EMPLOYMENT TRIBUNALS

Claimant: **Mr M Jones**

Respondent: **Cygnet Learning Disability Limited**

Heard at: **East London Hearing Centre**

On: **6 December 2023, 7 December 2023, 8 December 2023**
4 January 2024 (in chambers)

Before: **Employment Judge Allen KC**
Members: **Ms Forrest**
Mr Lush

Appearances:
For the Claimant: in person
For the Respondent: Mr Sheppard (counsel)

JUDGMENT

1. The Claimant's claim for automatic unfair constructive dismissal (s100(1)(d) ERA 1996 fails and is dismissed.

2. The Claimant's claim for ordinary constructive unfair dismissal succeeds.

3. The Claimant's claim for age discrimination fails and is dismissed.

4. The Claimant's claim for harassment related to age fails and is dismissed.

5. The Claimant's claim for victimisation fails and is dismissed.

6. The Claimant's claim for wrongful dismissal (failure to pay notice pay) succeeds.

7. The Claimant's claim for breach of contract (relating to annual pay reviews) succeeds.

REASONS

1. Following a period of early conciliation between 6 July and 17 August 2021, the Claimant presented his claim on 8 October 2021.

2. Draft lists of issues had been canvassed at a preliminary hearing on 20 April 2022. The Claimant was ordered to provide further and better particulars of his claim, which he did on 10 May 2022.

3. An application to amend the claim to include a claim to include automatic unfair dismissal under s100(1)(d) ERA 1996 (concerning serious and imminent circumstances of danger) was permitted by the tribunal on 14 October 2022.

4. There was no definitive list of claims and issues at the start of the hearing. Following discussion with the parties, the following issues were identified and agreed at this hearing:

The Claimant is bringing claims for:

A. Constructive Unfair Dismissal – ordinary s98 Employment Rights Act 1996 (ERA)
B. Constructive Unfair Dismissal – automatic – s100(1)(d) ERA
C. Direct age discrimination – s13 Equality Act 2010 (EqA)
D. Harassment - s26 EqA
E. Victimisation - s27 EqA
F. Breach of contract – Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 - notice pay / annual pay reviews – limited to £25,000.

The issues for the tribunal to determine are:

A. Constructive Unfair Dismissal s98 ERA

1. Whether the Claimant was subjected to the following treatment by the Respondent:

a. Failure to provide an annual pay review for over 10 years;

b. Provision of incorrect or misleading information about the Claimant's eligibility to be furloughed – specifically in or around November 2020, the Respondent informed the Claimant that employees aged over 70 could not be furloughed unless they provided a letter from their GP that they were clinically vulnerable;

c. An inadequate response in relation to the Claimant's covid related health and concerns regarding the safety of the workplace:

i. the Claimant, by email on 14 August 2020, queried what measures the Respondent had put in place to reduce the risk of COVID-19 transmission. The Respondent did not provide the Claimant with its risk assessment until 18 September 2020 after repeated follow-ups from the Claimant;

ii. upon returning to work at the beginning of October 2020, the Claimant noticed little to no measures had been put in place to reduce the risk of COVID-19 transmission, particularly in the areas in which he worked;

iii. after a few days of returning to work in October 2020, the Respondent informed the Claimant that there had been cases of COVID-19 in the ward units amongst patients and the Claimant was told to not return to work and would be placed on unpaid leave;

iv. the Respondent attempted to withdraw the Claimant's furlough agreement on 6 April 2021 without consulting with the Claimant; and

v. following a meeting with the Claimant on 20 April 2021, the Respondent wrongly asserted that the Claimant had agreed to begin attending work on 6 May 2021. The Claimant informed the Respondent by email on 29 April 2021 that this was not the case and he did not intend to return to work until the Respondent had provided him with a detailed risk assessment and assurances that suitable safety measures had been put in place. The Respondent failed to provide an updated company site risk assessment despite the Claimant's multiple requests.

d. Failure to uphold and resolve any material aspects of the Claimant's grievance of 15 October 2020 and grievance appeal including the following:

i. Failure to provide an annual pay review for over 10 years and then an inadequate and delayed response to this breach of contract, leaving him significantly out of pocket and aggrieved;

ii. Mismanagement and communication inconsistencies regarding furlough leave in particular in or around November 2020, the Respondent informed the Claimant that employees aged over 70 could not be furloughed unless they provided a letter from their GP that they were clinically vulnerable;

iii. Age discrimination;

e. Delays in the grievance process (grievance 15 October 2020 – outcome 5 January 2021; appeal 10 January 2021 – outcome 1 April 2021);

f. Threat of disciplinary action and dismissal by letters dated 1 June, 11 June and 25 June 2021 - due to alleged breach of contract for not attending work despite numerous communications from the Claimant seeking a response from the Respondent to address his Covid related health and safety concerns at work which were not adequately responded to;

g. Direct discrimination because of age (see below para 12); harassment related to age (see below para 17); and victimisation (see below para 21).

2. Whether those matters amounted to a breach of any of the following express or implied terms of the Claimant's contract of employment:

a. Not to act in a way calculated or likely to destroy or seriously damage mutual trust and confidence;

b. To undertake an annual pay review;

c. To take reasonable care for an employee's health and safety.

3. If there was a breach, whether it was sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to terminate the contract of employment without notice.

4. If so whether the resignation was in response to the alleged breach, and that breach had not been waived.

5. If, which is denied, it is found that the claimant was entitled to terminate the contract without notice by reason of the Respondent's conduct, whether the dismissal was fair having regard to s98 ERA 1996.

6. If the dismissal was unfair, whether the Claimant has mitigated his loss and whether any compensation should be:

a. reduced to reflect the claimant's contributory conduct;

b. reduced pursuant to *Polkey v AE Dayton Services* on the basis that had a fair process been followed, there was a possibility that this Respondent would have fairly dismissed the Claimant.

B. Automatic Constructive Unfair Dismissal s100(1)(d) ERA 1996

7. Did the following amount to circumstances of danger:

a. The Respondent's failure to carry out a detailed risk assessment of the kitchen; and

b. The Respondent's failure to give assurances to the claimant that suitable safety measures had been put in place to minimise the risk of the Claimant contracting Covid-19?

8. If so, did the Claimant reasonably believe them to be serious and imminent?

9. If so, could the Claimant not reasonably have been expected to avert the circumstances of danger?

10. Did the Claimant left (or propose to leave) or (while the danger persisted) refuse to return to his place of work or any dangerous part of his place of work between May 2020 and June 2021?

11. Was the Claimant constructively dismissed by reason of the threats in June 2021 of disciplinary action and dismissal and if so was the reason or principal reason for his dismissal that he refused to return to his place of work in the circumstances set out above?

C. Direct Age Discrimination s13 EqA

12. Whether the Claimant was subjected to less favourable treatment because of his age when the Respondent:

a. between 6 September 2011 and April 2021 failed to review the Claimant's salary:

i. the Claimant raised this with the Respondent on multiple occasions throughout his employment, including in August 2019 to Amanda Albano (after which a pay increase of £2,500 was promised but not provided) and in his formal grievance raised on 15 October 2020;

ii. the Respondent did not conduct a formal pay review of the Claimant's salary until April 2021 (over 10 years after he had been employed) at which time he was informed he would have a 6% pay rise but this was never implemented;

iii. the Respondent accepts in its Grounds of Resistance at paragraph 12 that members of staff received a "standard pay rise" in April 2021, implying that members of staff other than the Claimant received an annual pay rise;

iv. the Claimant's colleague, Mr Gary Wray, also did not receive a pay review or pay rise during his employment with the Respondent that commenced at the same time as the Claimant's. Mr Wray resigned in or around December 2019 and was in his mid-fifties at the time; and

v. the Respondent accepted in the Claimant's grievance outcome that the Claimant should have had annual pay reviews;

b. on 27 March 2020 alleged that the Claimant had taken unauthorised leave:

i. the Claimant spoke with Amanda Albano on 23 March 2020 informing her that he would not be attending work due to Government guidance;

ii. Ms Albano informed the Claimant at the meeting on 23 March 2020 that she would consider how the Claimant would continue to be paid whilst being absent from work (by being on furlough, annual leave, or authorised absence on full pay);

iii. the Claimant attempted to contact Ms Albano on 25 March 2020 and left her messages for her to contact him but she failed to do so.

c. In November 2020 informed the Claimant that employees over 70 could not be furloughed unless they provided a GP letter they were clinically vulnerable:

i. government guidance did not set such criteria for a member of staff to be placed on furlough; and

ii. government guidance did not distinguish between members of staff aged 70 and over.

d. On 1 June, 11 June, 25 June 2021 alleged the Claimant had taken unauthorised leave since 6 May 2021:

i. the Claimant had a detailed discussion with Mr Ron Gutu where he raised his concerns about the Respondent's safety protocols in relation to COVID-19. During this discussion the Claimant avers that he informed Mr Gutu that he would only return to work if the Respondent had taken all measures to ensure it was safe to do so;

ii. the Claimant emailed Mr Gutu, copying in Ms Laura Beales, on 29 April 2021 confirming the above and asking for an updated risk assessment. The Claimant did not agree a return-to-work date with the Respondent; and

iii. the Respondent was aware that the Claimant was absent from work due to his legitimate health and safety concerns. This was not unauthorised absence from work.

13. The Claimant relies on a hypothetical comparator with the following characteristics: someone in the Claimant's role since September 2010, who is below the age of 50, but who is considered to be at heightened risk from COVID-19.

