EMPLOYMENT TRIBUNALS

Claimant: Mr J Harrison

Respondent: Mr D May t/a Leeds Gymnastics Academy

Heard at Leeds **On:** 18 December 2024

Before: Employment Judge Miller
Members: Ms P Pepper
Mr Q Shah

Appearances
For the claimant: In person
For the respondent: No attendance

JUDGMENT having been sent to the parties on 18 December 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The respondent did not attend this hearing. The claimant attended and gave a witness statement and we heard oral evidence from him. The claimant's mother, Mrs Harrison, also attended and gave a witness statement and we heard evidence from her.

2. We decided under Rule 47 of the Employment Tribunal Rules of Procedure 2013 to go ahead in the absence of the respondent, having regard to the information that was on the Tribunal file. A decision had been made and communicated to the respondent on 16 December 2024 that the hearing was going to go ahead despite his application for postponement made on 11 December 2024. The claimant set out in response to that application a detailed

and well-reasoned explanation why the hearing should go ahead. In our judgment it was in the interests of justice to continue do so and we have done so. The consequence of that is that the respondent has not had the opportunity to give evidence or challenge the claimant's evidence.

3. The claims and issues to be decided at this hearing were agreed at a case management hearing on 25 July 2024 and that list of claims and issues is attached as an appendix to these reasons.

Chronological findings of fact

4. The claimant applied for a job with the respondent as a trampolining coach and was offered the job in an email dated 19 September 2023. The job was for 12 hours a week paid at £12 an hour working as a trampolining coach at the respondent's gym in Leeds. The claimant was told in an email of 19 September 2023 that his employment would be subjected to a 12 week probationary period and his wages would be reviewed at the end of that.

5. The first email on 19 September 2023 enclosed a contract of employment and the claimant was given a limited period in which to sign it. The relevant terms of that contract are:

6. 7.5, which deals with holidays.

   "Holidays must be as per policy set out in the staff handbook. The handbook is for only (sic) and does not form part of this contract"

7. We note here, although we may mention it again later, the claimant asked for but was never given a copy of that handbook.

8. 7.5.1 says

   "You must find your own cover for any leave which you take. The cover must be both appropriate and suitably qualified. Failure to find cover resulting in lessons being cancelled would be a disciplinary issue, and the company reserves the right to seek reimbursement as a deduction from salary due to any loss and damage arising from your failure to follow the policy".

9. The contract also provides that the claimant is entitled to 67.2 hours per year holiday which is in accordance with the statutory minimum.

10. The other relevant contractual terms are 9.1 which says

    "The contract is terminable by the employer giving statutory minimum notice (other than in the case of summary dismissal for gross misconduct) or by the employee giving 90 days written notice or three (3) months' gross salary in lieu of notice"

11. and 9.2 says

    "In the case of 90 days' notice not being served the company shall make a deduction from salary to reduce the loss and damage suffered by the company. County Court action will be taken to recover the balance set out in Clause 9.1".

12. The claimant signed and agreed to that contract.

13. The claimant took the job expecting to be able to train people at a certain level and undertake training and mentorship at the respondent's expense to progress his coaching qualifications.

14. The claimant started work on 24 September 2023 but soon found that the role was not as he had anticipated. He was not offered coaching or mentorship at the level on the terms he believed he required to be able to progress and obtain his qualifications. Two other relevant events at this time are that the claimant was invited to a work Zoom meeting on 26 September 2023 and from which we conclude the respondent had access to remote video conference facilities, and the claimant was unable to attend work on 15 October 2023 because York Marathon meant he was unable to leave his home by car and travel to Leeds because the roads were closed. This absence was notified to and apparently accepted by the respondent and the claimant's classes were covered by another remember of staff.

15. By 20 October 2023 the claimant had decided that he no longer wanted to work for the respondent. He understood that he was in a probationary period and he was therefore only obliged to give a shorter notice period than the three months set out in his contract. He contacted the respondent to clarify his notice period on 20 October 2023 and he also made complaints about the work that he was given in that email.

