EMPLOYMENT TRIBUNALS

Claimant: Mr D Allen
Mrs S Allen

Respondent: DG Weaver Ltd

Heard at: Cardiff, by video

On: 9, 10, 11, 12 &13 May 2022 and in chambers on 1 July 2022

Before: Employment Judge R Harfield
Ms L Bishop
Ms A Fine

Representation
Claimants: Mr Cowley (Citizens Advice Bureau)
Respondent: Mr C Howells (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

Mr D Allen

1. The Respondent made an unauthorised deduction from wages in respect of Mr D Allen's wages in the period 23 March 2020 to 18 May 2020;
2. The Respondent made an unauthorised deduction from wages in respect of Mr D Allen's final payment of wages;
3. Such deductions constitute a series of deductions such that the complaints of unauthorised deduction from wages were all presented in time;
4. Mr D Allen's complaint of breach of Regulation 16 of the Working Time Regulations 1996 in respect of holiday pay prior to 6 April 2020 is dismissed upon withdrawal by the Claimant;
5. Mr D Allen's complaint of failure to pay holiday pay under Regulation 16 of the Working Time Regulations 1996 for 6 April onwards is not well founded and is dismissed;

6. Mr D Allen's complaint of health & safety detriment under section 44 Employment Rights Act 1996 is not well founded and is dismissed;
7. The Respondent constructively unfairly dismissed Mr D Allen;
8. The Respondent wrongfully dismissed Mr D Allen;
9. The Respondent failed to provide Mr D Allen with a written statement of terms and conditions of employment contrary to section 1 of the Employment Rights Act 1996;
10. Mr D Allen is entitled to an award under section 38 of the Employment Act 2002;
11. Mr D Allen's successful complaints (unauthorised deduction from wages, constructive unfair dismissal, constructive wrongful dismissal and a section 38 award) will be listed for a remedy hearing.

Mrs S Allen

1. Mrs S Allen's complaint of discrimination arising from disability in respect of the alleged "displaying annoyance towards her whenever she requested time off to attend medical appointments" is dismissed upon withdrawal by the Claimant;
2. Mrs S Allen's complaint of discrimination arising from disability in respect of paying her statutory sick pay from 15 May 2020 instead of extending furlough leave, is dismissed as the Tribunal does not have jurisdiction over the complaint because it was presented out of time and it is not just and equitable in all the circumstances to extend time;
3. Mrs S Allen's complaints of failure to make reasonable adjustments in respect of the alleged "displaying annoyance towards her whenever she requested time off to attend medical appointments", requiring her to sit on a broken chair for several years, and requiring her to return to full time work on 2 January 2019 following a sickness absence are dismissed upon withdrawal by the Claimant;
4. Mrs S Allen's complaint of a failure to make reasonable adjustments in respect of paying statutory sick pay when she did not return to work from furlough leave on 18 May 2020 is dismissed as the Tribunal does not have jurisdiction over the complaint because it was presented out of time and it is not just and equitable in all the circumstances to extend time;
5. Mrs S Allen's complaint of unauthorised deduction from wages in respect of the period 23 March 2020 to 18 May 2020 is dismissed upon withdrawal by the Claimant;
6. Mrs S Allen's complaint of breach of Regulation 10 of the Working Time Regulations 1996 (daily rest) is dismissed upon withdrawal;
7. Mrs S Allen's complaint of breach of Regulation 16 of the Working Time Regulations 1996 in respect of holiday pay prior to 6 April 2020 is dismissed upon withdrawal by the Claimant;
8. Mrs S Allen's complaint of failure to pay holiday pay under Regulation 16 of the Working Time Regulations 1996 for 6 April onwards is not well founded and is dismissed;
9. Mrs S Allen's complaint of health &safety detriment under section 44 Employment Rights Act 1996 is not well founded and is dismissed;

10. Mrs S Allen's complaint of constructive unfair dismissal is not well founded and is dismissed;
11. Mrs S Allen's complaint of constructive wrongful dismissal is not well founded and is dismissed;
12. Mrs S Allen's complaints of harassment related to sex and marital discrimination are dismissed upon withdrawal by the Claimant;
12. The Respondent failed to provide Mrs S Allen with a written statement of terms and conditions of employment contrary to section 1 of the Employment Rights Act 1996;
13. Mrs S Allen is not entitled to an award under section 38 of the Employment Act 2002 as no other qualifying complaint has been successful.

REASONS

Introduction

1. The claimants both worked for the respondents as senior car sales executives until their resignations, Both allege their resignations amounted to constructive unfair and wrongful dismissal. Mr Allen presented his claim on 28 October 2020 having resigned on 15 June 2020. Mrs Allen presented her claim on 29 October 2020 having resigned on 10 August 2020.

2. Both claims were case managed by EJ V Ryan on 4 February 2021. The claimants were ordered to prepare further and better particulars. Other directions were made to get the cases ready for hearing. Further to my direction, the claimants also provided a chronological list of events complained about. The claims came back before EJ Sharp on 14 April 2022 for further case management. Much of the time spent was working through a draft list of issues with the parties which they were to work on further. EJ Sharp also directed that this hearing would be on liability issues only.

3. We had before us an agreed list of issues, a chronology prepared by the Respondent, a hearing bundle extending to 912 pages, and a witness statement bundle. We had written witness statements from and heard evidence from the claimants. For the respondent we had written witness statements from, and heard oral evidence from, Mr David Weaver, Mr Jonathan Weaver and Mr Keith Thomas.

4. We heard oral closing submissions from both representatives and Mr Howells also provided written closing arguments. We have not set out here either party's closing submissions in full but we took them fully into account. They are incorporated at the appropriate places by reference in our decision below. Prior to the start of the hearing on 28 April 2022 Mrs Allen confirmed that her sex discrimination and marriage discrimination claims were withdrawn but the facts were being relied upon for the constructive unfair dismissal claim.

5. In the course of closing submissions Mr Cowley also withdrew further aspects of the claimants' complaints, as set out below.

6. This meant that the final list of issues we had to decide is as follows:

List of Issues

"1. Time Limits

1.1 Given the date the claim forms were presented and the dates of early conciliation, any complaint about something that happened before 29 June 2020 (David Allen) and 30 June 2020 (Sheren Allen) may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Were the unfair dismissal claims made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) beginning with the effect date of termination?

1.3.2 If not, was it reasonably practicable for the Claimant to present that complaint before the end of the three months period?

1.3.3 If so, was the complaint presented within such further period as the Tribunal considers reasonable?

1.4 Were the unlawful deductions from wages claims made within the time limit in section 23(2) Employment Rights Act 1996? The Tribunal will decide:

1.4.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) beginning with the date of payment of the wages from which the deduction was made or the last deduction in a series.

1.4.2 If not, was it reasonably practicable for the Claimant to present that complaint before the end of the three months period?

1.4.3 If so, was the complaint presented within such further period as the Tribunal considers reasonable?

1.5 Were the Working Time Regulation claims made within the time limit in regulation 30(2)? The Tribunal will decide:

1.5.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) beginning with the date it is claimed that the exercise of the right should have been permitted?

1.5.2 If not, was it reasonably practicable for the Claimant to present that complaint before the end of the three months period?

1.5.3 If so, was the complaint presented within such further period as the Tribunal considers reasonable?

2. Disability discrimination

2.1 Mrs Allen automatically qualifies for protection under the Equality Act 2010 as a disabled person.

2.2 The Respondent accepts that it had knowledge of Mrs Allen's disability at all material times for the purposes of her claims.

3. Discrimination arising from disability (section 15 Equality Act 2010)

3.1 Did the Respondent treat Mrs Allen less favourably by:

3.1.1 Paying her Statutory Sick Pay from 15 May 2020 instead of extending her furlough leave?

3.2 Did the following things arise in consequence of the Claimant's disability:

3.2.1 The Claimant's continued absence from work beyond 15 May 2020

3.3 Was the unfavourable treatment because of any of those things?

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent relies upon the statutory defence in respect of the treatment at 3.1.1. and says that its aim was:

3.4.1 To ensure that furlough leave was conducted in accordance with the legislative scheme and Treasury Direction (in particular, paragraphs 5(a)(ii) and 6.1 of the First Treasury Direction, published 15 April 2020)

3.5 The Tribunal will decide in particular:

3.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;
3.5.2 Could something less discriminatory have been done instead;
3.5.3 How should the needs of the Claimant and the Respondent be balanced?

4. ***Reasonable adjustments (sections 20 and 21 Equality Act 2010)***

4.1 Did the Respondent have the following provision, criterion or practice:

4.1.1 Awarding Mrs Allen Statutory Sick Pay when she did not return to work from furlough leave on 18 May 2020

4.2 Did the PCPs put Mrs Allen at a substantial disadvantage compared to someone without her disability, in that:

4.2.1 Mrs Allen was unable to return to work and therefore her income dropped when she was transferred from furlough leave to Statutory Sick Pay

4.3 Did the Respondent know or could it reasonably have been expected to know that Mrs Allen was likely to be placed at the disadvantage?

4.4 What steps could have been taken to avoid the disadvantage? Mrs Allen suggests:

4.4.1 She could have been retained on furlough leave

4.5 Was it reasonable for the Respondent to have to take those steps and when?

4.6 Did the Respondent fail to take those steps?

5. Unlawful deductions from wages (section 13 Employment Rights Act 1996)

5.1 In respect of the wages received from 23 March 2020 to 18 May 2020:

5.1.1 What are the relevant pay periods for the purposes of the claims?

5.1.2 Was the total amount of wages paid by the Respondent during that period(s) less than the total amount properly payable to the Claimant?

5.1.2.1 The Claimants assert that they were entitled to basic pay and non-discretionary commission pay throughout that period
5.1.2.2 The Respondent asserts that the Claimants were entitled to basic pay plus commission pay until 16 April 2020, at which point the parties agreed that the Claimants would receive the lesser sum of average wage (including commission) or £2,500 per month. The Respondent stopped paying the Claimants furlough pay from 4 May 2020 and from that point the Claimants received their basic wage.

5.1.3 If so, what is the value of that deduction?
5.1.4 Was any deduction made an excepted deduction for the purposes of s.14 ERA 1996?

6. Working Time Regulations 1998 (Regulation 16, Regulation 30(1)(b))

6.1 Did the Respondent fail to pay the Claimants the whole or part of any amount due to them under regulation 16(1):

6.1.1 The Claimants' holiday pay was paid in blocks of 10 days from January 2019 and that this meant that they were not paid in respect of periods of annual leave that were shorter than 10 days.
6.1.2 Did that method of calculating and awarding holiday pay breach regulation 16(1) WTR 1998?
6.1.3 If it did, have the Claimants since received the holiday pay owed to them? (Regulation 16(5) WTR)

6.2 Similar issues arise for consideration in respect of the Claimants' claim that they were unpaid holiday pay from 6 April 2020:
6.2.1 How was the Claimants' holiday pay calculated from 6 April 2020?
6.2.2 Did the Respondent fail to pay the Claimants the whole or any part of any amount due to them under regulation 16(1) WTR?

7. Health and Safety detriment (s.44 Employment Rights Act 1996)

7.1 Did the Claimants do a protected act for the purposes of s.44(1) ERA 1996?
7.1.1 The Claimants assert that they asked to work from home from 18 May 2020 so that Mrs Allen could remain "shielded"
7.1.2 Did the Claimants reasonably believe that their return to work from 18 May 2020 would be harmful or potentially harmful to health or safety (s.44(1)(c) ERA 1996)
7.1.3 Did the Claimants use reasonable means to bring those concerns to the Respondent's attention?

7.2 Did the Claimants suffer the following treatment:

7.2.1 Their request to work from home was refused

7.3 If so, did that treatment amount to a detriment?

7.4 If so, was the protected act the reason for that treatment?

8. Constructive dismissal

8.1 What was the most recent act (or omission) on the part of the Respondent that the Claimant says caused, or triggered, his/her resignation?

8.1.1 Mr Allen asserts that the events surrounding the requirement for him to return to work from furlough in May 2020 led to him being off work due to his stress and caused him to resign
8.1.2 Mrs Allen states that the withdrawal of her IT access caused her to resign

8.2 Has the Claimant affirmed the contract since that act?

8.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

8.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

8.4.1 Mr Allen complains about the following treatment:

8.4.1.1 Experiencing an angry reaction from Mr Weaver after Mr Allen raised a query about unpaid wages (dates unspecified)
8.4.1.2 Repeated threatening and degrading behaviour from Mr Weaver (dates unspecified)
8.4.1.3 The lack of an employment contract
8.4.1.4 Financial detriment because his wages were "often" calculated incorrectly (dates unspecified)
8.4.1.4 Abusive conduct from Mr Weaver during September 2018 because Mr Allen had not attended the showroom during a period of time when he was permitted to work from home
8.4.1.5 Paid basic pay during periods of holiday leave taken before January 2019
8.4.1.6 Unilateral variation of his contractual working hours on 15 May 2020 from 5 days per week to 5.5 days
8.4.1.7 Unlawful deductions during the furloughed period
8.4.1.8 Detriment as set out in the s.44 ERA claim

8.4.2 Mrs Allen complains about the following treatment:

8.4.2.1 Paid basic pay during periods of holiday leave taken before January 2019
8.4.2.2 Unlawful deductions during the furloughed period
8.4.2.3 Detriment as set out in the s.44 ERA claim
8.4.2.4 Threats made by Mr Weaver on 25 January 2019, 22 June 2019 and 8 August 2019 to "not pay commission if customers did not take out an App on their mobile phones"
8.4.2.5 Being ignored by Mr Weaver following her return to work on 9 September 2019
8.4.2.6 Unilateral variation of her contractual working hours on 15 May 2020 from 5 days per week to 5.5 days
8.4.2.7 Financial detriment because her wages were "often" calculated incorrectly (dates unspecified)
8.4.2. 8 Breaches of the Working Time Regulations (as outlined separately)
8.4.2.9 Discrimination on the grounds of disability (as outlined separately)
8.4.2.10 Inappropriate comments made by Mr Keith Thomas over a period of time (dates unspecified)

8.5 Did the employee resign in response (or partly in response) to that breach?

8.6 If there was a dismissal for the purposes of s.95 Employment Rights Act 1996, then what was the reason for that dismissal?

8.7 Was that dismissal unfair taking into account all the circumstances of the case? (s.98(4) Employment Rights Act 1996)

9. Wrongful dismissal

9.1 Did the Claimants resign in circumstances that triggered their entitlement to statutory notice under their contract of employment?

10. Failure to provide written statement of terms and conditions

10.1 Did the Respondent fail to provide the Claimants with a statement of initial employment particulars in breach of s.1 Employment Rights Act 1996?"

The legal principles

Equality Act - Burden of Proof

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

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

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

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

9. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provisions should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 as supplemented in Madarassy v Nomura International Plc [2007] ICR 867. Although the concept of the shifting burden of proof involves a two-stage process, that analysis should only be conducted once the Tribunal has heard all the evidence. Furthermore, in practice if the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Duty to make reasonable adjustments

10. The duty to make reasonable adjustments appears in Section 20 as having three requirements. In this case we are concerned with the first requirement in Section 20(3) –

    "(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."

11. Under section 21 a failure to comply with that requirement is a failure to comply with a duty to make reasonable adjustments and will amount to discrimination. Under Schedule 8 to the Equality Act an employer is not subject to the duty to make reasonable adjustments if the employer does not know and could not reasonably be expected to know that the claimant has a disability or that the claimant is likely to be placed at a substantial disadvantage.

12. In Environment Agency v Rowan [2008] ICR 218 it was emphasised that an employment tribunal must first identify the "provision, criterion or practice" applied by the respondent, any non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant. Only then is the tribunal in a position to know if any proposed adjustment would be reasonable.

13. The words "provision, criterion or practice" ["PCP"] are said to be ordinary English words which are broad and overlapping. They are not to be narrowly construed or unjustifiably limited in application. However, case law has indicated that there are some limits as to what can constitute a PCP. Not all one-off acts will necessarily qualify as a PCP. In particular, there has to be an element of repetition, whether actual or potential. In Ishola v Transport for London [2020] EWCA Civ 112 it was said:

    "*all three words carry the commutation of a state of affairs… indicating how similar cases are generally treated or how a similar case would be treated if it occurred again."*

    It was also said that the word "practice" connotes some form of continuum in the sense that it is the way in which things are generally or will be done.

14. The purpose of considering how a non-disabled comparator may be treated is to assess whether the disadvantage is linked to the disability.

15. Substantial disadvantage is such disadvantage as is more than minor or trivial; Section 212.

16. Consulting an employee or arranging for an occupational health or other assessment of his or her needs is not normally in itself a reasonable adjustment. This is because such steps alone do not normally remove any disadvantage; Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 663; Project Management Institute v Latif [2007] IRLR 579.

17. What adjustments are reasonable will depend on the individual facts of a particular case. The Tribunal is obliged to take into account, where relevant, the statutory Code of Practice on Employment published by the Equality and Human Rights Commission. Paragraphs 6.23 to 6.29 give guidance on what is meant by reasonable steps. Paragraph 6.28 identifies some of the factors which might be taken into account when deciding whether a step is reasonable. They include the size of the employer; the practicality of the proposed step; the cost of making the adjustment; the extent of the employer's resources; and whether the steps would be effective in preventing the substantial disadvantage.