14. Was the Claimant thereby subjected to less favourable treatment?

15. If so, was it because of age?

Either

a. What was the reason for the Claimant's treatment? ('the reason why')

Or the two stage test:

a. Has the Claimant proved facts from which the tribunal could conclude in the absence of an adequate explanation that the Respondent has discriminated against the claimant because of age (i.e. a prima facie case)?

b. If so what is the Respondent's explanation? Does it provide a non-discriminatory reason for any proven treatment?

16. The Respondent is not arguing that any direct age discrimination was justified.

D. Harassment related to age s26 Equality Act (in the alternative to the direct discrimination claim)

17. Was the Claimant subjected to unwanted conduct / the conduct referred to at para 12 above?

18. If so, was this unwanted conduct related to age?

19. If so, did this conduct have the purpose or effect or violating the Claimant's dignity and / or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and was it reasonably to so conclude?

E. Victimisation

20. It is agreed that in doing the following, the Claimant did a protected act:

a. on 16 September 2020, the claimant met with Mr Joseph would and Mr. Lewis Morgan and alleged that he had been subject to age discrimination by the respondent.

b. the Claimant's grievance dated 15th October 2020;

c. the Claimant's e-mail dated 18 March 2021;

21. Was the Claimant subjected to the following treatment:

a. removing him from furlough following his meeting with Mr Wood and Mr Morgan on 16 September 2020. This is not in dispute;

b. the grievance took longer than was reasonable to conclude;

c. informing him in November he was not eligible to be furloughed unless he provided a GP's letter stating that he was clinically vulnerable;

d. failing to adequately deal with the Claimant's health and safety concerns in October 2020 and from April to June 2021;

22. If so, was that because of the protected act?

F. Breach of Contract including Notice pay

23. Was the claimant was entitled to notice pay notwithstanding his resignation without notice?

24. Was the claimant contractually entitled to annual pay reviews and if so was he contractually entitled to consequential pay increments.

G. Time Limits

25. The resignation was on 2 July 2021 and therefore the unfair dismissal claims are in time.

26. The breach of contract claim is in time (as it relates to a matter outstanding on the termination of employment).

27. In relation to the discrimination claims, the claim form was presented on 8 October 2021. Early conciliation was a 6 week period between 6 July 2021 and 17 August 2021. Accordingly, any individual act or omission which took place prior to 27 May 2021 (three months and 6 weeks before the presentation of the claim form) is potentially out of time so the tribunal may not have jurisdiction.

28. Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period and is such conduct accordingly in time?

29. If any of the claim was presented out of time should time be extended to admit such parts of the claim on the basis that it would be just and equitable to do so?

5. The italicised parts of the list of issues above were agreed to reflect the Claimant's argument rather than stating any agreed position on those matters.

6. The hearing itself took 3 days in December 2023 before the conclusion of evidence and submissions. The tribunal sat in chambers on a separate day in early January 2024.

7. We were referred to pages in a bundle running to page 637. During the hearing at the Tribunal's request, we received, from the parties, information to remind the tribunal of some of the various stages of the government guidance and rules during the pandemic period: '2 Years of COVID-19 on GOV.UK' dated 25 July 2022; 'Prime Minister's Statement on Coronavirus (COVID-19)' dated 23 March 2020; 'FAQs: Coronavirus Job Retention Scheme' Research Briefing dated 1 October 2021.

8. There was also a disputed documents bundle containing unredacted versions of documents in our bundle that were in totally or partly redacted form at pages 461, 470-474, 475-476, 477-478, 482, 486 and 488. The Claimant sought to put those documents before the tribunal. Following discussion with the parties, it was agreed that pages 461, 470-474, 477-478, (the redacted part of) 482, 486 and 488 contained privileged material (without prejudice correspondence). The tribunal was provided with the unredacted pages 475-476.

9. The Respondent produced a cast list and a chronology. The Claimant produced a chronology.

10. We heard oral evidence from the Claimant. He presented an additional witness statement from Gary Wray a former co-worker, who had been a Chef at Colchester until the end of December 2019. Mr Wray was unable to attend the tribunal. The Claimant obtained a signed copy of Mr Wray's witness statement and the tribunal read the statement and was able to give it some weight despite Mr Wray's non-attendance.

11. On behalf of the Respondent, we heard from Nanday Obace, Clinical Manager (who was the investigator into the Claimant's grievance of 15 October 2020); Sharin Daniel, Office Manager; Laura Beales, HR Manager (who dealt with the Claimant's grievance appeal); Ron Gutu, Operations Director (South) at times interim Hospital Manager; and Kristy Watters, Head of Employee Relations (who investigated the issues raised in the Claimant's resignation letter). We read a witness statement from Kudzanai Chikodzi, Clinical Services Manager, who was unable to attend the tribunal because he was in Zimbabwe attending to a family situation. An application to postpone the hearing on the basis of Mr Chikodzi's non-attendance had been refused by the tribunal in advance of this hearing. The Respondent was not able to produce a signed version of Mr Chikodzi's statement during the hearing but did send a signed copy after the hearing and prior to the tribunal's deliberations. The tribunal read the witness statement and was able to give it some weight. The tribunal noted that in the signed statement, Mr Chikodzi had made some amendments to the version of the statement before the tribunal. The tribunal was content to accept minor changes to dates or numbers and corrections to spelling or grammar. The tribunal did not give any weight to the more substantive amendments to paragraphs 10 and 11 which

were not in the version of the witness statement at the hearing and which could not therefore have been subject to comment by the Claimant.

12. On 8 December 2023 we were shown by the Respondent a short video of the kitchen in which the Claimant worked. That video evidence was then presented as part of the evidence of Ms Daniel, who had taken the video on her mobile telephone. We heard oral submissions from both parties and written submissions from the Respondent.

Findings of Fact

13. The Respondent is a commercial operation providing residential care services for people with learning disabilities and autistic people with a variety of mental health conditions at a number of sites including Colchester, where the Claimant was employed as a Head Chef / Manager from 6 September 2010 until his resignation with immediate effect on 2 July 2021. The Claimant was born on 28 August 1948. The Respondent had taken over the business in May 2018.

14. The management structure was in a state of flux during the relevant period in which the hospital was having a number of difficulties. In 2016-2018 the Claimant reported to the Head of Hotel and Catering, Christine Bereton. Between July 2019 to July 2020, the Claimant reported to Amanda Albano, Hospital Manager. Then from July 2020 to September 2020, he reported to Joseph Wood, Office Manager; and then Sharon Daniel, Office Manager from September 2020. Ron Gutu, Operations Director (South) took over responsibility for Cygnet Colchester in January 2019 and for a time, he also performed the role of Hospital Manager. Kudzanai Chikodzi was the clinical services manager from July 2019. Hector Bayayi was Consultant Clinical Services Manager in 2020.

15. The Claimant's contract of employment stated:

> ***9. Remuneration***
> *9.1 Your rate of pay is £25,500 per annum. Pay rates are reviewed annually. Whilst the Employer will endeavour to ensure that rates remain competitive, you should not assume that this review will constitute an increase in pay.*

16. It is common ground that the Claimant's pay did not increase in the decade after that contract was entered into.

17. The Claimant had been incorrectly categorised on the Respondent's system as an hourly paid 'Chef' and as such his notional 'hourly rate' was higher than the standard rate and therefore no increase was applied. However, the Claimant was actually employed as Head Chef / Manager and should have been categorised on the system as a salaried employee. Typical or average pay increases for salaried employees over the relevant period were in the region of 1.5-2% according to the oral evidence of Ms Beales.

18. The tribunal accepted the Claimant's evidence that he had raised the issue of his lack of pay increase informally over the years including in 2012, 2017 and 2018.

19. The tribunal accepted the Claimant's evidence, backed up by Mr Wray's evidence that in 2019 the Claimant (who would have been about 71) and Mr Wray (who was 54 at the time) raised the lack of pay increases with Ms Albano. The tribunal find that Ms Albano accepted that the Claimant had been overlooked and that the Claimant was told that he would receive a pay increase. This pay increase did not materialise and the Claimant made specific reference to this in his letter to Ms Albano in 29 February 2020 in which he stated:

> *Finally I remind you that you have failed to honour your promise to myself and Gray Wray to substantially increase our pay which you made in August 2019*

20. In relation to Covid-19, the following dates are relevant:

    20.1 On 20 March 2020, the government announced the Coronavirus Job Retention Scheme (furlough). This originally applied from 1 March to 30 May 2020 and was subsequently extended to 30 June 2020 and then extended (as a 'flexible furlough') to 31 October 2020 and then extended to 31 March 2021; and then extended to 30 April 2021; and then extended to 30 September 2021;

    20.2 On 23 March 2020, the Prime Minister announced the first national lockdown in which the British people were told 'you must stay at home' save for limited purposes which included 'travelling to and from work, but only where this is absolutely necessary and cannot be done from home';

    20.3 The second national lockdown began on 5 November 2020;

    20.4 The third national lockdown began on 4 January 2021.

21. The Tribunal was not presented with any national or government guidance on shielding and vulnerability with specific reference to over 70s. The tribunal noted that the Claimant believed that he should not be working immediately after 23 March 2020 because he and his wife were over 70.