16. The respondent replied on 21 October 20203 and said that they had decided not to give the claimant a probationary period after all. They had not previously told the claimant that. The claimant then gave notice to end his employment and requested on 21 October a shortened notice period. The claimant gave notice to end his employment and the respondent replied on the 21 October in terms which we will not set out but which, in our view, were oppressive and unnecessary. It is also relevant to note that this email did not say who it was from and it originated from a generic respondent email address. The claimant found this response odd and upsetting and we are not surprised. The claimant said, and we accept, he was physically shaken by the tone of this email which is in our view bizarre and unnecessarily aggressive.

17. On 22 October 2023 the claimant offered to work one months' notice and there was no reply to that.

18. The claimant says, and we accept, that this communication from the respondent had a significant impact on him because of his autism. The claimant described brain fog starting around this time. He started to need extra support from his parents in terms of them checking in with him and making sure he was okay and staying on top of things.

19. On 30 October the claimant made a holiday request for 19 November and arranged cover for that shift and the respondent did not respond to that request. The claimant assumed that his leave request was acceptable.

20. By 1 November the claimant was becoming very stressed by the respondent's approach to the end of his employment and telephoned to say that he was too unwell to attend work the next day, having spoken to his GP.

21. That same evening at 16.56 the claimant received a Facebook message from someone at the respondent asking him to cover an extra shift that evening. The

claimant replied to say he had already phoned in sick for the next day and was too unwell to work that day. The cause of his ill health absence was stress related to the respondent's conduct in dealing with his attempt to give notice.

22. Fifteen minutes later at 17.11 the claimant was told, and again it does not say in the email by whom, that he had hit the trigger point for absences and needed to attend an occupational health appointment by 8 November 2023. The claimant had not been given a copy of the sickness absence policy. We assume it was included in the staff handbook which he had not received despite repeatedly requesting an electronic copy, so the claimant was unaware of the respondent's sickness process or procedure. The email from the respondent refers to a number of matters including using the Bradford Factor to assess the claimant's place on the sickness absence process. Given that the claimant had not even been off sick for one day yet, in our view the tone of this email was wholly unreasonable and oppressive.

23. On 2 November 2023 the claimant was invited to an occupational health appointment by Facebook Messenger and the claimant replied disputing the need for an occupational health appointment after just one day's sickness.

24. The next day the respondent emailed the claimant and said that he'd failed to follow the sickness procedure and we find that the claimant had never had the sickness policy so was not aware of the procedure, but in any event the claimant clearly had notified the respondent twice that he was not going to be able to come into work because of his health. This email purported to be from someone called Joshua who the claimant had never met.

25. On 4 November the claimant sent an email with a fit note saying he was still waiting for the employee handbook, and someone from the respondent replied 25 minutes later alleging that they had heard from another employee that the claimant had gone off sick to avoid the notice period and consequently he was invited to a fact finding meeting on 7 November 2023 at the gym in Leeds.

26. The respondent explicitly stated in this communication that the claimant was not allowed to bring a representative. They say

    "it is important to inform you that during this meeting you will not have the right for representation"

27. We find that this communication was aggressive and threatening. We also find that the respondent's statement about what they say another person had told them was untrue. The evidence of the claimant's communication with the employee alleged to have told the respondent the claimant had gone off sick to avoid the notice period, which is consistent with the evidence the claimant gave to us, shows that the respondent was not told by another employee that the claimant had gone off sick to avoid the notice provisions.

28. The claimant said in evidence, and we accept, that he was working at another place, that the respondent knew about that work, that it was on a day he was not contracted to work for the respondent, and that the claimant's sickness was wholly related to the conduct of the respondent's managers not his ability to coach trampolining. The claimant said in his communication of 4 November 2023 that he was waiting for a GP appointment, and that the respondent's

approach to refer to occupational health within hours of the claimant phoning in sick for the first time was oppressive.

29. On 7 November the claimant replied to say that he could not attend a meeting at that time. It was not on his working day and he had other commitments. He also said that the statement about him trying to avoid the notice period was false. The respondent then replied by email to say that the meeting had moved to 12 November at 12.45, but as the claimant's shift then ended at 12.55 the meeting could be no longer than 10 minutes.

