



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102960/2023

**Held in Glasgow on 5 – 8 February 2024
Deliberations on 9 and 12 February 2024**

**Employment Judge D Hoey
Members Mr R McPherson and Mr R Taggart**

Mr R Johnston

**Claimant
Represented by:
Ms E Matheson -
Solicitor**

Duffield Morgan Limited

**Respondent
Represented by:
Ms S J Lundy -
Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that

1. The complaints of unlawful harassment pursuant to section 26 of the Equality Act 2010 are ill founded and are dismissed.
2. The complaints of unlawful victimisation pursuant to section 27 of the Equality Act 2010 are ill founded and are dismissed.
3. The Tribunal declares pursuant to section 24(1) of the Employment Rights Act 1996 that the respondent unlawfully deducted the sum of **One thousand seven hundred and eighty eight pounds and fifty pence (£1,788.50)** from the claimant's wages and that pursuant to section 24(2) of the Employment Rights Act 1996 the respondent shall pay to the claimant the gross sum of **One thousand seven hundred and eighty eight pounds and fifty pence (£1,788.50)**, less any deductions required by law.

4. The other complaints are dismissed following their withdrawal by the claimant at the hearing.

REASONS

1. The claimant raised a complaint for unlawful deductions which was subsequently amended to include complaints for disability discrimination. Following case management the claims were focussed and by the time the hearing reached submissions, the claims before the Tribunal were in respect of unlawful deductions, harassment and victimisation.
2. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality. It was also explained that the Tribunal makes a decision in respect of the issues before it and only from the evidence led, whether by agreement or that led.

Case management

3. The parties had worked together to focus the issues in this case and that continued until the submission stage for which the Tribunal was grateful. It has helped the Tribunal to ensure the issues it required to determine in light of the complaints before it were carefully and precisely focussed. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time.

Issues to be determined

4. The issues to be determined were discussed in detail and became clearer as the Hearing progressed. It was conceded by the respondent that in the event any of the discrimination claims were time barred, the claims made within a further period that was just and equitable and accordingly no issues of time bar arose.
5. The issues to be determined were agreed to be as follows.

Harassment related to disability (Equality Act 2010 section 26)

- 1 *Did the respondent do the following things:*
- 1.1 *Subject the claimant to a partial grievance process;*
- 1.2 *Fail to uphold the claimant's grievance dated 19 August 2022 on 13*
5 *October 2022 (which the respondent conceded had happened);*
- 1.3 *Prevent the claimant from appealing against the grievance outcome of*
 13 October 2022;
- 1.4 *Give an inaccurate job description to the occupational health provider*
 on 7 April 2022 and again on 22 November 2022;
- 10 1.5 *Deduct £480 on 31 December 2022 (the cost of the OH report) (which*
 the respondent conceded had happened);
- 1.6 *Vary or attempt to vary, the claimant's contractual duties by including*
 additional duties/requirements within a job description which were
15 *capability requirements, namely that should be able to stand or walk*
 whole golf course and have knowledge of operation of electric welder's
 torches, pneumatic tools (which were not part of skills set of a
 greenkeeper or golf course superintendent) around 27 January 2023,
 20 February 2023 and finally on 7 April 2023;
- 1.7 *Not pay 10 day's sick pay which was requested on 16 April 2023; and*
- 20 1.8 *Refuse the claimant's holiday request in May 2023.*
- 2 *It was conceded the foregoing acts amounted to unwanted conduct.*
- 3 *Did each act (individually) "relate to disability"?*
- 4 *Did each act (individually) have the purpose of violating the claimant's dignity*
 or creating an intimidating, hostile, degrading, humiliating or offensive
25 *environment for the claimant?*

5 *If not, did each act (individually) have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

Victimisation (Equality Act 2010 section 27)

5 *It was conceded by the respondent that the claimant had carried out the following protected acts:*

- a) *Raise an appeal against the outcome of his grievance on 17 July 2021 which included an allegation of discrimination.”*
- b) *On 18 July 2022 make an allegation of discrimination, that his job description was discriminatory to Mr N Campbell; and*
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- c) *Lodge a second grievance on 19 August 2022 referring to breaches of the Equality Act 2010.*

6 *Did the respondent do the following things (which the respondent conceded would each amount to a detriment if established):*

- 15 6.1 *Subject the claimant to a partial grievance process;*
- 6.2 *Fail to uphold the claimant's grievance dated 19 August 2022 on 13 October 2022 (which the respondent conceded had happened);*
- 6.3 *Prevent the claimant from appealing against the grievance outcome of 13 October 2022;*
- 20 6.4 *Give an inaccurate job description to the occupational health provider on 7 April 2022 or on 22 November 2022;*
- 6.5 *Deduct £480 on 31 December 2022 (the cost of the OH report) (which the respondent conceded had happened);*
- 6.6 *Not pay 10 day's sick pay which was requested on 16 April 2023;*
- 25 6.7 *Refuse the claimant's holiday request in May 2023.*

5 6.8 *Vary or attempt to vary, the claimant's contractual duties by including additional duties/requirements within a job description which were capability requirements, namely that should be able to stand or walk whole golf course and have knowledge of operation of electric welder's torches, pneumatic tools (which were not part of skills set of a greenkeeper or golf course superintendent) around 27 January 2023, 20 February 2023 and finally on 7 April 2023;*

7 *Were the detriments because of a protected act as follows:*

10 7.1 *It was alleged respondent subjected the claimant to a partial grievance process because of any (or all) of each of the protected acts.*

7.2 *It was alleged the respondent rejected the claimant's grievance of August 2022 on 13 October 2022 because of any or all of the protected acts;*

15 7.3 *It was alleged the respondent prevented the claimant from appealing against a grievance outcome which failure took place 13 October 2022 because of any or all of the protected acts;*

7.4 *It was alleged that the respondent provided an inaccurate job description to the occupational health provider on 7 April 2022 because of the first protected act;*

20 7.5 *It was alleged the respondent on 22 November 2022 gave the same incorrect information to the OH a second time because of any or all of the protected acts;*

7.6 *It was alleged the respondent deducted £480 on 31 December 2022 (cost of OH report) because of any or all of the protected acts;*

25 7.7 *It was alleged that the respondent varied or attempted to vary the claimant's contractual duties by including additional duties/requirements within a job description which were capability requirements, namely that should be able to stand or walk whole golf course and have knowledge of operation of electric welder's torches,*

pneumatic tools (which were not part of skills set of a greenkeeper or golf course superintendent) around 27 January 2023, 20 February 2023 and finally on 7 April 2023 because of any or all of the protected acts.

5 7.8 *It was alleged that the respondent failed to pay 10 day's contractual sick pay due in April each year because of any or all of the protected acts;*

 7.9 *It was alleged that the respondent refused a request for holidays in May 2023 because of any or all of the protected acts.*

10 **Remedy**

8 *The parties had agreed a number of issues with regard to remedy in relation to the discrimination claims.*

Unauthorised deductions

10 *It is alleged that the failure to pay 10 day's contractual sick pay amounting to*
15 *the gross sum of £1,788.50 was an unlawful deduction, and was due on 30*
 April 2023. The sum was agreed and the only issue was whether the sum was
 properly due to the claimant in terms of his contract.

Evidence

6. The parties had produced a joint bundle of 348 pages with a further 38 pages
20 added.

7. The Tribunal heard from the claimant, Mr N Campbell (managing director) and
 Mr G Campbell (General Manager). The witnesses each gave oral evidence
 and were cross examined and asked further relevant questions.

Facts

25 8. The Tribunal is able to make the following findings of fact which it has done
 from the evidence submitted to it, both orally and in writing. The Tribunal only
 makes findings that are strictly necessary to determine the issues before it
 (and not in relation to all disputes that arose nor in relation to all the evidence

led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time. There was little dispute about the key facts in this case and much of the facts were found from the statement the parties had agreed. The Tribunal is grateful in particular to the claimant's agent for the time taken to work upon the agreed facts.

Background

9. The respondent is a family company responsible for building and maintaining a golf course with other business interests. Mr N Campbell was managing director. Mr N Campbell's son and daughter worked in the business with Mr G Campbell being general manager. There were around 30 other employees.
10. The claimant had been engaged as Golf Course Superintendent or Head Greenkeeper, terms the respondent considered interchangeable (although the claimant believed he was Golf Course Superintendent with a focus on management matters).
11. The claimant was confirmed in post on 24 May 2007 and a contract of employment was created. The claimant's job title at appointment was Golf Course Superintendent.
12. The respondent had engaged a recruitment company, IMG, to source a head green keeper/golf course superintendent. A recruitment process was undertaken and documentation was issued to the claimant. The respondent maintained a personnel file in respect of the claimant and placed within it relevant information they had in connection with the claimant's employment (which documentation had emanated from IMG).
13. Within the claimant's personnel file there was an offer letter dated 4 June 2007 which was addressed to the claimant and signed by the respondent. The file also had 2 identical documents which appeared to be dated 4 June 2007 and 4 July 2007. Those documents were identical contractual documents. The respondent had no other contractual documents pertaining to the claimant.

The file also contained an Employee Handbook which the respondent updated.

14. Five weeks after commencing the role the claimant wrote to IMG (copying his communication to Mr N Campbell) raising a number of queries about the premises in which he was based. He noted that his contract “still remains unsigned” and that the contract had not referred to a company car or health insurance which the claimant had been told was to be part of his entitlement. No further contractual documents were issued and the claimant continued to work as head green keeper/golf course superintendent and had other staff to assist him in maintaining the golf course, including a depute head green keeper (which the claimant had recruited).

Sick pay

15. The relevant contractual term in terms of sick pay pertaining to the claimant was as follows: “The Club shall pay your full salary in respect of the first ten days of absence due to illness in any year (being a year commencing 6th April) during your employment (subject to satisfactory evidence of your inability to attend work because of illness) but you shall not receive any payment in respect of any subsequent period of illness in any such year”.

Other contractual terms

16. In respect of holidays, the contract stated that “Holiday entitlement is accumulated in accordance with applicable legislation or the Club’s policy, currently at the rate of one fifty-second of your annual paid holiday entitlement for each completed week worked during the holiday year; also ‘alterations of all foregoing arrangements concerning holiday is at the Club’s discretion’.
17. The claimant’s contract was supplemented by an Employee Handbook which had employment related terms, including in connection with medical examinations.

Claimant’s duties

18. Upon appointment the claimant was issued with a job description in relation to the role for which he had been employed. This was a job title in respect of the role of Golf Course Superintendent/Head Green Keeper.
19. The document was issued by the company that had recruited the claimant and a copy was sent to the respondent. The respondent believed that since the document was in their personnel file it had been sent to the claimant. That job description was what the respondent considered the claimant's duties to be and was, in the respondent's belief, an accurate description of the claimant's duties in light of their knowledge of what the claimant was doing (and required to do, along with his team). That job description had the "basic function" of Golf Course Superintendent/Head Green Keeper to be growing in and improving the golf course and grounds, to engage the workforce to supplement green keeping activities and to maintain the golf course. The document referred to "examples of work to be performed", "Maneerial (sic) responsibility" and "knowledge skills and abilities required".
20. The claimant maintained that there were some matters referred to in this document which he did not consider part of his duties. That included reference to "standing or walking the whole area of the course, repeated bending and lifting objects up to 90 lbs" (which was found under "maneerial (sic) responsibility"). He also disputed some of the headings under knowledge skills and abilities, such as "knowledge of the operation of various hand tool, electric welders, pneumatic drills, specialist turf equipment, heavy and light tractors and ability to attach specialised equipment to them".
21. On the job description for the claimant's depute (which the claimant recruited), the job title is "Deputy Golf Course Superintendent" and he reports to 'Head Greenkeeper/Golf Course Superintendent'.
22. On 11 August 2011 an internal management meeting took place with the respondents' senior staff. One of the matters discussed was that Job Descriptions were to be drafted because the other staff were unclear what activities the other staff carried out and it was felt useful to know what these tasks were.

23. The claimant drafted what he considered to be his key tasks and submitted the document. The focus of that document was in respect of management tasks but the claimant did carry out significant manual work (and had done so since his appointment, which was necessary given the nature of his role and the limited assistance that he had). The focus of that document had been in relation to management and referred to management of the greenkeeping team, use of physical resources and managing, implementing and evaluating golf course maintenance and the environment.

24. The claimant sent his document to Mr Campbell who replied stating “more than enough” which was in essence a flippant remark about how the claimant had more than sufficient tasks to carry out. The document the claimant had sent was the claimant’s summary of the key managerial tasks for which he was responsible (but did still refer to implementing golf course maintenance).

Disagreement with colleague

25. On 10 June 2021 the claimant and a colleague had a disagreement at work. The claimant reported the matter to Mr N Campbell as he was unhappy working with that individual and he wished something done about the incident as he saw it. He believed his colleague was in the wrong and wanted matters dealt with.

First grievance lodged

26. On 21 June 2021 the claimant returned to work having taken compassionate leave as a result of a bereavement whereupon the claimant intimated his written account of the dispute between him and his colleague to Mr N Campbell, which was his first grievance for the purposes of this claim.

Claimant unable to return to work

27. The claimant went home on 21 June 2021 and was signed off by his doctor with work related stress. The claimant remained off work and has not returned.

Grievance investigation

28. On 22 June 2021 the claimant was advised that an outsourced HR Company would be progressing the claimant's grievance and on 23 June 2021 a fact find meeting took place and the claimant was interviewed. On 28 June 2021 the claimant's colleague was interviewed as part of the fact find. The claimant's colleague gave conflicting accounts of what had occurred on the day in question but disputed that he was in the wrong and argued the claimant had been at fault.

Grievance outcome

29. On 1 July 2021 a Grievance Investigation Outcome report was prepared which concluded that in the absence of any witness evidence it was not possible to reach any conclusions as to what happened as between the claimant and his colleague. Recommendations included seeking to find ways to allow the parties to work together.
30. The claimant received a letter on 13 July 2021 setting out the outcome of his grievance which stated that his grievance had not been upheld given the absence of evidence. He was advised that he could appeal by lodging written reasons for his appeal within 5 working days.

