# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr P Stott** | | |
| **Respondent:** | **City of Bradford Metropolitan District Council** | | |
| **Heard at:** | **Leeds** | **On:** | **23 and 24 April 2018, 25 May 2018 (deliberations)** |
| **Before:** | **Employment Judge Davies**<br>**Dr D Bright**<br>**Mr T Downes** | | |

**Representation**

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| Claimant: | Mr Morgan (counsel) |
| Respondent: | Ms Wilson (solicitor) |

# RESERVED JUDGMENT

1. At the relevant times the Claimant did not have a disability within the definition in the Equality Act 2010. His claim of disability discrimination therefore does not succeed and is dismissed.
2. The claim of unauthorised deduction from wages is well-founded and succeeds.
3. The particulars of employment relating to the payment of sick pay are those set out in the locally agreed Blue Book, which is incorporated in the Claimant's written contract of employment.

# ORDERS

1. The amount payable to the Claimant will be determined at the remedy hearing on **26 June 2018.**
2. The Claimant is to produce a revised schedule of loss, which takes into account that his sick pay entitlement is calculated on a rolling twelve month basis, and which gives credit for the two weeks' holiday pay he received.
3. It may be that the parties are able to agree the sum payable and avoid the need for a further hearing. If so, they must notify the Tribunal as soon as possible.

# REASONS

## Introduction

1.1 These were claims of disability discrimination and unauthorised deduction from wages and a reference under s 11 Employment Rights Act 1996 brought by the Claimant, Mr P Stott, against his employer, City of Bradford MDC. The Claimant

was represented by Mr Morgan of counsel and the Respondent was represented by Ms Wilson, its in-house solicitor. The Tribunal was provided with an agreed file of documents and we read those to which the parties drew our attention. We heard evidence from the Claimant and from Mr P Kerry, trade union representative, on his behalf. For the Respondent we heard evidence from Mr C Wolstenholme, Markets Manager; Mr N Bassi, Assistant Markets Manager; Mr A Barnes, Market Superintendent; and Mr T Barker, HR Manager.

## The issues

2.1 The issues to be determined were as follows:

2.1.1 At the relevant times was the Claimant disabled within the definition in the Equality Act by virtue of the mental impairment of stress/depression?

2.1.2 If so, did the Respondent treat him unfavourably by not paying him during his absence from work between May and November 2017 because of something arising in consequence of that disability, namely his absence from work.

2.1.3 If so, did the Respondent know or could it reasonably be expected to know that the Claimant had the disability?

2.1.4 If so, can the Respondent show that its treatment of the Claimant was a proportionate means of achieving a legitimate aim?

2.1.5 Were the wages paid to the Claimant on any occasion less than the wages properly payable, in that he was contractually entitled to sick pay between May and November 2017?

2.1.6 What were the particulars that ought to have been included or referred to in the Claimant's contract of employment relating to sick pay?

## The Facts

3.1 The Claimant worked as a Market Assistant for the Respondent from January 2005 onwards. He worked at St James's Wholesale Market.

3.2 He says that he suffered from the disability of stress/depression at the time of the events with which we were concerned and we make the following findings of fact relevant to that.

3.3 The Claimant says that he has suffered from stress and/or depression since 1994. He did not produce any medical evidence, relying instead on his own disability impact statement and the Respondent's Occupational Health records. He had an episode of depression when his first marriage broke up in 1994. That was a serious episode and he was prescribed antidepressant medication, which he took for around 3 to 4 months. The episode lasted no more than six months.

3.4 In February 2011 the Claimant had 2 to 4 weeks off work. In cross-examination he agreed that this was as a result of stress and that it arose from a disciplinary matter at work. He could not recall taking any medication.

3.5 In November 2016 a very serious issue arose in the Claimant's personal life. He went to see Occupational Health at work. He told them that this was affecting his sleep and they advised him to go to his GP. He did not go to his GP and he did not have any time off work.

3.6 The events with which the Tribunal was concerned started in March 2017. In May 2017 the Claimant was signed off work and remained absent from work until November 2017. He was initially signed off for seven days with "stress related

issues." Subsequent fit notes, which covered the period until 30 November 2017, referred to both anxiety and depression and work-related stress. He was seen by Occupational Health in June 2017. They recorded that he was by then suffering from anxiety and depression, associated with work-related issues (see below) and issues in his personal life. On 29 June 2017 Occupational Health recorded that the Claimant's sleep was poor and he was tearful and unhappy. He was fragile and anxious and ruminating about work issues. He cared for his mother and father. He was taking Citalopram but was not seeing any benefit. He had started counselling.