30. It was in this email that the respondent referred to it coming to their attention that the claimant was in fact also working in another job, although we find that the respondent was already aware of that and had been since the outset of the claimant's employment with them. The claimant replied requesting a virtual meeting and saying that he had not been given any terms of reference for the meeting. He wanted the names of the attendees and asked that it be recorded and he said, quite reasonably in our view, that his other commitments were of no concern to the respondent.

31. On 10 November the respondent said the meeting could be at a mutual venue at a Premier Inn in Leeds or at the claimant's home. They said that the claimant could not have any documents in advance but that occupational health would be at the meeting. The claimant formed the view that the Premier Inn had no private meeting spaces so that a meeting there would be in public. He was not prepared to have the meeting in his home. The claimant proposed a neutral venue in York where he lives, so that the respondent would be travelling to a place they were prepared to travel to anyway (namely, York), and that the meeting be brought forward by 15 minutes to allow 25 minutes for the meeting. The claimant queried if occupational health would be there and again that he did not understand why the meeting could not be done remotely.

32. On 11 November 2023 the claimant sent the respondent details of the meeting venue and on 12 November 2023 the claimant attended the meeting by himself and the respondent did not attend. The claimant made notes of what he would have said at the meeting and sent them to the respondent.

33. On 19 November 2023 the claimant took the leave that he had pre-arranged and on 21 November the respondent told the claimant about an occupational health appointment the next day on 22 November which the claimant attended by telephone.

34. The occupational health report makes some relevant findings. Those are that the claimant's stress concerns at work are related to workplace issues, the management and the issues with the employment contract relating to his notice that we have already described.

35. It is clear that the claimant is at that time able to continue in secondary employment as a trampoline instructor in York because the issues that are making it difficult for him to go to work with the respondent are related solely to management to the respondent and it says specifically

    "the stress condition has not lasted longer than 12 months. The impairment has not had a substantial or adverse impact on the ability to perform daily activities. In my opinion this stress condition[which was what the claimant was

off with] is unlikely to be considered as a disability under the provisions of the Equality Act".

36. It then goes on to say,

    "please note that the client has a condition which is likely to be protected by the Equality Act 2010 as I do not have consent to share the details of this with management at the time."

37. The claimant had declined to allow the respondent to know about his autism because he was suspicious about their treatment of him and particularly with regard to comments that he had heard people say about children who attended the classes who the respondent described as autistic.

38. On 22 November 2023 the claimant was due to be paid for the October work a sum of £684 and he was not paid. He wrote to the respondent to query this.

39. The respondent replied on 22 November with a lengthy email setting out 16 points. In this email, the respondent accuses the claimant of various misconduct and, importantly, threatens the claimant. It says

    "in accordance with Clause 9.2 we have enacted our contractual entitlement to take a deduction from your salary. This action has been taken to mitigate the loss and damage incurred by the company due to a breach of contractual clause at 7.5.1 and 9.1".

40. We find as a fact that the respondent had, and could have had, no evidence whatsoever to suggest that the claimant had breached either of those clauses. He had applied for leave in accordance with the terms as he understood them. He had arranged cover for his day off and the claimant was at this point continuing to be employed throughout the three months' notice period.

41. In response to this the claimant submitted a grievance on 2 December 2023 rebutting each of the points in the letter of 22 November and making further specific complaints about the notice period, withholding his salary and the threats to pursue the claimant through the courts.

42. There was some correspondence about the claimant's grievance document, but the respondent did not explicitly acknowledge the grievance and has never dealt with it. The respondent's response on 2 December simply said,

    "we note the following paragraph 'my sickness is due to work related stress and anxiety brought on by the actions and assertions from the LGA'. Please outline with evidence the actions and assertions from LGA that caused stress and anxiety prior to 1 November 2023".

43. The claimant replied to say he suggested they read his grievance letter which sets out in detail his concerns and the respondent replied again on 3 December in a defensive and unhelpful way saying

    "none of the points in the attached document explicitly state alleged actions undertaken by the business prior to 1 November. Please particularise your points properly including dates. With regard to pay I suggest you read our email to you dated 22 November. With regard to pay slips Sandra has previously sent these to the email address received on the pay roll form which you completed during your induction".