22. The Respondent's Covid-19 Policy changed over time to reflect changing guidance and rules. In the Policy dated May 2020, it stated:

> **4.1 FURLOUGHING**
>
> 4.1. Under the government's Coronavirus Job Retention Scheme, some staff can be 'furloughed' which means that the Company can place them on a leave of absence but still keep them employed. These staff include:
>
> - Staff who are at very high risk of severe illness from Covid-19 and are in receipt of a letter from the NHS/their GP stating that they need to 'shield'
> - Staff who are 28 weeks pregnant or more
> - Staff who are aged 70 or over
>
> **Staff who are at very high risk (shielded)**
> 4.7. Staff who are at very high risk of severe illness from Covid-19 because of an underlying health condition are being advised to stay at home at all times and avoid any face-to-face contact for a period (shield). These staff should be receiving a letter from the NHS/their GP telling them they fall within this group.

4.8. If these staff can work from home then they should do so, with their line manager's authorisation.

4.9. In order to be granted the leave and to receive pay the staff member must show the NHS/GP letter to their manager for a copy to be taken. A photograph of the letter would also be acceptable in the circumstances.

4.10. If a staff member has received a letter from the NHS/GP and does not wish to be furloughed i.e. they wish to carry on working, the Manager will be required to complete a risk assessment with them. In addition, should the staff member believe they should not have received a letter, they can challenge this with their GP.

4.11. Staff who live in the same household as someone who is at high risk of illness from Covid-19 and have received a letter from the NHS should remain at work while observing all the advice in the NHS letter including use of shared spaces and facilities, and the usual infection prevention advice such as hand washing.

23. Section 4.15 stated that:

Staff who are aged 70 years or older
4.15. Staff who aged 70 years or older and are in a patient/resident facing role and can be moved into another role can remain at work. or if they are able to work from home they can. Staff who are patient/resident facing and cannot move roles should be furloughed.

24. The Claimant was not in a patient / resident facing role.
25. Section 4.19 stated:

4.19. HMRC guidance on furloughing is very specific so payment for a furlough will rely on the Company receiving a signed copy of the aforementioned 'Agreement for Furlough Leave' or an email from the staff member expressly accepting the agreement. If neither the signed agreement nor an email is received the staff member will be placed on unpaid leave for the duration instead of furlough leave.

26. Sections 5.8 and 5.9 stated:

Staff who have other underlying health conditions
5.8. Staff who have underlying health conditions but have not received a letter from the NHS/their GP advising that they are at high risk, should practice social distancing but can continue to work in patient facing roles, provided the necessary precautions are taken (hand washing etc}. They should avoid caring, where possible, for patients/residents with suspected or confirmed Covid-19 infection.

5.9. If the staff member believes they should have received a letter from the NHS, then they should ring their GP to enquire if they have a listed underlying condition and if so, can a letter be sent to them. The list is available here **https://www.nhs.uk/conditlons/coronavlrus-covld-19/advice-for-people-at-high-risk/.**

27. Furlough was neither a right nor an obligation. It could only happen by agreement between employee and employer.

28. In the revised policy in June 2020, the Policy at 4.1 states:

4. FURLOUGHING
4.1. Under the government's Coronavirus Job Retention Scheme. some staff have been 'furloughed'. Currently those staff are furloughed up until 31 July 2020, unless government

> or company guidelines change. No further employees can join the furlough scheme after 10 June 2020. Furlough means that the Company can place staff on a leave of absence but still keep them employed.
>
> . . .
>
> 4.5 The Company may end a furlough at any time. and staff who are furloughed may also return to work when they choose, although if they are considered vulnerable this will be dependant upon a risk assessment being carried out prior to their return, from which the Company may recommend that they stay furloughed.

29. There was no equivalent of section 4.15 of the May 2020 policy relating to those over 70 in a patient / resident facing role.

30. Section 5.9 stated:

> **Staff who have other underlying health conditions**
> 5.9. Staff who have underlying health conditions but have not received a letter from the NHS/their GP advising that they are at high risk, should practice social distancing but can continue to work in service user facing roles, provided the necessary precautions are taken (wearing a mask, hand washing etc).

31. A further revision in late June 2020 did not alter these provisions.

32. A further revision in late July 2020 applicable to mid-October 2020 stated at paragraph 4.1 and 4.2:

> **4. FURLOUGHING**
>
> 4.1. Under the government's Coronavirus Job Retention Scheme. some staff have been 'furloughed'. Furlough means that the Company can place staff on a leave of absence but still keep them employed.
>
> 4.2. The current position of the Company is outlined below. although this may be subject to change:
>
> • **Staff who clinically extremely vulnerable due to an underlying disease or health condition** - should have received a new letter from the Department of Health and Social Care towards the end of June advising them to shield. A copy should be sent to their unit/manager. In its place a letter from a GP/Consultant may be sufficient and a copy should be provided. These staff can remain on furlough until 31st October 2020, unless the staff member wishes to return to work, Government advice changes or the Company decides to end the furlough in which case a risk assessment is undertaken allowing for this.
>
> • **Staff who are aged 70 or over** - can remain on furlough until 31st October 2020, unless the staff member wishes to return to work, Government advice changes or the Company decides to end the furlough in which case a risk assessment is undertaken allowing for this.
>
> • **Staff who were unable to access childcare** - should now be preparing to return to work. Furlough will end for this group on 7th September 2020.
>
> • **Staff who had a family member or partner who was classified as extremely vulnerable** - as the virus rate is coming down, they should discuss their individual circumstances with their manager with a view to returning to work. Furlough will end for this group on 30th August 2020.

33. The next revision was in place between mid October and end November 2020 and stated at 4.1:

> **4. FURLOUGHING**
> 4.1. The government's current Coronavirus Job Retention Scheme (furlough) is ending on 31st October. Any staff who remain off work until the end of October or beyond, remain obligated to undertake relevant training including keeping their e-learning Achieve modules up to date, and may be asked to take some of their annual leave.

34. Furlough was then extended again and the following policy applied from end November 2020 to 17 December 2020 at section 4.1:

> **4. FURLOUGHING**
> 4.1. The government's Coronavirus Job Retention Scheme (furlough) was extended from 1st November 2020, ending 31st March 2021. Certain staff members are able to be furloughed. if they are unable to work from home, as long they were physically paid by the Company on or before 30th October. At present the Company will furlough staff until 4th December, and will then decide on a month by month basis.

35. The policy in place between 17 December 2020 and 11 January 2021 stated at section 4.1:

> **4. FURLOUGHING**
> 4.1. The government's Coronavirus Job Retention Scheme (furlough) currently run until 30th April 2021. Certain staff members are able to be furloughed until 30th April, if they are unable to work from home, as long they were physically paid by the Company on or before 30th October.

36. None of those policies from mid October 2020 to 11 January 2021 made specific reference to the over 70s in the list of staff who may be furloughed. However, the policy in place from 11 January 2021 to 13 February 2021 does again specifically list those over 70 as staff who may be furloughed and that was retained in the policies in place from 13 February 2021 to 16 February 2021; 16 February 2021 to 18 February 2021; and 18 February 2021 to 18 May 2021.

37. The Policy in place from 18 May 2021 to 9 September 2021 differed in that those over 70 were not referred to in the furlough section. Section 4.1 stated:

> **4. FURLOUGH**
> 4.1. The government's advice is that clinically extremely vulnerable people should cease shielding as of 31st March 2021. In some exceptional circumstances shielding may still be appropriate. In such cases the Coronavirus Job Retention Scheme (furlough) may be applied at the manager's discretion.

38. The Respondent did not notify the Claimant of these changes to the Policy. They may have been available to those in the workplace, but the Claimant was not in the workplace save for a brief period in October 2020.

39. Following the announcement of national lockdown by the Prime Minister on 23 March 2020, the Claimant informed Ms Albano that he would not be attending work due to the pandemic and the government guidance on his vulnerability due to him being over 70 (as was his wife). The tribunal were not presented with any government guidance which referred to those over 70 but the tribunal noted the references to the over 70s in some of the Respondent's Covid Policies.

40. The Claimant did not attend work after 23 March 2020 until the start of October 2020.

41. Ms Albano wrote to the Claimant by letter 27 March 2020 stating:

> Dear Michael
> l am writing with regard to your failure to report for work since 24th March 2020 and your failure to contact me to give a reason or to inform me of the likely duration of your absence. I have tried to contact you and you have not provided a valid reason for your absence.
>
> I would like to remind you of the procedure for notifying your manager of absence as laid out in the Absence Management policy. It is the responsibility of all colleagues who are absent from work. for any reason. to notify their manager or a member of the management team prior to the start of their shift. Contact must be made by telephone and in person.
>
> At this stage. you may be considered to be in breach of your contract of employment if you fail to resolve your issue, which could lead to your dismissal. In line with this, you absence is regarded as unauthorised and will therefore be unpaid.
>
> Therefore. I must request that you contact me as a matter of urgency on receipt of this letter on 01206 848000 and by no later than 4pm on Wednesday 1st April 2020 to discuss your return to work.

42. The Claimant did not receive that letter until 21 April 2020 because it was not properly stamped and he had to go to the post office and pay a surcharge. He emailed Ms Albano on 21 April 2020 to inform her of this. No other attempt had been made to contact the Claimant in the meantime.

43. On 24 April 2020, the Claimant complained to Ms Albano and Mr Bayayi about the letter of 27 March 2020 having been sent to him.

44. In any event, the Claimant was retrospectively furloughed from 1 April 2020 by agreement signed by the Claimant and Ms Albano on 24 April 2020. In the Claimant's absence, the Second Chef stepped up and managed the kitchen.