3.7 The Claimant was seen by Occupational Health again in July 2017. He continued to be unwell. He had continued with counselling and was seeing some benefit from it. His sleep and mood were still poor and he was still anxious. He was seen again by Occupational Health in September 2017. He told them that he felt worse. He was worried about money. He was not sleeping well. He said that he was unable to concentrate on the television when it was on. The Occupational Health advisor noted that he had been able to attend to his emails that day and to relate details of his disagreements with his managers and cross-refer to evidence on his phone. He was caring for his parents, getting shopping in for them and helping his father with personal care and meals. He was suffering anxiety every week or two. He was taking antidepressant medication but did not think this was helping. He was finding counselling useful. The view of the Occupational Health advisor was that he was suffering from mild depression. He reported that the Claimant had no significant problems with attention, concentration or memory. In his view the Claimant was fit to return to work at a different location at that stage and indeed he expressed the view that the Claimant's mental health would likely be improved by doing so.

3.8 In his impact statement the Claimant described how he felt during this period. When he was notified that he was to be investigated at work in May 2017 (see below) he felt that the walls were closing in around him. That is when he went to see his GP, who diagnosed him with stress and subsequently with depression. He was not sleeping and not socialising. He cared for his parents but was not in control of his emotions and would find himself shouting at them. He would spend most of his day in his bedroom often staring at the television for hours and would regularly break down crying. He was prescribed Citalopram, which he continued to take. He had eight sessions of counselling. At the lowest point of his depression he lost his appetite, could not concentrate on his day-to-day activities, became anxious and upset, and could not sleep. He did not take part in any leisure activities. At times he was unable to fulfil his duties as a carer for his parents. By October 2017 with the benefit of medication he felt able to engage socially and worked to get back to employment. He returned to work in November 2017.

3.9 We deal next with the terms of the Claimant's contract. The Claimant's letter of appointment, dated 20 January 2005, said that the terms of his employment were contained in the letter and in the relevant terms of other documents that were referred to, as amended from time to time. Clause 8 of the letter said that the Claimant's terms and conditions of employment would be in accordance with collective agreements negotiated from time to time, as amended and supplemented by provincial or local collective agreements and by the rules of the Council. Details were set out in the Personnel Manual, which was available on request.

3.10 By the end of the evidence all parties were agreed that the Personnel Manual referred to was the locally agreed Blue Book. There was a nationally agreed Green Book, but where they were inconsistent the Blue Book took precedence. All parties agreed that the relevant contractual terms were set out in the Blue Book.

3.11 The Blue Book contained terms relating to sickness payments. They made clear that subject to the provisions of the scheme, someone with more than 5 years' service who was absent from duty because of illness was entitled to 6 months on full pay and six months on half pay. The allowance was calculated on a rolling 12 month basis. A number of conditions were set out. They included conditions about reporting and providing doctor's statements. They also included the following:

> "(d) An allowance shall not be paid in a case of accident due to active participation in sport as a profession, nor in a case in which the absence arises from or is attributable to an officer's own misconduct, unless the Authority decide otherwise.
>
> …
>
> (i) If an officer has failed to observe the conditions of this Scheme or has been guilty of conduct prejudicial to his/her recovery, the payment of the allowance shall be suspended until the Authority has made a decision thereon, provided that before making a decision the Authority shall advise the officer of the terms of the report and shall afford him/her an opportunity of submitting his/her observations thereon and of appearing or being represented, before the Authority or its appropriate committee. If the Authority decides that the officer has failed without reasonable excuse to observe the conditions of the Scheme or has been guilty of conduct prejudicial to his/her recovery, then the officer shall forfeit his/her right to any further payment of allowance in respect of that period of absence."

3.12 Mr Barker gave evidence about the contractual terms. In cross-examination he said that subparagraph (d) was applicable in the Claimant's case (see below) and accepted that sub-paragraph (i) applied in such circumstances. It seemed clear to the Tribunal that subparagraph (i) provided for a procedure to be followed before sick payment allowance could be forfeited. This allowed payment of the allowance to be suspended until the Council had made a decision. Further, it required the Council to prepare a written report and give a copy to the Claimant before making a decision. He also had to be given the chance to respond to the report and to appear in person at the relevant committee.

3.13 The Tribunal's attention was also drawn to the Council's Sick Pay Guide. There were two versions of that Guide, the latter of which was introduced during the events with which the Tribunal was concerned. Both contained sections dealing with "Abuse of the sickness payments scheme." In the earlier version, the Guide said that sick pay could be suspended if an employee abused the scheme or was absent on account of sickness due or attributable to (among other things) the employee's own misconduct or neglect. The Guide said that where sick pay was suspended the manager would advise the employee of the grounds of suspension and the employee would have a right of appeal to the relevant Strategic Director/Director. If the Director decided that the grounds were justified then the employee would forfeit the right to any further payment in respect of that period of absence.