44. Having read the claimant's lengthy and detailed grievance letter, it is not right to say that the claimant did not express in very clear terms what the basis of his grievance was. Nonetheless, the respondent wholly failed to respond appropriately to it.

45. On 3 December the claimant wrote again to the respondent, starting the email "Dear unnamed LGA staff member" expressing his frustration that throughout his correspondence with the respondent in which he was detailing complex private matters he had no idea with whom he was communicating.

46. On 22 December the respondent saw the occupational health report which made specific recommendations that the claimant be allowed to attend meetings virtually and that the issues the claimant had were with the management style of the respondent and work related stress, and not with his ability to undertake his job as a trampoline coach.

47. We note that around this time the claimant made a subject access request. The respondent dealt with this in a similar way by making excuses for not dealing with it and ultimately ignoring it as far as we are aware.

48. On 29 December the respondent invited the claimant to a meeting on 1 January at 10am to discuss adjustments and a return to work date. This was not during the claimant's contracted working hours and the claimant said he would not attend.

49. At 10.01 on 1 January 2024, one minute after the meeting had been due to start, the respondent emailed the claimant and said he had failed to attend the meeting and it would be re-arranged at the Premier Inn (where the claimant believed were no private rooms) on 4 January. There was still no named correspondents at this point – the claimant did not know with whom he was communicating.

50. On 2 January the claimant asked for some adjustments for the meeting, that it would be virtual and it would need to finish on time as he had an interview for a new job. The respondent's reply was simply to ask for the time and location of the job interview without any explanation. The claimant replied to ask if they were ignoring his requests for reasonable adjustments and the respondent's reply included a wilful mis-reading of the occupational health report which referred to the need to resolve workplace stress before the claimant was ready to return to work. It explicitly did not say, despite the respondent's assertions, that the claimant was fit to return to work.

51. On 3 January 2024 the respondent again told the claimant they had booked a venue at the Premier Inn, that stress was not a disability and they imposed a 15 minute time limit on meetings in accordance with the stress risk assessment they had done.

52. The respondent had undertaken a stress risk assessment without the claimant's input.

53. The following day on 4 January the claimant emailed the respondent to say he did not want to disclose the nature of his disability, explaining the need for remote meetings and said that the respondent's actions were exacerbating his stress.

54. On 5 January 2024, the respondent replied with a somewhat lengthy and argumentative email, but they did agree to a telephone meeting on 7 January. On 6 January 2024 there is an exchange of emails about the content of the meeting on the 7 January. This was the first time that the respondent was prepared to identify who the claimant was corresponding with, and the claimant set out his concerns and the issues again in detail to Natasha Chadwick.

55. The claimant did not disclose the nature of his disability at this time and Ms Chadwick responded the same day confirming that the meeting would finally be by telephone, and she would be the claimant's point of contact from then on. She confirmed the purpose of the meeting was to focus on stress triggers, finalise the stress risk assessment, discuss the occupational health report and address concerns that had previously been identified in her terms of reference.

56. The meeting went ahead by phone on 7 January. The meeting lasted about 10 minutes and Ms Chadwick refused to discuss who the claimant had been corresponding with previously, or the accusations and demands levelled at the claimant. Eventually Ms Chadwick confirmed that it was she who had been dealing with the grievance and disciplinary. The claimant asked for the next meeting to be the following Sunday when his father would be able to support him. There was then an email after the meeting on the same day.

57. The next meeting was actually arranged for the following day despite the claimant's request for it to be the next week and it was not entirely clear what that meeting was to be about. It appears that there was in fact no further meeting.

58. The claimant replied on 7 January challenging Ms Chadwick's email and specifically explaining the stress that the respondent's conduct was causing him. There was another email from Ms Chadwick on 8 January bizarrely requesting the name of the claimant's solicitor and indicating that there would be a return to work on 11 January 2024.

