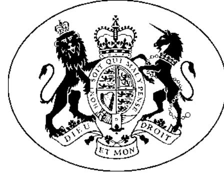

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr. R. Langan	**Car Spares (Distribution) Limited**

v

Heard at: **Birmingham** **On:** **18,19,20 & 21 January 2022**

Before: **Employment Judge Wedderspoon**

Members **Ms. S. Outwin**

Mr. P. Kennedy

Representation:

Claimant: **In person**

Respondents: **Mr. Mehat, H.R. Manager**

JUDGMENT

1. The complaint of direct sex discrimination is not well founded and is dismissed.
2. The complaint of direct age discrimination is not well founded and is dismissed.
3. The complaint of constructive unfair dismissal is not well founded and is dismissed.
4. The complaint of unlawful deductions of wages is not well founded and is dismissed.

REASONS

1.By claim form dated 16 October 2020 the claimant brought complaints of direct age and sex discrimination, constructive unfair dismissal and unlawful deduction of wages.

2. The issues to be determined at the hearing are as follows :-
Unfair constructive dismissal
(a)Did the respondent behave in a way that was calculated or likely to destroy or seriously damaged the trust and confidence between the claimant and respondent and did it have a reasonable and proper cause for so doing;
(b)What was the most recent act on the part of the respondent which the claimant says caused or triggered the resignation?
(c)Did the claimant affirm the contract after the act ?
(d)If not was the act itself a repudiatory breach of contract?
(e)If not was it nevertheless a part of a course of conduct comprising several acts or omissions which viewed cumulatively amounted to repudiatory breach of the implied term of trust and confidence as set out above ?
(f)Did the claimant resign in response to that breach?

(g)If the claimant was dismissed, what was the principal reason for the dismissal i.e. what was the reason for the breach of contract?
(h)Was it a potentially fair reason?
(i)Did the respondent respond and act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
(j)If the dismissal was unfair what compensation should be paid?
(k)Should there be an uplift for the alleged breach of the ACAS code of the respondent?
(l)Should there be any reductions for contributory fault/Polkey?

Direct age and sex discrimination (contrary to section 13 of the Equality Act 2010
The claimant asserts that he was treated less favourably on account of his age and/or his sex by
(a)the claimant's treatment of him in April/May 2020 and in particular :
(i)not permitting the claimant to work and/or to be furloughed;
(ii)failing to pay the claimant;
(b)the claimant's alleged constructive dismissal effective on 30 November 2020;
(c)Have each of the claims been brought within the relevant statutory time limit;
(d)If not are the acts of discrimination acts continuing over a period ?
(e)If not would it be just and equitable for time to be extended.
The claimant asserts his particular age group is "over 60s". No justification defence is asserted by the respondent in respect of the direct age discrimination claim.

Unlawful deduction of wages
(a)Did the respondent make deductions from the claimant's wages in April and May 2020 ?
(b)Were those deductions lawful pursuant to section 13 of the Employment Rights Act 1996?
(c)Has this claim been brought within the relevant statutory time limit ?
(d)If not was it reasonably practicable for it to have been brought within that time limit and if it was not was the claim brought within a reasonable time therafter?

3. The Tribunal was provided with a 376 page bundle of documents. The claimant relied upon his evidence and the evidence of Carolyn Piper, employee of the respondent (a part time driver) who accompanied the claimant to the grievance and grievance appeal hearings. The respondent relied upon the evidence of Jonathan Allen, Erdington Branch Manager; Manpreet Mehat, HR Manager; Michael Gardner, Director; and Christine Hogben, Car Spares Head Office Manager and note taker at the grievance appeal hearing. At the end of the evidence both parties confirmed they had received a fair hearing before the Tribunal. They both prepared written submissions and delivered these orally.

Law

Direct age or sex discrimination (section 13 of the EqA)

4. Pursuant to section 13 of the Equality Act 2010 the Tribunal should concentrate primarily why the Claimant was treated as he was. Was it because of the protected characteristic (of age or sex) ? That will call for an examination of all the facts of the case. Or was it for some other reason? If it

was the latter, the claim fails; see paragraph 11 of **Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) UKHL 1.** The inquiry for the Tribunal is into the subjective motivations of the decision maker (**CLFIS (UK) Limited v Reynolds 2015 EWCA Civ 439**).

5. Less favourable treatment is because of the protected characteristic if either it is inherently discriminatory or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind; **Nagarajan v London Regional Transport (1999) IRLR 572.**

6. In a direct claim of discrimination, the Tribunal must compare the treatment with an actual or hypothetical comparator. In accordance with section 23 (1) of the Equality Act 2010 there must be no material difference between the circumstances relating to each case. In **Shamoon** it was stated "*the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he or she is not a member of the protected class.*"

Burden of proof

7. Section 136 (2) and (3) of the Equality Act 2010 states
"(2)..If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred; (3)But subsection (2) does not apply if A shows that A did not contravene the provision."

8. Section 136 (2) of the Equality Act 2010 envisages a two-stage approach to the burden of proof in discrimination claims. The Claimant has the initial burden of proving a prima facie case of discrimination and if this hurdle has cleared the burden shifts to the Respondent to provide a non-discriminatory explanation **(Ayodele v Citylink Ltd and anor 2018 ICR 748).**

9. If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18.**

10. To establish a prima facie case, the Claimant has to show that he was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:
'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

(***Madarassy v Nomura International plc*** **[2007] ICR 867** at [56] *per* Mummery LJ).

11. A discrimination claim may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Where conduct extends over a period, the act is to be treated as done at the end of the period (see section 123 of the EqA). There is a distinction to be made between an act of discrimination which has continuing consequences and an ongoing situation or a continuing state of affairs which extends over time (**Hendricks v Commissioner of Police for the Metropolis)**.

12. The discretion to extend time is broad. In **Miller v MOJ (UKEAT/0003/15)** it was stated that time limits are to be observed strictly; the EAT can only interfere if the decision is Wednesbury unreasonable/perverse; the prejudice to the respondent is customarily relevant and section 33 of the Limitation Act 1980 contains a useful checklist. Lord Justice Underhill in the case of **Adedeji v University Hospital Birmingham NHS Foundation Trust (2021) EWCA Civ 23** that it was a useful exercise to consider the factors in section 33 of the Limitation Act 1980 but that there is no requirement to go through the list. The most relevant factors are likely to be (a)the length of and reasons for the delay and (b)whether the delay has prejudiced the respondent. In the case of **Wells Cathedral v Souter** the EAT held that a balancing exercise is required for the just and equitable test and that if the use of the grievance procedure exhausted the limitation period then this is a relevant factor for the Tribunal to consider in the balancing exercise.

