**Case No: 1401180/2017**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs A Tritton**

**Respondent:** **Mitie Cleaning & Environmental Services Limited**

**Heard at:** **Leeds** **On: 13 and 14 February 2018**

**Before:** **Employment Judge Maidment**
**Members:** **Mr D Dorman-Smith**
**Mr K Lannaman**

**Representation**
**Claimant:** **Mr S Tritton, the Claimant's husband**
**Respondent:** **Mr C Ridley, Solicitor**

**JUDGMENT** having been sent to the parties on 15 February 2018 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

# REASONS

## The Issues

1. The Claimant's primary complaints in these proceedings are of disability discrimination. Her first complaint relates to the Respondent not paying her a bonus as part of what is known as the Mitie Star Award in respect of work she says she carried out in December 2015/January 2016. Secondly, she complains of the Respondent's failure to take into account her overtime working in calculating her notice pay and accrued annual leave entitlement on the termination of her employment. These complaints are brought in the alternative as direct disability discrimination (less favourable treatment because of her disability where, in the case of the bonus she relies on a comparator colleague, Mr Fox) and discrimination arising from disability. It was confirmed by Mr S Tritton at the outset of the hearing that no claim was being pursued in respect of the Claimant acting effectively as a team leader. It has already been accepted by the Respondent that the Claimant was, at all material times, a disabled person by reason of her suffering from cancer.

2. In addition, the Claimant brought a claim for accrued but untaken holiday entitlement as at the termination of her employment where the number of days, but, in particular, how holiday pay had been calculated was in dispute.

3. Finally, the Claimant brought a claim for damages for breach of contract in that she maintains that she was entitled to receive the sum of £800 per month during her sickness as a result of a promise she said had been made to her, whereas she in fact was paid statutory sick pay only. She further seeks damages arising out of how her notice pay entitlement was calculated i.e. without reference to her habitual overtime working.

4. At the outset of the hearing the Respondent made it clear that it accepted that it had initially miscalculated the payments due in respect of accrued holiday entitlement and notice pay but that it had rectified matters and paid the shortfall it had calculated still to be due to the Claimant. During the hearing and witness evidence it became clear that further discrepancies existed attributable to, amongst other things, a failure to take account of paid travelling time in calculations and a miscalculation of the amount of untaken holiday accrued. The Respondent recalculated the amounts properly payable and it was agreed between the Claimant and the Respondent that the outstanding gross sum of £1,428.70 was payable in respect of accrued holiday entitlement and the additional sum of £149.94 in respect of notice pay.

## The Evidence

5. The Tribunal had before it an agreed bundle of documents. Having clarified the issues with the parties at the commencement of the hearing, the Tribunal took some time to privately read into the witness statements exchanged between the parties. In such circumstances each witness could simply confirm their statements and, subject to brief supplementary questions, then be open to be cross-examined on them.

6. The Claimant was too ill to attend this hearing but in circumstances where her condition will not improve and it was her wish that the hearing proceed in her absence. A written witness statement was accepted as her evidence albeit in circumstances where the Tribunal had to point out that only reduced weight could be attached to it in circumstances where she was not present to be cross-examined. Mr Stephen Tritton then gave evidence on the Claimant's behalf, followed by Mr Michael Fox, one of the Claimant's former industrial cleaner colleagues and Ms Sheri Tritton, the Claimant's daughter. On behalf of the Respondent, the Tribunal then heard evidence from Mrs Diane Exley, Senior Account Manager and Ms Christine Woulfe, Head of Operations TCS North/Scotland.

7. Having considered all the relevant evidence, the Tribunal makes the findings of fact as follows.

## The Facts

8. The Claimant was employed by the Respondent as an industrial cleaner from 12 August 2013. As such she was required to travel to various client sites including outside of the local area. She previously worked for the Respondent up until 10 December 2012 and prior, therefore, to a brief break in her employment with the Respondent. The Claimant reported to a team leader and then to Diane Exley, Senior Account Manager.