Appeal against grievance

31. The claimant sent a letter on 17 July 2021 seeking to appeal the outcome of his grievance. Within this email he stated his age and that he had serious health conditions and that he considered himself to be disabled in terms of the Equality Act 2010. The claimant argued that there were issues with regard to the working environment and contradictions within the report. The claimant referred to having sought legal advice but wanted to resolve matters amicably and sought "proposals".
32. An appeal took place on 21 July 2021. This was carried out by another individual from the outsourced HR company and on 22 July 2021 the claimant received a note of the grievance appeal meeting.

33. On 23 July 2021 at the claimant received the Grievance Appeal Outcome. That ran to 8 pages and presented a detailed analysis of the points the claimant had raised and why his appeal was not being upheld. The independent party had found no evidence to support the claimant's assertions that he had been discriminated against and the respondent was to take steps to seek to facilitate a return to work. The letter concluded recommending the claimant take up the offer of mediation to help improve working relationships.
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34. On 27 July 2021 the claimant advised the meetings notes and letter were inaccurate. He attached copy text messages to Mr N Campbell which he said supported his position.
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35. On 10 August 2021 Mr N Campbell wrote to the claimant asking whether it would be possible to meet up to discuss the claimant's return to work (which was a recommendation within the appeal report). Mr Campbell noted that he had not received the medical report that had been sought. The claimant stated that he had not heard from the appeal officer in respect of the points he had raised after receipt of the appeal outcome. Mr Campbell stated that the appeal officer was on holiday and he needed to see the medical report which would inform recommendations going forward.
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Ongoing matters

- 20 36. On 13 August 2021 the claimant was advised by Mr N Campbell that he had been on discretionary pay for the last month but the company could not afford to keep that going and that going forward his pay would be reduced to SSP until we was fit enough to return.
37. On 17 August 2021 the claimant was advised by the appeal officer that the grievance process had concluded and that there had been a breakdown in communication with his GP surgery. It was stated that open and transparent communication should take place with his employer. She also stated that once the GP report is received, it was the intention of the respondent to have a health review meeting with him to discuss his health conditions, the reasons for the current absence and what support can be facilitated for a return to work.
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Claimant's GP prepares a report

38. A medical report was prepared by the claimant's GP on 25 August 2021. The GP referred within this report to work related stress and an exacerbation of existing impairments.

5 *Respondent seeks to alter working environment*

39. On 30 August 2021 the claimant was advised that a full risk assessment was being undertaken of all the estate buildings and that there would be more people within the accommodation. On 6 September 2021 the claimant advised Mr N Campbell that he wished to discuss the proposed changes and made enquiries regarding proposals for his return to work.

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Medical specialist required

40. On 6 September 2021 Mr N Campbell advised that he had gone back to the claimant's GP for clarification and had been advised that specialist medical report was needed.

15 *Claimant makes holiday request*

41. On 7 December 2021 the claimant requested 10 days annual leave starting 20th December 2021. The respondent was unclear as to what the claimant had taken by way of holidays. On 10 December 2021 Mr N Campbell said he had understood the claimant had taken 14 days this year and that holidays could not be carried forward. The claimant was told that all holiday pay would be correctly allocated and paid as per the records submitted.

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Respondent alleges overpayment

42. On 15 December 2021 Mr N Campbell sent the claimant wage computations to date noting that June and July had been paid in full (despite the claimant's absence). The communication included computations from the previous year and stated that there had been an overpayment of holiday pay in the sum of

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£1607.76. It was also noted that fit notes for periods in June and July had not been provided.

Medical specialist report

43. On 21 December 2021 a specialist prepared a report was provided to the respondent in relation to the claimant, making it clear that the claimant had significant limiting impairments with regard to his airway which had an “unpredictable impact on his quality of life, work and general fitness, in particular this has develop more noticeable breathlessness and his exercise capacity has dropped as a result.”

10 *Claimant’s agent raises issues about holiday pay*

44. On 22 December 2021 the claimant’s then solicitor contacted the respondent setting out what the legal position was and what the claimant’s entitlement was, noting the claimant had 11 days of unused annual leave. On 31 December 2021 the claimant received a payment with a deduction in the sum of £443.21.

Claimant raises dispute about pay

45. On 2 January 2022 the claimant had referred to correspondence in June 2021 regarding an issue that had arisen which led to Mr N Campbell noting matters were being considered by the outsourced HR Company. The claimant said that he had not raised a formal complaint but instead set out his “side of the story” to allow a resolution. On 3 January 2022 Mr Campbell noted the claimant had expanded his grievance to include reference to discrimination and that the medical report was awaited to progress a resolution which would allow occupational health input.

46. On 3 January 2022 the claimant replied to Mr N Campbell in an emailed headed “complaint” apologising for having send an old email which he had sent in error and asked if the respondent was seeking repayment of pay for the day in which his mother had died. On 4 January 2023 Mr Campbell replied noting that he recalled compassionate leave had been granted and allowance was made for that. Fit notes were required for the outstanding days.

47. On 7 January 2022 the claimant emailed Mr N Campbell saying that he had considered matters. He set out the position as he understood and sought clarification as to what was needed. He said that there were no outstanding fit notes, that he had complied with his contractual requirements and his holiday pay was outstanding.
48. On 14 January 2022 Mr Campbell replied to the claimant setting out his understanding of the position. He stated that he had made an error in August referring to salary being paid. The claimant responded on 17 January 2022 stating he had no choice but to raise the issue as a “formal complaint”. Mr Campbell replied stating that the respondent had acted in good faith, evidenced by the goodwill gesture with regard to ignoring the overpayment. On that basis he said the claimant’s complaint was “superseded”.
49. On 31 January 2022 the claimant received a payslip showing a deduction of £337.94.
50. On 4 March 2022 the claimant contacted ACAS with regard to the deduction from his pay. He explained that the deduction was unclear. On 9 March 2022 Mr N Campbell sent ACAS a report from his pay roll provider who had looked into the matter which suggested the issue related to outstanding holiday pay. Mr Campbell told ACAS that the claimant had been paid full salary for 2 months, when in fact the second month ought to have included holiday pay only. The respondent said in light of the overpayment it was not minded to pay further but would follow ACAS advice.

Communication from occupational health

51. On 30 March 2022 the Occupational Health provider wrote to Mr Campbell stating that the claimant had been contacted to carry out an occupational health consultation. The Occupational Health provider noted the claimant had asked a number of questions regarding his role as Head Green Keeper and the claimant had advised that his role was Golf Superintendent which (the claimant explained) had a different job description. It was important to clarify the specific role being undertaken before a report was provided.

52. On 7 April 2022 Mr N Campbell replied stating that Golf Course Superintendent was an Americanism for Head Green Keeper (as he believed the terms to be interchangeable). Mr Campbell stated the claimant's role was as it was when he had started. It was 90% outdoors, driving, using heavy grass cutting machinery, diggers and carrying out drainage works. He stated the role was not a desk job and involved outside activities and work.
53. Mr Campbell noted the dispute that the claimant had, which had been investigated by an outside agency and the matter had concluded. It had been noted during the investigation that the claimant's cough had been getting worse and had in fact been a fairly serious debilitating disease that had led to a noticeable reduction in capability over the last couple of years.
54. Mr N Campbell said the claimant "appears to be continuously out of breath and has to break off when in conversation with frightening coughing spurts. All other employees find these episodes quite disturbing and are fearful to interact."
55. He concluded stating: "We had no knowledge until very recently that he was disputing his role and duties and believe this may be more down to the fact that his capabilities are in fact diminished". If any further information was required contact was to be made.
56. The email Mr Campbell sent to Dr Toal on 7 April 2022 was based upon what Mr Campbell believed the claimant's duties to be. Mr Campbell did not consider the description to be inaccurate. The decision to send the information Mr Campbell sent was solely because it represented what Mr Campbell genuinely considered the claimant's duties to be. He had the information from the claimant's personnel file and his knowledge of what the claimant did on a daily basis. The decision to send the details he did in April 2022 was not related to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021. Mr Campbell's decision to send the information he did about the claimant's duties was entirely unconnected to the claimant's assertions of unlawful activity and was solely because Mr

Cambell believed the duties were in fact those the claimant required to undertake.

First Tribunal claim

57. The claimant raised a claim with the Tribunal on 23 March 2022. A response
5 to that claim was received on 22 April 2022. Within that response Mr N
Campbell stated "Lastly we have fully engaged with Mr Johnston only to be
accused of discrimination against him because of his age and health which is
wholly denied. However as part of this process, which he flagged up, we have
nonetheless sought and received a report from Mr Johnston's consultant
10 which was disturbing and now await the outcome of an Occupational Health
review to see what capacity Mr Johnston can resume useful employment".
The response concluded: "We believe that we have behaved with the upmost
integrity, fairness and honesty in this situation but will of course abide with
your honour's decision".

15 *Events leading up to the second grievance*

58. On 18 July 2022 the claimant emailed Mr N Campbell regarding his 8 day
payment being categorised as holiday pay. The claimant stated that this was
incorrect and requested it be rectified. The claimant stated that his
understanding was that Occupational Health had assessed his fitness to work
20 on 31 March 2022. It was the claimant's understanding that the occupational
health Dr had not found the job description appropriate and could not
comment further on it in relation to specific advice about fitness for duties.
The claimant disputed his job description again and stated IMG had distanced
themselves from the document commenting that they did not recognise it was
something they had ever used before. The claimant also stated that the job
25 description was "clearly discriminatory" and did not accurately reflect his role.

59. On 25 July 2022 Mr N Campbell replied stating he had sent an amended
payslip and the figures were all correct. The payment the claimant had
received had been classified as holiday rather than sick pay and had not been
deducted from his holiday allowance. Mr Campbell stated that they required
30 an up to date occupational health in order to progress return to work. It was

also noted that there were limitations on when holidays could be taken due to constraints on the business. The claimant's cooperation was sought to allow a return to work to be facilitated following the occupational health report.

5 60. On 3 August 2022 the claimant advised that payment for two days extended sick pay had not been made which he said was due by the end of July 2022. He also requested to take 10 days "of his carried over holiday allowance" during August. Mr Campbell replied that he had been waiting for the payslip and would pay immediately upon receipt. Regarding holiday allowance, payroll required a month's notice as payroll had been outsourced but this
10 would be processed as soon as possible.

15 61. On 12 August 2022 Mr N Campbell stated that the claimant's SSP had been exhausted and that the respondent did not accept the claimant's position with regard to the job description. It was noted that the claimant had been performing a "hands on role within the golf course for a number of years" and a major proportion of the role had been spent doing manual work, repairing and maintaining the course. If the claimant did not provide further information as to his health, the respondent would have to make decisions based upon the information it had. The claimant was told of upgrades that had been made to the facilities which would address any concerns the claimant had as to
20 premises. The claimant was also advised that 10 days holiday pay had been allocated for that month.

Second grievance

25 62. On 19 August 2022 the claimant wrote to Mr N Campbell to raise a formal grievance about the respondent's insistence on a job description the claimant contended was incorrect. The claimant referred to the job description he had sent after the management meeting. The claimant said there was a disregard for the claimant's well being.

30 63. The respondent's senior management team considered the grievance the claimant had raised and decided to appoint Mr G Campbell as the grievance manager. Given the job description had been raised by Mr N Campbell it was not considered appropriate he deal with matters. Mr G Campbell was selected

as he had a good working relationship with the claimant and Mr N Campbell and was considered capable of resolving the issue fairly. The respondent did not wish to incur the cost of external input at this juncture given the issue that arose was focussed and could be determined by assessing what information was on file and speaking to those who had been present at the management meeting when the claimant had produced his job description.

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64. The reason for appointing Mr G Campbell was in no sense related to the claimant's disability nor was it because of the claimant having appealed against the outcome of his grievance in 17 July 2021, because he had made an allegation of discrimination on 18 July 2022 or lodged a second grievance on 18 August 2022. It was solely as Mr G Campbell was considered the best person to determine the issues on this occasion.

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65. On 27 August the claimant wrote to Mr G Campbell stating that he objected to the suggestion he carry out the meeting given that he has a close familial relationship with one of the subjects of complaint which he said would not be fair or impartial.

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66. On 31 August 2022 Mr G Campbell told the claimant that given the grievance related to the managing director it would not be appropriate for someone other than senior management to hear the matter and having fully considered matters Mr G Campbell, as general manager, would hear the matter fully thoroughly and impartially.

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67. The claimant argued that someone else should hear it given Mr G Campbell's connection and suggested head of golf, club captain or outsourcing the matter. Mr G Campbell responded to the claimant stating that he disagreed with the suggestions given the nature of the grievance. Mr Campbell was of the view the grievance related to a relatively narrow point, what the correct job description was, and he was at an appropriate level of seniority to hear the matter and would do so fairly. Mr Campbell had a long working relationship with the claimant and considered himself able to deal with the matter impartially.

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68. On 12 September 2022 the claimant's daughter corresponded with Mr N Campbell saying she was writing on behalf of her father due to ongoing health concerns. She referred to an outstanding balance of £1,788.50 representing 10 days holiday pay owed to the claimant which should have been paid in August as per the terms of an ACAS agreement.

69. On 13 September 2022 Mr N Campbell sent an email to the claimant with high importance noting the email had been received from the claimant's daughter but noted the respondent was unable to correspond with a third party given the sensitive data involved and that direct authorisation would be needed together with confirmation there was a medical basis for the request.

Grievance outcome

70. On 13 October 2022 the claimant received an email from Mr G Campbell headed "Grievance Outcome". Mr Campbell explained in the outcome letter that he was able to deal with the matter impartially and there was no other suitable individual at his level. He stated he had concluded the investigation on the basis of the information the claimant provided which he investigated. He had considered matters neutrally and reviewed the facts from the information he obtained.

71. The first ground of appeal was that the tasks set out in the job description did not pertain to his role as course superintendent and were in breach of current regulations. Mr Campbell explained that the job description was the document that was contained in the claimant's personnel file. Mr Campbell had concluded it had been issued by IMG at the time the claimant was recruited. There had been no one within IMG who was around at the time to suggest that this was not correct. Mr Campbell did agree to alter reference to being able to lift 45 kilos which would be changed to 15 or 20 kilos. Mr Campbell noted the claimant had been carrying out most of the duties contained within the job description the respondent had referred to and there had been no change to the claimant's duties.