18. In County Durham and Darlington NHS Trust v Dr E Jackson and Health Education England EAT/0068/17/DA the Employment Appeal Tribunal summarised the following additional propositions:

- It is for the disabled person to identify the "provision, criterion or practice" of the respondent on which s/he relies and to demonstrate the substantial disadvantage to which s/he was put by it;
- It is also for the disabled person to identify at least in broad terms the nature of the adjustment that would have avoided the disadvantage; s/he need not necessarily in every case identify the step(s) in detail, but the respondent must be able to understand the broad nature of the adjustment proposed to enable it to engage with the question whether it was reasonable;
- The disabled person does not have to show the proposed step(s) would necessarily have succeeded but the step(s) must have had some prospect of avoiding the disadvantage;
- Once a potential reasonable adjustment is identified the onus is cast on the respondent to show that it would not been reasonable in the circumstances to have to take the step(s)
- The question whether it was reasonable for the respondent to have to take the step(s) depends on all relevant circumstances, which will include:
    - The extent to which taking the step would prevent the effect in relation to which the duty is imposed;
    - The extent to which it is practicable to take the step;
    - The financial and other costs which would be incurred in taking the step and the extent to which taking it would disrupt any of its activities;
    - The extent of its financial and other resources;
    - The availability to it of financial or other assistance with respect to taking the step;
    - The nature of its activities and size of its undertaking;
- If the tribunal finds that there has been a breach of the duty; it should identify clearly the "provision, criterion, or practice" the disadvantage suffered as a consequence of the "provision, criterion or practice" and the step(s) the respondent should have taken.

Discrimination arising from disability

19. Section 15 of the Equality Act states:

"15 Discrimination arising from disability

(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."

20. The approach to determining Section 15 claims was summarised by the Employment Appeal Tribunal in Pnaiser v NHS England and Another [2016] IRLR 170. This includes:

- In determining what caused the treatment complained about or what was the reason for it, the focus is on the reason in the mind of A. This is likely to require an examination of the conscious or unconscious thought process of A;
- The "something" that causes the unfavourable treatment need not be the main or sole reason, but must at least have a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it;
- Motives are not relevant;
- The tribunal must determine whether the reason or the cause is "something arising in consequence of B's disability";
- The expression "arising in consequence of" can 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;
- Knowledge is only required of the disability. Knowledge is not required that the "something" leading to the unfavourable treatment is a consequence of the disability.

21. The respondent will successfully defend the claim if it can prove that the unfavourable treatment was a proportionate means of achieving a legitimate aim. This is often termed "objective justification." The burden of proof is on the employer to establish justification.

22. The Supreme Court in Ministry of Justice v O'Brien [2013] ICR 449 re-stated the general principles of objective justification that:

(a) firstly, the difference in treatment must pursue a legitimate aim;

(b) second, it must be suitable for achieving that objective; and

(c) third, it must be reasonably necessary to do so.

23. The Equality and Human Rights Commission Code of Practice on Employment contains guidance on objective justification, to reflect some of the case law in the field. It terms the first issue as being determination of whether the aim is the aim legal and non discriminatory and one that represents a real, objective consideration. In Bilka-Kauhaus GmBH v Weber von Hartz [1987] ICR 110 it was termed "*correspond to a real need on the part of the undertaking."*

24. In Chief Constable of West Yorkshire Police and anor v Homer [2012] ICR 704, the Supreme Court reiterated that the measure in question has to be both an appropriate means of achieving the legitimate aim, as well as being reasonably necessary in order to do so. Some measures may simply be inappropriate to the legitimate aim in question or they may be appropriate but go further than is reasonably necessary and so be disproportionate.

25. As to the third stage, the EHRC Employment Code notes "*Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts."* We pause here to note that in a section 15 claim, it is of course the treatment that is being justified, not a provision, criterion or practice (the terminology from an indirect discrimination complaint).

26. It was said by the Employment Appeal Tribunal in Ali v Drs Torrosian, Lochi, Ebeid & Doshi t/a Bedford Hill Family Practice [2018] UKEAT0029 18 0205 (a section 15 case) that:

    (a) Justification of the unfavourable treatment requires there to be an objective balance between the discriminatory effect and the reasonable needs of the employer;

    (b) When determining whether or not a measure is proportionate it will be relevant for the Tribunal to consider whether or not any lesser measure might nevertheless have served the employer's legitimate aim;

    (c) More specifically, the case law acknowledges that it will be for the Tribunal to undertake a fair and detailed assessment of the working practices and business considerations involved, and to have regard to the business needs of the employer;

    (d) As to the time at which justification needs to be established, that is when the unfavourable treatment in question is applied;

    (e) When the putative discriminator has not even considered questions of proportionality at that time, it is likely to be more difficult for them to establish justification.

27. In Hardy and Hansons Plc v Lax [2005] ICR 1565 Pill LJ stated: *"It is for the employment tribunal to weigh the real needs of the undertaking, expressed without exaggeration, against the discriminatory effect of the employer's proposal. The proposal must be objectively justified and proportionate."*

28. Further, Pill LJ said: *"I accept that the word 'necessary' .... has to be qualified by the word 'reasonably'. That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The*

employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. 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, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission ... that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances."

29. The Court of Appeal said in O'Brien v Bolton's St Catherine's Academy [2017] ICR 737:

"…it is well-established that in an appropriate context a proportionality test can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs (provided he has acted rationally and responsibly), while insisting that the Tribunal is responsible for striking the ultimate balance; and I see good reason for such an approach in the case of the employment relationship."

30. The Employment Appeal Tribunal said in Birtenshaw v Oldfield [2019] UKEAT 0288 18 1104 repeated the above but added that 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 otherwise 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.

31. Therefore the test is ultimately an objective one and at the other end of the scale it remains potentially open to an employer to justify the treatment after the event, even if in fact it was not properly articulated or thought through by the decision maker at the time. So it was said by the Employment Appeal Tribunal in Chief Constable of West Midlands v Harrod, [2015] ICR 1311

"I consider also that [Counsel for the employer] is right in his contention that the Tribunal focussed impermissibly on the decision making process which the Forces adopted in deciding to utilise A19. When considering justification, a Tribunal is concerned with that which can be established objectively. It therefore does not matter that the alleged discriminator thought that what it was doing was justified. It is not a matter for it to judge, but for courts and tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be shown to be justified is the outcome, not the process by which it is achieved. For just the same reasons, it does not ultimately matter that the decision maker failed to consider justification at all: to decide a case on the basis that the decision maker was careless, at fault, misinformed or misguided would be to fail to focus on whether the outcome was justified objectively in the eyes of a tribunal or court. It would be to concentrate instead on subjective matters irrelevant to that decision. This is not to say that a failure by a decision maker to consider discrimination at all, or to think about ways by which a legitimate aim might be achieved other than the discriminatory one adopted, is entirely without impact.

Evidence that other means had been considered and rejected, for reasons which appeared good to the alleged discriminator at the time, may give confidence to a Tribunal in reaching its own decision that the measure was justified. Evidence it had not been considered might lead to a more intense scrutiny of whether a suggested alternative, involving less or even no discriminatory impact, might be or could have been adopted. But the fact that there may be such an impact does not convert a Tribunal's task from determining if the measure in fact taken can be justified before it, objectively, into one of deciding whether the alleged discriminator was unconsidering or irrational in its approach."

32. It was, however, also observed in O'Brien that a court or Tribunal is likely to treat with greater respect justification for a policy which was carefully thought through by reference to the relevant principles at the time when it was adopted. It was commented it would be more difficult for a respondent to justify the proportionality of the means chosen to carry out their aims if they did not conduct the exercise of examining the alternatives or gather the necessary evidence to inform the choice at that time.

33. Whilst justification under section 15 has to be established at the time when the unfavourable treatment was applied, the Tribunal when making its objective assessment may take account of subsequent evidence; City of York Council v Grosset.

34. The more serious the discriminatory impact, the more cogent must be the justification for it; Macculloch v Imperial Chemical Industries plc [2008] UK EAT 0119/08.

35. When conducting the balancing exercise required, the tribunal is entitled to give weight to the fact an employer did not make reasonable adjustments as required by sections 20 and 21; Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265. However, this does not mean that, where a reasonable adjustment cannot be made, the treatment cannot still amount to discrimination within the meaning of section 15. They are separate provisions with their own legislative requirements.

Disability discrimination – time limits

36. The initial time limit for complaints under the Equality Act 2010 is 3 months starting with the date of the act of discrimination complained about. The effect of the early conciliation procedure is that, if the notification to ACAS is made within the initial time limit period, time is extended, at least, by the period of conciliation.

37. Under Section 123(3) of the Equality Act conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on a failure to do something when either P does an act inconsistent with doing it, or if P does not do an inconsistent act, on the expiry of the period in which P might reasonably have been expected to make the adjustment.

38. Sections 123(3) and 123(4) therefore establish a default rule that time begins to run at the end of the period in which the employer might

reasonably have been expected to comply with the relevant duty. The period in which the employer might reasonably have been expected to comply with its duty is assessed from the claimant's point of view, having regard to facts known or which ought reasonably to have been known by the claimant at the relevant time; *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640.

39. A tribunal may consider a complaint that has been brought out of time if it considers it just and equitable to do so in the relevant circumstances.

Constructive Unfair Dismissal

40. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if:

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

41. Case law has established the following principles:

(1) The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

(2) A repudiatory breach can be a breach of the implied term that is within every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 and Malik v Bank of Credit and Commerce International SA 1997 ICR 606, HL.) It was said in Woods that:

"*The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it any longer*."

(3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels or believes they have been unreasonably treated.

(4) The employee must leave, in part at least, because of the breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

(5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

(6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(7) In appropriate cases, a "last straw" doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial. Moreover, the concepts of a course of conduct or an act in a series are not used in a precise or technical sense; the act does not have to be of the same character as the earlier acts.

(8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(a) What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?

(b) Has he or she affirmed the contract since that act?

(c) If not, was that act (or omission) by itself a repudiatory breach of contract?

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.

(e) Did the employee resign in response (or partly in response) to that breach?

42. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Health & Safety Detriment

43. Section 44 of the Employment Rights Act 1996 ("ERA") states:

"44 Health and safety cases

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that- …

(c) being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he 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…"

44. Pursuant to section 48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

Statement of Employment Particulars

45. The respondent concedes they failed to give the claimants a statement of his employment particulars under sections 1 to 3 ERA. Under section 38 of the Employment Act 2002 if the claimants succeed in one of their other qualifying complaints the Tribunal must (unless there are exceptional circumstances which make an award or an increased award unjust or inequitable) make an award of at least 2 weeks' pay and may if it considers it just and equitable increase that to 4 weeks' pay (subject to the statutory cap on a week's pay).

Wrongful Dismissal

46. The Tribunal has jurisdiction to hear certain breach of contract claims under the Employment Tribunals Extension of Jurisdiction (England and Wales). A claim must be presented (in the sense at least of commencing Acas early conciliation) within 3 months beginning with the effective date of termination of the contract giving rise to the claim. It is not in dispute that if the claimants succeed in their constructive unfair dismissal complaints, they will also succeed in a constructive wrongful dismissal complaint (having resigned without notice). We therefore say no more about the relevant legal principles in that regard.

Unauthorised deduction from wages

47. Section 13 of the Employment Rights Act 1996 states: -

"(1) An employer shall not make a deduction from wages of a worker employed by him unless –

(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

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

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

48. Case law has established that for a sum to be "properly payable" to the claimant, the claimant has to have a legal entitlement to the sum. The legal entitlement is not necessarily contractual – although that is often the basis of the entitlement.

49. Section 14 Employment Rights Act 1996 says:

"*(1)Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—*

(a)an overpayment of wages, or
(b)an overpayment in respect of expenses incurred by the worker in carrying out his employment, made (for any reason) by the employer to the worker."

50. Section 23 of the Employment Rights Act gives a worker the right to complain to an employment tribunal that there has been a deduction of wages in contravention of section 13. Under section 23(2) a tribunal shall not consider such a complaint unless it is presented before the end of the period of 3 months (as adjusted for Acas early conciliation) beginning with the date of the payment of the wages from which the deduction was made. Section 23(3) specifically provides that where a complaint is brought in respect of a series of deductions the trigger date for the running of the time limit will be the last deduction in the series. Section 23(4) gives a tribunal a discretion to extend time where it is satisfied it was not reasonably practicable for a complaint to have been brought within the primary limitation period and if the claim was then presented within such further period as the tribunal considers reasonable.

51. In Bear Scotland Ltd and others v Fulton and others [2015] ICR 221 the Employment Appeal Tribunal held that whether there has been a series of deductions is primarily a question of fact. It may involve consideration of issues such as whether there is sufficient similarity of subject matter so that each event is factually linked with the next in some way. It may also involve considering whether there is a sufficient frequency of repetition. However, the Employment Appeal Tribunal also held that Parliament did not intend a non payment made 3 months after the last to be characterised as having such similar features it would be part of the same series. A gap of 3 months between deductions will therefore extinguish the tribunal's jurisdiction to consider a complaint. In effect, it breaks the chain of deductions.

52. Section 23(4A) also provides (with some exceptions not relevant here) that a tribunal cannot consider a complaint about a deduction from a payment

of wages where the deduction was made before the period of 2 years ended with the date that the tribunal claim was presented.

Working Time Regulations – Holiday Pay

53. A claim for payment for accrued but untaken holiday pay claim can be brought as an unauthorised deduction from wages claim under the Employment Rights Act or under the Working Time Regulations 1998. Regulations 13 and 13A of the Working Time Regulations 1998 provide workers with a statutory entitlement to paid annual leave.

54. Regulation 13 provides that a worker is entitled to 4 weeks' annual leave in each leave year. Regulation 13A provides an entitlement to an additional 1.6 weeks, subject to a maximum overall of 28 days in a leave year. Entitlement to paid leave cannot be replaced by a payment in lieu except where the worker's employment is terminated. Regulation 14 sets out the method for calculating a payment in lieu of accrued and undertaken holiday pay on termination of employment. Regulation 16 provides that a worker is entitled to be paid in respect of any period of leave under Regulation 13 or 13A at the rate of a week's pay in respect of each week of leave. A week's pay is governed by sections 221 to 224 of the Employment Rights Act 1996. Regulation 30 gives a worker a right to complain to the employment tribunal of a failure to pay an amount due under Regulation 14 or 16. A tribunal complaint must be brought (subject to any extension for Acas conciliation) within 3 months beginning with the date on which it is alleged the exercise of the right should have been permitted or the date payment should have been made. Time can be extended if it was not reasonably practicable for a complaint to have been presented within time and it is presented within such further period the tribunal considers reasonable.

Findings of fact

55. It is not necessary for us to make findings of fact on every point asserted or in dispute between the parties. We need only make those findings necessary for the purpose of deciding the issues before us. We make our findings applying the balance of probabilities.

56. The respondent is a car dealership with several three sites. It is a privately owned Ford car dealership. Mr D Weaver is the owner and dealer principal. Mr J Weaver, is Mr D Weaver's son and Operations Manager. Mr Thomas is the Sales Manager. The claimants are married. Mr Allen started working for the respondent on 4 October 1999 as a senior sales executive, based at Llandow. He was not given a written statement of particulars of employment or a written contract of employment. He was given some brief handwritten terms about pay and commission found at [229]. Mrs Allen started working for the respondent on 4 April 2011; again she had no written statement of particulars of employment or a written contract of employment. She was introduced to the respondent by Mr Allen.

57. As sales executives the claimants' income has always been largely commission led; with a smaller basic element. Initially Mr Allen was paid a

basic salary of £12400 plus commission. From 2019 onwards his basic salary was £18,000. Mrs Allen was initially paid basic salary of £9700 and from 2019 onwards £18,000.

58. Mr Allen was the respondent's top sales executive. When Mrs Allen joined she was also highly successful.

59. Mr Allen initially worked a 5.5 day week. Mrs Allen worked a 38 hour week. From around 2011 an arrangement was reached where the claimants would work every weekend and take off their rest days during the week. Most salespeople would not want to work every weekend, but it suited the claimants. Mr Allen would also work a late shift on a Monday night, having first driven Mrs Allen home.

60. The commission structure was complicated. Commission is paid on completion of the deal which could include the on-sale of a part exchange. Commission payments can vary; for example if Ford change their own commission structure to reflect their corporate priorities. They can also sometimes require recalculation or adjustment for example if there is a change in part exchange value, or there is an issue about discount eligibility or some other aspect of the deal. The sales executives would submit a file with their commission calculations which needed to be checked by the respondent.

61. The claimants say that their commission payments were a constant battle. They say that Mr Thomas was initially responsible for calculating commission payments and that he would hold back between £200 and £600 a month when he had been unable to complete commission checks before the payroll run. Mr Allen says that he was then often just offered a percentage of what was outstanding. He says that responsibility later passed to Mr D Weaver and Mr J Weaver but that things did not improve. He says his commission payments were paid incorrectly and late. Mrs Allen makes a similar complaint.

62. Mr D Weaver says that it was rare that wages were miscalculated and if they were they were corrected in the next pay run. He says it was more common for commission not to be calculated correctly by sales executives, including the claimants. He says that sales executives would miscalculate, for example, the value of a part exchange, or not charging clients for road fund license or by giving a discount to a customer they were not eligible for. He says that the figures therefore all had to be verified by the respondent and the commission was paid following a recalculation.

