EMPLOYMENT TRIBUNALS

Claimant: **Mr A Alzaidi**

Respondent: **2 Sisters Food Group Limited**

HELD at Sheffield **ON: 10, 11, 12 and 13 January 2023**

BEFORE: Employment Judge Brain

Members: **Dr C Langman**
Mr M Taj

REPRESENTATION

Claimant: **In person**
Respondent: **Mr J Davies, Counsel**

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant has permission to amend his claim to include a complaint that the respondent made an unauthorised deduction from his wages contrary to Part II of the Employment Rights Act 1996 for the period from 22 April 2022 to 30 June 2022.

2. Upon the claimant's claim that the respondent made an unauthorised deduction from his wages brought pursuant to Part II of the 1996 Act:

   2.1. The respondent made an unauthorised deduction from his wages for the period from 1 January 2022 to 30 June 2022.

   2.2. The respondent shall pay to the claimant the amount of the unauthorised deduction in the sum of £20400.

   2.3. The respondent's failure to pay pension contributions for the period between 1 January 2022 and 30 June 2022 is not an unauthorised deduction as those contributions are not monies properly payable to the claimant.

3. Upon the claimant's claims brought pursuant to the Equality Act 2010:

3.1. The complaint that the respondent failed to comply with the duty to make reasonable adjustments fails and stands dismissed.

3.2. The complaint that the respondent indirectly discriminated against the claimant in relation to his disability fails and stands dismissed.

3.3. The respondent subjected the claimant to unfavourable treatment for something arising in consequence of disability.

3.4. Upon the complaint in paragraph 3.3, the respondent's justification defence fails. Accordingly, the claimant's complaint of unfavourable treatment for something arising in consequence of dismissal succeeds.

4. Remedy upon the successful 2010 Act complaint:

4.1. The respondent shall pay to the claimant the sum of £9900 by way of compensation for injury to the claimant's feelings.

4.2. The respondent shall pay to the claimant the sum of £14885.40 to compensate the claimant for the net loss of wages caused by the respondent's discriminatory conduct for the period between 1 January 2022 and 30 June 2022

4.3 The Tribunal recommends that the respondent pays into their pension scheme the sum of £518.44 to make up for the lost employer's pension contributions for the period between 1 January 2022 and 30 June 2022 in the sum of £19.94 per week.

4.4 The respondent shall pay interest to the claimant upon the award in paragraph 4.1 in the sum of £792 (being interest at 8% per annum from 14 January 2022 to 13 January 2023).

4.5 The respondent shall pay to the claimant interest upon award in paragraph 4.2 from the mid-point of the loss (being 1 April 2022) to today's date in the sum of £938.88.

4.6 The awards in paragraphs 4.1, 4.2, 4.3 and 4.4 shall be paid to the claimant on or before **3 February 2023.**

5 The claimant's complaints that he was subjected to detriment for having made public interest disclosures brought pursuant to section 47(B) of the Employment Rights Act 1996 fails and stands dismissed.

REASONS

1. These reasons are provided at the request of the respondent.

Introduction and preliminaries

2. The Tribunal heard this case over four days on 10, 11, 12 and 13 January 2023. The evidence was concluded on the morning of the third day of the hearing on 12 January 2023. Helpful submissions were then received by the Tribunal from the claimant and from Mr Davies.

3. Judgment was delivered to the parties at 12 noon on the fourth day of the hearing on 13 January 2023. Following the delivery of the judgment, these reasons were requested from the Tribunal by Mr Davies.

4. The claimant presented his claim form to the Tribunal on 21 April 2022. Before doing so, he went through mandatory early conciliation as required by the Employment Tribunals Act 1996. Early conciliation commenced on 10 February 2022 and ended on 23 March 2022.

5. The case benefited from a case management preliminary hearing. This came before Employment Judge Shepherd on 4 July 2022. The minutes of the case management hearing are in the hearing bundle at pages 40 to 48.

6. Employment Judge Shepherd identified the issues in the case.

7. These are that the claimant pursues the following complaints:

   7.1. That respondent made an unauthorised deduction from his wages.

   7.2. That the respondent subjected the claimant to disability discrimination.

   7.3. That the respondent subjected the claimant to a detriment for having made a public interest disclosure.

8. An up-to-date list of issues was then prepared by the parties. This is in the bundle at pages 51 to 55. We shall look at the issues in further detail later in these reasons.

9. The Tribunal heard evidence from the claimant. He called the following witnesses to give evidence on his behalf:

   9.1. Abdul Basir Rasooly

   9.2. Mohamed Osman

   9.3. Labib Yafia

   9.4. Stephen Williams

10. All four of the claimant's witnesses are employees of the respondent. Mr Yafia did not attend to give live evidence. His evidence was admitted by the respondent. (The Tribunal found that the evidence of the first three witnesses to be of marginal relevance to the issues in any case).

11. On behalf of the respondent, evidence was heard from:

    11.1. Richard Broadley, general manager

    11.2. Declan Moore, health, safety and environmental manager

    11.3. Lindsey Buckley, HR director

    11.4. Natalie Webster, HR manager

12. Employment Judge Shepherd ordered that copies of witness statements shall be sent to the other party by 28 November 2022. In accordance with this direction, witness statements were sent and were before the Tribunal for all the witnesses except for Mr Williams and Miss Webster. A direction was given by the Tribunal on the second day of the hearing for witness statements to be prepared and sent from them upon an issue which arose during the course of the hearing (about the provenance of a fit note issued to the claimant by his general practitioner dated 25 January 2023 and a meeting

between Miss Webster and Mr Williams (in his capacity as the claimant's trade union representative) held on 9 February 2022).

13. The Tribunal will now set out our findings of fact. We shall then consider the relevant law and then go on to apply the relevant law to the factual findings order to determine the issues in the case.

Findings of fact

14. The respondent is a leading food manufacturer in the UK. As set out in paragraph 2 of the grounds of resistance, they have *"a particularly strong presence in the poultry, chilled and frozen food markets."*

15. The claimant commenced employment with the respondent on 5 October 2011. He remains in employment. On 11 August 2019 he was promoted to the role of shift manager.

16. The claimant's line manager is Mark Loy. Mr Loy holds the job title of factory manager. His line manager is Michelle Mack who holds the post of site manufacturing lead.

17. On 1 April 2021 the claimant submitted a formal grievance about Michelle Mack. This is at page 144. In summary, the claimant was complaining about inadequate staff allocation on his shift and Michelle Mack's approach to him whenever he raised concerns.

18. The claimant was signed off from work due to work related stress with effect from 2 April 2021. He has not returned to work since.

19. Mr Broadley was charged with the task of investigating the claimant's grievance. He met with the claimant on 14 April 2021 and 19 May 2021 (pages 147 to 150 and 170 to 173). The claimant raised concerns about under-manning on his shift (page 149) at the meeting held on 14 April 2021. At the next meeting held on 19 May 2021 he again raised the issue of under-staffing. He then said that a female employee had suffered a miscarriage and that an individual had died. The claimant sought to attribute these very sad and serious matters to the respondent's system of work. The claimant gave evidence (which we accept) that he had himself been informed of the fact of the miscarriage by the employee in question.

20. In addition to the under-manning, the miscarriage and the fatal incident, the claimant raised a fourth issue with Mr Broadley on 19 May 2021. This is that the claimant's hand had become trapped in the "*B4 roll plant".* This was to do with the functioning of the *"upper moulding belt".* The claimant said that he had raised his concerns about this with Mr Loy, but nothing had been done.

21. On 13 July 2021 Mr Broadley met with the claimant and gave him the outcome of the grievance. This is at pages 425 to 427. Mr Broadley's decision was confirmed on 15 July 2021 (pages 184 and 185).

22. Mr Broadley accepted that there was *"evidence of a labour and skills shortfall on your shift".* However, he found there to be *"no evidence to suggest undue pressure to deliver at all costs."* Mr Broadley made several recommendations for the support of the claimant and others including regular site meetings.

23. The claimant was dissatisfied with Mr Broadley's decision. He therefore appealed on 10 August 2021 (pages 186 and 187).

24. Miss Buckley handled the claimant's grievance appeal. She met with him on 10 September 2021 to discuss it. A transcript of the meeting is within the bundle at pages 329 to 357. (This is a transcript which has been prepared from a recording of the meeting).

25. We can see that the claimant mentioned the female employee's miscarriage at page 333. He also mentioned the death of a member of staff and staff shortage issues at page 351. It appears that the claimant did not recount his own incident with the B4 roll plant which he had mentioned to Mr Broadley on 19 May 2021. (At any rate, the Tribunal was not taken to the relevant passage by either of the parties if this was mentioned).

26. The claimant gave evidence (in paragraph 12 of his witness statement) that in September 2021 a serious incident had befallen a colleague due to the unsafe production line. As we read paragraph 12 of the claimant's statement, he did not appear to be saying that he mentioned this to Miss Buckley as part of the grievance appeal investigation. It is also not clear whether this arose out of the same area of concern (being the B4 roll plant) which the claimant raised with Mr Broadley on 19 May 2021.

