EMPLOYMENT TRIBUNALS

Claimant: Mr Z Baran

Respondent: Mario Iasi and Salvatore Iasi t/a Bel-Vedere Ristorante Italiano

Heard at: Watford Employment Tribunal

On: 7, 8 and 9 January 2020

Before: Employment Judge Tuck
Mrs J Smith
Mr M Bhatti MBE

Appearances
For the claimant: Mr Werenowski, Solicitor
For the respondent: Mr Hoyle, Consultant

JUDGMENT

The unanimous judgment of the tribunal is as follows:

1. The claimant's claim of discrimination because of disability is successful.
2. The claimant's claim of discrimination because of something arising in consequence of his disability is successful.
3. The claimant's claim for failure to make reasonable adjustments is dismissed on withdrawal.
4. The claimant's claim of automatically unfair dismissal fails and is dismissed.
5. The claimant's claim of wrongful dismissal is successful.
6. The claimant was not provided with written particulars of employment.
7. The claimant was not provided with wage slips.
8. The claimant was not given written reasons for his dismissal.

9. The claimant was permitted to amend his claim form to include a claim for unlawful deductions from wages, and this claim is successful.
10. The claimant is awarded the following sums by way of remedy:
    a. Unlawful deduction from wages for the period from 14/1/18 – 6/2/18, 3 weeks at £320 net per week.
       £960
    b. A sum representing statutory sick pay for the period from 6/2/18 to 12/4/18:
       £715.70
    c. Wrongful dismissal, one week's gross pay:
       £430
    d. Injury to feelings
       £10,000
    e. Interest at 8% on injury to feelings:
       £1530
    f. 25% ACAS Uplift on the above £13,635.70:
       £3,408.92
    g. 4 weeks gross pay for failure to provide a written statement of terms of employment:
       £1720

11. The Respondent must therefore pay to the claimant **£18,764.62**

Reasons

CLAIMS AND ISSUES.

1. By an ET1 presented on 4 May 2018, following a period of early conciliation between 8 March 2018 and 4 April 2018, the claimant, who was employed by the Respondent as a chef, brought the following claims:
    a. Direct disability discrimination
    b. Discrimination because of something arising from disability
    c. Failure to make reasonable adjustments
    d. Automatically unfair dismissal for asserting a statutory right
    e. Wrongful dismissal

   He additionally sought compensation for failure to provide him with a written statement of particulars of employment and wage slips, and failure to provide written reasons for dismissal. He said that any award should be uplifted by 25% for failure to follow ACAS guidelines.

2. Issues were set out following a PH on 15 March 2019, but after discussion at the outset of this hearing were further refined. The issues for determination at this hearing are as follows:
    a. DISABILITY : Was the claimant a disabled person at the material time?
    b. DIRECT DISCRIMINATION, S13 EqA: Did the Respondent subject the claimant to the less favourable treatment of summary dismissal on 6 February 2018 because of the Claimant's disability?
    c. DISCRIMINATION BECAUSE OF SOMETHING ARISING FROM DISABILITY, S15 EQA: The claimant claims that his absence from work at the material time arose from his disability. Was he treated unfavourably by being summarily dismissed on 6 February 2018 because of that?
    d. Did the Respondent know, or could the Respondent reasonably have been expected to know that the claimant had a disability at the material time?
    e. AUTOMATICALLY UNFAIR DISMISSAL: Was the claimant dismissed for asserting a statutory right of requesting written particulars of employment and/or wage slips between August 2017 and January 2018?
    f. WRONGFUL DISMISSAL: Was the claimant dismissed summarily on 6 February 2018, or did he resign?
    g. S32 EA 2002 /S8 ERA 1996: Was there a failure to provide the claimant with a written statement of particulars of employment and/or wage slips?
    h. If there was a dismissal, it is agreed there was a failure to provide written reasons for this.
    i. As to remedy: Was there a failure to follow ACAS guidelines? If so, is it appropriate to award any uplift to compensation, and if yes to what level?

PRELIMINARY MATTERS / APPLICATIONS.

3. At the outset of the hearing Mr Werenowski told the tribunal that the claimant was taking morphine and was unwell. He told us that the claimant very much wanted the hearing to proceed. The tribunal enquired whether any adjustments could be made to its process to assist the claimant, and was told that more frequent breaks would be beneficial. We therefore ensured that - particularly when the claimant was giving his evidence – we broke approximately every hour.

4. The claimant's representative sought to pursue five amendment applications at the outset of the hearing. These were as follows:

    a. As set out in a letter dated 11 December 2019, the claimant sought to amend the ET1 by correcting the claimant's cancer diagnosis (it is pancreatic not prostate), and correcting the date on which it is alleged the claimant was dismissed, from 2 February to 6 February 2018.

These were minor changes which did not alter the nature of the claims being pursued and were permitted.

b. An order for specific disclosure of a comparator's contract of employment and payslips set out in an email of 30 October 2019. It transpired (see list of issues below) that in fact the claimant does not contend that the failure to provide him with a contract or payslips was because of his disability. These documents are therefore not relevant and the application was not pursued.
c. An application dated 2 January 2020 to amend the further and better particulars by correcting dates. These were minor alterations which did not alter the nature of the claims and were permitted.
d. An application to adduce additional medical documents and a short supplementary witness statement setting out the claimant's symptoms since commencing cancer treatment. Whilst we were not given any proper explanation for its late disclosure, we accepted this documentation into evidence.
e. An application to amend the claim to include a claim for unpaid holiday pay. Mr Werenowski said that the basis of this claim had not been known until a payslip was disclosed in June 2019 which failed to mention holiday leave at all. Mr Hoyle objected to the application to add a new claim considerably out of time.

Law in relation to amendments.