59. The claimant brought his Employment Tribunal claim on 19 January 2024 having completed early conciliation from 23 December to 27 December 2023.

60. He said the harassment from the respondent continued and increased from then and included the respondent bringing further proceedings for breach of contract in the County Court. We make no findings about that because that happened after the issue of these proceedings and do not form part of the claimant's claim.

Additional findings of fact

61. We make the following additional relevant findings of fact.

62. In our view, having seen the way the people at the respondent's business conduct themselves in all communications with the claimant and, in fact, regardless of who at the respondent's business was corresponding with the claimant and having regard to how the Employment Tribunal proceedings had been conducted, we find on the balance of probabilities that the style of communication set out in these findings are a feature of the respondent's conduct and communication style.

63. That is to say this communication style is not particular to the respondent's communications with the claimant but how the respondent, Ms Chadwick and potentially other employees who have written the communications, conduct themselves generally. To be clear they do so in an aggressive and overly assertive, threatening manner.

Findings of fact related to disability

64. In terms of the claimant's asserted disability, the claimant relies on the disability of Autism Spectrum Disorder and he has a diagnosis of autism made on 19 October 2021.

65. The letter from Jane Higgins, a clinical psychologist, identifies two broad areas of difficulty that the claimant has: persistent difficulties in social communication and social interaction across contexts, which is manifested by a number of factors; and restricted repetitive patterns of behaviour, interest or activities.

66. We accept the claimant's evidence and the claimant's mother's evidence, that these manifest themselves on a day to day basis as a difficulty of making friends and socialising generally; difficulty in dealing with everyday situations including conflicts that arise in house sharing; being easily distracted by, for example, small noises; and difficulties keeping on top of his self-care in terms of maintaining appropriate standards of tidiness and cleanliness in his house. The claimant experiences a greater reaction to stress than neurotypical people and this causes further difficulties with day to day functioning.

Law and conclusions

67. In respect of disability, Section 6 of the Equality Act 2010 says

    (1) A person (P) has a disability if—

    (a) P has a physical or mental impairment, and
    (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

68. The claimant relies on the impairment of autism and it is clear from the letter of Jane Higgins that the claimant does have that impairment.

69. We have set out our findings about the impact on the claimant's day to day activities and we find that that does meet the second part of the test. The impact is substantial, it is more than minor or trivial and it is long term. It is a lifetime condition and we do not need to say anything more about that.

70. We find that at the relevant time the claimant was disabled by reason of Autism Spectrum Disorder.

71. Turning to the disability discrimination claims, claim for indirect discrimination is covered by Section 19 of the Equality Act 2010.

72. This says that

    (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are—

…

disability;

73. The first question relates to the provision, criterion or practice (PCP). The PCP is described in the case management order as the application of a practice of threatening and aggressive communications and excessive demands which put the claimant at a disadvantage in comparison with colleagues without autism and that he was less able to cope and suffer with work related stress as a result.

74. We found that it was the respondent's practice generally to conduct itself in the very aggressive, assertive and threatening manner as been evidenced by the correspondence throughout this hearing, and the correspondence with the Tribunal. Although we have not heard or seen no communications directly from Mr May, the claimant says that perhaps Joshua was pseudonym for Mr May, it is undoubtedly the respondent's practice as an employer.

75. In our view the respondent is likely to apply this style of communication to all his employees. It is not something that is particular to the claimant and in our judgment it is a practice of the respondent. It is applied to people who have autism spectrum disorder and those who do not. That is further indicated by the fact that the respondent did not know that the claimant had autism spectrum disorder which we will come on to.

76. It puts or would put persons with whom the claimant shares the characteristic of having autism spectrum disorder at a particular disadvantage, and we have heard the claimant's evidence about the impact of the respondent's practices on him. It substantially exacerbated his stress and it further adversely impacted his ability to function on a day to day basis. It affected him to such an extent that it necessitated additional support from his parents and made the claimant become extremely stressed, lose trust and in fact had an impact on his ability to obtain further employment.