27. On 15 October 2020 Miss Buckley informed the claimant of the outcome of his appeal. She upheld Mr Broadley's decision.

28. The claimant signed a contract of employment on 23 August 2019. This appears to have followed his promotion to the role of shift manager. Unhelpfully, the copy of contract of employment within the bundle at pages 128 to 142 was not in fact of the one signed by the claimant on 23 August 2019. A copy of the correct contract was produced by the claimant during the course of the hearing.

29. We can see from clause 10 of the contract that the claimant has a contractual entitlement to eight weeks of sick pay during periods of sickness absence. He was entitled to a maximum of eight weeks in any rolling 12 months' period.

30. It will be recalled that the claimant had gone on sick leave on 2 April 2021. Plainly, by the time of the grievance appeal investigation conducted by Miss Buckley he had long since exhausted his contractual sick pay. This notwithstanding, the respondent continued to pay him his salary.

31. In her appeal decision letter at pages 191 to 197, Miss Buckley informed the claimant that the salary arrangement would continue for a further week and would then cease after 23 October 2021. She also said that the *"site HR team"* would be in touch with the claimant to discuss plans for his return to work.

32. At this time (around October 2021) the claimant remained signed off by his GP as unfit for work due to work stress. A sick note covering the period between 26 September to 30 October 2021 to this effect is in the bundle at page 306.

33. On 17 October 2021 the claimant emailed Miss Buckley. He thanked her for her efforts around the appeal. He then asked if it was permissible to take all his accrued holiday entitlement of 23 days in one go *"to clear my mind and prepare myself emotionally to return to work in a good state after this difficult period for me".* He therefore asked for permission to take annual leave between 3 November 2021 and 16 December 2021. He suggested that he return to work on 17 December 2021.

34. Miss Buckley responded positively on 18 October 2021. A question arose as to what would become of the week between 23 October and 2 November 2021. She suggested that he take one week of statutory sick pay. The claimant agreed with this suggestion.

35. It was put to the claimant in cross-examination that his intention was to return to work on 17 December 2021. The claimant confirmed this to be the case. When she gave evidence, Miss Buckley said that the plan was for the claimant to use his accrued holiday and return to work on 17 December 2021. Therefore, the parties had agreed that as the return- to-work date.

36. The claimant's final sick note certifying that he was unfit to work through ill health is in the bundle at page 305. This covers the period from 29 October 2021 to 28 November 2021.

37. As we have seen, Miss Buckley told the claimant to expect contact from the respondent's *"site HR team"* about his return to work. The claimant was abroad in Libya on holiday and returned to the UK on or around 7 December 2021. Unfortunately, due to Covid rules and regulations then in place he had to self-isolate upon his return and therefore could not commence work on 17 December 2021 as planned. The return-to-work date was put back by around 10 days.

38. Within the bundle at pages 202 to 209 are screenshots of text messages between the claimant, Miss Webster and Mr Moore. The first in time is one dated 20 December 2021. This was from Miss Webster to the claimant. The claimant had been making efforts to get hold of Tracey Sanderson (divisional occupational health lead) about his return to work. Miss Sanderson was absent from work on bereavement leave over this period. Further, the onsite occupational health advisor Rachel Baker was also away (in the event between October 2021 and May 2022).

39. This gave the respondent a difficulty in progressing the return-to-work plan with the claimant. Therefore, a decision was taken for Mr Moore to see the claimant. They met on 6 January 20222.

40. The claimant was paid his full salary for December 2021.

41. A record of what was discussed between Mr Moore and the claimant on 6 January 2022 is in the bundle at pages 210 to 212. The document is entitled *'mental health assessment tool.'* Mr Moore has no medical qualifications. He was undertaking a stress risk assessment and not a mental health diagnosis or assessment.

42. The claimant said that some of the matters recorded in this note were inaccurate. We accept the claimant's case upon this. Mr Moore told us that he had not taken notes during the meeting. The meeting lasted for a little over two hours after which Mr Moore wrote up the notes from his recollection of what was said. He was working from memory. It is perhaps unsurprising therefore that there were some inaccuracies in what he recorded about a lengthy meeting.

43. The claimant said that he had not told Mr Moore that he faced claiming state benefits for the first time in his life. We agree with the claimant that there would have been no need for him to mention the prospect of claiming benefits given that he had received his full salary for December 2021 and had no reason to suppose on 6 January 2022 that he would not be paid in full that

month. This inaccuracy renders it credible that Mr Moore also inaccurately recorded what the claimant had said about the state of his relationship with his wife and the need for him to sleep in his car. (The claimant said that he was not sleeping in his car but rather after a long shift rested or napped in his car for around 15 minutes).

44. Notwithstanding these inaccuracies, we do accept that Mr Moore had well-founded concerns about the prospect of the claimant returning to work without a plan in place. This arose out of two matters. The first of these was the side effects of medication which the claimant was taking. Mr Moore harboured concerns about this given that the claimant would be working around heavy machinery and moving parts. The second issue concerned the state of the claimant's relationship with Michelle Mack. Mr Moore said that the claimant became visibly agitated when she was mentioned in the meeting. For these reasons, Mr Moore feared for the safety of the claimant and Michelle Mack. It is credible that the claimant displayed these emotions about Miss Mack. After all, he had raised a grievance about her. Further, as will be seen, he had concerns about returning to work under her direct line management.

45. In evidence before us, Mr Moore rejected any suggestion that he had formed a view as to whether the claimant was sick. Mr Moore has no medical qualifications. He accepted that it was not part of his role or remit to say if the claimant was sick. He said that his role was solely about assessing the risks to the safety of the claimant and others.

46. The respondent then set about obtaining input from occupational health. This was of course a reasonable step particularly given the contents of Mr Moore's document at pages 210 to 212.

47. The respondent, through Tracey Sanderson, wanted some input from the claimant's general practitioner. The claimant refused consent for disclosure of his records but instead offered to provide a report from his GP. This is of course the claimant's prerogative. In the event, the claimant's decision to commission a report from his GP did not cause any greater delay than would have been the case had copies of GP notes and records had to be prepared.

48. On 14 January 2022 Miss Webster sent to the claimant the letter we see at page 214. This appears to be an incomplete copy. However, the Tribunal is satisfied that nothing significant appears upon the missing page (this having been read to us). Miss Webster informed the claimant that they had *"reached the conclusion that we need further information from your GP to help support a plan for your return to work".* She asked the claimant to remain at home. She went on to say that *"This period of what may be termed medical suspension unfortunately comes after a long period of absence which has exhausted your entitlement to both company and statutory sick pay and therefore this absence will remain unpaid."*

49. Both Miss Webster and Miss Buckley gave evidence to the Tribunal that they were uncertain how to proceed in the circumstances which presented in mid-January 2022. They were both unsure how to describe the refusal to permit the claimant to return to the workplace. It is significant, in our judgment, that in the letter of 14 January 2022 Miss Webster did not say that the respondent had formed the view that the claimant was sick. She did not say this because the claimant was not sick. It had been agreed that he would return to work on 17 December 2021. This was put back through nobody's fault for several

days because of the Covid issue. The claimant was not certified as unfit to work by his GP.

50. The claimant went to see his GP on 25 January 2022. The relevant entry from the claimant's GP notes is at page 65 of the bundle. The GP records the claimant informing her that the plan was for the claimant to return on a phased return and that "*they [the respondent] have now done a medical suspension and said he is on no pay!".* She recorded that the plan was for her to issue a fit note to make it clear that the claimant was fit to return to work. The fit note is at page 81. (It also appears in the bundle at page 309). The GP certified the claimant to be fit for work from 25 January to 24 February 2022 with the adjustment of a phased return to work. The GP recorded that all of the claimant's *"mental health problems were caused by work; he just needs appropriate management, dealing with grievances etc in a timely manner."* (It is not clear what is meant by *"grievances"* in this context. The grievance procedure dealt with by Mr Broadley and Miss Buckley had by this stage ended several months prior to this consultation).

51. On 3 February 2022 Miss Sanderson prepared her report (page 278). She refers to a letter from the claimant's GP (which is at page 82 and is dated 25 January 2022). This letter contains a brief report which refers to the claimant suffering from low mood related to his work-related stress. It mentions that the claimant is benefiting from anti-depression medication. The GP does not say one way or the other whether the claimant is fit for work.

52. Similarly, in her report of 3 February 2022 Miss Sanderson does not say one way or the other whether the claimant is fit for work. She does not say that he is not fit or that work is medically contra-indicated. Much of her report appears to be a repetition of what the GP said in her report. She makes no reference to the fit note at page 81.

53. On 3 February 2022 the claimant emailed Miss Webster (pages 216 and 217). He expressed his disappointment at the decision to suspend him from work without pay. He said that the GP's report of 25 January 2022 (page 82) had been sent to Miss Sanderson on 26 January 2022. The claimant did not mention that the fit note of 25 January 2022 at page 81 had also been sent.

54. Miss Webster did not respond to the email. The claimant then consulted Mr Williams.

55. This led to the meeting between Mr Williams and Miss Webster on 9 February 2022. During the course of the hearing, the claimant produced copies of screenshots of messages between him and Mr Williams on 7, 8 and 9 February 2022. Plainly, these were in anticipation of the meeting between Mr Williams and Miss Webster on 9 February 2022. The claimant sent to Mr Williams a copy of the fit note of 25 January 2022 at 8:37am on 9 February 2022.