45. Ms Albano left the Respondent on 10 July 2020.

46. A letter sent to the Claimant on 16 July 2020 from Joseph Wood, Office Manager stated:

> I am writing with regard to your current Furlough Status.
>
> Firstly can I say on behalf of the Company that we understand that this has not been an easy situation for you and that you have undoubtedly been concerned about the prevalence of COVID-19. Can I remind you of the Employee assistance Programme we run, where you can discuss, health or financial concerns in complete confidence. They can be contacted on 0800 975 3356. In addition please do not hesitate to contact your Line or Site Manager, if you wish to discuss any concerns.
>
> You are currently furloughing as you have been identified as being clinically extremely vulnerable due to an underlying disease or health condition that may put you at risk of

> severe illness, should you contract COVI0-19. You will have previously sent us your shielding letter, which identified you as such.
>
> The government, via the Department of Health and Social Care, have recently issued further guidance regarding shielding, with a slight relaxation of the shielding guidance from 1st July 2020 and a further relaxation from 1st August 2020, when shielding will be paused. They have also written to all those in receipt of the original shielding letter with how this new advice will affect you.
>
> As before, we would ask that you post scan or photo this new letter, issued towards the end of June 2020 and send it to your site Administrator or Manage by 24th July 2020.

47. The Claimant supplied the relevant letter from his GP dated 4 August 2020 which stated that:

> As he is over the age of 70, he is considered at increased risk of developing severe illness if he were to contract COVID19. As per government guidelines, he would therefore only be considered safe to return to work if the recommended safety precautions were in place. This would include maintaining a strict social distance at all times, provision of adequate PPE and ensuring any equipment and areas shared with colleagues or members of the public are regularly cleaned.

48. The Claimant on 14 August 2020 wrote to Mr Wood stating that he was "ready and willing to return to a safe working environment." And asking "if you could inform me of the action that has been taken by Cygnet to provide a Covid-19 safe working environment at the above location." The letter goes on to state:

> I would be particularly interested to learn of the action taken to meet the key steps stated in the Guidance that the Government believes are necessary to working safely. The relevant ones to my workplace are –
>
> The carrying out of a Covid-19 risk assessment and its results.
>
> Developing cleaning, hand washing and hygiene procedures.
>
> The maintenance of 2 metres social distancing where possible.
>
> If 2 m social distancing is not possible then everything practical needs to be done to manage the transmission risk. The Government guidance provides examples of the practical action that should be taken.

49. The Respondent wrote to the Claimant on 28 August informing him that he would no longer be on furlough from 7 September 2020 and that "We would like to reassure you that our Services are following Government, Public Health and NHS guidelines in terms of the wearing of PPE and that our ancillary staff are working hard to ensure that all surfaces are regularly cleaned".

50. The Claimant responded by email on 1 September 2020 asking for the Respondent to share with him it's Covid 19 risk assessment.

51. A meeting took place on 16 September with Joseph Wood and Lewis Morgan, HR Business Partner. The Respondent viewed the meeting as being about how to return the Claimant to the workplace. In addition to having that discussion, the Claimant asked for the meeting to take place on a without prejudice basis –

which the Respondent did not accept. The Claimant raised the issue of his lack of pay rises over a 10 year period and stated that this was due to age discrimination. The Claimant threatened to convert the matter to litigation. In an internal email after the meeting dated 16 September, Mr Morgan recorded that the Claimant had asked for 2 years' salary; and that it had been agreed that the Claimant would be sent a Covid risk assessment for the kitchen and that Mr Morgan would send the Claimant the grievance procedure.

52. The Respondent sent a risk assessment to the Claimant dated 18 September 2020. The section relating to the kitchen stated:

> COVID Risks in the Kitchen:
> - Team has been briefed on the hospital COVID policy
> - Personal COVID risk assessments have been done by all members of staff.
> - Handwashing is required regularly within the kitchen
> - Alcohol Gel dispensers are available around site and close to the kitchen entrance.
> - Social Distancing is to be maintained in the kitchen through work stations and communication between the team. Furthest possible social distancing measures to be followed at all times.
> - Airflow vents in the kitchen allow for proper ventilation as well as windows all serviced at regular intervals.
> - PPE worn at all times in the kitchen further gloves, masks, aprons can be provided as extra.

53. The tribunal considered that the risk assessment relating to the kitchen was rather general in its nature save for the reference to the airflow vents. The Claimant was never, after that date, sent any further or more specific risk assessment of the kitchen, his working area.

54. In his emailed response on 20 September 2020, the Claimant again asserted that his treatment had amounted to age discrimination including in relation to the lack of a pay increase and he again threated to bring an employment tribunal claim. In responding by email on 24 September 2020, Mr Morgan invited the Claimant to present a grievance.

55. The Claimant returned to work on 1 October 2020. He completed an individual risk assessment with Sharin Daniel and Kudzi Chikodzi which included a points based scheme for assessing vulnerability – including points for being male and over 65 as well as other factors such as being diabetic or having other medical conditions. For anyone scoring 2 or below the risk assessment stated: "Continue working with caution. Follow hand hygiene, social distancing and use of PPE, limit patient facing activities." The risk assessment form records that the Claimant raised issues about provision of hand sanitiser dispensers outside the kitchen and that PPE should be supplied and worn by staff using the kitchen area. In his witness statement, the Claimant states that no airflow vents had been installed in the kitchen, but that is not a matter noted by him on the risk assessment form.

56. The tribunal heard that there were 5 kitchen staff who would not have all been present at the same time. From observing the video, it was apparent to the

tribunal that the kitchen was small and social distancing would have been challenging.

57. The Claimant in his witness evidence makes reference to a CQC report criticising the Respondent's Covid measures. However the Claimant was not aware of this prior to his resignation.

58. The Claimant's evidence was that on 6 October 2020, the Claimant was called to a meeting with Mr Chikodzi and told that patients had tested positive for COVID and therefore that the Claimant was not expected to come to work.

59. The Claimant presented a formal grievance on 15 October 2020 which alleged a failure to communicate with him by Ms Albano, including replies to his letters, emails and telephone calls; a failure to fully discuss his removal from the furlough scheme; lack of pay increase for 10 years; and that this amounted to age discrimination.

60. The Claimant took some annual leave. He wrote to the Respondent on 20 October 2020 stating: "I assume at the current time and in view of the infections at the hospital you will not wish me to attend my workplace. Would you confirm that my absence is regarded as authorised and I will therefore be paid."

61. The Respondent replied on 21 October 2020 stating:

> Unfortunately we are not liable to pay you full pay as the hospital have adequately risk assessed the service, providing you with adequate PPE including disposable aprons, gloves, masks and hand sanitisers. We are taking all reasonable measures to reduce the risk of infection at this time. As I am sure you can appreciate, as a care organisation we must ensure the hospital remains open and operational for our patient cohort.
>
> We are not however requiring you to return to work, and would therefore be happy to authorise unpaid leave until the level of COVID risk at the hospital has reduced. We are happy to review this weekly with you
>
> I trust you have been provided with all site risk assessments in relation to COVID management.
>
> I would appreciate a response via email as to whether you intend to return to work or would like to take unpaid leave?

62. On 22 October 2020 the Respondent stated to the Claimant by email:

> I can confirm that the kitchen staff have been advised to request a test. We cannot not provide assurances that any part of the hospital is COVID secure, owing to the nature of the virus.
>
> We acknowledge that the site is currently a high risk one, and as such are offering you unpaid leave. We are in agreement that use of your annual leave is fine, subject to weekly review each Friday by the Office and Clinical Manager in line with hospital risk at that time. If this matter continues until such point that you have no remaining annual leave, you will be informed of the date at which you will transfer to unpaid leave.

63. The Claimant was informed by Mr Chikodzi on 30 October 2020 that Cygnet Colchester was now green (no patients or staff with covid) and ask to review his situation and to tell them if he was ready to come back to work.

64. The Claimant was informed on 6 November 2020 by Mr Morgan that only if he produced a letter from his GP to the effect that he was extremely vulnerable could he be furloughed. He was told that over 70s would not automatically be part of the furlough scheme (which reflected the Respondent's policy at that time). The Claimant asked for confirmation of government guidance in relation to the over 70s but none was produced. This was the position in the Respondents Covid Policy at that time but there is no sign in the evidence before the tribunal that this was given by the Respondent to the Claimant.

65. In any event, the Claimant obtained the necessary letter from his GP dated 18 November 2020 which stated "He remains clinically vulnerable due to his age and thus would be at increased risk of severe illness"; and he was then retrospectively placed on furlough from 5 November 2020. He did not return to work after that time.

66. The Respondent's grievance policy at section 4.6 states:

> Grievance Hearing
> 4.6. A formal grievance meeting will be arranged, usually within ten working days of receiving your grievance and you will receive a written invitation to this. You should make every effort to attend the meeting.

67. In the Claimant's case, he was not contacted in relation to his grievance dated 15 October 2020 until 10 November 2020 when he was invited to a grievance meeting on 24 November 2020.

68. The tribunal took into account the evidence of Ms Obace that the Respondent was under significant pressure at this time given the additional demands of dealing with the pandemic.

69. Ms Obace is based at Cygnet Woking. She invited the Claimant to a meeting very shortly after she was appointed, She offered him the right to be accompanied and conducted the investigation. She interviewed the Claimant and Mr Morgan and she was supplied with information as requested including in relation to pay and the lack of pay increases.