63. We consider it is likely, and find, that at times mistakes were made on both sides. The calculation of commission was clearly a complicated activity depending upon a variety of factors, which themselves could change, for example, with Ford marketing priorities, such as the introduction of the FordPass app. We consider it likely that sometimes errors were made by the respondent and sometimes made by the claimants (and no doubt other sales executives). There is an example of [236] of Mrs Allen emailing Mr D Weaver about stopped commission in February 2013, which he responded to explain that she had made a number of errors in her

commission claim for claiming finance commission which had not been received and wrong Glasses' guide valuations. In his email he offered to run through the figures with her. They also had a discussion which is transcribed starting at [238] which shows the numerous factors that could affect the calculation of commission, which reflected errors made both by Mrs Allen and by Mr Weaver. There is another example of an email exchange between Mrs Allen and Mr J Weaver at [350-351] from July 2016. There is an example about alterations to Mr Allen's commission at [353].

64. We do not consider that the respondent was being neglectful as to commission calculations and payments but that errors and the need for changes was simply part of the everyday life of being sales executives with a complicated commission structure that depended not only upon the sales executives undertaking the right calculations but also external factors such as Ford changing their commission margins and priorities, customer behaviour and third party valuations of part exchanged used cars.

65. In 2012 Mrs Allen was diagnosed with breast cancer. She had some sick leave for treatment, but then decided to return to work 3 weeks after her operation with a limited period of adjusted hours. She then had further time off for further treatment. For a period of time she did some light administrative duties at home and Mr Allen would cover those parts of her job she could not do such as seeing her customers in the showroom.

66. The claimants were successful and busy. Trainee staff were employed for the claimants to train up, but it also meant that the trainee staff could carry out activities such as delivery of vehicles, arranging test drives, checking in new vehicles from the transporters, carrying out stock checks and taking photographs of used cars for the website. This meant the claimants could maximise their selling time. In turn an element of the commission payment for deals was paid to the trainee staff.

67. Initially the claimants (along with the other sales staff) were only paid basic pay when they took annual leave, and not any figure for average commission. The claimants raised this with Mr Thomas and Mr D Weaver, but were told the business could not afford to pay average commission for holidays taken. On 26 July 2018 Mr Allen emailed Mr D Weaver saying they wanted to have a meeting about the situation [360]. The claimants referred to have discussed the situation with Mr Thomas on numerous occasions and that it was their legal entitlement. Mr D Weaver responded to say he wanted to sit down and discuss remuneration in general with operating costs increasing and margins ever narrowing.

68. Unfortunately in 2018 Mrs Allen was diagnosed with womb cancer. In September 2018 she had surgery and had time off work. Mr Allen needed to be at home to care for Mrs Allen, and worked from home, with the trainee sales team undertaking the elements that needed to be done in the showroom. Mrs Allen says that her working relationship with Mr D Weaver and Mr Thomas then began to break down. She says she felt they were angry at her for her diagnosis. Mr Weaver and Mr Thomas deny this.

69. Mr Allen alleges that Mr D Weaver shouted at him for not being in the showroom. He says Mr D Weaver told him they were 32 cars short of target. Mr Allen managed to sell 27 cars. He says that when he went into the office pleased with his success, he said to Mr D Weaver that it was a good result that he had managed to sell 27 cars from home, but Mr D Weaver knocked him back saying "I didn't need you at home, I needed in in the fucking showroom as we would have sold more cars." He says Mr D Weaver was angry and that when he retorted to say "you really don't like my wife," Mr D Weaver said "don't fucking put that one on me." Mr Allen says he left the office straight away.

70. Mr D Weaver denies this happened. He says he was supportive of the claimants, allowing Mr Allen to work from home so he could support Mrs Allen. He also acknowledges that the situation was far from ideal to have his two top sales executives working off site. There are some emails from around this period at [361-362 and 910-912] about anticipated sales figures which shows Mr Allen being invested in the figures they were achieving, and proactively trying to juggle work and looking after Mrs Allen. It would have been important to him that they did well so that he could achieve his commission. The emails show Mr Allen saying to Mr D Weaver: "thanks for the support with Sheren." Mr Allen in his evidence suggested that his thanks was being given to the team supporting him, not to Mr Weaver. We do not accept this, the email sensibly reads as him personally extending his thanks to Mr Weaver.

71. Unlike various other allegations made by the claimants this is an allegation that has some specificity to it. We consider it likely, and find, that the conversation happened along the lines as outlined by Mr Allen. We think it likely that he went into see Mr Weaver proud of what he thought had been achieved in difficult circumstances. September is a key, busy month for car sales in the year. We consider it likely Mr Weaver was frazzled by the drive to hit target and the work that had to be done to try to get there, including the additional demands of supporting Mr Allen working from home. We think it likely Mr Allen's gleefulness annoyed Mr Weaver and he snapped at Mr Allen words to the effect "I needed you in the fucking showroom." The impression from Mr Allen's evidence in general was that Mr D Weaver tended to swear in their everyday exchanges, as opposed to it being a particular mark of aggression. We do not consider that Mr Weaver was being aggressive with Mr Allen, or that he was bearing a serious grudge about the fact that Mrs Allen was off work due to her cancer treatment with Mr Allen supporting her. We think it likely he snapped and said what he did because he thought Mr Allen was showing a lack of understanding of the pressures. In doing so he burst Mr Allen's bubble, as Mr Allen was himself was proud of what he thought had been achieved in difficult circumstances. They had two different perspectives on the same difficult situation.

72. In 2019 a new pay structure was put in place [364-367]. The claimants' basic pay was increased and they were also to receive average commission whilst on holidays. The document refers to sales executives working 5.5 days a week. Mr Allen says that he questioned the reference to the wage being based on a 5.5 day week, as he had been working a 5 day week since 2012, but working every weekend. He says Mr D Weaver

said not to take any notice of the statement as it did not apply to the claimants, that it was a generic form and would take too long to print different ones for different people, but not to worry as Mr Allen's hours would not change.

73. Mr D Weaver denies saying this. He says that the contractual requirement was always to work 5.5 days a week but that he had shown some leniency because of the claimants working weekends. We consider it likely that the conversation did take place as outlined by Mr Allen. The documents appears to be a generic one for all sales executives. Mr Allen in those circumstances is likely to flag up the point that he was not working 5.5 days a week and had not done so for some time. Mrs Allen also had bespoke working hours. It is also likely Mr Weaver would refer to the document being generic and that it would be too much work to generate individual documents. This is a workplace in which the claimants did not have individual statements of particulars of employment and Mr D Weaver was generally looking to make efficiencies when it came to administration, such as only paying holiday pay commission once holidays had reached a block of 10. He runs his business with little administrative and support staff. It is also likely that Mr D Weaver would have told Mr Allen not to worry about it. At that point in time things were working well, with the weekends being covered which paid dividends for the claimants and for Mr Weaver given they are the busy days of the week for car sales.

74. Mrs Allen says that Mr D Weaver went out of his way to avoid her and did not speak to her between her diagnosis in August 2018 and return to work in January 2019. She says she spoke to Mr Thomas about how it was upsetting her and that he told her if she did not want to be treated differently she should not have told anyone she had cancer. Mr D Weaver and Mr Thomas deny this. The claimants say that as 2019 went on that Mr D Weaver remained unhappy with Mrs Allen and with her having to attend medical appointments. They say that the working environment became hostile, and that Mr D Weaver would threaten to not pay their wages for insignificant reasons. They say that they were threatened with losing commission on a sale if a customer did not take out an app on their phone. Mrs Allen alleges in particular that on 25 January 2019, 22 June 2019 and 8 August 2019 Mr D Weaver threatened not to pay commission if customers did not take out the Ford Pass app on their phones.

75. The email of 24 January 2019 at [852] was sent to all sales executives and in fact neither claimant had non activated vehicles attributed to them. The email of 22 June 2019 at [383] was again sent to all sales executives with various sales executives, including the claimants, notified of issues with their customers. The email of 8 August was sent directly to Mrs Allen about two of her July sales asking her to follow it up on an urgent basis as they had dropped down to 35% activation.

76. The Fast Pass App activation rate affected dealer margin and the respondent was achieving a lower sign up rate than other dealerships. We are satisfied that Mr D Weaver was simply notifying the sales executives of what the issue was and the impact it could have on commission. We accept he was seeking to get sales executives to address, if they could, any failure to activate the App and that was all he

was doing with his email to Mrs Allen. The email was polite. We do not consider she (or indeed Mr Allen) were singled out or threatened. In fact, ultimately neither claimant suffered a deduction in respect of the issue. Mr D Weaver was just doing his job.

77. Mr Allen says there was an increasing toxic atmosphere in the office and on one occasion when he went to see Mr D Weaver to ask a question he only got as far as saying “Dave” before Mr D Weaver said “NO!” without listening to the question. He says when he tried to ask about his wages Mr D Weaver would become irate and would say “I don’t need this, I will close the fucking door!" Mr Allen says that Mr Thomas told Mr D Weaver that he should not be behaving that way. Mr Allen says he felt like he was being bullied into surrendering his wages. Mr Allen does not give a date for this allegation in his witness statement, albeit it reads as probably allegedly occurring in 2019.

78. There is no date for the allegation in the list of issues. In the claimant’s ET1 claim form it is put a different way, where it is said: “Prior to the national lockdown, the Claimant questioned the Respondent (Mr Weaver) about unpaid wages. Mr Weaver, turned pale and clenched his fists. The Claimant told the Respondent that he should not be angry at the Claimant for asking to be paid correctly. Mr Weaver, sternly told the Claimant that “I will close the fucking door in Llandow, because I don't need this shit”. The Claimant would often feel threatened and degraded by Mr Weaver's unacceptable behaviour as he would often use this phrase.” It reads more of an allegation that Mr Weaver was threatening to close Llandow rather than shutting a door.

79. Mr Weaver denies behaving in this way and says that it is difficult to respond to allegations he has been provided with little information about.

80. On the balance of probabilities we did not find that Mr Allen had established that this alleged event occurred. Nowhere was it clearly set out to us the exact wages that Mr Allen said that he was missing. He is very unclear on the date and the accounts he gives in his ET1 claim form and in his witness statement differ somewhat.

81. Mr Allen also alleges that Mr D Weaver engaged in repeated threatening and degrading behaviour. No specific allegations or dates are put forward. That makes it very difficult for the recipient of such an allegation to respond to it. In the absence of such detail we did not find on the balance of probabilities that Mr Allen established that this occurred.

82. Mrs Allen says she had a further period of sick leave and returned to work in September 2019 against the advice of her GP. Mrs Allen also alleges she was ignored on her return to work in September 2019 by Mr D Weaver. Mr D Weaver denies this saying he did engage with her in relation to work related matters. Mr Thomas denies that Mr Weaver ignored Mrs Allen and says that he thought it was Mrs Allen who seemed to go out of her way to avoid Mr Weaver when Mr Weaver was on site. There is more detail in Mrs Allen’s ET1 claim form than is contained in her witness statement. In her ET1 claim form she says: “The Respondent would make a conscious effort to ignore the Claimant; he would say 'hello'

to colleagues but not to the Claimant. Should the Claimant enter a room the Respondent would often leave to make a cup of coffee or display signs that he was too busy to be disturbed. However, the Respondent would occasionally embrace a conversation when he required a work target to be met by the Claimant."

83. Again the lack of detail of Mrs Allen's witness evidence makes the allegation difficult to address. We think it likely that long term Mr Weaver and Mr Allen had had a good, close working relationship. Mr Allen worked for Mr Weaver for a long time, as his top salesperson. We do not consider it likely that Mr Weaver and Mrs Allen ever had a close working relationship in the same way. They are very different people who seem to have little in common. Even on the claimant's own ET1 claim form she was not saying that Mr Weaver was completely ignoring her, she acknowledged that he would talk to her about work targets. In all the circumstances we do not consider it established on the balance of probabilities that Mr Weaver set out to deliberately ignore Mrs Allen. We consider it likely that neither sought the other one out for social pleasantries.

84. Mrs Allen says that on her return to work in September 2019, she was again refused a phased return to work by Mr Thomas, saying that it was Mr D Weaver's decision. Mrs Allen says she continued to raise flexible working with Mr Thomas. She alleges that Mr D Weaver was having a personal relationship (which he denies) with another employee, who also had a cancer diagnosis but was allowed flexible working. She says that when she said to Mr Thomas in February or March 2020 that this was unfair compared to her situation, he said "that I should open my legs for Mr Weaver if I wanted the same advantages." She says she told Mr Thomas that was a disgusting thing to say and he tried to laugh it off. She says she was too embarrassed to tell Mr Allen. Mr Thomas denies saying this. Mr Weaver says the employee had a terminal cancer diagnosis and was permitted to start work at 10am and says he considers it unlikely Mr Thomas would make a "joke" about her situation.

85. This is Mrs Allen's word against Mr Thomas', with the burden ultimately on Mrs Allen to establish that it happened as a matter of fact, on the balance of probabilities. On the evidence before us and applying the balance of probabilities, we did not find it established that Mr Thomas made the alleged statement. In particular, Mrs Allen is not an individual who is afraid of standing up to treatment she considers unacceptable. We took into account the absence of reporting the allegation to anyone else at the time.

86. 23 March 2020 saw the UK placed into lockdown. That evening Mr D Weaver emailed all employees to tell them the business was temporarily closing and all employees were not required to work unless advised otherwise by him or Mr J Weaver. The email said:

- *"What does this mean with regards to your pay, I have ensured that for the foreseeable future maximum 12 weeks that your basic weekly wage will continue to be paid as normal.*
- *I will further clarify that Commission and Overtime will not be considered in the basic weekly wage payment.*

- *Outstanding Commissions for Sales will be honored and paid subject to the normal requirements.*
- *Outstanding Commissions for Service relative to March performance and will be paid as normal if applicable.*
- *Holidays that have been requested will remain in force and be paid accordingly.*
- *Holidays will still be accrued during this furloughed period of absence.*
- *Holiday requests from today will now necessitate a 3 month prior request to the department manager.*
- *Holiday requests will be dealt with on a first come first served basis with no carry over into 2021 being allowed."*

87. On 24 March, following further information, Mr D Weaver returned workshop staff to the workplace as garages were permitted to open for essential maintenance but sales executives were not recalled. On 27 March he sent a further update to say they were investigating options including the Coronavirus Job Retention Scheme which they understood may pay up to 80% of salaries. Mr Weaver said they would be in touch further when they had more information. He said: "*Please note that my previous email of 100% basic weekly pay still stands regardless of the companies eligibility into the scheme, further more I can confirm that your pensions if opted-in will continue to be paid."*

88. On 8 April Mr Weaver sent a further update to say:

"• Period of furlough will continue until further notice.
• Basic pay will be maintained at 100% at least until further notice (maximum 12 weeks) from start.
• Regular commission due for all correctly completed files will be paid this week
*• Deal files with traded vehicles uncollected will be paid commission less trade profit and conditioning.**
- *Government Basic salary and commission guaranteed up to £2500 per month***
• Ford Training eLearning can be completed but no proactive customer dealings.
• Work, an alternative source of work can be sought but I will need to be notified.

**A commission adjustment will be made up or down if the vehicle is traded or retained for stock, note that all vehicles previously traded subject to age and conditioned have had a VHC and repairs both bodywork mechanical have been completed with the vehicle being valeted and forecourt ready.*

***This has been an area of much confusion stating that "discretionary commission" will not be eligible and cannot therefore be added to the basic pay please see the government website for the that directive, However there has been lobbying by recognised bodies within the motor trade to clarify this matter further, should this change then I will revisit the situation and seek any solution that is in your favour within the government stipulated guide lines."*

89. On 14 April Mr Weaver was then able to provide further detail [429]. He said:

" I have previously informed you of my intention to pay your basic pay at 100% Excluding regular commission payments. Since this announcement, the government introduced the Job Retention Scheme to aid those individuals that have been furloughed by their organisations. The consequences of which are laid out below:

• On the 23rd of March the government announced an Employer Job retention scheme.

- *The job retention scheme now potentially makes provision for inclusion of commissions.*
- *The maximum Monthly payment has a cap of £2,500 including basic pay and commissions.*
- *Furloughed employees will therefore receive the lessor of 80% of average income including commission or the £2,500 cap.*
- *Income tax and national insurance will be deducted as normal.*
- *The company will continue to honour opted in pension scheme contributions.*
- *All outstanding commissions will be processed under the terms of my email dated 8th April.*
- *Average pay will be calculated using 2019/20 pay period or months worked to date if less.*
- *Should the job retention scheme end we will return to our original standing of basic pay at 100% excluding average commission."*

90. The sales executives were asked to sign a personal letter confirming their agreement. The claimants understood that their average commission from 2019 would be included when calculating their furlough pay at 80%, subject to the £2500 cap.

91. On 1 May Mr Weaver received an "action notice" from the Director of Dealer Operations of Ford advising that they expected vehicles would be delivered to all compounds the week commencing 18 May (534). On 5 May Mr Weaver wrote to the furloughed staff with some provisional information about safety measures that would be included in the workplace and asking any staff who were feeling vulnerable about a return to work to contact him at the earliest opportunity. On 8 May he sent furloughed staff training material to read. He said that should there be any individual top ups due on salary these would be added to the next payroll run [547].

92. On 9 May Mr Allen emailed Mr D Weaver on behalf of him and Mrs Allen questioning the pay they had been receiving on furlough [547]. He said they were expecting £2500 a month. He said they had been paid deal commission on two occasions in the last 6 to 7 weeks and that these were wages earned before lockdown and should not be included in the furlough payment. Mr Allen said they were hoping to hold part of those commissions back so they could have a wage on their return to work. They also questioned being paid for 2 days' holiday they had previously booked and they also to retract a holiday request for June 2020. Mr Weaver responded to state that salary payments had been run in line with

what had been agreed and that it did not involve holding back salary/commission. He refused permission to cancel booked holidays. Mr Weaver forewarned the claimants he was considering recalling selected sales staff from furlough either for home working or working from behind locked doors in work. He said he was following government guidance and if they saw anything different by way of government guidance they should forward it on.