56. The claimant had sent a copy of the fit note in response to Mr Williams' message (on 8 February 2022) that it would *"give me some ammunition"* if a GP report that the claimant was fit for work could be sent to Mr Williams.

57. Mr Williams and Miss Webster enjoy a good relationship. Mr Williams has worked for the respondent for over 20 years. He said that Miss Webster's door is always open.

58. The meeting of 9 February 2022 was not minuted. In her witness statement prepared during the course of the hearing Miss Webster said she had no recollection of the fit note of 25 January 2022 being received by her or of seeing it. For his part, Mr Williams said that he recalled showing it to her upon his mobile telephone. He had his telephone with him. The Tribunal had a look at the fit note on the mobile phone. It is legible and may be magnified. (Mr Davies was content to rely upon the Tribunal's assurance that this was the case).

59. In our judgment, it is against the probabilities that Mr Williams did not show the fit note to Miss Webster. They enjoyed a cordial relationship. It is therefore credible that Mr Williams would have felt comfortable in showing her the relevant fit note.

60. Mr Williams had also asked the claimant for *"ammunition".* He had been sent a copy of the fit note by the claimant that morning. In our judgment, it is simply not credible that he would have not used the *"ammunition"* which he had asked for and with which he was supplied by the claimant to advance the claimant's case. Further, it was agreed that the meeting had lasted for around 30 minutes. It is unlikely that the meeting would occupy that length of time if, as Miss Webster says, she was simply updating Mr Williams.

61. We therefore find as a fact that Mr Williams showed a copy of the fit note to Miss Webster. She (and therefore the respondent) was fixed with knowledge that the claimant was certified by his GP as fit for work. The GP report at page 82 therefore was to be read in conjunction with the fit note.

62. Miss Webster saw the GP report on or around 25 February 2022. Although this had been prepared on 26 January 2022 and then seen by Miss Sanderson on 3 February, she (Miss Sanderson) had been waiting for the claimant's authority to disclose it to Miss Webster. This was given on 14 February 20223. The report was then sent on to Miss Webster by Miss Sanderson. Unfortunately, the latter omitted to send the password. Miss Webster therefore did not in fact see the GP report until 25 February 2022. (Part of the delay was attributable to Miss Webster's annual leave).

63. Upon the basis of the Tribunal's finding that Miss Webster was fixed with knowledge of the fit note on 9 February 2022 the only reasonable conclusion which she could have reached when reading the GP report of 26 January 2022 is that the claimant was fit for work. There was nothing which credibly suggested otherwise. She had seen the fit note at page 81 on 9 February 2022. The report at page 82 did not say the claimant was unfit to work.

64. Further, as we saw at paragraph 53, the claimant had complained to Miss Webster on 3 February 2022 about the decision taken to suspend him. He said that he had made himself available to work prior to that decision being taken.

65. The Tribunal finds as a fact that Mr Williams did not furnish a copy of the sick note to Miss Webster on 9 February 2022 or ant any other time. Mr Williams said in evidence that he could not recall doing so. For him to supply a copy to her from his mobile telephone would of course have meant him emailing it to her. There was nothing on his phone to indicate that an email had been sent attaching the fit note. At any rate, the Tribunal was not informed of the existence of such an email.

66. We also accept Miss Webster's account that she did not receive a copy of the fit note given that the claimant has given a confused account upon it. He said in his disability impact statement (at paragraph 7) that he provided a copy of it to Mr Moore. This cannot be the case because Mr Moore saw the claimant 19 days before the fit note was created by his GP. The claimant's chronology of events refers in paragraph 23 to the GP medical report of 25 January 2022 being sent to Tracey Sanderson the next day. There is no mention in the chronology of the fit note being sent to her.

67. Given the confused account provided by the claimant upon this issue and Mr Williams' evidence we conclude that it is credible that Miss Webster did not receive a copy of the fit note. We accept that she did not. (This does not of course detract from the fact that she was fixed with knowledge of its content on 9 February 2022).

68. The next development was that Miss Webster and the claimant spoke on 22 March 2022. This was followed up by a letter from Miss Webster to the claimant dated 6 April 2022 at pages 221 and 222. This proposed a phased return to work with effect from 13 April 2022.

69. There was no explanation from Miss Webster or any of the respondent's witnesses to account for the delay between 25 February (the day Miss Webster viewed the GP report of 25 January 2022) and 22 March 2022. It is a notable feature of this case that Miss Webster was heavily involved following the conclusion of the grievance appeal. She was not called by the respondent to give evidence and only did so on the third day of the hearing at the behest of the Tribunal. (This was limited (at the Tribunal's direction) to her account around the provenance of the fit note of 25 January 2022).

70. When she did give evidence, the Tribunal took the opportunity of asking her to account for the period between 25 February and 22 March 2022. She attributed the delay to the parties going through the early conciliation process with Acas. This was an unsatisfactory explanation. It is difficult to see how going through that process justifies a delay in contacting the claimant about a return to work.

71. The claimant replied to the letter of 6 April 2022 on 11 April 2022 (page 226). He said that *"I would like to confirm that I am happy and willing to come back on Wednesday 13 April but I do have some concerns that I would appreciate to be taken into consideration."* This centred upon the requirement for him to report to Michelle Mack. This was necessary because Mr Loy was away on sick leave. The claimant was not refusing to return to work. On the contrary, he said he was happy to do so. However, he rightly raised a concern about the line management structure.

72. Also on 11 April 2022 the claimant raised a new grievance. This was about Miss Webster's failure to reply to his email of 3 February 2022 about the decision to suspend him without pay.

73. On 12 April 2022 Miss Webster instructed the claimant not to attend work on 13 April. Confirmation of this instruction may be found at page 230.

74. The respondent then referred the claimant to occupational health. The referral form is at pages 227 to 229. The purpose of the referral was to ascertain the claimant's fitness to return to work in circumstances where *"his*

reporting line has temporarily moved to report into the site manufacturing lead."

75. On 22 April 2022 the claimant met with Dr Vohra, occupational physician. Dr Vohra's report is also dated 22 April 2022 and is at pages 85 to 89. Dr Vohra expressed the opinion that it would be appropriate for the claimant to return to work upon a phased return to work basis. He did however have concerns that the claimant was "*still in a state of poor psychological health and exposure to triggers would need to be very carefully managed as trigger exposure may actually lead to a further deterioration in his psychological health, with an impact on his well-being and likely further absence from work. Mr Alzaidi's clear perception in this case is that there is only one organisational trigger that has a detrimental impact on his psychological health and it is his relationship with the site manufacturing lead".* Dr Vohra considered that the relationship between the claimant and Miss Mack would have to be carefully managed.

76. On 11 May 2022 Miss Webster asked the claimant to consent to the disclosure of Dr Vohra's report to Mr Broadley (page 234). It is not clear whether Mr Broadley saw the report. He does not mention it in his witness statement. As we have already observed, the Tribunal did not have a statement from Miss Webster to explain what transpired following this request of the claimant made on 11 May 2022 or for that matter to explain what happened between 22 April 2022 (being the date of Dr Vohra's report) and 20 June 2022.

77. Upon the latter day, Miss Webster offered the claimant an alternative role working with training assessors and reporting in to her as opposed to Miss Mack. This proposal may be found at pages 235 and 236 of the bundle. This was declined by the claimant who suggested mediation between him and Miss Mack (pages 237 to 238).

78. The proposal for the claimant to work in the alternative role was to commence on 4 July 2022. It was to last for four weeks at the end of which Miss Webster suggested a review of progress and a discussion of the next steps *"for a return either to your substantive role and/or to a full shift on a varied role and establish the phasing for the following four weeks."* She also said that the claimant would return to his full salary from July 2022 onwards. There was no suggestion that the claimant was to be removed from his substantive role altogether. In our judgment, this was a reasonable proposal as it allowed the claimant to return to work under a different line management from Miss Mack.

79. It was unreasonable, in our judgment, for the claimant to turn this down. Accordingly, the claimant was not ready and willing to work for the month of July 2022.

80. On 21 July 2022 Miss Webster wrote to the claimant (pages 242 and 243) with a third suggestion of a phased return to work, this time in his substantive role with effect from 1 August 2022. At this stage, Mr Loy had returned to work and therefore the claimant would be able to return under his previous line management structure.

81. Rachel Baker had also returned to work. She was therefore able to undertake a risk assessment (pages 288 to 291) and an occupational health report (pages 284 to 287). Rachel Baker said that the claimant was fit to return to work upon a phased return to work basis.

82. The claimant was due to commence work on 1 August 2022. However, at a meeting with Rachel Baker on 29 July 2022 the claimant was told not to return to work. The claimant confirmed this instruction in an email to Miss Webster of 5 August 2022 at page 249. Although he is now being paid his salary, the claimant has not yet returned to work. He has been ready and willing to work from the end of July 2022 in his substantive role. Rightly, payment of his salary resumed after the end of July 2022.

