EMPLOYMENT TRIBUNALS

Claimant: **Mr P Hunt**

Respondent: **RT Keedwell Group Ltd**

Heard at: **Manchester**

On: **24-28 April 2023 (and 15 June 2023 in Chambers)**

Before: **Employment Judge Eeley**
Dr H Vahramian
Mr D Wilson

Representation
Claimant: Mrs J Walsh, solicitor (claimant's daughter)
Respondent: Mr A Roberts, counsel

RESERVED JUDGMENT

1. The claimant's claim of protected disclosure detriment (section 47B Employment Rights Act 1996) is not well founded and is dismissed.

2. The claimant's claim of unfair dismissal is not well founded and is dismissed.

3. The claimant's claim of discrimination because of something arising from disability (section 15 Equality Act 2010) fails and is dismissed.

4. The claimant's claim of indirect disability discrimination (section 19 Equality Act 2010) fails and is dismissed.

5. The claimant's claim that the respondent failed to make reasonable adjustments fails and is dismissed (sections 20/21 Equality Act 2010).

6. The claimant's claim of disability related harassment (section 26 Equality Act 2010) fails and is dismissed.)

7. The claimant's claim of victimisation (section 27 Equality Act 2010) fails and is dismissed.

8. The claimant's claim of wrongful dismissal fails and is dismissed.

9. The claimant's claim of unauthorised deductions from wages fails and is dismissed.

10. The claimant's application for compensation for breach of the duty to provide written particulars of employment pursuant to section 38 Employment Act 2002 is refused on the basis that the claimant has not succeeded in one of the claims set out in Schedule 5 to the 2002 Act.

REASONS

Background

1. By a claim form presented on 8 April 2021 the claimant brought various complaints of disability discrimination, victimisation, protected disclosure detriment and constructive dismissal, constructive unfair dismissal, constructive wrongful dismissal and unauthorised deductions from wages arising out of his employment with the respondent.

2. For the purposes of determining the claims, the Tribunal had regard to the contents of an agreed hearing bundle which contained 735 pages. We read those documents to which we were referred by the parties. Numbers appearing in square brackets are references to pages within the hearing bundle, unless otherwise indicated.

3. We received written witness statements from:

   a. The claimant, Philip Hunt.
   b. Edith Hunt, the claimant's wife.
   c. Andrew Evans, Personal and Compliance Director for the respondent at the material time.

   We also heard oral evidence from the claimant and Mr Evans. Mrs Hunt was not cross examined.

4. At the start of the hearing (and in the course of confirming an agreed list of issues with the parties) the Tribunal was called upon to determine the admissibility of certain evidence and to determine an application to amend the claim. As a result, the witness statement of James Hunt was excluded from our consideration as it was, in effect, relied upon as expert evidence without the necessary permission having been obtained and the appropriate procedures having been adopted. Notwithstanding that decision, the Tribunal had regard to paragraphs 3, 5, 7 and 12 of Mr Evans' supplemental witness statement which were adduced on the basis that they were of wider relevance than simply being a response to the statement of James Hunt. The Tribunal refused the claimant permission to add a complaint of section 13 direct discrimination. Oral reasons having

already been given for those preliminary determinations we do not repeat the Tribunal's reasons for those decisions herein.

5. The Tribunal received a written skeleton argument on behalf of the respondent and heard oral closing submissions on behalf of both parties, for which we were grateful.

6. The agreed list of issues for the Tribunal to determine is set out as an Annex at the end of this reserved decision and reasons.

Findings of fact

7. The respondent is a national haulage provider and a family owned business. It is one of the largest independent haulage companies and operates through nine depots. The respondent company has three separate divisions: General Haulage; Brick and Block; and Pallet Forwarding. The respondent company had an average turnover of £50 million and anywhere between 400 and 500 employees at any given point in time.

8. The claimant was employed as an HGV driver, known colloquially within the business as a "Tramper". He had had a long career within the sector and had previously owned his own HGV business. He started in the respondent' General Haulage division. He then moved to work in Brick and Block in February 2020. This mainly involved collecting breeze blocks from a customer's factory and delivering those blocks direct to building sites or to building merchants for onward sale. The Brick and Block operation was operated out of the respondent's depots in Haydock, St Helens and Hensall (Goole.) The vehicles used in the Brick and Block operation are either fitted with a crane (operated by the driver to offload the blocks), or are wagons, designed to carry such a load. In the case of the latter wagons, the blocks are offloaded by a specialist on-site crane, operated by the customer who was taking the delivery.

9. The claimant worked out of the Haydock depot. This was his 'Home Depot.' In the normal course of employment the claimant had his own designated vehicle. This meant that he did not have to share the driver's cab with other members of staff. It was used exclusively by him. The claimant usually worked from Monday to Friday, full-time. The claimant would be away from home for most of the working week. He lived and slept in the cab whilst away from home. It was generally a self-sufficient existence. He had a fridge, kettle and camping stove supplied by himself. He only tended to use service stations to buy provisions for the occasional meal and to use the toilet and hygiene facilities. He also used truck stops where necessary and available. Those facilities were not accessible to the general public but were used by Trampers (such as himself) from various companies travelling up and down the country. At the end of the working week he would return to the Home Depot (Haydock) on a Friday. The claimant was known as a conscientious employee and was often willing to undertake overtime at the request of the respondent.

10. Prior to the Covid 19 pandemic the general practice for Trampers was that they would be responsible for the cleanliness of their own vehicles (interior and exterior). This cleaning would take place according to custom and practice rather than in line with some form of standardised, documented procedure designed or implemented by the respondent.

11. The Haydock depot had office facilities. There were also 'pigeonholes' for drivers which would contain the week's instructions and any written communications from the respondent to the drivers. Written communications would also be placed on notice boards within the premises. There were also toilet and shower facilities at each of the respondent's depots. The facilities at the respondent's depots were used routinely by the respondent's own drivers but also by "guest drivers" pursuant to an industry arrangement. Essentially, the facilities were open to employees of businesses who participated in that arrangement so that they could access the necessary facilities when away from their own employer's premises. During the course of the Covid pandemic the respondent was told by the government and the Health and Safety Executive that it was not permitted to refuse access to drivers as part of this agreement. Preventing access was against the law [199].

12. During the course of his employment the claimant thought that he reported to Anthony Bishop as his line manager. Mr Bishop was the Traffic Controller for Brick and Block. The claimant thought that Mr Bishop was his direct line manager. However, according to the respondent, the claimant's direct line manager was Ian Parry, the Operations Manager.

13. Andrew Evans was the Personnel and Compliance Director. He did not work directly with the claimant and was based away from the claimant's Home Depot in Haydock. Mr Evans reported directly to the Managing Director. Since the events which form the basis of these Tribunal proceedings, Mr Evans has been appointed as the respondent's Health, Safety and Environment Director. At the material time Mike Wright was the respondent's Compliance Manager. He worked for Mr Evans and covered the North of England part of the respondent's business. During the course of the pandemic Mr Evans and Mr Wright were appointed as "Pandemic Coordinators." However, during the first national lockdown Mr Wright was furloughed and never returned to work with the respondent. He took retirement on 11 September 2020. In addition, we were referred to the involvement of an employee named Bex Price. She was a personnel officer with the respondent but left employment with the respondent on 19 March 2021.

14. The claimant was diagnosed with COPD (Chronic Obstructive Pulmonary Disease) in 2012. It was initially thought that he had asthma. Once he was diagnosed with COPD he was called to attend annual reviews at a specialist clinic. The claimant did not declare his COPD on his application form when he started work with the respondent. He said that he took medication for asthma instead [110-114]. During the course of the claimant's employment with the respondent there are no written records held by the respondent which show him attending his annual appointments at the COPD clinic. We do not know whether this reflects a failure by the claimant to report his attendance at clinic appointments to the respondent, or a failure on the part of the respondent in recording the appointments

that it was informed of. We also note that during the course of his employment the claimant had no sickness absence from work attributed to his COPD.

15. For the purposes of these Tribunal proceedings the respondent has conceded that it knew of the claimant's disability by 22 March 2020, although it does not concede knowledge that the Provision Criterion or Practice ("PCP") relied upon by the claimant would put the claimant at a substantial disadvantage as compared to those who were not disabled.

16. The timeline of events in this case can be broken down into five separate periods: Period One, up to 29 March 2020 and the first furlough; Period Two, 30 March 2020-26 July 2020, the first period of furlough; Period Three, 27 July until November 2020, the period where the claimant returned to work; Period Four, the claimant's absence from work from 2 November to 25 November 2020; and Period Five, 26 November 2020 onwards, which covers the claimant's resignation and its aftermath.

Period 1: up to 29 March 2020, before the first period of furlough

17. On 13 March 2020 the government announced that there was a global pandemic.

18. The respondent reacted to the pandemic by appointing a management coordination team consisting of the most senior members of the business: Stuart Keedwell (owner and Chairman), John White (Managing Director), Andrew Evans and Mike Wright. Mr Wright and Mr Evans were named as Pandemic Coordinators. On 13 March 2020 the respondent issued the first of many safety bulletins to employees. Such safety bulletins were issued periodically. Mr Evans also produced the first of several risk assessments on 13 March 2020 [338-339]. This identified social distancing in close contact areas and extensive hand washing in such environments as methods to combat spread of the virus. Additional cleaning in communal areas was put in place with basic instructions to staff not to share crockery and cutlery. "Hands, Face, Space" was the key message which the respondent sought to adopt. We accept that the risk assessment document itself was not part of the documentation shared with the drivers. It was a policy document for use at higher management levels and was the source material for many of the operational documents sent out to drivers and other staff. The risk assessment document was updated in April, May and October 2020 as further knowledge and information became available to the respondent.

19. At around this time drivers were instructed to cease face-to-face interactions with loaders. Instructions were issued to drivers not to congregate and that there should only be one driver at the driver hatch at any one time. Systems developed so that most interactions with drivers were conducted by mobile phone.

20. As the risk assessment documents could be technical in nature they were paired with safe systems of work ("SSOWs"). These SSOWs were intended to be more digestible and to convey to staff both the risks and the processes which were in place to combat them. The Tribunal accepts that these SSOWs were provided to staff (including drivers) in pigeonholes.

They were also emailed to staff, often using the 'Payroll' email distribution list, as this would be received by all staff on the respondent's payroll. (The tribunal was provided with an example of such an email [364].) They would also periodically appear on notice boards at the respondent's various sites. Examples of the SSOWs in question were provided to the Tribunal within the hearing bundle [342-343, 344-345, 362-363, 366-367].

21. There was some dispute between the parties as to which of these documents the claimant saw during the relevant period of time. The claimant accepted that he had seen the SSOWs but did not accept that he had seen many of the bulletins. The Tribunal notes that not all of these bulletins were intended for the drivers. They were not always the intended audience.

22. The claimant conceded that he had seen some of the documents but we also accept that those documents not intended for drivers may not have been sent to the claimant. Where it appears from the face of the document that drivers were part of its intended audience but the claimant cannot specifically remember seeing it, the Tribunal is nevertheless prepared to accept that the document was sent to the claimant and that he could have read it upon receipt. In such circumstances the claimant is unsure and cannot recall having read the document. Just because the claimant cannot recall the document in question does not mean that it was not sent to him in the first place. The normal system adopted by the respondent was to place these documents in pigeonholes and email them to all the staff on the payroll distribution list. We accept that the claimant would have seen those documents. We cannot be sure that they were all posted on notice boards or, if they were, that the claimant would have walked past the relevant notice board at the relevant time in order to read the documents displayed there. In the course of evidence the claimant conceded having received bulletin 126 and said that he might possibly have received bulletin 135. He didn't recall having seen the remainder of the bulletins that he was taken to within the hearing bundle. In any event, there is no evidential basis to suggest that these documents were written after the event rather than being contemporaneously produced and disseminated amongst the workforce. The very nature of the subject matter of the documents meant that one document might well be very similar to another in terms of its tone and content. The same or similar messages could well be repeated with perhaps different emphasis between different iterations of the document. It is perhaps not surprising, therefore, that the claimant would not be able to recall specifically which documents he had seen and read. This was, after all, a period of rapid developments and many employees in many workplaces would have been on the receiving end of "information overload" as regards the pandemic.

23. As part of the respondent's FORS accreditation (Fleet Operator Recognition Scheme) Mr Evans updated the respondent's business continuity plan to include a pandemic viral disease plan. The Tribunal accepts that page 6 of that plan was distributed to drivers [386] and each depot had the final page of the plan printed and displayed at the premises. We do not know, however, whether the claimant actually noticed or read this document. A key strategy for drivers (who are physically isolated when they are in their cabs) was to focus on 'points of contact' at their Home

Depots and on customer sites. When at customer sites drivers were advised to stay within their vehicles at all times. Restricting possible points of contact around driver hatches at the respondent's depots was emphasised. As most vehicles were assigned to/driven by only one driver, the focus was on shared vehicles with the responsibility being on the incoming driver to clean down all hard surfaces on entry to the vehicle. Managers were instructed to make cleaning equipment available for all drivers of shared vehicles. The Tribunal heard and accepted that at no stage did the claimant ask for more sanitiser for himself or his vehicle.

24. At the outset of the pandemic the respondent did its best to obtain sufficient supplies of hand sanitiser. Hand sanitiser was in short supply across the country. However, this improved over time so that the respondent could source sufficient hand sanitiser for its workforce. In addition, electronic temperature testers were purchased and used, all cutlery was removed from kitchens, and fridges were sealed at the premises.

25. On 23 March the government announced that a lockdown would come into effect on 26 March 2020.

26. On 22 March the claimant sent a text message to Mr Bishop [400]. In that message the claimant confirmed that he was concerned about the virus and that he had been told to expect a letter or a text to tell him to stay at home as he has the respiratory disease COPD and therefore is in the critically vulnerable group. He indicated that he needed to speak to Mr Bishop with regard to self-isolating and the implications of that. He confirmed that he was happy to work the planned day on 23 March but that, moving forward, he would have to do as advised. He closed by asking who he should speak to within HR.

27. In his response Mr Bishop confirmed that he would ask the relevant questions the next day and get the correct advice and guidance as a matter of urgency. He also confirmed that he would point out the claimant's main point of contact in HR in the morning [401].

28. The Tribunal pauses to note that this was the first time that the claimant communicated information to the respondent (or its managers) to suggest that he was disabled. Unfortunately, Mr Bishop, having received the text, did not communicate that information to anyone else within the business. Nor did he record it on the respondent's records or in any paper/electronic files within the business. The information stayed with Mr Bishop and was not transmitted further.

29. On 24 March the claimant received an email from the NHS [407] notifying him that he had been identified as someone at risk of severe illness if he were to contract coronavirus. He was instructed to remain at home for a minimum of twelve weeks. The email confirmed that the claimant could open a window but not leave his home and that he should stay three steps away from others, even indoors. He was told to wash his hands more often, for at least 20 seconds and was given the link to online guidance and advice. This email was forwarded by the claimant's wife to Mr Wright at the respondent. Unfortunately Mr Wright did not pass this information concerning the claimant's medical position, his disability, or the NHS guidance to anyone else within the organisation either. It was not

forwarded to HR or put on the respondent's records. Upon enquiry, Mrs Hunt confirmed to Mr Wright that the claimant had received this information via text message but had been given to understand that there would be a paper letter arriving in the post.

30. On 24 March the claimant was scheduled to attend work as normal and make a delivery to Lincoln. He had, as indicated in the text message [400], agreed to carry out this task. The claimant therefore travelled to the Haydock depot and arrived there between 5:45am and 6am. There was nobody present in the office at the depot. The Tribunal accepts the claimant's evidence that, although he had agreed to do this delivery on the Monday, he had reconsidered his position overnight as he was worried and concerned about the health implications of the pandemic. We were also referred to the contents of the family's WhatsApp group communications. We can see for ourselves that the claimant's wife and family were extremely concerned, anxious and upset about Mr Hunt being required to make the delivery in Lincoln. In those circumstances, we accept the claimant's evidence when he says that he went into the depot on 24 March with a view to getting the delivery trip cancelled. When he attended the depot, the office was not due to open until 8am. Consequently, he could not speak to anyone face-to-face in the office. He then phoned Mr Bishop in an effort to speak to him about the issue. Mr Bishop did not answer the call. The claimant then got his wagon ready for the trip and then tried to phone Mr Bishop again. Mr Bishop did not answer the telephone and so the claimant left a voicemail message indicating that he wanted to speak to Mr Bishop. It transpired that the claimant did not receive a return phone call from anyone at the respondent (including Mr Bishop) until about 3pm that day. This left the claimant with a dilemma: what should he do? He decided to 'get on with it' and carry out the delivery as he had previously indicated he would. This was in keeping with his conscientious approach to employment. Whether or not the claimant thought he would lose his job if he refused to carry out the delivery we rather doubt. Rather, his decision to make the delivery reflected the kind of worker he was. As the respondent witness said to us in evidence, he was conscientious.

31. Mr Bishop already knew that the claimant was clinically vulnerable. Mr Bishop had already indicated that he would be giving the claimant the details of an HR contact early in the day. In those circumstances the Tribunal would have thought that a call to the claimant would have been one of the first phone calls Mr Bishop would have made on arrival at work on 24 March. However, this did not happen. It seems to the Tribunal that Mr Bishop could (and arguably should) have called the claimant as a matter of priority and certainly earlier than 3pm. Instead, the claimant and Mr Bishop first spoke to each other in the mid afternoon. The Tribunal did not hear any witness evidence from Mr Bishop. We do not know why as Mr Bishop is apparently still employed by the respondent. There is nothing before us to indicate that he would be unable to attend and give evidence at a Tribunal hearing. His evidence might be considered important given his line management involvement with the claimant and the fact that he was the person initially notified of the claimant's COPD.