93. On 13 May Mr Weaver wrote to the claimants [573-574] saying they had been selected for a return to work. They were told they would return to work on 18 May operating from a showroom closed to the public. The claimants were told that as a temporary measure their working hours would be 9am to 5pm Monday to Saturday and 10am to 4pm on a Sunday with a requirement to work 5.5 days a week but with no requirement to work any "lates." The claimants were told that as furlough was only supported by the government in blocks of 3 weeks their period of furlough had in fact already ended on 4th May and they would be paid basic wage from 4th May onwards. The claimants were told measures would be in place including physical distancing, staff temperature checks, the showroom would be closed to customers, handwashing facilities, hand sanitiser and disinfectant wipes were provided as were masks and gloves. Face shields were said to be on order. Mr J Weaver also prepared a risk assessment found at [585] (with updated versions at [651], [709] and [736].

94. On 13 May Mr Allen emailed Alun Cairns MP [622-623] saying they understood they would be expected to sell cars to the public. He said service customers could walk through the "closed" showroom to access toilet facilities or request a quote and put the staff at risk. He said Mrs Allen had received a shielding letter and they had spoken to public health who said they should seriously consider Mrs Allen's health before returning to the showroom. He said he felt the respondent was in breach of government guidelines. He asked for advice.

95. On 14 May Mr Cairns MP responded to say: "*From the outset guidelines have confirmed it is ok for you to continue going to work, providing staff cannot work from home and social distancing can be maintained*." He said it was different for those in the shielding group and "*I imagine you must shield also to protect her."* He suggested Mr Allen speak to his line manager. Mr Allen responded to ask whether that meant that car showrooms could open. Mr Cairns MP responded on 15 May to say official guidance was that car showrooms should not be open for trade.

96. On 14 May Mr Allen emailed Mr D Weaver to say they could find nothing about lockdown restrictions being lifted in Wales. The claimants suggested that Mr Weaver bring younger members of staff back to work as they were both in their 50s and at greater risk of complications. It was also raised that Mrs Allen had a compromised immune system [598]. Mr Weaver responded to state that the showroom remained closed to customers which satisfied the requirements of the Welsh Government. He said there was sufficient work to justify recalling some staff from furlough and the claimants had been selected due to their experience and competence. He said given his obligations under the Equality Act he did not consider that

age was an appropriate selection tool.

95. Mr D Weaver also said: "*A person at high risk is required to practice shielding and to self isolate for 12 weeks even from members of their own household. The Welsh Government allows me to retain shielding employees on furlough providing I have documentary evidence. In my email dated 5th May 2020 you were made aware of these shielding letters and asked to bring it to my attention at the earliest opportunity. To date I understand that neither of you have been able to provide shielding letters.*" He went on to re-state the physical distancing and other measures that would be in place in work. He concluded by saying: "*To date, I have no knowledge that you have been provided with shielding letters having made this enquiry on the 5th May 2020. With this in mind your period of furlough ended 4th May 2020. Since then D G Weaver will be responsible for 100% of your basic wage. Given adequate and reasonable notice and having agreed to the terms of furlough that you remain on furlough until such time as you were asked to return to work, you are required to be in Llandow at 09:00 on Monday 18th May 2020.*"

96. On the morning of 15 May Mrs Allen emailed Mr D Weaver with a shielding letter [625] which she said she had received that day (although Mr Allen's earlier email of 13 May to Mr Cairns suggests she had in fact already received it). The letter said she should shield until at least 15 June. The advice was also to keep away as much as possible from those that she lived with. Mrs Allen told Mr D Weaver she would therefore be shielding. Mr D Weaver responded that evening to confirm that Mrs Allen should shield and he did not expect her to return to work. He went on to say: "*Unfortunately due to your position as sales executive and in line with the regulations placed upon us by the Financial Conduct Authority and the Data Commissioner we will be unable to offer you home working. This is synonymic with our position prior to the COVID-19 outbreak. Fortunately owing to the welfare concessions made by government due to the coronavirus you are eligible to receive Statutory Sick Pay. You will not need to self-certificate or provide a doctors note as your shielding letter proves evidence enough in the event of an audit. You will continue to receive SSP until 15th June 2020 however I ask that should you receive your further letter prior to 15th June asking you to continue shielding. you forward to me so that I can update your record and continue to pay SSP.*"

97. Mrs Allen referred Mr Weaver back to his earlier email in which he had referred to the potential to retain shielding employees on furlough. She said she noted that Mr Weaver appeared to have changed his position by saying he would only pay SSP and she asked for his reasoning. She said she considered it to be a discriminatory act as others were still on paid furlough [627].

98. Mr Allen also emailed Mr Weaver referring to Mrs Allen being at significant risk and saying he needed to make calculated decisions to protect himself and his loved ones. He referred to Government guidelines to "stay home" and only venture to work when the individual cannot reasonably work from home. He asked what tasks needed completing that would require him to attend the workplace if the showroom was to remain closed. He expressed concern about customers being present waiting for service on their

vehicles and asked what measures would be taken to close the showroom such as a protective partition. He also said: "*At current I assume your email sent to be a generic one as it has caused some confusion for myself with the expectation of 5.5 working days. I have regularly during my employment worked my hours over a 5 day working week and will continue to do so in these testing times to continue to provide support to my family."*

99. Mr Weaver responded to say: "*New vehicle enquiries remain strong as there is a backlog of RMT leads, Leap leads and our own digitally generated leads. There has also been a noticeable increase in customer enquiries by phone and the service departments are reporting increasing levels of sales enquiries from customers that they are serving. Ford Motor Company to their credit have worked particularly hard behind the scenes offering their piece of mind marketing programme as well as their order take and delivery incentive for which we have opted in. Having had a meeting with our district manager this morning it appears as if either side of the weekend a Red Top is to be released activating the two week delivery window in England whereby the delivery incentive is eligible. We need to be in a position to utilise this incentive and conduct deliveries given that there will be a time constraint on its eligibility. FMC and I appreciate that at present, lockdown rules are devolved and thus the advice and instruction differs between Wales and the rest of the UK."* He also said: *"The daily functionality and responsibilities required of Vehicle Sales Executives does not adhere itself to home working as we have repeatedly identified this to yourselves prior to the covid 19 outbreak. Whilst this has been reviewed our position remains. FMC have recommenced the deliveries of new Vehicles of which you are accountable for the majority of customer orders. These vehicles will need to be organised and various deals will need to be reconfirmed in many cases with New settlements, New finance proposals and valuations etc being required. As you are aware, the General Data Protection Regulations came into force in 2017 governing amongst others, the security of customer data in both digital and physical form. As the Data Controller and Dealer Principal for D G Weaver, the governance procedures that we have put in place require that sensitive customer data not be removed from the premises as it increases the risk of the customers data being accessed illegitimately."* He said that Mr Allen was entitled to go to work as it was not reasonably practicable to work from home.

100. Mr Weaver went on to say: "*The showroom is indeed open plan and a thoroughfare to the offices, boardroom and restrooms. The showroom will therefore not be cordoned off with a physical barrier but as it is roughly 200m2, there is little risk or need for anyone to enter within 2m of your person. Should this be of concern, remember we have provided nitrile gloves, face masks and visors to ensure that you remain in a safe working environment. While I do not mandate that you wear PPE, I have supplied sufficient amount of which I recommend you make use. I can confirm that while I was prepared for both yourself and Sheren to operate out of the same premises, risks were mitigated as you shared a household. With new information I have today instructed Sheren not to return to work following advice from the Chief Medical Officer and I can confirm that at this point I will not be recalling another Sales Executive from furlough in*

Llandow. This should reassure you of my commitment to physical distancing in the workplace." Mr Weaver also referred to the fact that the shielding letter referred to the need for Mr Allen to socially distance from Mrs Allen at home which was likely to also mitigate the risk of infection. He said again that Mr Allen had been selected based on his experience and competence and the majority of customers that require contact were customers Mr Allen had previously sold vehicles to. He said that it remained the expectation that Mr Allen report for work on 18 May and said that if Mr Allen did not wish to return he should make a request for unpaid leave.

101. On the issue of the number of days working he said: "*regularly and without permission during your employment you have worked your hours over a 5 day week. I draw your attention to the commission declaration that you signed conveying the terms that you work 5.5 days per week. I feel now would be an appropriate time to draw your attention to these responsibilities of which you are no doubt aware."*

102. On 18 May Mr Allen responded to Mr Weaver again [639] to say: "*As you know, I have expressed my genuine and real concern with the coronavirus outbreak which presents a real risk of serious and imminent danger, killing thousands of the population. You are fully aware that Sheren has been identified as an extremely vulnerable at risk person and the government has instructed that she must shield herself. Whilst social distancing is practiced, we live in the same house and it will evidently mean that at home there will be times when social distancing will just not be possible. Therefore I genuinely believe that my return to the workplace during lockdown restrictions will place Sheren at a serious and imminent danger of infection. I do not believe that the safety arrangements you reference in your email dated 15th May will provide adequate and assured protection for Sheren and I contest this in accordance with Section 44 of the Employment Rights Act. I have attempted to explain to you my genuine level of concern I have in protecting my wife during these unprecedented and challenging times. I have experienced a dramatic increase in my stress and anxiety levels. After receiving your chain of emails, just thinking of returning to work during the coronavirus outbreak resulted in me having a panic attached and I had to seek immediate medical attention from my GP as a direct result of your decision to instruct me to return to work. My GP has signed me off on sick leave, so I will forward you a copy for your records in due course."* He said he did not consider it reasonable to recall him from furlough when Mr Weaver had other viable options. He asked that Mr Weaver consider furloughing him again when his certified sickness came to an end. He also said that it was not the case that Mr Weaver could only furlough staff in 3 week cycles and said they were entitled to furlough pay up to 18 May.

103. Mr Allen also said: "*In addition, when you sent us the contract for the Furlough Scheme, you clearly stated that your sales team would be paid up to the maximum of £2500 per month (80%) depending on our previous years earnings, and that our commission was compulsory, however, we have only received £345.92 per week, which has left us at a financial disadvantage. This I believe is a breach of contract and an unlawful deduction of wages. We therefore request a special pay for the arrears*

due."

104. In relation to the working week Mr Allen referred to the commission agreement and said: "*This is the document that the Sales Team were forced to sign in January 2019. The Commission Structure does not confirm that this is a variation in contract and we have not agreed to vary our working days from 5 days to 5.5. Therefore we do not accept your attempt to unilaterally impose a change to our contract of employment and will continue with our 5 days a week as regular."*

105. The exchange of lengthy emails continued with Mr Weaver responding at [642]. Mr Weaver pointed out that when he originally recalled them from furlough he did not have Mrs Allen's shielding letter. He referred to the fact a risk assessment had been undertaken and set out again the measures in place in the workplace, including that the face shields had now arrived. He said that there had been a visit from trading standards in response to a complaint alleging they were running an open showroom and said they were satisfied with the measures taken. He asked for Mr Allen's doctor's note and said Mr Allen would be placed on SSP. He said that both would continue to receive SSP whilst signed off sick/ in receipt of shielding letters. In relation to furlough pay he said: "*Salary, I can confirm that your pay to date during the period of lockdown is greater than 80% of your pay for the same period 19/2020 tax year so no top up is not required. As furlough continues your average pay is recalculated to correspond to the same period last year. Should the amount you are paid fall below 80% of the equivalent period's average pay, I will top it up. I can further state that at the time of writing there is no instruction from HMRC that commission earnt be deferred."* On the topic of working week he said:

"*Regarding your concern over the requirement to work 5.5 days per week. At this moment in time I'm happy to park this issue to one side. With you suffering anxiety I feel that this issue can be resolved at a later date. For the sake of your wellbeing I propose that we address this once a doctor has confirmed that you're fit to return to work."*

106. The claimants had also contacted the First Minister's office for advice. His office responded on 6 June [704] saying at the current time car dealerships and showrooms would remain closed but would be considered at the next review. On 12 June Mr Allen forwarded to Mr D Weaver the latest shielding letter for Mrs Allen saying she was now able to leave the house and meet people outside, socially distanced. She was told not to enter any other premises or go to work.

107. On 15 June Mr Weaver emailed Mr Allen asking for an update, pointing out his sick note had run out [724]. On 16 June Mr Allen emailed Mr Weaver a resignation letter dated 15 June which he said Mr Weaver should have received in the post the day before. The letter said: "*Due to your continuous unlawful deduction of wages which includes holding back commissions due, late/non payment of holiday pay, change of hours and trying to force me back into the showroom against Government legislation while refusing to let me work form home which I have done on a number of occasions, and at the same time allowing other staff to work form home. You have left me with no other alternative but to resign from my position.*

Due to your behaviour as outlined above, which has caused me a lot of stress and anxiety and has had a detrimental effect on my health which led me to seek medical treatment I therefore believe our employment relationship has irrevocably broken down and has forced me to resign as a result of fundamental breach of my Employment on your part, in particular the duty of trust and confidence."

108. On 16 June Mr D Weaver and Mr J Weaver decided to block Mrs Allen's access to the internal computer system. They suspected that Mr Allen could access and download customer information from the DG Weaver database. Mr D Weaver says he suspected this because he had been told by people working in the sector and by Mr Allen himself, that Mr Allen had taken data from two former employers. He says they were concerned that Mr Allen could access Mrs Allen's laptop at any time and access confidential data.

109. On 17 June Mr Weaver accepted Mr Allen's resignation and asked for the return of his keys and laptop. He said: "*I feel I'm required further remind you that any customer information acquired throughout your period of employment at D G Weaver Ltd. remains company property. In the event that you have illegally extracted this information in any form, we will be required to inform the ICO of the illegal data breach by a former employee. Under the Data Protection Act 2018 it's a criminal offence to knowingly or recklessly obtain or disclose personal data (or procure its disclosure to a third party) without the consent of the data controller. The offence is punishable by way of a fine on conviction and it could be committed where, for example, an ex-employee takes customer, client or other employee records that contain personal information to a new job without your express permission. It doesn't matter that they might have freely used that information as part of their job duties when working for you - it doesn't belong to them and they can't take it with them without your consent. It's also irrelevant how the personal data was removed, so the same would apply whether the employee had downloaded the data to a USB flash drive, sent it to their personal e-mail address or physically photocopied it."*

110. Mr Weaver also posted a letter to Mrs Allen that day saying: "*It will no doubt not have escaped your notice that your husband has terminated his employment with D G Weaver Ltd. as of 15th June 2020. Your employment is not conditional upon your husband working here and as such, at the point your shielding letter ends, you would be welcome and required to return to work. Under the circumstances, with you working so closely as a team with Dave, I feel it reasonable that I ask you your intentions regarding your employment at D G Weaver."* Mrs Allen did not reply.

111. On 22 June Mr Allen sent an email saying: "*Afternoon your laptop and keys are here safe if you can confirm when I will be have my holiday pay outstanding and 3 deals not be paid on? So I can then have my p45 and I have p60 in my draw 2 coats and sunglasses in my cupboard in need return And put a line under this".* Mr Weaver responded to say that company property was not a bargaining chip. He said Mr Allen had 9 days holiday due to be paid at average pay, which would be paid. He asked what the 3 deals referred to were [730]. Mr Allen provided the details and

Mr Weaver responded on 26 June at [632] setting out a summary of commission calculations and said that on balance there had been an overpayment to the claimant of £138. He said: "*Further you may recall that you were recalled from furlough as of Monday 4th May 2020. Your fitness for work note commenced on the Friday 15th May 2020. During this period you were absent without permission yet you received your basic pay in error. The overpayment will be deducted from the balance owed."*

112. Mr Allen says that about a week after his resignation he decided to call a few contacts to see if they had any news about jobs. He says he was then contacted by one of the directors from Bridgend Ford who, after a couple of phone calls, requested a face to face meeting. He says that the director told him they would be careful as his own wife was shielding too. They met, with social distancing, in the boardroom and the director said he would see what he could do for Mr Allen. Mr Allen says that he was then offered a position and started his new employment on 7 July 2020 when the retail market was allowed to re-open.

113. Mr Allen did therefore return to his new workplace on 7 July 2020. He says that he felt safe to return to work there because they were operating on an appointment only basis, and the teams were split into groups so he would only work within a "bubble", and he had his own office to use.

114. On 28 June Mr Allen sent a further email to say his holiday pay had been underpaid. He also sought 18 years worth of backpay for the period of time when average commission was not paid for holiday pay [733]. He questioned the commission calculations. He refuted there had been any unauthorised absence. He said there had been an unauthorised deduction of £555.87 from his final pay.

115. Mr Allen's laptop was collected and was examined and Mr D Weaver understood that an external device had been connected to it and customer information transferred. He says that once Mr Allen commenced working at Bridgend Ford they were receiving some enquiries via the website which alerted them that Mr Allen was contacting their customer database. The respondent contacted their solicitors. On 3 July the respondent's solicitors wrote to Mr Allen [764] saying no further sums were owed to him. The letter alleged that prior to his departure Mr Allen had downloaded the client database. He was asked, amongst other things, to deliver up the data. Mr Allen expressed his outrage and indicated the solicitors should set out what it is alleged he had. They did so on 6 July [772] setting out what they said was downloaded from the laptop to a portable drive that included excel spreadsheets. Mr Allen responded to say that he only had personal items such as payslips which seemed to be mixed in with other random items that he no longer had access to. On 9 July the solicitors responded further to say they were aware Mr Allen had started working at Bridgend Ford, that the respondent would agree to a "clean break" if, amongst other things, copies were returned, Mr Allen confirmed he had not passed on any confidential information and a COT3 agreement was reached. Mr Allen responded to say he had only backed up the diary because the spreadsheet had a tendency to become corrupted and he had not used or passed on the information and had been deleted. There was no COT3 settlement.