13. <u>Constructive unfair dismissal</u>

14. Section 95 (1) (c) of the Employment Rights Act 1996 ("ERA") relevantly provides *"For the purposes of this Part an employee is dismissed by his employer if (and only if)-the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

15. An employee seeking to establish that he has been constructively dismissed must prove :- (1)that the employer fundamentally breached the contract of employment; and (2)that he resigned in response to the breach (see **Western Excavating (ECC) Limited v Sharp (1978) IRLR 27**).

16. It is an implied term of the contract of employment that the employer will not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee; **Malik v BCCI plc (1997) IRLR 462; Baldwin v Brighton & Hove CC (2007) IRLR 232.** The two part test was emphasised in the case of **Mr. M Sharfudeen v T J Morris Limited t/a Home Bargains (UKEAT/0272/16).**

17. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT in **Pearce v Receptek (2013) All ER (D) 364** at paragraphs 12/13

"It has always to be borne in mind that such a breach (of the implied term) is necessarily repudiatory and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious". The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal not in an employment context, in the case of **Eminence Property Developments Limited v Heaney (2010) EWCA Civ 1168** *"..the legal test is simply stated..it is whether looking at all the circumstances objectively that is from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract'.* That case has been followed since in **Cooper v Oates (2010) EWCA Civ 1346** but is not just a test of commercial application. In the case of **Tullet Prebon Plc v BGC Brokers LP (2011) EWCA Civ 131** Aikens LJ took the same approach and adopted the expression *'Abandon and altogether refuse to perform the contract. In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that since it is repudiatory it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract'.*

18. The case of **Morrow v Safeway Stores plc (2002) IRLR 9** held a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract and entitling the employee to resign and claim constructive dismissal. Whether any conduct amounts to a repudiatory breach is a matter for the tribunal to determine having heard the evidence and considered all the circumstances.

19. Where a fundamental breach of contract has played a part in the decision to resign the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning; **Wright v North Ayrshire Council (2014) IRLR 4 (paragraph 16).**

20. Where a Claimant relies upon a final straw to resign the final act may not be blameworthy or unreasonable but it must contribute something to the breach even if relatively insignificant **Omilaju v Waltham Forest London Borough Council (2005) EWCA Civ 1493.** Further, there cannot be a series of last straws; once the contract is affirmed earlier repudiatory breaches cannot be revived by a subsequent "last straw" and following affirmation it takes a subsequent repudiatory breach to entitle the employee to resign.

21. If dismissal is found, the Tribunal considers whether the respondent has established an admissible reason for the dismissal pursuant to section 98 of the Employment Rights Act 1996. Some other substantial reason is a potentially fair reason pursuant to section 98 (2) of the Act.

22. There is a neutral burden in respect of the fairness of the dismissal pursuant to section 98 (4) of the Employment Rights Act 1996 but the Tribunal should

consider all the circumstances of the case including the size and administrative resources of the employer's undertaking, whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and this issue is to be determined in accordance with equity and the substantial merits of the case.

23. Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of compensatory award by such proportion as it considers just and equitable having regard to that finding pursuant to section 123 (6) of the Employment Rights Act 1996.

24. Further in accordance with the case of Polkey, the Tribunal is entitled to consider whether the adoption of a different fair process would have made a difference to the outcome and apply a deduction to the level of compensation.

25. <u>Unlawful deduction of wages</u>

26. Pursuant to section 13 of the Employment Rights Act 1996, 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.

27. A complaint of unlawful deduction of wages should be presented to the Tribunal before the end of the period of three months beginning with the date of the payment of the wages from which the deduction was made or where a series of deductions is claimed before the end of the period of three months of the last deduction in the series. If not presented within this primary limitation period the claimant must establish (**Porter v Bandridge Limited 1978 ICR** 943) whether it was not reasonably practicable for the claimant to have brought the claim within time (in the sense of what was reasonably feasible **Palmer v Southern on Sea Borough Council 1984 ICR 372**) and whether the claim was brought in such further period of time as was reasonable.

<u>FACTS</u>

28. From 10 March 2016 the claimant was employed by the respondent as a part time driver. He resigned his employment on 30 October 2020 and his employment terminated with effect on 30 November 2020. The respondent is a medium sized limited company in the business of supplying car parts and employs about 250 people at 8 different branches in the midland area. The claimant was employed at the respondent's Erdington Branch. The claimant was a well-respected driver with a clean disciplinary record and a valued employee. His regular shift pattern was to work Monday to

Wednesday on week 1 and Thursday to Saturday on week 2 and then revert back to week 1 shift pattern and so on.

29. The claimant's employment contract contained a sickness absence clause at paragraph 7 (page 63) which required an employee to complete a self-certificate for any absence due to illness/incapacity of 7 days or less including non-working days. *"A fit note must be provided for all days of absence including non-working days after the first seven which should have been self-certified".* The agreed custom and practice at the respondent's business is when an employee was fit to return to work they would generally just turn up to work to complete a shift.

30. The claimant's employment contract was also subject to a company handbook which contained a grievance procedure. This provided for an informal (stage 1) and formal procedure. There are two stages of the formal procedure. The formal procedure is set out at pages 81 to 82 which provided that an employee may set their grievance out in writing explaining the nature of the complaint and the outcome they hope to achieve (stage two) . This should be given to the employee's line manager or if it is about the line manager to the next level of management. The next stage is for a senior and experienced person (who is not involved in the dispute) to investigate the grievance and deal with it as quickly as possible. A meeting should be arranged with the employee and any other party to discuss the grievance and the outcome of any investigations and provide directions/instructions to resolve the issue. Where this cannot be resolved the employee may invoke a stage 3 grievance. At stage 3 a senior manager not previously involved will be appointed to investigate the complaint and on conclusion of the investigation arrange a meeting. The investigator should present the findings of the investigation to the parties concerned and seek the party's views in relation to this and how the issues can be resolved. The investigator should make a final decision and inform the parties in writing of any findings or recommendations. Employees who wish to appeal the outcome of the grievance procedure have a right to so. The employee is to be notified of the grievance appeal hearing of the outcome at the hearing or in writing. The way that the procedure is drafted seems to suggest that there could be an appeal at the second stage and third stage of the formal grievance procedure.