3.14 In the later version of the Guide, a definition of what was meant by misconduct was set out. It said that misconduct included (among other things) "being the subject of a management investigation or disciplinary/capability procedures." The

relevant procedure was also different. The revised Guide said that where there was an abuse of the sick pay scheme the manager must "normally have informed the employee" that his or her actions would result in the suspension of sick pay and the reasons for it. The employee would then have a right of appeal as before.

3.15 In evidence Mr Barker said that the Guide was intended to reflect the underlying contractual position. He accepted that the Guide was not itself contractual and that the contractual terms would take precedence if there was any inconsistency.

3.16 It seemed to the Tribunal that both versions of the Guide were inconsistent with the contract as set out in the Blue Book. First, neither version provided for a procedure that was compatible with the contractual requirement. The contract only allowed sick pay to be suspended until a formal decision was taken and required a written report and a chance to attend before the relevant decision maker before a final decision was taken. The Guide seemed to treat the act of suspension as being the initial decision, against which it provided a right of appeal. Neither version of the Guide required the provision of a written report or a chance to appear at a hearing.

3.17 Further, the Tribunal had no doubt that the definition of misconduct in the later version of the Guide was inconsistent with the contractual position. We say more about that below.

3.18 We turn now to the events giving rise to these claims. There was a background to those events. In 2014 Mr Barnes had been brought in as the Market Superintendent responsible for managing the operations of the St James wholesale market. As such he was the line manager of the five Market Attendants, including the Claimant. It was clear to the Tribunal that Mr Barnes had taken steps to address what he regarded as various shortcomings on the part of some of the Market Attendants, for example about taking extended breaks. While Mr Barnes regarded this as simply managing the employees, they suggested that he was bullying them. It is not for the Tribunal to resolve that, but it is the background to events in March 2017.

3.19 On 29 March 2017 there was an incident involving Mr Barnes, the Claimant and one of the other Market Attendants, Mr Jackson. In his written version of events, Mr Barnes said that he found the two Attendants by a fire exit having a break. He went over to speak to them and this led to an altercation in which both swore at him. He called his manager Mr Barker and HRPlus (the Respondent's external HR provider). Mr Bassi was eventually asked to investigate.

3.20 On 11 April 2017 Mr Bassi had an informal discussion with the Claimant to find out what had happened. Mr Bassi's notes record that the Claimant told him that Mr Jackson had suggested that they have "two minutes sit down." Then the Claimant saw Mr Barnes coming across the car park so he suggested they should leave. When they did so Mr Barnes followed them and asked them why they were sitting down. Mr Jackson swore at him. The Claimant said that he did not swear at him but did call him a bully.

After conducting the informal meeting Mr Bassi had a period of annual leave and was also carrying out some voluntary work so it took him a little time to decide how to proceed. He eventually decided that a formal investigation was required. He wrote a letter to the Claimant dated 18 May 2017 telling him that he was conducting an investigation into "unauthorised breaks during work time and the

use of inappropriate language." He invited the Claimant to an investigation interview to be held on 26 May 2017. The letter was given to the Claimant by hand on Friday, 19 May 2017.

3.21 Mr Barnes's evidence was that around 12:30pm after his lunch break the Claimant walked into Mr Barnes's office and told him that he was unwell and was going home. He said that he had a doctor's appointment at 4pm. In his oral evidence Mr Barnes explained that he was a bit shocked and was going to explain to the Claimant that medical appointments needed to be outside of work time. He followed the Claimant into the mess room to ask what was actually wrong and asked him whether he was feeling sick and what his symptoms were. The Claimant told him that he did not know and that the doctor would tell him. Mr Barnes suggested to the Claimant that he must have some symptoms and must know why he was going to the doctor and the Claimant simply told him that he had an appointment, the doctor would tell him what was wrong and that he was going home. The Claimant left.

3.22 On Monday 22 May 2017 the Claimant brought a fit note to work signing him off with stress related issues for a week. Mr Barnes forwarded the fit note by email to his manager, Mr Wolstenholme; Mr Bassi; and two others. He reported what had happened on the previous Friday and also said that he had informed HRPlus because the Claimant was only given a letter about an investigation on Friday, half an hour before leaving, and this seemed to be the reason for him leaving. HRPlus had told Mr Barnes that there might be a possibility that this would affect the Claimant's pay.