116. On a date in July Mrs Allen received a letter saying she no longer needed to shield after 16 August [782]. On 10 August Mrs Allen submitted her resignation [803]. She said: "*You should be aware that I am resigning in response to a repudiatory breach of contract by my employer and I therefore consider myself constructively dismissed. In March 2020 I signed a contract which you sent to me via email stating that I was to be put on furlough with 80% of my wages including commission to be paid to me, however, you only paid my basic wage and when you were asked on when I would receive the correct amount, you promised that the top up would be made, but this was never done. You were questioned on a few occasions on when the correct top up of monies would be paid, on which I never received a definite answer, you then informed me that I would not receive the top up. You held back my wages earned prior to furlough for two months, and used that money to pay me both in April & May, which I believe is an unlawful deduction of wages. In an email sent by yourself during furlough you informed your staff that anyone with a `Shielding Letter' must inform you straight away as the government legislation allows you to keep the person on furlough. I received a shielding letter in the middle of May and sent it to you straight away, you then made the decision to pay me sick pay instead of keeping me on furlough, and I did question your decision as I felt that you had purposely discriminated against me on the grounds of my disability, but you did not reply. This led me to believe that your decision was one of conscious bias to subject me to less favourable treatment. Furthermore, while I was shielding, you indirectly removed me from your employment by blocking my emails and access to all internal systems that allowed me to carry out my job which also left me unable to view my wage slips. Due to your actions outlined above, the trust and confidence has been destroyed and our relationship has broken down as I feel that you have deliberately placed me at a financial detriment when there was no need to do so as the government had put policies in place to support both employer and employee. I believe you have seriously breached my contract. I now consider that my position at D G weaver Ltd. is untenable and my working conditions intolerable, leaving me no options but to resign in response to your breach. I do not in any way believe I have affirmed or waived your breach."*

117. Mrs Allen commenced Acas early conciliation on 26 August 2020 and her certificate was issued on 10 October 2020. She presented her ET1 claim form on 28 October 2020. Mr Allen commenced Acas early conciliation on 28 August 2020 and his certificate was issued on 12 October 2020. He presented his ET1 claim form on 28 October 2020.

Discussion and Conclusions

118. Applying our findings of fact to the issues to be decided (as left after the withdrawal of certain complaints in closing submissions) our conclusions are as follows.

Mrs Allen – section 15 - discrimination arising from disability

Unfavourable treatment

119. Mrs Allen was paid only SSP from 15 May 2020 rather than being placed on furlough. The respondent denies that this amounts to unfavourable treatment. The respondent refers to paragraph 5(a)(ii) of the first Treasury Direction (published 15 April 2020) [897] which says that an employer may make a claim under the Coronavirus Job Retention Scheme ("CJRS") that relates to an employee "who is a furloughed employee." The respondent further refers to paragraph 6.1 which says that an employee is a furloughed employee if:

    (a) the employee has been instructed by the employer to cease all work in relation to their employment,
    (b) the period for which the employee has ceased (or will have ceased) all work is 21 calendar days or more, and
    (c) the instruction is given by reason of circumstances arising as a result of coronavirus or coronavirus disease.

120. The respondent argues that once the claimants were selected for a return to work, that the respondent was no longer eligible to submit a claim for furlough pay for Mrs Allen under the CJRS because she was no longer an employee who had been instructed to cease all work (because she had already been required to return). It is said that she fell outside the ambit of paragraph 6.1(a) of the Treasury Direction. The respondent argues that Mrs Allen in those circumstances, once she was required to shield from 15 May 2020, was only ever eligible to receive SSP. The respondent therefore submits there can be no unfavourable treatment when it was the only entitlement Mrs Allen could have had.

121. We find that the decision to only pay Mrs Allen SSP once she started shielding, rather than placing her on furlough, did amount to unfavourable treatment. Mrs Allen received a much smaller sum in SSP than she would have received if she was in receipt of furlough pay and she was therefore financially disadvantaged. We do not accept that it was not possible to place Mrs Allen back on furlough when she submitted her shielding letter. Mrs Allen was unable to return to the workplace because she was shielding. Mr D Weaver said he was unable to offer her home working. In such circumstances he was able to instruct her to cease all work in relation to her employment and the instruction to cease all work would be given by reason of circumstances arising as a result of coronavirus. The decision to place Mrs Allen on SPP therefore did amount to unfavourable treatment.

Because of something arising in consequence of disability

122. The decision to place Mrs Allen on SSP rather than furlough was because of something arising in consequence of disability. A material reason why the treatment occurred is because Mrs Allen was unable to attend the workplace because she was required to shield in consequence of her disability. We did not understand this to be in dispute by the respondent, but in any event we considered and decided this point in our deliberations.

Objective Justification

123. The respondent relies on the express legitimate aim of ensuring that "furlough leave was conducted in accordance with the legislative scheme and Treasury Direction (in particular paragraphs 5(a)(ii) and 6.1 of the Treasury Direction, published 15 April 2020)".

124. We accept that it is a legitimate aim to seek to comply with legislative requirements and the principles of the public funded CJRS.

125. The respondent argues that the justification defence must be made out in circumstances in which it was not possible for the respondent to extend furlough leave beyond 15 May and where they had paid the claimant all that she was lawfully entitled to receive. However, we have already found that it was in fact open to the respondent to place the claimant back on to furlough and pay her furlough pay.

126. Notwithstanding that finding, we did in any event go on to consider whether it was still open to the respondent to justify the treatment. The discriminatory impact on Mrs Allen is clear; she would only receive SSP during her shielding period, rather than furlough pay (at that time 80% of average pay and commission subject to the cap). In terms of the reasonable needs of the respondent, that cost of the higher rate of furlough pay would on the face of it be reimbursed to the respondent via the CRJS. A lesser measure of placing Mrs Allen on furlough with furlough pay would, on the face of it on a pure objective analysis, have still served the respondent's legitimate aim as it would have been, in our judgment for the reasons already given, compliant with the Treasury Direction.

127. But it is also important to weigh into the analysis the working practices and business considerations involved, having regard to the business needs of the employer. We reminded ourselves of the need to accommodate a substantial degree of respect for the decision taker, Mr D Weaver, as to his reasonable needs, provided he has acted rationally and responsibly. We reminded ourselves that justification needs to be established at the time when the unfavourable treatment is applied, and that we were in the early stages of the pandemic, and early stages of the CJRS at the time in question, which produced for everyone, including employers such as Mr Weaver, a time of great uncertainty and changing parameters.

128. Mr Weaver said in his witness statement that when Mrs Allen ceased to be a furloughed worker (before he received her shielding letter) there was sufficient work for her to return to her duties. He says his understanding was that the CJRS was only available in respect of employees instructed to cease all work in relation to their employment and so he felt it was not reasonable to retain Mrs Allen on a state funded income support scheme that no longer applied to her employment. He said he did not believe the business was so affected by coronavirus to keep Mrs Allen on furlough and it was not in keeping with the purpose of the scheme. He said at the time at [641] that "*while the government has extended the period of furlough, it is to be used as a business' discretion to protect jobs where there is no work for staff to carry out."*

129. Whilst appreciating the demands Mr Weaver was facing as an employer and business owner at the time, we considered that it was both reasonably open to Mr Weaver to have placed Mrs Allen back on to furlough and for him to reassured himself that he was legitimately able to do that. There was more he could reasonably have done to explore and satisfy himself as to the alternative measure. In his earlier email of 14 May Mr D Weaver had himself said "*The Welsh Government allows me to retain shielding employees on furlough providing I have documentary evidence.*" Once he had the shielding letter from Mrs Allen he had that documentary evidence. Mr Weaver said in evidence that he did not believe at the time he could place Mrs Allen back on to furlough because he had already taken her off. However, it was possible to take employees on and off furlough or to rotate staff (provided there was a 3 week minimum period). Mr Weaver, in evidence, was not certain if he knew that at the time. We consider that he was at the time reasonably able to find that out. For example, it is included in the Ford Q&A document at [449] dated 16 April.

130. Moreover, an employer in Mr Weaver's shoes should reasonably have been able to appreciate that if Mrs Allen was unable to return to the physical workplace, and he had no homeworking to offer her, that she had in effect been instructed to cease all employment for a coronavirus related reason and that a claim for her under the CJRS would not be in breach of its principles. Mr Weaver said in oral evidence that when he received Mrs Allen's shielding letter he read the Government shielding rights, and read that she could be placed on SSP but that he did not read she could be placed on furlough. He said he did not want to break the rules on furlough and the reading he did at the time was about SSP. He said that one of the documents he read at the time is at [450].

131. [450] is an HR article produced by the CIPP on 16 April 2020 which talks about a new entitlement to SPP when shielding. The article then goes on to say "…*the amendments are intended as a safety net for individuals in cases where their employer opts not to furlough them under the Coronavirus Job Retention Scheme (CJRS) and does not have other suitable policies in place, e.g. allowing the individual to work from home."* Mr Weaver's evidence was this was the kind of document he considered at the time. It supports our conclusion that it was reasonably open to him to have considered at the time that he could legitimately place Mrs Allen back on to furlough as an alternative to SPP. The CIPP articles mentions furlough as an alternative.

132. Weighing all of these factors into account we did not consider that the treatment to place on SPP was an appropriate and reasonably necessary way to achieve the aim, balancing the needs of the parties. A less discriminatory more proportionate alternative measure would have been to place Mrs Allen back on to furlough.

Time limits

133. Mr D Weaver's decision not to place Mrs Allen back on to furlough was announced on 15 May 2020. If that were the discriminatory act, the ordinary limitation period for the complaint expired on 14 August 2020. Mrs Allen commenced Acas early conciliation on 26 August 2020 which

would render the complaint out of time.

134. Mrs Allen argues, however, that the payment of SPP was conduct extending over a period until her SPP came to an end on 17 August 2020, and that her complaint is therefore in time.

135. In Sougrin v Haringey Health Authority [1992] ICR 650 the claimant complained about a regrading exercise which led to her receiving less pay. The claimant in that case compared herself to a white colleague (it being a race discrimination claim). It was held that the discriminatory act complained of was the respondent refusing to upgrade the applicant while upgrading her comparator, as opposed to the claimant complaining the respondent was operating a blanket policy or rule never to upgrade black nurses. The discriminatory act was therefore found to be a once-for-all event and not an "act extending over a period". The ongoing lower pay was the continuing consequence of that one off event and was not conduct extending over a period.

136. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686, the Court of Appeal emphasised the importance of looking at the substance of the particular complaint, and that the concepts of policy, rule, practice, scheme or regime in the authorities (such as Sougrin) were simply examples of when an act can extend over a period. It was said: "*The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

137. In Parr v MSR Partners LLP & Ors [2022] EWCA Civ24 the Court of Appeal similarly held a demotion was a one off act with continuing consequences rather than conduct extending over a period. It was said: "*The case law does draw a distinction, at any rate when analysing whether the conduct complained of is an "act extending over a period", between a rule, policy or practice which inevitably leads to the rejection of the claimant and one which involves (in practice and not just on paper) the exercise of a discretion…"*

138. In our judgment, Mr D Weaver was exercising an individual discretion when he decided to place Mrs Allen on to SPP on 15 May 2020 rather than back on to furlough. In our judgment it was, in substance, a one off decision rather than conduct continuing over a period. Mrs Allen's ongoing loss of pay was a consequence of/a loss that flowed from that one off decision, rather than itself being discriminatory conduct extending over a period. There was also no suggestion, in the claim as presented, that Mr D Weaver had made a fresh decision on the point further down the line.

139. Subject to any extension of time on a just and equitable basis, the complaint was therefore presented out of time. Mrs Allen was given the opportunity in cross examination to put forward any explanation for the delay in commencing proceedings but she did not identify one. She identified at the time in her correspondence with Mr D Weaver that she considered the decision to be discriminatory. We did not consider there was any basis on the evidence put before us on which we could find that it

would be just and equitable to extend time.

140. Whilst we therefore would have found this section 15 complaint to be well founded on its merits, we do not have jurisdiction over the complaint under section 123(1). As such the complaint is dismissed as being out of time.

141. The other section 15 complaint in the original list of issues relating to allegations of annoyance when Mrs Allen requested time off to attend medical appointments was withdrawn in closing submissions. It is therefore dismissed upon withdrawal.

Mrs Allen – reasonable adjustments

Provision, criterion or practice and substantial disadvantage

142. The respondent accepts that they applied a provision, criterion or practice that Mrs Allen would not be returned to furlough leave from 15 May 2020 and would instead be paid SPP. The respondent also accepts that Mrs Allen was placed at a substantial disadvantage in that she was unable to return to work because of her disability, as she was required to shield. In turn this resulted in her income dropping when she went on to SPP. A non-disabled employee would not have been in that situation.

143. The respondent accepts Mrs Allen was disabled and that they knew she was disabled. The respondent also accepts it knew Mrs Allen's income would drop as a result of being placed on SPP.

Reasonable steps

144. What is in dispute is whether the respondent failed to take reasonable steps to avoid that disadvantage, in particular by retaining Mrs Allen on furlough. The respondent here makes a similar argument made in relation to the section 15 claim; that Mrs Allen had ceased to be a furloughed worker and it was not in keeping with the CRJS to retain her on furlough once there was work in the business for her to do.

145. The respondent also argues that retaining Mrs Allen on furlough would not have acted as an incentive for her to return to work. It is said the intention behind the CJRS was to enable employers to permit employees to remain absent from work so as to restrict the spread of Covid-19. The respondent relies on O'Hanlon v Commissioners for HMRC [2007] IRLR 404 and Meikle v Nottingham County Council [2004] IRLR 703 where it was stated that extending sick pay for a disabled employee would rarely amount to a reasonable adjustment and that the purpose of the legislation was to assist the disabled to obtain employment and to integrate them into the workforce, and adjustments that might act as a disincentive for an employee to return to work are not compatible with the purpose of the legislation.

146. O'Hanlon v Commissioners for HM Revenue & Customs [2007] ICR 1359 CA involved an employee who was entitled under sick pay rules to 6 months full pay and 6 months half pay. The employee argued it would be a reasonable adjustment to pay for all disability related sickness absence at

full rate. The Employment Appeal Tribunal accepted that paying money to an employee who was absent sick was capable of being a reasonable adjustment. But held that it would be a rare and exceptional case. Elias P expressed reservations about tribunals usurping the management function of an employer in deciding whether they were financially able to meet the costs of modifying their policies by making such enhanced payments. He observed there was a difference between a single claim turning on its own facts where the cost may be limited, and a claim which if successful would inevitably apply to many others in the workplace.

147. Elias P went on to say that the purpose of the legislation was to assist the disabled to obtain employment and to integrate them into the workplace. He said: "*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*." O'Hanlon went on to the Court of Appeal but on a much narrower point. There Hooper LJ said that the EAT's approach had "*much force."*

148. G4S Cash Solutions (UK) Limited v Powell (UKEAT 0243/15), was a case about pay protection for an employee in work, rather than being a case about pay during a period of absence from work. Nonetheless there were some observations made worthy of note. The employee, for reasons relating to disability, was moved to a new role and there was a dispute about pay entitlement. The EAT rejected a contention that O'Hanlon excluded pay protection in principle from being capable of being a reasonable adjustment. They said "*If enhanced sick pay is within its ambit, albeit in a rare and exceptional case, I can see no reason why ordinary pay should not be."* The EAT noted that in O'Hanlon Elias P was dealing with a claim that inevitably impacted on many others whereas Powell depended on its own facts. The EAT further noted that O'Hanlon was about a situation where the proposed adjustment was simply to augment sick pay for employees who inevitably were not in work because they were signed off sick. It was said "*The objective is to keep employees in work, and I see no reason why a package of measures for this purpose, which includes some pay protection, should not be a reasonable adjustment.*"

149. In Powell it was also said: "*I do not expect that it will be an everyday event for an Employment Tribunal to conclude that an employer is required to makeup an employee's pay long-term to any significant extent – but can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work. They will be single claims turning on their own facts: see O'Hanlon. The financial considerations will always have to be weighed in the balance by the Employment Tribunal: see Cordell. I make it clear, also, that in changed circumstances what was a reasonable adjustment may at some time in the future cease to be an adjustment which it is reasonable for an employer to have to make; the need for a job may disappear or the economic circumstances of a business may alter."* On the facts of Powell the Tribunal's decision that it would be a reasonable adjustment to award pay protection was upheld. In particular, on the specific facts the protected pay had already been in place for nearly a year and the respondent had led the claimant to expect the pay protection to be long-term. Other pay

protection cases, with their own individual facts, have had different outcomes.

150. Ultimately each case turns upon an assessment of its own particular factors. Here, we weigh the factors as follows. First, we consider, for the reasons already given above, it was within the ambit of the CRJS for Mr D Weaver to have placed Mrs Allen on to furlough. Second, had Mr Weaver, bearing in mind the circumstances and information available at the time, given the matter reasonable consideration he would have identified that furlough was a legitimate course of action open to him as opposed to SSP. Third, the step would prevent the disadvantage Mrs Allen faced as she would be back on furlough pay.