83. Within the bundle, there is correspondence about a proposed mediation between the claimant and Michelle Mack and concerns on the claimant's part about the conditions of his return to work. It is to be hoped that the parties can work out their differences to enable the claimant to return to work as soon as possible.

84. Matters have not been helped by errors in communication as accepted by Natalie Webster in her letter to the claimant on 9 September 2022 (pages 262 to 263). It appears that correspondence was sent to the claimant's work account to which he did not have access rather than to his personal email account. In the same letter, Miss Webster informed the claimant that, *"should we be unable to reach a suitable phased return to work plan following the mediation session, given your length of absence to date, the company may have to review your capability to fulfil your substantive role which may result in termination of your employment on grounds of capability."*

85. On 14 September 2022 Miss Webster emailed the claimant to assure him that no decisions had been made to terminate his contract and that the respondent wished to support him back into the workplace "*as we have a genuine business need for your skills as we have communicated previously."* We refer to pages 270 and 271.

86. The claimant was distressed to find that his role was being advertised on an *"interim basis".* We refer to page 295 of the bundle. This was an internal advertisement for the post of "*bakery interim shift manager"* for a three months' period with a review to take place in the new year. The claimant gave unchallenged evidence in paragraph 75 of his witness statement that this was an advertisement for his role which led to him feeling upset and distressed.

87. In paragraph 82 of his witness statement, the claimant gave evidence (which was again unchallenged) that Acas was still prepared to assist with mediation. The claimant complained that he had heard nothing further from Miss Webster following Acas' email to the claimant and her of 7 November 2022 at page 264 to this effect.

88. It is unfortunate that the respondent chose not to call Natalie Webster to give evidence. Mr Moore had no involvement in matters after January 2022 until Rachel Baker discussed the case with him in July 2022. Then, Mr Moore did nothing other than reiterate the opinion that he had formed in January 2022 about the claimant's fitness to return to work. Mr Broadley's evidence is around his involvement in the grievance process and the conclusions which he reached. He gave no evidence in his witness statement about the events with which this case is principally concerned (being those from October 2021 to date). The bulk of Lindsey Buckley's witness statement is taken up with her involvement in the grievance process and the decision which she took to reject the claimant's grievance appeal. She gave some evidence about her

decision to end the claimant's pay after 23 October 2021 and to permit him to take holiday. She also gave evidence that it had been agreed that the claimant would return to work on 17 December 2021.

89. She was also able to confirm that a joint decision had been made between her and Miss Webster to suspend the claimant with effect from 14 January 2022. As to the events after that date she gives an account (in paragraph 46 of her witness statement) of what transpired after 14 January 2022. However, in evidence given during cross-examination she accepted that she had had no direct involvement and was reliant upon what she had been told by Natalie Webster and what she had read from the documents contained in the hearing bundle.

90. There was no explanation from the respondent for a failure to call Natalie Webster to give evidence. It is curious that they did not do so given that she was the one intimately involved in the events with which the Tribunal is primarily concerned.

91. This concludes our findings of fact.

The issues in the case

92. We now turn to a consideration of the issue to which the case gives rise. The agreed final list of issues is at pages 51 to 55 of the bundle. The issues are as follows:

"Unlawful deduction from wages

1. *Is the claimant entitled to payment of wages from January 2022 onwards?*
2. *If so, does the respondent have a lawful reason to withhold/deduct these payments of wages?*

Disability

1. *Is the claimant disabled for the purposes of section 6 Equality Act 2010; does he suffer from a mental or physical impairment which has a substantial effect on his ability to carry out normal day to day activities? [We interpose here to say that the relevant disability is the mental impairment of depression and anxiety. The respondent concedes the claimant to be a disabled person for the purposes of the 2010 Act – the respondent's solicitor's email to this effect dated 13 September 2022 is in the bundle at page 95].*

Indirect disability discrimination

1. *Does the respondent operate a PCP [provision, criterion or practice] of suspending employees on long term sick leave without pay on the grounds of capability (ill health)?*
2. *Does the respondent apply this PCP to all employees?*
3. *Does this PCP place employees who suffer with anxiety and depression at a disadvantage owing to the fact that they will likely have more sickness absence than employees who do not suffer from this medical condition?*
4. *If so, can the respondent show that the application of the PCP is a proportionate means of achieving a legitimate aim? The respondent*

denies suspending employees on long term sick leave without pay. The respondent pays employees for sickness absence to a certain level and thereafter payment is not made to employees. The legitimate aim is to ensure that sick payments are not unduly onerous on the respondent and that all employees are treated fairly in relation to sickness absence payments.

Discrimination arising from a disability

1. *What is the "something" arising out of the claimant's disability that he relies upon? The claimant relies on his sickness absence.*
2. *Was the claimant treated unfavourably (by being medically suspended) because of his sickness absence?*
3. *If so, was this treatment a proportionate means of achieving a legitimate aim? The respondent's legitimate aim is to ensure that employees are capable of working and carrying out their duties in accordance with the respondent's health and safety obligations to employees.*

Failure to make reasonable adjustments

1. *Does the respondent operate a PCP of suspending employees on long term sick leave without pay on the grounds of capability (ill health)?*
2. *Did the PCP put the claimant at a substantial disadvantage as compared to those who are not disabled?*
3. *If so:*
    - *(a) Did the respondent know or could it reasonably be expected to know that the claimant had the relevant disability at the relevant time; and if so,*
    - *(b) Did the respondent know or could it reasonably be expected to know of the alleged substantial disadvantage?*
4. *Did the respondent take such steps as were reasonable for it to take to avoid the disadvantage? The claimant asserts that the respondent should have:*
    - *(a) Paid the claimant during the period of suspension;*
    - *(b) Carried out a risk assessment in a timely manner to facilitate his return to work;*
    - *(c) Permitted an extended period of sickness absence; and*
    - *(d) Considered alternative line management and/or alternative roles.*

Detriment

1. *What are the specific disclosures that the claimant relies upon? Paragraphs 5 to 8 of the particulars of claim:*

    (1) On 1 April 2021, the claimant's grievance in writing by email to Natalie Webster, HR manager;

    (2) On 13 July 2021 in his grievance meeting with Richard Broadley, general manager;

(3) On 1 August 2021, in his appeal against grievance outcome by email to Lindsey Buckley Neil's HR director; and

(4) On 10 September 2021 at his grievance appeal meeting with Lindsey Buckley regarding:

(i) That notwithstanding the respondent's cost cutting exercise to reduce head count at the bakery, thereafter there was still insufficient staffing levels caused by Michelle Mack's actions which placed health and safety of operatives at risk of injury and/or death – after the cost cutting exercise, each shift should have a head count of 120 workers (which was approximately 140 workers prior) but Michelle Mack only provided shifts at the latter end of the week with approximately 83 workers. Michelle would be more flexible/generous with staffing level allocation on shifts early in the week, but so as to ensure the end of the week weekly productivity looked high and/or profitable she would allocate less staff of approximately 83 workers on shifts towards the latter end of the week; and

(ii) That one of the operatives on a nightshift at the latter end of the week suffered a miscarriage of her pregnancy, and another operative died of a heart attack, which the claimant believed was at least in part caused by the unsafe working practices directly attributable to Michelle Mack's dangerous approach to staffing allocation as described above. The claimant also cited an accident at work in which the running of a new unsafe production line resulted in a serious accident involving a 20-metre oven whereby one of his colleagues was hospitalised with broken ribs. The claimant also expressed his concerns that Michelle Mack's attitude to these health and safety concerns was dismissive and therefore dangerous and unethical.

2. *Did such disclosures amount to qualifying disclosures for the purposes of section 43B ERA [Employment Rights Act 1996].*

3. *The claimant relies on:*

   - *Section 43B(1)(b) – respondent has failed, is failing or is likely to fail to comply with a legal obligation to which it was subject, that obligation being to ensure its production lines are safe; and*
   - *Section 43B(1)(d) – the health or safety of the respondent's employees were being or likely to be endangered, the danger being that such production lines were inadequately staffed such that the operation of the same could result in serious injury and the loss of life.*

4. *For each disclosure relied upon:*

   (a) Did the claimant disclose information?

   (b) Did he believe the disclosure of information was in the public interest?

   (c) Was that belief reasonable?

(d) Did he believe that he tended to show that section 43B(1)(b) and section 43B(1)(d) applied?

(e) Was that belief reasonable?

5. Did the respondent subject the claimant to a detriment? The claimant relies on the withholding his pay from January 2022 onwards.

6. If so, was this on the grounds that he made a protected disclosure."

Relevant law and conclusions upon the unauthorised deduction from wages claim

93. We now turn to a consideration of the relevant law. We shall start with the claimant's complaint that he suffered an unauthorised deduction from his wages. The right of a worker not to suffer an unauthorised deduction from their wages may be found in Part II of the 1996 Act. By section 13(3), where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of the wages properly payable on that occasion then the amount of the deficiency shall be treated for the purposes of Part II as a deduction made by the employer from the worker's wages on that occasion.