72. The second ground of appeal was that the job description had not been given to the claimant. Mr Campbell found the document within the claimant's personnel file and concluded that the document was issued.

5 73. The third ground related to the revised job description the claimant had submitted following the internal management meeting. Mr Campbell had spoken to witnesses who had been at the meeting which was an internal management meeting and the intention had not been to set out the full job description particularly around the manual golf course workings but rather many of the management tasks. Mr N Campbell had confirmed he had no
10 issue with the management tasks the claimant was undertaking which was more than enough for him to do (given his other tasks).

15 74. The fourth ground of appeal was that the job description was "dismissed" by IMG and Dr Toal. Mr Campbell had spoken to IMG who were unable to locate anyone who was present at the time the document was issued and so could not say for certain the document was not issued to the claimant. The document was on the claimant's personnel file. DR Toal's comments had been based on what the claimant had told him. On that basis the fourth ground of appeal was dismissed.

20 75. The claimant was advised that he had 5 days to lodge an appeal against the decision and the grounds of appeal should be set out in writing.

25 76. The grievance was dismissed solely because Mr G Cambell was satisfied the grievance had no merit. He had applied his mind to each of the issues, had undertaken reasonable inquiries and reached a conclusion based upon the information before him. The decision not to uphold the grievance was not related to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021 nor because of the claimant's allegations of discrimination in July 2022 or because he had referred to a breach of the Equality Act 2010. The respondent's decision to dismiss the grievance was entirely unconnected to the claimant's assertions of unlawful
30 activity and was solely because Mr Cambell was satisfied there was no merit in the points arising.

Communication with claimant's daughter

77. On 9 October 2022 the respondent was advised that the claimant wished to take 10 days holiday in November 2022, one day being carried over from 2021 holidays. On 13 October Mr N Campbell told the claimant that the timing regarding his holidays does not suit the company and that winter holiday entitlement will be paid in December.

78. The claimant had been advised that in order to communicate with the claimant's daughter his specific written consent was needed and on 17 October 2022 the claimant wrote to the respondents giving consent to speak with his daughter. That letter had been sent to Mr N Campbell and had not been passed to Mr G Campbell who was unaware of the claimant having submitted it.

Grievance appeal

79. On 24 October 2022 the claimant's daughter wrote to Mr G Campbell intimating that the claimant wished to appeal the decision of his grievance and requested evidence relied upon in reaching the original decision. Mr G Campbell responded advising the claimant's daughter that any appeal by the claimant had to be by the claimant personally. Mr G Campbell had taken legal advice and been told that there were data protection implications which prevented disclosure of sensitive information. The claimant's daughter was advised that the claimant should send his appeal personally.

80. On 31 October 2022 the claimant's daughter stated that the claimant wanted to appeal sought specific information. On 13 December 2022 the claimant's daughter sent an email outlining reasons why the grievance should not have been dismissed, arguing that the job description relied upon was not the correct one and that his grievance had not been dealt with fairly or impartially.

81. As the grounds of appeal had not been sent by the claimant personally within the timeframe set out, and as Mr G Campbell had not received the written consent from the claimant authorising his daughter to act on his behalf, the appeal was not taken further. Mr G Campbell was aware that the claimant's

daughter had issued grounds of appeal but decided not to take the matter further given he understood no consent had been given for his daughter to progress matters and given the grounds were received late. As no appeal had been received by the claimant as Mr G Campbell had directed, the matter was not progressed.

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82. The reason why the grievance appeal was not progressed was solely because Mr G Cambell had not received grounds of appeal within the time required. The decision not to progress an appeal was not related to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021 nor because of the claimant's allegations of discrimination in July 2022 or because he had referred to a breach of the Equality Act 2010. The respondent's decision not to progress the appeal was entirely unconnected to the claimant's assertions of unlawful activity and was solely because Mr G Cambell had not received grounds of appeal within the set time. No grounds of appeal had been provided from the claimant (albeit the respondent knew that the claimant had submitted grounds of appeal via his daughter late). Mr G Campbell had received legal advice which he believed required him not to progress matters with the claimant's daughter until he had express written authorisation which he had not seen when he made the decision.

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20 *Occupational health report and payment issues*

83. On 22 November 2022 the respondent wrote to the occupational health provider requesting the claimant be assessed noting that a previous report had been sought but as a result of a dispute over the job description no progress had been made.

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84. Mr N Campbell attached the job description which Mr N Campbell believed pertained to the claimant. This was the information Mr N Campbell had found in the claimant's file and was what Mr N Campbell considered the claimant's duties to be (from his knowledge of the work the claimant did and the operation). Mr N Campbell was seeking a detailed report as to the claimant's fitness for work and how a return to work can be facilitated, including the identification of other roles or tasks that would facilitate such a return.

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85. The information Mr N Campbell provided was based upon what he believed the claimant's duties to be. Mr N Campbell did not consider the job description to be inaccurate. The decision to send the information was solely because it represented what Mr N Campbell genuinely considered the claimant's duties to be. He had the information from the claimant's personnel file and his knowledge of what the claimant did on a daily basis. The decision to send the details he did was not related to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021 nor because of the claimant's allegations of discrimination in July 2022 or because he had referred to a breach of the Equality Act 2010. Mr N Campbell's decision to send the job description he had was entirely unconnected to the claimant's assertions of unlawful activity and was solely because Mr N Campbell believed the duties were in fact those the claimant required to undertake.

86. On 2 December 2022 the claimant consented to attend an Occupational Health assessment.

Occupational health report not provided as claimant does not consent

87. On 14 December 2022 Mr N Campbell was told that a report had been prepared the preceding day but the claimant's consent was needed before it could be released.

20 *Respondent deducts sum for report from claimant's pay*

88. On 31 December 2022 the sum of £480 was deducted from the claimant's holiday pay. This was the cost of the medical report. Mr N Campbell concluded that the respondent had sought to secure up to date information to facilitate the claimant's return to work. That information was being sought to allow matters to progress. The claimant had decided not to release the report to the respondent. That meant there was no way for the respondent to obtain the up to date information and the respondent believed they should not have to pay for something they could not secure. Mr N Campbell decided that the claimant should bear the cost of the report since it was only the claimant who had the information. Release of the report was entirely within the gift of the

claimant and Mr N Campbell did not consider it appropriate the respondent paid on that basis and the cost should be borne by the claimant.

89. The decision to deduct the sum in question was solely because of Mr N Campbell's decision as to the fairness of paying for a report that the claimant refused to release to the respondent. Mr N Campbell did not consider it appropriate the respondent paid for a report that the claimant refused to release to the respondent. That decision was not related to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021 nor because of the claimant's allegations of discrimination in July 2022 or because he had referred to a breach of the Equality Act 2010. Mr Campbell's decision to deduct the money was entirely unconnected to the claimant's assertions of unlawful activity and was solely because Mr Campbell believed the duties were in fact those the claimant required to undertake.

Further holiday pay requests

90. On 5 January 2023 the respondent was asked to explain why a deduction had been made from the claimant's pay. On 6 January 2023 Mr N Campbell responded stating that during the holiday break they had been advised the claimant was withholding his consent to release the report despite there being consent to obtain the report and the company having incurred the cost of the report. The £480 deduction had been "under the remuneration clause" of the contract and handbook.

91. Mr N Campbell asked the claimant what his concerns were with the report given the previous disclosures from his medical team and whether there were any steps the respondent could take to alleviate those concerns and allow the claimant to return to work. The claimant was reminded that he had been absent from work for 18 months and the respondent wanted up to date medical evidence to assist them in managing the claimant's return to work. He was also reminded that unreasonable withholding of permission for a medical examination could lead to disciplinary action. If the claimant wished a particular section to be edited, that could be done. The claimant was reminded

that a decision would be taken on the information available and a failure to provide the information could lead to disciplinary action.

Further holiday sought

92. On 13 January 2023 the claimant sought 10 days holiday from 13 February 2023. No reply was made and the request was made again on 28 January 2023.

Claimant refuses consent to report not provided

93. On 15 January 2023 the respondent was told that the claimant had not consented to release of the report.

94. On 27 January 2023 Mr N Campbell advised the Occupational Health provider that it was understood the claimant was challenging one of the requirements within the report which referred to "repeatedly bending and lifting objects up to 90lb". Mr N Campbell stated that it had been agreed that the amount should be 20lbs - 44lbs and asked that the report be reappraised on this basis and issued to the claimant for his agreement.

Respondent reimburse deduction for report

95. The deduction for the cost of the Occupational Health report was repaid on 27 January 2023, the respondent deciding that they would pay for the report despite not receiving it.

Respondent replies to request for holidays

96. On 2 February 2023 Mr N Campbell advised the claimant that the 10 day holiday pay, request would be processed and reach the claimant by the beginning of March. He was advised that paying this sum placed the small family run business under significant pressure from a cash flow perspective which was the reason for the delay. Nonetheless the sum would be paid.

97. He was told that the occupational health provider would be advised as to the change as to the lifting requirement. It was important to obtain as recent information as possible from the medical experts to allow informed decisions

to be made. The respondent's strong preference was to see if adjustments can be put in place to help facilitate the claimant back to work.

5 98. On 20 February 2023 the claimant's daughter emailed Mr N Campbell and said there were a number of issues with regard to the job description still outstanding (which relate to the grievance appeal) and the lifting requirement was only one of them. She stated the medical input was being held up due to the job description which was contended to be discriminatory.

10 99. Mr N Campbell replied that consent still had not been forthcoming for the report to be released which had held up release of the report. The respondent was advised on 28 February 2023 that the claimant did not know the report would be based upon the job description relied upon by the respondent. The medical report would be released once the correct job description (as understood by the claimant) was referred to.

15 100. On 16 March 2023 Mr N Campbell noted that the claimant knew the job description that was being relied upon and had referred to the issues during the consultation. The current approach was considered to be unreasonable behaviour. Mr N Campbell noted that with regard to the grievance appeal that had not progressed because the claimant had not accepted the process had validity. If the claimant was prepared to proceed with the appeal arrangements
20 would be made to progress it. Until a decision is taken that reliance upon the job description was wrong, which job description aligned with what work the claimant had been doing, matters would proceed based upon that document.

25 101. The claimant's daughter replied stating that the claimant had questioned the ability of the appeals officer to consider matters but grounds of appeal had been submitted and nothing had been progressed. Consent for a report from the GP would be provided if the company confirmed it no longer required a specialist report. Mr Campbell replied referring to his email of 16 March 2023.

Outstanding pay for March 2023

30 102. On 16 March 2023 the respondent had been reminded that it had agreed to pay 10 days holiday pay in March 2023 but this had not been received. The

respondent advised that the payment would be processed by the end of March 2023.

Respondent asked to pay 10 day's sick pay in April 2023

5 103. On 15 April 2023 the respondent was reminded that in accordance with his terms and conditions he was due to be paid 10 day's sick pay as of 16 April 2023, a fit note having been provided in respect of his absence.

104. The respondent did not pay the sick pay as the respondent believed that there was a contractual right to decline to pay sick pay where the claimant had not provided satisfactory evidence in respect of his absence. The respondent
10 concluded that the claimant's refusal to disclose the report which was intended to provide evidence as to the claimant's fitness for work resulted in there being a lack of satisfactory evidence and as such the claimant was not entitled to the sums sought. Mr Campbell was also of the view that there was no right to carry forward sick pay each year and that the entitlement for
15 absence spanning more than one year remained at 10 days.

105. In his view the claimant had no contractual right to further sick pay in respect of a continued absence.

106. The decision not to pay the claimant sick pay was solely based upon what Mr Campbell believed the contractual entitlement to be. The decision was not
20 related to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021 nor because of the claimant's allegations of discrimination in July 2022 or because he had referred to a breach of the Equality Act 2010. Mr Campbell's decision not to pay contractual sick pay in 2023 was entirely unconnected to the claimant's assertions of
25 unlawful activity and was solely because Mr Cambell believed there was no contractual right to sick pay.

107. No grievance was raised in respect of the decision not to pay the claimant the sums the claimant believed was due in terms of April 2023 sick pay.

Claimant requests holiday pay

108. On 10 May 2023 10 days holiday pay was sought. The reply to the request was: "Please refer to condition 4.2 of the handbook attached to the contract". That clause is entitled "Conditions applying to holiday entitlement" and stated that holidays could only be taken at a time agreed with a Director in line with the holiday periods specified by the company. Holidays were not to be taken during June, July, August and December and 4 week's notice of holidays was to be given. There was no follow up email from the claimant as to his request and no further request for that holiday was made. The application was not expressly rejected but no holiday pay was paid following that request.

109. The decision not to pay holiday pay was because at the time of the request, paying holiday pay would have had an impact upon cash flow. The respondent did not consider paying holiday pay at that time to be in the interests of the business. The decision did not relate to the claimant's disability and was not because of the claimant appealing against a grievance in July 2021 nor because of the claimant's allegations of discrimination in July 2022 or because he had referred to a breach of the Equality Act 2010. Mr Campbell's decision not to pay holiday pay was entirely unconnected to the claimant's assertions of unlawful activity and was solely because Mr N Cambell did not consider making the payment at that time would have a positive effect on the cashflow of the business.

Claim raised

110. The claimant raised the present claim with the Tribunal on 15 May 2023.

Observations on the evidence

111. The Tribunal found each of the witnesses generally to be credible. They did their best to recollect the position.

112. **The claimant** was adamant that the respondent had got it wrong and he firmly believed that the respondent wished to cause him harm as a result of the issues he had raised and the fact that he was correct in his belief. The difficulty with the claimant's position was that in fact the respondent was seeking to work with the claimant and facilitate his return to work. At no stage had the

respondent in fact taken steps to dismiss the claimant even although this had been warned on a number of occasions. The respondent had sought as much information to allow it to make an informed decision and had sought to work with the claimant. The claimant genuinely believed that the respondent had acted in an unlawful way because of his views and what he asserted but the reality was regrettably that the parties had become so entrenched, the claimant was unable to work with the claimant to progress matters and consequently the respondent became more concerned that matters were not progressing and an impasse was reached. The fact the claimant was not prepared to move on created a barrier which led to the respondent being frustrated.