5. Presidential guidance on the amendment of claim forms essentially sets out the principles to be drawn from the two seminal cases of ***Cocking v Sandhurst (Stationers) Ltd [1974***] ICR 650, and ***Selkent Bus Co Ltd v Moore*** [1996] ICR 386. The guidance includes the following:
    a. Para 5.1 – applications vary from the correction of clerical and typing errors to the addition of facts, the addition or substitution of labels for facts already described, and the making of entirely new factual allegations which change the basis of the existing claim. The tribunal must decide whether the amendment applied for is minor or a substantial alteration describing a new complaint.
    b. Para 6.1 – the tribunal draws a distinction between amendments as follows:
        i. Those that seek to add or substitute a new claim arising out of the same facts as the original claim; and
        ii. Those that add a new claim entirely unconnected with the original claim.
    c. Para 12 – where a party seeks to add a new ground of complaint, the ET must look for a link between the facts described in the claim form and the proposed amendment. If there is no such link the claimant will be bringing an entirely new cause of action. In this case, the Tribunal must consider whether the new claim is in time.

6. Mummery J in **Selkent** provided non-exhaustive guidance beyond considering the nature of the amendment, namely he said that it is important to consider the applicability of time limits (if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to

consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions), and the timing and manner of the application. He said "an application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

Conclusion on amendment application.

7. The tribunal refused to give permission to amend the claim to include a claim for holiday pay. The complaint is considerably out of time, and there is no reason why it could not have been set out in the ET1, or the application made before the PH in March 2019. The payslip disclosed in June did not provide any information whatsoever to give rise to formulating this claim. Further and in any event, there was a significant delay from June, to this application being set out in writing on 3 January 2020, just two working days before the hearing started. Determination of the holiday issue would require additional factual evidence which the Respondent was not on notice it needed to adduce. The prejudice to the Respondent in permitting the application was such that, on balance, the tribunal considered it proper to reject it.

Respondent's Application for specific disclosure.

8. The claimant asserts – in his ET1 and witness statement – that he told the Respondent he had cancer on 17th January 2018. This is denied by the Respondent, and Mr Iasi says he was not told of this until he received a letter dated 28th February 2018 from the Claimant. In the course of cross examining the claimant, there was extensive consideration of the claimant's GP records – which were disclosed in relation to the relevant period in June 2019 and with further disclosure of GP and other medical records shortly before the hearing. The GP records contain entries for 17th January 2018 recording "suspected pancreatic cancer", for 22nd January 2018 "had CRCP and stent. Biopsies have been taken. Results will be given later on", and for 8th Feb "patient diagnosed with pancreatic cancer".

9. The date on which the cancer diagnosis was given is of relevance as there is a dispute of fact as to whether Mr Iasi was first told the claimant had cancer before or after the EDT. To assist in determining whose evidence the tribunal should prefer, Mr Hoyle submitted that if the claimant had not been told he had cancer on 17th January, it is inherently unlikely he would have said this to Mr Iasi. To this end, Mr Hoyle - upon the claimant refusing to accept in cross examination that there was no diagnosis of his cancer until 8 February 2018 - applied for an order for specific discovery of all the claimant's hospital records

relating to his cancer. In relation to the letters we do have before us, Mr Hoyle submitted that the "diagnosis of a mass lesion within the head of the pancreas" recorded in the letter dated 7 February 2018 from Kings College Hospital does not indicate a diagnosis of "cancer", which could not be confirmed before biopsies were taken and analysed.

10. Mr Hoyle acknowledged that granting his application would require this hearing to be vacated; his estimate was that it would take approximately 3 months to obtain these documents. He submitted that it had not been apparent that the "GP records would be challenged" by the claimant until the oral evidence was given, and submitted that the case would be determined entirely on whether the cancer diagnosis had been made on 17th January or 8th February 2018. The EJ asked whether this would be determinative, because s13 EqA permits claims by persons who are perceived to be disabled, and if the claimant had told Mr Iasi on 17th January 2018 that he had cancer, and was dismissed because of that, it would constitute direct discrimination whether or not the claimant had a definitive diagnosis by that date. Mr Hoyle accepted this proposition in theory but said it did not apply to this case. Mr Hoyle added that it was "clear to [him] that while [he] understood the GP records, it was apparent that [the Employment judge] did not" and he feared that the panel may draw the wrong conclusion and be unfair to his client. (This appeared to be in relation to the GP entry relating to 8 February 2018, which the EJ said on its face could be the doctor giving information to the son, or the son giving information to the doctor, and we would have to seek clarification when the son gave his own evidence.)

11. Mr Werenowski submitted that the request could and should have been made earlier, that his client was very ill and any delay would be highly prejudicial. He went on to say that in any event the definitive date of diagnosis would not be determinative of the issue because the factual assertion from the claimant is that he told Mr Iasi on 17th January he had cancer. Further, he said that the CT scan showing the pancreatic tumour on 17th January was noted to be "T2 NI MO", and that the "T2" indicated it was cancerous.

12. The tribunal took time to deliberate. It reminded itself of that rule 31 of the ET (Constitution and Rules of Procedure) Regs 2013 provides that a tribunal "may order any person in Great Britain to disclose documents or information to a party (by providing copies or otherwise) or to allow a party to inspect such material as might be ordered by a county court". We must consider the issues of relevance, proportionality and apply the overriding objectives.

13. We have made the following findings:

    a. The tribunal readily accepted Mr Hoyle's submission that the hospital records are relevant documents, and would be very likely to cast light on the date on which a diagnosis of pancreatic cancer was made.
    b. The Respondent asked at the PH in March 2019 for "medical evidence on when the claimant was diagnosed" (issue 3 on the draft list of issues prepared by the Respondent for that PH).

c. The Claimant's case - that he was told he had pancreatic cancer when he attended hospital on 17 January 2018 - is set out in his ET1, so the respondent has always known that was his assertion.
d. If the respondent was dissatisfied with the medical evidence disclosed in June it could have sought an order then (and certainly if it was an application to be determined by this tribunal *at that time* we would have granted it).
e. The Claimant's witness statement – again asserting that he was told of his diagnosis on 17th January 2018 - was disclosed in December 2019.
f. Shortly before the hearing the Claimant disclosed further medical documents (see application (d) above). This included a letter from the hospital dated 7 February 2018 which confirmed the claimant had a CT scan on 17th January 2018 and was "diagnosed to have a mass lesion within the head of the pancreas". He was kept in hospital from 17th to 30th January 2018 and seen in clinic on 31st January 2018. ERCPs were carried out on 19th and 26th January 2018, and when his case was discussed in a MDM (multi-disciplinary meeting) prior to 31 January 2018, it was recorded that he had a "T2 N1 MO pancreatic head tumour".
g. It is not in dispute that the tumour which had been identified during the scan on 17 January 2018 was in fact cancerous. The claimant had major surgery on 1 March 2018, and thereafter courses of chemotherapy and radiotherapy.
h. We accept the submission of Mr Werenowski that to vacate this hearing, which was listed 9 months ago, and to have the matter hanging over the claimant for a further lengthy period until it could be relisted would be prejudicial to the claimant, who is an unwell man.