32. The gist of the conversation which took place between the claimant and Mr Bishop was that Mr Bishop did not understand furlough, he did not know

what it was. He therefore gave the claimant two options: work as normal; or take sick leave on Statutory Sick Pay ("SSP"). We doubt that the amount of sick pay which would be payable to the claimant was specifically quoted during the conversation. Indeed, Mr Bishop and the claimant probably knew how much SSP was payable from previous experience so that it did not need to be specified during the phone call. We note that the bulletin issued on 13 March [329] already referred to furlough. Whilst we accept that this was early in the chronology and Mr Bishop may not have grasped what furlough was, he really should have been referring the matter to someone who *did* understand furlough. On the respondent's case, the business was already taking considerable steps to ensure Covid safety within the workforce. Mr Bishop's failure to address furlough himself or to refer the issue to somebody higher up the management chain (or in HR) to assist, is somewhat out of step with the respondent's overall approach to the issue.

33. The claimant travelled home from the delivery in Lincoln in the afternoon.

34. All of the drivers were sent home from work from 25 March onwards. They were furloughed from 30 March 2020. Mr Wright and Mr Evans were also furloughed. Mr Evans did not work during lockdown save to discharge director's duties in line with the terms of the Coronavirus Job Retention Scheme ("CJRS".) The claimant was paid SSP for self- isolating from 24 to 27 March before formally commencing furlough on 30 March. Mr Evans returned to work from furlough on 1 May. Mr Wright confirmed to the claimant that he would be furloughed along with the others from Monday 30 March.

35. On Mr Evans' return from furlough he took on Mr Wright's duties for the fleet of vehicles. He later relinquished responsibility for overseeing transport compliance to Paul Phillips, Operations Director. Mr Evans' job title then changed to Health Safety and Environment Director. He confirmed to the Tribunal that Mr Wright did not inform him of the email he had received from the claimant's wife [407]. Mr Evans saw that email request and Mr Wright's responses to it for the first time when they were disclosed by the claimant's representatives during the course of the Tribunal proceedings. Mr Evans gave evidence that he has discussed the matter with Mr Wright and asked him whether he made any further enquiry in connection with the claimant's COPD. Mr Wright apparently confirmed that because the majority of the fleet (including the claimant) were being furloughed, events overtook the issue of the individual status of the claimant as a shielding employee. Mr Evans confirmed that he personally only became aware that the claimant had been diagnosed with COPD when the claimant asked to be furloughed in November 2020.

<u>Period 2: 30 March to 26 July 2020</u>

36. During the first lockdown period the claimant stayed at home and shielded. We accept the claimant's evidence that he did not set out foot outside his front door for the full twelve weeks. Although he would sometimes sit at the back door with the door open, he would be frightened if he could smell cigarette smoke coming from the neighbour's garden as he worried about the virus particles travelling through the air. We accept the claimant's evidence that he did not see his children or grandchildren at all throughout

the first lockdown (other than through a window when they dropped food at the front door.) We also accept the claimant's evidence as to the precautions he took in sanitising items coming into the home (including food shopping.) It is apparent from evidence within the hearing bundle that the claimant and his wife kept in touch with their family through remote forms of communication such as Zoom and WhatsApp. The contents of the WhatsApp messages clearly demonstrate the anxiety levels within the family during this time surrounding the risk of Covid 19 for the claimant.

37. During this first furlough period the respondent's business came to something of a grinding halt due to the closure of most parts of the economy. When the construction sector closed down so did the respondent's Brick and Block operation. We heard that the respondent made some redundancies during the first lockdown and approximately twenty of the vehicles were sold. The claimant's truck was one of the trucks that the respondent sold. There was clearly a downturn in the respondent's business. The respondent made these changes with the view to being 'lean' and ready to 'swing into action' once lockdown measures lifted. We accept that the furlough scheme, whilst useful, was not sufficient on its own to preserve the respondent's business. Each unused vehicle represented a significant cost to the business. Consequently, at the time of the redundancies the respondent reduced the size of its fleet.

Period 3: the return to work from furlough (27 July to 1 November 2020)

38. The claimant's requirement to shield was due to come to an end on 1 August. The claimant should have stayed at home and shielded until that date. However, the respondent took the decision to recall the remaining drivers back to work from 27 July. Getting the drivers back to work had been a gradual process. The group of drivers returning to work on 27 July were the last of the respondent's drivers to return to work from furlough. The Tribunal was not told why the respondent chose 27 July as the return date for this group.

39. Page 360 indicates the respondent's approach to bringing staff back. The claimant says he did not get this document. The final draft with the sent details was not provided to the tribunal but the draft does indicate the respondent's overall approach. It reiterated the respondent's desire to avoid a further peak in Covid or a further lockdown. It indicated that the respondent had been reviewing its business practices and looking to improve efficiency during the lockdown in order to ensure that the respondent was in a strong position once business improved.

40. The Tribunal was unsure why the claimant came back to work before shielding had concluded. The claimant gave various descriptions of how he had been asked to return to work in July. In his witness statement he indicated that, although he had been asked to return before the end of shielding, he had noted that the respondent had supported him through one of the most terrifying ordeals of his life. So, when the respondent asked him to return a few days earlier than he should have done, he obliged. Effectively, he went along with it. In oral evidence he gave evidence of a conversation with Karen Mudford who apparently said that they were all back on 27 July despite the claimant's protestations that he was still shielding. This was the first time that the claimant mentioned this

conversation. Whilst there must have been some form of conversation in order for the respondent to tell him to return to work, we do not accept the characterisation of the exchange that the claimant put forward in his oral evidence. We find that it is more likely than not that his witness statement account is correct. We find that he was obliging to the respondent as a matter of 'give-and-take.' He was back at work a few days before he should have been, not because anyone from the respondent was leaning on him to act against his own better judgement, but because he recognised the respondent's support during the pandemic and wanted to co-operate with his employer as a result.

41. The Tribunal accepts that by 27 July the systems and practices within the respondent's business had become more sophisticated. We accept that drivers were sent Bulletin 132 [334] which set out rules relating to deliveries on site. This emphasised that the driver was empowered to make the final decision about whether they felt it was safe to complete a delivery. If a driver had any qualms about the safety measures on a customer site, they were reassured that they need not complete that delivery. The driver was to notify the respondent if they had any concerns. Management would then raise any issues about the aborted delivery directly with the customer. Each driver was asked to sign and return the safety brief. There was no copy of the claimant's signature but we have no reason to doubt that the claimant received this document.

42. The claimant's truck had been sold during furlough and he therefore needed to work using a new truck. When he arrived at work on 27 July the new replacement vehicle was not present and was due to be delivered later that day. The vehicle duly arrived later that morning.

43. Although the claimant mentioned it for the first time during the Tribunal hearing, the Tribunal is prepared to accept that the truck was delivered by low loader on 27 July and that the delivery man had to drive the truck off the low loader for insurance reasons. So, although the truck had not been used by one of the drivers for deliveries for the previous 62 hours (as stated by the respondent), it is not correct to say that it had been left vacant for that period or that, as a result, it had been decontaminated. The delivery driver had been inside the vehicle on 27 July. To that extent there was and remained a risk of virus transmission. We also accept the claimant's description of the dirty state of the truck on delivery. Just because the respondent had told its employees to clean vehicles on exit this does not mean that the previous driver had in fact done as instructed. Furthermore, if there was any meaningful dispute about the state of the vehicle on delivery, it was open to the respondent to call a witness (such as Mr Bishop) to give evidence as to the true state of the vehicle. The claimant described the vehicle as filthy, full of dust, with crumbs of food on the seat. There were remnants of food packaging and empty bottles in the door bins. The Tribunal considered that the description given by the claimant had the "ring of truth" about it. The claimant was understandably alarmed at the state of the vehicle given his clinically vulnerable state and the fact that he would be living and working in that space going forwards. Consequently, the claimant asked Mr Bishop if he could have the vehicle professionally cleaned before he had to work with it. Mr Bishop refused to get the truck professionally cleaned even though he was one of the few people within

the respondent organisation who was aware of the claimant's COPD and his consequent clinical vulnerability. It would have been apparent to Mr Bishop why the claimant was so concerned about the cleanliness of the vehicle given that he had just returned from a period of shielding.

44. In light of the circumstances there was no alternative save for the claimant to clean the vehicle himself. Both parties accept that he did this. We accept the claimant's account that he was given some grey rags (from the mechanics workshop) plus warm water and washing-up liquid and that he got on and did the clean. Management may well have thought that the claimant should have received blue commercial towels and indeed this may well have been the respondent's procedural intention, but the respondent's manager witness would have no way of knowing if this was actually implemented on site at the time. We therefore accept the claimant's account as to the nature of the equipment he was given. We also accept that the claimant had some of his own detox spray which he used to supplement the cleaning materials provided. We accept that he carried out the cleaning and got the state of the cab to a level of cleanliness that was to his own satisfaction. We also accept that at this point the claimant had not been provided with a PPE kit (see statement from Ian Parry [501]). The claimant had his own gloves and mask which he used when he cleaned the truck.

45. Given the available evidence, the Tribunal notes that there was some level of avoidable risk to the claimant involved in this sequence of events. The claimant was being asked to clean something which should already have been left in a clean state even though Mr Bishop knew of his COPD and consequent vulnerability. The cab had not been quarantined (insofar as the delivery driver had entered the cab to drive it off the low loader) and the claimant was not provided with PPE to do the cleaning himself (although we accept that he did in fact have some of his own PPE, which he used.) Once cleaned, the cab was up to the required standard. The respondent understandably says that the cab had to be cleaned by someone and that it was not unreasonable to expect the claimant, as one of the drivers (and the respondent's employee) to do the cleaning. This might well have been the case for the generality of the driver workforce as we were told that the claimant was the only driver recorded/reported as clinically vulnerable for Covid purposes. Any other driver would not have been at any greater Covid related risk than any person doing such cleaning (e.g. a professional cleaner.) However, this was not true of the claimant. As a clinically vulnerable individual he was at risk of more severe consequences if he were to contract the virus.

46. In any event, the claimant reacted stoically at the time. He raised the issue with his perceived line manager (Mr Bishop) and when he did not receive a favourable response, he just got on with it. The fact that he did not raise a formal grievance or written complaint about this at the time does not suggest that his account of the events of 27 July to the Tribunal is untrue. Whilst the claimant did not raise it with Mr Evans when he subsequently contacted him in September, this was largely because the incident had been resolved on 27 July and there was nothing to be gained by resurrecting the matter so long after the event. He raised it at the time and then just got on with things when he was not provided with any other

solution. We still accept his account of what happened with regard to the cleaning on 27 July.

47. After 27 July the vehicle remained in the claimant's sole use and custody. July 27 was the one occasion on which there was a handover of the vehicle to the claimant from someone else. The Tribunal was not informed of any other instance of this. It follows that the claimant was able to keep the vehicle to an appropriate standard of cleanliness thereafter and was not subjected to another similar incident where cleaning was required to decontaminate the cab.

48. On 14 September 2020 the drivers received a Covid 19 update from managers [389]. It said that the respondent's business was back to full capacity and most haulage companies were struggling with demand. The claimant was frustrated by the email as he had hoped for some reassurance from the respondent that they were monitoring the risks and implementing increased safety measures where necessary. He took it from the update that the respondent was more concerned with capitalising on the pandemic rather than dealing with the risks it posed to employees. The claimant received a further email on 21 September 2020 attaching safe systems of work policy. The document set out the importance of effective hand washing to prevent transmission of Covid 19 and identified contaminated surfaces within communal toilet facilities as a source of virus transmission [366-368]. Safety Bulletin 137 advised that if site and company rules were not being followed it must be reported to senior management immediately. The emails provoked the claimant to make a complaint. He felt that the toilets presented a health risk. He therefore spoke to Harry Crossman who had sent the email attaching the safety bulletin. His opening line to the Harry Crossman was, "Maybe you should practice what you preach and stop talking to us as if we are children. We are the ones out there on the front line worried about our health and you tell us by email to wash our hands properly." He pointed out to Mr Crossman that the soap dispenser the company provided was empty, the water only tepid and the hand dryer was always breaking down. The claimant reports that Harry Crossman assured him that the company would do what they could but said that the claimant would have to understand that they were living through a global pandemic and there was only so much they could do.

49. The claimant subsequently raised the issue directly with Mr Evans. He contacted Mr Evans about the washing facilities in Hensall. He complained about the condition of the facilities. He said to Mr Evans that he had received the latest safety bulletin stating the things drivers were being mandated to do and noting the picture of the toilet and sink in SSOW 179 but said how this contrasted with the facilities the respondent was providing. Upon being notified of the problem Mr Evans apologised to the claimant if the facilities had been found in unacceptable condition and assured the claimant that he would investigate. The claimant did not mention any other issues regarding cleaning of trucks or the claimant's own health condition during the course of this conversation.

50. The day-to-day maintenance of each depot was overseen by the Depot Manager. The Depot Manager for Hensall was Karen Mudford. Following the call with the claimant, Mr Evans contacted Karen to notify her of the

complaint. It turned out that the cleaning company who had been contracted to clean the facilities had cancelled the contract. This was because cleaning companies were in high demand and the depot was at a rather remote location thus making it less profitable for the cleaning companies to service. In any event, Karen Mudford went to ensure that the facilities were cleaned up herself pending implementation of a new cleaning regime. Within a few days, possibly a week, a replacement company had been sourced. The claimant also called Mr Evans shortly thereafter to state that the toilets had been brought up to standard and thanking him for the improvement in the facilities.

51. Having heard all the evidence the Tribunal accepts the claimant's account given at paragraph 112 of his witness statement. We accept that he spoke to Mr Crossman first and that what he said to Mr Crossman is contained within the witness statement. We also accept Mr Evans' account of what the claimant said to him at paragraph 46 of his statement. We accept these two paragraphs as accurate records of what was said in the respective verbal exchanges. There is no direct evidence from Mr Munroe as to what he said and we cannot therefore establish that there was a protected disclosure by him on this occasion as we cannot be certain what any disclosure consisted of. We cannot make findings of fact in relation to Mr Munroe's comments/disclosures.

52. Having considered the evidence in the round, the Tribunal accepts that there was one incident of unacceptably dirty toilet facilities. Hence, the claimant raised a complaint and the issue was resolved as soon as reasonably practicable. However, we do not accept, on balance, that this was an ongoing problem or a wider systems failure within the respondent organisation. In particular, we note that the claimant only made one complaint. If the facilities were as dirty as he now maintains (including excrement up the walls) it is inconceivable that he would have failed to complain about this at the earliest opportunity and on an ongoing basis, particularly in light of the fact that he had spent twelve weeks isolating and shielding due to his clinical vulnerability. Yet it was only when there was an email from the respondent that he was prompted to make a complaint. We find that he would have taken the initiative and complained about the facilities without the email prompt if it had been an ongoing problem or if the problem was as severe as he asserted during the Tribunal hearing. As far as the claimant is concerned this was the one and only complaint he made about this. We also note that the claimant tended to take photographs and we would perhaps have expected him to take photographs and post them on WhatsApp to show the ongoing state of affairs if the facilities were not up to scratch on an ongoing basis. The Tribunal is also aware of the size of the respondent's workforce. We note that there were no other written complaints from other employees adduced in evidence before us. Had this been a particular problem for an extended period of time, we would have expected to see wider evidence of complaints from amongst the driver workforce. The claimant maintains that Paul Munroe made a similar complaint however there is no evidence before us to substantiate this. The respondent's witness was unaware of such a complaint. Mr Munroe clearly did not raise a grievance, speak to HR about the matter or escalate any issues further. The claimant gives a

second-hand account of the exchange between Paul Munroe and Karen Mudford. He was not present during the conversation and is reliant on, at best, Mr Munroe's account of it. He is therefore unable to prove exactly what was said during that exchange if, indeed, it took place at all. The allegation was that Ms. Mudford had been asked when the respondent was going to do something about the toilets and her response was that she had more important things to do than worry about toilets and cleaners. It was asserted that she had told him to "fuck off out of her office." The claimant asserts that Mr Munroe told several others about this but the claimant provided no other witnesses able to confirm this. The claimant bears the burden of proof on this. On the basis that "he who asserts must prove" we are not satisfied, on balance of probabilities, that this complaint was made or that the details of the complaint and Karen Mudford's response to it are accurately summarised by the claimant in his evidence to the Tribunal.

53. By the time this issue came before the Tribunal the claimant had embellished his description of the toilet facilities. He went so far as to say that they were consistently low standard and that there was excrement up the walls. It's fair to say that what he described was a flagrant disregard for appropriate cleaning systems and practices. Such a flagrant disregard does not sit comfortably with the evidence provided by the respondent to the Tribunal regarding the respondent's attempts to ensure adequate systems of work, particularly on health and safety grounds during the pandemic. Such a cavalier attitude to toilet facilities is somewhat out of step with the wider evidence available to the Tribunal relating to the respondent's approach to the issue. Furthermore, within his witness statement to the Tribunal the claimant explains the problems that he had described to Harry Crossman. They were matters such as the hand dryer being out of action, the water not being hot enough, and the soap dispenser being empty. Even on his own version of events he did not complain to Harry Crossman of a long-standing problem or that it was as severe as excrement on the walls. This undermines the plausibility of the description in the claimant's evidence to the Tribunal that there was long-standing problem. Thus, on balance we find that the issue with the toilet cleanliness was a one-off issue in September which was resolved once the claimant escalated it to the respondent. It was not a flagrant breach and it was not a long-standing problem. A replacement cleaner was obtained and the matter was resolved, apparently to the claimant's satisfaction at the time. The fact that the cleaning contractor had cancelled the contract was a matter which was outside the respondent's control. We also note that even if cleaned regularly, there is still a chance that the facilities would become dirty again before the next scheduled clean. Just because an employee went into facilities and found them dirty does not mean that there had been a breach of the duty of care by the respondent. It is going too far to expect the respondent to keep a cleaner on standby constantly to deal with issues as they arose in order to ensure that no employee uses the facilities after a colleague has left them in a mess and before the respondent has cleaned them again.