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113. The claimant was clear that the dispute with his colleague which led to his absence from work caused the claimant substantial stress. The claimant's unhappiness as to how the respondent dealt with that issue (and did not, for example, suspend the other individual) created further stress for the claimant and resulted in the claimant viewing the respondent in a negative light. The impact of the events relied upon as harassment and victimisation was relatively limited when compared to the stress the claimant felt as a result of his view of the respondent's approach to that dispute. It was notable too for example that it was not the claimant who initially believed he had been subject to unlawful discrimination because of his disability but a solicitor whom he consulted. The impact of the acts relied upon doubtless increased the stress the claimant felt as a result of the beliefs the claimant had and developed that the respondent was acting negatively.

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114. **Mr N Campbell** did his best to recall matters and generally the Tribunal found him to be credible and honest. He genuinely wanted to help the claimant return to work. He had experience of working with the claimant and believed that the claimant had a strong work ethic. Mr N Campbell genuinely and firmly believed that the job description he had found in the claimant's file was the correct job description. He believed this not only because it was what he found in the claimant's file but also from his experience of working with the claimant and observing him at work. The impasse which had been reached caused

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frustration as Mr Campbell wished to facilitate the claimant's return to work and he viewed the claimant's decision not to release the occupational health report as baffling, when the claimant had agreed to go for an examination and work with the respondent. Consequently the claimant and Mr Campbell diverged and Mr Campbell found it difficult to see how matters could progress when the claimant was not prepared to accept the decision as to the job description.

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115. Mr N Campbell genuinely believed the respondent would doing its best to support the claimant back to work. He was concerned about the claimant's health (hence his comment that he found the medical report "disturbing" in the sense of worrying in a compassionate way). Mr N Campbell believed the respondent had made the right decision and found it difficult that the claimant was refusing to accept the position set out by the respondent. He was frustrated by the lack of progress which led to his comments and approach but those stemmed from a concern that the claimant was unable to accept the decision the respondent had made and work with the respondent to ascertain whether a return to work was possible, Mr N Campbell believed the claimant was a good worker with a strong work ethic and genuinely wanted him to return to work.

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116. The Tribunal did not accept the claimant's agent's criticism of Mr N Campbell that he was not a credible witness. While Mr N Campbell was unable to set out the position in relation to payments for holiday pay and sick pay clearly at the hearing, that was unsurprising given the number of requests that had been made and the uncertainty as to which request had been granted and which had not. The Tribunal accepted that the reasons he gave for the decisions he took were genuine.

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117. The Tribunal did not accept that looking through the productions suggested his approach was coached or that he was seeking to pre-empt questions. Mr N Campbell recalled matters to the best of his ability and the Tribunal assessed his evidence in light of the documents produced at the time.

118. **Mr G Campbell** was clear and cogent in his evidence. He was candid. Mr G Campbell genuinely believed that he had a good working relationship with both the claimant and Mr N Campbell. While there was an obvious familial connection, Mr G Campbell was more than happy to do what was right for the business. He was genuinely prepared to get to the bottom of the issue and seek to move matters on. He independently investigated the issue and reached a decision from the information before him. Regrettably the claimant's inability to accept the decision to appoint Mr Campbell led to a number of issues, notably the claimant not fully participating in the grievance process and Mr Campbell's directions not being fully followed.

119. It was regrettable that Mr G Campbell had not seen the letter the claimant had sent authorising his daughter to deal with matters on his behalf. However, the grounds of appeal had been submitted well after the time to submit the appeal had expired. The Tribunal considered carefully Mr G Campbell's evidence and accepted his explanation that he had not seen the letter and decided, having taken legal advice, that he could not consider any communication from the claimant's daughter without the claimant's express written consent. He believed could not progress the claimant's appeal without such consent and given it was lodged late he decided not to action it. Given the lateness of the appeal, he decided not to progress it and that was why the appeal was not progressed. While other employers may well have dealt with this situation differently, the Tribunal accepted Mr G Campbell's evidence. He genuinely believed that he could not consider the appeal without the claimant's consent and decided not to progress it because it was lodged so late.

120. The Tribunal did not accept the claimant's agent's assertion that Mr G Campbell's evidence was rehearsed. It was not surprising his evidence was similar to Mr N Campbell given their evidence on that matters was what had happened. The fact their evidence was not identical supported that position. The Tribunal did not accept the assertion that Mr N Campbell and Mr G Campbell were "acting in concert" to treat the claimant badly because of his disability or because of any of the protected acts. The Tribunal found both Mr N Campbell and Mr G Campbell to have carried out their roles fairly and

reasonably. They understood that the claimant disputed the position with regard to his job description but they proceeded based upon their genuinely held belief, whilst recognising the claimant held a different belief equally firmly. The respondent sought to accommodate the claimant and tried to facilitate his return to work despite the impasse which had been reached.

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121. The Tribunal was satisfied Mr G Campbell made his own decisions and did what he felt best and not simply what Mr N Campbell wished. There was no evidence to suggest Mr G Campbell had anything other than a good working relationship with the claimant. The matters relied upon by the claimant as supporting the assertion that Mr N Campbell and Mr G Campbell were acting together did not result in that assertion being meritorious. For example, the fact no one from IMG was able to say for sure the job description was one which had been issued at the time did not support the claimant's assertion since there was no one from IMG who was present at the time and it was equally possible the document had been issued. The document was in the claimant's personnel file and aligned with what Mr N Campbell understood the claimant's duties to be from his knowledge and experience of the claimant and the operation.

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122. There were relatively few **disputes on the evidence** and the parties worked together to agree many of the key facts, largely due to the hard work of the claimant's agent.

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123. The central issue in dispute was the job description of the claimant. The Tribunal found that the respondent genuinely believed the job description it used was that pertaining to the claimant. The Tribunal found both Mr N Campbell and Mr G Campbell's evidence to be clear, candid and accepted it. The claimant fervently disagreed with the outcome. This was known by the respondent and steps were taken to take account of the claimant's position but the Tribunal found that the respondent's approach was reasonable with regard to the job description issue. The respondent genuinely believed golf course superintendent was synonymous with Head Green Keeper. The respondent genuinely believed the claimant had done most if not all of the tasks set out in the job description they found on the claimant's file, which they

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understood from their experience of working with the claimant and their knowledge of the size and nature of the operation. The claimant accepted he spent many days (and often most of such days) working outside and had brought his own tools to the respondent, which supported the respondent's position. The claimant's role was an important role with managerial responsibilities and he was expected (and did) carry out manual tasks.

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124. The fundamental dispute between the parties was in relation to the reason for the treatment relied upon. The claimant was firmly of the view the treatment relied to disability and in some way was influenced by the protected acts. His position was that knowledge of his disability and discrimination claims led to the negative actions on which he relied. Had the Tribunal accepted that evidence, his claims would have been meritorious. However, the Tribunal, having spent considerable time assessing all the evidence before it, concluded that the respondent's position was to be preferred and the respondent did not act in a negative way towards the claimant for any reason related to disability. The protected acts were in no sense a reason for the treatments relied upon. This was a decision the Tribunal took having assessed all the evidence before it taking account of the parties' knowledge and perception and critically analysing the conduct in the context in which it occurred bearing in mind the claimant's agent's submissions and that people rarely readily accept to acting for prohibited reasons. Having considered the evidence, the Tribunal was able to make positive findings as to the reason for the treatment.

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125. Assessing whether or not the treatment was related to disability and assessing the influence (or not) of the protected acts took time and careful analysis of what the parties said in evidence together with what was said at the time orally and in writing.

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126. The difficulty with this case was that the claimant's position had become entrenched. He was not prepared to accept the position the respondent adopted and found many aspects of the decisions the respondent took to be inaccurate. There were errors the respondent had made and comments made that could be misunderstood. The Tribunal considered those matters and

found that the errors and comments did not detract from the genuineness of the respondent's belief as to their position.

127. This claim arose because the parties had been unable to resolve their working relationship and an impasse had been reached. The claimant viewed the actions of the respondent through a particular lens, firmly of the view the respondent was not acting fairly and honestly in its dealings with the claimant. That continued as matters developed and the claimant's perception of the respondent was firmly rooted on that belief. The difficulty was that the respondent was trying to work with the claimant to facilitate a return and such a return was impeded and ultimately prevented by the claimant's decision not to work with the respondent unless it accepted his position.

Law

Burden of proof

128. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

“(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

129. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

130. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

131. In ***Hewage v Grampian Health Board*** 2012 IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the

burden of proof provision should apply. That guidance appears in **Igen Limited v Wong** 2005 ICR 931 and was supplemented in **Madarassy v Nomura International Plc** 2007 ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

132. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

133. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see **Brown v London Borough of Croydon** 2007 ICR 909). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a Tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a *prima facie* case.

134. The Tribunal was also able to take into account **Field v Steve Pye & Co** EAT2021-000357 and **Klonowska v Falck** EAT-2020-000901. The Tribunal carefully considered the submissions made and made findings in light of the facts found. The Tribunal was careful to consider the submissions by the parties in this regard and make positive findings of fact on key issues.

Harassment

135. In terms of section 26 of the Equality Act 2010:

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

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

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

i. violating B's dignity, or

ii. *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*”

136. It is important to consider the conduct with regard to each element of the statutory test. Whether or not the conduct relied upon is related to the characteristic in question is a matter for the Tribunal to find, making a finding of fact drawing on all the evidence before it (see ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** EAT 0039/19). The fact that the claimant considers the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. There must be some basis from the facts found which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in the manner alleged in the claim. In that case the Employment Appeal Tribunal held it is a matter for the Tribunal to determine making a finding of fact drawing on all the evidence before it. There must be some feature of the factual matrix identified by the Tribunal which leads it to the conclusion conduct is related to the protected characteristic and the Tribunal should articulate clearly what feature of the evidence leads it to that conclusion. The Tribunal should consider the matter objectively.

137. For example in ***Hartley v Foreign and Commonwealth Office Services*** 2016 ICR D17 the Employment Appeal Tribunal held that an Employment Tribunal had failed to carry out the necessary analysis to see whether comments made by the claimant’s managers during a performance improvement meeting — accusing her of rudeness and apparently questioning her intelligence when she failed to understand a spreadsheet of comments concerning her performance — were related to her Asperger’s syndrome. The Employment Appeal Tribunal emphasised that an Employment Tribunal considering the question posed by section 26(1)(a) must evaluate the evidence in the round, recognising that witnesses “*will not readily volunteer*” that a remark was related to a protected characteristic. The alleged harasser’s knowledge or perception of the victim’s protected characteristic is relevant but should not be viewed as in any way conclusive.

Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic "cannot be conclusive of that question".

5 138. **Warby v Wunda Group Plc** EAT 0434/11 is authority for the proposition that the conduct should be viewed in context in assessing whether the conduct is related to the protected characteristic. The then President of the Employment Appeal Tribunal, Mr Justice Langstaff, upheld a Tribunal's decision that an employee accused by her superior of having lied about a miscarriage was not subjected to conduct "*related to*" her sex within the meaning of the sex discrimination provisions then in force. Langstaff P held that context was important and that the tribunal had been entitled to find that the accusation was made in the context of a dispute over a work matter, about which the employer believed that the employee was lying. Thus the conduct complained of was an emphatic complaint about alleged lying; it was not made because of the employee's sex, because she was pregnant or because she had had a miscarriage. While that case considered the predecessor legislation, the issue was whether the conduct was "related to" the protected characteristic.

20 139. In **Kelly v Covance Laboratories Ltd** [2016] IRLR 338 an instruction not to speak Russian at work, so that any conversations could be understood by English speaking managers was not related to race or national origins, even though it potentially could have been. The conduct was because the employer was suspicious about what was being said and could not understand. Viewed in the context of the company's business and risks the employer's explanation for the conduct was accepted and the conduct was not related to race or national origins.

25 140. In **UNITE the Union v Nailard** [2018] IRLR 730 the Tribunal had held that a failure to address a sexual harassment complaint made against elected officials of the union could amount to harassment related to sex "*because of the background of harassment related to sex*". The Court of Appeal considered that went too far. There had been no findings as to the mental processes of the (employed) officials of the union dealing with the complaint and whether they had been motivated by sex discrimination. The Court of Appeal noted that the previous potential liability for third party harassment

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under the Equality Act 2010, section 40 had been repealed and there was no automatic liability on the part of the union for harassment by third parties (if that was how the elected officials were to be characterised). The union could be (vicariously) liable for acts of discrimination by its employees but there would need to be a finding that the employees in question were themselves guilty of discrimination. An important point of this case was the reminder that Tribunals should focus on the conduct of the person who carried out the act and determine whether that conduct is related to the protected characteristic (not whether the conduct of someone else or some other conduct is related to the protected characteristic). If the action (or inaction) is because of illness or incompetence it may not relate to the protected characteristic.

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141. At paragraph 7.10 of the Code the breadth of the words “related to” is noted and some examples are provided. It gives the example of a female worker who has a relationship with her male manager. On seeing her with another male colleague, the manager suspects she is having an affair. As a result, the manager makes her working life difficult by criticising her work in an offensive manner. The behaviour is not because of the sex of the female worker but because of the suspected affair, which is related to her sex. This could amount to harassment related to sex.

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142. At paragraph 7.11 the Code states that in the examples there was “a connection with the protected characteristic”.

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143. The question of whether the conduct in question “relates to” the protected characteristic requires a consideration of the mental processes of the putative harasser (**GMB v Henderson** 2017 IRLR 340) bearing in mind that there should be an intense focus on the context in which the words or behaviour took place (see **Bakkali v Greater Manchester** 2018 IRLR 906). In **Bakkali** the question was whether a comment as to whether an individual was said to be still promoting ISIS/Daesh was related to race. The Tribunal found it was not as it related to a previous conversation. The Employment Appeal Tribunal emphasised that context is important and the words used must be seen in context. In considering whether the conduct is related to the protected characteristic there should be an intense focus on the context of the offending

words or behaviour. The mental processes of the perpetrator are relevant in assessing the issue.

144. In **Raj v Capita** 2019 UKEAT 0074/2019 the Employment Appeal Tribunal upheld a Tribunal which had found that the massage at his desk by a manager was not conduct related to sex. The conduct was misguided encouragement by a manager. It was an isolated incident and the context was key: a standing manager over a sitting team member in a gender neutral part within an open plan office. In that case the Tribunal did not expressly consider the burden of proof provisions but had found that the conduct was in no sense whatsoever related to sex.