77. In our judgment, taking judicial notice of the fact that autism is a relatively well understood condition these days, albeit that everybody with autism experiences it in a different way, we think that it is an impact that is likely to happen to one degree or another to a significant proportion of people with autism compared to those without. For that reason the PCP does put people with whom the

claimant shares a protected characteristic, namely autism spectrum disorder, at a particular disadvantage, and for the same reasons it has done so for the claimant.

78. Finally, has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim?

79. Firstly, the respondent has not said what legitimate aim they say they are trying to meet in adopting the aggressive communication style, but in any event, adopting an unreasonably, aggressive and threatening tone in all communications is extraordinarily unlikely to be a proportionate means of achieving any legitimate aim and we certainly cannot see that it is proportionate in these circumstances. So for those reasons the claimant's claim of indirect discrimination is successful.

80. In respect of harassment, this is covered by Section 26 of the Equality Act 2010 which says

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

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

(a) the perception of B;

(b) the other circumstances of the case;

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

(5) The relevant protected characteristics are—

…

disability;

81. Broadly speaking, we have found that the conduct relied on as harassment did happen and we have set out what we think about the letters and the emails. They key issue in this case is whether it was related to the claimant's disability and we have heard no evidence that it was. We are not saying that the conduct did not violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It is likely that it did.

82. However, in our judgment the respondent's conduct was in no way connected with disability. As far as we can see it is just the way that the respondent conducted themselves. For those reasons the harassment claim is unsuccessful.

83. In respect of the claim of a failure to make reasonable adjustments, section 20 Equality 2010 says, as far as is relevant

> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
> (2) The duty comprises the following three requirements.
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

84. Section 21 says

> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
>
> (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

85. Paragraph 20 of schedule 8 to the Equality Act 2010 says

> (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—
>
> (b) …that [an employee of A's] disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

86. The same PCP is relied on as for indirect discrimination and we have made our findings about that above – there was a PCP, it was applied to the claimant and it subjected him to a disadvantage.

87. However a claim for failure to make reasonable adjustments cannot succeed unless the respondent knows or ought reasonably to know both that the claimant is disabled by the particular disability and what the impacts of that disability that are in relation to the PCP.

88. The claimant has been very honest in his evidence in our view, and said he did not tell the respondent about his disability. The respondent did make efforts to find out about the claimant's disability, albeit in a somewhat callous and uncaring way. The respondent cannot be expected to know that the claimant is disabled by reason of autism spectrum disorder in those circumstances. For these reason, the complaint of a failure to make reasonable adjustments is not well founded and is dismissed.

89. Turning to the claim for unauthorised deductions from wages.

90. Section 13 of the Employment Rights Act 1996 says

> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

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

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

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

91. In deciding what is properly payable in section 13(3) the tribunal has the power to interpret any contractual terms.

92. The respondent appears to have deducted wages from the claimant's November pay for work done in October on the basis that the claimant was in breach of Clauses 9.1 and 7.5.1 of the contract of employment.

93. As a matter of fact, the claimant was not in breach of either of those terms. In respect of 7.5.1, the claimant had sought approval for his one day of holiday and ensured that the class was covered. He had complied with the terms of his contract.

94. In respect of 9.1, the claimant gave notice and remained employed for 3 months. The respondent's suggestion that the claimant was faking his sickness absence to avoid the notice provisions was (a) wholly unfounded and (b) a tacit recognition, in our view of the inherent unreasonableness of the notice provisions. In any event, there was nothing in the contract about different rules applying if an employee was sick during the notice period.

95. The claimant was, as a matter of fact, not in breach of clause 9.1.

96. There was, therefore, no basis at all for the respondent to seek any recovery of money from the claimant under these provisions, whether by deduction form the claimant's wages or otherwise.

97. In any event, in our judgment, the term of the contract on which they seek to rely in Clause 9.2 is an unlawful penalty clause.

98. The law is summarised in Harvey on Employment Law at 537.04 as follows

"(1) The advantaged party (here, the employer) must be able to show that there was commercial justification for the inclusion of the clause; this is not necessarily negated by the fact that the clause has (and indeed is intended to have) a deterrent effect on that employee, if that can be justified in the circumstances but on the other hand the employer does not have a valid interest in merely punishing the employee.