151. Fourth, unlike many other reasonable adjustment pay disputes, here there would also be limited financial consequences for the respondent bearing in mind the reimbursement provided by the Treasury under the CJRS. The issue does not raise the same floodgates arguments as in O'Hanlon. Fifthly the adjustment (unlike potentially for an employee on long term sickness absence seeking permanent maintenance of full pay sick pay), would be time limited. The CJRS and furlough pay reimbursement was always going to be limited in time.

152. Sixthly, we acknowledge it could be said that placing an employee on furlough is about paying an employee to not be in work, rather than fulfilling the purpose of reasonable adjustments in getting employees into work and keeping them there. However, Mrs Allen's situation remains a very different situation to the O'Hanlon situation. In Mrs Allen's case she was not sick or unable to work due to illness. Instead, due to the particular risks associated with coronavirus and her cancer history she was a vulnerable person who was required to shield. The requirement to shield, the length of shielding, or of the CJRS were not things that were in any way within her control. If it came to an end then furlough and furlough pay came to an end. We therefore do not find that in those circumstances, the payment of furlough pay should be considered a disincentive to Mrs Allen returning to work. These things were not within her control.

153. Furthermore paying furlough pay was not, in Mrs Allen's circumstances, about granting pay augmentation at a rate higher than SSP for an individual who was inevitably not going to be in work (as would be the case for an employee on certified long term sickness absence). But for the coronavirus/ shielding situation that arose, Mrs Allen would (placing for a moment aside the other issues that arose between the claimants and the respondent) have notionally been fit for work and not in the position of being signed off and in receipt of SSP. Again, her situation is therefore very different to the O'Hanlon situation.

154. Sick pay is there for the benefit of an employee unable to work due to ill health. Again, the furlough scheme had a very different context. Yes, it provided pay protection for individuals unable to work because their workplaces or work type could not function due to coronavirus risks and restrictions, as well as individual pay protection for those affected by health vulnerabilities or other personal difficulties such as caring responsibilities. But it also existed to keep businesses afloat so that they

could resume trading when they were able, and keep jobs open both for the benefit of employees and the business itself. Paying furlough pay was therefore not simply a question of making an augmented payment to an individual who was otherwise inevitably unable to work due to ill health/paying somebody to not be in work. It also had behind it the purposes of, for example, returning a shielding employee back to work in due course when the risk levels permitted it and keeping the employing business afloat until trading and/or that individual work could resume. Furlough pay was in that sense about getting a vulnerable, shielding individual back into work when it was safe to do so and making sure there was a job and a workplace still there for them to return to.

155. For all of those reasons (subject to the question of time limits) we would find that it would have been a reasonable adjustment to have placed Mrs Allen back on to paid furlough when shielding rather than SSP.

Time limits

156. Mr D Weaver told Mrs Allen on 15 May 2020 that she would not be returned to furlough. That was the date on which Mr Weaver decided not to make the reasonable adjustment that Mrs Allen contends for. We therefore find that the primary limitation period expired on 14 August 2020, and Mrs Allen, in not contacting Acas until 26 August 2020, presented her claim out of time. We do not find, applying section 123(4) of the Equality Act and the applicable case law that this was a continuing omission so as to extend time for the duration of the shielding period. As above, there was no basis put before us on which we could extend time on a just and equitable basis. Both the section 15 claim and the reasonable adjustments claim also have the same operative limitation date, and no other discrimination complaints remained live before us that would trigger consideration of a wider argument about a continuing act of discrimination such as to bring the individual complaints in time.

157. Whilst we therefore would have found this reasonable adjustment complaint to be well founded on its merits, we do not have jurisdiction over the complaint under section 123. As such the complaint is dismissed as being out of time.

158. The other reasonable adjustment complaints in the original list of issues were withdrawn in closing submissions and are dismissed upon withdrawal.

159. Mr Cowley argued in closing submissions that an alternative reasonable adjustment would have been to allow Mrs Allen to work from home. That is not, however, how the case is presented in the joint list of issues. There was no application to amend the claim and it is not appropriate to simply present a differing case in closing submissions, as it gives a respondent no fair warning that was the particular case they were being asked to meet. Indeed, in any event, as dealt with elsewhere in this Judgment, Mrs Allen did not in fact ask to work from home; she wanted to shield on furlough. For these reasons we therefore decline to address this alternative purported presentation of the complaint relating to this particular PCP.

Mr Allen – unauthorised deduction from wages

Wages properly payable 23 March 2020 to 18 May 2020

160. There is a dispute about whether the claimants were properly paid when the country was put into lockdown, during the furlough period, and up to 18 May 2020. That said, in closing submissions Mrs Allen's complaint on this point was withdrawn because it was accepted that the complaint was brought out of time. In the event we therefore only needed to consider Mr Allen's complaint.

161. Mr D Weaver's email of 23 March 2020 put his employees on to what became furlough, and he promised to pay staff for the foreseeable future, and for a maximum of 12 weeks, basic weekly pay as normal. He said that basic weekly pay would not include commission or overtime. He said outstanding commission for sales (and for service relative to March performance) would be paid as normal.

162. On 8 April 2020 Mr D Weaver repeated the position on basic pay. He said, in effect, he was continuing to look into the situation regarding commission payments and the CJRS given a lack of clarity at the time as to whether it could cover discretionary commission. He gave more information about payment of outstanding commission. He said regular commission due for all correctly completed files would be paid that week. He said that deal files with trade vehicles unallocated will be paid commission less trade profit and conditioning on the basis that a commission adjustment would be made up or down if the vehicle is traded or retained for stock.

163. On 14 April 2020 Mr D Weaver confirmed that the CJRS now potentially made provision for the inclusion of commission. The promise that he then made was that furloughed employees would receive the lesser of 80% of average income including commission or the £2500 cap. He said "Furloughed employees will therefore receive the lessor of 80% of average income including commission or the £2500 cap." Average pay would be calculated using the 2019/20 pay period. He again reiterated that all outstanding commissions would be processed under the terms of his email of 8 April. Mr Allen signed up to those terms [454] which also included that he would be paid 80% of average pay up to £2500 a month.

164. The respondent's position is that for the period 23 March to 16 April Mr Allen was properly paid because the promise that had been made for that period was to pay basic pay (excluding average commission) and that this had been honoured and paid. They say the contractual agreement changed on 16 April, but it only changed going forward. We agree that was the nature of Mr Weaver's promise and there is no pay owing for that first period.

165. Thereafter it is not in dispute that Mr Allen was entitled to receive £576.92 a week pay which is equivalent to £2500 a month. This is because the historic average basic pay and average commission calculation from 2019 would produce a figure higher than the £2500 cap. The dispute is whether that £576.92/£2500 was properly paid to Mr Allen. The respondent's

position is that Mr Allen was entitled to receive £2307.68 during that period and he received £2354.89 such that there was no underpayment.

166. Mr Allen's position is that the respondent is crediting against the amount properly payable sums which should not legitimately be credited, so that once they are discounted he was in fact underpaid. In particular, he asserts that the respondent has improperly credited against the amount properly payable commission payments earned on deals undertaken prior to lockdown, so as to improperly reduce their pay liability to him. He says that those outstanding commission payments were due to be paid separately and not as part of the furlough pay liability.

167. According to the payslips Mr Allen was paid the following:

Time period	**Gross wages paid**	**Commission paid**	**Entitlement under 16 April 2020 agreement/ CJRS**
Week 13/4/20 – 19/4/20 [751]	Gross wages £346.15	Deal commission £4149.76	£576.92
Week 20/4/20 - 26/4/40 [752]	Gross wages £346.15		£576.92
Week 27/4/20 – 3/5/20 [753]	Gross wages £345.92		£576.92
Week 4/5/20 – 10/5/20 [754]	Gross wages £345.92		£576.92
Week 11/5/20 - 17/5/20 [755]	Gross wages £213.44	Deal commission £970.98 Holiday pay of £132.48 also paid	£576.92

168. The respondent's calculation of what they say the position should be is at paragraph 24 of Mr Allen's statement. That calculation does not, however, appear to include the week of 13/4/2020 to 19/4/2020 which includes the start date of 16 April. That point aside what Mr Weaver's calculation does, in effect, is to give credit for the deal commission paid in the payslip of 11/5/20 (as well as the holiday pay paid in that payslip) against the CJRS sum payable to Mr Allen.

169. We do not consider that the respondent was entitled to offset against its liability to pay the capped £576.92/£2500 a month income figure of basic pay and average commission, the deal commission payment of £970.98 (or indeed the earlier one of £4149.76). We consider and find that under the agreement reached these were two separate entitlements. The deal commission paid on 13 April 2020 was for deals completed prior to lockdown where the files were all in order, as set out in the email of 8 April. The deal commission paid in May 2020 was the outstanding balance for commission on deals that took place before lockdown but where part exchanged cars had not been collected by the trade because of lockdown intervening. The complications that caused, which led to the delayed payment in May 2020, was envisaged in Mr Weaver's email of 8 April,

where he said that they would be paid commission less trade profit and conditioning with a potential adjustment depending on whether the vehicle ended up being traded or retained for stock.

170. When interpreting a contract the aim is to give effect to what the parties intended at the time, and the words of a contract should be interpreted in their grammatical and ordinary sense in context. Employment contracts *"are designed to be read in an informal and common sense manner in the context of a relationship affecting ordinary people in their everyday lives";* (Harlow v Artemis International Corporation Ltd 2008 IRLR 629). A contract has to be interpreted in line with the meaning it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract.

171. In our judgment a reasonable person with the background knowledge of the parties would have understood Mr D Weaver's emails (agreed to by Mr Allen) of 14 April and 8 April to mean that outstanding commission payments (including the sum ultimately paid in May) for customer deals undertaken prior to lockdown were payments that were separate to and additional to the average pay guarantee of £80% of average income/£2500 cap whilst on furlough. They are two separate bullet points in Mr D Weaver's email of 14 April; the first confirming that furloughed employees will receive 80% of income including commission/£2500 and the second confirming all outstanding commissions will be processed under the terms of the email dated 8 April. The bullet point of "furloughed employees will therefore receive the lessor of 80% of average income including commission or the £2500 cap" does include a reference to commission. However, in our judgment, that reference, placing it in the facts and circumstances known to the parties at the time, was a reference to producing on furlough a minimum income figure calculated on the basis of basic pay plus a historic commission average figure (to produce a fairly calculated minimum income). It was not, in our judgment, intended to say that outstanding commission for deals undertaken prior to lockdown would be offset against the minimum income furlough pay. They are sums that relate to two different period of time (deals done whilst trading prior to lockdown, and the post lockdown period when Mr Allen was unable to work and earn new commission and was being supported by a Government backed scheme). It is not the case, as the respondent suggests, that Mr Allen would otherwise be making double recovery of commission. They are different payments for different things, in effect, "earned" at different times.

172. Mr D Weaver appeared to be arguing that the May 2020 commission payment was different because it was not "outstanding commission." His rationale appearing to be that the deal files were not complete because the part exchanged cars had not been picked up. We do not accept that this reflects the intention of the parties at the time the agreement was reached or the commonsense meaning of the agreement at the time it was reached. The email of 14 April refers to all outstanding commissions being processed under the terms of the email of 8th April. In turn the email of 8 April clearly says that deal files with traded vehicles uncollected would also be paid commission less trade profit and conditioning. Neither of the

emails seeks to draw any other distinction between fully completed files and those where this part exchange problem had materialised to, for example, define the first as being outstanding commission and the second as not. A natural interpretation in the context of "all outstanding commissions" is that it includes both these kinds of deals and that those sums are a separate entitlement to furlough pay. It was also argued that Mr D Weaver was confused by the claimants' reference to hoping to keep some commission back. We did not consider, however, that any confusion this reference caused, would affect the analysis of the contractual promise made at the actual time in question.

173. We therefore find (subject to the time limit point below) that Mr Allen did suffer an unauthorised deduction of wages in the calendar period 23 March 2020 to 18 May 2020 as he was not paid the equivalent of £2500 gross pay per month. This was a liability hearing so we have not calculated a sum that is due to Mr Allen. It is likely the parties will be able to reach agreement on this point (the tax position also needs to be considered). If not, it can be dealt with at any remedy hearing.

174. The parties did not specifically address with us the status of the period 4 May to 18 May, taking into account Mr D Weaver's purported attempt to remove the claimants from furlough on 4 May without giving them any prior notice, and not notifying them of this until 13 May, when requiring them to return to work on 18 May. If effective, it left the claimants in receipt of basic pay only without prior notification of their removal from furlough and without any ability to make up any shortfall by earning commission as they could not be in work making deals. The parties did not address it with us and the calculations both referred parties us to in Mr Weaver's statement include that period of time. We therefore did not understand it to be in dispute that this period was covered by the 16 April 2020 agreement/ CJRS such that Mr Allen would be entitled to 80% of average pay/£2500 as opposed to simply basic pay. But we would observe in any event that whilst the agreement included the right to end furlough by requesting a return to work, it also said "we will contact you when you are required to return to work." In our judgment the ordinary meaning of the expressions used in the context and knowledge the parties had when seen through the eyes of a reasonable person standing in their shoes, is that there would be prior (not retrospective notification) of the end of furlough and a requirement to return to work with a sequential move from furlough to a return to work, and not some limbo period in between.

<u>Other deductions from wages</u>

175. Mr Cowley raised in closing submissions an argument that Mr Allen had suffered two other deduction from wages on 29 June 2020 when deductions were made of £138.87 for an alleged commission overpayment and £555.87 for "unattended work days" [762].

176. The eventual agreed position between the parties was that the £138.87 had not been pleaded and would require permission to amend the claim. The amendment application was ultimately not pursued. The £555.87 had been pleaded but had been accidentally omitted from the agreed list of issues.

177. The respondent accepts it made an unauthorised deduction of £555.87 from the claimant's final wages. The amended grounds of resistance at [203] say "*The Respondent paid what it believed at the time to be the correct amount (£1,306.92). However, with the benefit of hindsight, it is acknowledged that there appears to have been an inadvertent underpayment of £555.87 and that this sum may be due to the Claimant."*

178. The respondent accepted in closing submissions that this amount was due, had not been paid, and as an individual complaint was in time. We therefore make a declaration that the respondent made a further unauthorised deduction from wages on 29 June 2020 in respect of that £555.87.

Time limits

179. The deduction from wages in respect of furlough pay for the period 16 April 2020 to 18 May 2020 was presented out of time when considered as a stand alone complaint. Mr Allen, however, submits that it becomes in time by virtue of the subsequent deduction on 29 June 2020 on the basis they were a series of deductions and there was no break between the deductions of 3 months or more. The respondent argues that the two deductions cannot be linked such as to form a series of deductions on the basis that the final payment was concerned with the weekly payment of wages, which was very different to furlough pay which was due monthly at £2500. It is said there was a break between the deductions of two very different pay periods.

180. We find that that the deductions do form part of a series of deductions such as to bring the furlough deductions in time. Mr D Weaver responded to Mr Allen's emails expressing concerns about not being paid the correct furlough amount by saying his pay to date had been greater than 80% of the equivalent period in the year before. Mr D Weaver's oral evidence was that the calculations of whether any sums were owing to employees to ensure they received the 80% figure/£2500 cap of furlough pay was undertaken by his assistant Deborah who ran the payroll. He said they had a pay platform but that was not calculating the sums correctly so he instructed Deborah to do the calculations manually. He said he assumed that he knew at the time that the calculations were including the additional commission payment received in May, which had the effect of causing the deduction we have found. Mr D Weaver also wrote the terms of the furlough agreement emails that we have dealt with above. He must therefore have known that the promise made to honour previously earned commission prior to lockdown was a separate promise than the promise to pay at the 80% average/£2500 cap whilst on furlough. Mr D Weaver therefore must have known that the May commission payment should not have been credited against the furlough pay calculations. He knew Mr Allen's furlough pay was being depressed as a result, but continued to stick to his guns and refused to remedy it. It reflected a general observation we made about Mr D Weaver that once he made a decision he would tend to stick to it.

181. The deduction of £555 in Mr Allen's final pay was not inadvertent. It was

deliberate. The relationship between Mr Allen and Mr D Weaver had become increasingly strained, over a variety of issues including the requirement to return to work. That mutual strain screams through the otherwise long, faux polite emails between them. The strained exchanges culminated in Mr Allen's resignation. There was then the dispute about company property. On 22 June Mr D Weaver then sent his email in which he said "*Further you may recall that you were recalled from furlough as of Monday 4 May 2002. During this period you were absent without permission yet you received your basic pay in error. The overpayment will be deducted from the balance owed."* Mr Allen was not absent without permission. Mr D Weaver had himself told Mr Allen that furlough had ended on 4 May, but that he was not required to return until 18 May and that he would be paid basic pay from 4 May onwards. There was no requirement to return to work in the meantime. By 22 June, in our judgement, through anger and spite, Mr Weaver recast the narrative he knew was wrong, by saying that Mr Allen had been absent without permission and had been paid basic pay in error.

182. In those circumstances we find there was sufficient linkage between the deductions. On both occasions Mr Weaver knew Mr Allen was receiving less money than he was entitled to but nonetheless continued with his course of action. They were both decisions that were to Mr Weaver's financial advantage that he achieved by recasting to his own advantage the original narrative he had created. He changed the meaning of his emails of 8 April and 14 April about commission. He attempted to completely change the narrative about the ending of furlough and the recall to work. There is sufficient factual linkage that in our judgment this can be said to amount to a series of deductions and sufficient repetition between them. We did not find an analysis of furlough pay being monthly and the final pay being weekly to be of any assistance. Mr Allen continued to be paid weekly in furlough and the final pay slip was just that, the final pay that was said to be owed, to which Mr Weaver made the deduction in question.