145. Section 26(4) of the Act provides that:

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

(a) the perception of B;

15 *(b) the other circumstances of the case;*

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

146. The terms of the statute are reasonably clear, but guidance was given by the Court of Appeal in **Pemberton v Inwood** 2018 IRLR 542 in which the following was stated by Lord Justice Underhill: *“In order to decide whether any conduct falling within sub-paragraph 10 (1)(a) of section 26 Equality Act 2010 has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).”*

147. The Code states (at paragraph 7.18) that in deciding whether or not conduct has the relevant effects account must be taken of the claimant’s perception

and personal circumstances (which includes their mental health and the environment) and whether it is reasonable for conduct to have that effect. In assessing reasonableness an objective test must be applied. Thus, something is not likely to be considered to be reasonable if a claimant is hypersensitive or other people are unlikely to be offended.

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148. In relation to the effect of the conduct, intention is not a prerequisite and the effect is to be considered from the perception of the Claimant. The Code (at paragraph 8.20) gives the example of a club manager at a meeting making derogatory comments and jokes about women to a mixed sex audience. It is not that person's intention to offend or humiliate anyone, however the contact may amount to harassment if the effect of it is to create a humiliating or offensive environment for a man or woman in the audience.

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149. Relevant circumstances include the claimant's personal circumstances, cultural norms and previous experience of harassment. The perpetrator being in a position of trust or seniority over the recipient is also a relevant factor.

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150. Further as Underhill LJ stated above when deciding whether the conduct has the relevant effects (of violating the claimant's dignity or creating the relevant environment) the claimant's perception and all the circumstances must be taken into account and whether it is reasonable for the conduct to have the effect (Lindsay v LSE 2014 IRLR 218). Elias LJ in **Land Registry v Grant** 2011 IRLR 748 focused on the words "*intimidating, hostile, degrading, humiliating and offensive*" and said "*Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upset being caught*".

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151. Chapter 7 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

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Victimisation

152. Victimisation in this context has a specific legal meaning defined by section 27:

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because--*

(a) *B does a protected act, or*

(b) *A believes that B has done, or may do, a protected act.*

5 (2) *Each of the following is a protected act--*

(a) *bringing proceedings under this Act;*

(b) *giving evidence or information in connection with proceedings under this Act;*

10 (c) *doing any other thing for the purposes of or in connection with this Act;*

(d) *making an allegation (whether or not express) that A or another person has contravened this Act.*

15 (3) *Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.*

153. In terms of section 27(2)(d), namely the making of an allegation (whether or not express) that A or someone else has contravened the Equality Act, an issue has arisen as to whether an allegation of conduct for which the respondent could not be liable could still amount to a protected act. This issue was considered in ***Waters v Commissioner of Police of the Metropolis*** 1997 ICR 1073. In this case a woman police officer accused a male colleague of sexually assaulting her. Following this accusation, she was subjected to various forms of harassment and other unfair treatment at work. The Court of Appeal held that, on the officer's own version of events, her colleague had not committed the assault "*in the course of his employment*" and so the Commissioner of Police could not be held liable. It followed that she was not entitled to rely on her allegation of assault for the purpose of a victimisation claim as she had not alleged that her employer had committed an act which would amount to a contravention of the Act.

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154. Waite LJ said: “*All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of section 6(2)(b). The facts alleged by the complaint in this case were incapable in law of amounting to an act of discrimination by the Commissioner because they were not done by him, and they cannot (because the alleged perpetrator was not acting in the course of his employment) be treated as done by him for the purposes of section 41 of the Act.*”
155. That was a decision made in relation to the predecessor legislation to the Equality Act 2010 but there is no authority that suggests the position is otherwise to that set out by the Court of Appeal.
156. In **Page v Lord Chancellor** UKEAT/0304/18/LA, the claimant, a lay magistrate sitting on family cases involving adoption decisions, gave an interview to the BBC in which he expressed his Christian faith based view that it was “*not normal*” for a child to be adopted by a single-parent or a same-sex couple. The BBC report explained that the claimant had been suspended and disciplined. The Employment Appeal Tribunal held that it could not be inferred that there had been any specific allegation made by the claimant against the respondent so as to have amounted to a protected act. In the relevant interview, the claimant had done no more than explain his position and why he had done what he had done that had led to his reprimand. In doing so, he had made no reference to his Christian beliefs or that they had formed part of the reason for him being suspended and disciplined. Accordingly, the Employment Appeal Tribunal held that the Tribunal had not erred in finding that the comments made by the claimant in the interview had not constituted a protected act given that he had made no allegation of discrimination.
157. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC** 2013 ICR 337. It is an objective test focussed on the perception of the reasonable worker in all the circumstances of the case. Detriment is, accordingly, treatment which a

reasonable worker would or might regard as being to their disadvantage. It is not necessary for the claimant to demonstrate some physical or economic consequence.

158. The (then) House of Lords confirmed the position in ***Derbyshire v St Helens Metropolitan Borough Council*** 2007 ICR 841. Lord Neuberger opined that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. In assessing whether there is a detriment therefore consideration needs to be given to both subjective and objective elements, looking at matters from the claimant's point of view but his or her perception must be '*reasonable*' in the circumstances.

159. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why". In other words, the protected act must be an effective and substantial cause of the treatment, it does not need to be the principal cause. The Tribunal is concerned with establishing what the real reason (conscious or subconscious motivation) or reasons for the treatment is.

160. In determining whether a detriment was because of a protected act, it is important that the protected act is identified with precision and that the relationship between the detriment and that act specifically is examined. In ***JJ Food Service Ltd v Mohamud*** EAT 0310/15 the claimant went to work in jeans in breach of his employer's dress code. When challenged about this he alleged that the dress code was discriminatory as it was applied differently in relation to women. He was dismissed, ostensibly for breaching the dress code and disobeying management instructions, but he brought proceedings alleging that he had been victimised. A Tribunal upheld his claim on the basis that the fact that he had questioned the application of the dress code policy was a significant contributory factor in the decision to dismiss him. However, the Employment Appeal Tribunal allowed the employer's appeal on the basis that the tribunal should have asked itself whether the allegations of sex discrimination amounted to such a factor. While in some cases the Tribunal's

language might have been acceptable short-hand, in this case it was significant that the Tribunal did not ask itself the right question because there were other grounds on which M was challenging the application of the dress code. In addition, this was a case where it might have been open to the Tribunal to conclude that it was, for example, the manner or persistence of his complaints rather than the content of them which had led to his dismissal.

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161. The Tribunal has to consider not just whether or not the protected acts themselves were the reason but whether or not there are any other factors relating to the protected acts which were in the respondents' mind when taking decisions. For example, employees may lose the protection of the anti-victimisation provisions because the detriment is inflicted not because they have carried out a protected act but because of the manner in which they have carried it out.

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162. An approach that distinguishes between a protected act and the manner of doing that act was endorsed by Mr Justice Underhill, in ***Martin v Devonshires Solicitors*** 2011 ICR 352. In his view, there were cases where the reason for the dismissal (or any other detriment) was not the protected act as such but some feature of it which could properly be treated as separable — such as the manner in which the protected act was carried out.

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Unlawful deduction of wages

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163. Section 13 of the Employment Rights Act 1996 provides workers with the right not to suffer unauthorised deductions from their wages. Section 13(3) defines a deduction as “*where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion*”.

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164. Accordingly, there cannot be a deduction unless the wages claimed were “properly payable” in the first place. In order to determine what is “properly payable” for the purposes of section 13(3), the Tribunal is required to “*make findings as to the claimant's contractual entitlement to pay or...payments that were properly payable by reference to her employment in order to identify*

whether and to what extent there had been a shortfall” (Davies v Droylsden Academy UKEAT/0044/16, paragraph 37).

165. In so doing, the Employment Tribunal has jurisdiction to make a determination on the terms of the worker’s contract, including questions of contractual interpretation (*Agarwal v Cardiff University* [2018] EWCA CIV 2084). That may involve a requirement to consider not just the construction of the contract in question, but also general rules of contract law (*Cleeve Link Ltd v Bryla* 2014 IRLR 86).

166. The Tribunal is required to assess what was properly payable and compare that with what was paid and in the event of the sum being paid being less than that properly payable, section 24 states that the Tribunal shall make a declaration that the complaint is well founded and order the respondent to pay to the worker the amount of any such unlawful deduction.

Submissions

167. Both parties produced written submissions and the parties were able to comment upon each other submissions and answer questions from the Tribunal. The Tribunal deals with the parties’ submissions as relevant below, but does not repeat them in detail. The parties’ full submissions were taken into account in reaching a unanimous decision.

Decision and reasons

168. The Tribunal spent a very substantial amount of time considering the evidence that had been led, both in writing and orally and the full submissions of both parties and was able to reach a unanimous decision on each of the issues. The Tribunal deals with issues arising in turn.

Harassment related to disability (Equality Act 2010 section 26)

169. The Tribunal took each issue in turn and considered the relevant statutory elements applying the law as above to the facts as found.

First unwanted act: subjecting the claimant to a partial grievance process

170. The first issue to determine is this act had been established in evidence. The person hearing the grievance was Mr G Campbell whom the claimant considered to be biased since his father was the person who had issued the job description on which his grievance was based. To the extent the conduct relates to the appointment of Mr G Campbell, this conduct did take place.

171. The Tribunal did not consider it self-evident that the appointment of Mr G Campbell was unreasonable or that such an appointment resulted in the process being devoid of partiality. The aim was to identify what the claimant's job description was. There was no suggestion that Mr G Campbell did not have a good working relationship with the claimant and Mr N Campbell. Mr Campbell was prepared to conduct a fair and extensive investigation into the issue the claimant had raised. The issue here was the claimant's perception. He believed that Mr G Campbell was not impartial. The Tribunal considered the errors the claimant had raised in relation to the outcome and did not consider these demonstrated that Mr G Campbell did not properly or fully consider matters. He approached matters with an open minded on the basis of the information he had. His response did have errors in it but the Tribunal did not consider those errors to support the claimant's agent's contention. The Tribunal looked at the entire factual context and matrix in reaching its conclusion.

172. The point arising was relatively sharply focussed and was in essence whether the job description that Mr N Campbell had issued (from that within the claimant's personnel file) was in fact the claimant's job description. That was the job description that was on the claimants personnel file, even although the claimant disputed its accuracy.

Did the act relate to disability?

173. The parties agreed the act, if established, amounted to unwanted conduct and so the next issue was whether the act related to disability.

174. The Tribunal considered this carefully in light of the authorities above. The Tribunal took care to avoid considering whether the treatment was because of disability, but instead focussed on the statutory words and whether the

conduct “related to disability” which is a wider concept. It is clearly possible that the reason for conduct could be something entirely unrelated to disability while the conduct itself is related to disability. The Tribunal has been careful to assess whether the conduct in question was related to disability.

5 175. The Tribunal was satisfied that the conduct, the appointment of Mr G Campbell to hear the grievance, was solely related to the fact the respondent believed Mr G Campbell was competent and capable of making a fair decision on the material before him in relation to the key question, the resolution of what the claimant’s job description was. There was no connection or influence
10 in deciding to appoint Mr G Campbell with the claimant’s disability. The act, the appointment of Mr G Campbell, did not in any sense relate to disability when viewed in context in light of what the parties knew and viewing the matter in context.

15 176. The only link to disability was the fact that the claimant believed the content of the job description amounted to disability discrimination. That did not, however, result in the decision as to who hears the claimant’s grievance being related to disability. The Tribunal did not accept that the respondent had decided to treat the claimant in a negative way once it had been alerted to the claimant’s disability such that the actions it took were related to disability. Had
20 the respondent taken such an approach on the evidence, the claimant’s agent’s submissions would have merit but on the facts of this case in light of the context in which the conduct occurred, the decision did not relate to disability. The decision was solely related to the fact it was believed that Mr G Campbell could fairly and competently determine the issue, the claimant’s
25 disability being entirely unconnected to that decision.

30 177. The Tribunal did not uphold the claimant’s agent’s submission that Mr C Campbell and Mr G Campbell were “acting in concert” and seeking to “stymie the grievance” by having Mr G Campbell consider matters. The Tribunal accepted Mr G Campbell’s evidence that he genuinely and fairly wished to and did consider the issues arising. There was no doubt that Mr N Campbell was concerned about the claimant’s absence from work but Mr N Campbell knew the claimant and considered the claimant to have a strong worth ethic.

The Tribunal did not find that the outcome of the grievance was unfair or partial or that Mr G Campbell had reached a decision that was not open to him from the information before him. The Tribunal considered the outcome to have been a fair one from the information before him and supported his evidence that he did fairly consider the issue. The decision to appoint Mr G Campbell was not related to disability in any sense.

Did the act have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10 178. While it was not necessary to determine this, the Tribunal considered whether or not the appointment of Mr G Campbell to determine the grievance satisfied this element of the definition. The Tribunal would not have been satisfied that the appointment of Mr Campbell had the purpose of violating the claimant's dignity. Its sole purpose was to fairly and reasonably consider the claimant's grievance.

15 179. The claimant was clearly unhappy that Mr G Campbell had been chosen. The Tribunal would not have been satisfied that the effect of the appointment was to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. He was unhappy at the choice but given he had a good working relationship with Mr G Campbell and no issues had been raised prior to this, the unhappiness the claimant had was because he wanted someone else to hear the matter.

20 180. The claimant's agent's submissions in this regard were the same for each act of harassment, arguing the treatment had its purpose the creation of the proscribed effects because of the "retaliation" of Mr N Campbell. The Tribunal did not accept Mr N Campbell was in any sense seeking to retaliate against the claimant.

If not, did it that effect?