70. As communicated to the Claimant on 5 January 2021, Ms Obace upheld the grievance relating to failure to communicate by Ms Albano. She found that no pay reviews or pay increase had taken place in the decade since his employment had started and she recommended that a review of salary take place. She did not uphold the grievance relating to an alleged failure to discuss removal from the furlough scheme and she did not uphold the age discrimination complaint. She made recommendations and offered the Claimant the right of appeal.

71. The Claimant appealed the grievance outcome on 10 January 2021 on the basis that he believed that there was age discrimination; that there had been a failure to supply a company risk assessment within a reasonable time of it being

requested and that his letter of 14 August 2020 had not been acknowledged; and challenging the conclusion that his lack of pay review had been due to structural weakness in management.

72. The grievance policy did not contain any express provision as to the time period within which an appeal meeting should be convened.

73. Laura Beales, HR Manager at the time responsible for Cygnet healthcare operations across Britain, conducted the appeal process. On 12 February 2021, she invited the Claimant to a meeting on 24 February 2021. She looked into the comparable salaries for Head Chefs across the business, which showed a wide range – some below the Claimant's salary of £25,500 and some considerably above - up to £37,000. The size of the different facilities varies across the country.

74. Her witness statement evidence was that during her employment by Cygnet (since 2020) there was usually an annual increase of 2% or more. At the appeal meeting, she told the Claimant that he would be receiving a pay increase in April 2021.

75. Ms Beales continued to address the matter after that interview. She was told that the hospital budget allowed for a 6% increase to the Claimant's pay. The tribunal noted that this was dictated by the budget – rather than an assessment of what the Claimant would have received had he been given the pay reviews that his contract suggested should have taken place every year.

76. In her appeal outcome letter dated 1 April 2021, Ms Beales set out that she agreed that no pay reviews had taken place. She explained the mis-categorisation of the Claimant in the Respondent's system as an hourly paid Chef rather than a salaried Head Chef and that she did not find that he did not receive a pay increase because of his age as other people found themselves in a similar position in relation to lack of pay rises. He was told that he would receive a pay rise in excess of the 2% rise given to others in April 2021. She rejected his appeal in relation to a failure to address the letter of 14 August 2020.

77. The Claimant received a pay rise email dated 17 April 2021 – advising him that his pay would rise by 6% to £27,060.

78. On 6 April 2021 by letter from Ron Gutu "with regard to the formal end of shielding", the Respondent stated that it required that the Claimant return to work as of week commencing 12 April 2021 and asked the Claimant to meet with Mr Gutu prior to returning to work.

79. The Claimant responded by email dated 8 April 2021 stating:

> I have received your letter of 6th April 2021 via email from Bobby Stirling and she has today provided an email address for you.
>
> I note the contents of your letter and very much welcome the meeting with you to discuss a return to work.

> Could you do this preferably on Tuesday 13th April at 1pm or Thursday 15th April at 1pm.
>
> I remain clinically vulnerable due to my age, 72 and you will understand I am cautious about returning to work whilst there is exposure to any risk. With this in mind would you kindly bring along with you a copy of Cygnets current Covid 19 risk assessment for the Colchester site including the kitchen area.
>
> With regard to the vaccine I am having my second jab on Wednesday 21st April 2021.

80. The Claimant chased for a response on 15 April 2021. Mr Gutu responded on 15 April 2021 that the email had gone to his spam box and offered a meeting on 20 April 2021.

81. The meeting took place outdoors. At the meeting Mr Gutu went through an individual risk assessment. Again the Claimant was assessed as someone with a score of 2 or below which meant: "Continue working with caution. Follow hand hygiene, social distancing and use of PPE, limit patient facing activities."

82. The Claimant says that he asked Mr Gutu for an updated risk assessment for the site including the kitchen at this meeting. Mr Gutu's evidence before the tribunal was that he did not recall that request.

83. After the meeting, Mr Gutu believed that there had been an agreement that the Claimant would return to work on 6 May 2021.

84. On 27 April 2021, Mr Gutu emailed the Claimant. He did not make reference to any risk assessment other than the personal risk assessment. Mr Gutu agreed that the Claimant would be paid up to 5 May 2021.

85. The Claimant replied on 29 April 2021 stating:

> Thank you for your email of the 27th April 2021. I was pleased to have our lengthy without prejudice discussion regarding the matters relating to my return to work and how my claim for compensation could be resolved following the internal grievance procedures.
> I note you have seen my email to Laura Beales requesting a substantive reply by 30th April 2021.
> I am in receipt of a copy current personal assessment and would be obliged to receive the copy of my risk assessment completed on or about 1st October 2020 when I returned to work.
> I have received my second jab on 21st April. To avoid any misunderstanding, I advised you I would only consider coming back to work provided I was satisfied everything had been done to reduce my risk. To that end I asked you to bring along a current corporate risk assessment which you did not and I handed you a copy of the original assessment of 18th September 2020. Would you furnish a copy of the updated assessment and a note of the actions that have been taken in order to comply with the assessment I wish to have an answer by 30th April 2021 in the hope that a compromise may be achieved without my having to instruct an employment specialist.

86. There was no response from Mr Gutu to this email.

87. On 30 April 2021 the furlough scheme having been extended, the Claimant was informed of this.

88. On 1 June 2021, Mr Gutu wrote to the Claimant in the following terms:

> I am writing with regard to your failure to report for work since 6 May 2021 I am unaware of the likely duration of your absence.
>
> At this stage, you may be considered to be in breach of your contract of employment if you do not contact me to discuss your absence, which could lead to your dismissal. In line with this, your absence is regarded as unauthorised and will therefore be unpaid.
>
> Therefore, I must request that you contact me as a matter of urgency on receipt of this letter on 01206 848000 and by no later than 9.00am on Monday, 7th June 2021 to discuss your absence from work

89. Mr Gutu's evidence is that this was a standard template letter sent because he was expecting the Claimant's return to work. His evidence to the tribunal was that the working environment was safe and that he was not aware of any 'corporate risk assessment'.

90. The Claimant's solicitors wrote on 4 June 2021 including stating:

> As you have been made aware, our client is in a vulnerable group and has been shielding during the COVID-19 pandemic and has had genuine concerns about returning to the workplace. To facilitate his return to work and the related consultations with you, he has reasonably requested on more than one occasion a copy of the revised risk assessment and how the hospital have ensured a COVID-secure workplace. By way of one example we refer to our client's email to you (copying in Laura Beales from HR) dated 29 April 2021 in relation to which he has received no response.

91. Ms Beales replied to the solicitors on 11 June 2021 enclosing a copy of the personal risk assessment and the risk assessment from September 2020 but not the risk assessment in the tribunal bundle dated 14 May 2021. She stated:

> *For clarification for letter of 4th June 2021:*
> - The risk assessment has been completed to confirm your client has now had his second vaccination. This was discussed at the meeting of 20th April and was a factor in agreeing a return to work date of 6th May 2021.
> - For the avoidance of doubt I also enclose the risk assessment from September 2020.
> - *Our position is that it was agreed that your client would return to work on 6th May 2021, and he was informed he would continue to be paid furlough pay until 5th May, the day before his planned return date.*
> - *Your client has not returned to work as planned and now is on unauthorised absence.*
> - *He has been sent correspondence to confirm that he has failed to report for work and that we are unaware of the likely duration of the absence. He has not submitted a sick note. This letter is in line with Cygnet's policy on the management of absence.*

92. On 16 and again on 17 June 2021 the solicitors for the Claimant wrote as follows:

> *We have had the opportunity to take our client's instructions and wish to clarify a few points as follows:*

1. Our client did not agree to return to work on 6 May 2021.

2. Our client has yet to receive a response to his email to Mr Gutu dated 29 April in which he requested a copy of the current corporate risk assessment. We note you have provided a copy of the Covid Policy, but further risk still needs to be addressed most specifically in relation to our client's workplace and the extent to which this is Covid Secure. Our client still has genuine concerns about this in terms of ventilation, social distancing measures and other hygiene and PPE matters.

3. Our client does not agree that the internal grievance and appeal process has been concluded. Many of his issues remain unresolved to include the ten years where the company failed to provide a salary review, in breach of his contract.

93. Mr Gutu emailed the Claimant directly on 18 June 2021 enclosing the Claimant's personal risk assessment from April 2021 and the previous one from 1 October 2020 (but not the risk assessment in the tribunal bundle dated 14 May 2021) and the letter from 1 June 2021 and stating:

Please see attached a copy of your current risk assessment as well as a copy of the one from last year. As *per my previous correspondence to you on 27th April please have a look at this new risk assessment and let me know any comments or questions you have. I believe the environment ls safe at the Hospital for you to return and we have the correct protocols in place to minimise risk.*
Please also see a copy of the letter of 1st June.
I have still have not heard from you as to your intention to return to work. Please will you contact me by 23rd June to let me know your intention with regards to returning to work. I am unsure if you are sick or whether you intend to return to work or not.

94. The Claimant's solicitors responded on 23 June 2021 as follows:

We refer to your email to our above-named client dated 18 June 2021 requesting a response from him by today to confirm whether he intends to return to work. This email makes specific reference to your letter of 1 June 2021 which unreasonably refers to his *'failure to report for work* and indicating that this may be a breach of contract which could lead to his dismissal. He has
asked us to respond on his behalf.