9. When the Claimant rejoined the Respondent for a second time, she was given and completed a starter pack which included a contract of employment. The Claimant was told that everything remained the same as the last time she had worked with the Respondent. She signed the documentation provided but was not given a copy to retain.

10. At first, the Claimant was employed on a zero hours basis but it was subsequently verbally agreed that she would be provided with a minimum of 20 hours of work each week. The Claimant's basic hours of work were 4 hours each day, Monday – Friday. In reality, the Claimant worked a significant number of additional hours and further time spent indeed travelling to client sites for which she was paid. The Claimant was entitled under her contract of employment to 20 days of holiday plus bank holidays in each holiday year and to statutory sick pay only in the event of absences due to sickness. She was able to terminate her contract of employment on one week's notice.

11. It is clear that the Claimant had enjoyed a very good relationship with Mrs Exley and that they considered each other to be good friends.

12. The Claimant was absent on holiday from 21 December 2015 until returning to work on Monday 4 January 2016. During this period, an emergency situation arose with a client, Vodafone, whose Leeds premises, in particular a site on Kirkstall Road, were affected by severe flooding. Mrs Exley was aware of this by early on the afternoon of 27 December 2015. She contacted a number of the Respondent's industrial cleaners to ask if they would be willing to come in and work over the Christmas period. The Claimant told Mrs Exley that she did not wish to work as she wanted to spend time with her family over the festive period.

13. A number of the Respondent's employees were willing to work on the flooded site, including but not limited to industrial cleaners such as the Claimant. As a result of their efforts, the site was operational again by 29 December albeit a significant amount of cleaning up work remained to be

completed. This cleaning work continued on and after the Claimant's return to work from holiday on 4 January 2016 as well as similar work necessary to be completed at Vodafone's second Leeds site, Falcon House.

14. One of the Claimant's colleagues, Michael Fox, had been expected to work on the Kirkstall Road site from 28 December, but was ultimately unable to do so because he had to assist his own daughter who lived nearby and was also experiencing flooding. Mr Fox worked away in Wrexham on 30 December and then did work at Vodafone's Kirkstall Road site on Sunday 3 January.

15. As a result of their efforts, Vodafone nominated those of the Respondent's employees who had worked on the site over the Christmas period for a Respondent company award known as the Mitie Star Award. Subsequently, Mr Dave Hoey, Service Delivery Manager for Vodafone asked Mrs Exley to give him a list of all of those employees who had been on site up to 3 January. As a result of his attendance on 3 January, Mr Fox was included on that list together with any other employee who had worked there at least one day during the period from 27 December.

16. The Award allowed staff to progress through various levels of award and ultimately the Respondent's staff involved in the Vodafone flood clean-up during the Christmas period progressed to a level 5 award which involved a prize of £15,000 being split equally between 38 or so employees. A letter was sent by the Respondent to those employees nominated praising their work and reflecting their achievement of a level 1 award in January 2016. The letters included a list of all of those employees eligible. A subsequent level 2 award was made in March 2016 with further correspondence confirming the employees' achievements. Similarly, a letter confirming a Level 3 award was sent out to them in October 2016. There were no additions to the names of the environmental crew eligible of which the Claimant would have been part had she work during this period. However, a Mr Kendall was removed from the list due to his having left the Respondent's employment.

17. At the time of the Vodafone flood the Claimant appeared to be in good health. Indeed, she did not have a significant sickness absence record and was regarded within the Respondent as extremely committed and an extremely good worker. However, on 16 July 2016 the Claimant was taken ill and was forced to take some time off work. The Claimant's husband, Mr Stephen Tritton, who also worked for the Respondent, passed a sick note to Mrs Exley's line manager, Christine Woulfe, on 26 July. She said for him to tell the Claimant to "*hurry up and get back to work*". Mr Tritton thought that comment to be inappropriate, but took no offence at the time and was more concerned with other issues concerning him personally.

