiction under section 123 of the Act.

Other

Unauthorised deductions from wages – section 13 Employment Rights Act 1996

1. Was the Claimant entitled to receive a payment in respect of commission? Yes
2. If so, on what basis was the Claimant due to be paid commission? During the course of his employment, and until termination
3. What commission was the Claimant due to be paid? The Tribunal did not have the evidence to calculate this. The parties agreed that the sums sought were approximately £7,000 if the North Standard commission did not have a 90% threshold, and for work booked but not delivered at termination, where the claimant sought £42,000 for the period of 12 months after termination.

4. What date was the Claimant due to be paid? Commission was paid monthly in arrears
5. Was the Claimant paid that commission? Yes
6. If so, when was the Claimant paid commission? The full details were not before the Tribunal, see issue 3 above.
7. If not, what commission was due to be paid to the Claimant? None is due
8. When was the commission due to be paid to the Claimant? Not applicable
9. Could the Respondent lawfully withhold payment of commission? Not if it was due, but none was due
10. In the alternative, is the above in respect of commission, a breach of contract? No

Remedy

1. What financial losses (if any) is due to the Claimant? None given the above
2. Is the Claimant due an award of injury to feelings? If so, what award should be made in this regard? No
3. Was the Claimant subjected to unauthorised deductions from his wages? If so, what award should be made in that regard? No as to the first question, and therefore no award should be made.

Conclusion

179. We formed the strong impression that the claimant felt that his dismissal was entirely unfair, he did not understand the somewhat briefly expressed reasons for it, he did not think that there could be any ground for criticism of him in any way such that there had to be another reason for it, and that he had made arguments on discrimination and commission as a vehicle to seek compensation for that. His discrimination arguments had originally included the protected characteristic of age, which he later withdrew. That he put forward two protected characteristics each with at best a limited factual basis did not assist his arguments in the present case. But whatever the claimant thought we consider that the respondent did not discriminate against him under either section 13 or 15 of the Act, and did not make unlawful deductions from wages or breach the contract.

180. The Claim must therefore be dismissed.

181. The Tribunal has made reference to some authorities which the parties had not addressed, but in circumstances where the Tribunal considers it appropriate to issue the Judgment rather than invite further submission given that they illustrate principles discussed in very general terms in the submissions. In the event that the claimant considers that he has suffered prejudice in that regard he can apply for reconsideration setting out which authorities are involved in that and making submissions in relation to them.

Date sent to parties **02 June 2025**