54. When the claimant initially returned to work in July the respondent had not provided the full PPE kit to drivers. This is confirmed in the statement from Ian Parry, Operations Manager dated 18 January 2021 [503]. In that statement he confirms that all Haydock based drivers were issued with a

bag containing a small bottle of hand sanitiser, some disposable gloves and two facemasks. These were issued on 31 July and if individuals were not seen face-to-face the pack was put in their pigeonhole for the following week. All drivers were told that when they required more supplies they should ask and it would be issued to them. The statement also confirms that buckets with cloths and cleaning equipment including disinfectant and sanitising wipes were left out for drivers to clean the inside of their trucks. Hot water was available. He went on to confirm that a large bottle of hand sanitiser was on the window of the drivers' reception. He further confirms that at no time did the claimant ask anyone at Haydock for more hand sanitiser, masks, or gloves. Nor did he complain to them about any of these issues. On balance, we accept the respondent's evidence in relation to this. Each driver was issued with a 100ml bottle of sanitiser, masks and gloves and could ask for more. There was a delay in issuing this equipment but once it was issued there was no reason why a driver would be left without the appropriate PPE. If the claimant was not happy, he could have asked for more or he could get supplies that he was happy with. Indeed, the claimant does not suggest that the equipment for cleaning his own cab was inadequate. The impression given by the claimant's evidence is that during this period he was just glad to be back at work and was not overly worried about the conditions in which he was working. Given that the claimant was working in isolation within his cab for the most part, his potential exposure to points of contact was limited. The claimant was self-contained in his cab except when he used the facilities such as truck stops. Thus the sanitiser bottle was ample for the claimant's purposes and could be replenished as needed. The claimant sought to suggest that it was too small but the Tribunal finds that it was reasonable in all the circumstances of this case. As drivers were self-contained in their own cabs, they would not need to repeatedly sanitise their hands save when they left the cab to use outside facilities. In those circumstances, a driver was unlikely to run out of santiser as quickly as, for example, an office worker. Mr Evans went further and indicated that drivers were provided with disinfectant spray, disposable blue towels, disposable sanitising wipes etc. Mr Evans confirmed that he was not aware of any instance of a driver complaining about the cleaning materials provided.

55. In relation to the period from 27 July to 31 July it appears that the respondent had not implemented the provision of PPE and cleaning equipment for individual drivers. The Tribunal is unsure why they required the drivers to return to work before the PPE packs had been obtained and supplied.

56. The document at page 334 is the safety and operational bulletin number 132. It appears to have been addressed for the attention of delivery drivers as it refers to precautions to be taken on construction sites. It states: "all delivery drivers must be instructed to remain in their vehicles if the load will allow it. Drivers must wear all required PPE if they leave a vehicle. It states: "the driver makes the final decision about whether they feel it is safe to complete the delivery when they arrive at the site. If they are uncomfortable about any aspect of the offload they are empowered to return to their vehicles and leave the site safe." This is the document with a tear off signature slip. We are satisfied that this was sent to and seen by the claimant. The document refers to July 2020.

57. Once all the drivers returned to work in July some of the wider restrictions in society started to be lifted during the summer. We accept that the respondent's Brick and Block operations began to increase in line with the increased levels of activity within the construction industry. The respondent made a company announcement on 5 August which reflected the positive and promising news, albeit the ongoing volatility in the market and the time needed to recover from lockdown was also noted. The message was to remain vigilant and to stay safe. This was conveyed to all staff [365].

58. Business continued to grow in September 2020. The announcement issued in September 2020 informed staff that the respondent's business was back to full capacity with a very strong customer demand and volumes [389-390]. In the autumn of 2020 the respondent began to get very busy and this coincided with a shortage of drivers in the industry, many of whom had decided not to return to the industry following furlough. Many Trampers' lifestyles had changed during furlough and they were reluctant to go back to the old ways of working.

59. However, as restrictions were eased the rate of Covid infections started to increase. A further wave of Covid started to take hold. Face coverings became mandatory and drivers were instructed to self-isolate in their vehicles [335-337].

60. At the start of November the respondent's business was operating at maximum capacity and the respondent was anticipating an increase in weekend work [397]. Around this period of time the respondent bought further products for cleaning purposes, such as fogging disinfectant machines to be used within vehicles which would, in essence, fumigate the interior of the vehicle.

Period 4 Absence 2 November to 26 November

61. On 2 November the claimant texted Mr Bishop to say that his legs were swollen and that he was seeing a doctor later that day [513]. Having heard the evidence of the parties we accept that the claimant was relieved to have a reason to be off work given that the respondent, to his mind, was threatening disciplinary action if employees did not do weekend overtime. It appears from the contemporaneous documents that it was thought that the leg swelling suffered by the claimant was likely to be connected to a DVT. That was certainly the fear at the time. There was nothing at that point to indicate that it was a side-effect of his COPD.

62. The claimant's fit note indicated that he was suffering with leg swelling which was under investigation. [576]

63. On 4 November the claimant received a text from the NHS saying that he was vulnerable and should shield.

64. At some point during the week commencing 2 November the claimant phoned Mr Evans and informed him that he was classified as a high-risk employee and had been advised to self-isolate. He also asked to be furloughed during this period of self-isolation. Whilst Mr Evans was aware that the claimant had been identified as someone thought to be extremely clinically vulnerable, he was not aware of the extent of the claimant's COPD condition or how this affected him on a day-to-day base day basis.

65. Mr Evans discussed the claimant's request with Bex Price and looked at the government guidance issued at the time. At this stage the respondent concluded that they did not have a business need to furlough staff. There had been no downturn in business. All of the respondent's drivers were needed. In those circumstances the respondent concluded that, on the basis of the scheme then in place, it was unable to make use of the CJRS at that point in time to furlough the claimant, even though this is what he wanted. This was communicated to the claimant. Mr Evans told the claimant that whilst the respondent was not in a position to use the furlough scheme at that time, if the position changed the claimant's status would mean that he would be prioritised. We accept that Mr Evans did not place any pressure on the claimant to return to work or query his status as a high-risk employee from a Covid point of view. Rather, he confirmed that the claimant was entitled to shield and that he would be paid statutory sick pay during that period of isolation in accordance with the SSP regulations.

66. On 4 November the claimant emailed Mr Evans reiterating that he had been advised to shield [483]. He said that he might have to attend work as it would be unrealistic to survive on statutory sick pay. He asked Mr Evans to advise how he intended to ensure a safe system of work was in place for the claimant. The claimant made reference to his daughter's status as a catastrophic injury lawyer. The claimant queried what risk assessments had been carried out and whether the respondent's insurers had been notified of the situation and were prepared to cover the claimant in light of the Covid 19 concerns.

67. On 9 November Mr Bishop asked the claimant for a further update by text. The claimant confirmed that he was still shielding following government advice and that he had received an email from the DHSC informing him to stay at home if he could not work from home. The claimant said he would keep Mr Bishop informed [487-488].

68. The claimant sent a further email on 9 November still maintaining that he was entitled to be furloughed [484]. He sent an attachment which comprised the first two pages of a current communication he had received from the government advising how he must be deemed extremely clinically vulnerable. Part of the attachment stated, "If you cannot work from home, then you should not attend work. You may be eligible for the coronavirus job retention scheme (furlough). This letter is a formal shielding notification and can act as evidence for your employer to show that you cannot work outside your home until 2 December, including for statutory sick pay (SSP) purposes."

69. The claimant sent a further email on 10 November, again chasing an entitlement to furlough [489]. On the morning of 10 November, before Mr Evans had the opportunity to respond, the claimant emailed Dee Keedwell,

again referring to advice that he should stay at home and referring to guidelines that stated he was eligible to be placed on furlough.

70. Mr Evans and Bex Price carried out research into the correct interpretation of the CJRS. They consulted the latest guidance on what use the respondent could legitimately make of the furlough scheme. They wanted to be sure of the respondent's position. Mr Evans notes that the government guidance, *"Check if you can claim for your employees' wages through the CJRS"* at the outset states: *"If you cannot maintain your workforce because your operations have been affected by Coronavirus (Covid 19), you can furlough employees and apply for a grant to cover a portion of their usual monthly wage costs…"* Mr Evans noted that only *then* did the furlough guidance go on to include a hyperlink to some separate guidance about *which* employees are eligible to be furloughed. Mr Evans and Ms. Price therefore remained of the view that furlough could only be used where a business was adversely affected by coronavirus and that this was, in effect, the 'gateway' that needed to be passed before considering which employees were eligible to be furloughed [257-266]. This understanding was also derived from the latest Treasury Direction which had been published at that time. Under the heading *"purpose of the scheme"* at paragraph 2.1 it stated that: *"The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of furloughed employees arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease."* Paragraph 2.2 stated: *"Integral to the purpose of CJRS is that the amounts paid to an employer pursuant to a claim under CJRS are only made by way of reimbursement of the expenditure described in paragraph 8.1 incurred or to be incurred by the employer in respect of the employee to which the claim relates."* Paragraph 2.5 stated: *"No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purposes of the CJRS."* In the latest Treasury Direction No 4 dated 1 October 2020 (in force at the time of the claimant's request to be furloughed) paragraph 2.2 had been amended to state: *"Integral to the purpose of CJRS is that the amounts paid to an employer in accordance with the CJRS directions are used by the employer to continue the employment of employees whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission."* (emphasis added.)

71. The respondent's interpretation of the guidance in place at that time was that the first test to be applied was whether the respondent was an eligible business to claim from the CJRS at all. The respondent had to get through this preliminary gateway before it could decide which (if any) of its employees, should be furloughed. This preliminary gateway test was based on the business activities of the respondent business. It mirrored the original intended use of furlough to preserve the employment of employees during the pandemic as an alternative to redundancies. Thus, if there had been a downturn in business which would otherwise result in the termination of employees' contracts of employment then it was likely that a business would pass through the preliminary gateway in the guidance. Thus, during the first lockdown (when the construction industry closed) the respondent closed down its operations and sold off vehicles.

Indeed it made redundancies. To avoid making further redundancies it was able to claim through CJRS to preserve the employment of the remaining drivers. This meant that the respondent was able to furlough the claimant, and others, during the first lockdown. The material circumstances were different by November 2020. Although the requirement for the claimant and others to shield had been reimposed and although rates of Covid 19 were increasing, the impact on the respondent's business operations had yet to be felt. At that point in time there had been no downturn in the respondent's business and there was no need to consider restructuring or making redundancies. There was work available for the drivers to do and the respondent wanted them to do it in order to meet the ongoing business needs. Redundancies, or restructuring were not on the cards. There was no business related reason to keep the drivers at home. This meant that the respondent did not pass through the preliminary gateway and was not (at that time) an employer that was entitled to claim on the CJRS at all. This meant that the respondent could not go on to consider which employees were eligible for furlough. If the respondent could not use the CJRS at all then it was irrelevant which employees could be eligible for furlough: the question simply did not arise for consideration.

72. Having reviewed the relevant documentation, the respondent's evidence, and the contemporaneous guidance being issued by the government, the Tribunal is satisfied that the respondent's interpretation of the Covid 19 furlough scheme as drafted and implemented at the beginning of November 2020 was in fact correct on the terms of the scheme at that point in time. Furthermore, even if the Tribunal were mistaken about this, the respondent's witnesses certainly had a reasonable evidential basis for coming to the conclusions that they did in light of the information which was available to them at that point in time. It is important that the respondent should not be judged with the benefit of hindsight. Aspects of the CJRS may now be clearer with the benefit of subsequent developments than they were at the time of the events in question. Any employer standing in the respondent's shoes would not know how things would develop subsequently.

73. The Tribunal further accepts (based on the evidence available) that it was only once an employer business became eligible to use the CJRS in principle, that an employer would be able to consider an individual employee's eligibility for furlough. Thus the furlough guidance included a hyperlink to a separate piece of guidance headed *"Check which employees you can put on furlough to use the coronavirus job retention scheme."* ("The eligibility guidance".)

74. The respondent accepted (and still accepts) that if it as a business had been entitled to claim on the CJRS at the beginning of November, the claimant would have been one of the eligible employees who could be furloughed. Indeed, the respondent would have prioritised the claimant given his clinical vulnerabilities. He would, so to speak, be 'at the top of the list.' The respondent referred to the applicable eligibility guidance which had last been updated on 14 May 2020. The guidance referred to being able to furlough employees for business reasons in which case the guidance stated that the employee should no longer receive sick pay. The paragraph following confirmed that employers could furlough employees

like the claimant who were clinically extremely vulnerable. The respondent reassured the claimant of this at that time.

75. In summary, the respondent considered that whilst the claimant was an eligible employee, whether the respondent could make use of the CJRS was predicated on both the furlough guidance (which referred to being unable to retain the workforce because operations had been affected by Covid), and the Treasury Direction (which required the employees activities to be adversely affected) being satisfied. Mr Evans also did not see that the Eligibility Guidance made employees who were classified as clinically extremely vulnerable a special case such that the gateway test needn't be met: *"Employers can furlough employees who are clinically extremely vulnerable, at the highest risk of severe illness from coronavirus or off on long-term sick leave. It is up to employers to decide whether to furlough these employees."* Mr Evans therefore understood that the Eligibility Guidance was in fact saying that those employees who were shielding or who were off on long-term sick leave remained eligible to be furloughed despite the fact that they were not currently at work. It did not, as he understood it, make employees, either on long-term sick or who were shielding, a special case.

76. At this point in time the respondent was operating at maximum capacity and was in fact anticipating an increase in weekend work. The respondent's business was not being adversely affected by Covid. In fact the opposite was true at the time: there was increased demand which it was attempting to meet. Therefore, although the respondent understood that the claimant met the eligibility criteria pursuant to the Eligibility Guidance, the respondent did not itself have legitimate grounds to use the CJRS scheme at that time within the confines of the Guidance and Treasury Direction.

77. Mr Evans also gave evidence that Bex Price sought advice from a contact of hers who was a Level 7 CIPD associate and that contact also agreed with the respondent's interpretation.

78. Ms. Price responded to the claimant's email on 10 November at 12:46 and confirmed the respondent's position. She confirmed that anyone classed as clinically extremely vulnerable would be considered at the top of the list if there was a need for furlough. She also confirmed that CJRS availability would be monitored and the claimant would be advised of any changes as soon as possible. [493-494].

79. The claimant sent a further email at 15:06 [493] in which he agreed that it was a grey area. The claimant said that from the information he was reading he could be furloughed even if asked to shield by the government. He enclosed an extract from Citizens' Advice containing details which the respondent did not consider to be relevant to the issue in question.

80. Ms. Price sent a further email response and confirmed that advice on websites was often conflicting. She referred to the additional advice she had received from her CIPD contact [492].

81. The claimant sent a further email to the respondent on 11 November asserting that the respondent's interpretation of the guidance was wrong

[492]. Ms. Price responded again on 12 November at 16:18 saying she would respond with a further conclusion [491].

82. Mr Evans and Ms. Price discussed the matter on the Friday which coincided with another (5th) Treasury Direction [267-297]. This amended the paragraph under the heading "Purpose of the CJRS" adding a new paragraph 2.2. Mr Evans indicated that at that time there was a large amount of commentary regarding the new Treasury Direction which suggested that if use of the furlough scheme was challenged, the respondent would need to show a 'resurgence' of Covid 19 and the disruption caused had resulted in operations being affected. He felt that at the time of the claimant's request the opposite was true. He noted that paragraph 2.3 of the Treasury Direction was also amended to refer to the 'employee to which the claim relates' (rather than employees in general) whose employment activities have been adversely affected by the coronavirus and coronavirus disease. Mr Evans pointed out that at that time all trucks (including the truck assigned to the claimant) were being fully utilised. Mr Evans also noted that around this time there was a lot of publicity about details of employers who were found to have abused the CJRS being published.

83. Then, on 16 November Ms. Price sent a further email confirming that, whilst the respondent supported the claimant's need to self-isolate and would ensure that SSP was processed, they were unable to furlough the claimant at that stage. She confirmed that should the business become affected to such an extent that they needed to seek support from the CJRS then they would consider the claimant a priority candidate but until that time they did not believe they were eligible to claim for the claimant under the CJRS [491].