94. By section 23 of the 1996 Act, a worker may present a complaint to a Tribunal that the employer has made a deduction from wages in contravention to section 13. By section 24 of the 1996 Act, where a Tribunal finds a complaint under section 23 to be well-founded, it shall make a declaration to that effect and shall order the employer to pay to the worker the amount of any deduction made in contravention of section 13.

95. The key issue in this case is what was properly payable to the claimant between January 2022 and July 2022. An unauthorised deduction from wages claim may require the Tribunal to resolve disputes about the meaning of a contract, including questions of interpretation and implication: **Agarwal v Cardiff University** [2009] ICR 433. The approach to be taken is that of the civil courts in contractual actions to determine the amount to which the worker is entitled by way of wages.

96. In the absence of a contractual right to suspend without pay, then a worker's wages are properly payable during the suspension period. As recognised by the House of Lords in **Miles v Wakefield Metropolitan District Council** [1987] AC 539, the common law recognises that so long as the employee is ready and willing to work, then generally they are entitled to payment of the remuneration due under the contract unless there is an express or implied term to the contrary.

97. The doctrine of being *"ready and willing to work"* first appears in the Court of Appeal's decision in **Petrie v McFisheries Limited** [1940] 1 KB 258. The judge in that case, Atkinson J, used the phrase when considering whether an employee was entitled to his wages whilst off sick. However, on the facts of **Petrie** there was no need to apply the principle because, in the court's view, the contract quite clearly excluded the right to wages during sickness absence, which therefore determined the matter.

98. The situation was rather different in **Beveridge v KLM UK Limited** [2000] IRLR 765, EAT. In that case, an employee who had been on sick leave had obtained a medical certificate pronouncing her fully fit and she wished to return to work. However, she was prevented from returning for six weeks by her employer whilst they waited for its own medical report. As her entitlement to contractual sick pay had run out by this stage the employer did not pay her any wages for the six weeks' waiting period. The contract was silent on the issue of whether wages could be withheld during this time so the EAT had to determine whether the employee had been ready and willing to work during the waiting period. The EAT held that in the absence of a contractual term to the contrary, wages were payable for the six weeks' period. The employee was willing to work and had done all she could to perform her part of the bargain.

99. The Tribunal drew the parties' attention to **Petrie** and **Beveridge** during the hearing.

100. In the instant case, the employment contract between the parties excluded a right to pay where the employee was not ready to work because of sickness save for the first eight weeks of sickness absence or eight weeks during any rolling 12 months period. On the facts as we have found them, the parties agreed that the claimant was ready and willing to work and had agreed a return-to -work date of 17 December 2021.

101. As Mr Davies said, the interpretation of the contract must be taken in context and be interpreted not against the subjective views of the parties but in line with the meaning it would convey to a reasonable person having all of the background knowledge. In our judgment, a reasonable person would conclude that the parties had agreed a return-to-work date and had agreed that the claimant was not sick and was ready and willing to work.

102. Indeed, in our judgment this is the only sensible interpretation of events. The claimant's final sick note certifying him as unfit (and therefore not ready to work) expired on 28 November 2021. The claimant was paid in full for December 2021. This was an acknowledgement by the respondent that he was ready and willing to work.

103. He continued to be willing and ready to work in January 2022. The respondent prevented his return to work as they wanted to satisfy themselves that a return-to-work plan was in place to ensure both his and other employees' safety. There is nothing wrong with this. However, where the employer effectively suspends the employee where the employee is ready and willing to work then the employee is entitled to be paid unless there is a contractual provision to the contrary (which there is not in this case) or the employee is sick (which the claimant was not).

104. On the facts, the claimant was not sick. There was no certificate from his GP or any other qualified medical practitioner that he was. In reality, this is why the respondent did not refer to him as sick in the letter of 14 January 2022. The phrase "*medical suspension"* was tentatively used instead of simply referring to the claimant as *"sick".* When asked why they had phrased matters in this way, neither Miss Webster nor Miss Buckley could give a satisfactory explanation. In our judgment, they did not say to the claimant "*you are sick"* because they knew full well that he was not.

105. The Tribunal's conclusion upon this is reinforced by an email sent from Rachel Baker to the claimant on 27 July 2022 (pages 246 and 247). This appears to be an exchange between the parties about the contents of Rachel Baker's occupational health report. In her email, Rachel Baker acknowledged that the employee was currently absent from the workplace. She says that, *"this is not strictly referring to "sickness absence" more that you're not at work, therefore "absent", if that makes sense"* – (emphasis added by the Tribunal). This is an acknowledgement from the claimant's own occupational health advisor that the claimant was not properly classed as sick during his period of absence.

106. Further, an adverse inference is drawn against the respondent upon this point by reason of their failure to call Natalie Webster to give evidence on their behalf about matters generally.

107. Mr Davies submitted that the claimant had unilaterally declared his fitness to work. On the facts, this is not the case. The last sick note that the claimant was unfit for work had expired at the end of November 2021. The parties agreed that the claimant was fit for work. Hence, it had been agreed that the claimant would return to work on 17 December 2021. In the event, this had to be put back by 10 days or so because of Covid restrictions. In recognition of the fact that the claimant was fit to work, he was paid in full for December 2021. These were consensual and not unilateral actions by the claimant.

108. There was no sick note certifying the claimant as unfit to work from January 2022. On the contrary, the only note created following the turn of the year was the one dated 25 January 2022 in which the claimant's GP certifies him as fit for work. Far from it being the claimant who took unilateral action, it was in fact the respondent who did so in preventing him returning to work around the middle of January 2022.

109. We can see no basis upon which to distinguish **Beveridge.** The claimant had done all he could to fulfil his part of the bargain.

110. Mr Davies drew to the Tribunal's attention that the fit note (page 309) was couched in terms of the GP certifying that the claimant may be fit for work taking account of the advice to make adjustments in order to resolve the management issue (between the claimant and Michelle Mack). The wording of the note says that where there is a certificate that the employee may be fit for work the employee *"could go back to work with the support of [their employer]. Sometimes [the] employer cannot give [the employee] the support [needed]."*

111. The difficulty for the respondent upon this issue is that support could have been given to the claimant. Mr Broadley accepted, under questioning from the panel, that arrangements could have been made to alter the shift patterns such that the claimant would have minimal contact with Michelle Mack. There was no explanation as to why an alternative role could not have been offered sooner than 20 June 2022 where otherwise the claimant would be returning under the line management of Miss Mack. It is does not lie in the mouth of an employer who can easily make such an adjustment to then treat the employee as sick in such circumstances.

112. In our judgment, it cannot be right that an employer can simply say to an employee *"we think your sick now"* and withhold pay without any foundation from somebody medically qualified to express an opinion. If the employer

wishes to satisfy themselves as the employee's fitness, then they are entitled to suspend provided they have good reason. A good reason did exist here. There were well founded concerns on the part of Mr Moore that the claimant may be unsafe in the workplace due to the side effects of the medications that he was taking. There were also concerns around the claimant's agitation when the issue of Michelle Mack was raised at the meeting of 6 January 2022 and well-founded concerns on Mr Moore's part for her safety and welfare. The employer of course owes a duty of care to all employees.

113. Mr Moore recognised that there was no medical basis upon which he was able to declare the claimant as sick. He was very careful not to say that the claimant was sick.

114. Miss Webster said in evidence that the claimant's agitation was a manifestation of his disability and that accordingly he was sick. In our judgment, by taking this approach the respondent has unfortunately conflated disability and sickness. Many disabled people are able to work. It cannot be right to classify disability and its manifestations as sickness and inability or lack of readiness to work without any medical basis properly so to do.

115. At all material times, the claimant was a disabled person by reason of anxiety and depression. That condition resulted in the claimant being certified as unfit for work up to the end of November 2021. Notwithstanding that he continued to have depression and anxiety, there was no certificate that he was unfit for work after the end of November 2021. To the contrary he was certified as fit to work in the fit note of 25 January 2022. The parties also agreed that the claimant was fit to work from the end of November 2021. It was in recognition of that fact that the claimant was paid in full in December 2021. His agreed return to work date was 17 December 2021 after a period of holiday.

116. It would amount to direct discrimination upon the grounds of disability were an employer able to class disability as a sickness without a sick note or other medical evidence of unfitness and sickness in circumstances where a non-disabled employee in the same circumstances would not be liable to such treatment. (The claimant did not bring a complaint of direct disability discrimination in this case but nonetheless the point remains valid – to proceed as this employer did must be wrong in principle upon this basis).

117. The respondent took a pleading point against the claimant that he had not made an application to amend his unauthorised deduction from wages claim to take account of the deductions after 21 April 2022 (being the date of presentation of his claim to the Employment Tribunal). The claimant (or more accurately his solicitors) had filed an up-to-date schedule of loss on 3 January 2023 in which was sought a declaration that the claimant had suffered an unauthorised deduction from wages between 1 January 2022 (as the claimant was paid nothing at all during that month) and the end of July 2022 (upon the basis that the claimant was then paid his full salary from 1 August 2022).