25 181. The Tribunal also considered whether in fact the decision to appoint Mr G Campbell to hear the grievance violated the claimant's dignity or created an

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intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was upset that the decision had been taken as he believed Mr G Campbell was not partial and would not consider matters fairly. He did not like the decision. The Tribunal took into account the claimant's perception. The Tribunal was not satisfied, however, the decision did in fact violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

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182. Even if the proscribed effects had been established as a fact, the Tribunal would have found that it was not reasonable for the conduct to have the proscribed effects. While the claimant's perception was that the appointment of Mr G Campbell was unfair and biased, objectively viewed, the respondent was seeking to determine a narrow issue as to the claimant's job description. It was alleged that this in turn led to discrimination but the key issue was whether the job description the respondent had on the claimant's personnel file was that pertaining to the claimant. Mr G Campbell was capable of fairly investigating this matter and reaching a fair conclusion. He had a good working relationship with both the claimant and Mr N Campbell and there was no basis to find in relation to this particular issue that Mr G Campbell would do anything other than determine the matter fairly from the information before him. He wished to do what was right. He intended to approach the matter (and did approach the matter) with an open mind. Looking at all the circumstances including the claimant's perception, it would not have been reasonable for the conduct to have had the proscribed effects.

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Second act: Failure to uphold the claimant's grievance dated 19 August 2022 on 13 October 2022

183. It was conceded that this act had taken place and that it was unwanted. The key question was whether the failure to uphold the grievance related to disability.

Did it relate to disability

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184. The Tribunal focussed on the act, viewed in context. The Tribunal found that the grievance was dismissed solely because Mr G Campbell was satisfied

there was no merit in it. The decision not to uphold the grievance did not relate to disability. To hold otherwise could result in every grievance about disability discrimination that is not upheld (irrespective of its merits) being an act relating to disability. While in some cases that may be so (such as where there is evidence that supported the claimant's principal submission, namely a desire to act negatively towards the claimant due to his disability or for reasons related to it), the Tribunal must consider the context and the facts before it.

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185. In this case the failure to uphold the claimant's grievance was related to the material before Mr G Campbell and his decision in relation to that material. The decision did not relate to disability which was entirely unconnected to his decision and in no way influenced it. The grievance was about disability but the decision not to uphold it did not relate to disability. The context of the decision is important, taking account of what the claimant perceived and what Mr G Campbell knew. From a full assessment of the facts, the decision not to uphold the grievance was not related to disability. The claimant's grievance included assertions of disability but the decision not to uphold it was not, on the facts before this Tribunal, related to disability.

186. The Tribunal did not accept the claimant's agent's submission that the failure to uphold the grievance was "in effect a forgone conclusion". The appointment of Mr G Campbell was not an unreasonable approach to take given the narrow issue under consideration. The Tribunal did not accept the submission that Mr N Campbell had a "discriminatory motive". While Mr Campbell was concerned as to the claimant's absence and the lack of progress, the decisions that were taken were reasonable on the facts.

187. The Tribunal did not accept that Mr N Campbells' comments about the claimant's impairment was an indicator of malice or unfairness that somehow affected how Mr G Campell acted. Mr N Campbell was concerned by the extent of the claimant's impairments (the extent of which had been unknown to him).

188. The Tribunal did not find any conscious or subconscious animus towards the claimant for any reasons connected to his disability or that his disability was connected in any way to the approach the respondent took. The claimant's agent's submission that the claimant's disability was a material influence was not upheld, there being no evidence on the facts of this case to support that assertion. The claimant's disability was not at all relevant or connected on the facts. The comments of Mr N Campbell and his view of the claimant and his absence were his views but that did not result Mr G Campbell's determination of the grievance being in any sense related to disability. He reached a decision that was reasonably open to him, having applied his mind independently to the issues. The reason for upholding the grievance was solely because there was no merit in it from the information he had.

Did the act have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

189. Had it been necessary to consider this element, the Tribunal would have found that the purpose of the refusing the grievance was not to violate the claimant's dignity or create an intimidating hostile degrading humiliating or offensive environment. The purpose was to fairly resolve the dispute that had arisen and determine the issues from the information that had been provided.

If not, did it have that effect?

190. The Tribunal also considered whether in fact the decision not to uphold the grievance violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The Tribunal did not find the decision to have had such an effect. The claimant did not like the outcome but the decision was not such as to create the proscribed effects on the facts.

191. The claimant was unhappy with the outcome. That was natural because the claimant believed that he was correct and the respondent was incorrect. It would not have been reasonable, objectively viewed, for the conduct to have had the effect. On the facts before the Tribunal the respondent did reasonably

and fairly investigate the matter the claimant had raised. The respondent reached a decision from the information before it. That decision was reasonable, albeit not the decision the claimant wished.

5 *Third act: Prevent the claimant from appealing against the grievance outcome of 13 October 2022*

10 192. Mr G Campbell did not know that the claimant had authorised his daughter to act on his behalf. However, he did know that grounds of appeal had been lodged and had decided not to take them forward. He therefore did prevent the appeal from proceeding. This act had therefore been established and the parties agreed the act was unwanted conduct.

Did the act relate to disability

15 193. The issue with regard to this act was whether the act related to disability. The decision Mr G Campbell took not to allow the claimant to progress with his appeal was because the claimant had not submitted an appeal in the form and time Mr G Campbell had directed. Mr Campbell had taken legal advice and believed he was unable to deal with the claimant's daughter with regard to the appeal. The appeal had been lodged late. On that basis the appeal that was subsequently lodged by the claimant's daughter was not taken forward. The reason not to take the appeal forward did not relate to disability. It was solely because Mr Campbell felt he was unable to correspond with the claimant's daughter and the appeal had been lodged outwith the time set out in his letter.

25 194. The Tribunal carefully considered the comments which had been made but did not accept the claimant's agent's assertions that comments made about the claimant's disability and medical reports resulted in decisions being taken being related to the claimant's disability.

30 195. The Tribunal considered this issue carefully. The Tribunal must not decide upon the reasonableness of what Mr G Campbell did but instead focus on whether the action related to disability viewed in context. The Tribunal also bore in mind that the reason for something might not be disability but the act

itself could still be related to disability. The Tribunal accepted Mt G Campbell's evidence and considered on balance and in light of the context in which the act took place that the decision not to take the grievance forward was in no sense related to disability. Mr G Campbell genuinely believed he was unable to progress the grievance without express written consent from the claimant, which he had understood was not present. The appeal was late. He therefore chose not to progress the appeal when the claimant's daughter subsequently lodged it. The appeal outcome had been issued on 13 October 2021 with 5 days being given to lodge an appeal and grounds for the appeal. While the claimant's daughter indicated an appeal was to be lodged, the appeal was not in fact lodged until 13 December 2021. That decision when viewed in the context in which the decision was made, taking account of the knowledge and perception of both parties, was not related to disability. The claimant's disability was entirely unrelated to Mr G Campbell's decision.

15 *Did the act have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?*

196. The act did not have as its purpose violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The purpose was to ensure that the direction that had been given was followed. As the direction had not been followed, Mr G Campbell understood that he was unable to progress the appeal.

Did the act have that effect?

197. The Tribunal was satisfied that the claimant was upset that his appeal had not been taken forward. From the evidence before the Tribunal the effect of the decision not to allow his appeal to be considered was not such as to fairly be considered as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was not happy his appeal had not been considered but from the evidence that did not amount to violating the claimant's dignity or creating an

intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

198. On the facts of this case the Tribunal would not have found it reasonable for the act to reasonably be considered as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. From the facts of this case Mr G Campbell had taken legal advice and genuinely believed he was unable to progress matters without express written consent of the claimant. He had not received any such consent. He took the decision not to progress the grievance. While other employers may well have acted differently, from the evidence before this Tribunal, viewed in context and objectively, it would not have been reasonable for the claimant to have found the decision to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him.

15 *Fourth and fifth act: Give an inaccurate job description to the occupational health provider on 7 April 2022 and again on 22 November 2022*

199. The Tribunal did not find the respondent had presented an inaccurate job description as the claimant alleged. While it was a job description with which the claimant disagreed, the respondent genuinely believed the job description was accurate. It was found within the claimant's personnel file and reflected what the respondent believed the claimant's duties to be.

200. While the respondent agreed to vary the job description (in terms of the weights that could be lifted) the content of the document represented what the respondent believed the claimant's duties to cover. They had understood the claimant believed his role was more management based upon their knowledge of the claimant and their operation was such that they believed the document they had located to be accurate.

201. It was not disputed that the claimant believed the role of golf course superintendent was different to that of head greenkeeper but that was not the respondent's understanding. While the claimant said he had not seen the job description before, the Tribunal accepted the respondent's evidence that it

contained duties and tasks that the respondent genuinely believed the claimant had done or would do as part of his day to day tasks given the nature of his role, experience and the nature and size of the operation.

Did it relate to disability?

5 202. If the act had been established, the parties had agreed it was unwanted
conduct and the Tribunal would then have had to consider whether the act
related to disability. Had it been necessary to do so, the Tribunal would have
found that on the facts before the Tribunal the decision to send to the
occupational health provider the job description the respondent genuinely
10 believed to be the claimant's job description did not relate to disability. It was
necessary to provide the job description to allow information to be provided
as to the claimant's fitness for work. The decision, which was a reasonable
decision on the facts, was not related to disability but was purely to facilitate
an informed decision as to the claimant's fitness for work. When viewed
15 objectively in context, the decision did not relate to disability. This decision
applies in respect of both individual acts, the circumstances pertaining to them
being identical.

*Did the act have the purpose of violating the claimant's dignity or creating an
intimidating, hostile, degrading, humiliating or offensive environment for the
20 claimant?*

203. The purpose of sending the job description the respondent had (on both
occasions) was not to violate the claimant's dignity or create an intimidating,
hostile, degrading, humiliating or offensive environment for the claimant but
to ensure the occupational health provider had all the necessary information
25 to issue a relevant report.

If not, did the act have that effect?

204. The claimant was unhappy that the job description had been sent to the
occupational health provider but on the facts of this case the decision did not
violate the claimant's dignity or create an intimidating, hostile, degrading,

humiliating or offensive environment for the claimant. The claimant did not like the decision but the proscribed effects had not been established in evidence.

205. Viewed objectively, taking account of the claimant's perception and the respondent's knowledge, it would not have been reasonable to consider the effect to be the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The respondent genuinely believed the job description it had was accurate and while the claimant disagreed, the respondent proceeded upon its reasonable and genuine belief. Relying upon that job description was a reasonable position to take and it would not have been reasonable for the decision to be found to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

206. The claimant's agent's submissions with regard to the effect of the treatment were identical for each of the acts of harassment, arguing an inference should be drawn that Mr N Campbell was "affronted" the claimant had made allegations of discrimination and he had found the claimant's coughing to be disturbing and frightening. The Tribunal accepted Mr N Campbell's evidence that he was concerned for the claimant particularly in light of the serious effects and nature of the claimant's debilitating impairments. That was what Mr N Campbell found disturbing, the seriousness of the illness. The issue was not whether Mr N Campbell's comments were hostile or offensive but whether each individual act viewed objectively within context could reasonably be considered to have the proscribed effects. Having analysed the context in light of what the parties knew the Tribunal did not find the conduct to reasonably have the proscribed effects.

Sixth act: Deduct £480 on 31 December 2022 (the cost of the Occupational Health report)

207. The parties had agreed the deduction had been made and it was unwanted conduct. The issue was whether the deduction related to disability.

30 *Did it relate to disability?*

208. The Tribunal was not satisfied the decision to deduct the cost of the occupational health report “related to disability”. The decision to deduct the sum was because the respondent was concerned it had to pay for something that it would not receive. The respondent was not prepared to pay for something which they had agreed would be obtained to facilitate the claimant’s return to work. It was possible that the report itself could in fact have suggested the claimant was fit for work or that his impairments had in some way materially changed. It was equally possible the report was neutral, there having been no change or the report could have discussed a worsening of the impairments.

209. The deduction stemmed from the respondent’s frustration that the claimant refused to release the report to allow matters to progress. Mr N Campbell was concerned that the claimant was not cooperating with the respondent to progress his return to work. The decision in light of the knowledge and perception of both parties when viewed objectively in the context in which it occurred did not relate to disability. The frustration arose because of the fact matters were not progressing. The act was not related to disability.

210. It was ironic that the claimant believed the deduction in respect of the cost of the report was an attempt to remove him, when in fact the purpose of seeking the report was to help the claimant back to work and identify tasks he was capable of doing.

Did the act have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

211. The purpose of the decision to deduct the relevant sums was not to violate the claimant’s dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant but to seek reimbursement for a report that the claimant was refusing to provide. That was the sole purpose of the deduction.

Did the act have that effect?

212. The Tribunal was not satisfied the decision to deduct the sums actually violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The claimant was unhappy with the decision but given the respondent had sought to work with the claimant and had understood that the report would be forthcoming, and assist them in working with the claimant to facilitate his return to work

213. Taking account of the knowledge and perception of both parties and viewed all the circumstances of his case, the Tribunal considered that it would not have been reasonable for the conduct to have the proscribed effects. The respondent was understandably concerned that the claimant had decided not to share the report about his health with the respondent when the report had been obtained, with the claimant's agreement, to seek as much information as to the claimant's health and current position to facilitate a return to work. The claimant's decision not to share the report led the respondent to seek reimbursement of the cost of the report. The decision could not reasonably be considered as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Seventh act: Vary or attempt to vary, the claimant's contractual duties by including additional duties/requirements within a job description which were capability requirements, namely that should be able to stand or walk whole golf course and have knowledge of operation of electric welder's torches, pneumatic tools (which were not part of skills set of a greenkeeper or golf course superintendent) around 27 January 2023, 20 February 2023 and finally on 7 April 2023

214. The Tribunal did not accept that the respondent had varied or attempted to vary the claimant's duties as alleged on any of the dates alleged. The job description the respondent had represented what they believed the claimant's duties to be. While the claimant disagreed, his "contractual duties" were those reasonably considered by the respondent to fall within the role of head green keeper/golf superintendent (which the respondent considered to be interchangeable, even although this was disputed by the claimant). It was not correct therefore to assert that the respondent was seeking to vary or had varied the claimant's duties. The duties in question were already part of the

claimant's contractual position, even although the claimant disagreed with that.

Did the act "relate to disability"?

5 215. If the conduct had been established, it was agreed it was unwanted and the next issue would have been whether it related to disability. The decision to present the job description the respondent believed was accurate did not relate to disability on the facts. The decision related to the respondent's desire to ensure the job description represented what the respondent believed the claimant's duties to be, identified both from the job description on file and from
10 their experience in working with the claimant. The decision did not relate to disability.