3.23 The same day, 22 May 2017, Mr Bassi took advice from HRPlus. Having done so he spoke to the Claimant by telephone and asked about the onset of his sudden illness on the Friday. The Claimant told him that it was "related" to receiving the investigation letter. Mr Bassi explained that if that was the case then he had been advised that the Claimant would not receive sick pay. He told the Claimant that he would send a copy of the Sick Pay Guide and that he had the right of appeal. He recorded their conversation in a letter to the Claimant the same day. He wrote a further letter on the same day confirming that the Claimant's sick pay would be suspended from 20 May 2017 in line with the Sick Pay Guide. He referred to the section dealing with abuse of the sick pay scheme, to which we have referred above. He wrote, "you confirmed that this sudden absence was related to the Investigation Interview letter which you received on Friday, 19 May 2017 and therefore this is considered to be an abuse of the Sick Pay Scheme." He told the Claimant that he could appeal against the decision in writing to Mr Hartley, Strategic Director. In his oral evidence Mr Bassi said that it was not his decision to suspend the Claimant's sick pay. He took advice from HR. HR told him that he had to contact the Claimant to find out his reasons for leaving on the Friday. They told him that if it related to receiving the letter he needed to advise the Claimant that his sick pay would be stopped.

3.24 In his oral evidence Mr Barker explained that he had been asked to advise some time after 22 May 2017 by HRPlus because of the involvement of the Claimant's trade union. He believed it was reasonable in accordance with the scheme conditions to stop the Claimant's sick pay because it seemed clear that the absence was directly attributable to the Claimant's misconduct. He was asked what misconduct he was referring to and he said "taking an unauthorised break and abusing his supervisor." He confirmed that this was the very misconduct that there was to be an investigation about. He was asked how it fitted into the

contractual wording and he referred to the bullet point in the Guide about being the subject of a management investigation. He confirmed his view that sick pay could be stopped simply if misconduct had been alleged and was being investigated. He acknowledged that when advising he had not seen any investigation documents but had simply heard the supervisor's account. When asked whether the absence was due or attributable to the alleged misconduct or the investigation Mr Barker suggested that the misconduct led to the necessity for an investigation and that was part of why the Claimant left work.

3.25 The Claimant's sick pay was in fact stopped 20 May 2017 and was never reinstated. Mr Barnes referred the Claimant to Occupational Health on 24 May 2017. The same day, 24 May 2017, Mr Kerry, the Claimant's trade union representative, emailed Mr Bassi about the Claimant's sick pay. Mr Kerry said that the Claimant had submitted a valid sick note from his doctor and that this could not be unauthorised absence. Mr Bassi replied to say that following advice from HRPlus he had written to the Claimant regarding suspension of his sick pay and had explained the reasons for doing so, which was in line with the Council sick pay scheme.

3.26 The Claimant's second sick note, referring for the first time to anxiety and depression, was provided on 26 May 2017.

3.27 On 30 May 2017 Mr Kerry emailed Mr Hartley appealing against the suspension of the Claimant's sick pay. He said that the Claimant had at no time stated that he was off with stress because of the management investigation. He had a history of stress and depression and had been referred to employee well-being for it. He had also received care from his GP for stress and depression. It was not Council policy to suspend sick pay. Sick pay was contractual and could not be changed without consultation. That had not been done. Mr Kerry said that this was a breach of contract and any deduction was unauthorised.

3.28 On 8 June 2017 Mr Bassi wrote to the Claimant to try and rearrange the investigation interview. He suggested a date later in June.

3.29 On 13 June 2017 the Claimant met with Ms St Romaine to carry out an individual stress management assessment. She recorded that the Claimant had initially become too unwell to be at work when he received notice about a management investigation interview. He started his absence citing work-related stress but this had now developed into anxiety and depression. He had a fit note from his GP and had been taking antidepressants for the last three weeks. He felt unwell tearful and had disturbed sleep. The Claimant's stressors included having his pay suspended and he asked for it to be reinstated.

3.30 There were a number of emails between Mr Kerry and Mr Hartley and on 14 June 2017 Mr Hartley said that he had asked officers to review the actions taken and expected to receive a report on the appeal by the end of the week.