31. At the Erdington branch, there were 17 men and 8 women employed from ages 27 to 70 years. Five of the employees including the claimant were over 60 years of age (the claimant was aged 61 at the relevant time) and Mr. Basham was aged 66 years.

32. On 1 March 2020, the Government introduced the first coronavirus job retention scheme (CRJS). There was a great deal of uncertainty in the context of the pandemic as to the continuance of the respondent's business. Mr. Gardner director was uncertain if his business would actually survive and in fact obtained a fork lift truck driver licence to carry out work for his business. The situation was unprecedented and extremely challenging to handle. Mr. Mehat joined the respondent as a graduate entry HR generalist/administrator (he is now employed as a HR Manager) on 3

February 2020. During the days preceding the national lockdown the respondent encountered its worst ever period of short and long-term absenteeism. A number of employees called in or notified as sick whilst other employees did not attend shifts (see pages 206 to 209). At the beginning of March 2020 there was a HR team of three. By 1 April, Mr. Mehat was on his own, following one of his colleagues resigning and the other employee in the team was in isolation. Mr. Mehat himself had to self-isolate for two weeks in April 2020. Mr. Mehat was extremely busy and under a great deal of pressure.

33. On 26 March 2020 (page 163) the claimant emailed the respondent stating *"I sadly had to call in sick this morning with symptoms of coronavirus. NHS direct e-mailed me the isolation note no : 1529 4191 3167 7449 enclosed here."* The self-isolation note was applicable for the period from 26 March 2020 until 1 April 2020 (page 375). Whilst the claimant was absent from work, he was paid SSP for the period of the isolation note. He did not submit any further isolation notes or any sick notes to the respondent. The claimant received a pay slip dated 27 April 2020 when he was paid £19.76 and on 27 May 2020 he received a payslip for 7.5 hours at a total of £65.40.

34. As a direct result of coronavirus, initially the respondent suffered a downturn in work. The respondent decided to furlough some but not all employees. In this way the respondent could provide service to its reduced clients. The original plan was to furlough 50% of its 12 drivers at Erdington but due to ill health, it had only 4 drivers available (two were shielding). Erdington was particularly badly affected with absence at this time.

35. On 24 March 2020, Manpreet Mehat, HR Manager handed out health questionnaires to employees who were in attendance at work. The claimant was not in work on this date so did not receive a questionnaire to complete. The questionnaire was initially to be used as a tool to determine which employees should be furloughed. However, following liaising with other businesses and taking into account that its workforce was ageing, the respondent concluded the questionnaires may be considered discriminatory so abandoned them as a means of determining employees to be furloughed. Instead, the respondent adopted a random selection of employees for furlough.

36. On 30 March 2020 Mr. Mehat prepared a spreadsheet for Mr. Tuby, director, including all active employees (namely all those employees who were not off sick). Mr. Mehat's understanding is that those receiving SSP could not be furloughed simultaneously. The government guidance published on 26 March 2020 did not provide for employees on SSP to be furloughed.

37. Mr. Tuby, Director, went through an anonymised spreadsheet (pages 236 and 179) and divided the staff at the Erdington branch into two groups; 1 and 2; with the intention of having group 1 working and furloughing group 2 for three weeks; they would then be swapped to work/furlough. Mr. Tuby achieved this division of the employees by putting a 1 or 2 against an anonymised name. Alison Collins aged 48 worked in April and May;

Margaret Dale aged 43 worked in April and May. Ms. Piper was aged 55 and Claire Huyton aged 43 years were both furloughed as they were number "2"s. The claimant and Mr. Basham who worked the same shift pattern as Ms. Huyton and Ms. Piper were not included on the list to be furloughed on 1 April because they were both off sick. Following a period of about 2 weeks, Mr. Basham aged 66 was also furloughed retrospectively from 1 April 2020 which the respondent now accepts was incorrect; he was furloughed at this later stage on the understanding by Mr. Mehat that he was able to furlough an employee who had sick leave. Guidance was updated by the government on or about 10 April 2020 to permit employers to furlough employees on SSP. Mr. Basham, unlike the claimant, continued to send in sick notes until he was furloughed by the respondent.

38. Mr. Mehat created and sent a MEMO to managers as guidance for employee furlough consultations (page 180) accompanied with a furlough agreement template to be completed by employees that were going to be placed on furlough on 1 April 2020 (page 181). Six out of 12 drivers were placed on furlough including both men and women aged between 37 to 71.

39. On or about 6 April 2020 the claimant contacted Mr. Allen, the branch manager by telephone. The claimant was asking Mr. Allen about the furlough scheme. There is a dispute between the claimant and Mr. Allen as to what was said. On the balance of probabilities, the Tribunal prefer the evidence of Mr. Allen who it found credible and who corroborated his evidence with contemporaneous emails.

40. Mr. Allen's evidence, which is accepted by the Tribunal, is that Mr. Langan enquired about furlough. Mr. Allen explained to the claimant about the changing of shifts and stated he did not believe that any more employees were going to be furloughed. He informed the claimant he should contact Mr. Mehat and then contact Mr. Allen again. The Tribunal finds that Mr. Allen's account is corroborated by his email to Mr. Mehat dated 7 April 2020 (page 168). The Tribunal rejects the claimant's assertion that Mr. Allen told him not return to work. The Tribunal do not find this to be credible; Mr. Allen gave evidence to the contrary and the Tribunal takes account that the claimant failed to mention this important matter in his grievance dated 4 June 2020 nor did the claimant mention it to Mr. Mehat at the time of his conversation with him on 6 April 2020. It would be expected, had the claimant been told not to attend work, he would have at least enquired about the payment of his wages; he did not do so. Further the claimant's account was in contradiction to his assertion that he kept the branch informed. The Tribunal finds it unlikely that had Mr. Allen told the claimant to stay away from work that the claimant would have kept the branch updated; there would have been no need to keep the branch informed. The Tribunal concluded that the claimant wanted to be furloughed and wrongly thought as he had health conditions he could simply stay away from work and would be paid. This was a misunderstanding on the part of the claimant. He made that assumption.