(2) If there is such a commercial justification for including a clause, the question becomes whether this clause was in all the circumstances extravagant, exorbitant or unconscionable; to put it another way (in a manner readily recognisable from EU law and discrimination law in particular), was the clause used out of all proportion to the legitimate interest concerned? In relation to this crucial question, the issue of whether the clause contained a genuine pre-estimate of potential loss, while no longer determinative, may be evidence.

(3) A court or tribunal may be more willing to uphold the clause if it was subject to arm's length negotiation between parties of equal bargaining power and/or with legal advice. That may be the case in some high-worth employment cases, but in more typical employment cases (involving the use of standard contracts on a take-it-or-leave-it basis) it will be the opposite principle that will apply, namely that here a court or tribunal may need more convincing that it was not an unenforceable penalty".

99. Clause 9.2 is wholly disproportionate in that it does not in any way at all reflect the genuine losses that the respondent suffered or was likely to suffer in any of the circumstances to which it applied and the respondent has not provided any evidence at all to the tribunal to suggest otherwise. Further, the respondent did not provide any evidence or explanation in their communications with the claimant, or at any other point, about any losses they have incurred.

100. The respondent has shown no commercial justification for the clause

101. In any event, the clause is unconscionable and disproportionate. Firstly, it is wholly unreasonable to impose a 3 month notice clause for a part time job paying barely above minimum wage. The respondent has produced no evidence that payment of 3 months gross wages for failure to give that notice is commercially justifiable and very compelling evidence would be needed to demonstrate that it was. Finally, to state that the unpaid three months' notice would be withheld from wages turns an already unreasonable clause into an even more oppressive and unconscionable provisions.

102. Finally, the claimant was given a short period in which to sign the contract under an implied threat that the offer would be withdrawn after that period. This does not amount to an arm's length negotiation between parties with equal bargaining power.

103. There was no basis then for the respondent to lawfully deduct the money from the claimant's wages.

104. The claimant, in his grievance, brought a complaint about the failure to pay wages. We have found that that grievance was not dealt with at all so we therefore award a 25% uplift under Section 207A of the Trade Union and Labour Relations Consolidation Act 1992 for a wholesale failure by the respondent to apply the ACAS Code of Practice on disciplinary and grievance procedures.

105. That claim is successful and we award the claimant the gross sum for wages of £684 and an £55.20 ACAS uplift.

106. In respect of holiday entitlement, under regulation 14 of the Working Time Regulations 1998, an employee is entitled to be paid in lieu of any accrued but untaken holiday on termination of their employment.

107. The claimant was entitled to 67.2 hours holiday per year. He took three hours in 2023 on 19 November. The respondent's leave year is a calendar year from December to January. The claimant worked for part year from 24 September to 31 December in the holiday year 2023. This is 98 days which represents 27% of the year, so that the claimant had accrued 18.1 hours holiday, taken three hours so that 15.1 hours were left in 2023.

108. In 2024 the claimant worked eight days in that holiday year which is 4.9% of the year so he had accrued 3.3 hours. As a matter of law untaken holiday does not usually automatically carry over from one holiday year to the next unless it is specifically agreed.

109. In these circumstances however the claimant was off work sick from 1 November 2023 so that he was unable to take his holiday. In those circumstances caselaw provides that the claimant is entitled to carry his holiday over into, at least, the following holiday year. This means that at the date of the end of his employment on 18 January 2024 a total of 18.4 hours holiday at £12 per hour were owed to claimant which comes to a total of £220.80

110. The remedy for discrimination claims is set out in Section 124 of the Equality Act 2010 which says that we may award compensation. That compensation is on the tortious basis and should be such as to put the claimant in the position he would have been in if he had not suffered the discrimination. We are entitled to make an award for injury to feelings.

111. Guidance on the amount of injury to feelings awards is set out in the case of *Vento v The Chief Constable of West Yorkshire* Police [2002] EWCA Civ 1871 and is uprated from year to year. At the time this claim was brought the three bands, the lower band, the middle band and the upper band reflected compensation levels of £1100 to £11200 for less serious cases, middle band of £11200 to £33700 and the upper band of £33700 to £56200 being the most serious cases.