15 216. The Tribunal did not accept the claimant's agent's submission that there was a desire by the respondent to make the claimant's working life difficult once it discovered his disability and the respondent's negative actions towards the claimant thereafter therefore related to disability. The respondent genuinely believed the claimant's contractual duties were as it set out. The respondent knew the claimant disagreed but the respondent proceeded upon their belief which the Tribunal found was genuine. There was no desire to frustrate the claimant because of his disability or for reasons connected to it, when the
20 respondent insisted upon what it considered, reasonably, upon the claimant's duties.

Did the act have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

25 217. The purpose of the act was not to violate the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant but to fairly represent the duties the claimant had. That was the respondent's genuine and reasonable belief. The purpose was solely to represent what the claimant's contractual duties already were.

30 *Did the act have that effect?*

218. In this case the claimant was unhappy with the decision that had been taken. He did not like the fact that the respondent did not agree with him. However, the Tribunal from the evidence before it did not consider the claimant to have concluded that the actions of the respondent in this regard violated the claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

219. Viewed objectively and taking account of the knowledge of the claimant and respondent, it would not have been reasonable for the conduct to have the proscribed effects. While the claimant was unhappy that the job description was incorrect, the respondent had reasonably reached a conclusion from the information before them that the description was accurate. They were entitled to rely upon it, irrespective of the claimant's unhappiness.

Eighth act: Not pay 10 day's sick pay which was requested on 16 April 2023

220. It was conceded that this happened and that it was unwanted. The key issue was whether the refusal to pay sick pay related to disability.

Was the act related to disability?

221. The Tribunal considered the context and concluded that the refusal to pay sick pay was because of Mr N Campbell's view that the claimant was not entitled to 10 day's sick pay in terms of the contract. He believed the contractual entitlement was to 10 day's per period of absence (in respect of absences lasting more than a year) and that satisfactory evidence had not been produced. The claimant's disability was not related to that decision or interpretation.

222. Mr N Campbell was not satisfied the contractual conditions which required to be satisfied had been satisfied such that sick pay was due. The Tribunal did not accept the submission that that there was an underlying attempt to frustrate the claimant in all his requests because of his disability. Mr N Campbell genuinely believed the claimant was not entitled to the sum in question and as a result it was not paid. While Mr N Campbell was wrong in his interpretation of the contract, his view was genuine and was why sick pay

was not paid. The decision was not related to disability when viewed in the full context in which the decision was taken.

Did the act have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

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223. The sole purpose of the decision not to pay sick pay was to ensure a decision was taken that was consistent with the understood contractual position. Mr N Campbell did not believe the claimant was contractually entitled to sick pay. The purpose was not to violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

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Did each act have that effect?

224. There was limited evidence as to the effect of the decision not to pay sick pay. While it upset the claimant, the Tribunal did not consider the decision to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

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225. From the evidence before the Tribunal and taking account of the knowledge and perception of both parties and viewing the context objectively, it would not have been reasonable for the claimant to have considered the decision not to pay him sick pay as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The respondent genuinely believed the claimant had not provided satisfactory evidence of his absence, given he was refusing to consent to provide a report that evidenced his fitness for work. While fit notes had been provided the claimant knew a report was available that set out an occupational health provider's opinion on matters, albeit based upon a job description with which the claimant disagreed (but one the claimant knew the respondent considered to be accurate). The claimant knew that the respondent believed sick pay was not contractually due. While that interpretation was wrong in law, it would not have been reasonable for the claimant to have concluded the effect of not paying him sick pay was violating the claimant's dignity or

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creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant on the facts of this case.

Ninth act: Refuse the claimant's holiday request in May 2023

226. The claimant's request for holidays was met with reference to the handbook.

5 The matter does not appear to have been taken forward. The Tribunal did not find evidence that the holiday request had been refused. The claimant did not follow up the email that was sent that referred to the handbook (which detailed the provisions with regard to holidays). That was not as such a refusal but rather referred to the holiday provisions within the handbook. The claimant
10 did not make any further request or query what had been sent. The request had not therefore at least expressly refused and the matter was not taken forward by the claimant. There was no evidence that the matter was being insisted upon given the terms of the handbook.

227. Had this been made out, the parties agreed the act was unwanted conduct
15 and the issue would have been whether it related to disability.

Did the act relate to disability?

228. The request was not taken forward by the claimant, the respondent having referred to the handbook with regard to holidays. No response to the respondent's email was made and accordingly no action was taken. If the
20 decision was a refusal, albeit impliedly, the decision not to process the holiday request did not relate to disability. Viewed in context, the request was not processed as the claimant did not reply to the respondent's email and no further action was taken.

229. The claimant's disability was entirely unrelated to the approach the
25 respondent took. If the request had been refused, it had been refused because the respondent had provisions which detailed how and when holidays be taken and the respondent wished those provisions followed. While the claimant was already off work, the taking of holidays had a financial implication for the respondent and therefore when holidays were taken
30 impacted upon the respondent. Disability was not related to the way in which

5 this holiday request was progressed. The claimant's agent's submission of an underlying pattern of behaviour by the respondent, which was connected with the claimant's disability, was not upheld. Viewed objectively in light of the context in which the conduct occurred in light of what the claimant and respondent knew, this was not conduct related to disability.

Did the act have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10 230. The sole purpose of the decision not to pay holiday pay was because the respondent did not consider it suited the business at that time to pay holiday pay, which was why the respondent referred to the employee handbook. The purpose was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

Did the act have that effect?

15 231. There was limited evidence as to the effect of the decision not to pay holiday pay at this time. While it upset the claimant, the Tribunal did not consider the decision to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

20 232. From the evidence before the Tribunal and taking account of the knowledge and perception of both parties and viewing the context objectively, it would not have been reasonable for the claimant to have considered the decision not to pay him holiday pay as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The respondent did not consider paying holiday pay to be in the
25 respondent's interest in terms of cash flow. It would not have been reasonable for the claimant to have concluded the effect of not paying him holiday pay was violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant on the facts
30 of this case.

Taking a step back

233. The claimant's case was essentially based upon there being a concerted and repeated attempt to treat the claimant badly because of his disability and as a consequence the acts relied upon were therefore related to disability. The acts by themselves were not inherently or obviously related to disability but rather the Tribunal was invited to assess the evidence as a whole, the context in which the acts occurred in light of what was known and perceived by both parties, and find the acts were related to disability. The claimant's submissions in relation to harassment were very similar to those pertaining to victimisation. The essence of the claim was that once the claimant disclosed he was disabled (and made complaints about it) the respondent took actions to "scunner" the claimant and make his working life difficult.

234. The Tribunal looked at the evidence in detail in light of the claimant's agent's submissions. The Tribunal had the benefit of non legal members. The Tribunal unanimously did not uphold the claimant's agent's submission. From the evidence before the Tribunal there was no doubt the claimant sincerely and firmly held that belief (that the respondent's actions were related to his disability). Comments made by and actions of the respondent were accordingly viewed through that lens by the claimant. The claimant's perception and belief is a relevant factor which the Tribunal took into account. However, in reality and objectively viewed the Tribunal found the respondent's actions as relied upon by the claimant above did not to relate to the claimant's disability at all. The respondent was seeking to work with the claimant to facilitate his return to work. As matters progressed and an impasse was reached the respondent became frustrated that no progress had been made. That was not related to the claimant's disability. It stemmed from the fact the respondent and claimant were no longer cooperating or working together to facilitate a return to work and the claimant was unable to accept the decisions the respondent had made. As time progressed no progress was made. The respondent was concerned that the claimant was not working with the respondent and refused to accept their decision.

235. Mr N Campbell was concerned as to claimant's impairments and the impact they had but that was a concern relating to the claimant and how the impairments manifested themselves. The Tribunal did not accept the claimant's agent's submission that there was a concerted attempt by Mr N Campbell and Mr C Campbell to treat the claimant in a negative way for reasons related to the claimant's disability or that the negative treatment was related to disability. The Tribunal found the claimant's disability, viewed objectively and in context, to be entirely unrelated to the conduct relied upon.

236. The Tribunal evaluated the evidence in the round, acknowledging that witnesses rarely readily concede a protected characteristic was connected to their actions and considered matters objectively. In reaching the decision above, the Tribunal took account of what Mr N Campbell and Mr C Campbell knew about the claimant's disability and the claimant's perception of the conduct in question. Those were relevant factors which were considered. But the Tribunal had to view that in context of the conduct and considered carefully the context in which the conduct took place which was important. The Tribunal was alive to the fact that the reason for the conduct is not related to disability does not necessarily mean the conduct itself is not related to disability. Having carried out the assessment of all the evidence before it and applied the law, the Tribunal unanimously concluded that none of the unwanted acts relied upon by the claimant related to disability. The harassment complaint is accordingly dismissed.

Victimisation (Equality Act 2010 section 27)

237. The parties had agreed that the claimant had carried out 3 protected acts, namely:

- Raise an appeal against the outcome of his grievance on 17 July 2021 which included an allegation of discrimination.”
- On 18 July 2022 make an allegation of discrimination, that his job description was discriminatory to Mr N Campbell; and

- Lodge a second grievance on 19 August 2022 referring to breaches of the Equality Act 2010.

238. The issue in relation to this complaint was therefore whether the detriments alleged had been established in evidence (it being accepted they would amount to a detriment if established in evidence) and whether the detriments were because of any of the protected acts. The Tribunal took each detriment in turn to assess in light of the evidence whether the treatment had been established and whether the protected acts were in any sense a reason for the treatment relied upon (in a more than minor or trivial way).

10 *First detriment: Subject the claimant to a partial grievance process*

239. As set out above, this was established in evidence to a limited extent. The Tribunal did not accept that the claimant was subjected to a partial process as the appointment of Mr G Campbell was considered to be fair and reasonable and he could impartially consider the matter.

15 240. To the extent this was a detriment, the Tribunal considered whether the first, second or third protected acts were in any sense whatsoever a reason for or connected to the treatment. Having assessed the evidence the Tribunal was satisfied these protected acts were in no sense a reason for or had a material influence upon the treatment. The reason why Mr G Campbell was appointed was solely to keep costs down and ensure the matter was fully and properly investigated. That was why no external party was engaged and no other party was involved. The respondent was satisfied Mr G Campbell could deal with the issue that arose and consider the issue fully and fairly. The first, second and third protected acts were entirely irrelevant and unconnected to (and had no influence upon) the decision in question.

Second detriment: Fail to uphold the claimant's grievance dated 19 August 2022 on 13 October 2022

241. The Tribunal assessed whether or not any of the protected acts influenced the decision not to uphold the grievance. The Tribunal was satisfied that the protected acts were in no sense connected to or materially influenced the

decision. Mr G Campbell considered the material he had obtained and issued a decision that he genuinely believed was the correct one. His decision was that the grievance was without merit from a reasonable assessment of the evidence he had obtained.

5 242. For the reasons set out above, the Tribunal did not accept the claimant's agent's submissions Mr N Campbell was seeking to adversely affect the claimant because of his disability or discrimination complaints or that Mr N Campbell was working with Mr G Campbell to harm the claimant in some way. The grievance outcome was solely based upon the facts Mr G Campbell had
10 obtained and his assessment of that material.

243. The Tribunal did not accept the assertion the first protected act was a "trigger" for the "retaliatory behaviour". Mr N Campbell was concerned about the claimant's health given the severity of his illness. The Tribunal did not find the respondent had sought to "block or styme" the discrimination claim. Mr N
15 Campbell did not believe there had been any discrimination and had sought to work with the claimant to facilitate his return to work. In any event the decision with regard to the grievance was Mr G Campbell's and he decided that matter independently of Mr N Campbell.

244. The fact the claimant had carried out the protected acts was in no sense
20 connected to or influential of the decision not to uphold the grievance. Mr G Campbell had considered all the material he could obtain in relation to the grievance. He investigated the matter and reached a decision that was open to him from the information he had obtained. The approach he took was fair and reasonable. While it was not perfect, the decision was reasonable and
25 based genuinely and solely upon Mr G Campbell's assessment of the evidence. The protected acts were in no sense a reason for his decision and the protected acts did not have any influence upon his decision.

Third detriment: Prevent the claimant from appealing against the grievance outcome of 13 October 2022

30 245. The Tribunal considered whether Mr G Campbell's decision not to allow the appeal to progress was in any sense connected to or influenced by the

protected acts. The Tribunal decided that the protected acts were in no sense connected to the decision. The protected acts did not influence the decision in any way. Mr G Campbell decided not to accept the appeal because of the time that had passed. The appeal had not been submitted in accordance with the outcome letter and he decided on that basis not to progress it.

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246. While some reasonable employers might well have proceeded to deal with the appeal, the Tribunal is satisfied from the evidence before it that Mr G Campbell's decision not to do so was in no sense influenced by the protected acts. The protected acts did not influence Mr G Campbell's decision in any way. Given the time that had passed, Mr G Campbell decided not to progress the appeal. He had not seen any written authority authorising the claimant's daughter to communicate on the claimant's behalf and given the time that had passed he chose not to progress the appeal. That was the sole reason for the decision.

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15 *Fourth and fifth detriment: Give an inaccurate job description to the occupational health provider on 7 April 2022 and 22 November 2022*

247. The Tribunal considered both occasions and was satisfied the sole reason on both occasions was the same. Mr N Campbell believed the job description he had was the correct job description and accurately reflected the claimant's duties. While the claimant disagreed, the description the respondent had was found on his personnel file and had aligned with what Mr N Campbell understood the claimant's duties to be from his experience of the claimant and the operation. The protected acts were in no sense whatsoever a reason for and did not influence in any material way the decision to send what the respondent considered the accurate job description to be to occupational health.

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248. The Tribunal considered the facts carefully and was satisfied the first protected act was in no way connected with (or influenced) the decision to provide the job description the respondent had to occupational health on 7 April 2022. The Tribunal did not accept the claimant's agent's submission as to the respondent's motivation and found the respondent was instead seeking

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to obtain as much medical input as possible to allow them to understand what the claimant's capabilities were (in relation to the tasks they reasonably understood the claimant's role to include). The motivation of the respondent was entirely unrelated to the protected act.