41. Following the claimant's conversation with Mr. Allen, on or about 6 April 2020, the claimant contacted Mr. Mehat by telephone. The claimant asked Mr. Mehat if he had been furloughed and Mr. Mehat advised the claimant that he had not. Mr. Mehat informed the claimant that SSP and furlough pay could not be issued simultaneously. Mr. Mehat did not inform the claimant he could not return to work nor did the claimant tell Mr. Mehat that he had been told not to return work. The Tribunal as noted prefer the evidence of Mr. Allen in this regard and it was clear from the evidence of Mr. Gardner, a director, that as the Erdington branch was badly affected by absence, the business did need the support of employees at the time. The claimant's suggestion that the respondent would have told an employee not to come into work if not furloughed was incredible.

42. On 8 April 2020 (page 164) the claimant sent an email to the HR department to state he was *"currently self-isolating due to being high risk from coronavirus due to my age (61) type 2 diabetes and a history of asthma. Further to our telephone conversation of 6/4/20 it transpires that the chancellor has decreed that people who are self-isolating can be furloughed after 2 weeks on statutory sick pay."*

43. The claimant informed the Tribunal he had childhood asthma and he was "borderline diabetic". On enquiry from the Tribunal the claimant stated that the test results for diabetes he was "7.0" and to be diabetic you have to have a result of 7.5. He did not receive any medication for this condition and managed it by diet. He did not receive any information by text or letter from the government to state that he should shield as a clinically vulnerable individual at any stage. However, the respondent did not respond to the email of the claimant dated 8 April 2020. Mr. Mehat candidly informed the Tribunal that he missed this. In the context of the chaos of the pandemic, although he must have read it, the email and its significance did not register with him.

44. On 9 April 2020 Mr. Allen, Branch Manager emailed Mr. Mehat (page 166) to state that the claimant had contacted him on 8 April and would be continuing his self-isolation and not returning to work as he was expecting to be put on furlough in May. He also stated as the claimant was going to be required to work full time hours during April including every Saturday he was continuing his self-isolation. The Tribunal found that the claimant had decided he did not wish to work the new hours in the pandemic but wanted to be furloughed. When it became apparent that the respondent was not going to do this, he decided himself to self-isolate. However, he did not submit any medical or self-isolation certificates in line with the company policy.

45. The respondent's business picked up by the end of April. It was decided that employees would be gradually recalled from furlough. It was decided that group 1 were to remain on furlough because after three weeks on furlough an employee can be recalled immediately. Whereas if group 2 were to be furloughed, a minimum 3 week period would need to have elapsed before a return could be actioned and furlough submissions made. The concern for

the respondent was that by furloughing group 2 the respondent would not be able to meet customer demand with considerable cost to the company. Group 2 were unhappy about this because they expected to be furloughed. The respondent issued a bonus to these employees for their commitment to the company by working through the pandemic. Mr. Mehat instructed managers to bring some employees off furlough to coincide with the increase in business.

46. By email dated 27 April 2020, Mr. Allen confirmed that he had a driver returning on 7 May 2020 (page 167). Mr. Allen had not contacted the claimant because he was still self-isolating as he was due to return in April but *when he found out he was not going to get furloughed he said he will be continuing to self-isolate."*

47. The business began to increase to pre-covid levels at the end of May/start of June 2020 so the respondent required staff to return to their scheduled shifts after 1 June 2020.

48. On 20 May 2020 the claimant received a telephone call from Mr. Mehat to inform he should return to work in June 2020 because the business was picking up and there would be work for the claimant. The claimant did not indicate any reluctance to Mr. Mehat to return to work in this telephone call. The claimant rang the branch and arranged his return to work with Mr. Allen for 4 June 2020.

49. Shortly, thereafter the claimant received a letter from Mr. Mehat dated 20 May 2020 (page 113) which stated *"Further to our conversation on 20 May 2020 your scheduled return to work is 1 June 2020. Please be advised your furlough period will end on 1 June and our furlough agreement is no longer valid. If you have any queries feel free to contact me or your line manager. We are very much looking forward to your return."* Mr. Mehat's evidence is that this letter was sent in error to the claimant. The claimant was included in a mail merge with those expected to return from furlough. The Tribunal accept Mr. Mehat's explanation; the Tribunal found Mr. Mehat to be a credible witness. There was a great deal of chaos during the pandemic and the business was firefighting and mistakes were made.

50. On 27 May 2020 (page 165) the claimant emailed payroll and questioned why he had only received SSP in April and no wages in May. The claimant expected to be paid whilst he self-isolated without providing the relevant certificates to cover his absence. He sought an explanation for the wrongly sent out letter dated 20 May why a letter confirming his return to work alluded to a furlough agreement. The claimant's evidence is that he responded by email to ask how his furlough could have ended when Mr. Mehat had refused to furlough him. Mr. Mehat did not respond to this email. Again, Mr. Mehat missed this communication and failed to respond to this.

51. On 4 June 2020 the claimant lodged a grievance at his branch and returned to work on 4 June 2020. The claimant's grievance titled *"Unfair treatment"* complained about a lack of communication; the respondent's refusal to furlough him, his return to work and non-payment of wages (pages 114 to

117). The claimant complained that he had not received a letter about furlough arrangements; he accepted he did not receive the questionnaire handout because he was not in attendance but he complained that he had no information at all. In his grievance he accepted that Mr. Mehat had advised him when he contacted him in April that as the claimant was off sick and could not be furloughed. He was also told that the respondent had furloughed staff so he would not be furloughed. The claimant stated in his grievance that he had checked the schedules and noted that 10 part time drivers at Erdington, 2 were continuing to work, 7 were furloughed and he was *"left to rot in self-isolation.*" He said that the chancellor had stated that people off sick could be included in the furlough scheme after 2 weeks on statutory sick pay. He emailed Mr. Mehat to request to be furloughed because of his underlying health condition (asthma and type 2 diabetes) which put him at high risk of coronavirus. He said this request was not acknowledged. He said that the respondent insisted that he return to work at the beginning of June despite informing the respondent that he had been shielding for 12 weeks but he had been informed the needs of the business come first. He stated he reluctantly agreed to return to work in June 2020. He complained about the letter he received on 20 May 2020. Further the claimant stated he had missed 5 weeks of scheduled work during self-isolation and he had only received one weeks coronavirus statutory sick pay. He did not complain about discrimination at this stage.