112. We accept the claimant's evidence that he sets out in his impact statement and gave to us today about the way in which the respondent's conduct affected him. We accept the claimant has lost trust and has required more support from his parents. However the conduct extended over a relatively short period and happily the claimant is now working in a graduate job suggesting that he is hopefully starting to get over the way he was treated by the respondent. In our view injury to feelings is at the upper end of the lower Vento band which at the time was £1100 to £11200 so we make an injury to feelings award of £11000.

113. In respect of other losses, we heard evidence that the claimant was unable to obtain work after the end of his job. We accept that the job would have ended anyway because the claimant gave notice, but we prefer the claimant's evidence that were it not for the stress caused to him by the conduct of the respondent he would possibly have converted his PhD studies to a Master's degree and continued to be paid through that.

114. This did not happen and the claimant was supported by his parents in the sum of £1500 per month for around three months. We accept the claimant has an obligation to repay that support. However we also think there is a possibility that things might or might not have worked out with the Master's degree regardless of the respondent's conduct. In our view it is just and equitable to award a proportion of that loss at 50% on the chance the claimant might or might not have managed to convert to a Masters were it not for what had happened at the respondent's employment. So therefore we award half of the three months remuneration at £1500 which comes to £2250.
115. We award a 25% ACAS uplift (as discussed briefly above) on both of those awards because they were matters that were complained about in the grievance. The respondent effectively just ignored the claimant's grievance and complaints. That comes to an increase of **£2750** on the injury to feelings award and £562.50 on the financial award.
116. We also award interest at 8% from the date of discrimination to the hearing today on the injury to feelings award which comes out at **£1039.72** and interest on the pecuniary loss from the mid-point between the last date of discrimination and today which comes to £102.55.

Employment Judge Miller

Date: 17 January 2025

Corrected on 5 March 2025

Appendix – List of issues

The claims and grounds of resistance within the ET1/ET3 and attachments

9. The claims discernible in the claim form to be determined at the final hearing are:

9.1 Unlawful deduction of wages concerning pay for October 2023/also breach of the National Minimum Wage Regulations;

9.2 Regulation 14 holiday pay on termination of employment;

9.3 Disability related harassment;

9.4 Indirect discrimination (disability)

9.5 Failures to make reasonable adjustment.

10. The particulars of these allegations are [or in square brackets appear to be]:

10.1 On or around end October 2023 the respondent failed to pay the claimant's October wages in the sum of £684;

10.2 On or after 18 January 2024 the respondent failed to pay the claimant for untaken holiday in the sum of £258;

10.3 The claimant asserts he is and was at the material times a disabled person by reason of autism;

10.4 He alleges the course of conduct (said to be bullying and lying between 20 October 2023 and 8 January 2024) in his claim statement amounted to:

10.4.1 Unwelcome conduct related to disability which contravened Section 26 of the Equality Act (with section 40);

10.4.2 [The application to him of a practice of threatening and aggressive communications and excessive demands (the PCP) which put him at a disadvantage in comparison with colleagues without autism, in that he was less able to cope and suffered with work related stress as a result.]

10.4.3 [He alleges that a reasonable adjustment would have been to cease the same;]

10.4.4 [He alleges that the PCP was applied to other colleagues without his disability];

10.4.5 [He alleges the PCP cannot be justified as a proportionate means of achieving a legitimate aim and as such constituted indirect disability discrimination.]

11. The defences to the allegations are:

11.1 The respondent was entitled to deduct holiday pay and wages in reliance on clause 9.2 of the contract signed by the claimant at 5:16pm on 21 September 2023;

11.2 The respondent did not have knowledge of the claimant's disability or the specific disadvantages to him of any matters at the material times and accordingly neither harassed him nor failed to make reasonable adjustments nor engaged in any form of disability discrimination;

12. If any of the complaints succeed the claimant seeks an uplift for failure to comply with ACAS code procedures.