118. It is a matter of discretion for the Tribunal whether to grant an amendment to a claim or a response. The Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

119. As is well known, in **Selkent Bus Co v Moore** [1996] IRLR 661, Mummery LJ identified the relevant circumstances upon amendment applications on a non-exhaustive basis as follows:

    (a) *The nature of the amendment*. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded, to on the other hand the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

    (b) *The applicability of time limits*. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and if so whether the time should be extended under the relevant statutory provisions.

    (c) *The timing and manner of the application.* An application should not be refused solely because there has been a delay in making it. There are no time limits within the Employment Tribunals Rules of Procedure for the making of amendments. Amendments may be made at any time, before, at or even after the hearing of the case. Delay in the making of the application is a relevant factor. It is relevant to consider why the application was not made earlier and why it is now being made.

    (d) Distinctions may be drawn between amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint, amendments which add or substitute a new cause of action, but which is linked to or arises out of the same facts as the original claim and those amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

120. It is only in respect of amendments falling within the latter category (pleading a wholly new cause of action) that the time limits will require to be considered.

121. After the merits judgment was pronounced, the Tribunal enquired of the respondent whether the pleading point was still being taken against the respondent. Mr Davies confirmed that his instructions that it was. The claimant asked the Tribunal to make the award upon the basis of the schedule of loss filed on 3 January 2023 (which is in effect the pleading of an amended case to take account of the post-presentation losses between 21 April and 31 July 2022).

122. Clearly, the claim for that 10 weeks or so period is not a new cause of action to that presented on 21 April 2022 (in respect of the past unauthorised deduction of wages between 1 January and that date). The claim from 21 April 2022 to 31 July 2022 is about a continuation of the series of deductions complained of by the claimant in his claim form. The post-21 April 2022 deductions are plainly closely tied up with those prior to that date.

123. The prejudice to the claimant of refusing the amendment application is significant. He would not then be able to obtain a declaration and an award in respect of the post-21 April 2022 deductions. He would be put to the trouble of pursuing the matter in the county court for recovery as a breach of contract. There is no prejudice or hardship to the respondent other than having to meet the claim. The respondent accepted not paying the claimant between 1 January and 31 July 2022. The only issue therefore was whether the wages were properly payable. It is the self-same issue throughout. The respondent treated the claimant (wrongly) as on sick leave for the entirety of the period. Nothing changed. The defence being run is the same for both the pre- and post-21 April 2022 deductions. On any view therefore, balancing the hardship and the question of injustice between the parties favours the claimant and he is given permission to amend his claim to include one for an unauthorised deduction from wages between 21 April 2022 and 31 July 2022.

124. On the facts, the Tribunal determines that the claimant's unauthorised deduction from wages claim succeeds but only to the end of June 2022. In our judgment, there was no proper basis for the claimant to refuse the second phased return to work offer which, it will be recalled, entailed him fulfilling the temporary training role from 1 July 2022 and then reviewing matters thereafter. The respondent was not refusing to reinstate the claimant to his substantive role, but simply was willing to employ him in an alternative role (which he was well capable of fulfilling) to get him back into the workplace. He was not ready and willing to work in July 2022 and is not entitled to be paid for that month. Wages are not properly payable to him for July 2022.

125. It follows therefore that there shall be declaration that the respondent made an unauthorised deduction from the claimant's wages between 1 January 2022 and 30 June 2022. The respondent shall pay to the claimant the amount of the unauthorised deduction in the sum of £20400 gross. This is calculated upon the basis of his monthly gross wage of £3400 for a period of six months.

The relevant law and conclusions upon the Equality Act complaints

126. We now turn to the complaints brought by the claimant under the Equality Act 2010. We shall start with the complaint brought by the claimant under section 15 of the 2010 Act. This is a complaint that he was unfavourably treated by the respondent for something arising in consequence of disability. The unfavourable treatment and detriment complained of is the respondent's decision to medically suspend him because of his sickness absence.

127. The prohibited conduct of unfavourable treatment for something arising in consequence of disability by way of subjecting the claimant to a detriment is made unlawful in the workplace pursuant to section 39(2)(d) of the 2010 Act. It is for the claimant to show a prima facie case that he was unfavourably treated for something arising in consequence of disability. It is for him to show that he has been unfavourably treated and that the unfavourable treatment was because of *"something"* and that the *"something"* arose in consequence of the disability.

128. The respondent concedes the claimant to have been unfavourably treated for something arising in consequence of disability. On any view, this is an appropriate and sensible concession.

129. The claimant was suspended with effect from 14 January 2022 without pay. On any view, this is unfavourable treatment. There was no proper basis for

the respondent to suspend the claimant without pay given that the claimant was not sick and there was no contractual provision authorising the respondent to suspend the claimant without pay. The respondent's decision to suspend the claimant was because of concerns which Mr Moore had about the claimant's own safety and that of others. Those concerns arose out of behaviours and medication causally connected with the disability. These are *"things"* arising in from disability. Therefore, this is a case about justification.

130. The burden is upon the respondent, when seeking to run a justification defence, to show that the treatment of the complainant is a proportionate means of achieving a legitimate aim.

131. The aim in question must be legitimate and unrelated to any discrimination based on any prohibited ground. The means or measure adopted to achieve the aim must be capable of so doing and must be proportionate. The objective of the measure must be sufficiently important to justify the limitation of a protected right. This involves a consideration of whether a less intrusive measure could have been used and balancing the severity of the measure's effect upon the complainant against the extent that the measure will contribute to the achievement of the aim from the perspective of the employer. The test to be applied by the Tribunal is objective. The Tribunal has to make its own judgment as to whether the measure applied by the respondent is reasonably necessary as a proportionate means of achieving the aim in question.

132. The employer must therefore satisfy the Tribunal that there was a legitimate aim and that it was appropriate and reasonably necessary to adopt the means in question to achieve the aim. It must be shown that the means adopted contributed to the pursuit of the aim.

133. The Equality and Human Rights Commission's *Employment Code* sets out guidance on the objective justification issue. As to proportionality, the Code notes that the measures adopted by the employer do not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective.

134. The legitimate aim in question in this case is to ensure that employees are capable of working and carrying out their duties in accordance with the respondent's health and safety obligations to employees. There can be no question that this is a legitimate aim. As has been said, an employer owes a duty of care at common law to all employees to provide a safe system of work and safe and competent workmates. The issue therefore is one of proportionality.

135. Plainly, the suspension of an employee where there are proper concerns about their own safety and that of others may be a proportionate measure to take to achieve the aim. The difficulty for the respondent in this case is that the suspension of the claimant lasted for around six months (until the date, as we find, that the claimant should have returned to work at the end of June 2022). It was also without pay.

136. We find there to be nothing wrong in principle with the respondent suspending the claimant in order to make enquiries and devise a return-to-work plan in the interests of the safety of all. However, there were lengthy and unexplained delays between 25 February and 22 March 2022 and then from

mid-April to mid-June 2022. There was no evidence from the respondent to seek to justify these delays or to explain what was happening over these three months or so. Such significantly increased the length of the suspension endured by the claimant. Miss Webster was not called by the respondent to explain these delays. An adverse inference is drawn against the respondent because of the failure to call her to explain the handling of this aspect of matters.

137. In the absence of any explanation from the respondent, the only safe conclusion is that the suspension period was too long. The inactivity over these periods went nowhere towards achieving the aim. They were unexplained. They had a detrimental impact upon the claimant who gave unchallenged evidence in his witness statement that his absence from work had a deleterious impact upon his mental health.

138. Further, the entire period of suspension was unpaid. The claimant gave evidence in his witness statement that being unpaid had a significant impact upon his mental health as it added extra stress and worries. He gave unchallenged evidence that his credit rating was adversely affected and that extra costs of living were incurred. He also found it degrading and distressing to have to borrow money from others. It impacted his social life as he was unwilling to go out with friends as he would not be able to pay his fair share of the entertainment bills.

139. The respondent has significant resources. Suspending the claimant without pay in circumstances where he was not sick and there was no contractual right so to do had a significant impact upon the claimant. The respondent breached the contract. That impact significantly outweighs the benefit to the respondent of deciding not to pay the claimant while investigations were undertaken. Not paying the claimant went nowhere towards meeting the respondent's legitimate aim. The aim could just as well have been pursued by paying the claimant in circumstances where there was no contractual entitlement for the respondent not to do so.

140. Mr Davies drew the Tribunal's attention to **O'Hanlon v Revenue and Customs Commissioners** [2006] ICR EAT and [2007] EWCA Civ 283. This case is authority for the proposition that increasing sick pay for a disabled person would not in the normal course be an adjustment which it is reasonable for an employer to make.

141. The difficulty for the respondent upon this submission is, of course, that the claimant was not sick. The sick pay provisions within the contract were therefore not engaged. True it is that the claimant had exhausted his sick pay entitlement when he was suspended on 14 January 2022. Had he been sick, then we would have agreed with the respondent that it would not be a reasonable adjustment for them to increase the claimant's sick pay entitlement.