As the Company is aware our client has raised a number of significant health and safety related concerns to include in his letters dated 8 and 29 April 2021. We have also raised these concerns in our letters to the Company dated 4 and 17 June 2021.

The Company have still not addressed these concerns to confirm what measures have been put in place in relation to his workplace, namely the kitchen area. Concerns have been raised previously regarding ventilation, social distancing and the wearing of masks.

Our client's concerns were realised in October 2020 soon alter his return to work when there was a COVID outbreak at the workplace. In view of the recent increase in positive cases relating to the Delta variant, we trust that our client's concerns will be addressed without further delay. Discussions regarding a return to work can then progress.

We wish to take this opportunity to remind you of our client's rights in relation to the raising of health and safety concerns at work in accordance with Sections 44 and 100 of the Employment Rights Act 1996.

95. Ms Beales responded on 25 June as follows:

Thank you for your letters of 17th and 23rd June 2021.

I address your points as follows:

- There appears to be a difference of opinion regarding agreement of return to work on 6th May. The company position is (as confirmed via email to your client on 27th April 2021), following the meeting between your client and Ron Gutu there was an agreed return to work date.
- In an email of 18th June 2021 Ron Gutu has written to your client to ask him to look at the new risk assessment and let him know any comments or questions he has. He asked your client to contact him by 23rd June 2021 but your client has not.
- As per my previous clarification to you the organisation's grievance and appeal process has been concluded. We are aware he is unhappy about the outcome but an outcome has been provided to him. There are no further lines of appeal.
- The organisation continues to make meaningful attempts to discuss your client's concerns about safety in the work place. This includes but is not limited to providing him with an updated risk assessment and asking for his comments and questions.
- Ron Gutu will be inviting your client to a further meeting to talk about his concerns about returning to work, and this includes his response to the risk assessment (i.e. does it address everything he has concerns about), fears over matters to ventilation or any other matter. It is difficult for the company to resolve any issues he has if he will not talk to us.

96. Mr Gutu emailed the Claimant on 25 June 2021 chasing for a response to his email of 18 June 2021 and asking him to attend a meeting on 30 June 2021:

> Further to my email of 18th June I have not heard back from you.
>
> May you please meet with me on Wednesday the 30th of June 2021 so we can discuss any outstanding concerns you may have about the safety of returning to work.
>
> This includes wearing masks, social distancing and any concerns you have about the kitchen area and safety measures.
>
> I would very much like to discuss this with you, following supplying you with the risk assessments for your comment. It is difficult for me to understand your concerns about returning if you do not talk to me about the risk assessment I have provided you.

97. The Claimant responded by asking Mr Gutu to correspond with the Claimant's solicitor.

98. The Claimant then resigned on 2 July 2021. His resignation letter stated:

> Please accept this letter as notice of my resignation from my position of Head Chef and Manager with Cygnet Health Care Limited with Immediate effect.
>
> The reasons for my resignation are as follows:
> 1. The failure to uphold and resolve any material aspects of my grievance and grievance appeal to include the following:
> a. Failure to provide an annual pay review for over ten years and then an Inadequate and delayed response to this breach of contract, leaving me significantly out of pocket and aggrieved.
> b. Mismanagement and communication inconsistencies regarding furlough leave
> c. Age discrimination.
> d. An inadequate response in relation to my covid related health and concerns regarding the safety of my workplace.

> 2. The delays in the grievance process when the Company knew how much this was Impacting on my mental health and ability to return to work to perform my role. After raising my pay review grievance for years, I submitted my formal grievance on 15 October 2020 and the outcome was not received until 5 January 2021. After submitting an appeal on 10 January 2021the outcome was not received until 1 April 2021, nearly six months after the initial grievance was documented.
>
> 3. Despite numerous communications from me seeking a response from the Company to address my covid related health and safety concerns at work, despite not receiving an adequate response, I have been threatened with disciplinary action due to alleged breach of contract for not attending work and dismissal in recent weeks. I also consider that my rights in respect of raising health and safety concerns have been breached and I feel I have been harassed and victimised for raising my grievances.
>
> These recent threats have represented a last straw. Coupled with the failure to respond to my grievance, unlawfully withholding my salary for years and a refusal to consider my grievances further, I consider that my ongoing employment is untenable as I have lost all faith and trust In the Company's ability to be fair and reasonable.
>
> For these reasons I consider that I have been forced to resign from my position as the situation has become so unbearable at work and has Impacted on my mental health. This has been devastating for me after ten years in a job that I had previously loved and been proud of.
>
> I look forward to hearing from you to confirm any final arrangements regarding salary and the return of my company property."

99. Ms Watters, Head of Employee Relations, investigated the new matters set out in the Claimant's resignation letter, namely an inadequate response in relation to his covid related health and concerns regarding the safety in the workplace and the threat of disciplinary action due to alleged breach of contract. The Claimant proposed that his concerns be addressed in writing. Ms Watters sent her grievance outcome letter to the Claimant on 24 August 2021. She did not uphold any points of the grievance.

The Legal Framework

100. The relevant parts of sections 94, 95, 98 and 100 Employment Rights Act 1996 (ERA) state:

> **94 The right**
> (1) An employee has the right not to be unfairly dismissed by his employer.
> . . .
>
> **95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if) —
> . . .
> (c) 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.
> . . .
>
> **98 General**
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> . . .
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.
>
> **100 Health and safety cases**
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
> . . .
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work

101. All contracts of employment contain an implied term of trust and confidence. Under this term, the employer must not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the mutual trust and confidence between employer and employee.

102. The following elements are needed to establish constructive dismissal:

    102.1 Repudiatory breach on the part of the employer. This may be an actual breach or anticipatory breach, and can also arise from a series of acts rather than a single one, but must be sufficiently serious to justify the employee resigning. An employer can commit a repudiatory breach in a constructive dismissal context even where its actions do not indicate an intention to bring the employment relationship to an end; what is required is that the employer demonstrates an intention to no longer comply with the terms of the contract that is so serious that it goes to the root of the contract.

    102.2 An election by the employee to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.

    102.3 The employee must not delay too long in accepting the breach, as it is always open to an innocent party to "waive" the breach and treat the contract as continuing (affirmation) (subject to any damages claim that they may have).

103. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:

103.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?

103.2 Has the employee affirmed the contract since that act?

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

103.4 If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju* [2004] EWCA Civ 1493) 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? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)

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

104. It is not necessary that a contractual breach is the only reason for the resignation, merely that it played a part in the dismissal.

105. The Court of Appeal in *Rodgers v Leeds Laser Cutting Ltd* [2023] ICR 356 considered that the questions that a tribunal must decide in a claim brought under section 100(1)(d) were:

105.1 Did the employee believe that there were circumstances of serious and imminent danger at the workplace? If so:

105.2 Was that belief reasonable? If so:

105.3 Could they reasonably have averted that danger? If not:

105.4 Did they leave, or propose to leave or refuse to return to, the workplace, or the relevant part, because of the (perceived) serious and imminent danger? If so:

105.5 Was that the reason (or principal reason) for the dismissal?

106. It was suggested that the paradigm case under section 100(1)(d) would be one in which there was an evident serious and imminent danger at the workplace, affecting the premises, equipment or system of working as the result of an accident or the manifestation of a more chronic problem. The language of the section was less suited to a case where the danger relied on is the risk of employees infecting each other with a disease such as Covid-19. In the *Leeds Cutting* case, the tribunal had rejected the employer's suggestion that, for that reason, section 100(1)(d) did not apply to the case at all. It was not pursued before the EAT and the Court of Appeal agreed that there was nothing in principle about such a risk which took it outside the scope of section 100(1)(d):

in each case the tribunal will have to decide whether, on the particular facts, it amounts to a serious and imminent danger.

Discrimination, Harassment and Victimisation

107. Age is a protected characteristic under the Equality Act 2010.

108. The relevant parts of sections 13, 23, 26, 27, 123 and 136 of the Equality Act state:

> **13 Direct discrimination**
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
> . . .
>
> **23 Comparison by reference to circumstances**
> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
> . . .
>
> **26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> . . .
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> **27 Victimisation**
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
> (4) This section applies only where the person subjected to a detriment is an individual.
> (5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.
>
> **123 Time limits**

> (1) Subject to sections 140A and 140B, Proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> . . .
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.
>
> **136 Burden of proof**
> (1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

109. A bare difference in status and a difference in treatment does not make out a prima facie case of direct discrimination. Direct age discrimination can be justified in some cases, but this Respondent does not seek to rely on justification. Unreasonable behaviour in, and of itself, is insufficient to advance a prima facie case of discrimination but it can go to credibility and can open the door to an inference of discrimination.

110. An act of harassment cannot also be an act of direct discrimination.

111. In order to establish a prima facie case in a victimisation claim, it is for the Claimant to establish knowledge of the protected act. The protected act need only have a significant influence on the impugned conduct. It need not be the sole or main reason.

Breach of Contract: Wrongful Dismissal

112. If there was a fundamental breach of contract by the Respondent giving rise to a constructive dismissal, the Claimant is entitled to bring a claim for wrongful dismissal.

Breach of Contract: Pay Reviews

113. If there was a contractual right to pay reviews, it does not follow that there was a contractual right to an increase in pay at each review point. A tribunal would need to determine the damages which would place the claimant in the same position as if the contract had been performed.