14. Against those findings, we have drawn the conclusion that in the face of the claimant consistently saying he had been diagnosed on 17th January 2018, the Respondent sought opportunistically to alight on the GP notes (which refer to "suspected pancreatic cancer" on 17th January 2018 and a "diagnosis" being recorded after a telephone consultation on 8 February 2018) to argue that no definitive diagnosis had been made until 8th February 2018 in support of its denial of knowledge of the claimant's disability.

15. Significantly, we do not accept that the date on which a definitive diagnosis was made by medics would be determinative of this case as Mr Hoyle submits. The key issue in this case is whether the claimant was dismissed upon telling Mr Iasi he had cancer, or whether he resigned saying he was too ill to return to work. This will depend on the assessment of the oral evidence each gives as to their conversations – and the conversation between Mr Iasi and the claimant's son. Whether the doctors were 100% sure that the tumour which had clearly be identified on 17th January 2018 was cancerous or not is not the relevant question. The issue for us is whether the claimant heard that he had cancer and reported that back to his employer. In these circumstances the prejudice to the claimant which would result from an adjournment of these proceedings far outweighs the advantage in having the relevant – but not determinative - documents.

16. Mr Hoyle commented that he "reserved the right to remake this application again", and asked that we note this which we duly did.

FACTS

17. The Tribunal heard evidence on oath from the claimant (with the assistance of an interpreter), Mr Hubert Skladnik and Mr Marak Baran (the claimant's son), and for the respondent from Mr Mario Iasi. We were provided with a joint bundle of documents of 152 pages, and the claimant produced a further bundle which ran from pages 153 to 190. We were additionally handed a print out from Cancer Research UK describing stages for pancreatic cancer.

18. We found the evidence of the claimant and his witnesses, plausible, measured and consistent. The same cannot be said of the evidence of Mr Iasi. As well as openly admitting to defrauding HMRC (see below), he also gave flatly contradictory answers during his evidence. This was most notable about a dispute arising from the events of 24 February 2018, when he firstly said he had asked the claimant to put forward his proposals about what to do about non-payment of tax / ni, then said he had offered to pay the tax / ni, then withdrew this statement, and went on later to answered ET questions by repeating it. We also found his evidence as to knowledge of the claimant's ill health completely implausible; he said he "did not need to ask" about tests the claimant was undergoing because they were in constant touch by telephone, then told us that he had no idea what the claimant was having an operation for, because he was not told and did not ask. We have taken into account that English is not the first language of Mr Iasi, but are entirely satisfied that the contradictions and implausibility of his evidence did not arise from any linguistic issues – and indeed Mr Hoyle did not make any suggestion that they may have.

19. The Claimant, who is Polish, was born in 1957, and by 2017 was an experienced chef. He sought employment with the Respondent in the summer of 2017 and was engaged by Mr Mario Iasi. Both the ET1 and ET3 state that employment commenced on 1 August 2017, but in the course of evidence it became apparent that both parties said that in fact the claimant worked a two week probation period prior to that, and was paid £640 for so doing by bank transfer on 3 August 2017. We therefore find that employment commenced on 17 July 2017 – although in fact in this case no issue turns on this.

20. It is not in dispute that the Respondent did not provide the Claimant with a written statement of particulars of employment at any point during his employment, nor were any payslips provided to him during his employment. Mr Iasi told us that he offered the claimant a written contract, and the claimant declined it. He said for the first time in answer to a question from the tribunal that he had a draft document with standard terms and conditions – even though he said that the only other employee about whom we have heard, a chef called Jose - also does not have a written contract. We consider that if

the respondent did have a draft pro forma, he would have given it to the claimant, who, particularly as English was not his first language, would have wanted such a contract to confirm not only his terms of employment, but also his tenancy as accommodation came with the job. Further, the failure to disclose such a draft to this tribunal again suggests there was none.

21. Both the Claimant and Mr Iasi told us that they agreed he would be paid a net sum of £1320 pcm, and he would be provided with a room in shared accommodation. At any one time four people were in the shared accommodation, including other employees. The claimant worked Monday to Friday 10am to, he said 2.30pm and Mr Iasi said 2pm, then again from 6pm to - he said10.30pm and Mr Iasi said 10pm. Saturdays he worked 5pm to 11pm and he had Sundays off. Whilst there was no claim before us for breach of the national minimum wage, the claimant in his statement stated that whilst some allowance had to be made for accommodation, he was paid less than the NMW, receiving just £5.90 per hour. Whilst we rejected the application to amend the ET1 to include a claim for breach of the working time regulations, we do accept the submission of Mr Werenowski that there is certainly no evidence from the respondent of compliance with those provisions relating to provision for holiday pay.

22. It is not in dispute that the claimant was not provided with payslips for any of the sums he was paid between 3 August 2017 and 4 December 2017. Mr Iasi said that this was because the claimant had failed to provide him with a P45 from his last employment. In his witness statement Mr Iasi said that the claimant declined to complete a new starter from as it would result in him having an emergency tax code and result in him overpaying tax and NI. This evidence lacked credibility as a net rate of pay had been agreed, and in fact the claimant did have a P45 which was provided to Mr Iasi following a request in January 2018. Mr Iasi very openly admitted that he did not pay any tax or national insurance provisions relating to the claimant at all. We set out below the circumstances surrounding the completion of a P45 new employers form in February 2018, which Mr Iasi again freely admitted to having completed with information he knew to be incorrect. Mr Iasi confirmed in his evidence that to the date of this hearing, he had taken no steps whatsoever to correct these matters with the HMRC. Whilst his accountants said that they could not produce backdated pay slips, this does not address the point, that an unpaid tax liability could be declared.