84. On 18 November the claimant sent a further email again asking the respondent to reconsider the decision and quoting various advice that the claimant said he had received. [490]

85. On 18 November Mr Evans wrote the claimant an email again reiterating the respondent's decision [498]. He reassured the claimant that his job was secure. He accepted that companies have the option to furlough employees in the claimant's position and that the alternative was SSP and that the respondent had decided to go along the route of SSP. He continued, *"if we get into a situation as happened in March/April when our volumes dropped significantly and we have to furlough drivers, I can assure you that any "critically extremely vulnerable" drivers will be first on the list. Your last communication mentioned that we were "insisting on your return to work", I can assure you that this is definitely not the case, we support your shielding wholeheartedly."* In evidence to the Tribunal Mr Evans accepted that the choice of words he made in this email might have given the impression that he considered the respondent to have a choice as to whether to opt for SSP or furlough for the claimant. He maintained and clarified that this is not what he was saying. Based on the information he had at the time he did not think furlough was a possibility for the respondent business. He was merely indicating that the only alternative to that was SSP and that is what the respondent was offering the claimant.

86. By this stage in the chronology the respondent's decision had been conveyed to the claimant twice orally, then once by Ms. Price in an email and once by email from Mr Evans.

Period 5: Claimant's resignation: 26 November onwards.

87. On 26 November the claimant sent an email giving notice of termination of employment. This was his resignation email [499]. In that resignation email he complained about three specific matters. He said that he had no confidence in the respondent's ability to provide a safe and secure working environment during the pandemic. In support of that assertion he referred to his return to work on 27 July and the inadequacy of the arrangements for cleaning his cab. He complained that it was not until 31 July that he was provided with a PPE pack. He also complained about the problems with the Hensall depot toilets which led to his complaint in September 2020. He concluded by focusing on the respondent's failure to provide furlough. He clearly felt let down by the respondent in this regard. He concluded: "Keedwells have maintained that the company weren't obliged to enter into the furlough scheme to provide support to extremely clinically vulnerable/disabled workers, despite being encouraged by the government to do so. But surely any half decent employer would have had a moral duty of care to look after its employees. We can only speculate at the company's reasons for not doing so."

88. Beck's price responded to the resignation letter that afternoon and referred to the positive feedback about the improvement in standards, the spot checks, the clean down of vehicles on entry and exit and refills and replacement for sanitiser being readily available.

89. The claimant's employment ended on 2 December 2020.

90. On 10 December 2020 (*after* the claimant's last day of employment) the CJRS Eligibility Guidance was amended to specifically state that employers did not need to be facing a wider reduction in demand or be closed to be eligible to claim for employees who were clinically extremely vulnerable. The difference in the wording of the guidance applicable at the time of the claimant's request was clear. A sentence was added on 10 December stating that, *"An employer does not need to be facing a wider reduction in demand or be closed to be eligible to claim for these employees."* (i.e. those who are clinically extremely vulnerable) [320]

91. The respondent pointed out that the fact that the government felt there was a need for this additional sentence specifically supports the respondent's earlier conclusion regarding the difference between eligibility of an individual employee to be furloughed and entitlement of the respondent business to claim under the scheme.

92. The Tribunal accepts, based on its own reading of the available contemporaneous guidance, that the respondent is correct in its interpretation of the changes implemented on 10 December. We also accept the respondent's evidence that, had the claimant still been in employment as of 10 December, they would likely have reassessed the position in relation to a claim for furlough for the claimant.

93. The Tribunal also accepts that there was subsequently a drop off in trade for the respondent later in December. In response to this on 21 December the respondent furloughed a number of Brick and Block drivers. Had the claimant still been in employment at this time he would have been prioritised and would no doubt have been furloughed at that stage. Unfortunately for the claimant, at the point in time when he resigned none of this was known. It is only with the benefit of hindsight that we can see that the claimant could have stayed in employment for a few weeks more and was likely to have been furloughed at that point.

94. The Tribunal further notes that during the period in question businesses were told by the government not to abuse the CJRS. If they did so they were at risk of a fine, prosecution, directors' personal liability, 'naming and shaming' etc. Hence the respondent was concerned to ensure that it used the CJRS correctly in order to avoid any such penalties.

95. For the avoidance of doubt, the Tribunal has conducted its own review of the development of the government documentation over the period in question in order to check at what point the documents were modified and in what way and to satisfy ourselves as to the way the interrelated documents were supposed to fit together and operate cohesively. It appears that the document at [257] is the document headed "Check if you can claim for your employees' wages through the coronavirus job retention scheme." On page 258 it sets out a series of six steps that an employer would have to take to use the scheme. The first step is to check if the *employer* can claim. The second step is to check *which employees* can be put on furlough. The second step had a hyperlink taking an employer through to separate guidance on this particular issue. Steps three through to six dealt with the practicalities of calculating the claim and implementing it. Underneath the paragraphs numbered 1 to 6 there is a further paragraph stating, *"If you cannot maintain your workforce because your operations have been affected by coronavirus you can furlough employees and apply for a grant to cover a portion of their usual monthly wage costs where you record them as being on furlough."* It also noted that from 1 August 2020 employers would be asked to contribute towards the cost of the furloughed employees' wages.

96. The paragraph numbered "1" on page 258 is what the respondent referred to as the 'gateway.' Paragraph number 2 on page 258 requires a qualifying employer to check which of its employees is eligible for furlough. The document at page 257-266 deals with the gateway question (see description in the bundle index for items 28, 30 and 31) whereas the documents at pages 298-308 and 309-328 deal with question number two (i.e. once the business is through the gateway which of its employees can it furlough?).

97. Thus the sentence at page 303 about employees self-isolating/on sick leave being eligible for furlough is a 'question 2/employee eligibility' question. It is not a document which deals with 'question 1/employer 'gateway' eligibility. Page 303 is the earlier version. Page 320 is taken from the later version which has an additional sentence making it explicit that the employer does not need to be facing a wider decrease in demand or be closed to consider furlough for such employees. The amendments to

the document are tracked over time in a log at page 323-328. The entry for 10 December [324-325] makes it clear that the new sentence was added to the document on 10 December. The Tribunal can be satisfied that it was only made explicit that the respondent did not need to have its own operations affected by the virus (e.g. be closed or facing a wider downturn in business) in order to furlough drivers like the claimant after the claimant's employment with the respondent had already terminated.

98. The Tribunal can therefore see that, according to the government documentation, the respondent business's 'gateway' to eligibility to claim furlough was open during the first lockdown because the driving work had stopped when construction sites closed. The 'gateway' closed once the business reopened and the drivers came back to work. The gateway did not reopen when the second lockdown started on 5 November as the business did not face a reduction in demand and was not closed. The business operations were not affected at that point. The gateway remained closed until after the termination of the claimant's employment as until then there was no wider downturn in the business. All the drivers were required to meet demand. It was only after the end of the claimant's employment that the need for further furlough because apparent. Drivers were furloughed from 21 December. It was only on 10 December at the earliest that the respondent could have chosen to furlough the claimant because the terms of the guidance changed even though the respondent was not, at that stage, facing a reduction in demand and was not closed. The earliest that the respondent could have put the claimant onto furlough and still have complied with the terms of the scheme was 10 December.

99. As a postscript we note that the WhatsApp message at [463] dated 7 November 2020 indicated that the claimant had already decided to resign from his employment with the respondent. Hence the photograph of the claimant alongside his truck with the caption "end of an era… Start of a new one. " Later in the WhatsApp exchange the claimant confirms that he still has his licence and driving card and that there was a lot of part time and cover work out there. This suggests that anything done by the respondent after 7 November had no material impact on the claimant's decision to resign as he had apparently already made that decision.

100. We also note that some of the text exchanges within the family WhatsApp group show that the claimant may have been building his tribunal case after the event to some extent [459]. In these exchanges members of the family make statements such as: *"make more of the leg than Covid. You want to build a case that he is no longer able to work because of his injury. I'd even say you plan to go on Monday then ring in and say your leg was swollen again. Don't mention Covid again at all."* Insofar, as this impacts upon the claimant's own credibility as a witness (bearing in mind that these texts are largely from other members of the family) it does indicate that the claimant may be overemphasising some matters after the event. However, the Tribunal does not conclude that his chronology of events is fundamentally untrue. We are mindful that we should not hold the claimant responsible for what his family says to him or the advice that they give to him. That said we accept that there may be a degree of overemphasis. We are satisfied, however, that the fundamental outlines of the claimant's case

were not manufactured. We are satisfied that the claimant was a genuine and hard-working employee of long-standing. It is apparent that he felt let down by the respondent and genuinely felt that he should have received more support from the respondent in the circumstances (whether or not that criticism of the respondent is actually justified). His family have advised him to exaggerate or embellish his case. This was bad advice but his evidence as a whole was not given in bad faith. We do not go so far (as the respondent's representatives asked us to do) as to conclude that the claimant had deliberately told untruths.

101. The allegation about the presence of excrement on the walls of the toilets was not present in the claimant's resignation letter or the claimant's witness statement but was put forward in the claimant's oral evidence to the Tribunal. Likewise the claimant's resignation letter indicates that there was no cleaning equipment at all whereas in his witness statement the claimant says he was given a bucket of water. These cannot both be true. The claimant was reluctant to accept the contradiction between these two pieces of evidence. The respondent also pointed out that the claimant maintained in his communication to the respondent that he had taken time off work for stress related reasons, whereas in fact he was staying at home to care for his wife who was suffering from cancer. We do not consider this to be dishonest. Rather it is a reflection of the fact that caring for a loved one suffering from cancer would be stressful such that it would be legitimate for the employee to rely on that stress as a reason to take sick leave from their employment.

The Law

Section 15: Discrimination arising from disability

102. Section 15 Equality Act 2010 states:

> *(1) A person (A) discriminates against a disabled person (B) if-*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
>
> *(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

103. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability'. The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an

individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.

(iii) The unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.

(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

104. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

105. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

106. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.

(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(e) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable

treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).

(f) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability'. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

107. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

108. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

109. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

110. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

111. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

112. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

113. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Section 26: harassment

114. Section 26 states:

> (1) A person (A) harasses another (B) if-
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) The conduct has the purpose or effect of-
> (i) violating B' s dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B
>
> ….
>
> (4) In deciding whether conduct has the effect referred to in subsection (1) (b), each of the following must be taken into account-
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

115. 'Unwanted' conduct is essentially the same as 'unwelcome' or 'uninvited' conduct.

116. Harassment will be unlawful pursuant to section 26 if the unwanted conduct related to a relevant protected characteristic had *either* the purpose *or* the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

117. The harassment has to be "related to" a particular protected characteristic. The tribunal is required to identify the reason for the harassment with a particular focus on the context of the particular case. In Unite v Naillard [2017] ICR 121 the EAT indicated that section 26 requires the tribunal to focus upon the conduct of the individual(s) concerned and ask whether their conduct is associated with the protected characteristic. In that case it was not enough that an individual had failed to deal with sexual harassment by a third party unless there was something about the individual's own conduct which was related to sex. The focus will be on the person against whom the allegation of harassment is made and his conduct or inaction. So long as the tribunal focuses on the conduct of the alleged perpetrator himself it will be a matter of fact whether the conduct is related to the protected characteristic. As stated in Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, "there must still … be some feature or features of the factual matrix identified by the tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found have led to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be."

118. The test as to the effect of the unwanted conduct has both subjective and objective elements to it. The subjective element involves looking at the effect of the conduct on the particular complainant. The objective part requires the tribunal to ask itself whether it was reasonable for the complainant to claim that the conduct had that effect. Whilst the ultimate judgement as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered. So, whilst the victim must have felt or perceived her dignity to have been violated or an adverse environment to have been created, it is only if it was reasonable for the victim to hold this feeling or perception that the conduct will amount to harassment. Much depends on context. See the guidance Richmond Pharmacology v Dhaliwal [2009] ICR 724 revisited in Pemberton v Inwood [2018] IRLR where Underhill LJ stated:

> *In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c))*

whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

The context of the conduct and whether it was intended to produce the proscribed consequences are material to the tribunal's decision as to whether it was reasonable for the conduct to have the effect relied upon. Chawla v Hewlett Packard Ltd [2015] IRLR 356.)

119. As stated in Dhaliwal:

'If, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.

Victimisation

120. Section 27 Equality Act 2010, so far as relevant, provides that:

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

(a) B does a protected act…

(2) Each of the following is a protected act –

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

121. A protected act requires that an allegation is raised which, if proved, would amount to a contravention of the Equality Act 2010. No protected act arises merely by making reference to a criticism, grievance, or complaint without suggesting that it was in some sense an allegation of discrimination or otherwise a contravention of the Equality Act 2010: Beneviste v Kingston University UKEAT/0393/05/DA [29].

122. The test for detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his perception must be 'reasonable' in the circumstances.

123. The employee must be subjected to the detriment 'because of' the protected act. The same principles apply in considering causation in a victimisation claim as apply in consideration of direct discrimination. The protected act need not be the sole cause of the detriment as long as it has a significant influence in a 'Nagarajan' sense. It need not even have to be the primary cause of the detriment so long as it is a significant factor. Detriment cannot be because of a protected act in circumstances where there is no evidence that the person who allegedly inflicted the detriment knew about the protected act. In the absence of clear circumstances from which such knowledge can be inferred, the claim for victimisation will fail Essex County Council v Jarrett EAT 0045/15.

Section 20/21: reasonable adjustments.

124. Section 20 (so far as relevant) states:

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

125. Section 21 states:

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

126. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

> (a) Identify the PCP applied by or on behalf of the employer,
> (b) Identify comparators (if necessary),
> (c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

127. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

128. In Ishola v Transport for London [2020] EWCA Civ 112 it was noted that the phrase PCP should be construed widely but remarks were made about

the legislator's choice of language (as opposed to the words "act" or "decision".) Simler LJ stated, *"I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs…. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice." It is just done; and the words "in practice" add nothing….The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee…To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply…. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. …In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP of "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to "practice" as having something of an element of repetition about it."*

129. A 'substantial disadvantage' is one which is 'more than minor or trivial'.

130. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather it is sufficient that a tribunal concludes on the evidence that there would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

131. Particular issues have arisen in the case law around reasonable adjustments in relation to levels of pay, particularly in relation to sick pay. The purpose of reasonable adjustments is said to be to assist the employee to obtain employment and integrate into the workforce, rather than to facilitate leave absence from work and to make it less disadvantageous to stay away from work. In O'Hanlon v Revenue and Customs Commissioners [2007] EWCA Civ 283 the Court of Appeal stated: *"In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances."* The EAT had said (in relation to the same case) that to consider this to be a reasonable adjustment would be for the Tribunal to usurp the management function of the employer. It also stated, importantly, that: *"the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in s18B (3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packets of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work."* The Court of Appeal also referred to the EAT's rationale that the claimant could not rely on financial hardship of the attending stress as a substantial disadvantage, as that would be no different to a comparator. The EAT held: *"In any event, it seems to us that it would be wholly invidious for an employer to have to determine whether to increase sick payments by assessing the financial hardship suffered by the employee, or the stress resulting from lack of money- stress which no doubt would be equally felt by a non-disabled person absent for a similar period."*

132. The O'Hanlon decision was further approved under the terms of the Equality Act 2010 in Aleem v E-Act Academy Trust Ltd EKEAT/0099/20.

133. If there are no adjustments which would enable the employer to return to work, it would not be reasonable to make them (Conway v Community Options Ltd UKEAT/0034/12).

134. An employer can satisfy the duty to make reasonable adjustments even if the adjustments adopted are not the adjustments preferred by the employee (Garrett v Lidl Ltd UKEAT/0541/0).

135. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is

what objectively the employer could reasonably have known following reasonable enquiry.

Indirect discrimination

136. Section 19 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a protected characteristic of B's.
(2) For the purposes of subsection (1), a provision criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
   a. A applies, or would apply, it to persons with whom B does not share the characteristic,
   b. It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
   c. It puts, or would put, B at that disadvantage, and
   d. A cannot show it to be a proportionate means of achieving a legitimate aim.

137. The key element in indirect discrimination claims is the causal link between the PCP and the particular disadvantage suffered by the group and the individual. As Baroness Hale stated in Essop and ors v Home Office (UK Border Agency) and anor [2017] ICR 640: '*Sometimes, perhaps usually, the reason [why the PCP results in the disadvantage] will be obvious: women are on average shorter than men, so a tall minimum height requirement will disadvantage women whereas a short maximum will disadvantage men. But sometimes it will not be obvious: there is no generally accepted explanation for why women have on average achieved lower grades as chess players than men, but a requirement to hold a high chess grade will put them at a disadvantage… Indirect discrimination assumes equality of treatment — the PCP is applied indiscriminately to all — but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified. The prohibition of indirect discrimination thus aims to achieve equality of results in the absence of such justification. It is dealing with hidden barriers which are not easy to anticipate or to spot'.* Implying a 'reason why' question into section 19 would undermine the protection afforded by that provision and could result in the continuation of discrimination.

138. The claimant must establish the relevant PCP for the purposes of his indirect discrimination claim. The Tribunal will generally take a consistent approach to the meaning of 'provision, criterion or practice' irrespective of whether it arises under section 19 (indirect discrimination) or section 20 (reasonable adjustments.) A PCP need not impose an absolute bar on the affected employee in order to be caught by section 19. As in claims for reasonable adjustments, the words provision criterion or practice carry a

connotation of a state of affairs indicating how the employer generally treats similar cases or how it would deal with a similar case if it occurred again. A PCP must be capable of being applied to others. Although a one-off decision or act can be a practice, it is not necessarily one, and not every act of unfair treatment of a particular employee can be formulated as a PCP (see Ishola above).

139. The wording of section 19 still requires a comparative exercise. A 'pool for comparison' approach may still be a way of carrying out the comparison, although it is not necessarily the only method. If used, the pool should generally encompass all those affected by the PCP about which the complaint is made, including those who are disadvantaged by it and those that are advantaged by it. The pool for comparison must be drawn up in accordance with section 23(1) of the Equality Act. On a comparison of cases where must be no material difference between the circumstances relating to each case.