18. Mr Tritton attended a grievance meeting personal to him with Mrs Exley on 31 August 2016 and gave her a further sicknote from the Claimant's GP. It is accepted that Mrs Exley said to him that Ms Woulfe was sick of people being on sick when there was nothing wrong with them and that their heads were on the chopping block. It is noted that Mrs Woulfe denies ever speaking in such terms as Mrs Exley reported. Mr Tritton replied to Mrs Exley that he hoped she was not talking about the Claimant to which Mrs Exley responded that indeed she didn't mean the Claimant. Again, whilst Mr Tritton thought the comment to be inappropriate he appreciated that Mrs Exley was a friend of the Claimant's and thought little further about the comment.

19. From the commencement of her sickness absence, the Claimant received statutory sick pay only which was all that she expected to be paid. Sadly, on 22 September 2016, the Claimant was diagnosed as terminally ill with lung cancer. She started a course of chemotherapy on 27 September 2016 and did not return to work.

20. Whilst not material to the Tribunal's findings, Mrs Exley's evidence that she visited the Claimant on two or three occasions in the early stages of her sickness absence is accepted as a clear and accurate recollection and consistent with the relationship of friendship between her and the Claimant at that time.

21. It is agreed that she certainly visited the Claimant at her home on 1 October 2016 and spoke there with the Claimant and Mr Tritton. The Claimant's evidence was that during their conversation, Mrs Exley said: *"We can pay you £800 a month but it depends if you are entitled to any benefits*". Mr Tritton has confirmed that statement as accurate. Mr Tritton said that given her level within the Respondent he thought that Mrs Exley had authority to change rates of pay and he said that he and the Claimant took this to be a genuine offer. He then told Mrs Exley that a benefits adviser from Macmillan care, who Mrs Exley mistakenly confused with a nurse, was visiting the following week to advise if the Claimant was entitled to any benefits.

22. Mrs Exley's recollection of the conversation is very different. She said that Mr Tritton asked her about holiday pay and she explained that they couldn't pay the Claimant statutory sick pay and holiday pay at the same time. Holidays would continue to accrue and be paid out at a later date. She was adamant that she had not referred to the Respondent paying a sum of £800 per month or any other sum to the Claimant and had no idea where that came from. Her evidence was that she had just said that she would go to human resources to see if the Claimant could get an additional payment because she had never dealt before with an employee suffering from a terminal illness. She said that she couldn't have referred to any particular figures, but if she had had in mind any payment, it would have been with reference to the Claimant working around 80 hours per

month at a rate of £7.20 which she thought came to a sum of around £600 but not £800. There was no logic or basis, she said, for any payment of £800.

23. On 6 October 2016 the Claimant was visited at home by Tracey Parsons of Macmillan care and, whilst there, a call was received from Mrs Exley. The Claimant's evidence was that she and Mr Tritton had already explained to Ms Parsons that Mrs Exley had offered to pay £800 a month subject to whether or not they were eligible for benefits. Ms Parsons said that they would not be eligible for benefits and said that the Respondent could pay any extra amount it saw fit on top of statutory sick pay. Around that point the telephone call was received from Mrs Exley, who was told by Mr Tritton that he was glad she had phoned and that the benefits adviser had said that they were not eligible for benefits so that Mrs Exley could go ahead with the £800 offered. He said that Mrs Exley then said that she would have to speak to human resources. The phone was passed to Ms Parsons who, the Claimant maintained, was also told by Mrs Exley that she would need to speak to human resources. The Claimant and Mr Tritton said that they had subsequently sought to chase a response regarding an increase in sickness payments but that Mrs Exley did not revert to them.

24. The Tribunal has seen a note (on its face taken by Ms Parsons) of what was discussed between the Claimant and Ms Parsons on 6 October which does not make reference to any additional payment of £800 and refers to a "PIP" benefit as having been applied for .

25. Mrs Exley's recollection of the phone conversation on 6 October 2016 was that Mr Tritton passed the phone over to Ms Parsons who asked what pay the Claimant would receive from the Respondent whilst on sickness absence. She said that she told her that she could not say and would have to speak to human resources.