23. The claimant asked for, and was granted, time off on a number of occasions in the autumn of 2017 to attend medical appointments. Whilst his solicitor had submitted a claim for failure to make reasonable adjustments to permit this time off (which was withdrawn at the outset of the hearing as the appointments predated anyone knowing the claimant in fact had cancer), the claimant was clear that he was never refused any requests by Mr Iasi or anyone else. He was permitted paid time off to go.

24. Over the Christmas period of 2017 the claimant stayed with his son. The claimant was very unwell, and his skin and eyes were yellow. He was unable to get a GP appointment until 2 January 2018, at which time he was noted to be "jaundiced". A MED3 was provided by the GP stating that the claimant was unfit for work until 15 January 2018. The claimant says that he returned to work on 4 January 2018 and handed the Med3 to Mr Iasi, but was pressurised to work. Mr Iasi said that the claimant did appear to be unwell, and was "very yellow all over" but that the claimant did not hand him a medical certificate and insisted he was fit to work. Mr Iasi said that he would not permit a person to work in his kitchen if they were unfit as it might breach his employer liability insurance. It is agreed between the parties that the claimant did in fact work from 4 January to Saturday 13 January 2018 – and for this he was paid a net sum of £640 by bank transfer on 5 February 2018. Mr Iasi said for the first time in evidence before us that he had not paid the claimant for any period after 13 January 2018. We accept the account of the claimant that he did attempt to give Mr Iasi a sick note, having gone to the trouble of obtaining one from the GP (before us at page 68). We see no reason why the claimant would obtain the certificate, and not hand it over.

25. On Monday 15 January 2018 the Claimant attended his GP, and was given another sick note, saying he was jaundiced, which ran til 12 February 2018 (page 69). The GP made an urgent referral to the hospital. The claimant telephoned Mr Iasi and told him he was to attend the hospital for tests and would not be in work.

26. On 17th January 2018, the claimant had a CT scan at Lewisham hospital. His statement says (as does his ET1) that on this date "I learnt that I had pancreatic cancer". Before us, he gave evidence that this information was given to him by two doctors, one of whom sat beside him – a man, and another, kneeled in front of him – a woman. Both took this hands. They said they had bad news, and he had pancreatic cancer. The claimant said this was a day that he would never forget, and that the scene was etched into his memory. He was in a waiting room at the hospital. The claimant telephoned his son, who left work and arrived at the hospital at around 4pm. The claimant's son said on his arrival at the hospital, when his father told him he had cancer, the son asked to speak to the doctors. Those who had been on duty earlier in the day were no longer available. The claimant's son said that he and his father were taken into a small room by two young Indian looking people who confirmed that Mr Baran had pancreatic cancer. The claimant says at around 6pm he was outside, his son was nearby, and he telephoned Mr Iasi. He was adamant, in the face of firm cross examination, that he told Mr Iasi he had just been diagnosed with cancer, and that he used the word "cancer".

27. Mr Hoyle submitted that as the two people had been identified as Indian, it is likely that none of the four people in the room were native English speakers, and there may have been some miscommunication. He said that no medic would ever diagnose cancer from a CT scan, because biopsies must be taken. He relied heavily on the GP entry which reads as follows:

> "Called spoke to his son.
> He has been admitted to hospital. Will be doing more tests on Friday. Suspected pancreatic cancer. They have seen a small lump in his pancreas. They think the lung problem could be scarring from previous infection. They are focusing on pancreatic problem for now"

Mr M Baran (son) said he was giving the GP information in this call. He denied saying it was "suspected" cancer.

28. We accept entirely the evidence of the claimant and his son, that they were both told, on 17 January 2018, that the claimant had "pancreatic cancer". We firmly decline to draw any inference that there could have been miscommunication by individuals in the hospital because they were of Indian appearance. There is quite simply no evidence from which to draw such a conclusion save for the appearance of two people, and to assume language or communication ability from this would, in our view, be wholly improper.

29. We have considered whether the Claimant's evidence on this point could be undermined by a definitive diagnosis being recorded at some later point (particularly in light of the application to adjourn these proceedings to permit these records to be obtained, as set out above). However, even if the records did have the definitive diagnosis at a date later than 17 January, we unhesitating accept that what the claimant and his father heard, understood and genuinely believed on 17 January, was that he had been told the tumour found, was cancer. Furthermore, we accept that the claimant telephoned Mr Iasi, and told him, that he had been diagnosed with cancer on 17 January 2018. The claimant had not sought to hide his illness from Mr Iasi previously, and we can see no reason why he would have done so at this time. The claimant and his son were consistent, and very clear that they had received shocking news on this date, which remained very vividly in their memories, and they were able to provide us with significant detail.

30. Mr Iasi said for the first time in his evidence that the claimant gave him information about being jaundice and having a blood problem, possibly from food poisoning. We noted that none of this was put in cross examination by Mr Hoyle to the claimant or his witnesses. We and consider it highly likely that had Mr Iasi given such an account at any point prior to cross examination, it would have appeared in his witness statement and have been put to the claimant in questioning by Mr Hoyle.

31. The claimant was admitted into hospital on 17, and remained there until 30 January 2018. We were provided with an admission document (pg 155) which Mr Hoyle said, and we accepted, was incomplete. We do however accept the evidence of the Claimant's son, that when his father was admitted to hospital on 17 January 2018, he took a photograph of the admission form, which had been completed by somebody in the hospital. It is not the fault of the claimant or his family that it was incomplete, and they had no power or influence over who filled it in – insofar as there was any suggestion the document was fraudulent, we reject it. We know from other documents – such as the

discharge summary posted to the Claimant's GP, that he was admitted on the said date, to the said hospital.