140. Statistical analysis can be used to establish disparate impact in a section 19 case but it is not the only method.

141. The EHRC Code states that 'disadvantage' is to be construed as something that a reasonable person would complain about. An unjustified sense of grievance would not qualify. However, a disadvantage does not have to be quantifiable and the claimant does not have to experience actual loss (economic or otherwise). It is enough that the worker can reasonably say that they would have preferred to be treated differently (paragraph 4.9.) The concept of disadvantage overlaps significantly with 'detriment.'

142. It is not enough to show that the claimant and his group sharing the protected characteristic have been put at a disadvantage. The disadvantage must be a 'particular disadvantage.' Particular disadvantage does not refer to serious, obvious or particularly significant cases of inequality but instead denotes that it is particularly persons of a given protected characteristic (e.g., race) who are at a disadvantage because of the practice at issue (see Pendleton v Derbyshire County Council 2016 IRLR 580). A policy with which the claimant has complied can still give rise to a disadvantage. Compliance does not preclude disadvantage.

143. A hypothetical comparator group can be used in a section 19 claim.

144. Group disadvantage can be examined using statistical evidence or expert evidence or even relying on judicial notice of a particular disadvantage. Depending on the facts of the case in question group disadvantage may also be inferred from the fact that there is particular disadvantage in the individual case. The disadvantage may be inherent in the PCP in question. (Dobson v North Cumbria Integrated Care NHS Foundation Trust 2021 ICR 1699.)

145. Group disadvantage and individual disadvantage must be considered in the proper order. The correct approach is to first identify the relevant group disadvantage and then to consider whether the claimant suffered that disadvantage (Ryan v South Western Ambulance Service NHS Trust [2021] ICR 555). The claimant must prove that the PCP puts him or her at

the same disadvantage as those others who share the relevant protected characteristic.

146. In order to examine a defence of objective justification the Tribunal will need to consider whether the aim pursued is legal, not discriminatory in itself and presents a real, objective consideration. The measure adopted by the respondent does not have to be the only possible way of achieving the legitimate aim, it is sufficient that the aim could not have been achieved by less discriminatory means.

147. The justification put forward by the employer for an indirectly discriminatory PCP falls to be judged at the time when the measure was applied to the claimant, not at the time when the PCP was introduced. This does not mean that the employer is prevented from relying on considerations that were not in contemplation at the time of the PCP's application. There is no rule of law whereby the justification must have consciously and contemporaneously featured in the employer's decision-making processes. However, the burden of proving that a particular aim was legitimate may become more onerous when the reasons for the aim were not in the mind of the discriminatory at the time that the discriminatory act was committed (R (on the application of Elias) v Secretary of State for Defence 2006 IRLR 934).

148. Reference can be made to the case law guidance on carrying out the proportionality assessment set out above in the context of section 15.

Burden of Proof

149. Section 136 of the Equality Act 2010 provides that, once there are facts from which an employment tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof "shifts" to the respondent to prove any non-discriminatory explanation. The two-stage shifting burden of proof applies to all forms of discrimination under the Equality Act.

150. The wording of section 136 of the act should remain the touchstone. The relevant principles to be considered have been established in the key cases: Igen Ltd v Wong 2005 ICR 931; Laing v Manchester City Council and another ICR 1519; Madarassy v Nomura International Plc 2007 ICR 867; and Hewage v Grampian Health Board 2012 ICR 1054.

151. The correct approach requires a two-stage analysis. At the first stage the claimant must prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out on the balance of probabilities is the second stage engaged, whereby the burden then "shifts" to the respondent to prove (on the balance of probabilities) that the treatment in question was "in no sense whatsoever" on the protected ground.

152. The approved guidance in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205 (as adjusted) can be summarised as:

a) It is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in

the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.

b) In deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. In many cases the discrimination will not be intentional.

c) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination, it merely has to decide what inferences could be drawn.

d) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts. These inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information. Inferences may also be drawn from any failure to comply with the relevant Code of Practice.

e) When there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent. It is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.

f) Not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. Since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden.

153. The shifting burden of proof rule only applies to the discriminatory element of any claim. The burden remains on the claimant to prove that the alleged discriminatory treatment actually happened and that the respondent was responsible. The statutory burden of proof provisions only play a role where there is room for doubt as to the facts necessary to establish discrimination. In a case where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against on the alleged protected ground, they have no relevance (Hewage). If a tribunal cannot make a positive finding of fact as to whether or not discrimination has taken place it must apply the shifting burden of proof.

154. Where it is alleged that the treatment is inherently discriminatory, an employment tribunal is simply required to identify the factual criterion applied by the respondent and there is no need to inquire into the

employer's mental processes. If the reason is clear or the tribunal is able to identify the criteria or reason on the evidence before it, there will be no question of inferring discrimination and thus no need to apply the burden of proof rule. Where the act complained of is not in itself discriminatory and the reason for the less favourable treatment is not immediately apparent, it is necessary to explore the employer's mental processes (conscious or unconscious) to discover the ground or reason behind the act. In this type of case, the tribunal may well need to have recourse to the shifting burden of proof rules to establish an employer's motivation

155. The claimant bears the initial burden of proving a prima facie case of discrimination on the balance of probabilities. The requirement on the claimant is to prove on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination. The employer's explanation (if any) for the alleged discriminatory treatment should be left out of the equation at the first stage. The tribunal must assume that there is no adequate explanation. The tribunal is required to make an assumption at the first stage which may in fact be contrary to reality. In certain circumstances evidence that is material to the question whether or not a prima facie case has been established may also be relevant to the question whether or not the employer has rebutted that prima facie case.

156. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, with more, sufficient material from which tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination (see Madarassy).

157. If the claimant establishes a prima facie case of discrimination the second stage of the burden of proof is reached and the burden of proof shifts onto the respondent. The respondent must at this stage prove, on balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected characteristic. The employer's reason for the treatment of the claimant does not need to be laudable or reasonable in order to be non-discriminatory.

158. In some instances, it may be appropriate to dispense with the first stage altogether and proceed straight to the second stage (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.) The employment tribunal should examine whether or not the issue of less favourable treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule. If the tribunal is unable to make a positive finding and finds itself in the situation of being unable to decide the issue of less favourable treatment without examining the reason, it must examine the reason (i.e. conduct the two stage inquiry) and it should be for the employer to prove that the reason is not discriminatory, failing which the claimant must succeed in the claim.

159. In a claim of indirect discrimination, following the case off Dziedziak v Future Electronics Ltd EAT 0271/11 the matters that would have to be established before there could be any reversal of the burden of proof would be, first, that there was a provision, criterion or practice; secondly, that it disadvantaged [those who share the protected characteristic] generally, and thirdly, that what was a disadvantage to the general created a particular disadvantage to the individual claimant. Only then would the employer be required to justify the provision, criterion or practice. It appears that the burden lies on the claimant to establish the 1st 2nd and 3rd elements of the statutory definition, only then does it fall to the employer to justify the PCP as a proportionate means of achieving a legit aim.

160. In a case of harassment under section 26 of the Equality Act the shifting burden of proof in section 136 will still be of use in establishing that the unwanted conduct in question was "related to a relevant protected characteristic" for the purposes of section 26(1)(a). Where the conduct complained of is clearly related to protected characteristic then the employment tribunal will not need to revert to the shifting burden of proof rules at all. Where the conduct complained of is ostensibly indiscriminate the shifting burden of proof may be applicable to establish whether or not the reason for the treatment was the protected characteristic. Before the burden can shift to the respondent the claimant will need to establish on the balance of probabilities that she was subjected to the unwanted conduct which had the relevant purpose or effect of violating dignity, creating an intimidating etc. environment for her. The claimant may also need to adduce some evidence to suggest that the conduct could be related to the protected characteristic, although she clearly does not need to prove that the conduct *is* related to the protected characteristic as that would be no different to the normal burden of proof.

161. In the context of a section 15 claim in order to establish a prima facie case of discrimination the claimant must prove that he or she has the disability and has been treated unfavourably by the employer. It is also for the claimant to show that "something" arose as a consequence of his or her disability and that there are facts from which it could be inferred that this "something" was the reason for the unfavourable treatment. Where the prima facie case has been established, the employer will have three possible means of showing that it did not commit the act of discrimination. First, it can rely on section 15(2) and prove that it did not know that the claimant was disabled. Secondly, the employer can prove that the reason for the unfavourable treatment was not the "something" alleged by the claimant. Lastly, it can show that the treatment was a proportionate means of achieving legitimate aim.

162. Where it is alleged that an employer has failed to make reasonable adjustments, the burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments had arisen but also that there are facts from which it could reasonably be inferred (absent an explanation) that the duty been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it can be properly inferred that there is a breach of that duty. Rather, there must be evidence of some apparently reasonable adjustment that could have been made. Therefore, the burden is reversed only once a potentially

reasonable amendment adjustment has been identified Project Management Institute v Latif [2007] IRLR 579.

163. In a victimisation claim where there is clear evidence of the reason for the treatment (which forms the detriment) there is no need for recourse to the shifting burden of proof in section 136. However, where the shifting burden of proof does come into play it is for the claimant to establish that he/she has done a protected act and has suffered a detriment at the hands of the employer. Applying the approach in Madarassy would suggest that there needs to be some evidence from which the tribunal could infer a causal link between the protected act and the detriment. One of the essential elements of the prima facie case that the claimant must establish appears to be that the employer actually knows about the protected act (Scott v London Borough of Hillingdon [2001] EWCA Civ 2005).

Protected Disclosures

164. A protected disclosure is defined by section 43A Employment Rights Act 1996 as a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. In this case the alleged disclosures were made to the claimant's employer in line with section 43C.

165. Section 43B of the Employment Rights Act 1996 defines a qualifying disclosure thus:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

a. that a criminal offence has been committed, is being committed or is likely to be committed,
b. that a person has failed, is failing, is likely to fail to comply with any legal obligation to which he is subject,
c. that a miscarriage of justice has occurred, is occurring or is likely to occur,
d. that the health or safety of any individual has been, is being or is likely to be endangered,
e. that the environment has been, is being or is likely to be damaged, or
f. that information tending to show any other matter falling within one of the preceding paragraphs has been, or is likely to be deliberately concealed.

….

(5) In this Part "the relevant failure," in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

166. As set out in Williams v Brown AM UKEAT/0024/19 there are five separate stages to applying the necessary tests: *"First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is*

made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief it must be reasonably held."

Disclosure

167. In order to make a disclosure an employee simply has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.

168. 'Information' in the context of section 43B is capable of covering statements which might also be characterised as allegations (*Kilraine v London Borough of Wandsworth [2018] ICR 1850)*. 'Information' and 'allegation' are not mutually exclusive categories of communication. Rather, a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a 'relevant failure.' The decision in *Kilraine* stressed that the word 'information' in section 43B(1) has to be read with the qualifying phrase 'tends to show'. The worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. In order for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a)–(f).

169. The context of any disclosure may also be relevant in determining the content of the disclosure. Meaning can be derived from context. Disclosures may also have to be looked at cumulatively. Information previously communicated by a worker to an employer could be regarded as 'embedded' in a subsequent communication. Two or more communications taken together can amount to a qualifying disclosure even if, taken on their own, each communication would not (*Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540). Whether two communications are to be read together is generally a question of fact (Simpson v Cantor Fitzgerald Europe [2021] ICR 695).*

Qualifying disclosures

170. A qualifying disclosure does not have to relate to a relevant failure of the employer that employs the worker making the disclosure. It may relate to the relevant failure of a colleague, a client or other third party.

171. Section 43B(1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the 'reasonable belief' of the worker:

1. be made in the public interest, and
2. tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur.

172. The employee has to have a reasonable belief that that the information he or she disclosed tends to show one of the six relevant failures. This has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

173. The worker's reasonable belief must be that the *information disclosed tends to show* that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure *has* occurred, *is* occurring, or is *likely to occur*. The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable. Rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.

174. The focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. This does not mean that the test is entirely subjective. Section 43B(1) requires a *reasonable* belief of the worker making the disclosure. This introduces a requirement that there should be some objective basis for the worker's belief. In *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT* it was held that reasonableness under section 43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe. The subjective element is that the worker must believe that the information disclosed tends to show one of the relevant failures and the objective element is that that belief must be reasonable (*Phoenix House Ltd v Stockman [2017] ICR 84).* The EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board* stated that the focus on 'belief' in section 43B establishes a low threshold. However, the reasonableness test clearly requires the belief to be based on some evidence. Unfounded suspicions, uncorroborated allegations etc. will not be enough to establish a reasonable belief.

175. There can be a qualifying disclosure of information even if the worker is wrong (*Darnton v University of Surrey [2003] ICR 615).* Truth and accuracy are still relevant considerations in deciding whether a worker has a reasonable belief. Determination of the factual accuracy of the worker's allegations will often help to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure. It may be difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he or she believes that the factual basis of the allegation is false.

176. The worker must reasonably believe that his disclosure tends to show that one of the relevant failures has occurred, is occurring or is *likely* to occur. Likely should be construed as requiring more than a possibility or a risk, that an employer or other person might fail to comply with a relevant legal obligation. The information disclosed should " in the reasonable belief of the worker at the time it is disclosed, tend to show that it is *probable or more probable than not* that the employer will fail to comply with the relevant legal obligation' (Kraus v Penna Plc and anor [2004] IRLR 260).

Public interest

177. The public interest element of the test is also qualified by the requirement of 'reasonable belief.' In order for any disclosure to qualify for protection the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest.' There is no statutory definition of the public interest. The focus is on whether the worker reasonable believed that the disclosure was in the public interest rather than on the objective question of whether the public interest test was in fact satisfied.

178. In *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731* the Court of Appeal rejected the argument that for a disclosure to be in the public interest it must serve the interests of persons outside the workplace and that mere multiplicity of workers sharing the same interest was not enough. The essential point was that to be in the public interest the disclosure had to serve a wider interest than the private or personal interest of the worker making the disclosure. Even where the disclosure relates to a breach of the worker's own contract of employment there may still be features of the case that make it reasonable to regard disclosure as being in the public interest. The following factors might be relevant:

(a) the numbers in the group whose interests the disclosure served;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
(c) the nature of the wrongdoing disclosed; and
(d) the identity of the alleged wrongdoer.

The number of people sharing the interest is not determinative. The fact that at least one other person shared the interest was insufficient in itself to convert it into a matter of public interest. Conversely, it was wrong to say that the fact that it was a large number of people whose interests were served by the disclosure of a breach of the contract of employment could never, in itself, convert a personal interest into a public interest.

179. In Underwood v Wincanton Plc EAT/0163/15 the EAT held that it was arguable that the public interest test was satisfied by a group of employees raising a matter specific to their terms of employment. 'The public' can refer to a subset of the general public, even one composed solely of employees of the same employer. In Morgan v Royal Mencap Society [2016] IRLR 428 it was held that it was reasonably arguable that an employee could

consider a health and safety complaint, even one where the employee is the principal person affected, to be made in the wider interests of employees generally.

180. There may be a difference between a matter of public interest and a matter that is of interest to the public, and that there may be subjects that most people would rather not know about that may be matters of public interest (*Dobbie v Felton t/a Feltons Solicitors 2021 [IRLR] 679, EAT)*. A disclosure could be made in the public interest even though the public will never know that it has been made, and a disclosure could be made in the public interest even if it relates to a specific incident without any likelihood of repetition. The absence of a statutory definition of 'public interest' does not mean that it is not to be determined by a principled analysis. The four factors identified in *Nurmohamed* will often be of assistance. Some private employment disputes will more obviously raise public interest matters than others.

181. For a disclosure to qualify the worker need only have a *reasonable belief* that his or her disclosure is made in the public interest. The tribunal does not have to determine the objective question of what the public interest is, and whether a disclosure served it. The Tribunal has to consider what the worker considered to be in the public interest; whether the worker believed that the disclosure served that interest; and whether that belief was held reasonably. As reasonableness is judged to some extent objectively, it is open to a Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time. Tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker *(Nurmohamed)*. That does not mean that it is illegitimate for the tribunal to form its own view on that question as part of its thinking but only that that view is not, as such, determinative. The necessary belief is simply that the disclosure is in the public interest and the particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the tribunal finds were not in his or her head at the time. A tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his or her belief but nevertheless find it to have been reasonable for different reasons which he or she had not articulated at the time: all that matters is that his or her (subjective) belief was (objectively) reasonable.

182. Belief in the public interest need not be the predominant motive for making the disclosure or even form part of the worker's motivation. The worker's motive might, however, be one of the individual circumstances taken into account by a tribunal when considering whether the worker reasonably believed the disclosure to be in the public interest. A worker may seek to justify an alleged qualifying disclosure by reference to matters that were not in his or her head at the time he or she made it, but if he or she cannot give credible reasons for why he or she thought at the time that the disclosure was in the public interest, that may cast doubt on whether he or

she really thought so at all. Belief in a public interest element would not have to form any part of the worker's motivation so long as the worker has a genuine (and reasonable) belief that the disclosure is in the public interest.

Breach of a legal obligation

183. Section 43B(1)(b) is capable of covering not only those obligations set down in statute and secondary legislation but also any obligation imposed under the common law (e.g. negligence, nuisance and defamation), as well as contractual obligations and those derived from administrative law. It can include breaches of legal obligations arising under the employee's own contract of employment (subject to the public interest element of the test also being met.) It does not cover a breach of guidance or best practice, or something that is considered merely morally wrong. A worker will not be deprived of protection in relation to a disclosure simply because he or she is wrong about what the law requires.