26. Mrs Exley said that she spoke to human resources the next day and was told that the Claimant had signed a 2013 starter form which provided for statutory sick pay only. Mrs Exley said that she felt she needed to check as, whilst she had dealt with the Claimant's re-commencement of employment, the Respondent's staff were under a number of differing terms an conditions given that some had been inherited, for example, from other contractors through TUPE.

27. The Tribunal has had difficulty in determining exactly what was said to the Claimant regarding payments during sickness given the stark conflict in evidence and lack of corroboration from any independent source. On the balance of probabilities, the Tribunal concludes that the Claimant was not told that she would be paid an amount of £800 per month or any other set amount. It considers that the figure of £800 relied upon by the Claimant must have come from somewhere and was not a matter of pure invention

by the Claimant and Mr Tritton. There may have been a discussion regarding monies and/or benefits generally and reference to sums of money during the 1 October 2016 conversation with Mrs Exley. However, the Tribunal does not conclude that Mrs Exley said that the Claimant would be paid the sum of £800 per month. That indeed is not the essence of the Claimant's evidence in that she maintains that any sum of money was said to be conditional upon the amount received by the Claimant in benefits. Nor does she say that there was there any reference to any particular period over which payments would be made. The objective meaning of what Mrs Exley's said could not have been that £800 or any particular set amount would be paid if there was no benefits entitlement and then for a period of 28 weeks mirroring the period of statutory sick pay entitlement. That is, however, what the Claimant assumed and says what was agreed. There is no logic in the exact sum of £800 being mentioned given that this does not relate to any particular calculation of earnings the Claimant would have ordinarily received or any obvious proportion of such earnings. The Tribunal accepts that Mrs Exley did not know what the Respondent might be willing and able to do to assist the Claimant and that she knew that she could not (and would not) promise any additional payment without consulting human resources.

28. On 5 August 2016 Mr Tritton raised a grievance regarding his own treatment at work. He was then invited to a meeting with Ms Woulfe on 10 January 2017, which indeed concentrated on his own issues. Mr Tritton's grievance was expanded to include the Claimant's issue regarding her entitlement to salary during her absence from work. It expanded further when, on 20 January 2017, the Claimant spoke to her colleague, Mr Fox, who asked her if she had received a voucher in the sum of £444 for the Vodafone work completed at the beginning of January 2016. The Claimant said that she thought Mrs Exley had forgotten that she had been working at that site. Mr Tritton expressed his view to the Tribunal that the Claimant's initial omission had been a pure oversight. Mr Tritton then pursued this issue on the Claimant's behalf with Ms Woulfe, when he met her again at what was termed a second grievance appeal meeting on 30 January. Ms Woulfe interviewed Mrs Exley on 7 and 10 March 2017, who denied suggesting that the Claimant might be paid £800 per month during sickness. As regards the Mitie Star Award, she concluded that only those who had worked on the Vodafone flood in the Christmas holiday period had been eligible and as the Claimant had not worked over that period she was not and should not have been nominated. She might have worked on the flood damaged site but not at the relevant time. The Tribunal accepts this as Ms Woulfe's genuine conclusion and finds a reference she made (in a message to Mr Tritton) to the Claimant's holiday and the crucial period of the flood work lasting until 5 not 4 January to be a mistake as to the relevant date. Another message notes the Claimant's return to work to have been on 4 January 2016. Mrs Exelby was not clear as to the relevant dates when spoken to, but this was at a distance from the events of over 12 months and without reference to any contemporaneous records. The Tribunal has already made it findings as to why the Claimant was not originally put on the list of potential award nominees.

The Claimant's complaints were not upheld as was confirmed in Ms Woulfe's letter of 21 March 2017.

29. In May 2017 the Claimant learned that her family had organised a holiday for her and, as she needed spending money, she decided to resign from the Respondent's employment so as, in particular, to receive a payment in lieu of her accrued but untaken holiday entitlement. She sent to the Respondent on 10 May a resignation letter giving a week's notice and requesting outstanding holiday pay and her accrual from the current holiday year. The Claimant referred to being owed 17 days of holiday for the holiday year 2016/17 in circumstances where she had thought that her annual entitlement was limited to 20 days per annum.