32. On 20th January 2018 Mr M Baran telephoned Mr Iasi; we had a printout Mr Baran's telephone record showing a 28 minute call and Mr Iasi confirmed the call was to his number. One purpose of the call was for Mr M Baran to ask for payslips for his father, and say he had a sick note to post. During this call Mr Iasi told Mr M Baran that he needed his father's P45 from his previous employment - Mr M Baran expressed surprise he didn't already have this and sent a copy via recorded delivery on 22 January 2018. Mr Iasi said that Mr M Baran asked for the postal address of the Respondent, and that was the entirety of the call. Mr M Baran said that he told Mr Iasi about his father's health and the tests he was undergoing, and that on telling him this Mr Iasi asked that the claimant resign, and he (Mr Iasi) offered to help write a resignation letter. We accept the account of Mr M Baran that in a 30 minute call he did update Mr Iasi about the claimant's condition and his having cancer, and that he was asked to write a resignation letter for his father, and that he rejected outright the suggestion that his father should resign. This rejection of the invitation to resign was done without recourse to his father, but later confirmed by him. We did not accept that there was any doubt about this arising from the claimant's witness statement saying that 'he also' rejected the suggestion and there having been no second call to relay it; we accept that the claimant's reaction of rejecting such an invitation to resign was the same as his son's, which is to day an immediate and outright rejection, and do not consider the statement to be communicating anything more than this.

33. On 31 January, having been discharged the previous day, the claimant attended an outpatients appointment. A letter typed on 7 February 2018 (pg 153) says:

"I did explain to the patient that his case was discussed in our MDM and the decision was that he has got T2 N1 MO pancreatic head tumour".

The Cancer Research UK document explains that "T2" is a description of the stage of cancer a tumour is considered to have reached. The tribunal conclude that it is beyond doubt, that by 31 January 2018, the claimant had been told by his treating doctors, that the tumour on his pancreas, was cancerous.

34. On 6 February 2018 a call took place between the claimant's son and Mr Iasi. Mr Iasi was silent as to this call in his statement, but upon the (late) disclosure of Mr M Baran's telephone records indicating a 20 minute call had taken place, accepted that it had. Before closing submissions Mr Hoyle sought to question the telephone record as it appeared to have 'shading' unlike the record for 20 January – despite his client having admitted to a call taking place and purporting to tell us of the content. The original record was produced the next day, and simply showed that the call had been highlighted in yellow on the original, so when photocopied for the bundle light shading had appeared. As to the content of the call, Mr Iasi tod us that having received a sick note that expired on 12 Feb, wanted to know if the claimant would be

working on 14 February 2018. (Obviously a very busy night for an Italian Restaurant.) The claimant's son concurs that this was the start of the conversation, and says that Mr Iasi went on to say that if his father was not at work on 14 February, this would be "enough" and he would be dismissed. Mr Iasi confirmed that during the call he told Mr M Baran he would be issuing a P45 to the claimant, and that his belongings needed to be collected. The claimant said that his son reported to him on 6 February 2018 that he was being dismissed, and that this was a profound shock to him, and a blow. (See further below under 'remedy'). We accept the evidence of Mr M Baran that Mr Iasi did dismiss the claimant in this call, and that of the claimant that his son reported this to him immediately thereafter.

35. The claimant was dismissed, summarily on 6 February 2018.

36. On 8 February 2018 a GP entry (with a doctor who was not the one who had generally been treating the claimant / talking to his son) reads:

> "I have spoken to the son after getting the patient consent. The patient diagnosed with pancreatic cancer. Jaundice. Will have operation in KCH. Need med3 and his inhaler – agreed med 3 & RX to be collected by the family from the reception".

The claimant's son cannot recall whether he was telling the doctor of the diagnosis, or whether the doctor was telling him; as the letter written from the hospital clinic to the GP (dated 7/2/18) had not been received at the time of this call, it seems most likely that it was the son telling the GP what had been happening in the hospital – i.e. "will have operation". The MED3 certificate for the period 8 February 2018 to 30 April 2018 continued to say "jaundiced" in the diagnosis box; this again might indicate that it was the son telling the doctor of the diagnosis rather than the other way around, as a GP had confirmed jaundice and by this date the GP surgery has not received written confirmation from the hospital of the cancer diagnosis.

37. Mr Iasi said that on 12 February 2018 the claimant telephoned him, and said that he was not well enough to work, was due to have an operation, may go back to Poland thereafter, and wanted to arrange for collection of his P45 to give to DSS, and his £320 deposit for the accommodation, and to have his room emptied. We do not accept this evidence. The claimant denies it, and it is clear that he anticipated receiving sick pay whilst he was off work. We are unable to see any reason why he would resign his employment. Nor do we accept he would have expressed any intention to return to Poland after surgery given he knew it was to be followed by chemotherapy and radiotherapy. (In fact he did not go back to Poland at all in 2018.) Further, the account of Mr Iasi' - that the claimant told him he was to have an operation, that Mr Iasi did not know what this was for, and did not make any enquiry about it - also lacked any credibility. Both Mr Iasi and the claimant said their working relationship had been perfectly good, and Mr Iasi said he had spoken regularly to the claimant to be updated as to his medical situation.

38. Upon the claimant's son asking, repeatedly for wage slips, and sending the P45, Mr Iasi fraudulently completed such a document - page 108. He said it

was not possible to back date the start of employment date, but in fact he did so, completing this form in early February, saying employment had started on 1/1/18. This was known to be untrue.

39. We note at this juncture, that the claimant asserted in his statement that he had asked for a contract and payslips on numerous occasions. Mr Iasi accepted there were request for payslips but said he was waiting for the claimant to produce his P45. Whilst it was undoubtedly an omission for the claimant not to have volunteered his P45 to Mr Iasi on starting employment, had he been asked for it, we find he would have supplied it. We find this because (a) when there was a request in January it was produced immediately, and (b) the HMRC records before us confirm the claimant's evidence that he has paid tax and NI in previous employments, and there is no reason, having agreed a net salary, he would have wanted to avoid doing so in this employment. Mr Iasi on the other hand was retaining monies he ought properly to have been paying to the revenue by not putting the claimant on the payroll and so did benefit financially from not providing payslips. In balance, we do not accept that the claimant was making repeated requests for payslips (or his contract), because if he had been, the topic of the P45 would have been fully ventilated earlier.