Mrs Allen and Mr Allen – Working Time Regulations – Holiday Pay

183. Mrs Allen's Working Time Regulations daily rest claim was withdrawn in closing submissions on the basis it was accepted it was presented out of time. It is dismissed.

184. The list of issues breaks the Working Time Regulations holiday pay claim down into two parts. First, there is a complaint about paying holiday pay in blocks of 10 from January 2019 onwards, on the basis that the claimants were not paid for periods of annual leave that were shorter than 10 days at the time that annual leave was taken. In fact, basic pay is paid at the time, it is an average commission figure calculation that is undertaken on the accumulation of 10 days annual leave. Second, there is a claim for unpaid holiday pay from 6 April said to be on the basis of "similar issues arising."

185. In closing submissions we asked Mr Cowley what the claimants' exact claim was for in respect of not paying average commission until 10 days holiday have been taken, because Regulation 30(1) says that a complaint for breach of Regulation 16(1) has to be brought on the basis that the

respondent has failed to pay the whole or any part of any amount due under Regulation 16(1). Mr Cowley was unable to answer that question and said he did not actively pursue that complaint. It was not formally withdrawn, however, we were left with, in effect, no active complaints in this regard pursued before us. The claimants have therefore not discharged the burden of proving these complaints and we dismiss them.

186. In relation to holiday pay accrued from 6 April 2020 onwards, Mr Cowley said there was holiday pay owed on the termination of employment because a 12 week reference period had been used for calculations and not a 52 week period. We asked where the claimants' calculations could be found, given the basis of such a claim must mean they had undertaken a comparative exercise to show the wrong reference period had been used and were saying it resulted in an underpayment. Mr Cowley referred to the schedules of loss. For example, Mr Allen's at [126] says "non-inclusion of commission in holiday pay £159.65." But the schedules of loss contain no breakdown of how that has been calculated according to a 52 week reference period rather than a 12 week reference period. Indeed on the face of it the sum claimed seems to relate to a complaint about non inclusion of commission in holiday pay rather than a complaint about the wrong reference period being used. These are also issues not explored in detail in the cross examination of witnesses. As such the claimants have failed to discharge the burden of proving their claims and they are dismissed.

Mrs Allen and Mr Allen – health and safety detriment

Mrs Allen

187. It is not in dispute that the claimants were employed at a workplace where there was no representative of employee safety or safety committee and they therefore have standing to bring a claim under section 44(1)(c).

188. The claimants' case is premised on the basis that they asked to work from home so that Mrs Allen could shield, and that they reasonably believed their return to work from 18 May would be harmful or potentially harmful to health or safety. They say they used reasonable means to bring these concerns to the respondent's attention. They say they were subjected to a detriment when their request to work from home was refused. They say that the reason for that detriment was the raising of their health and safety concerns about the requirement to return to work.

189. The claims are therefore predicated on the claimants having both made a request to work from home, and that request being refused as, in effect, an act of victimisation.

190. We do not find, however, that Mrs Allen made a request to work from home. On 14 May Mr Allen expressed concerns about the claimants returning to work because of them being at higher risk in their 50s and with Mrs Allen having a compromised immune system [598]. It was a request, in effect, to remain on furlough not a request for home working. Mr D Weaver responded on 14 May, pointing out amongst other things, he was not in receipt of any shielding letter. Mrs Allen provided her shielding letter

on 15 May 2020 [625] in which she said "*Due to be identified as High risk, I will be shielding as instructed to do so."* She did not request home working in her email. Mr Weaver responded that day [626] to say Mrs Allen was not expected to attend work and he was unable to offer home working. It was not, however, in response to a request actually made to home work. Mrs Allen responded further [627] to question why she was placed on SSP and not on paid furlough. But that was, in effect, a request to be placed back on to furlough, not a request for home working.

191. Also on 15 May Mr Allen emailed Mr D Weaver [628] and part of his email included a request for an explanation as to why he had been recalled to the workplace rather than being allowed the security of home working. That email was, however, an email that was about Mr Allen, not about Mrs Allen. It asked why the decision had been made to "call me" to attend the workplace instead of "allowing me" to work from home. The claimants accepted this interpretation in cross examination. There was then a joint email from the claimants on 18 May, in which Mr Allen said he genuinely believed his return to the workplace would place Mrs Allen at a serious and imminent danger of infection, and which referred to section 44 of the Employment Rights Act. But it was a request for Mr Allen to be furloughed; not a request for home working.

192. In the circumstances we do not find that Mrs Allen has established the fundamental basis of her complaint. She did not make a request to work from home that was refused. What she was seeking was to be placed back on to furlough whilst she shielded. Her complaint of breach of section 44 of the Employment Rights Act is therefore not well founded and is dismissed.

<u>Mr Allen – Did Mr Allen bring to his employer's attention circumstances that he reasonably believed were harmful to health or safety?</u>

193. The respondent does not accept that Mr Allen reasonably believed that requiring him to attend work would have been harmful or potentially harmful to health or safety in light of the protective measures in place they said they told him about and had in place.

194. We accept that Mr Allen genuinely believed that a return to work would potentially be harmful to the health and safety of Mrs Allen in respect of the risk of exposing her to covid 19 when she was a vulnerable individual due two previously twice having cancer, and who was shielding. We accept that subjectively held belief was also a reasonably held belief. It is a test of reasonableness, but one that is focused on the employee's belief and state of mind when bringing the matters to the intention of the employer. The test is not concerned with whether the employer agreed with the employee's assessment: <u>Oudahar v Esporta Group Ltd [2011] IRLR 730.</u>

195. Mr Weaver had taken measures to reduce the risks and he had communicated these to Mr Allen such as temperature checks, handwashing facilities, hand sanitiser, disinfectant wipes, face coverings, gloves, and requirements to social distance in work. The showroom was closed to customers, and although it could be used as a point of access to

the offices, boardroom and restrooms, Mr Weaver explained that the room was roughly 200 metres squared so there was no need for anyone to enter within 2 meters of Mr Allen's person. Once Mrs Allen provided her shielding letter, Mr Weaver confirmed that he would not be recalling another sales executive in her place, which again would enable Mr Allen to socially distance. Mr Weaver also observed that, as Mrs Allen's shielding letter confirmed, Mr Allen should be socially distancing from Mrs Allen at home, again to mitigate the risk.

196. Mr Weaver may therefore not have felt that Mr Allen's ongoing concerns were reasonably held. But as stated, that is not the test which focuses on Mr Allen's perspective. These events happened in mid May 2020. It is important to remember the level of fear that existed in the general population at that time about the risk of catching covid 19 and particularly the risk of advertently infecting vulnerable family members. Undertaking risks assessments and introducing mitigating measures were all about reducing the risk, but it was never possible to remove all risk of infection. Against that background we do accept that Mr Allen's belief that if he returned to the workplace it was potentially harmful to the health and safety of Mrs Allen was a reasonably held one.

197. The respondent here relied in particular on the fact that Mr Allen started working for Bridgend Ford a few weeks after his resignation, on 7 July 2020, working alongside two new colleagues. The respondent observes this involved the claimant mixing three different households, whereas he was the sole sales executive recalled to Llandow. It is said this means that Mr Allen was not truly troubled about the health risks of returning to work. Mr Allen's evidence was that he had more faith in the measures in his new workplace and that he had the benefit of his own office. On balance, we did not consider that Mr Allen's return to work in person at Bridgend Ford meant that he was not genuinely or reasonably worried about exposing Mrs Allen to risk. This is a period in which things were constantly changing. Car showrooms in Wales reopened on 22 June. Whatever Mr Allen's personal feelings, the reality was that any employer in his industry was going to need him back in the workplace. We think it likely he accepted he had to physically go to work at Bridgend Ford and deal best with the mitigations that he could. We do not find it means that he was not or had never been genuinely concerned about the risk of exposing Mrs Allen to the virus.

198. The respondent also refers to the fact that the claimants visited Bath on 7 December 2020 to celebrate Mrs Allen's birthday [806]. At that time social restrictions were less stringent in Wales than England, with Bath being in tier 2. In Wales bars and restaurants could not serve alcohol and had to close at 6pm. Mr Allen said in evidence that the risk had been reduced by this time as the vaccine roll out had started. The respondent points out this cannot be correct as the first jab in the world was administered on 8 December. We accept it is likely the claimants chose to travel to Bath to celebrate and it would have been better if they had been more upfront about this in their evidence. We do not, however, consider that it is of any great assistance in assessing Mr Allen's belief in May 2020. As already stated, 2020 was a year of a constantly changing picture. We were all having to make different decisions and assessments of risk as the year

progressed and the pandemic waxed and waned. People's attitudes to risk also waxed and waned as was inevitably the case when what started as an unprecedented, terrible situation morphed into everyday life, and bearing in mind the long periods in which those shielding had been trapped in their homes.

199. We are therefore satisfied that Mr Allen did bring to the respondent's attention circumstances in which he reasonably believed were potentially harmful to health and safety. He expressed his concern about Mrs Allen's compromised immune system and the instruction to return to work on 13 May. On 15 May his email again identified the risks to Mrs Allen in his returning to the workplace and asked about the risk of service customers entering the showroom. The joint email of 18 May expressly referred to section 44 of the Employment Rights Act and said that it was not always possible to entirely socially distance at home, such that Mrs Allen would be at risk if he returned to work even with measures in place.

<u>Mr Allen – was the refusal of home working treatment that amounted to subjecting Mr Allen to a detriment? If so, was it done on the ground that he had brought to the respondent's attention the circumstances connected with work he reasonably believed were potentially harmful to health and safety?</u>

200. We do not understand it to be in dispute that the refusal of home working/ the requirement to return to the workplace can be considered a detriment.

201. So we turn to the question of why home working was refused. This has to be set in the wider context of the respondent's situation at that point in time. On 9 May Mr Weaver forewarned the claimants that he was considering recalling selected sales staff from furlough either for home working or working from behind locked doors in work. He said he had yet to decide which.

202. Prior to that on 1 May Mr D Weaver had received an "action notice" from Ford advising vehicles were expected to be delivered in week commencing 18 May. The car industry had also been working hard to adapt their operations to accommodate social distancing such as offering unaccompanied drives, and contactless vehicle delivery.

203. Mr D Weaver was anticipating a return to some kind of trading. By 13 May 2020 he had decided to recall some sales executives to the workplace, and not for home working. He decided to recall around 4 staff across the 3 sites, which included the claimants.

204. We are satisfied that this initial decision was a business led decision. Mr Weaver was anticipating a return to trading and wanted to gear up for that. He said in evidence that Ford were impressing on dealerships the need to get workers back to work in readiness for reopening. He also wanted the sales executives to prepare for and pick up on sales activities when that was possible such as picking up leads, and speaking with customers. There was also a need to address problems caused by lockdown such as cars sold prior to lockdown and problems with finance agreements and cancelled contracts. Potentially some of that, initially at least, could be done on the telephone and email, if data protection issues were resolved.

But we are satisfied that Mr Weaver decided he wanted sales staff to return to the workplace because there were other activities he wanted them to cover such as taking receipt of deliveries from Ford, managing the collection of trade vehicles, and generally getting ready for a return to work by undertaking tasks such as updating stock lists, and ensuring vehicles still in stock were appraised, catalogued and photographed for sale. A return to the workplace would also avoid the need of sorting out the data protection issues involved with home working.

205. The claimants were some of the sales staff selected for that initial return. But others were selected to. By that point the claimants had not requested home working or expressed health and safety concerns so that cannot have been a cause of that initial decision to recall them to the workplace. In any event, we are satisfied that Mr D Weaver, in deciding which staff to return, decided to choose his more senior sales executives. In particular, we consider and find that he thought Mr Allen had the varied skills and experience needed to look after all the steps that would need to be covered with a reduced sales force returning. The claimants also had the largest portfolio of returning clients who were likely to produce a demand for car sales, and in an industry where maintaining salesperson/ client relationships is important. The claimants doubt this rationale, pointing out that much of the work Mr Weaver refers to, had previously been undertaken by trainees to free them up for selling. But that misses the point that on this initial return to work Mr Weaver was looking for experienced staff that could turn their hand to all of the tasks.

206. Mr Allen then raised his concerns on 14 May 2020 about the recall to work. That was not a request for home working, but in any event we are satisfied that Mr Weaver maintained his decision to recall the claimants to work because he considered he had work for them to do and he continued to consider they were best individuals to select to return at Llandow. We do not consider it was influenced in any way by the email raising concerns about Mrs Allen's compromised immune system.

207. Mrs Allen then provided her shielding letter, and Mr Allen raised the question of why he could not work from home. Mr Weaver responded with his email at [628] stating it was not reasonably practicable for Mr Allen to work from home, stating that Ford had recommenced deliveries which needed to be organised and deals re-sorted. He said data protection rules meant customer data could not be removed from the premises. He said the majority of the customers in need of attention were Mr Allen's. He said Mr Allen had been selected for his experience and competence.

208. Whilst Mr Allen may dispute the rationality of Mr D Weaver's decision making process, we are satisfied that was his decision making process and was the primary reasoning why he maintained his decision that he wanted Mr Allen to return to work rather than another sales executive and why he refused home working. We also consider that another factor was likely to be that Mr Weaver had ongoing concerns that Mr Allen was seeking to leave and potentially move to work for a rival, and he wanted to keep an eye on Mr Allen and also the respondent's customer data. Mr Thomas told us in evidence that he was not surprised when Mr Allen resigned as he had realised in the previous 12 months it was heading in

that direction as he was hearing that Mr Allen might have opportunities elsewhere and was attending interviews.

209. We are also satisfied that the health concerns Mr Allen raised about the potential risks posed to Mrs Allen if he returned to work played no part in Mr D Weaver's decision making process. They were not a material influence in any sense in that decision making process to refuse home working. The logic of this complaint as presented by Mr Allen appears to be that because he raised safety concerns and asked for home working, Mr D Weaver was upset and was motivated to decline the home working request. But Mr D Weaver had already decided to return staff to the workplace and to select Mr Allen for such a return, before Mr Allen even raised his concerns. Furthermore, we do not consider it likely, and do not find, that Mr D Weaver was troubled by the concerns and questions raised by Mr Allen. That is not because Mr Weaver was unconcerned about Mrs Allen's wellbeing, but because he considered that the respondent had conducted a thorough risk assessment and had put in place extensive mitigations to reduce coronavirus related risks. As such there was no particular reason for him to be worried about the points Mr Allen was raising. We are satisfied that under section 48(2) the respondent has shown the grounds on which the respondent refused the home working request, and this was not influenced in any way by the concerns Mr Allen raised.

210. We would have in any event found the complaint to be out of time. The refusal of home working occurred on 15 May 2020 giving a primary limitation date of 14 August. Mr Allen did not enter Acas early conciliation until 28 August. No basis was put before us for extending time under the reasonably practicable test.

Mr Allen – constructive unfair dismissal

<u>Experiencing an angry reaction from Mr Weaver after Mr Allen raised a query about unpaid wages (dates unspecified)</u>

211. This is a vague allegation, and depends on Mr Allen's word against Mr D Weaver's with no corroborating documents. We would accept there may well have been occasions on Mr Weaver told Mr Allen, for example, that he did not have time at that particular point in time, to speak about wages because he was engaging in dealing with other matters. But we do not find it established, on the evidence before us, applying the balance of probabilities, that Mr Weaver displayed an angry reaction to Mr Allen when Mr Allen raised a query about unpaid wages. We have not made a finding of fact that Mr Weaver shouted at Mr Allen about closing the "fucking door" (if indeed that is the alleged incident being relied upon). As such we do not accept that in this regard there was conduct capable of undermining mutual trust and confidence.

<u>Repeated threatening and degrading behaviour from Mr D Weaver (dates unspecified)</u>

212. Again this is a very vague allegation and we do not find it established on the evidence before us and applying the balance of probabilities. If Mr D

Weaver had behaved in such a way towards Mr Allen to the extent that it rattled him and undermined trust and confidence, he should be able to remember and set out the gist of what is he said happened and when. It is also the type of serious incident that the recipient would be likely to record in documentary form somewhere. We had none of that evidence.

The lack of an employment contract

213. Mr Allen did not have a contract that complied with the statutory requirements of a statement of particulars of employment. He did have initial brief terms outlined. There is no evidence that Mr Allen had ever raised a concern about the lack of a more detailed contract. It was not a factor identified in his resignation letter. We do not consider that its absence, in fact, played any part in Mr Allen's decision to resign.

Financial detriment because his wages were often calculated incorrectly (dates unspecified)

214. Mr Allen in his resignation letter did refer to there being alleged continuous deductions from wages including holding back commission that was due. But he did not evidentially set out before us in any cohesive picture the occasions on which he said his commission was calculated incorrectly. (The deductions during the furlough period are dealt with separately below). If it was something that troubled him to the extent it contributed to him resigning he should have been able to do so. As set out in our findings of fact, we accept there were occasions on which there was dialogue between the parties about commission calculations, which could be due sometimes to an error on either side, or due to changing circumstances. But we consider that was inevitably part of the complicated commission structure and system, and was something there was dialogue about both ways, as shown by the emails in the bundle. We do not consider it established that this was something that amounted to a breach of trust and confidence based on the evidence put before us.