142. However, **O'Hanlon** is not engaged where the employee is simply not sick at all. That circumstance does not engage the question of enhancing contractual sick pay. In the absence of a contractual provision to the contrary, an employer who suspends an employee is obliged to pay them. If the employer suspends the employee, then they must take steps to ensure that the suspension period is as short as reasonably practicable. The employer did not take steps to keep the suspension period as short as reasonably

practicable in this case. As we have said, there were unexplained delays totalling three months. Further, not paying the claimant anything not only was a breach of the contract of employment between the parties but also was a disproportionate means of achieving the legitimate aim which the respondent has established.

143. Mr Davies referred to **Coxall v Goodyear GB Ltd** [2002] IRLR 742, CA as authority for the proposition that an employer may be under a duty at common law to dismiss an employee rather than allow them to run the risk of physical injury. It is difficult to see the applicability of this principle to the case before us. The claimant was fit to work. There was no evidence that matters were so hazardous for him in the workplace as to warrant the draconian step of dismissal. The only barrier to his return was the relationship between him and Miss Mack which was capable of resolution with adjustments to shift patterns, the line management of the claimant or to the claimant's duties.

144. It follows therefore that the respondent has failed to discharge the burden upon them to show that the treatment of the claimant was a proportionate means of achieving the legitimate aim in question. The complaint of unfavourable treatment for something arising in consequence of disability therefore succeeds.

145. We now turn to the reasonable adjustments complaint. Employers are required to take reasonable steps to avoid a substantial disadvantage where a provision, criterion or practice applied to a disabled person puts the disabled person at a substantial disadvantage compared to those who are not disabled. A failure to do so may be a breach of sections 20 and 21 of the 2010 Act. That conduct is made unlawful in the workplace by section 39(5).

146. The purpose of the comparison with people who are not disabled is to establish whether it is because of disability that the particular provision, criterion or practice disadvantages the disabled person. Accordingly, there is no requirement (as there is in a direct discrimination claim) to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person's circumstances. A comparison can be made with non-disabled people generally.

147. The phrase "*provision, criterion or practice"* is not defined by the 2010 Act. It broadly encompasses requirements placed upon employees by employers. It can extend to formal or informal policies, rules, practices or arrangements.

148. An employer only has a duty to make adjustments if they know or could reasonably be expected to know both that the affected worker is disabled and that they are placed at a substantial disadvantage by the application to them of the relevant provision, criterion or practice.

149. The defence of lack of knowledge in a reasonable adjustments complaint differs from that upon a complaint made under section 15 of the 2010 Act. In the latter, a lack of knowledge defence is open to an employer where they did not know or could not reasonably be expected to know of the disability. A lack of knowledge defence upon a reasonable adjustments complaint is available to an employer where they did not know and could not reasonably be expected to know both of the disability and the disadvantage caused by it. In this case, Mr Davies confirmed that no defence of lack of knowledge is being run by the respondent upon either the section 15 complaint raised by the claimant or upon the reasonable adjustments claim.

150. The duty to make reasonable adjustments requires employers to take such steps as is reasonable to have to make adjustments. There is no onus upon the disabled person to suggest what adjustments should be made. However, by the time that the matter comes before the Tribunal, the disabled person ought to be able to identify the adjustments which they say would be of benefit.

151. If the employee is to succeed in a claim that the employer has failed to make reasonable adjustments, they must clearly identify the provision, criterion or practice to which it is asserted adjustments ought to have been made. The Tribunal may only consider the claim that has been made to it by the claimant: **Secretary of State for Justice v Prospere** [EAT]/0412/14.

152. As we say, the expression "*provision, criterion or practice"* is not defined in the 2010 Act. The EHRC's Code states that the term *"should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions. A PCP may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a "one off" or discretionary decision."*

153. The relevant provision, criterion or practice relied upon by the claimant in this case is that of suspending employees on long term sick leave without pay on the grounds of capability (ill health). There is no provision in the contract of employment to this effect. The Tribunal was not taken to any other written policy where such a provision has been recorded. Indeed, it would be a surprise if the respondent had such a provision anywhere. For similar reasons, there is no evidence that they had such a criterion anywhere either.

154. It therefore comes down to the question of whether there was a practice of suspending employees on long term sick leave without pay. In **Nottingham City Transport Ltd v Harvey** [EAT] 0032/12 the Employment Appeal Tribunal held that to constitute a practice there must be an element of repetition about the matter in question and be applicable to both the disabled person and non-disabled comparators. A one-off act is not capable of amounting to a practice (**Fox v British Airways Plc** EAT 0315/14). However, a one-off act can amount to a practice if there is some indication that it would be repeated if similar circumstances were to arise in the future (**Ishola v Transport for London** [2020] EWCA Civ 112, CA).

155. On the facts of this case, there was no evidence that the decision to suspend the claimant on 14 January 2022 was anything other than a one-off act. Indeed, the respondent's evidence pointed firmly in this direction. Both Miss Buckley and Miss Webster were unsure what to do. They were unsure what to do because the situation had never arisen before. There was no evidence from the claimant of anyone else (disabled or not disabled) also being suspended on long term sick leave without pay before he was. Therefore, there was no established past practice.

156. Upon the authority of **Ishola**, therefore, the claimant can only succeed in establishing that such practice existed if he can point to somebody else having been similarly treated after mid-January 2022 or that the respondent would act similarly if such a situation again arose. There was no such evidence. It follows, therefore, in our judgment that this was a one-off act on the part of the respondent which was applied to the claimant only with no

element of repetition about it. It follows therefore that the claimant has not established there to be a disadvantaging provision, criterion or practice and the reasonable adjustments claim must therefore fail at the first hurdle.

157. The other complaint brought under the 2010 Act by the claimant is one of indirect disability discrimination. This must also fail upon the same basis as it relies upon on the same provision, criterion or practice. There being none, the complaint must fail.

158. There is a further difficulty for the claimant upon the indirect disability discrimination complaint. This is that the burden is upon him to show that within a comparison pool of people, those with his disability within the pool suffer a particular disadvantage by application of the PCP in comparison to those within the comparison pool who are not disabled or who have a different disability. (It is of course impossible to weigh group disadvantage in the absence of an identified PCP anyway). However, the claimant did not adduce any evidence to show a particular group disadvantage for those with the mental impairment of anxiety and depression in any case when compared to those without a disability or those with a different disability.

The relevant law and conclusions upon the public interest disclosure claims

159. We now turn to the complaint of detriment for having made a public interest disclosure. This is a complaint brought under section 47B of the Employment Rights Act 1996.

160. The first matter which arises is whether the claimant made any qualifying disclosures. By section 43B(1) a disclosure qualifies for protection where a worker discloses information which in their reasonable belief is made in the public interest and tends to show one or more of the six relevant failures set out in section 43B(1).

161. To be a protected disclosure, it is necessary for the claimant to have disclosed information. The disclosure may be made to a number of recipients including to the employer. There is no issue in this case that the respondent made the disclosures upon which he relies as qualifying for protection to anybody other than the employer.

162. It is not necessary for the Tribunal to decide whether in fact the relevant failure has occurred, is occurring or is likely to occur. The issue is whether the employee had a reasonable belief in the relevant failure in question. It is not necessary for the employee to prove the validity of their concerns. The Tribunal does not have to decide that the concerns were correct, merely that the employee reasonably held a belief that they were.

163. The Tribunal must also consider whether the disclosure was, in the employee's reasonable belief, made in the public interest. Again, the question is not whether the disclosure was in fact in the public interest. The Tribunal must decide whether the claimant believed the disclosure to be in the public interest and that it was reasonable to believe that.

164. It does not matter if the disclosure was also made in the claimant's own interest. What is in the public interest is considered by reference to all the circumstances including: how serious was the matter; how many people might be affected; and the identity of the wrongdoer. The public in this context may be the public at large or may simply be other people employed by the same employer.

165. In **Chesterton v Nurmohamad** [2017] EWCA Civ, the Court of Appeal upheld the decision of the Employment Appeal Tribunal that the words *"in the public interest"* were introduced to do no more than prevent a worker from relying on a breach of their contract where the breach is of a personal nature and there are no wider public interest implications. Even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

166. The term *"detriment"* is not defined in the 1996 Act. It clearly has a broad ambit. The detriment relied upon by the claimant is the withholding of his pay from January 2022 onwards. There can be no question that this is a detriment for the purposes of the 1996 Act.

167. By section 48(2) of the 1996 Act, it is for the claimant to show that he was subjected to a detriment, that the respondent subjected the claimant to the detriment and that there was a protected disclosure. Should the claimant succeed in showing these elements of the claim, then the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the grounds that they had made a protected disclosure and that the making of a protected disclosure was not a material reason for the claimant being subjected to the detriment in question.

168. Other facts, we have found that the claimant disclosed information to the respondent as his employer about being short staffed. On any view, the claimant had reasonable belief that such was the case. This was conceded and accepted by Mr Broadley in his grievance decision (and which was upheld by Miss Buckley).

169. The difficulty for the claimant is to establish that he had reasonable belief that this disclosure was in the public interest. It is difficult to see how it can be. In our judgment, staffing is a private matter between employer and employee.

170. The second issue raised by the claimant is that of the sad death of one of the respondent's employees. The claimant in fact withdrew any public interest disclosure detriment arising out of this matter. We need not therefore say anything more about it when determining this claim.