184. A worker need not always be precise about what legal obligation he or she envisages is being breached or is likely to be breached for the purpose of a qualifying disclosure under section 43B(1)(b). In cases where it is 'obvious' that some legal obligation is engaged then the absence of specificity will be of little evidential relevance. In less obvious cases, a failure by the worker to at least set out the nature of the legal wrong he or she believes to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation.

Health and safety disclosures

185. Any disclosure which, in the reasonable belief of the worker, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered is a qualifying disclosure section 43B(1)(d). 'Health and safety' is a well understood phrase and so it will usually be obvious whether the subject matter of the disclosure has the potential to fall within section 43B(1)(d). A disclosure does not have to relate to a failure of the employer employing the worker making the disclosure — it may cover wrongdoing by a third party (Hibbins v Hesters Way Neighbourhood Project 2009 ICR 319). Thus, the health and safety matter at issue need not necessarily fall under the control of the employer. A worker will be expected to have provided sufficient details in the disclosure of the nature of the perceived threat to health and safety. Furthermore, the worker's belief must be reasonable. A wholly irrational belief will not acquire protection.

Method of disclosure

186. In order to be a protected disclosure, the qualifying disclosure must be made in the correct manner as set out in sections 43C-43H. A worker who

makes a disclosure to their employer has fewer hurdles to get over than one who makes the disclosure to an outsider. A disclosure made to a worker's employer will be a protected disclosure s43C(1)(a).

Causation and burden of proof in section 103A dismissal cases

187. In a claim of automatically unfair dismissal for making a public interest disclosure, the public interest disclosure must be the sole or principal reason for the dismissal. As in a case of ordinary unfair dismissal the Tribunal must examine the mind of the decision maker. What was the decision maker's reason for dismissal? Where the employee lacks the necessary two years' qualifying service to pursue a claim of ordinary unfair dismissal the employee will bear the burden of proof in showing the reason for the dismissal was the protected disclosure (i.e. the automatically unfair reason.)

Detriment

188. Section 47B of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to any detriment by his or her employer, a colleague acting in the course of employment or an agent acting with the employer's authority on the ground that the worker made a protected disclosure. The requirements for a successful claim are that:
    (e) the claimant must have made a protected disclosure;
    (f) he must have suffered some identifiable detriment;
    (g) the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act; and
    (h) the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

189. Section 47B(1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal. Any such complaint instead falls under section 103A which renders a dismissal automatically unfair if the sole or principal reason for it was that the employee made a protected disclosure.

190. A detriment is unlawful under section 47B if done 'on the ground' of a protected disclosure, whereas dismissal is unfair under section 103A only if the protected disclosure is the reason or principal reason for it. A section 47B claim may be established where the protected disclosure is one of many reasons for the detriment, whereas section 103A requires the disclosure to be the primary motivation for a dismissal.

191. Section 47B provides protection from any detriment. There is no test of seriousness or severity. It is not necessary for there to be physical or economic consequences for it to amount to a detriment. What matters is that the complainant is shown to have suffered a disadvantage of some kind.

192. The protection is against acts and *deliberate* failures to act. A deliberate failure to act shall be treated as done when it was decided upon (section 48(4)(b)).

Causation (detriment cases)

193. Causation under section 47B has two elements:
   (i) was the worker subjected to the detriment by the employer, other worker or agent?
   (j) was the worker subjected to that detriment because he or she had made a protected disclosure?

194. The question of causation is to be applied to the employer's act or omission not the ensuing detriment. What was the reason for the respondent's act or omission? (Not, what was the reason for the detriment?)

195. In any detriment claim it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2)). This does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant (i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment) the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

196. If the tribunal has rejected the reason advanced by the employer, the tribunal is not then bound to accept the reason advanced by the employee: it can conclude that the true reason for dismissal was one that was not advanced by either party (Kuzel v Roche Products Ltd 2008 ICR 799, Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14).

197. It may be appropriate to draw inferences as to the real reason for the employer's action on the basis of the tribunal's principal findings of fact. The EAT summarised the proper approach to drawing inferences in a detriment claim in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17:

   (a) The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made.
   (b) By virtue of section 48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) (see London Borough of Harrow v Knight 2003 IRLR 140, EAT)

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

198. In order for liability under section 47B to be established the worker must show that the detriment arises from the act or deliberate failure to act by the employer. Only then can the worker say that he or she has been 'subjected to' the detriment in question.

199. Section 47B will be infringed if the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistle-blower (*Fecitt and ors v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372)*. There is a different test in detriment cases from dismissal cases under section 103A. The 'material influence' test is to be applied in section 47B detriment cases whereas in a section 103A unfair dismissal case the test is still to ask what the *sole or principal reason* for the dismissal actually was.

200. It is not necessary to consider how a real or hypothetical comparator who has not made a protected disclosure was or would have been treated when determining whether the protected disclosure was the 'ground' for the treatment complained of (even though it may be a useful exercise).

201. The motivation need not be malicious. It does not matter whether the employer intends to do the whistle-blower harm, so long as the whistle-blower has, as a matter of fact, been subjected to a detriment on the ground of the protected disclosure.

202. In general, in a detriment claim, the starting point is that it is necessary to examine the thought processes of the alleged wrongdoer. Does the person who actually subjects the worker to the detriment know of the protected disclosure so that the protected disclosure can have materially influenced his decision to subject the claimant to the detriment? The tribunal must generally focus on the mental processes of the individual decisionmaker and so cannot find an unlawful detriment if the decisionmaker did not know about (and so could not have been influenced by) the protected disclosure. That general rule is sometimes said to be displaced in cases where a manipulator with an unlawful motivation is in the 'hierarchy of responsibility' above the worker subjected to the detriment or is in some way formally involved in the process that leads to the decision, and thereby procures the detriment via the innocent decisionmaker.

Unauthorised deductions from wages

203. The right to claim for unauthorised deductions from wages is set out in section 13 of the Employment Rights Act 1996. 'Wages' are defined by section 27 Employment Rights Act 1996 and include 'any sums payable to the worker in connection with his employment'. This includes 'any fee,

bonus, commission, holiday pay or other emolument referable to the employment' (section 27(1)(a).) These may be payable under the contract 'or otherwise'. Wages can include overtime payments. It does not include expenses (s27(2)(b).) Any complaint of a failure to reimburse expenses would have to be addressed as a claim for breach of contract.

204. Where a claim for unauthorized deductions is made the Tribunal must first determine what sums were 'properly payable' at any given pay date. Properly payable wages will include those due under the contract and those to which some other legal entitlement is established. However, purely discretionary payments will not be caught by the provision, the claimant must have some form of legal entitlement to the sums claimed although it need not be contractual (New Century Cleaning Co Ltd v Church 2000 IRLR 27). If a deduction from the wages 'properly payable' is established then it may yet constitute an authorised deduction if it falls within the scope of s13(1)(a) or (b). Section 14 Employment Rights Act 1996 also sets out certain deductions which are 'excepted' or excluded from the scope of the worker's right not to suffer unauthorised deductions.

Constructive unfair dismissal

205. An employee may bring a claim of unfair dismissal related to either an express dismissal or a so-called constructive unfair dismissal. Pursuant to section 95(1)(c) an employee is dismissed where the employee terminates his contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

206. To establish a constructive dismissal the employee needs to demonstrate that the employer had committed a fundamental or repudiatory breach of contract. Such a breach of contract goes to the root of the contract and, if accepted by the employee, can discharge the employee from any further obligations under the contract. The employee also needs to demonstrate that they in fact resigned in response to the employer's breach of contract and that they did not wait for too long before doing so. Otherwise, they will be deemed to have waived the employer's breach and affirmed the contract.

207. The employer's breach of contract may be a breach of an express or implied term of the contract. Employees frequently assert that the employer has breached the implied term of mutual trust and confidence between employer and employee. This term requires that the employer shall not, without proper cause, conduct itself in a manner which is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Any breach of this implied term is considered to be a fundamental breach of contract because of the centrality of the implied term to the employment relationship.

208. Where the employee establishes that he has been constructively dismissed the constructive dismissal may still be found to be fair if the reason for the conduct which amounts to the dismissal is a potentially fair reason within the meaning of section 98 of the Employment Rights Act. The Tribunal can then determine whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996.

Wrongful dismissal

209. A wrongful dismissal occurs where an employer dismisses an employee in breach of contract. This is generally where the dismissal takes effect summarily (i.e. without notice). An employer is only entitled to summarily dismiss the employee where the employee has committed a fundamental or repudiatory breach of contract, such as by committing an act of gross misconduct. Otherwise, in order to dismiss the employee within the terms of the employment contract the employer must give the requisite notice of termination and ensure that the employee is paid for the notice period. In circumstances where there has been a constructive dismissal of the employee by the employer it is possible that there may be said to have been a constructive wrongful dismissal if the employee is not paid for the relevant notice period in circumstances where they would be entitled to notice.

Statement of employment particulars

210. Pursuant to section 1 of the Employment Rights Act 1996 an employee has the right to an initial written statement of the particulars of the employment. If the employer is found to be in breach of this obligation this may, in some circumstances, mean that the employee is entitled to compensation. Section 38 of the Employment Act 2002 provides for such compensation but it can only be awarded where the employee has also pursued a successful claim within one of the jurisdictions listed at schedule 5 to the 2002 Act.

Conclusions

211. We have determined the issues and the claims in line with the agreed list of issues.

Protected disclosure detriment.

212. The claimant asserts that he made two protected disclosures. Based on our findings of fact, the Tribunal accepts that the claimant communicated with Mr Crossman directly and also, subsequently, with Mr Evans. In the course of those communications the claimant did disclose some information about the inadequacy of the hygiene facilities and the

inadequacy of the cleaning in place at the depot at the time. He described the state of the facilities which he had observed. We are satisfied, based on our findings of fact, that the disclosures made by the claimant in his reasonable belief tended to show either that the respondent had failed, was failing or was likely to fail to comply with a legal obligation or that the health and safety of any individual had been, was being or was likely to be endangered. As an employer, the respondent had a legal duty of care to provide the claimant and his colleagues with a reasonably safe place and systems of work and this would include the provision of reasonably safe and hygienic facilities to be used in the course of the drivers' work. (See also section 2 Health and Safety at Work Act 1974 and associated secondary legislation). Section 43B(1)(b) and (d) of the Employment Rights Act would both be satisfied in these circumstances.

213. These disclosures took place in the context of the Covid 19 pandemic. This was a public health emergency. Furthermore, the facilities that the claimant was talking about were not provided for the claimant's sole use. They were likely to be used by numerous members of the respondent's workforce and also (potentially) the employees of other haulage businesses. The claimant was clinically vulnerable and the consequences of him contracting Covid 19 were potentially severe. Taking all the relevant context and circumstances into account the Tribunal is satisfied that the claimant had the necessary reasonable belief that the disclosure was made in the public interest. It did not relate solely to his own personal or individual circumstances.

214. As the first disclosure was made to the claimant's employer it would qualify for protection under section 43C.

215. In light of the above we are satisfied that the claimant's first alleged disclosure constituted a protected disclosure within the meaning of the Act.

216. By contrast, the Tribunal is not satisfied that the claimant has proved the second disclosure on which he relies in the List of Issues (paragraph 1(1)(b)). This is the disclosure which the claimant says was made by Paul Munroe to Karen Mudford. We do not have sufficient evidence or information to confirm what (if anything) was said, whether it disclosed sufficient information (for the purposes of the legal test) and whether the information disclosed had the necessary content (for the purposes of the legal test.) The claimant bears the burden of proof on balance of probabilities in relation to the relevant facts and we are not satisfied that he has discharged this, particularly as he was not personally present during the conversation and so cannot give direct evidence as to what was said. Furthermore, even if the fact and content of the disclosure were proven we would be unable to determine whether the individual in question had the necessary belief as to what the disclosure 'tended to show' or as to the public interest element of the legal test. We also note that the disclosure was not made by the claimant. Given the wording of section 47B(1) we are unsure how a disclosure made by Paul Monroe could assist the claimant in a claim of protected disclosure detriment or dismissal. The wording of s47B(1) suggests that the worker making the disclosure and the person suffering the detriment should be the same person. Furthermore, it is difficult to see how causation could be established. Why

would the claimant be subjected to a detriment because someone else had made a protected disclosure with which the claimant was not involved?

217. The claimant asserts two detriments. First, that the respondent paid the claimant statutory sick pay. Second, that the respondent refused to furlough the claimant. The Tribunal is satisfied that the claimant was subjected to both these detriments. However, we are not satisfied that the necessary causation is established. Were the detriments 'done on the ground that' the claimant had made the protected disclosure? Given the evidence in this case we do not accept that the decision to pay statutory sick pay or the decision to refuse furlough had anything at all to do with the protected disclosure made by the claimant. The decision regarding SSP and regarding furlough was based on the factual situation facing the respondent at the relevant time. The claimant could not attend work and the respondent had to facilitate his absence from work. It had to ensure that it discharged its legal obligations as regards pay. At the time the decision to pay SSP and refuse furlough was made, the rules of the CJRS meant that the respondent was not permitted to put the claimant on furlough as the business itself was not in circumstances where it was entitled to access the CJRS scheme. These were materially different circumstances to the period covered by the first lockdown where the respondent was facing a decrease in demand and needed to use furlough to preserve the drivers' employment. This was no longer the case by the time the claimant asked to be furloughed for a second time. The business circumstances were different and the gateway to the CJRS remained closed to the respondent, irrespective of the claimant's own personal circumstances. In those circumstances the respondent's decision regarding furlough would have been no different even in the absence of any protected disclosure. The respondent was entitled to ensure that it did not wrongly claim on the CJRS. As regards sick pay, the claimant was not at work and so was not entitled to normal pay. If he was off sick from work there was no contractual entitlement to full pay as contractual sick pay. The default position in the absence of Covid 19 and the CJRS would be the payment of SSP. Nothing in the terms of the CJRS or the circumstances of the pandemic altered this default position. In the absence of entitlement to furlough there was no other route through which the claimant would be entitled to full pay during sick leave. The government guidance documentation regarding the CJRS also confirmed that SSP was available in such circumstances. We are satisfied that the respondent had good reasons for making these decisions which were nothing to do with any disclosure made by the claimant. In short, the respondent correctly interpreted the government rules and guidance in relation to its ability to claim furlough for the claimant during the period in question. There was ample evidence to demonstrate how the respondent's managers came to that conclusion and we are satisfied that they came to that conclusion in good faith. Indeed, any reasonable manager faced with that information at the time would have been driven towards the same decision.

218. As the necessary causation is absent, the claimant's claim for protected disclosure detriment must fail and is dismissed.

<u>Section 15 discrimination</u>

219. The claimant was disabled at the material time. This has been conceded by the respondent. The respondent had conceded knowledge of the disability from 22 March.

220. The claimant relies on two elements of unfavourable treatment: payment of SSP and failure to make an adjustment to mitigate the financial impact on the claimant by exercising the discretion to place the claimant on furlough. The respondent did pay SSP and did refuse to furlough the claimant at the relevant time. We are satisfied that this amounts to unfavourable treatment. Whilst payment of SSP was a payment of money and therefore a 'benefit 'it was less beneficial than either furlough payment or payment of normal wages. The respondent decided to pay this lower amount. Certainly, we are satisfied that a decision not to make a claim on the CJRS and then furlough the claimant was unfavourable treatment, even if the respondent had good reason for acting in this way.

221. The claimant relies on three matters which are said to be 'something arising in consequence of disability. We accept that his need to shield arose in consequence of disability as it was linked to his clinical vulnerability. We accept that if the claimant was going to be at work, then he would wish to work closer to home and avoid using public hygiene facilities as part of his infection control measures. Whilst everyone wished to avoid contracting Covid, the particular care that the claimant needed to take was linked to his clinical vulnerability which arose from his disability. It is therefore apparent that we also accept that his need for increased safety measures to be put in place by the employer was also something arising in consequence of disability. Whilst every employee expected a safe workplace and systems of work, this was particularly important for the claimant given his health status. We therefore accept that the claimant has established that all three matters relied upon were 'something arising in consequence of disability.'

222. The Tribunal is satisfied that both aspects of the unfavourable treatment (SSP and refusal of furlough) were because of the claimant's need to shield. The need to shield need not be the sole cause of the unfavourable treatment as long as it is an effective cause. Thus, the fact that the respondent was not entitled to claim furlough for the claimant at that time is another reason for the failure to pay furlough. However, if the claimant had not needed to shield then the issue of furlough would not have arisen. It was an effective cause.

223. The Tribunal is less convinced that the claimant's need to work close to home or his need for increased safety measures were of any causal relevance in this part of the case. Absent the need to shield, the claimant had not required the respondent to give him work closer to home or increased safety measures over and above what was already in place. Thus the claimant was able to return to work in July 2020 once he stopped shielding. This suggests that any perceived need to work closer to home or any need for increased safety measures did not cause the payment of SSP or the failure to furlough the claimant. They were not an effective cause of the unfavourable treatment, they were just part of the factual matrix of the case. Based on the evidence that we heard the claimant was not going to return to work when he had been advised to shield. This was so irrespective of the safety measures in place in the workplace. There is

nothing in the evidence to suggest that any particular improvements to safety measures would have overridden the advice the claimant was following to shield during the second lockdown. In any event, the claimant does not need to establish that causal link between the unfavourable treatment and all three of the asserted 'something arising from disability' matters. Establishing the link to the need to shield is sufficient.