- 5 249. The Tribunal found the same in relation to the respondent's providing the same job description on 22 November 2022. The sole reason for doing so was to progress the claimant's return to work and was entirely unrelated to and not influenced by any of the three protected acts.

10 *Sixth detriment: Deduct £480 on 31 December 2022 (the cost of the Occupational Health report)*

- 15 250. The Tribunal accepted Mr N Campbell's evidence that the reason he deducted the sum in question was solely because the claimant had refused to consent to release the report. The respondent was being asked to pay for something which the claimant was refusing to provide and accordingly the claimant was being asked to repay the sum in question. The protected acts were in no sense whatsoever connected with or influential of the decision. The protected acts did not influence the decision in any way.

Seventh detriment: Not pay 10 day's sick pay which was requested on 16 April 2023

- 20 251. Mr N Campbell did not pay the claimant's sick pay as he believed it was not contractually due. He believed there was an implied term limiting payment to continuous sickness absence which lasted over a year and that there was not satisfactory evidence entitling the claimant to sick pay, as he had not disclosed the medical report. The Tribunal was satisfied that the protected acts were not a reason for the decision. The protected acts did not in any way influence the decision not to pay the sick pay that was due. The sole reason for not paying the sum requested was because Mr N Campbell genuinely believed the sums were not contractually due. The protected acts were not connected to that decision in any way.

Eighth detriment: Refuse the claimant's holiday request in May 2023.

252. As set out above, this had not been established in evidence since the respondent had responded to the request for holidays (or more accurately holiday pay) by referring to the handbook. The claimant took no further steps to seek holidays or holiday pay and the matter paused. On that basis it could not be said that the respondent had (at least expressly) refused the claimant's holiday request.

253. If the reference to the handbook was an implicit refusal, the Tribunal considered the reason for not progressing the request and found that the protected acts were in no sense connected to the decision not to expressly pay for the holidays on this occasion. The sole reason for not progressing the request was due to cash flow at the time in question. The protected acts did not in any sense influence the decision not to progress the claimant's request. The Tribunal did not accept that the respondent had sought to place barriers for the claimant because of the protected acts. The Tribunal having assessed the evidence and the claimant's agent's submissions, found that the protected acts were in no sense a reason for the decision and the protected acts did not influence the decision not to progress the holiday pay request.

Ninth detriment: Vary or attempt to vary, the claimant's contractual duties by including additional duties/requirements within a job description which were capability requirements, namely that should be able to stand or walk whole golf course and have knowledge of operation of electric welder's torches, pneumatic tools (which were not part of skills set of a greenkeeper or golf course superintendent) around 27 January 2023, 20 February 2023 and finally on 7 April 2023;

254. The Tribunal did not find that the respondent had varied or attempted to vary the claimant's contractual duties. The respondent's acted on the basis of what it considered the claimant's duties to be. The sole reason in seeking to progress matters was to facilitate a return to work for the claimant. The respondent genuinely believed that the job description it had from the claimant's personnel file was accurate. While they were prepared to adjust it, such as by altering weight requirements, they were not seeking to vary the

claimant's contractual duties. They were seeking to insist he carry out what his contractual duties were.

255. Even if the respondent had varied or sought to vary the claimant's contractual duties, the Tribunal would have found that the protected acts were in no sense
5 whatsoever a reason for the decision to rely upon the job description and the protected acts did not in any way influence the decision to rely upon the duties in this regard. The sole reason in seeking to rely upon the duties set out was because the respondent genuinely and reasonably believed those to be the claimant's contractual duties. None of the protected acts influenced the
10 decision to rely upon what the respondent genuinely believed the contractual duties to be in any sense.

Taking a step back

256. In reaching its decision with regard to the victimisation complaint, the Tribunal carefully assessed the evidence that had been led to assess what, if any,
15 influence each protected act had upon the detriments relied upon. That took time and involved assessing the oral evidence together with the documentary evidence and submissions. The Tribunal recognised witnesses rarely readily agree that protected acts did influence their decision in some way. The Tribunal also recognised that there can be more than one reason for an action
20 and it is possible for a protected act to influence a decision in more than a minor or trivial way. The Tribunal therefore took care to assess each detriment and each protected act in light of the evidence and applicable law. Given the points raised by the claimant's agent, which suggested the protected acts could be a reason for the treatment, the Tribunal analysed and assessed the
25 evidence to determine whether the protected acts were a reason (in a more than minor or trivial way) for the treatment.

257. The claimant's agent's submissions with regard to the victimisation complaint mirrored those underpinning the harassment complaint (with regard to the arguments that the acts were related to disability) which were that in essence
30 there was a recurring pattern such that the respondent's actions were influenced by the protected acts which led to the respondent treating the

claimant badly. It was asserted the respondent was seeking to “scunner” the claimant because (at least in part) of the protected acts. In other words the claimant believed that once the respondent knew of his claims of discrimination (and other protected acts), steps were taken to make things difficult for him.

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258. The Tribunal considered the evidence before the Tribunal carefully and the full submissions of the parties. The Tribunal did not accept that the first protected act was a trigger for retaliatory action by the respondent from which the other acts stemmed. The respondent was concerned by the assertions that had been made (as any employer would be given their seriousness) but that did not by itself mean the actions were connected. The respondent did not believe it had done anything wrong and was concerned that the claimant remained unable to accept the decision that had been reached and continued to assert that he had been discriminated against. The working relationship was not operating properly and the parties were in disagreement. An impasse had been reached. The claimant viewed the respondent’s actions through that lens and perceived that the acts which he considered detrimental, to be in some way connected to his protected acts.

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259. The respondent, however, was frustrated at the claimant’s refusal to accept their decision and to work with the respondent in facilitating his return to work. The disagreement infected the parties’ perceptions of each other and made a return to work difficult.

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260. The Tribunal did not accept the submission that any of the protected acts caused in some way (or influenced (in more than a minor or trivial way)) the acts relied upon. The reasons for the treatment were entirely unrelated to the protected acts and were in no sense whatsoever a reason for the treatment. The Tribunal considered the claimant’s agent’s submissions as to why it was said a reason for the treatment was

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261. The Tribunal accepted the respondent’s evidence that they genuinely believed the job description they had to be true and accurate. Their attempts to secure the claimant’s return to work were prevented due to the claimant’s

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firm believe the respondent was wrong in that conclusion. The respondent was frustrated at the lack of progress and the claimant's refusal to work with the respondent but that did not result in their actions being influenced by the protected acts.

- 5 262. In reaching its decision the Tribunal looked at all the evidence and the points raised by the claimant. The Tribunal carefully assessed the evidence. Applying the legal tests, the Tribunal found that none of the protected acts in any way influenced the treatment relied upon. On that basis the victimisation complaint is ill founded and is dismissed.

10 *Unlawful deduction of wages*

- 15 263. The claimant asserts that the respondent's deduction of the gross sum of £1,788.50 in relation to sick pay was an unlawful deduction since the sum was properly payable in terms of the claimant's contract. The respondent alleges the sum due was not properly payable since the claimant had not provided satisfactory evidence of absence, there being an outstanding occupational health report that the claimant refused to disclose. While Mr N Campbell in evidence said he believed there was an implied term that sick pay only arose in respect of one period of absence (and as such there was no annual entitlement to 10 days sick pay), the respondent's agent did not maintain that argument and relied solely upon the absence of satisfactory evidence as a condition entitling them respondent to decline to pay sick pay.
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264. The claimant's agent's submission was that the sum is due under the contract, the conditions precedent for payment having been satisfied.

- 25 265. The parties had agreed that if the claimant's agent's submission was correct in law, the sum payable was £1,788.50 gross (less deductions required by law).

- 30 266. The relevant contractual term in term of sick pay pertaining to the claimant was as follows: "The Club shall pay your full salary in respect of the first ten days of absence due to illness in any year (being a year commencing 6th April) during your employment (subject to satisfactory evidence of your

inability to attend work because of illness) but you shall not receive any payment in respect of any subsequent period of illness in any such year”.

Decision in relation to unlawful deduction

5 267. The parties agreed that the only issue was whether or not “satisfactory evidence” had been provided. In previous years the respondent had paid sick pay when the claimant had provided fit notes certifying the period of absence. Relevant medical information had also been provided, whether from the GP or otherwise.

10 268. It is a matter of fact that satisfactory evidence has now been provided. The claimant during these proceedings did provide the occupational health report and the respondent has seen it and it confirms the claimant was unfair for work. The report had not been disclosed to the respondent at the time payment had been sought. Given the only defence to not paying sick pay was the absence of satisfactory evidence, as such evidence had now been
15 provided, there is therefore no legal basis that the relevant sick pay entitlement can now be refused. The clause requires satisfactory evidence to be provided to release the payment. That evidence has now been provided and as a result the sum is now due. There is no restriction as to when the satisfactory evidence required to be provided, simply that satisfactory
20 evidence required to be provided, following which payment would be due.

25 269. The Tribunal considered the terms of the contract and noted the only issue is whether satisfactory evidence was provided to the respondent. That does not say an occupational health report had to be provided before payment was made and if the parties wished the contract to say that, it was open to include that requirement. The Tribunal must apply the contract as the parties had set out and not seek to re-write the bargain. The claimant had provided fit notes which had previously been accepted as satisfactory evidence. At no point had
30 it been suggested anything other than evidence as to fitness for work was satisfactory. Satisfactory evidence must mean what it says, interpreting the words the parties used when they entered into the contract.

270. At the time of request when fit notes had been provided, the respondent did not know what the occupational health report said. At that time therefore it could not be said that production of the report was itself satisfactory evidence without knowing its contents given fit notes had already been provided
5 evidencing the claimant's unfitness for work (given fit notes had already been provided setting out the claimant's unfitness for work). *Satisfactory* evidence does not mean *best* evidence but means what it says within context. Evidence from a GP of unfitness to work, which had been accepted before, absent any obvious material change in circumstances, must be what the parties intended
10 satisfactory evidence to be in context. While other evidence had been provided, such as medical reports, there was no suggestion sick pay was conditional upon that evidence being presented. It was sufficient that satisfactory evidence was presented, evidence that satisfactorily showed the claimant was unfit to work. When viewed in context the production of the fit
15 notes in relation to the deduction in question, viewed objectively, was satisfactory evidence. There was no suggestion for example that the claimant's medical position had changed such that the fit notes could no longer be relied upon as satisfactory evidence. Fit notes were not best evidence but they were satisfactory evidence, evidence that satisfied the
20 respondent the claimant was unfit for work.

271. Even if the occupational health report had not been provided, satisfactory evidence is evidence that satisfied the respondent (on an objective basis) that the claimant is unfit for work. That is what the fit note did and what was accepted on previous occasions as satisfactory evidence of fitness for work.
25 While the respondent was annoyed the occupational health report was not being provided, and such a report may have provided further evidence (and perhaps best evidence) as to fitness for work, absent clarity in terms of the contract, a normal interpretation would entitle the claimant to payment upon production of GP notes, which would reasonably be considered satisfactory
30 evidence. The Tribunal cannot rewrite the contract the parties entered into but must instead interpret the contract in light of what the parties intended their words to mean at the time it was entered into. Satisfactory evidence does not mean whatever evidence the respondent at any point in time decides is

satisfactory. It means evidence that objectively shows the claimant's inability to work.

5 272. Given satisfactory evidence has now been provided (which the respondent accepts is evidence of unfitness to work) and in the absence of any temporal restrictions upon such evidence being provided, the claimant is entitled to the sick pay in terms of his contract. Satisfactory evidence of fitness for work has (and had) been provided and as such 10 days sick pay is contractually due to the claimant in respect of the year in question.

10 273. This aspect of the claim therefore succeeds. The Tribunal declares that the complaint that the respondent had made an unlawful deduction of the claimant's wage in respect of the non payment of contractual sick pay is well founded. The respondent is ordered to pay the claimant the gross sum of £1,788.50, less such deductions required by law.

15 274. There was no evidence of a grievance having been lodged by or on behalf of the claimant in respect of this sum. However, there was no argument made before the Tribunal that the sum awarded sought be reduced (pursuant to Schedule A2 of the Trade Union and Labour Relations (Consolidation) Act 1992 or otherwise). In any event the Tribunal did not consider it just to make any adjustment to the sum given the absence of any evidence as to the reasonableness or otherwise of not following the relevant procedure in
20 connection with this complaint.

275. In all the circumstances the Tribunal therefore awards the gross sum of £1,788.50 in respect of the respondent's unauthorised deduction.

Final observations

25 276. It was regrettable that the working relationship between the claimant and respondent had reached the stage that led to these proceedings. As indicated above, many of the issues arising arose because the claimant genuinely and firmly believed the respondent was acting in a negative way towards him because of his disability or his disability complaints. The claimant was unable

to view matters objectively, which is understandable. The claimant's belief and perception was misplaced.

5 277. It is unfortunate that the breakdown appears in large part to stem from the claimant's belief the respondent was seeking to rely upon a job description containing duties the claimant considered to be incorrect. It is unfortunate because at no stage has the claimant been forced to carry out such duties and the purpose of seeking medical input was to ascertain what tasks the claimant was capable of performing to facilitate some form of a return to work. It may well be therefore that upon objective consideration of the issues arising, 10 a return to work may be possible with focus on the aspects of the role the claimant can do. It was clear that Mr N Campbell found the claimant to be a hard worker with a strong work ethic and that had not changed,

15 278. The Tribunal spent a considerable period of time analysing the evidence that was led in this case. The Tribunal found that the respondent wanted to work with the claimant to facilitate a return to work. The parties disagreed as to the claimant's duties but the respondent reached a conclusion that was open to it on the facts. It is a decision with which the claimant disagrees but it is hoped the parties can now put that issue behind them and find a way to move forward in a conciliatory way to facilitate some form of return to work.

20 279. The occupational health report that led to an impasse has now been produced. That report supports the claimant's position in terms of the fit notes. In light of that, and the respondent's desire to facilitate the claimant's return to work, it is hoped the parties can now seek to draw a line under the disagreements in the past and find a new way to move forward and work 25 together which is in both party's interests.

D Hoey

Employment Judge

21 February 2024

Date

Date sent to parties

21 February 2024