171. The third issue is that of the miscarriage which sadly was suffered by one of the respondent's female employees. We accept that the claimant had a reasonable belief that the employee miscarried. The claimant's evidence (which was unchallenged) was that he had been told of this by her. On any view therefore the claimant had a reasonable belief.

172. However, it is difficult to see how the claimant could have had a reasonable belief that the miscarriage (distressing as it doubtless was) had any connection with the respondent's system of work. The claimant did not give any evidence that the female employee attributed this sad event to the respondent. His evidence is that she told him of the miscarriage but nothing more. That there was a connection between the system of work and the miscarriage was nothing more than speculation on the claimant's part. There is no basis to make a connection. Therefore, the Tribunal does not find that the disclosure to the respondent of information around the miscarriage was a disclosure which qualifies for protection.

173. We find that the claimant did make a protected disclosure around his concerns about an unsafe system of work upon the B4 roll plant. The claimant plainly had a reasonable belief in the unsafeness of the system of work given that it was he himself that was affected by it. In our judgment, this was also in the public interest. There must be public interest in employers adopting a safe system of work so as to avoid injury (and possibly worse) affecting their employees. Unlike the staffing situation therefore this is a matter which goes beyond a private dispute between employer and employee. That there is a public interest in safe workplaces is plain from the fact that Parliament has legislated (in the Health and Safety at Work etc Act 1974 and in other primary and secondary legislation) to place an obligation upon employers to adopt safe systems of work on pain of criminal sanctions.

174. It follows therefore that the claimant has satisfied the burden of proof upon him to show that he made a public interest disclosure. He has also of course succeeded in establishing that he was subjected to the detriment of being suspended without pay and that it was the respondent who subjected him to that detriment. Therefore, the burden of passes to the respondent to show the reason for the detrimental treatment.

175. The Tribunal is satisfied that the reason why the claimant was suspended from work on 14 January 2022 was nothing to do with him making a protected disclosure about the Bake 4 roll plant on 19 May 2021. There is no evidence that Mr Broadley (to whom the disclosure was made) had anything to do with the decision to suspend the claimant on 14 January 2022.

176. The other side of that coin is that there was nothing to show that Miss Webster and Miss Buckley were in any way influenced by the fact of the claimant having raised his grievance in May 2021. Miss Buckley of course knew of it as she adjudicated upon the claimant's appeal against Mr Broadley's decision. However, it was not put to either Miss Webster or Miss Buckley that they were influenced by the fact that he had made disclosures and raised grievances about matters of concern. The Tribunal is satisfied that the fact of the claimant's disclosure about the B4 roll plant did not materially influence the respondent's decision to subject him to the detriment of suspension without pay from mid-January 2022. That decision was solely influenced by the respondent's well-founded concerns about the safety of the claimant and Miss Mack should he return to work. The disclosure about the B4 roll plant had no influence at all on detrimental treatment of the claimant by the suspension.

177. Even if we are wrong upon our conclusion about disclosure about safe staffing levels, and that such is a matter of public interest, the same conclusions upon causation in paragraphs 175 and 176 must follow.

Remedy upon the Equality Act complaint

178. We then turn to the question of remedy upon the claimant's successful complaint brought under the 2010 Act. The measure of damages is tortious. That is to say, the idea of an award of compensation is to put the claimant into the position he would have been in had the discriminatory conduct occurred.

179. Had the respondent not treated the claimant unfavourably for something arising in consequence of disability he would have been suspended for a shorter period and would have received full remuneration from January 2022

to June 2022 inclusive. Compensation for loss of earnings is therefore awarded from 1 January to 30 June 2022. The latter date is the end point as in our judgment the claimant broke the chain of causation arising from the discriminatory conduct when he refused a reasonable offer of a return to work in an alternative role and was no longer ready to work.

180. We now turn to the claimant's claim of non-monetary compensation. The claimant's solicitor put the claim for injury to feelings in the sum of £9000. The solicitors referred to the case of **Vento v Chief Constable of West Yorkshire Police** [2002] EWCA Civ 1871.

181. An injury to feelings award is to compensate for the emotional impact of the discrimination upon the claimant by way of upset, frustration, annoyance, vexation and the like. It is to compensate for the non-medically verifiable impact of the discriminatory conduct.

182. There are three bands of compensation given in the guidance of the Court of Appeal in **Vento**. These are increased annually each April in line with inflation by way of guidance published by the President of the Employment Tribunals (England and Wales).

183. The lower band is relevant for less serious cases, such as where the prohibited act was an isolated or one-off occurrence. The middle band is relevant for more serious cases, which do not merit an award in the highest band. The top band is only used for the most serious cases, such as where there has been a lengthy campaign of discrimination.

184. The claimant's solicitor sought an award of £9000 in the schedule of loss which was filed by them on 3 January 2023. £9000 is in fact the top of the lower band and the bottom of the middle band of the **Vento** bands for claims presented to the Tribunal between 6 April 2020 and 5 April 2021. The figure for claims presented after 6 April 2022 (such as this one) is in fact £9900.

185. The overall focus must be upon the impact upon the complainant as opposed to the length of time for which the prohibited act occurred. There is much in Mr Davies' point that the claimant suffered injury to his feelings for non-discriminatory reasons in any case. He was signed off for work related stress on 2 April 2021. This is not the subject of any complaint of discrimination and therefore the Tribunal can make no award to compensate for the distress caused by the claimant for his absence from work from that date. Therefore, Mr Davies is correct to say that this is a complaint of exacerbation of feelings for which the respondent was not responsible. Plainly, the claimant had been gravely upset anyway at work by the actions of Michelle Mack and the claimant's perceptions around her management of him.

186. However, it is only with effect from January 2022 that the claimant was unpaid by the respondent. We have little doubt that this must have been very distressing for the claimant for the reasons which he articulates in his witness statement. We are satisfied that this caused the claimant significant distress.

187. The distress was caused to the claimant for a significant period of six months from January to June 2022. (As we say, the chain of causation attributable to the respondent's discriminatory conduct was broken by the claimant's refusal to accept the reasonable offer to return to work upon a phased return to work basis in a different role).

188. Therefore, in our judgment, an award of injury of feelings ought to be made in the sum of £9900. The claim for injury to feelings was conservatively but reasonably pitched by the claimant's solicitor in that amount. While of course it is a matter of discretion for the Tribunal as to how much to award to compensate for injury to feelings the Tribunal considers this to be an appropriate amount and makes an award accordingly.

189. By the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, where the Tribunal makes an award of compensation under the 2010 Act it may include interest on the sums awarded and shall consider whether to do so without the need for any application by a party in the proceedings. The relevant rate of interest currently prescribed for England and Wales under the Judgments Act 1838 is 8%.

190. In the case of an award of injury to feelings, interest shall be for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation (which is the day that the amount of interest is calculated by the Tribunal). In all other cases such as arrears of remuneration, interest shall be paid for the period beginning on the mid-point date and ending on the day of calculation.

191. There was no submission from the respondent that it would be unjust to award interest and therefore we do so.

192. Accordingly, interest on the interest to feelings award shall be paid to the claimant in the sum of £792. The suspension date was 14 January 2022. The calculation date is 13 January 2023. This is a period of exactly one calendar year.

193. The pecuniary loss award is for six months net loss of earnings at £2480.84 per calendar month. Net loss is the appropriate measure to put the claimant in the position he would have been in but for the discrimination. This is £14885.40 in total. The mid-point of the award is 1 April 2022 and therefore interest is awarded in the sum of £938.88 for 288 days at £3.26 per day.

194. The Tribunal does not make an award for the respondent to pay to the claimant the amount claimed in the schedule of loss for lost employer's pension contributions. These are claimed at the rate of £19.94 per week. Had the discrimination not occurred, then these contributions would not have been paid to the claimant but would have been paid by the employer into the employer's pension scheme. The Tribunal therefore makes a recommendation that the sum of £518.44 be paid by the employer into the pension scheme for the claimant's benefit that being six months loss of pension contributions in the sum of £19.94 per week. (For the same reason, the Tribunal may not make an award that these sums be paid to the claimant under Part II of the 1996 Act as they are not properly payable to him- rather, they are paid into a pension scheme).

195. By Rules 65 and 66 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 a Judgment or Order takes effect from the day when it is given or made or on such later day as specified by the Tribunal. A party shall comply with the Judgment or Order for the payment of an amount of money within 14 days of the date of the Judgment or Order unless the Judgment or Order specifies a different date for compliance.

196. On behalf of the respondent, Mr Davies requested a period of 28 days for payment of the sums due to the claimant. The claimant objected to such a period. However, given that there are ongoing discussions between the parties with a view to the claimant returning to the workplace. in the Tribunal's judgment it is appropriate to specify a later date than that stipulated in the Rules for payment. A seven days' extension shall therefore be granted, and the respondent shall pay the compensation due to the claimant on or before 3 February 2023.

197. Finally, we should observe that the unauthorised deduction from wages claim and the compensation for loss of earnings made under the 2010 Act in fact covers the same period. The claimant will appreciate that there is a rule against double recovery. He will not therefore recover both awards as such would offend that principle.

Employment Judge Brain
2 February 2023