224. The Tribunal has gone on to consider whether the respondent can establish a defence to the claim on the basis that the treatment was a proportionate means of achieving a legitimate aim. The respondent prayed in aid "the efficient management of staffing of the respondent's business and complying with its legal obligations." It also relied on the need to ensure that " the CJRS was only used according to the terms of the scheme and/or that public money was not used otherwise than according to the spirit of the scheme and where necessary to retain jobs."

225. We are satisfied that both asserted aims were legitimate in all the circumstances. The respondent was entitled to ensure that it acted within the spirit and the letter of the law at the time and did not open itself up to claims of abuse of the system or of making fraudulent furlough claims. Given our findings of fact we have already found that the respondent's interpretation of the way the scheme worked at the relevant time was correct based on the published guidance and rules which were available at the time. Furthermore, even if we were wrong about that and the respondent had misinterpreted the rules, we have concluded that the respondent's interpretation of the CJRS was a reasonable one based on the basis of the guidance available to it at the time. (The respondent should not be judged with the benefit of hindsight in this regard.)

226. Given the respondent's interpretation of the requirements of the CJRS at the relevant time, the respondent *could not* pay furlough to the claimant. This was the only way which the respondent could meet the aim of properly using the CJRS according to the terms of the scheme and ensuring that public money was only used according to the spirit of the scheme. This alone objectively justifies the decision not to furlough the claimant. Furthermore, the respondent was seeking to comply with its legal obligations in keeping the claimant safe (i.e. away from work) but not breaching its legal obligations not to improperly claim on the CJRS. The failure to furlough the claimant was objectively justified. There was no other more proportionate way to balance the need not to treat the claimant unfavourably against the need of the respondent to achieve its legitimate aims. Furthermore, it is important to note that when the employer's contribution to furlough pay is taken into consideration, and when it is considered that the respondent had to fund the SSP out of its own resources (and could not claim it from the government) the decision to keep the claimant on SSP was clearly not a cost saving exercise.

227. Given that the respondent could not furlough the claimant under the terms of the scheme it had to consider what options were available to it. It was clear from the available guidance that SSP was an alternative which would preserve the claimant's employment, keep him away from work (and therefore safe) and provide him with some remuneration (albeit less than full pay.) In order to comply with the furlough scheme rules the respondent could not pay furlough but it could pay SSP. That was the alternative open

to it which it took. The only other alternative, in the absence of furlough, would be to require the respondent to pay the claimant full pay as sick pay even though the claimant was not at work. However, this would not achieve the respondent's aim of efficiently managing the staffing of the business and complying with its legal obligations. It was not efficient to keep someone employed and receiving full pay even when they were not providing work services to the respondent. This would make no business sense. In circumstances where there was no contractual right to full pay during sick leave this was not efficient staff management. It imposed an additional cost on the business without helping the business to cover the demand for drivers through the provision of services by the claimant. It would require the respondent to bear an additional cost without the assistance of CJRS or the extra income associated with the claimant actually doing his driving job for the respondent.

228. Given that the CJRS documentation foresaw the possibility that employees might be on SSP it would be disproportionate to require the respondent to go further and pay full pay beyond any legal obligation to do so. It also would not help the respondent comply with its legal obligations. It would not assist the respondent in meeting its contractual commitments and it would not be part of the respondent complying with the terms of the claimant's contract of employment or the terms of the CJRS. Any requirement for the respondent to keep the claimant at home on full pay effectively undermined the whole purpose of the CJRS. The terms of the CJRS were designed to meet the employees' need for financial support during Covid. To require the respondent to find that extra money out of its own funds without the claimant earning the payment via his own work would be disproportionate. The claimant had no contractual entitlement to anything other than statutory sick pay. The only other option would have been redundancy which would be even more to the claimant's disadvantage. Taking into account all the relevant circumstances and carrying out the balancing exercise, the Tribunal concludes that the respondent has made out its defence to the claim. Its payment of SSP and failure to furlough the claimant were proportionate means of achieving the legitimate aims.

229. In light of the above the claim of section 15 discrimination fails and must be dismissed.

<u>Indirect discrimination</u>

230. The claimant relied on two PCPs. The first PCP was specifying "a requirement for all trampers under the Respondent's employ to undertake their normal working hours throughout the pandemic or remain at home and isolate on Statutory sick Pay." Given the factual matrix in this case this PCP must relate to a specific period in time, namely November 2020. At that point in time the respondent did apply that PCP to the drivers in the workforce. They either stayed at work or stayed at home on SSP. Furlough was not an option.

231. The second PCP asserted by the claimant is the respondent refusing "to furlough staff and instead relying on Statutory Sick Pay as a means to remunerate employees not able to work due to the pandemic." This is effectively a rewording or reformulation of the first PCP. Again, it is another

way of describing the situation in November 2020. The respondent was not able to furlough staff in November 2020 so they either worked as usual or stayed at home on SSP.

232. The Tribunal is satisfied that both PCPs were applied or would be applied to all the drivers including the claimant, anyone who might have a similar disability (even if hypothetical) and those without any such disability.

233. The claimant relied on two elements of disadvantage. The first aspect of disadvantage was to suggest that travelling and working away from home placed the claimant (and those with his disability) at a greater risk of severe illness or death than those employees who did not share his disability. In principle this may be true if it can be established that working away from home and travelling increases the risk of contracting Covid then the disabled group are more likely to suffer severe illness or death than the comparator group. It reflects the claimant's critical vulnerability and the fact that if he contracted Covid 19 he was more likely to be severely ill than a non-disabled person. However, the claimant needs to show a link between the PCPs relied upon and the disadvantage asserted. The PCPs relied upon did not put the claimant or his cohort at that disadvantage because they did not require him to leave home, work away from home or travel away from home. The first PCP specifically provides for the employees to stay at some and isolate on SSP rather than go to work. In having the first PCP applied to them the claimant and other similarly disabled employees would not be working away from home and would not be at greater risk of severe illness and death. The PCP relied upon would not put the claimant or the disabled group at the particular disadvantage asserted.

234. Likewise, the second PCP did not require staff to work away from home or put them at risk of severe illness or death. The second PCP did not put the claimant and the disabled group at the particular disadvantage contended for. Thus, the first particular disadvantage contended for does not assist the claimant.

235. The second disadvantage asserted is that SSP represented "a significantly greater financial detriment to the claimant as compared to those employees who did not share his disability and were therefore not required to shield throughout the pandemic." As a matter of fact, receiving SSP would likely be just as much of a financial detriment for the non-disabled group. Both groups would be financially disadvantaged by it.

236. The real mischief at which this is aimed is the likelihood that an employee would have to fall back on SSP. In essence, the claimant is saying that he was more likely to have to claim SSP and stay at home than a non-disabled employee. A non-disabled employee is more likely to be able to continue working and receiving full pay. To that extent the the second element of particular disadvantage does flow from the two PCPs. Where drivers are required to work or shield on SSP the disabled group is more likely to have to stay at home on SSP and the non-disabled group is more likely to stay in work on full pay. Likewise, if furlough is not available to those staying away from work, then they will be on SSP i.e. less money. The disabled group is more likely to fall into that financially disadvantaged cohort.

237. On that basis it appears that that there is a primary case of indirect discrimination relating to those PCPs and the second pleaded 'particular disadvantage'. Consequently, the Tribunal has to consider whether the respondent has a defence that the PCPs were a proportionate means of achieving a legitimate sim.

238. The respondent relies upon the same legitimate aims in the section 19 claim as in the section 15 claim. Once again, the respondent asserts that the PCPs in question were a proportionate means of achieving the legitimate aims it relies on the same legitimate aims as in the section 15 claim. We repeat our analysis of the legitimate aims and the proportionality as set out at paragraphs 224-228 above. In essence the respondent could not furlough staff and still comply with the CJRS and its legal obligations. Consequently the respondent had to either let staff come to work and continue earning full pay or protect them by letting them stay at home but on the lower remuneration provided by SSP. It would not have been efficient staff management to pay full pay rather than SSP in the absence of access to public money from the CJRS and it would be disproportionate to require this rather than to allow the respondent to rely on the other legally available alternative envisaged by the relevant scheme, namely SSP.

239. We cannot accept that the respondent was required to go against the rules in place in relation to furlough in order to allow the claimant to stay in employment, at home, on a higher rate of pay. Nor can we accept that it would be realistic to require the respondent to pay full pay whilst the claimant stayed home on sick leave, shielding. This would essentially require the respondent to make payments out of its own pocket when it was unable to claim reimbursement from a scheme which had been set up specifically for this purpose. It would not be proportionate to expect the respondent to pay for the claimant's services without either being reimbursed by the government or receiving the claimant's work. It would not take account of the fact that the claimant's work would still need to be done by someone else in the claimant's absence. The respondent would therefore be effectively paying twice over for one piece of work. That is not proportionate in circumstances where the government scheme has been implemented after due consideration of all the parties' competing interests and where the government has concluded that this is a fair and appropriate balance to strike between the needs of the employer and the vulnerabilities of the employee.

240. The claim for indirect discrimination therefore fails and is dismissed.

<u>Reasonable adjustments</u>

241. The claimant pursues a claim of reasonable adjustments relying on the same PCPs as in relation to the indirect discrimination claim. For the reasons already set out in relation to the section 19 claim, we accept that the two PCPs were proven in this case. We also make the same findings in relation to substantial disadvantage in the context of section 20 as we have in relation to particular disadvantage in the context of the section 19 claim. Namely, there was no substantial disadvantage in terms of the claimant having to travel and work away from home and being put at a greater risk of severe illness and death than the nondisabled cohort. The

PCP did not require that, the claimant could stay at home. The statutory sick pay would be equally advantageous/disadvantageous to the claimant as to the non-disabled employee but we accept the disabled employee is more likely to have to rely on statutory sick pay than the non-disabled comparator. To that extent there is substantial disadvantage.

242. The Tribunal is also satisfied that, given the respondent's knowledge of the claimant's condition, and given the representations made by the claimant in the correspondence in November, the respondent ought reasonably to have known that the PCPs would put the claimant at the relevant substantial disadvantage of being more likely to have to go onto SSP than a non-disabled driver.

243. The real nub of the reasonable adjustments claim is, as ever whether the adjustments contended for were reasonable adjustments which the respondent was obliged to make in all the circumstances of the case. The claimant argues that the respondent should have exercised its discretion to place the claimant on furlough during the relevant period that he had to stay at home and shield. The difficulty with this adjustment is that it asserts that the respondent had the discretion to use furlough. For the reasons already stated the respondent *did not have that discretion at this point in time.* The CJRS rules and guidance and the proper interpretation of them meant that the gateway to furlough for the respondent was firmly closed at this point in the chronology. The respondent could not use the CJRS during this period. The gateway to CJRS for the respondent only opened after the claimant's employment had already terminated when the requirements changed and the respondent's business circumstances also changed. It was therefore not open to the respondent to place the claimant on furlough even though the claimant's personal circumstances meant that he would have been a priority employee for furlough once the gateway opened and the respondent business could use the CJRS again.

244. The second adjustment contended for in the list of issues is that the respondent should have provided the claimant with a suitable alternative on-site role enabling him to maintain social distancing while continuing to work. There are a number of problems with this aspect of the claimant's case. Firstly, the possibility of a suitable alternative on-site role was not really put by the claimant's representative to the respondent's witnesses during cross examination. They have not been able to address whether such a role existed. Furthermore, there is no evidence before the Tribunal to suggest that such a job did exist at the relevant point in time. Indeed the nature of the working practices on site were not the problem in the claimant's case from November. He had already been back at work during the pandemic doing his own job (July to November 2020). He had been content to work as a tramper during the pandemic using the systems of work implemented by the respondent and taking the necessary precautions. If the advice to shield had not been re-imposed in November 2020 there is nothing to suggest that the claimant would have had to cease work. He would have continued to work as he did during August September and October. Thus even if a "suitable alternative on-site role" could be identified on the facts of this case, this would not have brought the claimant back to work in November. He would still have followed government guidance to shield irrespective of the nature of the work he was asked to do by the respondent or the systems and measures

implemented at work. The claimant was always going to follow the medical advice he had been given no matter what the respondent did. As this adjustment would not alleviate the disadvantage and alternative work would not have been taken up by the claimant, the Tribunal cannot say that the respondent breached the duty to make reasonable adjustments by not offering an alternative on-site role. The claimant and his family would have followed the shielding advice in the second lock down just as the evidence shows that they did in the first lockdown.

245. The third adjustment contended for is that the respondent should have implemented adequate protective measures in particular those listed in paragraph 25(1)(a) (i)-(xi). This falls foul of the same difficulty as the second adjustment. Irrespective of the protective measures implemented by the respondent the claimant would still have been advised to shield and stay at home and we are satisfied that he would have done so. All of the measures at paragraph 25(1)(a) (i)-(xi) are based on the claimant leaving his house, ceasing to shield, and coming back to work outside his home environment.

246. The Tribunal notes that in the email at page 483 the claimant does suggest a return to work if appropriate measures are found. However, we also note that in that correspondence he does not make any concrete suggestion as to what those measures would look like. To that extent it was an empty offer. He knew that the respondent would not and could not provide measures which he would consider outweighed the medical advice that he had received that he should shield at home. The respondent would never "call the claimant's bluff" and do something to make him choose whether to return to work. Indeed if there were such protective measures that would have satisfied the claimant that it was safe to come to work, we would have expected him to set them out in substance in this correspondence. He did not do so. This rather suggests he did not know of any such necessary and sufficient protective measures. We also note that the protective measures referred to at this part of the list of issues were either implemented or were not addressed with the witnesses by the claimant's representative in cross examination at the hearing.

247. For those reason we conclude that there were no reasonable adjustments that the respondent could and should have taken to avoid the disadvantage to the claimant arising from the PCPs in this case. There was no breach of a legal duty on the respondent's part and on that basis the claim for reasonable adjustments fails and must be dismissed.

<u>Harassment</u>

248. The claimant asserts that the refusal to furlough him was unwanted conduct. That is evidently the case. It is more difficult to conclude, however, that the unwanted conduct was related to disability. In the list of issues the claimant indicated that he considered the conduct related to disability in that he was informed on a number of occasions that "nobody would be furloughed." This was seemingly without qualification. He asserted that for a person who is disabled and suffers from COPD this would be alarming, hurtful and the cause of considerable stress given that contracting Covid could have been fatal for the claimant. However, the fact is that the decision related to *all* employees and that no distinction was

made between those with disabilities and those without. This makes it difficult for the Tribunal to conclude that the unwanted conduct related to disability. The unwanted conduct related to the circumstances of the Covid pandemic, the circumstances of the respondent's business and the levels of demand, the eligibility requirements for the CJRS and the government rules and guidance on the furlough scheme. The mere fact that the decision was applied to the claimant and the claimant happens to be disabled does not mean that the conduct 'related to' disability.

249. The claimant also asserted that the refusal to furlough was used as a mechanism to force the claimant out of the respondent's business. The respondent did all that it was entitled to do pursuant to the rules of the furlough scheme. There is no evidence to suggest that the respondent had any wish to force the claimant out of the business. On the contrary, the respondent repeatedly reassured the claimant that his job was safe and secure and that they would welcome him back to work once the shielding advice lapsed. It was entirely the claimant's choice to resign when he did. In any event, it is hard to see how this allegation demonstrates that the unwanted conduct was related to disability particularly as it was applied across the board to all employees irrespective of disability.

250. Whilst the claimant was upset at the respondent's refusal to furlough him, we do not accept that it violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him. We do not accept that that is how he felt. He felt let down but that is not the same thing. In reality his reaction was to the wider circumstances of the pandemic and the fact that it was causing him real difficulties because he had to shield. In any event it would not have been reasonable for the for the conduct in question to have that effect on the claimant given the surrounding circumstances of the pandemic (section 26(4) Equality Act 2010.)

251. For those reasons the claim of harassment fails and is dismissed.

Victimisation

252. The Tribunal accepts that the claimant was subjected to the asserted detriment insofar as the respondent decided to pay SSP rather than any higher remuneration. Taking the claimant's case at its highest and assuming that his requests or assertions that he should be furloughed due to his disability constituted a protected act within the meaning of section 27, we do not accept that the respondent subjected the claimant to the detriment because he had done the alleged protected act. The causal link between protected act and detriment is wholly absent in this case. We have explained in various ways in the paragraphs above why it is that the respondent decided to pay SSP. Those reasons had nothing whatsoever to do with the fact that the claimant had done a protected act. Even in the absence of a protected act the same decision would have been made. Nobody was furloughed at this point in time. The respondent could not use furlough at this time.

253. On that basis the claimant's claim of victimisation fails and must be dismissed.

Unfair dismissal

254. On the basis of the facts as found there was no repudiatory breach of contract in this case. Whilst the respondent did instruct the claimant to return to work on 27 July it had undertaken the necessary risk assessments. We note that there was a delay in providing personal protective equipment. However, this complaint related solely to the events of 27 July and the issue was resolved shortly thereafter. It therefore did not have any ongoing impact which could form part of a repudiatory breach or contribute to a decision to resign by the claimant so long after the event. After 31 July the Tribunal has found that the respondent provided an adequate supply of PPE. We have also found that the respondent provided sufficient hand sanitiser, antibacterial wipes, and tissues. Whilst there was an individual incident of inadequate toilet and hygiene facilities this was resolved once it was raised with the respondent. There was therefore no ongoing failure to provide sanitary hygiene, toilet and hand washing facilities or a constant supply of hot water and soap.