Breach of Contract: Limit on Tribunal's Jurisdiction

114. A tribunal only has jurisdiction to award up to £25,000 in total for breach of contract.

Conclusions (with reference to the list of issues)

Unfair dismissal

Constructive Unfair Dismissal s98 ERA

1. Whether the Claimant was subjected to the following treatment by the Respondent:

a. Failure to provide an annual pay review for over 10 years;

115. This happened and was subject to a finding in the Respondents internal grievance and grievance appeal process.

b. Provision of incorrect or misleading information about the Claimant's eligibility to be furloughed – specifically in or around November 2020, the Respondent informed the Claimant that employees aged over 70 could not be furloughed unless they provided a letter from their GP that they were clinically vulnerable;

116. Furlough was not an entitlement of an employee or an obligation on an employer. The email of 6 November 2020 accurately reflected the *Respondent's* policy for that period. The tribunal were not supplied with any evidence that government policy at that time stated any particular thing about those over 70 one way or another. The Respondent did ultimately place the Claimant on furlough for this period following the provision of a GP letter. The Respondent did not provide the Claimant with a copy of its policy. The tribunal did not consider that the email from Mr Morgan dated 6 November 2020 was incorrect or misleading.

c. An inadequate response in relation to the Claimant's covid related health and concerns regarding the safety of the workplace:

i. the Claimant, by email on 14 August 2020, queried what measures the Respondent had put in place to reduce the risk of COVID-19 transmission. The Respondent did not provide the Claimant with its risk assessment until 18 September 2020 after repeated follow-ups from the Claimant;

117. This happened and is not disputed.

ii. upon returning to work at the beginning of October 2020, the Claimant noticed little to no measures had been put in place to reduce the risk of COVID-19 transmission, particularly in the areas in which he worked;

118. The tribunal accepted that the Claimant had raised concerns on 1 October 2020 in relation to issues about provision of hand sanitiser dispensers outside the kitchen and that PPE should be supplied and worn by staff using the kitchen area. The Respondent did put these measures into place in response to the Claimant's concerns.

iii. after a few days of returning to work in October 2020, the Respondent informed the Claimant that there had been cases of COVID-19 in the ward units amongst patients and the Claimant was told to not return to work and would be placed on unpaid leave;

119. This happened and is supported by the contemporaneous correspondence.

> iv. the Respondent attempted to withdraw the Claimant's furlough agreement on 6 April 2021 without consulting with the Claimant; and

120. The Respondent did write to the Claimant on 6 April 2021 requiring him to return to work as of the week commencing 12 April 2021. This was in accordance with the changes to the scheme envisaged at that time. However, the Respondent did meet the Claimant on 30 April 2021 and undertook a personal risk assessment and extended his period of pay initially to 6 May 2021 and ultimately up to the date of his resignation.

> v. following a meeting with the Claimant on 20 April 2021, the Respondent wrongly asserted that the Claimant had agreed to begin attending work on 6 May 2021. The Claimant informed the Respondent by email on 29 April 2021 that this was not the case and he did not intend to return to work until the Respondent had provided him with a detailed risk assessment and assurances that suitable safety measures had been put in place. The Respondent failed to provide an updated company site risk assessment despite the Claimant's multiple requests.

121. There may have been a misunderstanding at the meeting on 20 April 2021 about the firmness of the Claimant's intention to return to work on 6 May 2021 and as to the nature of the risk assessment that he was requesting. However following his email of 29 April, and the Claimant chasing for a response on a number of occasions, the nature of the Claimant's request for a risk assessment other than his personal risk assessment was sufficiently clear and the Respondent failed to provide him with anything beyond the individual risk assessments and the old September 2020 site risk assessment, despite the Respondent having a site risk assessment dated 18 May 2021.

> d. Failure to uphold and resolve any material aspects of the Claimant's grievance of 15 October 2020 and grievance appeal including the following:
>
> i. Failure to provide an annual pay review for over 10 years and then an inadequate and delayed response to this breach of contract, leaving him significantly out of pocket and aggrieved;

122. The grievance and grievance appeal did uphold this element of the grievance. The Respondent did provide the Claimant on 17 April 2021 with notification of a 6% pay increase. Given that the evidence before the tribunal was that an average of 1.5 to 2% pay increase was usual per annum, this was not an adequate response to the Respondent's failure to conduct an annual pay review.

> ii. Mismanagement and communication inconsistencies regarding furlough leave in particular in or around November 2020, the Respondent informed the Claimant that employees aged over 70 could not be furloughed unless they provided a letter from their GP that they were clinically vulnerable;

123. This is dealt with above. The tribunal does not consider that the grievance failed to deal with this adequately.

> iii. Age discrimination;

124. Ms Obace and Ms Beales both properly considered whether age was the reason for the failure to review pay and for other matters that they had upheld. They

conducted a reasonable investigation and reasonably concluded that age was not the reason, having taking into account that other people of other ages had been subjected to similar treatment and that there had been management difficulties at the Respondent at Colchester. The tribunal does not consider that the grievance process failed to deal with this adequately.

e. Delays in the grievance process (grievance 15 October 2020 – outcome 5 January 2021; appeal 10 January 2021 – outcome 1 April 2021);

125. The Respondent's grievance process does state that a grievance hearing should usually take place within 10 days. That did not happen in this case. The grievance procedure does not set any other target times for the grievance or appeal. In light of the evidence from the Respondent of the impact of the pandemic upon its operation and its assessment of the thoroughness of the grievance and grievance appeal process, in this situation, the tribunal did not consider that the length of time taken was unacceptable in a way that was capable of being a breach of contract.

f. Threat of disciplinary action and dismissal by letters dated 1 June, 11 June and 25 June 2021 - due to alleged breach of contract for not attending work despite numerous communications from the Claimant seeking a response from the Respondent to address his Covid related health and safety concerns at work which were not adequately responded to;

126. These standard form letters were sent and did state that the Claimant may be in breach of his contract of employment if he did not contact Mr Gutu to discuss his absence, which could lead to his dismissal. It was the case that the Claimant was absent from work and that the Respondent had understood (perhaps a misapprehension – but a genuine one) that the Claimant had agreed to return to work on 6 May 2021. The Respondent did not in fact discipline the Claimant and did engage in correspondence with the Claimant and his solicitors (albeit of an ultimately somewhat circular back and forth nature). The tribunal considered that once it became apparent that he was asking for it, the Respondent should not have sent such communications without also having addressed the Claimant's request to be sent an updated site risk assessment.

g. Direct discrimination because of age (see below para 12); harassment related to age (see below para 17); and victimisation (see below para 21).

127. As set out below, the tribunal did not consider that any direct discrimination, harassment or victimisation had taken place.

2. Whether those matters amounted to a breach of any of the following express or implied terms of the Claimant's contract of employment:

a. Not to act in a way calculated or likely to destroy or seriously damage mutual trust and confidence;

128. The tribunal concluded that the following matters taken together amounted to a breach of the implied term of trust and confidence: the failure to conduct pay reviews over a 10 year period; the failure to do more than simply offer one 6% pay rise in April 2021 after the grievance process had concluded; and the failure to provide the risk assessment when requested numerous times after 29 April 2021.

b. To undertake an annual pay review;

129. There was a breach of this obligation (which is not an obligation to necessarily increase pay annually) which amounted to a breach of contract.

c. To take reasonable care for an employee's health and safety.

130. The Claimant did not visit the kitchen on 20 April 2021. There was no evidence from him as to the health and safety measures in place in the period leading up to his resignation. The Respondent's evidence was that the workplace was sufficiently safe. The tribunal did not have sufficient evidence to conclude that there was a failure to take reasonable care for the Claimant's health and safety.

3. If there was a breach, whether it was sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to terminate the contract of employment without notice.

131. The tribunal concluded that both 2 (a) and (b) are repudiatory breaches.

4. If so whether the resignation was in response to the alleged breach, and that breach had not been waived.

Waiver

132. The tribunal did not consider that the Claimant had waived the breach relating to the annual pay reviews given that this was an ongoing issue and the breach happened anew each time the pay review did not take place and that even post grievance it had not been resolved and he was still complaining about it via solicitors up to the date of his resignation. The failure to provide the risk assessment was also still very much a live complaint at the time of the resignation.

Was resignation in response to the breach?

133. The Claimant's resignation was in response to a number of matters, some of which the tribunal has not found to be made out (e.g. some of the criticisms of the grievance process / age discrimination / miscommunication relating to furlough on 6 November 2020 / failure to consult after 6 April 2021) and some of which the tribunal did not consider to be breaches of contract (e.g. delays). However, it is clear that his resignation was in response to important breaches of contract that we have found to be made out (lack of pay reviews and failure to provide risk assessment) and therefore his resignation was in response to those breaches.

5. If, which is denied, it is found that the claimant was entitled to terminate the contract without notice by reason of the Respondent's conduct, whether the dismissal was fair having regard to s98 ERA 1996.

134. No alternative reason was put forward by the Respondent.

6. If the dismissal was unfair, whether the Claimant has mitigated his loss and whether any compensation should be:

a. reduced to reflect the claimant's contributory conduct;

b. reduced pursuant to *Polkey v AE Dayton Services* on the basis that had a fair process been followed, there was a possibility that this Respondent would have fairly dismissed the Claimant.

135. Mitigation is a matter to be determined at the remedy hearing.

136. The tribunal does not make any reduction for contribution or *Polkey*.

B. Automatic Constructive Unfair Dismissal s100(1)(d) ERA 1996

7. Did the following amount to circumstances of danger:

a. The Respondent's failure to carry out a detailed risk assessment of the kitchen; and

b. The Respondent's failure to give assurances to the claimant that suitable safety measures had been put in place to minimise the risk of the Claimant contracting Covid-19?