52. On 10 June 2020 (page 119) the respondent sent a reply to the claimant's grievance. The Tribunal finds that the letter of Mr. Mehat covers each of the points raised by the claimant. In the response, Mr. Mehat stated in respect of lack of communication all aspects of the organisation had been strained and delays were to be expected. The claimant had been paid statutory sick pay for the dates of the isolation note. The respondent did ask the claimant to return to work as the needs of the business required the claimant work his scheduled hours. The claimant did not suggest he was reluctant to do so at the time. In respect of the claimant's point of refusal to furlough Mr. Mehat stated that the selection process was designed to be the fairest possible. In respect of the claimant's non-payment of wages, the respondent stated that it had only received one isolation note from the claimant to which he was paid accordingly. He was not issued with any further SSP as he had not received any further isolation notes or 12 week NHS letter. The response ended *"We apologise that you feel as though you have not received guidance ..the company would have struggled to offer you any more advice than you would have already likely received".*

53. The claimant accepted the offer of a formal grievance meeting. Originally, it was scheduled for 26 June 2020 but this was adjourned to 13 July at the claimant's request (page 123). The grievance meeting took place on 13 July 2020 (page 125-6). The claimant was accompanied by Mrs. Carolyn Piper (Erdington branch part time driver) who took some handwritten notes of the main points discussed. Mr. Mehat and Andy Stanley, HR Advisor were also in attendance. Notes were taken by the respondent. The claimant suggested that the notes of both the grievance hearing and the grievance appeal hearing were inaccurate and fabricated. The Tribunal rejects this. On detailed cross examination of the claimant at the hearing and a comparison

of the respondent's notes and notes taken by the claimant's note taker, the Tribunal finds that although neither set of notes are verbatim, both sets of notes demonstrate consistency and demonstrate that the main themes discussed were captured in the notes. This was conceded by the claimant and his note taker Ms. Piper.

54. At the grievance hearing, the respondent explained to the claimant that hundreds of staff during this period were requesting HR service and therefore there were email backlogs in this period. The claimant was asked why he had not phoned ther respondent and the claimant said he preferred to put things in writing. Mr. Mehat apologised and the claimant stated he appreciated the situation Mr. Mehat was in. The process adopted for the selection of employees on furlough was explained to the claimant. In the hearing for the first time, the claimant claimed that Mr. Allen said he could not return to work. The claimant was asked why he had stated in his grievance that he was reluctant to return to work; the claimant said he was having bad day when he completed the grievance because his friend died. He was asked what the claimant wanted from the grievance process and the claimant stated "my wages for a start." The claimant produced a schedule of loss amounting to £1,090. Mr. Stanley suggested to the claimant to perform overtime to make the time back the wages or a retrospective furlough payment or discretionary payment of sorts. The claimant was informed that he would receive a response to his grievance in about 2 weeks and he had a right of appeal.

55. The claimant in evidence suggested that Mr. Mehat should not have been involved in the grievance hearing or process because it was a breach of the grievance procedure. The claimant relied upon page 81 namely that the company should appoint a senior and experienced individual *"not involved in the dispute to investigate the grievance."* At no time during the grievance hearing did the claimant ever object to Mr. Mehat being involved in the grievance. The Tribunal found that this was an afterthought of the claimant and he had no real objection to Mr. Mehat investigating his complaint at the material time. In any event the Tribunal notes that Mr. Mehat was responsible for the lack of communication and request the claimant to return to work in June which were issues included in the claimant's grievance but the claimant did accept in the hearing that he understood the position Mr. Mehat was in in respect of communication and the claimant admitted he was not reluctant to return to work. However, Mr. Mehat was not involved in the selection of furloughing employees. The Tribunal finds that there was a breach of the grievance procedure by Mr. Mehat hearing the grievance but the claimant was unconcerned about this at the material time.

56. There was a delay in sending the claimant a response to his grievance. However the Tribunal finds that this was not a deliberate act by the respondent and it simply was struggling to function administratively during the chaos of the pandemic. The claimant was sent a response to his grievance in early August 2020 (page 130) date stamped 27 July 2020 (page 128).

57. The outcome of the grievance hearing (page 128) stated

"..we understand the impact COVI 19 has had any on many businesses and employees alike. The points made concerning your qualms relating to you not being placed or furlough have been noted and the company wishes to apologise for the selection process, unfortunately not accommodating for you..I hope you can appreciate the selection process was orchestrated using the fairest possible mechanism and accept no afore malice or ill intention was exhibited before the selection. As such as a gesture of goodwill the company would like to issue you a payment of £200 on August's pay round." The claimant was given a right of appeal which he exercised.

58. By email dated 9 August 2020, the claimant refused the goodwill payment of £200 (page 130). This money was paid into the claimant's August pay slip even though the claimant refused it. The claimant stated *"I find myself unable to accept such a derisory sum even as a gesture of goodwill."* He requested an appeal. The meeting was arranged for a mutually convenient date of 1 October. There was a delay in setting up the meeting as Ms. Piper (the claimant's selected person to accompany him) was recovering from surgery.

59. At the grievance appeal hearing on 1 October 2020 Mike Gardner, managing director, chaired the appeal; Chris Hogben was the note taker and the claimant attended with Carolyn Piper. Despite the suggestion by the claimant that Chris Hogben did not make notes, the Tribunal finds Ms. Hogben to be a credible witness and accept as she contends that she did make notes. Ms. Piper said in evidence she could not confirm whether Ms. Hogben made notes because she had a pen on her lap in the course of the grievance appeal hearing. The Tribunal again were taken through the handwritten notes made by the respondent at page 137 and its typed version at page 147- 148 and compared these with the notes of Ms. Piper at page 149. The claimant accepted on a comparison that the main themese were recorded in both sets of notes (claimant's and respondents) and the Tribunal finds that they were broadly similar and accurately recorded the main points discussed.

60. It was a main point of the claimant's case that at neither the grievance hearing nor at the grievance hearing was he asked to sign a record of the notes. He contended this was a breach of the ACAS code of practice and his understanding of the correct procedure to be adopted at such hearings relying upon his previous employment of security. Ms. Hogden who had experience of taking notes at previous hearings at the respondent described the procedure adopted at the respondent namely that handwritten notes are not signed by the employee at the end of the hearing. Instead, notes are typed up and passed to HR and then passed by HR to the employee. The Tribunal finds that this is a reasonable and usual procedure in terms of notes of hearings.