30. When the Claimant received her payslip after the ending of her employment, she realised that she had been paid for only 4 hours in respect of each outstanding day of holiday. She contested the amount understanding that she ought to have been paid an amount representing additional overtime hours and travel time which she habitually incurred. Ultimately, the Respondent agreed to pay to the Claimant and indeed transferred an amount to her bank account based on average working hours of 42.5 per week. This represented average time spent on cleaning work but did not include time spent and paid for travelling to client sites. Initially, the Respondent had taken the view that the law remained uncertain as to the need to include amounts beyond an employee's normal contractual hours as paid holiday. It did not recognise travelling time to be a potentially relevant issue at all.

31. Similarly, the Claimant's notice entitlement had initially been paid as one week's basic pay with reference to her minimum contractual hours of 20 hours per week. Subsequently, the Respondent paid an amount again reflecting average overtime hours.

32. As stated, the Claimant believed she had holiday entitlement of 20 days and, having taken only 3 days of holiday in respect of the holiday year ending in April 2017, that 17 days were outstanding. However, whilst the Claimant's understanding was inaccurate and underestimated her own entitlement, the Respondent had also miscalculated. It had considered the Claimant's holiday entitlement on the basis that she had taken an additional period of 10 days of leave in August 2016 whereas, as the Claimant was absent due to sickness, she had cancelled such leave and been paid statutory sick pay only during that period. The change had not been picked up in the Respondent's absence/payroll systems which had recorded 2 weeks' holiday taken and the Respondent's calculation had been based on this unamended amount.

33. The evidence is that Ms Woulfe dealt with the Claimant's resignation, made her own calculation of final payment entitlements, including in respect of holiday, and passed this on to Clare Evans in HR to check. The

calculation was approved. Ms Woulfe said that she later became aware that there had been an error which led to the rectification to include overtime hours within the amount payable.

## Applicable Law

34. The Claimant complains of direct discrimination. In the Equality Act 2010 direct discrimination is defined in Section 13(1) which provides: *"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."*

35. *"Disability"* is one of the protected characteristics listed in Section 4. Section 23 provides that on a comparison of cases for the purpose of Section 13 *"there must be no material difference between the circumstances relating to each case".*

36. The Act deals with the burden of proof at Section 136(2) as follows:-
    a. *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
    b. *(3) But subsection (2) does not apply if A shows that A did not contravene the provisions".*

37. In **Igen v Wong [2005] ICR 935** guidance was given on the operation of the burden of proof provisions in the preceding discrimination legislation albeit with the caveat that this is not a substitute for the statutory language. The Tribunal also takes notice of the case of **Madarassy v Nomura International Plc [2007] ICR 867**.

38. It is permissible for the Tribunal to consider the explanations of the Respondent at the stage of deciding whether a prima facie case is made out (see also **Laing v Manchester CC IRLR 748**). Langstaff J in **Birmingham CC v Millwood 2012 EqLR 910** commented that unaccepted explanations may be sufficient to cause the shifting of the burden of proof. At this second stage the employer must show on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of the protected characteristic. At this stage the Tribunal is simply concerned with the reason the employer acted as it did. The burden imposed on the employer will depend on the strength of the prima facie case – see **Network Rail Infrastructure Limited v Griffiths-Henry 2006 IRLR 865**.

39. The Tribunal refers to the case of **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** for guidance as to how the Tribunal should apply what is effectively a two stage test. More recently the Supreme Court in **Hewage v Grampian Health Board**

**[2012] UKSC 37** made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

40. In the Equality Act 2010 discrimination arising from disability is defined in Section 15 which provides:-
    a. *"(1) A person (A) discriminates against a disabled person (B) if – A treats B unfavourably because of something arising in consequence of B's disability, and*

    b. *A cannot show that treatment is a proportionate means of achieving a legitimate aim."*

41. Section 123 of the Equality Act 2010 provides for a three month time limit for the bringing of complaints to an Employment Tribunal. This runs from the date of the act complained of and conduct extending over a period of time is to be treated as done at the end of the period. The Tribunal has an ability to extend time if it is just and equitable to do so.