40. Remaining sections of the P45 were completed by Mr Iasi's accountant (presumably on his instruction), saying that employment had ended on 2 February 2018, which Mr Iasi said was not correct, but was convenient because the payroll date was 3rd of each month. It is certified as having been completed on 14 February 2018. It says that the total pay in the employment to the claimant was £692.59. This sum is taken from a payslip which Mr Iasi was unable to explain to the tribunal. The payslip gave a gross salary of £429.62, said there were tips of £262.97, and an accommodate credit of £97.06 which is then debited in the next column. Mr Iasi said the accommodation amount was for "tax purposes", but could not tell us what that meant. He said that all customers are charged a 'service charge' and that tips are shared only by waiting staff; kitchen staff do not receive any. He said that he employed 3 people in the kitchen, and did not employ any waiting staff, as this was done by him, his wife, his brother-in-law, and nephew, none of whom are employees. The net sum shown of £692.59 does not correspond to any sum every paid to the claimant by the Respondent. The Respondent could have provided evidence from its accountants about how these sums were calculated and has not.

41. In his evidence Mr Iasi said that the claimant had been paid a net sum of £640 for his work in January, and had not been paid for any time after that, prior to the EDT. This was the first time the claimant knew what the sum of £640 deposited into his account on 5 February 2018 was for.

42. A number of telephone conversations took place between 6 and 24 February to arrange the Claimant's collecting his belongings and P45, between Mr Iasi and Mr M Baran.

43. On 24th February, the claimant and his son were driven by their friend, Mr Skladnik to the Respondent's property. The claimant's belongings were in a suitcase and black bag. The Claimant had with him the MED3 form the doctor had drawn up on 8 February 2018 – it is not entirely clear why he did this given it entirely post -dated 6th February from which date he had been dismissed. He was handed a cheque for £320 – the deposit for the accommodation. There is a dispute as to whether Mr Iasi also gave the claimant the payslip dated 2 February 2018; we accept Mr Iasi's evidence on this point as he had clearly had the document drawn up, having been chased for payslips, and think it more likely than not he would therefore have handed it over. Mr M Baran said that his exchange about the lack of payslips with Mr Iasi became heated, that Mr Iasi said he could not produce backdated payslips, and that it would cost him a lot with no benefit to the claimant. Mr M Baran reports that Mr Iasi said he would pay to the claimant the NI contributions so the claimant could pay this tax himself. Mr Iasi, as set out above, initially said that he had asked Mr M Baran to write to him setting out what he thought should be done about tax, then said he offered to pay the tax, then withdrew this statement, then repeated it again. We accept the clear and consistent accounts of Mr M Baran.

44. On 28th February 2018, having, at the suggestion of Mr Skladnik, consulted a polish speaking solicitor, the claimant wrote to Mr Iasi saying that Mr Iasi knew of the cancer diagnosis, asking why he was dismissed, why he had not been provided with payslips and why he had only recently been registered with HMRC. Mr Iasi did not write any response to this letter. He told us that was because he did not agree there had been a dismissal. We did not understand why he did not reply simply setting out that he disagreed knowing about the cancer or having dismissed the claimant, nor why when he took legal advice on 12 March 2018, did not instruct a response then. Mr M Baran said that Mr Iasi telephoned him and his father repeatedly on 1 March 2018 – the date he was being taken down to surgery, expressing anger at receiving the letter and saying he would not be responding. As no response was ever sent, and in light of the evidence of the claimant and his son, we accept that these calls did take place.

45. We note that if Mr Iasi's account of the claimant having resigned due to ill health, and not telling him of cancer had been correct, it would be difficult to understand why, on receipt of the letter of 28 February 2018, Mr Iasi didn't seek to express any sympathy or support for the claimant, and as a loss to understand why the letter would provoke anger.

Amendment to ET1 to claim unlawful deduction from wages.

46. At the conclusion of Mr Iasi's evidence, the Tribunal asked whether it was necessary to amend the ET1 in light of the admission of non-payment of any remuneration after 13 January 2018, as the claimant's employment on any account continued into February 2018. The Claimant sought permission to make such an amendment. The Respondent objected on the basis that such

an amendment was grossly out of time, and the Claimant, who had been represented throughout, could have sought particulars of what the February 2018 payment had been for.

47. We considered the legal frame work in which amendments can be made, as set out above.

48. Claims under s 13 ERA 1996, complaining of an unlawful deduction from wages, must be presented to a tribunal within 3 months of the deduction, unless it was not reasonably practicable to have presented the claim within that period. It was clear to us that the claimant had no knowledge of the fact the Respondent had not paid him for any period of time after 13 January 2018 until Mr Iasi was giving evidence. We are entirely satisfied that, in circumstances where the claimant had been complaining of a lack of payslips since at least January 2018, and the respondent did not offer any contemporaneous explanation of what pay represented what, it was not reasonably practicable for this compliant to have been made before 9 January 2020. The claim is not therefore out of time, and we consider that it is in accordance with the overriding objective to consider it alongside the other claims. We relied in particular on the fact that the Respondent had no substantive defence to this claim, and did not suggest that had it been on notice earlier, there were relevant enquiries which could have been made or evidence gathered in order to defend the claim.

49. We accordingly grant permission to amend the ET1 to include a claim for an unlawful deduction from wages between the 14 January 2018 and the EDT.

LAW.

50. The claims we are to determine are:

Disability

51. It was agreed that a person diagnosed with “cancer” is deemed to be disabled for the purposes of s6 of the Equality Act 2019 (“EqA”). The dispute in this case is the date on which the claimant was told he had cancer / told the respondent of that.

Direct disability discrimination

52. Section 13 EqA provides that 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.

53. This requires consideration of the reason why the claimant was treated as he was.

54. Whether the person has the protected characteristic or not, they may be discriminated against if the reason for the treatment is the protected

characteristic. I.e. if the claimant is perceived as being disabled, he will be within the ambit of s13 EqA, whether he is, as a matter of law, within s6 EqA at that time, or not.