137. It is for the Claimant to demonstrate that there were circumstances of danger. The Claimant did not see the kitchen on 20 April 2021. The Respondent's evidence is that there was no danger to the Claimant. The Respondent has produced to us a comprehensive risk assessment dated 14 May 2021. The tribunal were not satisfied that there were circumstances of danger.

8. If so, did the Claimant reasonably believe them to be serious and imminent?

138. For the same reasons as given immediately above, particularly that the Claimant did not view the kitchen in 2021, the tribunal concluded that it would not have been reasonable for him to believe that any danger was serious and imminent.

9. If so, could the Claimant not reasonably have been expected to avert the circumstances of danger?

139. In light of the tribunal previous findings, this question cannot be answered.

10. Did the Claimant left (or propose to leave) or (while the danger persisted) refuse to return to his place of work or any dangerous part of his place of work between May 2020 and June 2021?

140. The Claimant did refuse to return unless he was given a risk assessment but as set out above the serious and imminent danger has not been established.

11. Was the Claimant constructively dismissed by reason of the threats in June 2021 of disciplinary action and dismissal and if so was the reason or principal reason for his dismissal that he refused to return to his place of work in the circumstances set out above?

141. This is not made out in light of the tribunal's findings above.

C. Direct Age Discrimination s13 EqA

12. Whether the Claimant was subjected to less favourable treatment because of his age when the Respondent:

    a. between 6 September 2011 and April 2021 failed to review the Claimant's salary:

        i. the Claimant raised this with the Respondent on multiple occasions throughout his employment, including in August 2019 to Amanda Albano (after which a pay increase of £2,500 was promised but not provided) and in his formal grievance raised on 15 October 2020;

        ii. the Respondent did not conduct a formal pay review of the Claimant's salary until April 2021 (over 10 years after he had been employed) at which time he was informed he would have a 6% pay rise but this was never implemented;

        iii. the Respondent accepts in its Grounds of Resistance at paragraph 12 that members of staff received a "standard pay rise" in April 2021, implying that members of staff other than the Claimant received an annual pay rise;

        iv. the Claimant's colleague, Mr Gary Wray, also did not receive a pay review or pay rise during his employment with the Respondent that commenced at the same time as the Claimant's. Mr Wray resigned in or around December 2019 and was in his mid-fifties at the time; and

        v. the Respondent accepted in the Claimant's grievance outcome that the Claimant should have had annual pay reviews;

142. No. For the same reasons set out in the grievance and grievance appeal conclusions, the tribunal find that the reason for the lack of pay review was not age. Other people were treated in the same way as the Claimant at different ages including Mr Wray (54 at the time); and there was clearly considerable lack of good management at times at the Respondent.

    b. on 27 March 2020 alleged that the Claimant had taken unauthorised leave:

        i. the Claimant spoke with Amanda Albano on 23 March 2020 informing her that he would not be attending work due to Government guidance;

        ii. Ms Albano informed the Claimant at the meeting on 23 March 2020 that she would consider how the Claimant would continue to be paid whilst being absent from work (by being on furlough, annual leave, or authorised absence on full pay);

        iii. the Claimant attempted to contact Ms Albano on 25 March 2020 and left her messages for her to contact him but she failed to do so.

143. No. The Claimant was paid, The Claimant was sent a standard letter that would have been sent to any comparator of a different age. The Claimant may have not attended work because of his age but the reason for Ms Albano's treatment of the Claimant was not age. This claim is out of time in any event and it would not be just and equitable to extend time.

    c. In November 2020 informed the Claimant that employees over 70 could not be furloughed unless they provided a GP letter they were clinically vulnerable:

        i. government guidance did not set such criteria for a member of staff to be placed on furlough; and

ii. government guidance did not distinguish between members of staff aged 70 and over.

144. No. The tribunal did not have sufficient evidence of such government guidance (one way or another). In any event, the reason for telling the Claimant that he could not be furloughed without a GP letter was not age. In effect he was being treated in the same way as employees of other ages. The Respondent's action was in accordance with its own policy at that time.

d. On 1 June, 11 June, 25 June 2021 alleged the Claimant had taken unauthorised leave since 6 May 2021:

i. the Claimant had a detailed discussion with Mr Ron Gutu where he raised his concerns about the Respondent's safety protocols in relation to COVID-19. During this discussion the Claimant avers that he informed Mr Gutu that he would only return to work if the Respondent had taken all measures to ensure it was safe to do so;

ii. the Claimant emailed Mr Gutu, copying in Ms Laura Beales, on 29 April 2021 confirming the above and asking for an updated risk assessment. The Claimant did not agree a return-to-work date with the Respondent; and

iii. the Respondent was aware that the Claimant was absent from work due to his legitimate health and safety concerns. This was not unauthorised absence from work.

145. None of the Respondents actions in this regard were taken because of age. None of them would have been taken differently in relation to a comparator of a different age.

13. The Claimant relies on a hypothetical comparator with the following characteristics: someone in the Claimant's role since September 2010, who is below the age of 50, but who is considered to be at heightened risk from COVID-19.

146. The tribunal concluded that such a comparator would have been treated in the same way as the Claimant in relation to all of these matters.

14. Was the Claimant thereby subjected to less favourable treatment?

147. The tribunal concluded that the Claimant was not subjected to less favourable treatment.

15. If so, was it because of age?

148. The tribunal concluded that the Claimant was not subjected any of this treatment because of age.

D. Harassment related to age s26 Equality Act (in the alternative to the direct discrimination claim)

16. Was the Claimant subjected to unwanted conduct / the conduct referred to at para 12 above?

17. If so, was this unwanted conduct related to age?

18. If so, did this conduct have the purpose or effect or violating the Claimant's dignity and / or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and was it reasonably to so conclude?

149. The tribunal concluded that all but (c) (informing the Claimant that employees over 70 could not be furloughed unless they provided a GP letter they were clinically vulnerable) are not related to age. (c) could be said to be 'related to age' but it was not done with the purpose or effect of creating such an environment. If the Claimant did conclude that such an environment was created, it was not reasonable for him to have done so.

H. Victimisation

19. It is agreed that in doing the following, the Claimant did a protected act:

a. on 16 September 2020, the claimant met with Mr Joseph would and Mr. Lewis Morgan and alleged that he had been subject to age discrimination by the respondent.

b. the Claimant's grievance dated 15th October 2020;

c. the Claimant's e-mail dated 18 March 2021;

20. Was the Claimant subjected to the following treatment:

a. removing him from furlough following his meeting with Mr Wood and Mr Morgan on 16 September 2020.

150. This is not in dispute. It happened.

b. the grievance took longer than was reasonable to conclude;

151. The tribunal did not find that it was longer than reasonable.

c. informing him in November he was not eligible to be furloughed unless he provided a GP's letter stating that he was clinically vulnerable;

152. That did happen.

d. failing to adequately deal with the Claimant's health and safety concerns in October 2020 and from April to June 2021;

153. The tribunal has found that the Respondent failed to supply the Claimant with a risk assessment when requested after 29 April 2021. There is no finding in the Claimant's favour relating to October 2020.

21. If so, was that because of the protected act?

154. None of these matters happened because of the protected acts. The tribunal concluded that none of the relevant decision makers were motivated by the protected acts.

I. Breach of Contract including Notice pay

22. Was the claimant was entitled to notice pay notwithstanding his resignation without notice?

155. The Claimant was dismissed (constructively) because the Respondent fundamentally breached the Claimant's contract. The Claimant is entitled to the notice pay that he would have received had the Respondent terminated his employment in accordance with the contract. Therefore, the Claimant is entitled to claim his notice pay.

    23. Was the claimant contractually entitled to annual pay reviews and if so was he contractually entitled to consequential pay increments.

156. The Claimant was contractually entitled to have had annual pay reviews. Those pay reviews were not carried out. That was a breach (or a series of breaches) of contract. He was not contractually entitled to specific contractual pay increments. The consequences of these conclusions will have to be explored at the remedy hearing – in particular in light of the statutory cap on damages for breach of contract and the amount to be awarded for wrongful dismissal.

    J. Time Limits

    24. The resignation was on 2 July 2021 and therefore the unfair dismissal claims are in time.

    25. The breach of contract claim is in time (as it relates to a matter outstanding on the termination of employment).

    26. In relation to the discrimination claims, the claim form was presented on 8 October 2021. Early conciliation was a 6 week period between 6 July 2021 and 17 August 2021. Accordingly, any individual act or omission which took place prior to 27 May 2021 (three months and 6 weeks before the presentation of the claim form) is potentially out of time so the tribunal may not have jurisdiction.

    27. Can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period and is such conduct accordingly in time?

    28. If any of the claim was presented out of time should time be extended to admit such parts of the claim on the basis that it would be just and equitable to do so?

157. The specific complaints relating to Ms Albano's actions are out of time, save in relation to the pay review which is a continuing act. The specific complaints relating to the failure to provide the risk assessment post 29 April 2021 are also a continuing act into the period which is in time. No reason was put forward to extend time where any claim was out of time. It would not be just and equitable to extend time in relation to the complaints relating to Ms Albano's actions. In any event the discrimination claims have all failed.

Employment Judge W A Allen KC
Dated: 31 January 2024