42. Applying the Tribunal's findings of facts to the legal principles the Tribunal reaches the following conclusions.

## Conclusions

43. The non-inclusion of the Claimant in the Mitie Star Award was because the Respondent only included those employees who were on site in the immediate aftermath of the Vodafone flood and who worked over the festive period, at least on one occasion, up to and including 3 January 2016. The names of those eligible were provided to Vodafone on that basis and upon Vodafone's request.

44. It is said in fact by Mr Tritton, on the Claimant's behalf, that this was an oversight and not because of the Claimant's disability. Indeed, it cannot have had any connection with the Claimant's disability as the Respondent and indeed the Claimant herself did not know that the Claimant would be a disabled person for a further 9 months.

45. The Claimant's complaint is then that the Respondent ought to have corrected its decision not to include her in the bonus award and did not do so for discriminatory reasons. The Claimant has shown and the Tribunal has found no facts from which the Tribunal could reasonably conclude the decision to be because of the Claimant's disability or arising out of her sickness absence. The comment regarding sickness absence on 31 August 2016 was made at an early stage of the Claimant's illness and was not considered by Mr Tritton to be aimed at the Claimant at the time. The

Claimant was not being criticised for her current absence. The Claimant's contention that Mrs Exelby offered her additional payments during her sickness does not suggest a desire to deprive the Claimant as a disabled person from a financial benefit.

46. The decision, on the Claimant's raising of a grievance, not to retrospectively place her in the bonus pool, was because Ms Woulfe did not believe that she qualified to be included. She was given incorrect and inconsistent dates as to the relevant periods of working, likely, on the balance of probabilities, to be due to defects in Mrs Exelby's memory in circumstances where she was recalling distant events without her records to hand. However, Ms Woulfe understood the principle to be that to get a share, an employee had to be on site in the holiday period. The Claimant had not been.

47. The Respondent has shown that its decision-making in respect of the award was because of the limitations it placed on those eligible and its belief that the Claimant did not fit the criteria set, a reason untainted by any adverse consideration of the Claimant as a disabled person or of her inability to attend work due to her disabling condition.

48. The Claimant's complaint of disability discrimination (pursuant to Sections 13 and 15 of the Act) in respect of the Mitie Star Award must therefore fail.

49. Similarly, the Claimant's complaint of disability discrimination in respect of how notice and holiday monies were calculated also fails. There are no facts from which the Tribunal could infer discrimination. In fact, the Respondent has shown that the failings arose from its understanding as to the law in respect of those entitlements and a systems error which counted an extra 10 days of holiday as taken, when a pre-booked holiday ought to have been reclassified as a period of sickness absence.

50. The Claimant's claim of damages for breach of contract arising out of an offer of £800 per month during the Claimant's sickness must, on the Tribunal's findings, fail. On the balance of probabilities, such offer was not made, but even if it had been, it did not have the effect of giving the Claimant any contractual rights. On the Claimant's own case, the payment was conditional with no clarity as to the conditions to be met and was for an undefined period. There was no consideration flowing from the Claimant for any such payment. Any such payment would never have been more than a discretionary payment which the Respondent could have withdrawn at any time and for any reason.

51. The Claimant's complaints in respect of the amount of holiday and notice pay due to her do succeed. They should have included a sum calculated to reflect overtime and travel time. The holiday pay was 10 days short and

the parties, as already referred to, have now agreed the calculations of the amounts due to the Claimant.

52. The Respondent also failed to give to the Claimant a written statement of the particulars of her employment in accordance with section 1 of the Employment Rights Act 1996 and to provide written notification of a change in her hours. It did, however, provide a written contract for her to sign (although not retain) and did make her aware of the change of hours which she certainly understood to have occurred. In these circumstances the Tribunal considers a compensatory payment representing two weeks' pay to be just and equitable. Based on normal contractual hours of 20 hours each week and an hourly rate of pay of £7.85, this gives a further amount payable by the Respondent to the Claimant of £314.

Employment Judge Maidment

19 March 2018
Date