55. If the claimant proves facts from which we could decide, in the absence of any other explanation, that a contravention of the EqA has occurred, we must hold that contravention has occurred unless A shows they did not contravene the provision – s136 EqA.

Discrimination because of something arising from disability.

56. Section 15 EqA provides that a person discriminates against a disabled person if, because of something arising in consequence of B's disability, he treats him unfavourably. This may be justified, but no defence of justification is relied upon in this case.

57. Liability will not apply under this section if "A shows that A did not, and could not reasonably have been expected to know, that B had the disability".

58. Simler P in *Pnaiser v NHS England [2016] IRLR 170, EAT*, gave detailed guidance as to the correct approach to a claim under this section at paragraph 31. We have reviewed this carefully, and paid particular attention to sub paragraph (h), that the knowledge required under this section is of the disability, not of the "something arising" in consequence of the disability.

59. The relevance of this to this case, is that the claimant says that his inability to attend work from 15 January 2018 was a consequence of his disability; clearly the Respondent knew of this "something". The question however is whether the respondent knew, or could reasonably have been expected to know, of the disability.

Automatically unfair dismissal for asserting a statutory right

60. Section 104 ERA 1996 provides that a dismissal will be automatically unfair if it is by reason of asserting a statutory right. The right to written particulars of employment and to payslips are relevant statutory rights.

Wrongful dismissal

61. If the claimant was summarily dismissed, he will be entitled to one week's notice.

Compensation for failure to provide him with a written statement of particulars of employment and wage slips, and failure to provide written reasons for dismissal.

62. Section 38 of the Employment Act 2002 provides that where there is a failure to give a statement of particulars of employment to an employee in a claim listed in schedule 5 thereto, the tribunal must make an award of 2 weeks' pay, and may make an award of 4 weeks' pay if it considers it just and equitable to do so. The claims in schedule 5 include discrimination at work claims under the Equality Act.

63. While there is an obligation on employers to provide wage slips under s8 ERA 1996, failure to do so does not attract any further award in compensation.

64. Similarly, written reasons for dismissal should be given if requested, section 92 ERA 1996, but no specific compensation flows from a failure to give this.

Unlawful deduction from wages.

65. Section 13(3) ERA provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable to him on that occasion, the amount of the deficiency shall be treated as a deduction.

Conclusions on Issue.

66. DISABILITY : Was the claimant a disabled person at the material time?
    a. It follows from our findings of fact, that we find the claimant was diagnosed with cancer on 17 January 2018, and was "disabled" for the purposes of s 6 EqA from that date.

67. DIRECT DISCRIMINATION, S13 EqA: Did the Respondent subject the claimant to the less favourable treatment of summary dismissal on 6 February 2018 because of the Claimant's disability?
    a. We have found as a fact that the claimant was summarily dismissed by Mr Iasi telling his son this, on 6 February 2018.
    b. We are satisfied that the reason Mr Iasi did this was because the claimant had cancer and was unable to return to work – by 14 February or at all at that time.
    c. If we had not been satisfied that the claimant was diagnosed with cancer definitively on 17 January, or are wrong on this - we would in any event have accepted that the Claimant told Mr Iasi that a tumour believed to be cancer had been discovered on 17 January 2018, and that in the days thereafter as more tests were being conducted on the tumour (not due to any food poisoning), that Mr Iasi's dismissal of the claimant was because Mr Iasi perceived him to have cancer.

d. The claimant's claim of being dismissed because of his disability is therefore upheld.

68. DISCRIMINATION BECAUSE OF SOMETHING ARISING FROM DISABILITY, S15 EQA: The claimant claims that his absence from work at the material time arose from his disability. Was he treated unfavourably by being summarily dismissed on 6 February 2018 because of that? Did the Respondent know, or could the Respondent reasonably have been expected to know that the claimant had a disability at the material time?
    a. The claimant's absence from work from 14 January 2018 was 'something arising' from his disability.
    b. We have found that the Respondent knew not only this, but also knew of the disability. Had we accepted Mr Iasi's evidence he did not know of the cancer diagnosis by the EDT, we would have in any event found that he could have been reasonably been expected to know by asking the claimant, who would have told him he had cancer.
    c. We have found that the reason for the dismissal is because of the claimant's disability. Further or alternatively, we are entirely satisfied that it is because of something arising in consequence of the disability, namely his inability to work in January / February 2018.

69. AUTOMATICALLY UNFAIR DISMISSAL: Was the claimant dismissed for asserting a statutory right of requesting written particulars of employment and/or wage slips between August 2017 and January 2018?
    a. We are not satisfied, on a balance of probabilities, that the claimant repeatedly requested his wage slips in 2017; in any event, whatever requests he may have made, we do not find this was the reason for the claimant's dismissal. This claim is dismissed.

70. WRONGFUL DISMISSAL: Was the claimant dismissed summarily on 6 February 2018, or did he resign?
    a. The parties agreed that if we found the claimant was dismissed, it follows that he is entitled to one weeks' notice pay. This claim therefore succeeds.

71. S32 EA 2002 /S8 ERA 1996: Was there a failure to provide the claimant with a written statement of particulars of employment and/or wage slips?
    a. There was a failure to provide the claimant with a written statement of particulars of employment.
    b. There was a failure to provide the claimant with any payslips during his employment.
    c. There was a failure to provide the claimant with written reasons for the termination of his employment, despite his requesting this in writing.

REMEDY

72. We heard further evidence from the claimant in relation to remedy. He told us that two dates stuck most in his mind, 17 January 2018 when he was told he had cancer, and 6 February 2018 when his son told him he had been dismissed.

73. The impact of the dismissal he described to us as being very upsetting indeed; at a time when he had recently be diagnosed with cancer and was very ill and facing major surgery, he was left with no income and no home. He asked himself why he could be treated in such a manner. He claimed benefits, but was in fact initially refused and it was only after an appeal to a benefits tribunal that in April 2019 – some 14 months after dismissal, that he received any monies. He was fortunate in being able to live with his son who had to support him entirely during this period.

74. In answering cross examination questions from Mr Hoyle, the claimant did not seek to minimize other stressful factors in his life – such as his wife having issues in Poland with her pension, and longstanding health issues with his back – and indeed the shock and upset of receiving the cancer diagnosis. Nor did he exaggerate the impact the Respondent's decision to dismiss had on him. He did however express what a blow it was to him to be without both a job and a home at that time, particularly with no warning.

75. The claimant explained that he had been very depressed – and indeed correspondence before us from the psychiatrist at the cancer hospital records that he felt very low 'having been sacked when he told his boss of the cancer'. The claimant was diagnosed with anti -depressant medication – he had never had a diagnosis of depression or taken such medication at any time earlier in his life. This was a first.

76. Each party made submissions as to remedy. Mr Hoyle said that employment was bound to end given the claimant's health, and that from 14 January 2018 onwards he would only have received SSP from the respondent. He accepted the difficulty with this submission was that the claimant would not have been entitled to SSP in fact because the Respondent had failed to pay any NI contributions during his employment. As to injury to feelings, Mr Hoyle said that £3000 was the appropriate amount.

77. As to what would have happened had the claimant not been discriminated against by being dismissed, we do accept that his employment would have ended by reason of incapability. We find this would fairly have occurred after a period of 6 months, given that the statutory entitlement to SSP expires at that time and his employment with the respondent had been for a relatively short period of around 7 months.

78. We made the following pecuniary awards:

a. The claimant suffered unlawful deductions for the period between 14/1/18 and his EDT on 6/2/18. He would not have been eligible for SSP as insufficient NI payments had been made. Therefore, we find that he would have received his full pay. For this period of 3 weeks and 1 day, he is entitled to £320 net for three weeks = **£960**. (Note, we have taken the net rate of pay from the single payslip before us, produced by the Respondent).
b. In relation to future loss of earnings to a period when a fair dismissal could have been effected, we accept Mr Hoyle's submission that in fact the claimant would have moved onto a rate reflecting Statutory sick pay. In fact the claimant had no income until 12 April 2018 (following a successful appeal – pg 183). For the period 7/2/18 – 12/4/18, we award what he would have got by SSP (taking the rates from the government website). **£715.70**.
c. For the period from 13/4/18 to whenever a fair dismissal would have taken place (in Autumn 2018), the claimant in fact received more in benefit payments (PIP) than he would have in SSP. We do not therefore award any further future losses.
d. We have awarded 1 weeks' notice for wrongful dismissal - **£430**
e. For failure to provide a written statement of terms of employment, we consider it appropriate in all the circumstances set out above, bearing in mind the deliberate untruths told to HMRC, to award four weeks' net pay: **£1720.**

79. As to injury to feelings, we take into account that this is a one off act, but that dismissal is a very significant matter, and the impact this had on the claimant was profound, as he told his treating psychiatrists. He was inevitably going to have a very difficult 2018 given his diagnosis, treatment and, as we have found, the fact this would lead to the loss of his job. However, the manner in which he was dismissed – telling his son over the phone when he had just been discharged from hospital - was particularly hurtful.

80. The tribunal have reminded themselves of the up to date Vento guidelines, the presidential guidance on injury to feelings awards, and have also reviewed the discrimination awards reported in Harvey on Employment Law and Industrial Relations in division L, part 7. We noted an award of £7500 to a deaf employee who was refused an interview because of their disability in 2007 (para 1051) and an award of £12,000 to a claimant in 2010 who had an offer of employment withdrawn because he was HIV positive; a one off act of discrimination which had a significant impact on that claimant (para 1052.03). We consider the dismissal of the Claimant after around 7 months in post to be of similar gravity, and remind ourselves that it is essential to consider the impact of the act of discrimination we have found, on the claimant, Mr Z Baran.

81. We consider that the appropriate level of compensation for injury to feelings is at the bottom end of the middle bracket of Vento, and award the sum of £**10,000**.

82. Added to this is interest at 8% from the date of the act of discrimination to the date of judgment (which was given orally on the final day of the hearing): £**1530**.

83. At the conclusion of our giving judgment, Mr Werenowski submitted that the ACAS uplift for failure to follow any procedure whatsoever, should be applied not only to the pecuniary awards, but also to the award for injury to feelings. Mr Hoyle had not considered this point. Given the late hour, we reserved our judgment on this matter.

84. Section 207A of the Trade Union and Law Reform Consolidation Act 1992 provides:

> **207A Effect of failure to comply with Code: adjustment of awards**
>
> (1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
>
> (2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (*a*) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (*b*) the employer has failed to comply with that Code in relation to that matter, and
>
> (*c*) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

85. Schedule A2 includes claims presented under the Equality Act 2010, and under the Employment Rights Act 1996. (It does not include a complaint under the Employment Act 2002 – ie. the four weeks' pay for failure to give written particulars of employment.)

86. A recent example of such an uplift being upheld by the EAT is seen in the case of *Base Childrenswear Ltd v Otshudi* UKEAT /0267/18 (considered by the court of appeal in relation to a different issue). In that case pecuniary losses as well as the award for injury to feelings, interest thereon and aggravated damages were all uplifted by 25%. The EAT found there was double counting in awarding an uplift as well as aggravated damages as the factors being taken into consideration for both awards were the same.

87. In this case Mr Iasi did not attempt to follow any procedure whatsoever before dismissing the claimant. We accept that the claimant's dismissal was inevitable, but with a fair procedure he would have been subject to such an abrupt shock

but would have been able to plan moving out of his accommodation and applying for benefits and putting other affairs in order in a dignified manner. We do not hesitate in finding that an uplift of 25% is appropriate, and we apply this to all the above sums save for the four weeks for failure to provide written particulars.

88. A 25% ACAS Uplift on the above £13,635.70 amounts to £3,408.92. The Respondent must therefore pay to the claimant **£18,764.62**

_____
Employment Judge Tuck

Date: 24 January 2020

Sent to the parties on: ..10/02/2020

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For the Tribunal Office