255. The claimant never complained during the course of his employment about lack of ventilation in the welfare areas and we cannot conclude that this had any material impact on his ability to continue working for the respondent. Indeed the claimant continued to use those welfare areas during his employment without complaint. This suggests that they were not as problematic as he would now seek to suggest. It was also not really explored by the claimant with the witnesses during the tribunal hearing. Likewise the claimant never complained during the course of his employment or indeed in his resignation letter that there should have been an advisory limit on the maximum number of users in the communal welfare facilities. In any event an advisory limit would not have made any material difference to the claimant's day-to-day experience of using the facilities. Plus, the claimant was as able as any other employee to observe his surroundings and decide whether he wished to wait until fewer staff were using the facilities. The Tribunal did not hear any evidence that the absence of a queue management system was ever an issue for the claimant. He gave no evidence of particular circumstances where a system was required or where he felt he was put at risk because of its absence. He never complained of this during the course of his employment. He was as capable as other employees of maintaining social distance or staying in his cab until it was safe to use the facilities. The Tribunal also did not hear any particular evidence about pinch points in busy areas within the welfare facilities. Even if they had been identified as places where social distancing was not possible, it is not clear what it is that the respondent could do to resolve this given that the facilities themselves could not be redesigned or rebuilt. We heard evidence from the respondent that it was not allowed to close the facilities to truck drivers on welfare grounds. It would have been in breach of its legal obligations had it closed the facilities either to its own employees or others participating in the facility sharing agreement.

256. The Tribunal heard no particular evidence about the use of one-way systems or multiple entry and exit points. We have no reason to believe that this was a problem faced by the claimant or that it had any material impact on his ability to work safely for the respondent. He did not complain of it during his employment with the respondent. There was no evidence

to suggest that the employees did not have easy access to sanitary welfare and hygiene facilities at the premises they visited as part of their work either.

257. The claimant has not proven the element of his claim in relation to deep cleaning and ventilation at the beginning and end of each shift as this was only a material matter when the claimant returned to work on 27 July. This was the only time that he had to use the truck after it had been used by someone else. Thereafter he was responsible for cleaning and ventilating his truck and he would not have been put at any particular risk as nobody else was due to use it. After 27 July it was adequate. Indeed the respondent had started to purchase fogging disinfectant machines for that very reason. The claimant complains that cleaning and disinfectant measures should have been followed consistently and correctly and the respondent should have ensured this. We are satisfied, based on the evidence that we have heard, that the respondent took all reasonably practicable steps to ensure that the measures were followed consistently and correctly. The respondent, like any employer, is not able to guarantee compliance by each and every employee on each and every occasion. It would be unable to observe each and every employee at all times to ensure this level of compliance. The respondent did substantially comply with this requirement.

258. The claimant says that the respondent failed to reassure him of the protective safety measures implemented despite his request for that reassurance in March and November. We do not accept, taking the evidence as a whole, that the respondent failed to provide adequate reassurance. The claimant knew what the systems of work were and did not make any concrete suggestion as to how they could and should be improved. It is unclear what further reassurance the respondent could have provided to the claimant.

259. The respondent did provide the claimant with a dirty vehicle on 27 July but this was a one-off which had no ongoing impact on the claimant and could not have contributed to his decision to resign.

260. Likewise, the respondent did refuse the claimant's request to have the claimant's vehicle professionally cleaned on 27 July. This was also a one-off failure. It was not repeated.

261. The respondent may not have provided particularly comprehensive cleaning equipment and chemicals to enable the claimant to clean his truck on 27 July, although we have found that the claimant was able to properly clean his truck on that occasion. In any event, the cleaning equipment and chemicals provided improved over time and, to the extent that there was any failure on 27 July, it was not repeated thereafter.

262. We have found that the unsanitary toilet and hygiene facilities were only provided on one particular occasion in September. When the claimant complained steps were taken and the problem was resolved. It was not an ongoing state of affairs.

263. The respondent did refuse to furlough the claimant notwithstanding his clinical vulnerability. However, it had good reason for the refusing to do so.

It had no discretion to furlough the claimant at the relevant time and was entitled, nay required, to follow government rules and guidance in implementing the CJRS.

264. Taking all of the pleaded matters in the round we are not satisfied that they amount to a fundamental breach of the implied term of mutual trust and confidence either separately or cumulatively. Where the respondent fell short of the claimant's expectations it had reasonable and proper cause for doing so given the circumstances of the pandemic and the government rules it had to adhere to. Further we are not satisfied that the claimant resigned in response to those breaches in any event. Most of the matters complained of occurred in July (or at the latest in September.) The claimant's problems and complaints were resolved thereafter and the claimant continued in employment. He did not resign in response to any of these matters. The reason that he resigned was the respondent's failure to put him on furlough. As we have found, that was not a breach of contract and therefore the claimant did not resign in response to a breach of contract by the respondent. Put another way, the claimant had affirmed the employment contract after any of the proven shortcomings by the respondent. He thereby affirmed the contract and waived his entitlement to resign and claim constructive unfair dismissal in respect of those earlier matters.

265. In light of the claimant's failure to prove the constructive dismissal it is not necessary for us to continue to consider the reason for any dismissal or the fairness of any dismissal. The claimant's claim of unfair dismissal must therefore fail and be dismissed.

Wrongful dismissal

266. The wrongful dismissal claim must fail. The claimant resigned and gave notice and was paid accordingly. There was no breach of contract by the respondent.

Statement of employment particulars

267. In light of the above and the failure of the claimant's substantive claims, the fact that the respondent failed to provide a statement of initial employment particulars does not materially benefit the claimant. His claim pursuant to section 38 of the Employment Act 2002 cannot succeed in the absence of a successful complaint in a jurisdiction listed in Schedule 5.

Unauthorised deduction from wages

268. The claim for unauthorised deductions from wages must also fail. It is not correct to say that the amounts 'properly payable' to the claimant between 2 November and 2 December were higher than SSP. There was no contractual or statutory entitlement to anything more than SSP. There was no implied term requiring payment of full pay or higher pay than SSP. The

respondent therefore has not made a deduction from the sums properly payable and the claimant's claim in this regard must fail and be dismissed.

Employment Judge Eeley

Date 27 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

1 August 2023

FOR EMPLOYMENT TRIBUNALS

Annex 1: The agreed list of issues

(The parties' respective positions and commentary on the issues have been removed from the List of Issues as set out below. It otherwise reproduces the parties' List of Issues document.)

Protected disclosure detriment

1. Did C make a protected disclosure within the meaning of section 43A ERA? In particular:

   (1) Did C make disclosure of information within the meaning of section 43B ERA? C relies on the following:
      (a) "In response to an email received by C on 21 September 2020, C raised a complaint in connection with the state of R's hygiene facilities. In particular, C raised concerns about the number of people using R's hygiene facilities and the inadequate measures in place for cleaning. C made reference to mud on the walls of the showers, excrement covered toilets and lack of hot water, hand soap and/or sanitiser. The initial disclosure was made over the telephone to Harry Crossman who in turn contacted Andy Evans, R's Personnel and Compliance Director; C began by saying, "Maybe you should practice what you preach and stop talking to us as if we are children. We are the ones out there on the front line worried about our health and you tell us by email to wash our hands properly." He went on to describe the issues with the hygiene facilities as set out above; and
      (b) 'C was part of a group of employees who complained about the cleanliness of R's facilities.' C identified the following: Paul Munroe, an employee of R, also made a complaint about the state of the toilets. His complaint was made in person at the Hensall depot to the depot manager, Karen Mudford, in September 2020. He asked, "when are you going to do something about the state of these toilets?" The response was, "I have got more important things to do than worry about toilets and cleaners. I'll sort when I have got the time, now Fuck off out of my office." Mr Munroe was understandably upset and informed several others on the yard about the way he'd been spoken to. Mr Monroe is nearing retirement and didn't want to pursue the complaint through fear of losing his job.

   (2) If so, did C reasonably believe the disclosure was made in the public interest? C relies on the following:

      (a) C raised his concerns regarding the hygiene facilities provided by R during a global pandemic when good hand hygiene was particularly important to avoid unwanted public health implications and to help tackle the spread of the virus.

   (3) If so, did C reasonably believe the disclosure of information tended to show one or more of the following:

(a) That a person had failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; C relies on "the duty on the Respondent to ensure, so far as is reasonably practicable, the health, safety and welfare at work of its employees (s 2 Health and Safety at Work Act 1974) which extends to ensuring the provision of systems of work are safe and without risks to health (as well as ensuring the provision of training, supervision and instruction in connection with the same.)"

(b) That the health or safety of C had been, was being or was likely to be endangered; and

2. Did C make the disclosure in a protected manner?

3. Did R subject C to detrimental treatment? C relies upon the following:

(1) R paying C Statutory Sick Pay.

(2) R refusing to furlough C. C contends that the Respondent took an increasingly hardened approach to C following his protected disclosure being made, having previously furloughed the Claimant in March 2020 and having furloughed several employees following C's resignation in December 2020.

Disability and knowledge

C was disabled at the material time by virtue of Chronic Obstructive Pulmonary Disease ("COPD"). This is not in dispute. It is R's position that it did not have actual knowledge but had constructive knowledge from a date between 22 and 25/03/20. C has accepted this position. Accordingly, this is no longer an issue.

Discrimination arising from disability (s15 Equality Act)

4. C was disabled the material time by virtue of Chronic Obstructive Pulmonary Disease ("COPD"). It is accepted that R had constructive knowledge of C's disability from a date between 22 and 25 March 2020.

5. Did R subject C to unfavourable treatment? C relies upon the following:

(1) R paying C statutory sick pay.
(2) R failing to make a reasonable adjustment and mitigate the financial impact on C by exercising its discretion to place C on furlough.

6. Was there something arising in consequence of C's disability? C relies on the following as "something arising":
(1) his need to shield
(2) his need to work closer to home during the pandemic to avoid using public hygiene facilities.
(3) His need for increased safety measures to be put in place by his employer.

7. If so, was that something the reason for any unfavourable treatment?

8. If so, was the treatment a proportionate means of achieving the following aims:

    (1) The efficient management of staffing of the Respondent's business and complying with its legal obligations; and

    (2) Ensuring the Coronavirus Job Retention Scheme was only used according to the terms of the scheme and/or that public money was not used otherwise than according to the spirit of the scheme and where necessary to retain jobs.

Indirect Discrimination (s19 Equality Act)

9. Did R apply to C a provision, criterion or practice ("PCP")? C relies on the following:

    (1) Specify a requirement for all trampers under the R's employ to undertake their normal working hours throughout the pandemic or remain at home and isolate on Statutory Sick Pay?

    (2) Refuse to furlough staff and instead rely on Statutory Sick Pay as a means to remunerate employees not able to work due to the pandemic.

10. Did R apply, or would it have applied, the PCP to persons with whom C does not share the characteristic of disability?

11. If so, did the PCP put persons sharing C's protected characteristic at a particular disadvantage when compared with persons who do not share that protected characteristic? C relies on the following as the group "those with COPD and/or a chronic respiratory/lung condition or disease."

12. If so, did the PCP put C at that disadvantage? C relies on the following:

    (1) Did travelling and working away from home place persons with C's disability at a greater risk of severe illness or death than those employees who did not share his disability?
    (2) Did Statutory Sick Pay represent a significantly greater financial detriment to C as compared to those employees who did not share his disability and were therefore not required to shield throughout the pandemic.

13. If so, can R show the PCP was proportionate means of achieving the legitimate aims identified in paragraph 8 above.

Reasonable Adjustments (s20 Equality Act)

14. Did R apply to C a PCP? C relies on the following:

    (1) A requirement for all trampers under R's employ to undertake their normal working hours throughout the pandemic or remain at home and isolate on Statutory Sick Pay.

(2) A refusal to furlough staff and instead rely on Statutory Sick Pay as a means to remunerate employees not able to continue working throughout the pandemic.

15. If so, did the PCP put C at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? C relies on the following:

    (1) Did travelling and working away from home place persons with C's disability at a greater risk of severe illness or death than those employees who did not share his disability?

    (2) Did statutory sick pay represent a significantly greater financial detriment to C as compared with those employees who did not share his disability and were therefore not required to shield throughout the pandemic.

16. Did R know, or could it reasonably be expected to have known that the PCP had that effect?

17. If so, was there a reasonable step that R could have taken to avoid the disadvantage? C relies on the following: R failed to:

    (1) Exercise its discretion to place C on furlough to mitigate his financial losses during the period he was required to stay at home and shield?

    (2) Provide C with a suitable alternative on-site role, enabling him to maintain social distancing whilst continuing to work?

    (3) Implement adequate protective measures in particular those listed in paragraph 25 (1) (a) (i)-(xi).

Harassment (s26 Equality Act)

18. Did R subject C to unwanted conduct? C relies upon the "refusal to furlough him".

19. If so, was the unwanted conduct related to C's disability? By the order, C was required to specify the logical basis of this allegation. C identified two points:

    (1) It 'related to the Claimant's disability in that he was informed on a number of occasions that "nobody would be furloughed" without qualification seemingly. For a person who is disabled and suffers from COPD, this is alarming, hurtful and a cause of considerable stress given that contracting Covid 19 could have been fatal for the claimant." And

    (2) The refusal to furlough was unwanted conduct used as a mechanism to force the Claimant out of the Respondent's business which eventually succeeded when the Claimant chose to ensure his health and safety over earning an income.

20. If so, did the unwanted conduct violate C's dignity or create an intimidating, hostile, degrading, humiliating and offensive environment?

21. If so, was it reasonable for the conduct to have that effect?

Victimisation (s27 equality act)

22. Did C do a protected act within the meaning of s27 Equality Act? C relies on the "requests and/or assertion that he should be furloughed due to his disability including his resignation (made between 2-26 November 2020).

23. Did R subject C to a detriment? C relies upon the following 'R's decision to pay C Statutory Sick Pay.'

24. If so, did R subject C to that detriment because he had done a protected act?

Unfair dismissal

25. Was C dismissed within the meaning of section 95 (1)(c)

    Employment Rights Act? In particular:

    (1) Did R repudiate the employment contract by breaching the implied term of trust? C relies on the following alleged protective measures (individually or cumulatively):

        a. Did R instruct C to return to work on 27 July 2020 without undertaking adequate risk assessments and/or implementing adequate protective safety measures an accordance with those identified risks to prevent the spread of the virus and to protect employees? C relies on the following:

            i. The provision of an adequate supply of PPE

            ii. The provision of sufficient hand sanitiser, antibacterial wipes and tissues.

            iii. The provision of sanitary hygiene, toilet and hand washing facilities, with a constant supply of hot water and soap.

            iv. Ensuring all welfare areas are adequately ventilated.

            v. Identifying and implementing an advisory limit on the maximum number of users able to use the communal welfare facilities at any one time

            vi. Implementing an effective queue management system.

            vii. Identifying pinch points and busy areas within welfare facilities where social distancing may not be possible.

viii. Making use of one-way systems and multiple entry and exit points.

ix. Ensuring drivers have easy access to sanitary welfare and hygiene facilities at the premises they visit as part of their work.

x. Ensuring all trucks are deep cleaned and ventilated at the beginning and end of each shift.

xi. Ensuring all cleaning and disinfecting measures are followed consistently and correctly.

b. Did R failed to reassure C of the protective safety measures implemented despite his requests for that assurance in March and November 2020?

c. Did R provide C with a dirty vehicle?

d. Did R refuse C's request to have the vehicle professionally cleaned?

e. Did R refuse to provide C with adequate cleaning equipment and chemicals to sanitise the vehicle himself, such as bleach, alcohol or chlorine?

f. Did R provide C inadequate and unsanitary toilet and hygiene facilities?

g. Did R refuse to exercise its discretion and furlough C notwithstanding his clinical vulnerability?

(3) If so, did C resign in response to that breach?

(4) If so, had C affirmed the employment contract, thereby waving his entitlement to resign?

26. If C was dismissed, what was the reason for the dismissal? In particular, was the reason or principal reason for C's dismissal one of the following:

(1) That C brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety (section 100(1) (c) Employment Rights Act 1996);
(2) that in circumstances of danger which, C reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (s100(1)(d) ERA 1996); or
(3) That C had made a protected disclosure (as identified in paragraph 1 above) (section 103A Employment Rights Act 1996)?

27. Was the dismissal fair having regard to section 98(4)?

Wrongful dismissal

28. Did R wrongfully dismiss C? C alleges that the constructive dismissal was both wrongful and unfair.

Statement of employment particulars

29. Did R failed to provide C with a statement of employment particulars?

Unlawful deduction from wages

30. Was C contractually entitled to a rate of pay higher than SSP between 2 November 2020 and 2 December 2020? By the order, C was required to specify the contractual basis for this allegation. C has identified that he relies upon “the term of trust and confidence in imposing a blanket refusal to furlough. It would have been consistent with this implied term to pay the claimant at the rate set out above.”

31. If so, to what rate was C entitled? By the order, C was required to specify the rate he alleges was payable. C replied “he was entitled or at least should have been paid at 80% of his normal rate of pay which should have then been claimed via CJRS” and that it was “reasonable, permissible and consistent with the term of trust and confidence” for the R to have placed C on furlough.

Remedy

32. If successful in relation to any of the above claims, is C entitled to compensation?

33. If there should be a compensatory award, how much should it be?

34. Is the claimant entitled interest, and if so, in what sum?