Abusive conduct from Mr D Weaver during September 2018 because Mr Allen had not attended the showroom during a period of time he was permitted to work from home

215. We have found that this incident did happen to the extent set out in our findings of fact above. Whilst there is a subjective explanation for why Mr Weaver was frustrated, that does not amount to reasonable and proper cause for the conduct in question. Viewed objectively it was conduct that was capable of undermining trust and confidence albeit we consider it played a minimal role in Mr Allen's decision to resign.

Paid basic pay during periods of holiday leave taken before January 2019

216. Mr Allen was paid basic pay without an average commission element when taking holidays prior to January 2019. That this was not compliant with the claimants' statutory entitlement and was brought to Mr Weaver's attention but it was not resolved until January 2019. This was conduct that did damage trust and confidence and was without reasonable and proper cause. It was remedied in January 2019 and whilst that does not

necessarily prevent Mr Allen relying upon the conduct in his constructive dismissal claim, we considered that it played little involvement in Mr Allen's decision to resign.

Unilateral variation of his contractual working hours on 15 May 2020 from 5 days per week to 5.5 days

217. We have made a finding of fact that Mr Allen spoke with Mr D Weaver when he presented the new commission terms and that Mr Weaver told Mr Allen not to worry about that element of it. We consider the reality of the situation was that the parties had reached a system of working that suited them, with Mr Allen working 5 days a week but working every weekend. It suited Mr Weaver as much as it suited the claimants. There would have been no reason at the time to suppose an eventuality such as covid may disrupt such an arrangement. Even an employer who has a unilateral contractual right to vary an employment contract term, has to exercise that right in a manner which accords with trust and confidence. Given the length of time Mr Allen had been working to the 5 day a week pattern and given the previous reassurance given, it did undermine trust and confidence when Mr Weaver told him, without any consultation, he was being required to return to work 5.5 days a week. It is a substantial intrusion into someone's personal life to require them to be in the workplace an extra day a week. Mr Weaver was not returning sales executives to the workplace in the same way that they had been functioning prior to lockdown. That does not, however, give him reasonable and proper cause for the way in which he addressed that issue, initially at least, with Mr Allen by simply telling him that is what he would be doing going forward. It was conduct that undermined trust and confidence, albeit we accept that by the time of Mr Allen's resignation, Mr Weaver had conceded that the issue could be "parked" to a later date, given Mr Allen had commenced a period of sick leave.

Unlawful deductions during the furlough period

218. We have already found that the offsetting of commission for deals undertaken prior to lockdown against the minimum income promised to the claimants on furlough was contrary to the promise made by Mr D Weaver that had been agreed by the claimants. Mr D Weaver said he found the claimants' reference to hoping to hold back some of that commission as being confusing. It may be that he did find that reference confusing (albeit he did not ask Mr Allen to clarify), but we did not consider that bore any relationship to what Mr Weaver understood the agreement on the calculation of furlough pay would be. It is also said it was a busy and confusing time. It was. But again, that does not provide reasonable and proper cause, when viewed objectively, for not paying the claimants what they were contractually owed. This was a contractual promise made personally by Mr D Weaver. He said it was likely he had seen and understood how Deborah had undertaken the furlough pay calculations and checks. The issue was brought to his attention by the claimants which gave him the opportunity to review the situation, but he maintained his position that the calculations were correct. Given the nature of the claimants' work the payment of commission was a substantial part of their income. Pay is of fundamental importance in an employer/employee

relationship. To be promised 80% of basic pay and average commission, and then not receive all of that amount was conduct which was likely to seriously undermine trust and confidence. Given the original promise made, to not honour it was also conduct that was without reasonable and proper cause.

219. We consider that the handling of this furlough pay was by itself a repudiatory breach of contract.

Detriment as set out in the section 44 claim (refusal of home working) / The events surrounding the requirement for him to return to work from furlough in May 2020 led to Mr Allen being off work due to his stress and caused him to resign

220. Mr Allen's case is that the final straw in his decision to resign was the refusal of home working/ the requirement to return to work. We have found already that Mr Allen was genuinely concerned about being required to return to work. We must, however, consider the whole situation from an objective standpoint. We are satisfied that Mr Weaver had good reason for wanting to return a core of salespeople back to the workplace to get ready for a return to selling. We are satisfied that Mr Weaver had good reasons for selecting Mr Allen. Mr Allen was a long standing, experienced employee. He was a safe pair of hands that Mr Weaver wanted to deputise to in Llandow. He was his top salesperson with a large client base that needed serving as soon as possible. These were business decisions that Mr Weaver was entitled to make. We have said that Mr Weaver probably also wanted to keep an eye on Mr Allen, due to his long term fears that Mr Allen would leave. But even if so, there was justification for Mr Weaver to be concerned about that given the rumours he had continued to hear about whether the claimants might leave and given the information he had suggesting Mr Allen may have taken customer data with him when moving employers previously.

221. Mr Weaver had put in place a risk assessment process and he had taken a variety of measures outlined to try and protect his employees, including Mr Allen (and in turn Mrs Allen) in the workplace. We accept these were genuine. We have said already that a return to work could never be at "no risk" but that does not mean that employers could not return employees to the workplace provided they met the coronavirus measures required of them. The claimants say the measures did not reflect reality. They refer to a cold call that the claimants' daughter undertook to Llandow (under a false name) where she spoke with a trainee, which suggested an accompanied test drive may be done. The suggestion seemed to be that Mr Allen felt if he returned he would not be able to socially distance and would come under pressure to break the rules, such as opening up the showroom for sales before it was permitted by the Welsh Government. Mr Weaver's evidence was that he did not know about the actions of the trainee at the time and one of the reasons he wanted Mr Allen back was so that he could help supervise junior staff. We accept this. Given the worries that Mr Allen had expressed to Mr Weaver, it seems to us highly unlikely that Mr Weaver would have thought he could somehow persuade or force Mr Allen to break covid rules. We therefore consider he was likely to honour the covid measures required if Mr Allen returned to the workplace. Mr Allen also said he would be at risk of service customers

coming near him when working in the showroom. But we also accept given the size of the showroom (and the Llandow premises as a whole) there would have been locations where Mr Allen could sit without that happening.

222. Mr Allen says that he should not have been selected to return because the tasks that Mr Weaver wanted completing were not the tasks he did, such as photographing cars or taking new car deliveries. However, we accept that Mr Allen was capable of undertaking such activities, it was just the case that prior to lockdown he did not tend to do so if others could, so that selling could be maximised. But the initial post lockdown return to work was a different era. Mr Weaver was only returning minimal select staff, who he needed to multitask across a wider range of activities. Mr Weaver was entitled to legitimately view Mr Allen as the best overall candidate for that.

223. Mr Allen said that he should also have been allowed to home work and that he had done so successfully in the past. We do consider that the data protection issue was overplayed by Mr Weaver. Lockdown saw the whole financial sector having to move their operations to home working. It must have been possible to put secure systems in place, and it was more likely that Mr Weaver did not want the inconvenience of having to sort that out if he could instead return staff to the workplace. However, notwithstanding this we do accept that he had reasonable cause to want the core staff he was recalling to return to the workplace because of the wider range of activities he was wishing them to undertake, some of which did necessitate being on the premises.

224. Therefore whilst we understood Mr Allen's subjective fears, from an objective point of view we did not consider that the respondent, in requiring him to return to the workplace, acted without reasonable and proper cause in a manner calculated or likely to undermine trust and confidence.

<u>The overall position and affirmation</u>

225. We have found that the respondent undermined trust and confidence, by not giving Mr Allen a contact of employment, when he snapped at Mr Allen in September 2018, by the treatment of annual pay prior to January 2019, by the way in which he dealt with attempting to require Mr Allen to return to work 5.5 days a week, and by the failure to pay Mr Allen what he had been promised whilst on furlough leave. We did not, however, consider that the lack of an employment contract played any part in Mr Allen's decision to resign. The September 2018 incident and annual leave pay situation prior to 2019 played a very minimum role in the decision to resign but were more than truly trivial. The attempts to require him to work 5.5 days a week and the handling of furlough pay were more substantial. We consider the handling of furlough pay, in particular, was repudiatory in its own right. But, in any event, added to the other operative matters identified the cumulative effect was of a repudiatory breach that Mr Allen was entitled to accept and treat himself as dismissed.

226. We do not consider that Mr Allen affirmed the breach. On 18 May he was

protesting about the furlough pay situation, amongst other things and said he had been signed off by his GP. Mr Weaver then responded presumably shortly thereafter (the email at [642] is undated). Mr Allen then resigned on 16 June. Given Mr Allen's absence on certified sick leave with stress, and the relatively short period in question we do not consider that Mr Allen can be said to have affirmed the breach in the meantime. It is more indicative of Mr Allen having a limited period to consider his position, and then deciding to accept the breach and treat himself as dismissed.

227. We consider that the conduct which undermined trust and confidence (other than the lack of the written particulars of employment) played a part, and were a reason, in Mr Allen's decision to resign, even if there were other factors at play such as a longer term consideration of whether he wanted to progress his career elsewhere.

228. The constructive unfair dismissal claim is therefore well founded and is upheld. It was presented in time.

Mr Allen – constructive wrongful dismissal

229. It is not in dispute that if Mr Allen succeeds in his unfair dismissal claim it follows that his constructive wrongful dismissal claim would also succeed. It is therefore also upheld.

Mr Allen – failure to provide written statement of terms and conditions

230. It is not in dispute that the respondent failed to provide Mr Allen with a compliant statement of initial particulars of employment and he is entitled to a declaration in that regard. As other qualifying claims have succeeded he will also be entitled to an award under section 38 of the Employment Act.

Mrs Allen – constructive unfair dismissal

Paid basic pay during periods of holiday leave taken before January 2019

231. Our analysis is the same as for Mr Allen. We find that this was conduct that undermined trust and confidence but it played a small role in Mrs Allen's decision to resign.

Unlawful deduction in the furlough period

232. Again our analysis is the same as for Mr Allen. This was conduct without reasonable and proper cause which harmed trust and confidence. We would find it was a repudiatory breach of contract in its own right, albeit there are also other cumulative matters. It is, however, subject to considerations of affirmation, assessed below.

Detriment as set out in the s 44 Employment Rights Act claim

233. This is the complaint that Mrs Allen was refused home working. We do not find that she ever in fact requested home working; she wished to be furloughed. The complaint is therefore not factually made out.

Threats made by Mr Weaver on 25 January 2019, 22 June 2019 and 8 August 2019 to "not pay commission if customers did not take out an App on their mobile phone"

234. We do not find that Mr Weaver threatened Mrs Allen. He was, as a manager, communicating to all affected staff the importance of the Fordpass App and that it could affect commission because of the stance taken by Ford. Viewed objectively it was not conduct that would undermine trust and confidence and it was conduct that had reasonable and proper cause behind it.

Being ignored by Mr Weaver following her return to work on 9 September 2019

235. We did not find it established as a matter of fact, on the balance of probabilities, that Mr D Weaver had ignored Mrs Allen. As set out in our findings of fact we accept it is likely that Mr Weaver and Mrs Allen did not have much, if anything, in common and did not seek each other out to socialise, but we do not accept that Mr Weaver ignored Mrs Allen. In his email correspondence with her from the time he was courteous and professional.

Unilateral variation of contractual working hours on 15 May from 5 days per week to 5.5 days

236. Our analysis is similar to that in relation to Mr Allen about; it was conduct which was without reasonable and proper cause and which undermined trust and confidence. We considered, however, that it played a lesser role in Mrs Allen's decision to resign compared with Mr Allen as shortly thereafter she was shielding and because she herself was aware it may well not apply to her as she had been working lesser hours previously in any event. That said, Mr Weaver could have easily confirmed it did not apply to her.

Financial detriment because her wages were "often" calculated incorrectly (dates unspecified)

237. For the reasons given in relation to Mr Allen, we did not find this established as a matter of fact on the balance of probabilities.

Breaches of the Working Time Regulations (as outlined separately)

238. This is a reference to a complaint about rest breaks which was withdrawn in closing submissions. Our understanding was that the related complaint brought as part of the constructive unfair dismissal was therefore also withdrawn. We would be unable to uphold it in any event as we received no analysis as to how as a matter of law the complaint was said to be made out.

Discrimination on the grounds of disability (as outlined separately)

239. We checked with Mr Cowley whether here Mrs Allen is relying on the factual allegation that she was placed on to SSP rather than furlough, as being part of a repudiatory breach of contract entitling her to resign (an Employment Right Act complaint), or whether this was a complaint of a discriminatory constructive dismissal (an Equality Act complaint), or both. Mr Cowley said that Mrs Allen was relying on the complaint in its factual context only, as part of the Employment Rights Act constructive unfair dismissal complaint; he said it was not a complaint of a discriminatory dismissal. We therefore address it as such.

240. For similar reasoning to that set out in relation to the section 15 discrimination arising from disability complaint, we consider that in placing Mrs Allen on to SSP rather than furlough when she was shielding was conduct that was without reasonable and proper cause which was likely to undermine trust and confidence. With reasonable due diligence Mr Weaver ought to have placed Mrs Allen back on to furlough. Given the financial significance for Mrs Allen, we would consider it a repudiatory breach of contract in its own right, albeit it also falls part of cumulative matters in any event.

Inappropriate comments made by Mr Keith Thomas over a period of time (dates unspecified)

241. This came down to a matter of Mrs Allen's word against Mr Thomas. There was no corroborative evidence or indeed evidence put before us of Mr Thomas alleging making other inappropriate comments. We also took into account that we considered Mrs Allen was the type of person who would challenge inappropriate comments of this sort if she faced them. On the evidence before us we were therefore unable to conclude, applying the balance of probabilities, that it had been established this had happened. We would add that even if we had founded it established we would not have considered that it had anything to do with Mrs Allen's decision to resign. It is distant in time and Mr Thomas was not involved in the other matters that were causing upset in the run up to the claimants resigning.

Withdrawal of IT access

242. Whilst we could understand Mr Weaver's concern about Mr Allen potentially be able to access client resources via Mrs Allen's systems, the way these concerns were addressed was inappropriate. Mr D Weaver did not contact Mrs Allen to explain his concerns or tell her about his course of action. She was an employee in her own right, which he was well aware of. Mr D Weaver had reasonable cause to worry about his client data, given Mr Allen's history as Mr Weaver understood it, and that he was leaving to join a key competitor. But that did not give him reasonable cause to go about disabling Mrs Allen's access in the way that he did without telling her. It was conduct which therefore undermined trust and confidence.

The overall position and affirmation

243. The inappropriate offsetting of commission against furlough pay, and

placing Mrs Allen on SPP not paid furlough were, we have found, repudiatory breaches of contract. Such a breach remained live when Mr D Weaver removed Mrs Allen's IT access without telling her which is the last act complained about.

244. However, Mrs Allen resigned 2 months after the last of these things, on 10 August 2020. We consider and find that Mrs Allen did resign in part due to these things, but also for other reasons. In particular, her shielding was coming to an end, only a few days later on 16 August 2020. She had to decide whether or not to return to work in circumstances in which her husband had left and was now working for a competitor. It was also not simply the case that the claimants happened to be a married couple who worked for the same employer. They worked very closely together and Mrs Allen was in a variety of respects dependent upon Mr Allen in work. He would, for example, assist her with valuations. Also importantly, he had previously driven her to and from work as she did not drive.

245. We do not consider, and do not find, that Mrs Allen was intending to return to work after Mr Allen left. She did not respond to Mr Weaver's communication asking her what her intentions were. We consider it likely and find that Mrs Allen remained in employment because she was shielding and it meant she could remain in receipt of SSP during that shielding period. She then decided to process her resignation when her shielding was due to come to an end, as she knew she was not going to return to work for Mr Weaver. She was not off work on long term sickness absence, she was shielding.

246. Given these circumstances and the lapse of time we have to consider whether Mrs Allen affirmed the breach. In Hadji v St Luke's Plymouth UKEAT 0857/2012 the law of affirmation was summarised as follows:

(i) The employee must make up their mind whether or not to resign soon after the conduct of which they complain. If they do not do so they may be regarded as having elected to affirm the contract or as having lost their right to treat themselves as dismissed. Western Excavating v Sharp [1978] QB 761… as modified by WE Cox Toner (International Ltd v Crook [1981] IRLR 443… and Cantor Fitzgerald International v Bird [2002] EWHC 2736 (QB) 29 July 2002.

(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay – see Cox Toner para 13 p446.

(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: Fereday v S Staffs NHS Primary Care Trust (UKEAT/0513/ZT judgment 12 July 2011) paras 45/46.

(iv) There is no fixed time limit in which the employee must make up their mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts;

affirmation cases are fact sensitive; Fereday, para 44.

247. We consider and find that the delay in resigning and the way that Mrs Allen behaved was consistent with keeping the contract alive. She was keeping the contract alive for the purpose of receiving SPP whilst shielding. In doing so Mrs Allen was choosing to stay as an employee of the respondent and accepting that benefit. Mrs Allen affirmed the breach. It follows that she resigned and was not dismissed and her constructive unfair dismissal claim is not successful and is dismissed.

Mrs Allen – Constructive Wrongful Dismissal

248. For the same reasons Mrs Allen's constructive wrongful dismissal claim cannot success and is dismissed.

Mrs Allen – Failure to provide written statement of terms and conditions of employment.

249. Mrs Allen was not provided with a statement of employment particulars. That complaint is upheld and we make a declaration in that regard in her favour. She is not, however, entitled to an award under Section 38 because she has not succeeded in any other additional qualifying claim.

Next steps

252. Mr Allen's successful complaint will be listed for a remedy hearing and remedy directions will be issued separately.

Employment Judge R Harfield

Date 27 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 28 September 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche