EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Johnson**
Respondents:	**(1) Robert (known as Robin) Webb** **(2) KOA RTM Co Ltd**
Heard at:	**East London Hearing Centre**
On:	**1, 2, 3 and 4 February; and in chambers on 7 March, 25 July, 12 and 17 October 2022**
Before:	**Employment Judge Jones**
Members:	**Ms M Legg** **Dr J Ukemenam**

Representation

Claimant:	Mr M Salter (Counsel)
Respondents:	Mr B Randle (Counsel)

RESERVED JUDGMENT

1. The Claimant was not dismissed. The complaint of constructive unfair dismissal fails and is dismissed.

2. The Claimant was not automatically unfairly dismissed.

3. The Claimant was a disabled person for the purposes of the Equality Act 2010.

4. The complaints of disability discrimination fail and are dismissed.

5. The complaint of harassment fails.

6. The complaint of age discrimination fails and is dismissed.

REASONS

1. The Tribunal heard the claimant's claims of constructive unfair dismissal, discrimination arising from disability, direct age discrimination and disability related harassment.

2. At the start of the hearing, we had a discussion on the issues that the Tribunal would be asked to decide.

3. At the end of the discussion, it was agreed that the Claimant brings one complaint of harassment at paragraph 14.9 of the list of issues sent to EJ Burgher following his preliminary hearing, along with the first part of paragraph 25 of the grounds of claim. The balance of that paragraph relates to the allegation of discrimination arising from disability. The rest of the issues are as set out in the list. The respondent confirmed that it was not relying on justification for any age discrimination.

4. On the respondent's application, the Tribunal ordered the Claimant to redact parts of his witness statement that were not relevant to the issues in the claim.

5. The Tribunal apologises for the delay in the promulgation of this judgment and reasons. This was due to difficulties in the Tribunal arranging to meet in chambers during the year and pressure of work on the judge. This delay was regrettable but unavoidable.

Evidence

6. The Tribunal had an agreed bundle of documents. We had witness statements from the Claimant and on his behalf, from Karen Day, Director of Robert Day Associates who knew the Claimant in his capacity as Service Manager; and Madalene Drury, who had previously been a director of KOA between July 2018 – April 2019.

7. On behalf of the Respondents, we had witness statements from the 1st Respondent, Robert (known as Robin) Webb, Chairman of KOA Right to Manage Ltd and the Claimant's line manager; Riaz Ahmed, temporary Contracts and Services Manager for the 2nd Respondent; and Mariline Cooke, resident and board member.

8. All witnesses gave live evidence at the hearing. Apart from Mrs Day, all the other witnesses live in either Charles or Stuart House which are situated in close proximity to each other and are both part of KOA Right to Manage Ltd.

9. The Tribunal made the following findings of fact from the evidence produced at the hearing. Evidence is a combination of live evidence at the hearing and documents. The Tribunal has endeavoured to make findings of fact only on those matters that are relevant to the issues that we have to determine. We were especially concerned to only make findings on matters relevant to the claim in this case as we were conscious that the Claimant, 1st Respondent and most of the witnesses continue to be neighbours and are likely to be so for the foreseeable future and it would be in the interests of justice not to unnecessarily damage those relationships.

Findings of Fact

10. The Kingsmead development consists of a couple of blocks of flats. The Kingsmead Owners Association (KOA) was incorporated on 11 March 2009. This was following the introduction of the Commonhold and Leasehold Reform Act 2002

and the creation of the statutory right for leaseholders to manage their own properties by setting up a 'Right to Manage' company.

11. Prior to the formation of KOA, the properties and the nearby car park were owned by Jaygate Developments Ltd who provided 'combined facilities support' through PMS. The claimant was initially employed by Jaygate as Service Manager of the flats. He began his employment on 1 January 2007. He was TUPE transferred to PMS Leasehold Management Ltd from 1 July 2007. PMS employed him as its on-site Service Manager from 2007 on a salary of £23,500.

12. The main reason for the residents creating KOA, a right to manage company, was to keep costs down and stop the increase in service charges that had happened when a corporate management company managed and maintained the properties. The residents wanted to have the freedom to choose how they managed the properties and not always have to deal with the freeholder, an absent management company, situated far away from the properties. PMS resisted the respondents' application and did not cooperate with the transfer of the Claimant's employment to KOA. As a result, KOA was not provided with any of the Claimant's employment documentation, on his transfer from PMS. They only had the job description which was at page 67 of the hearing bundle. PMS did not pass over to the 2nd Respondent any procedures, handbooks or details of any practices that they used in managing the Claimant.

13. The 1st Respondent confirmed that the job description on page 67 of the bundle was the Claimant's just before the transfer, but it is likely that the 2nd Respondent did not have it until sometime after the transfer.

14. When the Claimant was employed and managed by PMS, he had no on-site line management. There was no other PMS presence on the estate and therefore no direct supervision of him while at work. Once KOA won the right to manage the buildings from PMS, the claimant's employment transferred along with the buildings from Jaygate to KOA. The buildings have approximately 95, one, two and three-bedroom flats. The car park, which is situated below Stuart House; has 209 car spaces.

15. KOA took over the combined facilities and support activities (such as a gym and swimming pool); of the buildings known as Charles House and Stuart House. There was also the nearby car park which was also owned by Jaygate Developments. The claimant's employment transferred to the 2nd Respondent on 1 July 2013 along with the right to manage Charles House, Stuart House and the car park.

16. KOA manages the funds for each building, which it uses to pay bills and carry out repairs and maintenance. As a not-for-profit organisation the 2nd Respondent believes that it has to maintain a zero cash balance. The management of the buildings is carried out by a board of volunteer directors. The 1st Respondent is the Chairman of the board and Ms Drury was on the board for a short time. Major John Nixon was on the board and was also the person the Claimant frequently liaised with about work as he was in the office more frequently than Mr Webb.

17. Once it took over management of the properties, KOA changed a lounge in Stuart House into an office which was then shared by the claimant, John Nixon and Mr Webb. Both Mr Nixon and Mr Webb worked for KOA on a voluntary basis, which meant that they were not remunerated for their services. Mr Webb was the chairman and Mr Nixon, the treasurer/financial officer.

18. KOA provided the Claimant with all the necessary tools, equipment and materials that he might require for the job. The respondent also built the Claimant a workshop in Stuart House, which he used for working on jobs. The 1st Respondent asked the Claimant whether he required health and safety training and he said that he did not need any. Mr Webb told him *'ok carry on'*.

19. The Claimant had detailed knowledge of the day-to-day, operational matters relating to the management of the properties and the car park. Mr Webb and Mr Nixon did not have that detailed knowledge. The Respondents were conscious of the fact that they also did not have much documentation from PMS about the Claimant's employment, so it was decided to try to regularise matters with him. On 19 July 2013, the respondent issued the claimant with a fresh statement of terms and conditions of employment. (page 110) The claimant's post was described as Contracts and Services Manager, working 40 hours a week. His working hours were described as between 9 AM and 5 PM daily and in addition, 8:30 AM to 10:30 AM on Saturdays. The claimant was entitled to a daily lunch break of one hour. The statement of terms and conditions went on to state as follows:

> *In addition you will be available for emergency callout during the silent hours up to midnight. However, to ensure that you meet the requirements of the working Time regulations 1998 you must ensure that if you are called out to work during the silent hours that you make suitable cover arrangements in order for you to have an 11 hour rest period. The onus will be on you to make these arrangements. You will also be required to make these arrangements when taking leave.*

20. A description of the claimant's duties is on page 68 of the hearing bundle. That description includes the following tasks: '*to ensure the smooth running of the development; to supervise and facilitate all on-site contractors, namely the cleaners, gardeners, lift engineers, water pump engineers, car park engineers and abseiling window cleaners; to ensure all contractors are briefed in health and safety procedures and are adequately covered; to control access to the development of all contractors and to ensure they are both signed in and out of the development; to assist, where applicable, the meter readers; to ensure the efficient operation of all communal services and equipment, this includes lifts, CCTV, car park entry and gym equipment; to be available to assist all new owners with enquiries and where applicable liaise between owners and managers agents; to maintain a log of any incidents as and when necessary.'*

21. In a separate section entitled <u>daily tasks</u> the following is listed: '*check the site security, check the bin stores and keep clean and tidy; issue and control use of car park permits; and vacuum and, dust the foyers of both Charles and Stuart houses'.* The claimant's <u>weekly tasks</u> were to *check the plant rooms and the lighting in all areas to see whether there was a need to replace light bulbs and to purchase as necessary.* On a <u>monthly</u> basis the claimant was to *provide electricity and water readings for the treasurer. (The underlining is the Tribunal's).*

22. The Claimant also had to supervise contractors engaged to replace emergency lighting in both houses and redecoration of communal areas in both houses and the car park.

23. The Claimant signed the new terms and conditions on 28 August 2013 (112). The statement of terms and conditions confirmed in the '*remuneration'* clause that the Claimant's wage was now going to be £27,000. This was an increase in his wage. Any additional hours worked would be rewarded with the approval of TOIL (time off in lieu) and if the Claimant was called out during the silent hours for an emergency, he would be paid a flat sum of £50 and at a time and ½ hourly rate. A similar arrangement applied to hours worked on Saturdays.

24. The Claimant's evidence was that in reality, he was seldom required to work on Saturday and he never claimed the £50 fee or the time and ½ hourly rate as if he ever had to work during the silent hours, he usually took time off in lieu, including extended lunch breaks or leaving early.

25. We find that when the 2nd Respondent took over the management of the buildings it noticed that the Claimant charged residents personally for programming key fobs which they needed in order to gain access to their building and to use the gym. When he received payment from residents for doing so, he would keep the money and in addition, would invoice the 2nd Respondent for the cost of the blank key fobs. The 1st Respondent realised that this was happening as he had to sign or approve the Claimant invoices for payment. The 1st Respondent was concerned about this, but he believed that he could not stop the Claimant from doing this as he was unsure whether this was part of the arrangement the Claimant had with PMS. They were not able to get any other information from PMS about any informal arrangements that it might have had with the Claimant, which covered things like the key fobs and cards..

26. The 2nd Respondent wrote to the claimant on 25 June 2014 to notify him that his salary would increase to £27,420 from 1 July 2014. The letter also stated that the 2nd Respondent wanted to thank the Claimant for his dedicated service during the past year.

27. In 2015 the Claimant was diagnosed with cancer. As part of his cancer treatment the Claimant had 30 sessions of radiotherapy over a six-week period. During that time, he would attend work every morning up until around 11:30 AM when he would leave work to attend the hospital for radiotherapy. Also, the Claimant took one week off work for medical treatment related to the cancer. The 2nd Respondent told the Claimant to take all the time he needed for his treatment and recovery. The Claimant has been in remission since the end of 2015 and continues to have regular check-ups to ensure that the cancer has not returned.

28. The 1st Respondent's wife died from cancer over 10 years ago.

29. While he was having treatment for cancer, the 2nd Respondent took certain tasks away from the Claimant, as a way of supporting him while he was dealing with his illness. Major Nixon took on a lot of those tasks that were part of the Claimant's job, to ensure that he was not too busy or stressed during his treatment and recovery.

30. In an invoice the Claimant submitted to the respondent on 31 July 2015, he included a claim for proximity cards for 16 Charles House and 25 Stuart House. He was paid all that he claimed on that invoice. From 1 July 2015 the Claimant's salary was increased to £28,240 per annum.

31. During 2015, the Claimant found out about his right to a workplace pension. He spoke to the 1st Respondent and expressed his desire to participate in an auto enrolment pension scheme. Although the Claimant asked about this in 2015, it was not compulsory for employers to have a workplace pension until 2017. There was a discussion between the Claimant and the 1st Respondent about this at the time. We find it unlikely that the 1st Respondent expressed any reluctance to putting a workplace pension scheme in place. The Respondents were simply not going to do so until required by law. The Claimant put his request in writing on 6 June 2017 and it was during that year that the 2nd Respondent agreed to provide the Claimant with a workplace pension.

32. On 20 June 2017, the 1st Respondent wrote to the Claimant to confirm that the Claimant would join the workplace pension scheme and contribute 10% of his salary into it and would receive a salary increase to £29,580 pa subject to signing and returning an amended contract.

33. By letter dated 26 June 2017, the Claimant wrote to the 2nd Respondent and stated that before he signed the revised contract, he wanted the 2nd Respondent to consider making his pay rise the same as the rate of inflation, and paid into the pension scheme, together with the employer's contribution of 1% and his contribution of 10% and removing all mention of Saturday mornings from the contract. The 2nd Respondent felt unable to do so. The Respondents wanted the Claimant to be around on Saturday mornings because most of the residents worked outside the home during the week and the 1st Respondent considered that it would be helpful to have access to the Claimant on Saturday mornings, just in case there were repairs that needed to be done or if they had any other queries.

34. The 1st Respondent considered that the Claimant had had an increase in his wages at every salary review since his employment transferred to the 2nd respondent and that in the circumstances, this was a reasonable offer. In their response, the Respondents referred to there being on the Claimant's part *'a lack of appreciation of the substantial salary'* that he was being paid at the time. The Respondents felt that the Claimant was well paid and that there was no recognition from him that his salary had increased since the TUPE transfer, even though he had not taken on any other significant duties.

35. In June 2017 the Claimant signed the contract of employment but remained unhappy that the 2nd Respondent had included time on Saturday morning as part of his working hours. He asked for the requirement to work Saturdays to be removed. The working hours set out in the 2017 contract is stated in exactly the same way as it was set out in the 2013 version of the contract. However, the Claimant was unhappy about it and when he signed the contract on 27 June 2017, he included the following statement: *'signed and agreed subject to the results of a referendum with residents confirming the necessity of the KOA office being manned on Saturday mornings from 8:30AM to 10:30 AM'.*

36. Subsequently, the 1st Respondent was told that the Claimant spoke to some of the residents who agreed for the Saturday hours to be removed from his contract and the Respondents gave in and agreed for that to happen.

37. On 14 June 2018, at a salary review meeting, the 1st Respondent confirmed that they had increased the employer pension contributions in April 2018 to 3%, which was 1% above the minimum set by the government. The 1st Respondent was concerned that at the same time there had been no major contracts during the year, which meant that the Claimant actually had insufficient work to do. During the past year, Mr Webb observed that the Claimant frequently had extended lunch breaks and left work early. The 1st Respondent did not object as he appreciated that this was due to the drop in work. In the circumstances, the Respondents considered that the increase in pension above the government minimum of 1% was a generous salary increase and that it was not going to be adjusted any further. Also, the Respondents expected the Claimant to be much busier in the following year.

38. The job description which accompanied the contract signed by the Claimant on 27 June 2017, stated that the Claimant was required to supervise and facilitate all on-site contractors, namely the cleaners, gardeners, lift engineers, water pump engineers, car park engineers and abseiling window cleaners. He was also to ensure that all contractors were briefed on health and safety procedures and were adequately covered and to control access to the development of all contractors including ensuring that they are both signed into and out of the development. He was to supervise all contractors during their time on site and ensure that health, safety and fire rules were adhered to. It does not appear that the Claimant objected to these detailed requirements related to contractors.

39. It is unlikely that the Claimant referred to a need for health and safety training at the meeting of 14 June 2018. If he had, we find it likely that the 1st Respondent would have organised health and safety training for him. They discussed the fact that as Mr Nixon was leaving, due to ill-health, he would need to pass all health and safety documentation and work back to the Claimant. As already stated, the 1st Respondent had recognised that there had been a drop in the Claimant's workload and this would therefore have been an ideal time to organise training for the Claimant, if required and so that he could take over the health and safety work from Major Nixon. In those circumstances, we find it likely that if the Claimant had asked for health and safety training, he would have been given it as the Respondents wanted him to be able to supervise contractors in their flats and around the development, so it was in their best interests for him to be able to do so safely and effectively.

40. The Claimant was told at the meeting that an annual appraisal system would be introduced in the following year. He was given some details of the anticipated commercial contracts that the Respondent had planned for the forthcoming year and told that if he performed well, it would be reflected in his salary.

41. Mr Nixon was in the office more frequently than the 1st Respondent as he had retired. At the time, the first respondent was still running his personal business. Mr Nixon picked up some of the Claimant's tasks while the Claimant was ill and he continued to perform some of those tasks even after the Claimant returned to work

and ceased having active cancer treatment. In July 2018, Mr Nixon resigned from position of treasurer.

42. After Mr Nixon resigned, the Claimant was the only person working for the 2nd Respondent who knew how things worked in the development, such as which keys opened which doors and where valves or meters were situated. The Respondents became concerned about how they would manage should the Claimant be unable to work, at short notice. The 1st Respondent's evidence was that this was even more of a concern because the Claimant did not readily share information with the 2nd Respondent's board about the day-to-day operational matters and '*guarded this information jealously'*.

43. It was because of the 1st Respondent's concerns about how they would manage should the Claimant decide to leave employment, that on 5 July 2018 the 1st Respondent wrote to HR Elite to obtain some HR advice on the Claimant's employment. In the letter, Mr Webb referred to the fact that the 2nd Respondent was now paying the claimant a pension. He asked for advice on 2 matters: *'identifying the claimant's retirement date so that we can plan for recruitment of his replacement'* and *'amendment of his conditions of employment'.*

44. We find that the request for advice on amending the claimant's terms and conditions of employment related to the Respondents' concerns about how the claimant spent his time as well as the issue of the claimant being paid for activating the key fobs/proximity cards, which the Respondents were unhappy about and wanted to clarify the contractual position.

45. The Claimant confirmed in evidence that at no time during his employment did Mr Webb ever speak to him about his retirement. We find that the Respondents did not ask the HR advisor for ways to avoid paying the Claimant's pension or how to remove him from their employment.

46. Following Mr Nixon's resignation on 1 July 2018, Madalene Drury had been appointed as a director and treasurer of the 2nd Respondent. June Matthews was treasurer.

47. At a board meeting on 16 July 2018, the directors (Ms June Matthews, Mr John Nixon and Mr Robert Webb) noted their concerns about the Claimant's performance of his contract (pg 141). The minutes show that they were concerned that the Claimant did not work the hours stipulated in this contract, he did not always carry out the jobs allocated to him, he could not be contacted by telephone and chose which calls he would respond to and could not always be found when a resident needed him. The 2nd Respondent's board was concerned that there were several doors in the buildings that were locked, to which only the Claimant had keys. The CCTV camera in the office was linked to the Claimant's personal apartment, which the Respondents considered to be unacceptable. Also, they wanted details of the operation of the CCTV and activation of the proximity cards to be written down so that any authorised individual could access them. The Claimant had not voluntarily shared these details with his employers after the transfer of his employment. The Respondents would not have had this information before the management of the properties transferred to them on incorporation and they received no information about this from PMS.

48. At the board meeting the Respondents also discussed the outcomes that they wanted. Firstly, the board wanted the Claimant to provide details of the CCTV system and how to operate it as well as how to program the proximity cards to be written down so that any member of the board could perform those functions.

49. Secondly, as the Claimant's whereabouts was not always known, during the working day, they wanted the Claimant to maintain a location board in his office, letting everyone know where he was at any time during the shift. Mr Webb was frustrated that he could never seem to be able to contact the Claimant by phone.

50. Thirdly, the Claimant has been performing extra work for residents - such as replacing window sashes, activating key fobs and proximity cards; all of which he charged the residents to carry out. The Respondents questioned whether he carried out these activities in his worktime for the 2nd Respondent and if so, whether the proceeds of those jobs should go to the 2nd Respondent rather than for the claimant's personal benefit. The Respondents stated that they would like this changed so that the Claimant did this work in his contracted time and the money earned went to the company. In evidence, the Claimant confirmed that he would usually keep the money he earned from those jobs. Sometimes he would give some money to Jermaine if he helped him.

51. The other significant matter the minutes noted for the benefit of forward planning, was that the 2nd Respondent wanted to know when the Claimant planned to retire, if he had such plans.

52. The Claimant was the 2nd Respondent's only employee, which meant that it needed to plan how the Claimant's tasks would be covered, if he left the job, in the event of his retirement or whenever he was on annual leave. At the time, the only other person that the Respondents could rely on, who might know how things worked, was someone called Jermaine Robinson who would work on a contract basis doing maintenance work and cleaning for the 2nd Respondent, under the Claimant's supervision. Mr Webb was concerned that the 2nd Respondent was not equipped to manage the changes that would occur if the Claimant suddenly decided to stop working, especially as Mr Nixon was no longer going to be involved in running the 2nd Respondent or in working in the office. He felt that the 2nd Respondent needed help on how to manage these issues.

53. The 1st Respondent also asked the HR advisor about the Claimant's hours. As far as the 1st Respondent and members of the board could tell, the Claimant did not always work his contractual hours. Mr Webb asked for advice on the implications of various options including reducing the Claimant's hours to those he actually worked or asking him to actually work his hours. He asked whether there would be a pension implication if the Claimant's contract was varied to just the hours the Respondents believed he was actually working at that time. Ms Matthews' note stated that they also discussed the fact that the Claimant had just returned from a three-week holiday which none of the directors were aware beforehand that he was taking.

54. Following that meeting, the Respondents instructed an HR adviser at Park City Consulting Ltd to advise them on the Claimant's contract of employment. The Respondents wanted it to be revised to rectify the issues highlighted above. We

find that the Respondents sought HR advice on this and followed that advice because they wanted to deal with this in the correct and proper way.

55. On 23 July, in the absence of the 1st Respondent who was on leave, Mr Nixon wrote to the HR adviser. He referred to the new document that she was to produce and his desire that it should be '*watertight'*. Also, when the adviser replied to ask whether the Respondent wanted to include enhanced adoption, maternity and paternity provision or just insert the statutory obligations, Mr Nixon replied to say that since the position is currently filled by a man, the Respondent would ask that the document pays *'basic lip service'* to those responsibilities. We find it likely, though we did not hear from Mr Nixon in evidence, that what he meant was that the Respondents wanted an effective employment contract and also, that as the Claimant was not of childbearing age, he was unlikely to need to exercise maternity, paternity or adoption rights but the full statutory obligations should still be in the contract. The clauses referred to in the email of 24 July were not any that the Respondents reasonably believed applied to the Claimant at that time. As a man, the Claimant would not be entitled to maternity leave. He had not given the Respondents any indication that he was thinking of applying for adoption leave or paternity leave. That is why Mr Nixon believed that they were not applicable to the current situation but that because the post-holder may change in future, it was appropriate to have those clauses inserted into the contract. That is what he meant by paying lip service. There was no evidence that it was designed to trip up the Claimant as he alleged in the hearing.

56. The Claimant had a mobile phone from PMS. When the Claimant transferred to the respondent he was provided with a different mobile phone. The Claimant took out a contract with Virgin Media and the 2nd Respondent paid the Claimant a monthly allowance to cover the cost of it, which he claimed through his monthly expense claims. In December 2015, the 2nd Respondent agreed that the Claimant should upgrade the phone so that he could monitor the recently installed CCTV system during the times while he was away from the office. The monthly phone allowance increased from £15 to £20.

57. One of the Claimant's complaints in the hearing was that the Respondents had always been aware that he supplied proximity cards and fobs to residents and the car park users for money, which he kept. The Claimant says that he frequently did so in the presence of both Mr Webb and Mr Nixon in the office and that when he went on leave, he left pre-programmed proximity cards and fobs with Mr Nixon so he could give them to residents/users who had ordered them. Mr Nixon would pass any money received, to the Claimant on his return. The Claimant was never disciplined about this and the Respondents did not treat this as a conduct matter. However, the Respondents were unhappy about these practices and wanted to stop them as they did not believe it was professional or right and considered that any money earned should belong to the 2nd Respondent and used for the benefit of all residents. Also, it was of concern that no one else, apart from the Claimant, knew how to operate the 2nd Respondent's systems to activate the cards and fobs.

58. In August 2018, Sam Parcell of Park City Consulting produced draft policies for a handbook and a draft contract for the 2nd Respondent's consideration. The draft contract of employment was in the bundle of documents at page 73. The draft contract did not refer to Saturday working, which meant that the Claimant had

succeeded in getting the Respondents to drop their requirement that he should work on Saturday mornings.

59. The Respondents wanted the Claimant to resume the duties that had been delegated to Mr Nixon in 2015 and those which he had taken on to assist the Claimant. It is likely that the Claimant and Mr Nixon worked well together and that there had not been a formal division of labour between them when the Claimant was dealing with cancer treatment and its aftermath. Nevertheless, we find that Mr Nixon assisted the Claimant by taking on some of his tasks and now that he was unwell and leaving, the 2nd Respondent wanted the Claimant to resume those tasks. Those were set out to the Claimant in the letters dated 5 October 2018.

60. The 1st Respondent wrote two letters to the Claimant dated 5 October. In the first letter he told the Claimant that the board had decided that when the office was not manned, there should be a notice - visible from outside the door - displaying his whereabouts, and an anticipated time of return. The second letter instructed the Claimant to prepare instructions to enable anyone standing in for him when he was away to be able to operate the fob programming system and the CCTV system. He was asked to complete this by 1 November 2018.

61. In a third letter, dated 6 October, the 1st Respondent set out a number of tasks that were the Claimant's, but which had more recently been undertaken by Mr Nixon. They included emptying the post boxes at both houses at 9am every morning and when necessary; taking electricity and water meter readings and passing to the treasurer to submit as appropriate; controlling gym access, usage and attendance and maintaining appropriate records for each; updating residents and owners' address details and keeping control of all health and safety documents. The 1st Respondent stated that these tasks would no doubt keep the Claimant busy and entail him working his contracted hours. He notified the Claimant that his timekeeping would be monitored from then on.

62. The Claimant was unhappy to receive these letters. His evidence to us was that he did not need to be supervised. He did not believe that he required active line management. The Claimant believed that he knew the job well and that he did it well and that the 1st Respondent should not have raised any issues with him. He also believed that these were administrative functions that Mr Nixon did and that he should not be asked to do them. We find that the board were concerned about these tasks following Mr Nixon's departure and they believed that these tasks were properly part of the Claimant's job, which should be returned to him.

63. Another letter on 7 October asked the Claimant to conduct a repair job that Mr Webb had been told about.

64. We had in the bundle some of the *'company policy rules and procedures'* that the HR advisor had drafted for the 2nd Respondent. The Claimant strongly objected to the following clauses in particular:

> *'the Company's time, material or equipment must not be used for any unauthorised work'*

> *'employees must not perform, arrange or carry out any work or activity which could be considered to be in competition with or which adversely affects in any way the Company's interests*.'

And the retirement policy, which stated as follows:

> *'it should be noted that the Company reserves the right to set a retirement age against any of its posts at any time in accordance with the applicable law from time to time'.*

65. It was 16 November when the 1st Respondent met with the Claimant in an appraisal meeting and discussed these documents with him.

66. On the day before, 15 November, Ms Drury asked for a board meeting to discuss whether Jermaine should be taken on as an employee or continue to work with the 2nd Respondent as a self-employed person. In attendance was the 1st Respondent. Ms Drury and Ms Matthews. The minutes show that the 2nd Respondent's intention was to give the Claimant the new contract at the meeting on the following day, 16 November, give him a week to read and consider it and come back to the 1st Respondent with any questions. In relation to Jermaine's request to be employed, after discussion it was decided that he would not be employed but would be engaged as an independent subcontractor, on specific tasks, and the 2nd Respondent would continue to pay his invoices submitted for the work done.

67. They discussed whether it would be a good idea to engage a management company to run the organisation rather than continuing as they were. There was some concern about various people *'reaping financial gain from the Company when they are supposed to be volunteering'*. Engaging a management company could mean that they would no longer need to employ the Claimant at all or in the same way. They decided to revisit the idea in the new year. Ms Drury's evidence in the hearing was that this was Ms Matthews idea. We find it likely that she also believed that this was a good idea as after the meeting, it was she who spoke to the Claimant about it in the office and asked whether he would be interested in being employed on a part-time basis. She also asked him if he would take a redundancy package to leave the 2nd Respondent, which he declined. It is likely that he said that he would leave for two years' pay. She also asked him if he would be prepared to become a part-time worker. On behalf of the 2nd Respondent, Ms Drury was open to the idea of the Claimant's employment ending or changing. The Respondents were clearly open to exploring different options to see what would give the residents the services they needed, for the best value for money.

68. On 16 November, the Claimant and the 1st Respondent met for an appraisal meeting. During that meeting they discussed the Claimant's timekeeping, following the letter that had been sent to him on 5 October. The Claimant denied that there had been any issue with his time keeping and was adamant that he worked from 9 – 5 every day, with an hour off for lunch. When it was put to him in the meeting (and in the hearing) that he was not working his hours and that this was supported by the fob records, he did not agree. He stated that he used more than one fob at a time. It was not clear why he felt the need to use more than one fob and whether this was his way of making it difficult to work out how many hours

he had worked. It was appropriate for the 2nd Respondent, as the Claimant's employer to keep track of how he was spending his time.

69. During that meeting, the 1st Respondent presented the Claimant with the proposed handbook, draft job description and revised terms and conditions of employment. We find it highly unlikely that the 1st Respondent told the Claimant that as 5 years had passed since he transferred under TUPE, the business was within its rights to revoke his existing contract and that he must accept a new one. There is no 5-year rule related to TUPE. Although the 1st Respondent was keen to change the Claimant's terms and conditions to address the board's concerns about the Claimant's time management, the proximity cards/fobs and the jobs he did '*outside'* of his contract; the 1st Respondent wanted to do it properly, which is why he got advice from an HR consultant before doing anything. We therefore find it highly unlikely that the 1st Respondent would have discussed TUPE with the Claimant as it was not something that he knew much about and he had not been advised to say anything about TUPE to him. We had the email correspondence between the 1st Respondent and Mr Nixon and the HR consultant in the bundle of documents as well as the advice letter from solicitors on page 575. We could not see anywhere in those where he was advised that there was any 5-year rule in relation to TUPE.

70. The solicitors correctly advised the 1st Respondent that an employer can change/vary an employee's contract as long as the change is unrelated to the transfer and where there is an economic, technical or organisational reason for it. If the reason for any variation is related to the transfer than it would be void. Having had that advice and that of the HR consultant, we find it extremely unlikely that a few days later, the 1st Respondent would have raised any 5-year rule related to TUPE with the Claimant.

71. The 1st Respondent made it clear to the Claimant in this meeting that he was to stop programming proximity cards and fobs and that he should also stop replacing sash window springs during working hours. The Claimant was therefore told that the private window work that he wanted to do for residents should be done in his own time and not during his working day for the 2nd Respondent. The Claimant was unhappy about this and stated that he should be allowed to continue operating in the way he had always done because it was *'custom and practice'*. He was clear however, that at this meeting he had been instructed to cease pocketing the fee for programming cards/fobs and that he should stop doing any private work during working hours.

72. The new company handbook was prepared in the absence of PMS passing over the old one. The job description had been updated. The Claimant was informed that the new terms and conditions were more favourable to him as his hours were reduced to the hours he actually worked while his salary remained unchanged. The Claimant was advised to read all the documents and return in a week with any points he wished to raise or to agree to them. Any technical points would be addressed by the HR consultant.

73. We find it unlikely that the Claimant was told that he had to sign the contract there and then. The Claimant stated that he would not sign anything without getting legal advice, as was his right. The minutes of the meeting, which was not created with the prospect of litigation in mind, records that he was asked to take

the documents away and consider them. Also, the minutes of the board meeting on 15 November confirmed that the 1st Respondent's intention had always been to give the Claimant the documents to take away and consider. Although the Claimant has not signed it, the minutes on page 165 are an accurate record of the meeting between the Claimant and the 1st Respondent on 16 November 2018.

74. The Claimant was unhappy about the documents that the Respondents produced.

75. The Claimant had his own un-programmed fobs which he used, as and when he needed to sell them to residents and leaseholders. Unprogrammed fobs cost between £3 - £5 and can be purchased from many outlets on the internet, including Amazon. The 2nd Respondent did not have its own stock of unprogrammed fobs. Once the Claimant programmed them, he would sell them to residents for around £30 each. He would keep that money and invoice the 2nd Respondent for the costs of each fob. Following the meeting, on 26 November the Claimant refused to help a resident who needed a new fob. He complained that he would be out of pocket if he did so. It was unhelpful that at the same time, he refused to sell his stock of unprogrammed fobs to the 1st Respondent, which would have allowed him to help the resident. The 1st Respondent had to purchase new fobs in order to help the resident and he invoiced the 2nd Respondent to cover that cost.

76. We find it likely that after 16 November 2018, Mr Ahmed overheard a conversation between the 1st Respondent and Major Nixon, in which they discussed Mr Nixon's belief that the Claimant had been seen receiving an envelope from the contractor, Jermaine and queried whether it contained money. They wondered whether the Claimant was receiving money for continuing to program fobs, after having been asked to stop doing so. They discussed that if that was the case, the money should have been paid to the 2nd Respondent. There was mention of the word '*theft'*. Mr Ahmed told the Claimant of the bits of the conversation he had overheard.

77. The Claimant was upset about this and he spoke to the 1st Respondent about it. The 1st Respondent considered that this was gossip. He did not conduct an investigation about it as he did not consider it to be warranted. Mr Nixon was no longer on the board and was simply speculating as a private resident. The 1st Respondent advised the Claimant to speak to Mr Nixon about it so that they could clear the air between them. The Claimant was not happy with that response and reported this to the Police. The Police took no action. The Claimant also spoke to Mr Nixon about it. He told Mr Nixon that the envelope contained fobs and not cash. Mr Nixon retracted the accusation, apologised and the Respondents understood that they shook hands and considered the matter closed.

78. On 30 November, the 1st Respondent met with the Claimant to discuss the contractual documents that he had been given to go away and consider. Mr Riaz Ahmed attended to support the Claimant. A record of their discussion was contained in an email to the Claimant dated 17 December. At the meeting the Claimant read out a personal statement recording all the things he had done over the years. He clearly felt that he needed to defend himself against the Respondent's attempts to regularise his contract.

79. In the email of 17 December, the 1st Respondent confirmed that the Claimant had been doing his job and that was why the Respondents had increased his wages every year since it took over his contract. The 1st Respondent confirmed that, after discussion, some of the Claimant's points had been accepted. The letter stated that the Respondents were happy with a '*common sense'* approach to the Claimant's working hours so that in future, extra time worked will equal time off. They were happy for his normal hours to be amended to 8.30am – 4.30pm. The 1st Respondent clarified that the Claimant was precluded from working for anyone else, but it did not mean that he could not do odd jobs in his spare time.

80. The only two clauses the 1st Respondent was not prepared to change was firstly, the clause which stated that the Claimant was to complete programming fobs and proximity cards via the 2nd Respondent and not as a '*bit on the side for you to earn additional cash'*; and secondly, the refusal to agree to the Claimant's request to have his holiday year changed so that it coincided with his partner's holiday year. The 2nd Respondent was unable to do this and stated its position that doing so would:

> *'involve a lot of calculations and a pro-rata amount of holiday for the remainder of one year and the start of another to realign it. It makes sense to keep all company matters as the same period. So we will keep the holiday year unchanged'*.

81. The Respondents considered that as they had agreed to most of the Claimant's requests, he would be prepared to sign the contract. He was asked to meet with the board on 21 December to sign the revised terms and conditions. The Claimant refused to sign the revised contract.

82. The Claimant's evidence in his witness statement was that he refused to sign the revised terms and conditions because he considered the 1st Respondent would not be fair or reasonable in his interpretation of the new contract, for example, to be '*flexible in your hours or work'*. It was not clear to the Tribunal why this caused the Claimant any concerns. His reason for considering that the 1st Respondent would not be fair or reasonable to him in his interpretation of the new contract and what he referred to as 1st Respondent's *unpredictability,* appeared to relate to the request in October for him to pick up tasks that Mr Nixon had been doing, now that he was leaving due to ill-health. The Claimant considered that the contract was very different to the one he had signed in 2017.

In his witness statement, the Claimant referred to matters that he considered unacceptable in the contract. However, those were not the issues that he raised with the Respondents at the time. In December 2018, the Respondent understood that the only two matters that were outstanding were the issue with him programming fobs, which the Claimant had reluctantly accepted; and the issue of the holiday year, which he did not accept. Mr Ahmed confirmed that the Claimant refused to sign the contract because of the holiday year issue. In the meeting, they did not discuss the clauses referred to in the witness statement at para 35 such as - the policy on unauthorised work and the clause preventing '*any work which could be considered to be in competition with or which adversely affects in any way the Company's interests'* and the right to set a retirement age.

In the claimant's grievance appeal on 18 February 2020, he set out in writing that he had refused to sign the contract because it included duties and responsibilities that had been passed on to other employees since 2013. He says he had taken legal advice on this as the new contract involved significant changes as his role had evolved throughout his 12 years of employment and was not therefore legally bound by the new contract.

We find, that the reasons given in the grievance appeal letter to be at variance with the detail provided in the Claimant's witness statement. It is likely therefore that the detail provided in the Claimant's witness statement has been thought of since he left the 2nd Respondent's employment.

83. The Tribunal did not consider that any of the clauses in the terms and conditions that the Claimant had been asked to sign on 30 November 2018, were unreasonable or extraordinary.

84. The 2nd Respondent decided that all money paid for programming proximity cards and fobs should be paid to it and this would be overseen by Ms Drury, as finance director. No proximity cards or fobs would be issued for free, other than to those who worked for the 2nd Respondent.

85. At a meeting on 2 January 19 between the board – the 1st Respondent, Ms Drury and Ms Matthews – and the Claimant; the terms and conditions were discussed again and changes to clauses under the heading of Place of Work were made to comply with his wishes. The 1st Respondent and Ms Matthews were firm in their decision not to change the annual leave year for the Claimant's convenience. This was the way that the company had been set up and was likely the way in which the Claimant's holiday year had been running since he had transferred from PMS. The 2nd Respondent was unable to change the holiday year, without some disruption and expense to the company. The minutes of the meeting noted that it was on that basis that the Claimant was not prepared to sign his terms and conditions of employment. Although the Claimant disputes this, we find that the reason why the Claimant did not sign the terms and conditions on 2 January 2019 was because the Respondents refused to change the corporate documents and processes so that his holiday year could align with his partner's holiday year. Nothing else is recorded in the minutes. Although the Claimant's evidence was that the minutes are incorrect, we find that the points he referred to in paragraph 35 of his witness statement and in his evidence were not made to the Respondents at the time.

86. As Mr Nixon was no longer coming into the office, the Claimant had to work closely with the 1st Respondent. They did not get along as well as the Claimant did with Mr Nixon. The 1st Respondent had a different style of working in the office to the way that the Claimant had worked with Mr Nixon. The Tribunal finds from the transcript of a recorded conversation between the Claimant and Mr Nixon that their relationship had been more informal. It is likely that Mr Nixon did not closely manage the Claimant and that he was content to fill in the gaps in the work left by the Claimant rather than insist that the Claimant complete every task in his job description.

87. We find it unlikely that the 1st Respondent ever threatened the Claimant with dismissal if he did not sign the revised terms and conditions of employment. The 1st Respondent took legal advice about the best way to go about changing an employee's terms and conditions of employment. He was doing all he could to reach agreement with the Claimant – he arranged and attended many meetings with him in which each clause was discussed in detail, and he wrote letters and emails about it, which is the complete opposite to making threats if the Claimant did not sign the contract. In reality, the Respondents gave way on many of the clauses that it had initially wanted in the contract, in order to reach agreement with the Claimant. Ultimately, the Claimant continued to refuse to sign the contract and was never dismissed.

88. After the meeting on 2 January 2019, the Respondents gave up on trying to get the Claimant to sign the revised terms and conditions of employment. The Claimant succeeded in getting the matter shelved.

89. The 1st Respondent was advised that as the Claimant continued to work to those terms and conditions, accepted wages, and used other clauses in the contract such as taking holidays; he had in effect accepted it.

90. On 15 March 2019, Ms Matthews ceased to be Company Secretary and on 17 April Ms Drury resigned. This put the 1st Respondent in some difficulty as he had to organise an Annual Budget Meeting on his own. Mr Nixon was re-appointed as a director of the 2nd Respondent.

91. The 2nd Respondent inherited an old CCTV system from PMS. By April 2019, the Claimant had still not provided the board with a manual or written instruction on how to operate the full CCTV system, as he had been instructed to do by the 1st Respondent by 1 November 2018. The Claimant's duties were to ensure that the CCTV systems operated properly. Decisions about the updating of the CCTV system and relocation of cameras etc were not solely the Claimant's responsibility and instead came within the board's remit, especially as it was likely to involve significant expenditure.

92. In 2019 the 2nd Respondent assessed its CCTV system and decided that it was time to upgrade it. The decision was taken to install CCTV cameras in the lobby areas of both Charles and Stuart houses. The Claimant objected to this. The Claimant would have been aware that there were issues in the flats to do with drug dealing, prostitution and general anti-social behaviour and the Respondents wanted to put cameras around the properties as one of the ways of deterring such conduct.

93. The residents were informed of the proposal to put up these cameras, which led to them expressing their concerns about what they perceived as an invasion of privacy. We had one example of this at page 174.

94. The 1st Respondent asked Riaz Ahmed to oversee the CCTV upgrade on behalf of the board. Mr Ahmed is an IT technician and consultant by trade. The Respondents asked him to work on the installation of the new CCTV equipment. The Claimant was unhappy about this. We find that on 22 August 2019, the 1st Respondent emailed Mr Ahmed and advised him to make sure that the Claimant signed off the work on the CCTV system as it would have been his responsibility

to manage it. We will not say any more about the CCTV upgrade as it was not on the list of issues that we had to determine.

95. The Claimant was clear that in the meeting of 16 November 2018, he had been instructed to refrain from issuing/programming fobs. We heard from a resident, Ms Cooke, who had been living in Charles House from February 2019. When she got the property, she was given a fob and a set of keys to access the house. The fob allowed her to access the gym and the car park. She was told that if she ever required a new or replacement access card/fob, those could be bought from the Management Office. At the time of the hearing, Ms Cooke was Treasurer of the 2nd Respondent. In May 2019, Ms Cooke's daughter was coming to stay with her. She approached the Claimant as the Contracts and maintenance supervisor and asked him if she could purchase a fob for her daughter. Initially he stated that he was no longer authorised to do so. He went on to say that he would sell one to her but that she should not let anyone know. He told her that she had to pay in cash and give him the cash outside of the office, out of the view of the CCTV cameras. Her other option was to buy a fob elsewhere which could take a while. He suggested that the Claimant meet him outside, the following Saturday when he expected to be watering the plants. Ms Cooke did so and paid him £30 or £35. She could not remember the exact amount. He programmed a fob and gave it to her.

96. On 20 July, the 1st Respondent emailed the Claimant about some health and safety matters. He gave the Claimant a list of items that he instructed the Claimant do and to present to him on Friday 9 August. He stated that the board expected the Claimant to apply all necessary health and safety checks thoroughly on all contractors without exception, before they commenced any work on site. He also expected the Claimant to conduct health and safety checks on his own activities. The list of items that the Claimant was to do before he began his holiday on 9 August was as follows:

1) the completion and sign off of the fire risk assessment;
2) the completion of all PAT testing;
3) the completion and sign off of the 2019 health and safety review, all 3 of which the 1st Respondent had already requested in an email dated 7 July;
4) the storage of all petrol, paint, chemicals and other flammable material in the stores in the multi-storey car park with the store key being passed to the 1st Respondent;
5) keys to the CCTV room and or any other locked rooms to be passed to the 1st Respondent;
6) presenting the 1st Respondent with an updated accident book
7) presenting the 1st Respondent with the record of all the health and safety checks undertaken on all contractors since 1 July 2013; and
8) undertaking the full requirements of his role including '*daily vacuum and dust the foyers of both Charles and Stuart houses'.*

97. The Claimant was very unhappy to receive this email from the 1st Respondent. His evidence was that he felt the tone of the email was hostile. We find that the email was instructing the Claimant about jobs to be done, some

of which had been outstanding for some time and others of which he had been asked to do in the earlier email dated 7 July. On receipt of this letter the Claimant did not ask the 1st Respondent whether some jobs could be completed at a later date. He did not present some of the jobs as completed and ask for time to do the rest. He simply did not complete the tasks.

98. The Claimant did not claim in the hearing that he completed these tasks. No disciplinary action was taken against the Claimant as a result of him not following his manager's instructions. It was not his case that these were matters outside of his job description or that he physically could not do them. Although he complained that there were a number of tasks that had to be done in a short space of time, he does not appear to have done any of them. The tasks listed on page 176 mirror tasks listed in the job description at pages 131 and 132 of the hearing bundle, which formed part of the contract which the Claimant signed on 27 June 2017. They were therefore part of his job. It is likely that the 1st Respondent wrote to him about them as they were outstanding and he was aware that the Claimant was soon going on holiday.

99. On 26 July 2019, the Claimant and Mr Nixon had a conversation, which the Claimant recorded without informing Mr Nixon. It was not clear to the Tribunal why the Claimant felt it necessary to record this conversation. Although the Claimant stated in his evidence that he felt that he needed to do so to protect himself, it was not clear what had given him cause for concern or what he felt he needed protection from. The Claimant had worked well with Major Nixon before he stepped down from the board and stopped working in the office. Major Nixon had returned to the board following Ms Drury's resignation. There was no indication that their relationship had deteriorated since his return to the board. We had a transcript of the recording in the bundle of documents. In it we saw that the Claimant considered that Jermaine and another contractor had been recruited to do the cleaning and gardening and that those matters no longer had anything to do with him. That was not the case and we have already found that those matters remained his responsibility although the job description does not say that he has to personally perform those tasks.

100. The Claimant referred to *'custom and practice'* in the conversation and his belief that this meant that he was no longer bound by the terms of his contract. In the transcript the Claimant does not appear to be intimidated or fearful but instead, he referred to the 1st Respondent's emails and letters to him as '*drivel constant drivel'*.

101. He referred to the tasks he had been asked to complete, such as cleaning the foyers; as *'insignificant things.'* When they talked about Major Nixon returning to the office, the Claimant said:

> '*if you can get Robin of ya back, off my back then you're more than welcome back in the office and that means that I haven't then got to bloody sign in and out all the time. All these small things … that are designed to irritate and are now beginning to really fucking irritate'* (pg 184, 198).

He also admitted to putting his phone on silent when out in the evening and not responding to a missed call which had been a call from a resident needing assistance.

102. They discussed the job that Jermaine had been contracted to do and the Claimant not being involved in some management level discussions in the business.

103. Although the Claimant stated to us that he knew nothing of health & safety requirements, we find it likely that he knew enough about health & safety to take Jermaine to task over the use of a chainsaw to cut a hedge on the property. In the transcript of the conversation, he describes in detail to Major Nixon the steps that one has to take before using a chainsaw such *as:*

> *'having the right gear – its £200 worth of gear you've gotta have, trousers, gloves…. A hat, a helmet…you've even got to wear the right boots with extra large....so you don't topple over whilst using it……you've even got to block the area off and not allow public access……You've gotta …that proper wire fence.'*

104. On 14 September 19, the 1st Respondent wrote to the Claimant to find out whether he had done what he had been asked to do since 5 October 2018, which was to prepare a set of written instructions so that someone could program fobs and operate the 2nd Respondent's CCTV system while he was away. The Claimant was supposed to have completed this task by 1 November 2018. He had produced notes on a few sheets of paper, but the 1st Respondent found that to be unsatisfactory.

105. The 1st Respondent stated that a failure to provide comprehensive and easy to follow manuals by 1 November 2019 would be considered a disciplinary matter. On the same day the 1st Respondent wrote to the Claimant about the notice he asked him to create to tell residents of his whereabouts and his anticipated time of return to the office. He stated that:

> '*You have never fully implemented this and in recent months you have slid back into not undertaking it at all'*.

106. The Claimant was told that a failure to fully meet this requirement before he took his holiday would also be considered a disciplinary matter.

107. Following receipt of these letters the Claimant downloaded the manuals for the CCTV and the Paxton Net 2 entry Systems which was used to program the key fob and proximity cards. He printed them off and left them on the 1st Respondent's desk. The Claimant had produced something before which the 1st Respondent described as 'cursory sheets of paper'. We did not see those. The Claimant did not check that what he produced was sufficient or could be understood by the 1st Respondent. The 1st Respondent did not raise these matters with the Claimant following his original instructions in October 2018 until these letters of 14 September 2019.

108. We were shown a small, A4 sized board on which the Claimant had stuck bits of paper that briefly stated his whereabouts and his expected time of return. He stated that he put it on top of the filing cabinets. It is likely that it would not have been clearly seen from outside of the office as it was so small. He had not checked with the 1st Respondent that this was satisfactory.

109. On 14 October 2019, the 1st Respondent wrote to the Claimant to invite him to an informal performance review meeting to be held on 31 October. The Claimant was told that the purpose of the meeting was to discuss the Claimant failing to complete the responsibilities set out in his job description and failing to complete all tasks and responsibilities to the best of his ability. He was informed that this was to be an informal meeting to discuss his performance and to explore ways to get it back to where it had been previously. He was told that there would be an HR Consultant present as a notetaker.

110. It is unlikely, with an HR Consultant present, that the 1st Respondent would have conducted a formal disciplinary process without going through a proper procedure. The Claimant considered that he also needed to have a companion with him and wrote back to the 1st Respondent to say so. The 1st Respondent refused. After a further exchange of emails between them, the meeting went ahead on 31 October 2019.

111. The Claimant refused to sign a performance improvement plan (PIP) prepared by Ms Parcell, the HR Consultant, which he found belittling and humiliating. He was being asked to do the job that he was employed to do and then, as there were concerns about whether he was doing it, the PIP was to support him in getting to the point where he was doing his job. He was told that he had one month to improve his performance.

112. He was referred to the 2013 contract, which he objected to as it had the cleaning and gardening duties as his responsibility. He felt that although he had not signed the new contract, the old contract had been varied by custom and practice. He did not appear to appreciate that such a variation would need to be done by agreement between the parties. There had been no agreement as the Respondents insisted that he continue to be responsible for cleaning and gardening. His comments on the draft job description he was given were that the tasks such as cleaning and checking bins were Jermaine's responsibility. The Claimant's job description had always required him to be responsible for supervising contractors on site and Jermaine was such a contractor. The Respondents were concerned that the Claimant should remain responsible for supervising Jermaine/contractors. He was to assist with/manage those doing manual tasks. He was not expected to have sole responsibility for them. If he had read the updated job description properly, he would have seen that the point about arranging cover when he went on leave now stated that this would be done in conjunction with the Chairman/committee, rather than on his own, which he had previously complained about. He objected to being asked to create a location board – referring to it as '*regimented'* and stated that he wanted to know why they wanted it.

113. On 4 November 2019, the 1st Respondent wrote to the Claimant to provide a list of jobs that needed to be done. This list stated that it arose out of the management committee meeting on 24 October. The tasks all came within the Claimant's remit. The email did not give the Claimant a date by which these all had to be done.

114. The Claimant was offended by this email although we were not clear why as it was simply a list of jobs that were all within his job remit and all of which

needed to be done. These were also the tasks that had been in the email of 25 October and which are unlikely to have been done since. In his witness statement, the Claimant confirmed that these duties were typical of the ones he would expect to be given and then delegate to various tradesmen, who he would then manage. On the following day, the Claimant did at least one of the tasks listed. However, he felt undervalued and that he was being asked to perform menial tasks. He phoned the office and informed the 1st Respondent that he felt stressed and that he was unable to return to work that afternoon. He also emailed the 1st Respondent on 5 November and stated that he felt unable to return to work due to the *'constant unwarranted stress being applied by yourself and John Nixon'.*

115. The Claimant went off sick and did not return to work. He reported sick to the 1st Respondent on 6 November 2019.

116. On 6 November, the Respondents' HR consultant invited the Claimant to a grievance meeting to discuss the issue he raised with the 1st Respondent the previous day. She stated that she would act as a completely independent, neutral party and try to resolve the situation. After a further exchange of emails, they agreed to meet on 11 November.

117. A note of their discussion was sent to the 1st Respondent on the same day. The Claimant and his partner attended the meeting and told Ms Parcell that they felt that the Claimant was being constructively dismissed. He complained about being micromanaged by the 1st Respondent. He felt that the 1st Respondent was trying to push him out of his job by asking him to do tasks which had not been part of his job duties for the last 5 years. He told her that Jermaine had been doing those tasks. She later advised the 1st Respondent that if that was true, the 2nd Respondent may find it difficult to get the Claimant to carry out these tasks.

118. The parties are agreed that there were contract cleaners that worked on the buildings. The 2nd Respondent had frequently hired other contractors to undertake gardening, cleaning and other activities since it took over management of the buildings in 2013 but we find that this did not alleviate the Claimant's responsibility, as Service Manager, to oversee the work and ensure that it was done to a good standard.

119. The 1st Respondent was mindful that the Claimant was off work with stress and checked with Ms Parcell that it was okay, whenever he proposed to communicate with him. In accordance with the Claimant's wishes, there was never direct contact between them. It is likely that the Claimant also did not have direct contact with Mr Nixon during that period. We had evidence in the bundle of the 1st Respondent checking with HR before communicating with the Claimant to make sure that he was doing the right thing. Examples can be found at pages 240, 285, 291 and 327.

120. Ms Parcell advised the 1st Respondent that the Claimant should be in contact with him daily to let him know whether he continued to be sick or was coming back to work. This was not set out in the Claimant's written contract and it was not something that the Respondents told the Claimant when they received his sick certificate. It is likely that most employers expect their employees who are off sick to keep in regular contact with their manager/employer so that cover can be arranged for work and so that they can plan for their return.

121. Having not heard from the Claimant, the 1st Respondent wrote to Ms Parcell on 12 November to ask whether, as far as she knew, the Claimant was going to return to work on the following day. On 13 November, having consulted with Ms Parcell on its contents, the 1st Respondent wrote to the Claimant and informed him that the Respondents had not heard from him since a week earlier, on 6 November. He was therefore absent without authorisation. He advised the Claimant that if he was still unwell, he should obtain a fit note from his GP. The 1st Respondent told the Claimant that if the 2nd Respondent did not hear from the Claimant by 5pm on Monday 18 November, they will assume that the Claimant had resigned and would process him as a leaver from the business. The Claimant was asked to provide the 2nd Respondent with the passwords for the fob machine to ensure that they could continue to use it. If he failed to do that, the 1st Respondent would need to get the equipment company to reset the machines and claim the costs incurred in doing so, from the Claimant. He also asked the Claimant for the original keys, or copies of the keys to the locked stores and other rooms. The 1st Respondent had previously requested this from him. The 1st Respondent offered to reimburse the Claimant if he incurred any costs in returning them to the office. The 1st Respondent hoped that the Claimant would return to work soon so that they could meet and discuss how to move forward in a mutually beneficial way.

122. On the same day, the Claimant went to his GP and was signed off for work-related stress and anxiety.

123. While he was off sick, the Claimant had sight of a solicitor's letter (575) written to the Respondent in November 2018 as it was one of the documents that Ms Drury allowed him to have access to on her iPad while she was still a director. It is also likely that she allowed him to see board meeting minutes and the 1st Respondent's draft AGM report.

124. The 1st Respondent sought advice from Ms Parcell in relation to the Claimant's sick pay and the period it should cover. The Claimant did not have sick notes covering all the days he was off sick. The first was for the period 13 November to 26 November. The Claimant had been absent from work from 6 November. The next was a sick certificate the Claimant dropped off at the office on 29 November, to start on that day and end on 2 December. The period 27 – 29 November was not covered. The last was from 2 December to 2 February 2020.

125. The 1st Respondent asked Mr Ahmed to assist as a temporary measure, in the run up to the AGM.

126. As the Claimant and the 1st Respondent both live in apartments in the estate it has been difficult. While he was off sick in November 2019, the Claimant had been seen washing cars in full view of the office. There are no issues with someone who is off sick with stress and anxiety engaging with an activity that helps with their recovery.

127. On 6 December, the Claimant raised a formal grievance with the Respondents. The 1st Respondent was concerned when he received this and realised that it covered a long period of time, from the appraisal meeting on 16 July, onwards. The Claimant complained about the following: the appraisal meeting, being asked to refrain from issuing fobs and proximity cards, being asked

to sign the new contract, being accused of theft by John Nixon, the 1st Respondent meeting with Park City Consulting; being excluded from meetings with contractors regarding the CCTV and the chainsaw; being asked to arrange cover whenever he went on annual leave, failing to pay his expenses and hinting in the chairman's report at the AGM that the 2nd Respondent may wish to outsource some aspects of management in the future. We did not go through the Claimant's expenses claim in detail. It was his evidence that he submitted a claim for expenses every three months.

128. The 1st Respondent wrote to the Claimant again on 9 December to acknowledge his latest sick note and to ask for a return of keys to the office so that the Respondent could continue to manage the property.

129. The Respondents were finding it difficult to envisage how they would address the Claimant's grievance since he had not indicated when he was likely to return to work and he did not want to meet to discuss the matter. There was correspondence in the bundle between the 1st Respondent and Ms Parcell in which she stated that she is thinking of how the grievance could be done as a paper exercise and promising to get back to the 1st Respondent on it. Her advice was to suggest to the Claimant that the matter wait until his return to work.

130. The 1st Respondent was very ill from the end of November 2019 to February 2020 and in retrospect, suspects that he might have had Covid-19, although it was not well known at that time. The 1st Respondent was 80 years old at the time.

131. The 2nd Respondent responded to the grievance by letter dated 15 January. This crossed with the Claimant's solicitors' letter dated 14 January. The Claimant's solicitor's letter referred the 2nd Respondent to the ACAS Code and the need to deal with a grievance promptly and chased up a response to the grievance. It asked the Respondents to address it on paper, given the Claimant's state of ill-health.

132. In the 2nd Respondent's response, the Claimant was asked whether he would be prepared to meet with Ms Parcell to discuss the grievance and expand on it. He was advised of his right to be accompanied and that this could be by a relative or friend, if he so wished. With apologies if it was seen as harassment, the 1st Respondent asked again for the return of keys to various buildings and the car park so that the person who was covering the Claimant's tasks could do the job.

133. In a letter dated 22 January 2020, the Claimant's solicitors stated that he was too ill to attend a meeting to discuss his grievance and that the 2nd Respondent should provide any questions that it had by return so that the issues could be addressed.

134. The Claimant sent the 2nd Respondent a sick certificate on 31 January covering the period to 30 March 2020. The reason for absence was stated as *'ongoing work related stress and anxiety'.*

135. The 1st Respondent then conducted an investigation into the issues raised in the Claimant's grievance. He asked Mr Nixon to provide him with his account of the conversation in which the Claimant alleged he accused him of theft. He discussed the issues with Ms Parcell and considered the issues that he had with

trying to manage the Claimant and how that had been perceived differently by the Claimant.

136. The 1st Respondent wrote to the Claimant on 1 February giving him details of the investigation he conducted and informing him that he did not uphold the grievance. He went through each of the issues that the Claimant raised in the grievance and explained his reasoning.

137. In his response to one of the issues in the grievance, the 2nd Respondent wrote the following, which had been drafted for him by the HR consultant:

> *'Until your cancer diagnosis and subsequent treatment, I found your performance to be impeccable and you to be an exceptional member of staff with high pride in your role and took pride in ensuring both Charles and Stuart House were kept to their best. This was reflected in amending your job role to be Contracts and Service Manager. On reflection, I believe that following your absence for your cancer, your standards have not been as they were, and you don't appear to be motivated within your role and take price in the buildings as you once did.'*

138. There was further correspondence between them about the return of keys, the Claimant's storage of his tools and machinery and his access to them. On 6 February 20, the 1st Respondent wrote to the Claimant to thank him for the latest certificate. He told him that he was disappointed that the Claimant had not called or dropped in to discuss his continued absence. He advised the Claimant that as the latest certificate signed the Claimant off for 2 months, the 2nd Respondent would change the locks to the offices and the workshops and storerooms to ensure security. If the Claimant had lost his keys or they were stolen, that would have left the 2nd Respondent vulnerable to access from unauthorised persons. The 1st Respondent kindly requested that the Claimant remove any personal belongings that he had in those areas. He was given just over a week, until 14 February to remove them before the locks were changed. He was offered assistance from Mr Ahmed in doing so.

139. The Claimant stated in his letter of 7 February that he had previously returned the keys. He confirmed in evidence that he attended the buildings and removed his tools and other property in the presence of Riaz Ahmed.

140. On 18 February the Claimant appealed against the outcome of his grievance. He objected to the 1st Respondent investigating the grievance as most of the complaints had been about him. He referred to having experienced '*bullying, harassment and intimidation*' that he experienced from the 1st Respondent since he had cancer. He alleged that the 1st Respondent discriminated against him on the grounds of his disability, being his cancer. He set out again all the points that he made in the original grievance letter and disputed the findings of the 1st Respondent's investigation. The Claimant also included allegations of age discrimination.

141. On 11 March, the 1st Respondent replied to the Claimant on behalf of the 2nd Respondent. He stated that as the Claimant was the only employee and as he was the Chairman of the board with only one other director, John Nixon against whom the Claimant had also made complaints; he could not envisage who else

could conduct an appeal hearing. He stated that he considered that there had not been any discrimination and that the Respondents had supported the Claimant when he was undergoing his cancer treatment. In relation to the point about age, he stated that both he and John Nixon were older than the Claimant and still working. The Respondents passed all papers to Sam Parcell and sought her guidance on how to address the grievance. There had been a process of investigation and consideration before they agreed the terms of the grievance outcome in January. As the Claimant stated that he found it difficult and stressful to have face-to-face contact with the anyone involved with the Respondents, they were left with few options and this made it difficult to resolve matters. The 2nd Respondent wrote that the grievance had been resolved and that the Claimant had come to the end of the process.

142. The 2nd Respondent intended to discuss the Claimant's expenses claim with him on his return to work as there were queries over some of the items.

143. It is likely that the 1st Respondent had that letter checked by Sam Parcell, the HR consultant, before it was sent to the Claimant, as he had done with his earlier letters and throughout this process. In an email to Ms Parcell dated 13 March, the 1st Respondent asked for the name of a recommended Occupational Health (OH) specialist so that he could arrange for the Claimant to be assessed. He was advised that the Claimant could consider that he was being harassed if he was asked to attend an appointment with an OH advisor.

144. Robert Day Associates Ltd (RDAL) lease car parking spaces in St Peter's Street car park from Jaygate Developments Ltd which it rents out to individuals and businesses. They purchased the parking spaces in 2013. The 2nd Respondent looks after the spaces as the management company. The Claimant would provide/activate access cards to the car park for RDAL. We heard from Mrs Day, company director that the Claimant was never paid for programming access cards or fobs. RDAL would purchase fobs and the Claimant would activate them for their customers. Mrs Day's evidence was that they had never been required to pay for access to the car park. The Claimant activated 101 fobs for RDAL in November 2018, using his administration account. He failed to inform the Respondents about it. This was in breach of the Respondent's instruction to the Claimant that he should stop issuing/activating fobs. The Respondents believed that it was likely that the Claimant had been paid for activating the fobs and that he had failed to pass on the money that he had been paid by RDAL, to the 2nd Respondent. The 2nd Respondent only found out that these fobs had been activated when it conducted an audit.

145. On 13 March 2020, John Nixon, on behalf of the 2nd Respondent, wrote to Robert Day to ask him about this. He stated that there was an account on the system but that there did not appear to be any significant payments made for those fobs, either by Mr Day himself or anyone else. He asked for a meeting to discuss the matter in person. Mrs Day's evidence was that Mr Day was ill at around the time he received the letter. In further correspondence between them in May, Mrs Day provided proof that she had purchased the blank fobs online. The 2nd Respondent billed RDAL for the activation of the fobs and Mr Nixon threatened to deactivate them unless the bill was paid. RDAL settled the invoice in June 2020. Mrs Day was clear in her evidence that the Claimant had never been paid for activating fobs for her customers. However, we found it incongruous that the

Claimant would charge his neighbours and their relatives the sum of £35 every time he activated a card/fob for them but did not charge RDAL, a successful business, any money for the time and effort it took to activate a huge amount of cards (101), which RDAL required for its paying clients.

146. A few days after the Respondent wrote to RDAL, on 18 March 2020, the Claimant resigned his employment. In his resignation letter he stated that he felt that he had no choice but to resign because the Respondents had discriminated against him in relation to his cancer and his age. He alleged that the 1st Respondent had:

> *'made my working life for the last two years a living hell leading up to my constructive and unfair dismissal. You have fundamentally breached my contract of employment and you have made it intolerable for me to continue my employment. I have tried to seek redress through the company's grievance procedure in accordance with the ACAS Code but to no avail whatsoever given your approach toward it. instead you have used the grievance process to further insult and denigrate me. I will now proceed with claims against both you and the KOA Limited in relation to the discrimination that I have suffered as well as my unfair dismissal.'*

147. By letter dated 20 March the 1st Respondent confirmed acceptance of the Claimant's resignation and the termination of his employment on 18 March 2020. He told the Claimant that following an inventory, the Respondent had discovered that some items that it purchased and some that the Claimant had purchased but submitted expenses for, had been taken by him when he came to collect his tools. The inventory came up to a total of £17, 124.33. The Respondents enclosed a list of conduct allegations against the Claimant and stated that he had grossly misused his position of trust with the KOA and continued to sell and keep the proceeds for issuing fobs and access cards, even after he had formally been asked to stop.

148. The Respondents had been in the process of considering whether to start a disciplinary investigation, when it received the Claimant's letter of resignation. Among the issues that were on the 1st Respondent's mind were the 101 fobs issued to RDAL, issues relating to the setting up of the new CCTV system - including sabotage of company property; unauthorised storage of the Claimant's bike in a locked KOA store, and the money received for the cards/fobs. Some of these issues were raised in the letter acknowledging receipt of the Claimant's resignation.

149. The Claimant began the ACAS early conciliation process on 27 March and the ACAS certificate was issued on 21 April. The ET1 claim form was issued on 16 May 2020.

Law

150. The claimant's brought complaints of unfair dismissal, automatic unfair dismissal, direct age and disability discrimination and harassment related to disability.

151. EJ Burgher, noted a list of issues at a preliminary hearing dated 10 September 2020. Those were in the bundle pages 49 – 55. At the start of this hearing, the Respondents produced a revised list of issues. After discussion between the parties and the Tribunal, it was agreed that the issues to be determined at this hearing are as set out at pages 58 to 63 with pages 58 to paragraph 17.2 page 61, being factual issues and the rest, the legal issues. The respondent confirmed that it had withdrawn the '*social policy objective'* justification in defence of the allegation of age discrimination.

152. The allegation of harassment is comprised of the sole allegation stated at paragraph 14.9, page 60 of the factual list and set out more clearly in paragraph 25 of the grounds of complaint. Paragraph 25 of the grounds of claim also provides the detail of the claimant's allegation of discrimination arising from disability.

153. The Respondents conceded that the Claimant was a disabled person by reason of cancer, for the purposes of the Equality Act 2010.

Time limits

154. The Respondents submitted that all of the Claimant's complaints were out of time, unless it was decided that they were part of a continuing act. The Respondents also submitted that it was not just and equitable to extend time in this case.

155. If any allegations were out of time, the tribunal would have to consider whether it could be said that there was *"an act extending over a period"* rather than a succession of unconnected or isolated specific acts as the Respondents submitted. The Tribunal was aware of the principles set out in the case of *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96. The effect of *Hendricks* is that a Claimant would not have to show that the incidents referred to in the claim indicate some sort of general policy or practice but rather that they are inter-linked, are discriminatory and that the respondent is responsible for the continuing state of affairs. The court stated that tribunals should focus on the substance of the complaints and whether the respondent *"was responsible for an ongoing situation or continuing state of affairs. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, from which time should begin to run from the date when each specific act was committed"*.

156. If there is no continuing act the tribunal would consider whether the claimant had shown that it was just and equitable to extend time to enable it to make judgments on some or all of the complaints.

157. In the case of H*utchinson v Westward TV* [1977] IRLR 69 it was held that the words '*just and equitable'* give the tribunal discretion to consider any factor which it judges to be relevant. In the case of *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal held that *"time limits must be exercised strictly in employment cases, and there is no presumption that a tribunal*

should exercise its discretion to extend time on a 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time 'the exercise of discretion is the exception rather than the rule''.

158. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 EWCA Civ 640, the Court of Appeal made the following points: -

> 158.1. The reference to '*such other period as the Employment Tribunal thinks just and equitable'* indicates that Parliament chose to give the tribunal the widest possible discretion;
>
> 158.2. There is no prescribed list of factors for the tribunal to consider in determining whether to use its discretion. However, factors which are almost always relevant to consider (and are usually considered in cases where the Limitation Act is being considered) are the length of and the reasons for the delay and whether the delay has prejudiced the Respondent.
>
> 158.3. There is no requirement that the tribunal has to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the Claimant's favour.
>
> 158.4. It was also said in that case that there are 2 questions to be asked when considering whether to use this discretion*: 'the first question …… is why it is that the primary time limit has not been met; and insofar as it is distinct the second question is (the) reason why after the expiry of the primary time limit the claim was not brought sooner than it was'.*

159. The tribunal was also aware of the principles set out in the case of *British Coal Corporation v Keeble* [1997] IRLR 336 and section 33 of the Limitation Act 1980.

Constructive unfair dismissal

160. The claimant resigned by letter dated 18 March 2020. The Tribunal has to consider whether this was pursuant to a fundamental breach of contract making it a constructive unfair dismissal contrary to section 95(1)(c) Employment Rights Act 1996 (ERA).

161. Constructive unfair dismissal happens when 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.

162. Section 95(1)(c) ERA states:

> "*The employee terminates a 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 employers' conduct".*

163. The circumstances in which an employee would be entitled to terminate his

contract would be where the employers' conduct amounted to a repudiatory breach of contract.

164. The leading case of constructive dismissal remains the case of *Western Excavating Ltd v Sharp [1978] ICR 221 (CA)* where, as Lord Denning stated: -

> "*If the employer is guilty of conduct which is a significant breach going to the root of employment, which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminated the contract by reason of the employer's conduct. He is constructively dismissed"*.

165. The Tribunal was aware of the case of *Post Office v Roberts [1980] IRLR 347* where it was held by the EAT that the conduct by the employer which amounted to a repudiatory breach of contract need not be deliberate or intentional or prompted by bad faith.

166. An employee can also rely on a breach of the implied term existing in all employment contracts that the *'employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee', Malik v BCCC SA* [1998] AC 20, 34H – 35D (Lord Nicholls) and referred to here as the '*Malik'* term. A breach of that implied term is inevitably a fundamental breach and a repudiation of the contract.

167. The test of whether there has been a breach of the implied term is objective, and not dependent on the employee's subjective view.

168. A course of conduct can amount to a breach of the implied term. Individual actions may not in themselves be sufficient but taken together can have the cumulative effect of such a breach, *Lewis v Motorworld Garages Ltd* [1986] ICR 157 CA. In such a case, the last incident relied on does not need to be serious or a breach in and of itself. Indeed, it need not even be blameworthy or unreasonable but it must contribute, however slightly, something to the breach of the implied term even if not significant. The *'last straw'* cannot objectively be trivial. See *Lewis* and also *Omilaju v Waltham Forest LBC* [2005] ICR 481.

169. The Tribunal has to consider whether there has been reasonable and proper cause for the conduct that the Claimant objected to.

170. If the '*last straw'* is objectively trivial, the Tribunal has to consider the last act that contributed to the conduct amounting to the breach. If there was no affirmation after it then the Claimant would have established a breach. In the case of *Williams v The Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589 EAT, HHJ Auerbach referred to the Court of Appeal's decision in *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ. 978 where Underhill LJ gave the following guidance:

> *"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

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

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

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

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

171. There are other kinds of breaches which have been regarded as breach of the *Malik* term or a fundamental breach such as a reduction in or a failure to pay wages, a duty to provide a safe system of work, a duty to provide a proportionate disciplinary sanction, a duty to follow fair disciplinary procedures; and a duty to provide prompt redress of grievance.

172. Discriminatory conduct will usually be a fundamental breach of the *Malik* term on its own. If the employee is making a cumulative case that there is discriminatory conduct that materially influences the conduct that amounted to the breach (*Williams*) or was a sufficient influence on it but occurred earlier in time or before affirmation; it would still contribute to it.

173. However, a breach of the Equality Act is not always a repudiatory breach. The tribunal would need to consider and decide on that.

174. A repudiatory breach cannot be remedied (See *Buckland*).

175. If the tribunal decides that there has been fundamental breach of contract or breach of the implied duty of trust and confidence, the tribunal then has to consider whether the employee has accepted the breach or affirmed the contract.

176. After any repudiatory breach the employee has a choice, either to affirm the contract and continue to work, or to accept the breach, resign and treat themselves as dismissed. If there is a '*last straw'* and no affirmation after it, the claimant can refer to earlier events (see *Lewis* and *Williams* above).

177. An employee will be held to have affirmed a contract where (with knowledge of the breach) he acts in a manner inconsistent with treating the contract as at an end. In *Bashir v Brillo Manufacturing Co [1979] IRLR 295* it was held that delay in itself is not sufficient to be considered as affirmation of a breach of contract. The employee needs to actually do the job for a period of time without leaving, or some other act which can be said to affirm the contract as varied. Whether or not he has affirmed the breach would depend on the circumstances in each case.

178. Delay in resigning after the breach, is not, of itself, but may be evidence from which we could infer affirmation because, by working and receiving a salary, the employee can be said to be doing acts consistent with further performance of the contract and therefore affirmation of it. *WE Cox Toner Ltd v Crook* [1981] ICR 823 EAT, in which the court also stated that:

> *'….. if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his rights subsequently to accept the repudiation'.*

179. If the tribunal's decision is that there has been fundamental breach contract/breach of the implied term of trust and confidence and there has been no affirmation of contract or the employee has accepted breach, the tribunal then has to decide whether the employee has left at least partly in response to the breach.

180. The Tribunal must be satisfied that the employee left at least partly in response to the breach or that it was the effective cause or principal reason for leaving. *Nottinghamshire County Council v Meikle* [2004] IRLR 703 CA.

181. If there is a constructive dismissal, the tribunal then needs to consider whether it was fair. Firstly, tribunal has to decide what is the reason for the dismissal i.e. what was the reason for the conduct which amounted to the breach? In *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445 CA, it was stated that it is open to the employer to show that such dismissal was for a potentially fair reason. If it does so, it will then be for the tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses, and was fair. Clearly, if the conduct is disputed, it would be difficult for the employer to say it had a good reason for the conduct.

182. The Claimant also complained that he had been automatically unfairly dismissed because he asserted statutory rights to TUPE and relating to the unlawful deduction of wages. Section 104 of the ERA refers. It states in subsection (1) that 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 the employee (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or (b) alleged that the employer had infringed a right of his which is a relevant statutory right. It is immaterial for the purposes of subsection (1) whether or not the employee had the right, or whether or not the right had been infringed.

183. The claim to the right and that it had been infringed must be made in good faith. Subsection (3) states that it is sufficient for the subsection to apply that he employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

Direct Age and Disability Discrimination

184. The Claimant's complaint was of discrimination because of the protected

characteristics of age and disability. The Claimant alleged that the Respondents treated him less favourably than others who did not have those protected characteristics. The Claimant was 59 years old at the time of his resignation. The Respondent conceded that the Claimant had been disabled by reason of his cancer diagnosis in 2015. He did not have an actual comparator in relation to either of these complaints.

185. In dealing with the complaint of less favourable treatment on the grounds of a protected characteristic the Tribunal is concerned with a complaint of direct discrimination. Section 13 of the Equality Act 2010 (the Act) deals with direct discrimination. The complaint is that A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treat or would treat others. If the protected characteristic is age, A does not discriminate against B if A can show that A's treatment of B to be a proportionate means of achieving a legitimate aim.

Discrimination arising from disability

186. Section 15 of the Equality Act 2010 states that:

> "A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

187. The way in which a Tribunal should approach section 15 claims was set out by Simler J (then President) in the case of *Pnaiser v NHS England* [2016] IRLR 170 as follows: -

> (a) The Tribunal should first identify whether there was unfavourable treatment and by whom.
>
> *(b)* The Tribunal must then determine what caused the impugned treatment, or what was the reason for it. The focus is on reason in the mind of the alleged discriminator at this point*; (the subjective test)*
>
> (c) the causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability. It must have at least a significant or more than trivial influence on the unfavourable treatment, and so amount to an effective reason or cause of it; *(objective test)*
>
> (d) Motive is irrelevant;
>
> (e) The causal link between the "something" that causes unfavourable treatment and the disability may include more than one link. The

more links in the chain of causation, the harder it will be to establish the necessary connection. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

(f) The knowledge required is of the disability only, and does not extend to knowledge of the 'something' that led to the unfavourable treatment;

(g) It does not matter in which order these are considered by the Tribunal.

188. What is unfavourable treatment? For discrimination arising from disability to occur, a disabled person must have been treated 'unfavourably' or put at a disadvantage. The definition of discrimination arising does not involve any comparison with a non-disabled person; it requires unfavourable treatment, not less favourable treatment. (See also *Griffiths v Secretary of State for Work & Pensions* [2015] EWCA Civ 1265). Persons may be said to be treated unfavourably if they are not in as good a position as others generally would be.

189. We considered the case of *IPC Media Ltd Millar* [2012] IRLR 707 in which it was held that the employment tribunal has to consider whether the proscribed factor operated on the mind of the alleged discriminator – whether consciously or unconsciously – to a significant extent. The tribunal would need to identify the person whose mind is in issue and who, in an appropriate case – becomes A above.

190. Can perception of "*something arising"* be sufficient?

191. At the end of the evidence, Counsel for the Claimant submitted that the Respondents would be liable if the 1st Respondent had a perception that the Claimant's performance had been adversely affected by his cancer, even if it had not. The Respondents were not ready to respond to that submission, this having not been the Claimant's case up to that point. They were both given 7 days to send it submissions to the point.

192. The Tribunal was assisted by submissions from both parties. They referred to *Pnaiser* above and the Respondent also referred to Sales LJ in *City of York Council v Grosset* [2018] IRLR 746 CA, which restates the steps that the tribunal has to take in making this assessment. The Court held that *"on a proper construction, section 15(1)(a) requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) "something"? and (ii) did that "something" arise in consequence of B's disability. The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant "something" and the second, objective matter, whether there is a causal link between B's disability and the relevant something."*

193. From the submissions, the Tribunal concludes that the second test in *Grosset* is the applicable one. It sets out the objective question as to the actual causal link between the disability and the '*something'* arising and that there can be no causal link if there is no something that actually arises. It would not be

restrictive, as the Claimant appears to suggest in his submissions, to require there to be an actual '*something'* arising in consequence of his disability, from which to conduct the above assessment.

Employer's Defence

194. Unfavourable treatment will not amount to discrimination arising from disability if the employer can show that the treatment is a *"proportionate means of achieving a legitimate aim".* It is an objective test and the burden of proof is on the employer. The respondent must produce evidence to support their assertion that the treatment was justified and not rely on mere generalisation. We considered the case of *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 in which Baroness Hale JSC gave guidance on objective justification, noting that in order for a measure, or treatment to be proportionate it *"has to be both an appropriate means of achieving a legitimate aim and (reasonably) necessary in order to do so"*. Treatment which is appropriate to achieve the aim but goes further than is reasonably necessary in order to do so may be disproportionate.

195. The tribunal should not simply review the employer's reasons applying a margin of discretion, but must carry out a "*critical evaluation"* and determine for itself whether, objectively, the means used are proportionate to any legitimate aim, balancing the detriment to the claimant against the legitimate aim and considering whether that aim could have been achieved by less detrimental means (*Allonby v Accrington and Rossendale College and others* [2001] ICR 1189). The tribunal should make its own objective assessment of the relevant facts and circumstances, having regard to the employer's reasonable business needs, business considerations and working practices.

Harassment

196. The law on harassment is contained in section 27 Equality Act 2010:

> "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 purposes or effect of
>
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B".

A also harasses B if –

> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).

197. Section 27(4) states that in deciding whether conduct has the effect referred to in subsection (1)(b) set out above, 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.

198. The Tribunal was aware of the case of *Land Registry v Grant* [2011] EWCA Civ. 769 in which Elias LJ focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caused by the concept of harassment".*

199. In the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the EAT stated that the conduct that is treated as violating a complainant's dignity is not so merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. The Tribunal is obliged to take the complainant's perspective into account in making that assessment but must also consider the relevance of the intention of the alleged harasser in determining whether the conduct could reasonably be considered to violate a complainant's dignity.

200. It is also important where the language used by the alleged harasser is relied upon, to assess the words used in the context in which the use occurred.

201. The Respondents disputed that they had harassed the Claimant at all.

Burden of Proof in discrimination cases

202. The burden of proving the discrimination complaint rests on the employee bringing the complaint. However, it has been recognised that this may well be difficult for an employee who does not hold all the information and evidence that is in the possession of the employer and also because it relies on the drawing of inferences from evidence. Section 136 of the Equality Act states that "*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. If A is able to show that it did not contravene the provision, then this would not apply."*

203. The burden of proof in discrimination complaints is discussed in a substantial volume of case law. It was dealt with most authoritatively in the case of *Igen v Wong [2005] IRLR* and confirmed in subsequent cases including *Madarassay v Nomura International Plc [2007] IRLR 246*.

204. The Court of Appeal of *Igen Ltd v Wong* specifically endorsed the principles set out in *Barton v Investec Securities Ltd [2003] IRLR 332,* some of which are as follows:

> (1) It is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an act of discrimination against the Claimant which is unlawful by virtue of

Part 2 or which by virtue of Sections 41 or Section 42 of the SDA 1975 (Sex Discrimination Act) is to be treated as having been committed against the Claimant. (This was a sex discrimination case, but these principles apply in a race case in the same way). These are referred to below as "such facts".

(2) If the Claimant does not prove such facts, he will fail.

(3) …

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to note the word "could" in SDA 1975 Section 63A(2) [which is comparable to Section 54A of the RRA]. At this stage the Tribunal does not *have* to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact *could* be drawn from them.

(6) In considering what inference is or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply in accordance with Section 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall under that section.

(8) …

(9) Where the Claimant has proved facts from which conclusions could be drawn that the Respondent had treated the Claimant less favourably on the grounds of sex, then the burden of proof shifts to the Respondent.

(10) It is then for the Respondent to prove that he did not commit, or as the case may be is not to be treated as having committed, that act.

(11) To discharge that reason, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires the Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal will normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal would need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

205. In the case of *Laing v Manchester City Council [2006]* ICR 1519 tribunals were cautioned against taking a mechanistic approach to the proof of discrimination by reference to the Race Relations Act 1976 but which would also apply to the Equality Act, in following the guidance set out above. In essence, the claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc [2007] IRLR 246)*.

206. In every case the tribunal has to determine the reason why the claimant was treated as s/he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

207. In assessing the facts in this case, the tribunal is also aware of the comments made in the case of *Bahl v The Law Society [2003] IRLR 640* that simply showing that conduct is unreasonable and unfair would not, by itself, be enough to trigger the reversal of the burden of proof. Unreasonable conduct is not always discriminatory whereas discriminatory conduct is always unreasonable. It was also stated in the case of *Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865* that an employer does not have to establish that he acted reasonably or fairly in order to avoid a finding of discrimination. He only has to establish that the true reason was not discriminatory. Obviously, if unreasonable conduct occurs alongside other factors which suggest that there is or might be discrimination, then the tribunal should find that the claimant had made a prima facie case and shift the burden on to the respondent to show that its treatment of the claimant had nothing to do with the claimant's race and in so doing apply the burden of proof principle as set out above.

208. There were conflicts of evidence in this case. In assessing the evidence, the Respondent referred us to the principle in the case of *Gestmin SGPS SA V credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm) 16 – 22 in which the following principles were set out, which the tribunal must bear in mind:

a. We are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are;

b. Memories are fluid and malleable, being constantly rewritten

whenever they are retrieved;

c. External information can intrude into a witness's memory as can his or her own thoughts and beliefs, both can cause dramatic changes in recollection;

d. Memory is particularly vulnerable to interference and alteration with a person is presented with new information or suggestions about an event in circumstances where his/her memory is already weak due to the passage of time;

e. The best approach for a judge to adopt is to base factual findings on inferences to be drawn from the documentary evidence and known or probable facts.

Applying Law to Facts

209. The Tribunal will now go through the list of issues.

210. The first issue to consider is that of time limits, which is the first issue in Section B on page 61.

Time Limits

211. The complaints in this case range span a 2-year period from 2018 to 2020.

212. The main issue in all of the complaints is the Claimant's relationship with the 1st Respondent and to a lesser extent, with Major John Nixon and whether their actions amounted to discrimination and/or constructive unfair dismissal of him.

213. In this Tribunal's judgment, it is likely that the allegations in the case form part of conduct extending over a period of time to the end of the Claimant's employment.

214. The Tribunal will now set out its judgment on the factual issues listed at pages 58 – 61 of the hearing bundle and then move on to the rest of the legal issues.

215. Before doing so, it is necessary to make some points relating to credibility of the witnesses at the live hearing.

Credibility

216. We had some conflicting evidence from live witnesses in this case. We found the 1st Respondent credible and that he was doing his best to remember what happened and to assist the Tribunal. There were times when he did not remember and he said so.

217. We also found Mr Ahmed to have been a credible witness. We found Ms Cooke to be a credible witness and note that although her evidence was proof of

dishonesty on the Claimant's part, her evidence was not contested.

218. We found Ms Drury's evidence to the Tribunal to be unreliable. She was reticent to give evidence about her unauthorised disclosure of confidential board documents to the Claimant. Under cross-examination by Respondent's Counsel, she eventually confirmed that she had allowed the Claimant to have access to those confidential documents that she had stored on her iPad from when she had been a director. She told us that she did so because she felt that the Claimant had been treated badly by the Respondent, he had had a breakdown and because his partner was lovely. The Claimant was not a board member and had no right to have access to those documents.

219. She denied that she had a difficult relationship with the Claimant before becoming a director but there was evidence that they had. She disputed that she had been in meetings when issues with the Claimant's performance had been discussed and she appeared to suggest that it was only the 1st Respondent that had concerns about it. The minutes of board meetings in October and November 2018 confirm that she had been present for those discussions and had not dissented from the concerns being expressed. Although she was at the meetings described above on 30 November 2018 and on 2 January 2019, her evidence was that she did not agree with the changes that had been made to the terms and conditions of employment. Again, we find this unlikely as no dissent was recorded in the minutes. She did not tell us what clauses she found unacceptable. We find it likely that Ms Drury has had a change of heart since these matters first occurred. It is likely that her friendship with the Claimant and his family has deepened since the events in this case and she has taken the Claimant's 'side' against the 1st Respondent. We find that this affected the cogency of her evidence and that her loyalty to the Claimant may have affected her recollection of events.

220. In relation to the Claimant's evidence, it may have been the time that has passed since these events occurred but we found his evidence to be unreliable. He has convinced himself that he was badly treated by the 1st Respondent and he has viewed everything that happened to him, looking back from that perspective. That has affected the cogency of his evidence to the Tribunal. We recall his evidence in relation to his reasons for not signing the contract on 2 January 2020 as an example. The Claimant could not point to anything he raised with the Respondent at the meetings that had not been covered in the notes. It is clear from the minutes of the meetings that everything, apart from the start and end of holiday year had been covered and that the Respondent had conceded all the other points. The reason he gave at the time for not signing the contract was the holiday year. The points in his witness statement have been thought of subsequently.

221. For those reasons, where there has been a dispute in the evidence, the Tribunal has preferred the Respondent's evidence.

Factual issues – Part A of the list of issues

222. The Tribunal will now give its decision on the list of factual issues from item 1 on page 50 – 17.2 on page 53.

223. It is this Tribunal's judgment that the 2nd Respondent inherited the Claimant

as the only employee when it took over running the right to manage company. The Respondents tried to obtain information on the Claimant's terms and conditions of employment from PMS Leasehold Management but they were not forthcoming. This put the 2nd Respondent and the Claimant at a disadvantage.

224. The Claimant's employment transferred to the 2nd Respondent in 2013. The Claimant's job title was changed and he was issued with a new employment contract which he accepted, agreed and signed. That new employment contract increased his wages and changed his title and it is our judgment that he was happy with it.

225. The 2nd Respondent increased his wages again on the annual salary review in 2014 and in 2015, after the Claimant's cancer diagnosis. It is this Tribunal's judgment that there was no formal handover of work when the Claimant was diagnosed with cancer. The Claimant, Major Nixon and the 1st Respondent are all neighbours, as are the other members of the board and volunteers in the office. It is likely that only Jermaine and his wife did not live in the buildings that the 2nd Respondent managed. In those circumstances, we would not be surprised at a degree of informality between the Claimant and his managers so that when he informed them of his diagnosis and that he was going to undertake hospital treatment, Mr Nixon agreed to take over some of his duties to assist him and this was not confirmed in writing. The Claimant maintained his salary levels and was generally supported by the Respondents during his cancer treatment. There was also no rush to get him to take back those duties that Major Nixon had taken on.

226. There was no attempt to change the Claimant's terms and conditions in July 2018. The Respondents took legal and HR advice in July 2018 on managing the Claimant and dealing with the issues they had with his performance. The Respondents concerns are outlined in paragraphs 47, 50, 60 and 61 above. In November 2018, the Claimant was given a revised set of terms and conditions to consider. In its instructions to the HR company drafting the revised terms and conditions, the 2nd Respondent, through Mr Nixon, instructed them to produce a contract that could be used for any employees and not specifically for the Claimant. As the Claimant was unlikely, as far as the 2nd Respondent was aware, to need to exercise rights relating to adoption, maternity and paternity, Mr Nixon advised them to put them in but not in detail. This did not indicate an intention to breach the Claimant's contract nor to '*trip him up'* as the Claimant suggested in evidence.

227. It is this Tribunal's judgment that the 2nd Respondent felt severely constrained in managing the Claimant as it had not been given sufficient information by its predecessors on the terms and conditions of the Claimant's employment or any applicable handbook or information on the practices that applied in running the properties such as how access cards were activated; to enable it to manage the Claimant and the buildings effectively. The Respondents were trying to regularise the Claimant's employment and get him to be effective as a service manager, which was the job he was employed to do.

228. The Respondents tried to discuss the Claimant's timekeeping with him and he flatly refused to accept that he did not work a full day, even though he was employed on a full-time basis. It is our judgment that he resented being asked to account for his whereabouts. The Claimant did not want to or like being managed.

However, the Respondents were not breaching his contract by trying to manage him and get him to perform the tasks that were part of his contract.

229. In our judgment those were the circumstances in which the 2nd Respondent engaged an HR professional to draw up revised terms and conditions of employment for the Claimant as it wanted to get the best out of the employment relationship and also, to do it properly. The Respondents had already raised with the Claimant in October that he was required to resume those duties that had been done by Mr Nixon. As a resident on the same estate the Claimant would have been aware that Major Nixon was stepping down because of his ill-health. He did not dispute that in the hearing.

230. It is our judgment that at no time was the Claimant told that the changes in the contract were being made because TUPE had expired, or because 5 years had passed since he had been transferred.

231. The Claimant was adamant in the hearing that there had never been a point in time when he told the Respondents that he was cancer free. However, he did cease cancer treatment and return to work on a full-time basis. The Respondents did not ask him to resume those tasks taken on by Major Nixon until some years later and only when Major Nixon was stepping down due to his own ill-health.

232. It is our judgment that at the appraisal meeting on 16 November, the Claimant was given the draft terms and conditions document to take away and consider. He was not told that he had to sign it there and then. The 1st Respondent wanted him to sign it as it would have concluded that matter. But he was not told that he had to do so. He was also not told that TUPE had expired. This was the Respondents consulting with him about the proposed changes to his contract of employment. They were not imposed on him. He had the opportunity to seek legal advice on them and to come back if he had any queries or concerns, which he did. There were two further meetings with the Claimant about his contract – 30 November and 2 January 2020. The Claimant succeeded in getting all the changes that he wanted, apart from the clause relating to his holiday year, which the Respondents were unable to change. All the other matters the Claimant raised in the hearing and in his witness statement were not raised at the time.

233. The Respondents also made it clear that the Claimant was to cease the activation of proximity cards and fobs. As the Claimant's employer, it is open to the 2nd Respondent to decide that it no longer wanted him to perform a task. Once the proper procedure is followed, the 2nd Respondent as the Claimant's employer can make other arrangements for how it wants certain tasks to be performed. It considered that it was appropriate, that as a not for profit company, the proceeds from the activation of fobs/access cards should be used for the benefit of all residents. That is a decision that the 2nd Respondent can make.

234. In this Tribunal's judgment, the Claimant made the decision in January that he would not sign the revised terms and conditions of employment because of the 2nd Respondent's refusal to change the holiday year. That was the only reason given at the time and the only issue that the Claimant raised at the previous meetings that the 2nd Respondent had refused to change. This was unreasonable, given the amount of time he had been given the 2nd Respondent's agreement to

all the other issues that he had raised and given that his holiday year had been the same since he transferred and had not been identified as an issue prior to these terms and conditions being prepared.

235. It is our judgment that the TUPE Regulations 2006 were not relevant to the Respondents attempts to change the Claimant's terms and conditions of employment and his job description and were also not relevant to the Claimant's refusal to accept and sign the new documents.

236. It is our judgment that the Claimant accessed the Respondents documents and emails, with the assistance of Madeline Drury or by himself. He did not have authorisation to do so as he was not a member of the board. He had not been given permission to have access to board meeting minutes or the AGM documents.

237. It is likely that the Claimant had been allowed, firstly by Jaygate and then PMS, to activate proximity cards and fobs for residents and their relatives/visitors as well as for the car park. The Respondents were uneasy about this once the Claimant was transferred to their employment but they were unsure of the legal position and therefore did nothing about it until they had obtained legal advice.

238. The Respondents instructed the Claimant on 16 November 2018 to stop issuing access cards/fobs. He was in no doubt that from 16 November 2018, his authority to program or activate fobs and access cards had been revoked. That was within the 2nd Respondent's remit as his employer. It is likely that the Claimant breached this instruction by activating 101 cards for RDAL also in November 2018 and definitely by activating a proximity card/fob for Ms Cooke in May 2019.

239. The Claimant had not been accused of theft by either of the Respondents. A conversation was overheard and it is likely that the query about the contents of the envelope came from Major Nixon and not from the 1st Respondent. This was against a background of the Claimant taking payment for additional jobs that he did for residents, including activating cards and fobs. In conversation with Major Nixon, the Claimant was able to clear up that query. As a result, Major Nixon apologised to him. He accepted the apology and shook his hand. The Respondents were entitled to consider this matter at an end.

240. The 2nd Respondent had reasonable grounds for concern with regard to the Claimant's performance at his job.

241. The Claimant had failed to complete the 1st Respondent's reasonable instructions contained in the letters of 5 October 2019. He also failed to complete other tasks that he had been instructed to do. He refused to be managed and to account for how he spent his day. He resented the instruction to provide a visible movement/location board so that residents knew where he was so that they could contact him. He preferred to be his own boss and attend to his duties as and when he decided to do so. He stated to Mr Nixon in their recorded conversation that he had turned his phone to silent and as a result missed a call from a resident who needed assistance. He was clear that he considered the 1st Respondent's instructions to be *drivel*. He did not express any feeling of being intimidated or bullied by the 1st Respondent. In the unguarded moment of the conversation, he referred to the 1st Respondent's instructions as *drivel* and as insignificant things

that were an irritant to him. It is our judgment that it was appropriate for the Respondents to seek to manage him more closely and to ask him to be accountable for how he spent his time.

242. The Claimant failed to complete the work on the location board and to write out the instructions for use of the CCTV and the fob programming system. He did not do either of those satisfactorily. It is no answer to say that the Respondents left it sometime before raising those issues with him again. The 1st Respondent was a volunteer and at times, managed this business on his own. The time that elapsed between the first request and the second meant that the Claimant had sufficient time to complete the task and/or to ask if what he had done was satisfactory or whether the Respondent required something else. There was no feedback from him in relation to the jobs that he had been instructed to do.

243. It is our judgment that the Claimant's duties were not eroded over time. it was appropriate for the 2nd Respondent to ask Mr Ahmed to assist with the CCTV upgrade as he is an IT expert. It also asked Mr Ahmed to ensure that the Claimant signed off on the job as he was the Service Manager. The Respondents were depending on the Claimant to ensure that the contractors, including Mr Ahmed, had done a good job. The Claimant was the Respondents eyes on the ground and they were depending on him rather than excluding him.

244. The Claimant was invited to an informal performance meeting on 31 October as there were genuine performance issues that needed to be considered. It was appropriate for the 2nd Respondent to take this step in its efforts to manage the Claimant's performance and ensure that he was doing the full duties of his job. It was appropriate also that a notetaker attend to take a note for the 1st Respondent who could then focus on the discussion rather than stopping to take a note.

245. The Claimant objected to the performance improvement plan (PIP) and the terms of the updated job description. The Respondents did not breach the Claimant's contract by presenting him with a PIP, once it had heard what he had to say about his performance and based on his reluctance to be managed and to carry out the tasks he had been asked to do. It was also not a breach of his contract to update his job description. The Claimant had previously accepted revisions to his contract and job description when the 2nd Respondent responded to changes in the workplace. He was made a Service Manager and his wages increased. He accepted that. The 2nd Respondent took duties off him while he undertook cancer treatment. He accepted that. Those duties were not returned to him immediately on his return to work and there was no complaint from the Claimant about that. Cleaning foyers, vacuuming etc had never been removed from his job description. In the beginning he was responsible for doing them himself. Later, he was responsible to ensure that the contractors did the cleaning etc but those tasks had never been removed from his job description. As Contracts Manager, it was his job to ensure that those tasks were completed and that the contractors did their jobs.

246. The meeting was not heavy handed and oppressive towards the Claimant. It was informal because it was not part of a disciplinary process. The Claimant did not want to be line managed so from his perspective any supervision or appraisal meeting would have felt like too much but that did not mean that it was so.

247. All the changes the 2nd Respondent proposed in November 2018 were refused by the Claimant and the Respondents accepted amendments. The changes to the job description were necessary to ensure the smooth running of Charles and Stuart Houses and the car park. The suggested changes were not a breach of the Claimant's contract.

248. In the letter of 13 November, the Respondent were seeking to determine whether the Claimant was returning to work. The circumstances surrounding this letter were that the Claimant had attended a meeting with Ms Parcell in which he had referred to constructive dismissal. He was off sick but had not sent in any sick notes. He was therefore absent without authorisation. The letter advised him that if he was still unwell, he should obtain a fit note from his GP, which the Claimant duly did and submitted the same day. The letter did not say that he was to be considered as having resigned that day, he was given just over a week to inform the Respondents whether that was the case.

249. The Respondents did not even know if the Claimant was still unwell. In the circumstances, it was reasonable for the Respondents to ask whether, if there is no contact from him up to 18 November, he had any intention of returning. This was the basis of the reference to resignation. In the circumstances, in our judgment, it was not a breach of contract to send the letter in the terms in which it was written.

250. We did not have evidence that the 1st Respondent proposed at the AGM that the Claimant should be dismissed. We were told that discussion about the appointment of a service management company was a recurring topic on AGM agendas. The 2nd Respondent was always looking at ways to reduce costs. Ms Drury had asked the Claimant whether he wanted to work part-time. The board had discussed and seriously considered various options – including engaging a management company, employing Jermaine and making the Claimant redundant. As a not-for-profit company the 2nd Respondent was doing its best to make the most of its income and considering where it could make efficiencies and savings. The 2nd Respondent kept the situation under constant review and this was appropriate.

251. It was the 1st Respondent's responsibility to lead such discussions at board level and at the AGM. We did not have evidence of a specific recommendation or a proposal that the Claimant should be dismissed. Even though that was an item on the AGM agenda, the Respondent raised the Claimant's wage annually and joined him to the pension scheme at the appropriate time.

252. In relation to the grievance, it is our judgment that this was a valid grievance and that the Respondents treated it as such. It was acknowledged within 2 days. Although it must have been frustrating for the Claimant to have to wait three months for an outcome, that was not unreasonable given that the 1st Respondent was acting without any other board members and having to seek advice on how to address it. Correspondence with HR shows that they were discussions about how best to approach the grievance, given that the Claimant had refused to meet with the 1st Respondent and Ms Parcell. There was no one else who could do it. This was a genuine attempt by the Respondents to address the Claimant's grievance and to investigate it and come to a decision on the issues raised. The 1st

Respondent was away and was then seriously ill and he responded after that, as soon as he was able.

253. Even though he was the subject of parts of the Claimant's grievance, it was appropriate, given the size of the organisation and the limited resources that it had. As a not-for-profit organisation; it was not unreasonable and certainly not a breach of the Claimant's employment contract for the 1st Respondent to investigate the grievance, with Ms Parcell's support. The Claimant had already been through most of his grievance in a meeting with Ms Parcell the previous month.

254. It is our judgment that the outcome of the grievance shows that the 1st Respondent addressed his mind to the issues raised and attempted to consider each separately and fairly. He gave a considered response. It may not have been the response that the Claimant wanted but that does not mean that it was a breach of the Claimant's contract in the way that it was handled or that it was unreasonable. The 1st Respondent did not uphold the Claimant's grievance because he did not find any basis, from his investigation, on which he could have upheld it. It is our judgment that the 2nd Respondent acted reasonably in rejecting the Claimant's grievances.

255. The Tribunal would have preferred if there had been someone else within the 2nd Respondent who could have heard the Claimant's appeal against his grievance outcome. As already stated above, the 2nd Respondent is a small, not-for-profit company and the 1st Respondent was the only active member of the board who could take these decisions. The Claimant's only issue with the appeal was that the 1st Respondent conducted it. His appeal was a repeat of the original grievance. Although it was not perfect, it is our judgment that it was reasonable, given its size and resources, for the 2nd Respondent to authorise its Chairman to conduct the grievance appeal, with the assistance and support of external HR. The appeal outcome letter shows that the 1st Respondent achieved the difficult task of looking at the grievance anew and considering the Claimant's points again.

256. There was no breach of contract in the way the Respondents dealt with the Claimant's grievance and grievance appeal. The Respondent did not breach the implied term of trust and confidence in the way it dealt with the Claimant's grievance and grievance appeal.

257. The 2nd Respondent was justified in asking the Claimant to return company property on 9 December 2019. The 2nd Respondent did not take an aggressive stance. It asked the Claimant to return property that he did not have a right to keep. He was given time to remove his items and to return the 2nd Respondent's items. The keys were required for work. It was not appropriate for him to have them over a sustained period, when he was sick, as he would have no reason to use them over that period. There was every intention to return the keys to him when he returned to work. The 1st Respondent also expected to talk with him about his expenses when he returned to work.

258. There was no evidence that the Respondent was attempting to push the Claimant out of his employment or to encourage him to resign. The Claimant had been working there for some time and was a resident in one of the houses that he managed. He was well known by the residents. The 1st Respondent was unwell

at the beginning of 2020 and there was no evidence that he had any desire to take over the Claimant's duties or to take them away from the Claimant. It is our judgment that the 1st Respondent wanted the Claimant to be accountable for the duties of his job, to be transparent about the way in which he did the job and to perform his job so that the residents got value for the salary he was paid.

259. The 1st Respondent had found it disappointing that the Claimant had not come to the office to communicate his absence. This was not admonishing the Claimant and was not an attempt to assert undue control over the Claimant.

260. We did not have evidence that supported an assertion that the Claimant was a source of irritation to the Respondents or that he caused significant frustration over his refusal to sign the new terms and conditions so that the Respondents would seek to terminate his contract. There was also no evidence to support an assertion that the Claimant had terms and conditions that the Respondent did not like or wished to be rid of.

261. The findings above show that the Claimant's conditions improved on being transferred to the Respondent. He had an elevated title on transfer to the 2nd Respondents as they wanted to acknowledge the work that he did and the wealth of knowledge that he had about the properties he managed. The 2nd Respondent increased the Claimant's wages at every review. There was no evidence that there was a reluctance to provide him with a pension. As soon as the 2nd Respondent was legally obliged to pay him a pension, it did so. The Respondent also provided flexibility by agreeing to the Claimant's requests to have pay increases made as pension contributions.

262. When the Respondent attempted to revise the working hours so that the Claimant could be available to residents on Saturday morning, the Claimant refused to accept this and indicated this when he signed the contract. He ensured that he did not do the hours that the board wanted him to do. This was not the actions of someone who felt bullied in the workplace or that he was being pushed out.

263. The Respondent sought to manage the Claimant. The Claimant was the 2nd Respondent's employee. It was entitled to ask him to account for his time and to show the work he had done. They were entitled to ask him to let the residents know his whereabouts during the day. The 2nd Respondent was entitled as his employer, to seek to negotiate revised terms and conditions of employment with him, if it considers that it needed to be revised. The 2nd Respondent was entitled, as the Claimant's employer, to ask him to dedicate his time during working hours to the duties of his job rather than making extra income from doing private jobs for residents. The Respondent decided to stop the Claimant from activating access cards and fobs and carrying out window spring work in working hours. That was not a breach of the Claimant's contract, even if he had been doing it for some time. it is this Tribunal's judgment that the Respondent did not make any unreasonable requests of the Claimant.

264. Changes suggested to his contract in 2018 were retracted apart from the clause regarding his holiday year. When he unreasonably continued to refuse to sign it, no further action was taken and the Claimant was allowed to continue to

work.

265. In relation to the complaint of age discrimination, the Claimant has failed to provide any evidence that he was treated less favourably than a hypothetical comparator. It was not clear to us whether he was comparing himself to an older age group, which could be a group comprising the 1st Respondent and Mr Nixon who were both at least 10 years older than the Claimant; or to a younger age group, which could include Mr Ahmed. Neither of these applied as the Claimant was the 2nd Respondent's only employee and none of the other individuals involved in the claim were employees. The Claimant also did not tell the Tribunal about a hypothetical comparator.

266. The Claimant complained that the 1st Respondent had enquired of the HR consultants about getting advice on retirement age. We accepted the 1st Respondent's evidence that he wanted to know about retirement as the law had changed and he wanted to know what had replaced the compulsory retirement age, he was concerned that as the Claimant was the 2nd Respondent's sole employee, the 2nd Respondent should be putting in plans for how it would operate, if the Claimant was to leave. He was concerned not to be taken by surprise as he had the responsibility for the daily running of these properties and was trying to plan ahead.

267. We did not find that the 1st Respondent talked to the Claimant or asked him about his retirement. Even if the 1st Respondent had talked about his own retirement, that could not be taken as a suggestion that the Claimant should retire or that he was being nudged towards retirement. This was also not something that he complained about in his recorded conversation with Mr Nixon.

268. There was also no evidence that the Respondents have ever referred to the Claimant's cancer before the grievance outcome letter. There was no evidence that it had ever been an issue for the Respondents or that there had been any problem with the Claimant getting time off to attend hospital appointments or to recover from treatment. The evidence was quite the opposite. The Claimant was allowed to do some work around his appointments and Major Nixon simply picked up the tasks that were left, in order to ensure the smooth running of the buildings and that the Claimant could concentrate on his health. Although he did not complete all his duties while undergoing cancer treatment, the Claimant maintained his salary and was told to take as long as he needed. The Claimant was not asked to take back those tasks until 3 years later.

269. The only reference to cancer was in the grievance outcome letter. It had not been referred to or the period of time during which he had been having treatment, had not been referred to in the board meeting minutes where the Claimant would not have been present nor in letters to or in meetings with the Claimant.

270. There was no evidence that the Claimant's cancer had been an issue for the Respondents.

271. The 1st Respondent referred to the Claimant's cancer in the grievance outcome letter in February 2020, which was written 5 years after the cancer

diagnosis in 2015. The context is also that the Respondents only began talking to the Claimant about his performance in 2018, some three years after his cancer treatment ended. The Respondents believed that the Claimant was in remission and had been so since the end of 2015. It was the Claimant's evidence in the hearing that he had never told the Respondents that he was in remission but the Respondents clearly believed that he was as they had no reason to think otherwise. The Claimant had never referred to cancer again or asked for time off to attend appointments or treatment, after the end of 2015.

Legal Issues: Unfair Dismissal

272. The Claimant has failed to show by reference to the facts set out above that he terminated his employment in circumstances in which he was entitled to do so without notice by reason of the Respondents conduct.

273. The Respondents did not conduct themselves in a matter calculated or likely to destroy or seriously damage the relationship of trust and confidence.

274. The 2nd Respondent did not breach the Claimant's contract. The 2nd Respondent did not conduct itself in breach of the Claimant's employment contract, without reasonable and proper cause.

275. The Claimant conducted himself unreasonably when he refused to sign new terms and conditions of employment in January 2019. All the matters that he had asked to be taken out of the draft had been agreed. The only matters outstanding were the adjustment to the holiday year and the Respondent's instruction to him to stop activating fobs which was not in the documents but had also happened in the 16 November meeting, as part of the appraisal meeting.

276. The Respondent took up legitimate performance issues with the Claimant. The 2nd Respondent was advised by HR that the contract should be updated and the Respondents themselves wanted to update the Claimant's contract to reflect what he was actually doing and the hours he was actually working. There was no proposal to reduce his wages.

277. It was not a breach of contract for the 2nd Respondent to take steps to ensure that its employee's contract is aligned with the job he is doing and sets out clearly its expectations and his obligations. The Claimant was the sole employee and the Respondent depended on him to look after the properties while they got on with their lives. It was a very responsible position. The Respondents increased his wages in 2013, 2014, 2015 and 2019 and the Claimant got an increase and joined the pension scheme in 2018. He was made Service and Contracts Manager when he transferred to the 2nd Respondent in an effort to convey to him his importance to the KOA and so that he would work with them and be their eyes and ears around the properties.

278. There was no intention on the Respondent's part not to be bound by the terms and conditions of employment. There was no evidence that they did not intend to keep him on in employment. Active line management does not equate to pushing someone out of employment.

279. The Respondents did their best to address the Claimant's grievance. The 1st Respondent was dealing with all of this on his own. He tried to deal separately with the Claimant's performance, his ill-health absence and his conduct, with the support of Ms Parcell, the HR consultant. Even if he did not do so as effectively as other employers might have, he did not breach the Claimant's contract in how he handled those matters, whether fundamentally or otherwise.

280. In this Tribunal's judgment, the Claimant has failed to prove that the 2nd Respondent breached his contract of employment in a way that entitled him to resign and claim constructive unfair dismissal. The Claimant did not identify a last straw event in submissions but the Tribunal did not find that there was such an event. At the meeting on 11 December the Claimant was already considering resigning and claiming constructive dismissal, which he did a month later.

281. The Claimant was not dismissed. The Claimant resigned in circumstances where he was unwell and decided that he did not want to return to the 2nd Respondent's employment. The 2nd Respondent is not liable for the Claimant's decision to resign.

282. The complaint of constructive unfair dismissal fails.

Automatic Unfair Dismissal

283. The Tribunal did not understand the Claimant's case that he asserted his rights under TUPE. It was his case that the 1st Respondent referred to TUPE in the meeting when he was given the revised terms and conditions document. It was not his evidence that he asserted any rights under TUPE.

284. The Claimant grieved about a number of things, one of which was unpaid expenses. The Respondents wanted to discuss those with him before paying them. The Respondents did not refuse to pay the Claimant's expense claim but deferred payment until he returned to work and there was an opportunity to discuss it with him. Section 27(2)(b) of the Employment Rights Act 1996 specifically excludes the reimbursement of expenses from the definition of wages.

285. The Claimant raised the issue of his unpaid expenses as part of his grievance but we were not referred to a statutory right to reimbursement of expenses. The Claimant's resignation letter did not refer to any statutory rights that he believed he asserted which had led to his resignation. Applying section 104 ERA, it was not clear to the Tribunal that the Claimant believed at the time he wrote the grievance letter that he was asserting a statutory right when he included his expenses claim as part of his grievance.

286. Even if he believed that he was doing so when he raised the grievance, it is our judgment that the Claimant was not dismissed. The delay in paying his expenses did not happen because he asserted a statutory right.

287. It is therefore this Tribunal's judgment that the Claimant has failed to show that he was dismissed for asserting a statutory right.

Unlawful Discrimination

Direct Age Discrimination

288. The Claimant did not tell the Tribunal the age group that he identified with or the age group he compared himself with.

289. The Claimant was not treated to a detriment or a series of detriments. It is our judgment that the Claimant has failed to prove facts from which we could infer that he was treated less favourably on the grounds of age.

290. The Claimant's complaint of age discrimination fails and is dismissed.

Disability Discrimination – the section 15 claim

291. Applying the test set out above in *Pnaiser* and *Grosset*, the Claimant was not treated unfavourably by the Respondents. Although the Claimant did not want to be line managed and in our judgment, resented any attempt to manage him, line management is not unfavourable treatment.

292. The 1st Respondent's attempts to line manage the Claimant by giving him instructions, asking him to account for his whereabouts and asking him to share information about the operation of the fobs machine and the CCTV; was not done in consequence of the Claimant's disability. They were done because the 1st Respondent saw that the Claimant was not fully occupied, was not always available to residents and had been unwilling to share information with his employers about how things worked around the buildings. He held all the keys, the CCTV was monitored from his flat, he had the power of granting residents' access by activating their cards – he was the only person who knew how to do that. It was appropriate for the Respondents to ask the Claimant to share that information so that when he went on leave or should he decide to leave the employment or if he was unwell, the work could continue. The requirement that he account for his time and that he let residents know of his whereabouts during the day was not done because of anything arising from his disability.

293. It was not the Claimant's case that something arising from his disability caused the printout from his fob to show that he was not always available to residents. It was not his case that something arising from his disability caused him to not complete the tasks that he was instructed to do in the 5 October letters. Those were tasks that were part of his job description.

294. It is also our judgment that the 1st Respondent did not have the Claimant's disability or anything arising from the Claimant's disability in his mind when he asked the HR consultant for advice on the current retirement rules and when he asked for the terms and conditions to be redrafted to reflect the current situation. It is correct that in the grievance outcome letter the 1st Respondent stated that the Claimant's performance had been impeccable up to the Claimant's diagnosis. He suggested that following the Claimant's absence from work for cancer treatment, the Claimant's standards dropped and he was less motivated.

295. In this Tribunal's judgment, the 1st Respondent made a clumsy statement here, in an attempt to pinpoint a time when he considered the Claimant's performance had changed. He did not say that it was the cancer that had changed the Claimant's performance or the cancer treatment. He was really pinpointing a time from when he noticed that it changed.

296. There are no other facts that point to this being a statement that the 1st Respondent perceived the Claimant's reduction in performance or the standard of his workmanship to have been caused by the Claimant's cancer rather than a statement that from around that time, the Claimant's performance changed and his efforts to get new terms and conditions drafted and a new contract signed was his attempt to get the Claimant back on track.

297. It is our judgment that there are no other facts that could lead us to conclude that by making that statement in the grievance outcome letter, 1st Respondent meant that he perceived the Claimant's disability to have had a detrimental effect on his performance. It is this Tribunal's judgment that the 1st Respondent meant that the reduction in the Claimant's standards of work coincided with his diagnosis of cancer and the treatment. They happened around the same time. In reaching this conclusion, we considered the surrounding facts. The Claimant's diagnosis of cancer was never hinted at, referred to or mentioned at work. It was not referred to while the Claimant was working. There was no evidence that the 1st Respondent had the Claimant's disability or anything arising from it in his mind when he tried to manage the Claimant or when he tried to change his terms and conditions of employment. All the letters of advice from the solicitors or the emails to and from the HR consultant were about the Claimant's performance and how to enhance it. It is with those facts in mind that we conclude that the 1st Respondent's statement in the grievance outcome letter was an inept way of saying that the reduction in the standards of your work happened around the time of your diagnosis, not that it was caused by it.

298. It is also our judgment that there is no causal link between the Claimant's disability and his performance at work. No case was put to us that there was something arising from the Claimant's disability that affected his performance at work. It was the Claimant's case that his performance was fine, that he knew his job and did it and that he did not need any line management.

299. As far as perception is concerned, we did not agree with the Claimant that perception would be sufficient to make a section 15 claim but in this case, we did not have evidence that the 1st Respondent perceived that the Claimant's performance was failing because of the Claimant's cancer diagnosis or cancer treatment. It is our judgment that the statement in the letter that the HR consultant drafted was that the issues with the Claimant's work arose after his cancer treatment. There was nothing to suggest that the 1st Respondent perceived one to have been caused by or arise from the other.

300. We did not have evidence that he meant that the cancer diagnosis or something arising from it had adversely affected the Claimant's performance. The 1st Respondent had not perceived anything relating to cancer affecting the Claimant's performance. We also did not have evidence of anything arising from the cancer diagnosis or treatment that this could be reference to.

301. The Claimant had cancer treatment in 2015. The issues with his performance began in 2018 or that is when the Respondent raised them with him.

302. It is therefore our judgment that the Respondents performance management of the Claimant did not arise from something in consequence of the Claimant's disability or something that the Respondent perceived arose from the Claimant's disability.

303. This complaint fails and is dismissed.

Harassment

304. The complaint of harassment relates to the 1st Respondent's criticism of the Claimant for the standard of his workmanship (para 14 of the Legal issues) set out more fully in paragraph 25 of the grounds of claim where it states that the purpose or effect of the statement in the grievance outcome letter about the Claimant's workmanship following his cancer treatment had violated his dignity or created an intimidating, hostile, degrading, humiliating, or offensive environment for him, related to his disability.

305. As already stated, the 1st Respondent made a statement in the grievance outcome letter that the Claimant's performance had been impeccable up to the time of his diagnosis and subsequent treatment. He also stated that following the Claimant's absence for cancer, his standards had dropped.

306. It is our judgment that the Claimant was not harassed by the matters covered in Part A of the list issues.

307. In relation to the grievance outcome letter, the 1st Respondent relied on the HR consultant to draft the letter and assumed that it was properly written by her.

308. Applying the test set out above and in section 27(1) Equality Act. Firstly, the statement by the 1st Respondent was unwanted and referred to the Claimant's disability. It is our judgment that this statement was unwanted conduct. The Claimant was deeply hurt by the comment and what he believed was a suggestion that his performance had been affected by his cancer.

309. The conduct was related to the Claimant's disability. The comment referred to the Claimant's cancer diagnosis and treatment and the period after he returned to work following treatment for cancer.

310. Secondly, we considered whether the conduct had the purpose of violating the Claimant's dignity or creating a hostile environment for him. It is our judgment that the comment did not have the purpose of harassing the Claimant. The 1st Respondent did not intend to harass the Claimant or make him feel uncomfortable or intimidated. He was trying to get the Claimant back to work. We are persuaded that the 1st Respondent wanted to keep the Claimant in employment but that he wanted him to perform better. His intention in referring to the Claimant's cancer diagnosis and treatment was to pinpoint the moment in time when things changed rather than to say that the Claimant's performance changed because of the cancer

or the treatment for cancer.

311. It is our judgment, taking into account the surrounding circumstances, such as the arrangements made to support the Claimant while he had treatment for cancer, the length of time between the Claimant's cancer diagnosis and the reference in the letter and the 1st Respondent's experience of cancer in his family; that the 1st Respondent did not mean to violate the Claimant's dignity by including that statement in the letter. In our judgment, he meant that the drop in the Claimant's standards of workmanship and his attention to the job coincided with his cancer diagnosis and treatment.

312. Did the conduct have the effect of violating the Claimant's dignity and creating a hostile, intimidating, degrading, humiliating and offensive environment for him? The Claimant experienced this as an upsetting remark from his manager. He referred to the statement many times in his letter of appeal and complained of discrimination on the grounds of disability.

313. Was it reasonable for this comment to have had that effect? The comment had such an effect on the Claimant because he already believed that the 1st Respondent wanted him out of employment and he already felt that he was being treated badly.

314. On 30 November, when the Claimant went to the meeting with Mr Ahmed, he felt that he needed to justify or defend himself and had prepared a list of all that he had done for the organisation and read it out at the meeting. This was not an employee who trusted his employers. This lack of trust that the Claimant felt toward the Respondents may be the reason why the comment in the letter had such an effect on him. When he met with Ms Parcell with his partner, he referred to constructive unfair dismissal and that he felt that he was being pushed out of his job. The Claimant hated the idea of being managed intensely and was suspicious of the 1st Respondent's actions in trying to manage him and to get him to account for how he spent his time. Even though the 2nd Respondent had agreed to all the changes that he asked for to the draft contract, apart from the holiday year clause; he still did not trust the Respondents and continued to refuse to sign it.

315. In considering whether the 1st Respondent's statement had the effect of violating his dignity or harassing him, we considered his perception, the other circumstances of the case and whether it was reasonable for it to have had that effect on him. the Claimant's perception is set out at paragraph 292 above. The other circumstances are that the Claimant and the 1st Respondent did not have as good a working relationship as his relationship with Major Nixon. However, during the Claimant's working relationship with the 1st Respondent there was no report of the 1st Respondent ever having made any reference to the Claimant's disability or the treatment he received. He never referred to it as a factor in his management of the Claimant or in his expectations of him or the tasks that he could or could not do.

316. It is this Tribunal's judgment that the 1st Respondent did not intend to harass the Claimant or create a hostile, intimidating or harassing environment for him. the 1st Respondent did not intend to suggest that the Claimant's cancer or his cancer treatment had affected his performance at work or his workmanship. The 1st

Respondent and the HR Consultant who drafted the letter were intending to pinpoint a moment in time when the Claimant's performance changed. They were not suggesting that the cancer caused the change.

317. The Claimant knew the 1st Respondent and would have known that the 1st Respondent had not ever referred to cancer or to the Claimant's diagnosis or treatment. He also knew that the 1st Respondent had made arrangements with Major Nixon for Mr Nixon to take over some of the Claimant's duties while he underwent cancer treatment.

318. The principle in *Richmond Pharmacology v Dhaliwal* is that the conduct is not to be treated as violating the Claimant's dignity, merely because he thinks it does. We have taken the Claimant's perspective into account but also, the surrounding circumstances, the context - including the intention of the alleged harasser. There was no intention to harass the Claimant. The context does not support a conclusion that a hostile environment was being created for him related to his disability. The Respondents were trying to improve the Claimant's performance of his job. This was unrelated to his cancer diagnosis or his cancer treatment. In the circumstances, it is our judgment that it is not reasonable to conclude that the 1st Respondent's conduct by making the only reference to cancer in the whole period since the Claimant's diagnosis, was harassment or had the effect of creating a hostile environment for the Claimant or violating their dignity.

319. In those circumstances, it is this Tribunal's judgment that the complaint of harassment related to disability fails and is dismissed.

Employment Judge Jones
Date: 30 December 2022