61. At the grievance appeal hearing, the claimant repeated the allegation that Mr. Allen told him not to return to work. He stated he had not received a

furlough letter from the respondent. Mr. Gardner informed the claimant that he could not get SSP don't have a letter. He informed Mr. Gardner he was told he was on furlough. The claimant stated Mr. Mehat had informed him he was on furlough by letter. The claimant stated he was not given a letter he was on furlough; he was sick. The claimant stated he was lodging an employment tribunal clam on 15 October. The claimant raised that he should have a third meeting. He then provided a provisional figure of £158,000 including 25 % for not following procedure. He described having a claim for gender and/or age discrimination and that the chances of him finding another job was very slim.

62. The Tribunal enquired with the claimant what he had wished to achieve from the grievance process. The claimant's evidence is that he wanted to receive his wages for April and May. In respect of his calculation of £158,000 the claimant stated that he thought if he lost his job it would be difficult for him to find another job and he was calculating his future losses. The Tribunal were not persuaded by this evidence. The Tribunal considered that even before the meeting on 1 October 2020 the claimant had decided to leave the employment of the respondent and make a large claim for a career loss in the Tribunal. Hence his statement when referencing £158,000 to finding a job is very slim at the grievance appeal hearing when the claimant was still employed.

63. Mr. Gardner provided a detailed response to the claimant's grievance appeal by letter dated 9 October 2020. His appeal was rejected. Mr. Gardner apologised for the failure to answer emails explaining that Mr. Mehat had to self isolate for two weeks and had an immense backlog of emails and the difficult working environment. Mr. Gardner stated

    "Separately your formal grievance suggested that the refusal to furlough was the principal factor in your grievance. Contrary to this, you stated in both Grievance and Appeal meetings the issue was that you were told to not come in as opposed to you not being placed on furlough. Upon communication with your Branch Manager the perusal of Planday records made by yourself I am satisfied that your period of self-isolation was directed on your own consensus with the company not influencing your decision. You stated in your appeal meeting that John Allen (Branch Manager) had told you you were on furlough. However your emails on 8 April, 27 May and formal grievance on 4 June 2020 all suggest you acknowledged the fact you were not on furlough."

64. Mr. Gardner considered the contemporaneous evidential trail of emails from Mr. Allen and concluded that *"on balance of probabilities supported with considerable evidence I have determined that your assertions of being told not to return to work as uncorroborated."*

65. In respect of the claimant's complaints of discrimination, Mr. Gardner stated *"at no point did you make reference to discrimination in your formal grievance letter or meeting and has seemingly transpired during your appeal*

meeting..any suggestion of employer advocated discrimination of any kind is false and without foundation."

66. On 16 October 2020 (page 156) the claimant acknowledged the grievance response but queried the accuracy of the minutes both for the appeal and the initial grievance meeting. He stated *"the minutes of the first meeting on 13/7/2020 look as though they've been written by an 8 year old, which appals me. The minutes of the Appeal hearing are not much better either in no way do they constitute a true and fair record of those meetings and I fail to see how a Judge would be able to allow them as evidence..I am now forwarding the ACAS certificate to the Tribunal."*
67. As the Tribunal has set out above, the suggestion that the notes were fabricated by the respondent was unsupported by the claimant's witness Mrs. Carolyn Piper who accompanied the claimant at both grievance and appeal hearings and following the reading of the notes could not find any inaccuracies.
68. Mr. Mehat (page 158) in an email to the claimant on 16 October 2020 requested the claimant to identify any incorrect matters in the minutes. The claimant did not take up this offer. In his email dated 16 October 2020 the claimant stated that the Tribunal would order disclosure of documents.

69. On 30 October 2020 (page 160) the claimant submitted his resignation. He requested the respondent to accept his email as one month's notice to leave. He stated *"My reason for leaving is the shambolic handling of my recent grievance by management in failing to follow the grievance procedure set out in the company handbook Car Spares have not given me a fair hearing. Also as someone who values honesty and integrity, the lack of both from all levels of management saddens me. I now feel that my position with the company has become untenable. I have up until recently enjoyed my time as a driver with Car Spares. I now count several of my colleagues as friends. It is a pity that it has had to end on such a sour note."* The claimant confirmed in his evidence that he relied upon the respondent's course of conduct towards him from April 2020, the failure to give him a third hearing and the inaccurate and fabricated notes of meetings.

<u>Submissions</u>

70. Both parties prepared written submissions and read these to the Tribunal. The Tribunal sets out the summary points made.

71. Mr. Mehat submitted on behalf of the respondent that the claimant's complaints were not made out. The respondent's case is that it did not include the claimant on the spread sheet for selection for furlough because he was off sick at the time. The government guidance did not allow for employees off sick in receipt of SSP to also be furloughed. The claimant was not told he should not come into work; the Tribunal was referred to the emails of Mr. Allen. The claimant decided to stay at home. The claimant should provide evidence that he was unable to work pursuant to the respondent's processes; following the expiry of his self-isolation note, the claimant did not provide any more sick notes; he was not informed by the

government he was clinically vulnerable and needed to shield. The claimant cannot be paid if he does not provide medical notes to the respondent. The respondent apologised for missing the claimant's emails; it was not deliberate and it was a difficult time for the business. There no discrimination in the respondent's decision making about furlough. The claimant's grievance was listened to. He did not complain about discriminatory treatment at the time. He did not request to move to third stage after level 2; he accepted the offer of an appeal. The claimant had decided to leave the respondent even before it had resolved his grievance.

72. The claimant submitted that his health conditions meant he should have been furloughed. Younger women were furloughed. This was discrimination. He was informed not to attend work by Mr. Allen. The guidance changed and the respondent could then have furloughed him but they did not. He was treated unfairly and his correspondence was not responded to. He was not given the opportunity to have a third meeting. He should have been handed the notes at the end of each meeting and asked to sign them; he was not.

Conclusions

Constructive unfair dismissal claim

73. The burden rests upon the claimant to establish that the respondent was in repudiatory (namely serious) breach of contract. The claimant relies upon the breach of the implied term of trust and confidence. His case is that there was a course of conduct by the respondent including failing to communicate with him, refusing to allow him to work, refusal to furlough him, subjecting him to discriminatory treatment by not allowing him to return to work or refusing to furlough him, not paying him wages, failing to follow the grievance procedure and offer him a third meeting, allowing Mr. Mehat to be involved in the first grievance hearing when he was in dispute with him, failing to hand over notes to the claimant at the end of both grievance and grievance appeal meetings to check and sign and fabricated notes of the meeting. The Tribunal having considered all of the evidence do not find that the claimant has established a repudiatory breach of contract. The Tribunal is mindful that it not only has to consider whether the respondent behaved in a way that was calculated or likely to destroy or seriously damaged the trust and confidence between the claimant and respondent but also whether there was no just cause for so conducting themselves.
74. The Tribunal considers that it is important to take account of the context of the position the claimant and the respondent found themselves in namely chaos in a national pandemic. Mr. Mehat was a new employee left alone in his department of the business in April 2020. The respondent was overwhelmed by the enormity of the situation and was uncertain whether the business would actually survive.
75. The respondent devised a reasonable process of selection for furlough namely randomly selecting employees from an anonymised list of active employees. Active employees were those not on sick leave in the business at the time of selection at the end of March 2020. The claimant was excluded from this list along with Mr. Basham because they were on sick leave. The guidance from the government at this stage was that employers could not furlough employees on SSP.

76. The Tribunal has already considered above the reasons for not furloughing the claimant at the end of March 2020 namely its understanding that an employee in receipt of SSP could not be furloughed at the same time. This was the government guidance and there can be no credible suggestion that the respondent's non-selection of the claimant for furlough based on government guidance could seriously damage the relationship of trust and confidence between the claimant and the respondent. In any event, there was just cause not to furlough the claimant at this stage.
77. The claimant was paid SSP for the period of the isolation note he presented to the respondent namely up to 1 April 2020. When the claimant enquired on 6 April 2020 whether he was to be furloughed and he was informed that he would not be the claimant took it upon himself to self-isolate. This is a decision that he made himself. The Tribunal concluded he was not told by Mr. Allen on 6 April or at any time he was not to return to work. The Tribunal has already set out above the reasons for preferring the evidence of Mr. Allen and in particular the contemporaneous evidence which corroborates Mr. Allen's version of events. The claimant had a self-isolation note that lasted until 1 April 2020. He became aware from his discussions with Mr. Allen on 6 April there had been a change in the contractual terms and he would be required to work Saturdays. Mr. Allen explained he did not believe any other members of staff were to be furloughed but that the claimant should contact Mr. Mehat. The claimant contacted Mr. Mehat who explained that the claimant was not to be furloughed. The claimant chose to self-isolate and remain off work. The Tribunal finds that the claimant acted under the misapprehension that he could stay away from work and self-isolate and be paid. He wanted to be furloughed. He did not wish to work the new contracted hours. The Tribunal finds that as the claimant was an employee of 4 years service would be aware of the need to provide medical evidence if remaining away from work. This is supported by the fact that the claimant presented to his employer an isolation note at the end of March 2020. The claimant failed to present medical material to support his absence from work and chose to self isolate and stay at home. He did not receive any information by text or letter from the government or provide this to his employer that he should shield as he was clinically vulnerable. The claimant had no grounds on the evidence to make this decision and expect to be paid. The claimant failed to follow the sickness procedure to provide medical support for his absence and accordingly he was not paid. The Tribunal has already found on the facts that the claimant was not told by Mr. Allen at any time not to come back to work. The reality is the claimant chose to self-isolate with no supporting medical evidence to corroborate his decision. He can not expect to be paid if he fails to comply with company policy and provide sick notes for his absence.

78. The respondent failed to respond to two pieces of correspondence sent by the claimant namely his email dated 8 April 2020 (page 164) and dated 27 May 2020 (page 165) concerning his wages and the letter dated 20 May 2020 furlough agreement. Deliberately ignoring correspondence from an employee may be considered likely to seriously damage the relationship of trust and confidence between the employer and employee but on the particular facts of this case, the Tribunal finds that there was reasonable and

proper cause. Mr. Mehat did not intentionally ignore the claimant. A national pandemic was live; Mr. Mehat was very busy and under pressure; there was uncertainty whether the business would survive, the business was plagued by a large amount of sickness of its employees and Mr. Mehat was left on his own in the department and had to self isolate. Mistakes are made but as soon as the claimant complained about the lack of communication, Mr. Mehat responded to this in his email dated 10 June 2020 and apologised. The apology was sincere and genuine. Mr. Mehat continued to apologise about this at the grievance hearing in July 2020 and the claimant accepted at the hearing the position Mr. Mehat was in. There was just cause for the respondent failing to respond to the claimant's correspondence.

79. The claimant complained at the hearing about the lack of an independent person at the first grievance hearing. This concerned the involvement of Mr. Mehat who had not responded to his correspondence and had communicated to the claimant he was not furloughed. The Tribunal finds that the complaint of Mr. Mehat's involvement in the grievance is an afterthought by the claimant. At the time of the grievance hearing the claimant never raised any concerns that Mr. Mehat was involved in the hearing and although this is a breach of the grievance procedure the Tribunal finds that the claimant waived this by failing to raise any concerns about this at the grievance hearing or at the grievance appeal hearing.
80. The claimant has sought to compare himself with younger females who were furloughed or who worked during April/May. At page 51 of the bundle the claimant compared himself to Alison Collins aged 48 and Margaret Dale aged 43 who were both allowed to work in April and May. The claimant also compares himself to Claire Huyton and Carolyn Piper aged 43 and 53 who were furloughed in April and worked in May. The Tribunal reject that any of the identified women are actual comparators. There is no evidence provided to show that any of the female comparators were on sick leave at the time of the decision made to furlough or when the decision was made to require employees to work. In the course of evidence, the claimant raised the issue of his colleague Mr. Basham who had his furlough backdated in about mid-April 2020 to 1 April 2020 complaining that he too should have had his furlough backdated. This had not previously been any part of the claimant's pleaded case. However, the Tribunal do not find that furloughing Mr. Basham retrospectively was discriminatory. Mr. Basham is actually older than the claimant at the age of 66. He was sick at the end of March 2020 but unlike the claimant, Mr. Basham continued to send in sick notes to support his absence. The respondent has conceded at the tribunal that on reflection backdating the furlough was an error at the time and not in accordance with the government guidance but a mistake was made. Furloughing an employee of similar age to the claimant retrospectively may well be a matter that could damage the trust in an employer but this was at no time relied upon the claimant as a reason to resign his employment and in any event was implemented because Mr. Basham submitted sick notes to support his sickness; the claimant did not.
81. The claimant also relies upon the fact he was not provided with a third meeting. Following the second stage outcome the claimant was offered an appeal which he accepted. Stage 3 as set out in the respondent's procedure requires an employee to request one. The claimant did not do so and did not raise this until the grievance appeal hearing. The failure to follow a

grievance process could damage the trust and confidence between employer and employee depending upon the extent of the failure. The Tribunal finds that there was no failure here. The claimant was offered an appeal at stage 2 which he accepted and he did not seek a stage 3 meeting. The claimant's concerns were listened to and investigated but were not accepted. The respondent reached a conclusion having taken account of the points of the claimant, their investigations and concluded the grievances were without merit. The Tribunal finds in any event there was just cause not to have a stage 3 meeting because the claimant did not elect one as required in the grievance procedure.

82. The notes of the grievance and grievance appeal meeting were not fabricated. This allegation is totally without merit. The notes of the respondent and of the claimant's companion were not verbatim but a summary of the main points discussed at the hearing. As conceded by the claimant and his witness Ms. Piper having analysed both sets they are similar and capture the main themes of the meeting. The claimant did receive a copy of the notes immediately at the end of the meeting. There is no requirement for an employer to do so pursuant to ACAS guidance. The claimant was relying upon his previous work experience in the security industry. The respondent's practice from the evidence of Ms. Hogben was to make handwritten notes, type these up, pass these to HR. These should be passed to the claimant for amendment within a reasonable period of the meeting to consider and amend. The first set of notes were sent to the claimant at a later stage but he was invited to amend both sets of notes and refused to do so. Fabricating notes could destroy or damage the relationship of trust and confidence between an employer and an employee but this was not done here. There was a delay in sending the first set of notes the Tribunal does not seriously consider weighing the short delay in time that this could seriously damage or destroy the relationship but in any event the respondent was dealing with a workforce with a great deal of sickness during the pandemic and there was just cause for an delay.
83. In the circumstances the claimant has not established a breach of the implied term of trust and confidence and the Tribunal finds that the respondent did not act in repudiatory breach of contract. The claimant was therefore not entitled to resign and claim constructive unfair dismissal and this claim is dismissed.

Discrimination claims

84. The Tribunal accepts that not allowing a person to return to work or not furloughing an employee can amount to less favourable treatment. However, on consideration of all of the evidence the Tribunal does not find that such treatment has anything to do with the protected characteristics of age or sex.

85. The starting point is to consider the thought processes of the respondent. The Tribunal has already found that a random selection of employees was made from an anonymised list of active employees. The claimant was not an active employee at the material time; he was off sick and was not included on the list. The claimant has not established on the evidence that any of the women (who were furloughed) were off sick at the time like him so cannot be considered to be actual comparators pursuant to section 23 of the Equality Act 2010.

86. Furthermore, the claimant was not at any stage told by the respondent not to come into work. The Tribunal finds this suggestion absurd in the light of the evidence of the respondent (which is accepted by the tribunal) that it was in need of employees to assist the business. Mr. Allen was an honest witness who supported his credible evidence with contemporaneous emails. The claimant chose not to come in. There can be no less favourable treatment for not being allowed to work because the claimant was never stopped by the respondent from returning to work; he chose to remain at home.

87. The claimant cannot rely upon Mr. Basham as a comparator because he was of the same sex and of a similar age to the claimant (Mr. Basham was aged 66) at the time the decision to furlough was made. Mr. Basham too did not appear on the spreadsheet for selection of furlough along with the claimant as they were both of sick at the time. Unlike the claimant, Mr. Basham continued to submit sick notes and the respondent made the decision about two weeks later (they now accept wrongly) to retrospectively furlough Mr. Basham. There is no prima facie case of discrimination here based on age or sex. In fact, the treatment had nothing whatsoever to do with these protected characteristics. The claimant was off sick at the time and chose to self-isolate without providing medical material.

<u>Unlawful deductions</u>

88. The claimant received reduced wages during the months of April and May 2020. There was a deduction. The claimant's contract is clear that an employee needs to complete a self-certificate for any absence due to illness/incapacity of 7 days or less including non-working days. *"A fit note must be provided for all days of absence including non-working days after the first seven which should have been self-certified".* There is no dispute that the claimant did not provide the necessary fit notes to the respondent after the date of the expiry of his self-isolation note. The Tribunal finds that the deduction was lawful by virtue of the terms of the claimant's contract; the claimant did not submit fit notes in accordance with the terms of his contract and is not entitled to be paid.

<u>Time</u>

89. The claim of discrimination is out of time in any event. The decision not to furlough the claimant was made at the end of March 2020. That decision had continuing consequences for the claimant. However the Tribunal finds it is just and equitable to extend time taking account of all the circumstances namely that the claimant was using the grievance procedure to seek a resolution of the issues albeit he did not raise age or sex discrimination expressly; he had been out of the business for a period self-isolating through choice and became more aware of who had been furloughed and working when he returned to work in June; he continued to pursue the grievance process to appeal. There is no evidential prejudice to the respondent for permitting this claim to be dealt with. However, the Tribunal has found that the discrimination complaints are without merit and are dismissed.

90. In respect of the claimant unlawful deductions from the claimant's wages claim the Tribunal finds that there was a deduction made in April and May 2020. However, those deductions were lawful pursuant to section 13 of the Employment Rights Act 1996 because they were made by the respondent because the claimant did not attend work and failed to provide either a self isolation note or medical evidence to establish he was entitled to remain from work. He did not receive information from the government that he should shield. The respondent's policy is clear an employee must provide medical information to remain off work after 7 days and be paid. The claimant failed to follow this process and therefore was absent without leave and was not entitled to be paid. This claim has been brought within the relevant statutory time limit by reason of the fact that the claimant complains about a series of deductions; the last in the series took place on 27 May 2020; the ACAS certificate was submitted on 24 August 2020. In any event there was no unlawful deduction of wages and this claim fails.

91. In the circumstances the claimant's claims are dismissed.

____

Employment Judge Wedderspoon

Date 27th January 2022