3.31 Mr Wolstenholme, Markets Manager, was asked to prepare the report and he sent a copy to Mr Hartley on 15 June 2017. He referred to it as a joint report from Markets and HR and confirmed in his oral evidence that parts were written by HR and parts by him. The report set out the advice received from HRPlus. It said, "We established that the reasons for [the Claimant's] actions and absence from work was as a direct result of him receiving the management invite letter, which was confirmed in a telephone conversation with Mr Bassi…." Reference was made to the Sick Pay Guide and the advice from HRPlus was that the Claimant

was absent because of his own misconduct or neglect. This was because "misconduct" included being the subject of a management investigation or disciplinary/capability procedure. The report also set out advice from corporate HR, Mr Barker's department. The corporate HR advice referred to the Claimant being absent from work because of receiving the letter inviting him to a management investigation interview. It said that this had been confirmed during the phone call with Mr Bassi and also in the stress management action plan. Corporate HR advice was, "As it is clear that [the Claimant's] only reason for his absence was as a result of receiving the letter, then he is contributing to his own stress/anxiety by refusing to cooperate with the management investigation and the suspension of his pay is valid in the circumstances." Corporate HR advised that the Claimant be invited to a further management investigation interview and be informed that if he attended the interview his pay would be reinstated retrospectively. Mr Wolstenholme prepared the next section of the report, which went in turn through Mr Kerry's grounds of appeal. Mr Wolstenholme repeated the view that the Claimant's absence was because he had received a letter inviting him to a management interview. Mr Wolstenholme expressed the view that the Council's Sick Pay Guide set out the policy for suspending sick pay where an abuse of the sickness payment scheme took place. He expressed the view that there had been no breach of contract and no unauthorised deduction of wages. He made the same recommendation that corporate HR had made.

3.32 In his oral evidence Mr Wolstenholme said that he had relied on HR advice in preparing the written report. With regard to the facts surrounding why the Claimant was off work he had relied on Mr Bassi. Mr Wolstenholme confirmed that when he wrote the report it was based on what the position was in May when the Claimant was given the letter inviting him to a management investigation interview and not what the position was in mid-June when the report was written. His understanding was that the decision to suspend sick pay was "once and for all" but the Claimant was told that if he engaged with the process it would be reinstated.

3.33 We note that around this time the Claimant had two weeks' annual leave booked and was paid for those two weeks.

3.34 Mr Wolstenholme sent the report to Mr Hartley on 15 June 2017 and on 20 June 2017 Mr Hartley emailed Mr Kerry with the outcome of the Claimant's appeal. Mr Hartley referred to the Sick Pay Guide and to the advice that the Claimant's absence was due to his own misconduct because misconduct included being the subject of a management investigation or disciplinary/capability procedure. Mr Hartley said that he had asked Markets management to invite the Claimant to a further investigation interview and to advise him that if he attended and cooperated with the investigation his pay would be reinstated retrospectively.

3.35 The report was not sent to the Claimant or Mr Kerry and neither was invited to attend a meeting or hearing. Mr Hartley did not give evidence to the Tribunal.

3.36 On 20 June 2017 Mr Kerry responded to Mr Hartley. He said that the Council's response was incorrect. He referred to the recent changes to the Sick Pay Guide. He pointed out that the provision being relied on, about being the subject of a management investigation, had not been in the Guide previously.

3.37 We can deal with the events that followed rather more briefly. There was no review or reconsideration of the decision whether to pay the Claimant sick pay between June 2017 and his return to work in November 2017. The Claimant did

not attend the rearranged investigation meeting in June 2017. The Claimant was assessed by Occupational Health on 29 June 2017 and we have referred to their report above. The Occupational Health advisor expressed the opinion that the Claimant was unfit for work because of his low mood and he did not see this improving any time soon. Any resolution would be from resolving the work dispute in a timely manner. He advised that the ongoing work disputes be brought to a timely conclusion.

3.38 As noted above, the Claimant was seen by Occupational Health again in July 2017. At that time the Occupational Health advisor expressed the opinion that he was unfit for work but was well enough to attend a workplace meeting to resolve the conflict. In August 2017 Mr Wolstenholme appointed Mr Butterworth as the Claimant's line manager, with a view to resolving the situation. There was some discussion of a move to Keighley market but the Claimant did not want to do that. He was seen by Occupational Health again on 13 September 2017. The view of the Occupational Health advisor was that the Claimant would be fit to perform the role at Keighley market with some conditions.

3.39 The Claimant eventually returned to work at St James's wholesale market on 30 November 2017. He had not received any pay from 20 May 2017 apart from the two weeks when he had annual leave booked.

## Legal Principles

4.1 Claims of discrimination are governed by the Equality Act 2010, s 4 of which provides that disability is a protected characteristic. By virtue of s 6, a person has a disability if he or she has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Section 6 is supplemented by schedule 1 of the Equality Act 2010, and by Guidance made by the Secretary of State pursuant to those provisions: "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" ("the Guidance"). The Tribunal is obliged to take the Guidance into account.

4.2 A substantial adverse effect is one that is more than minor or trivial. Schedule 1 provides that an adverse effect is "long-term" if it has lasted twelve months, or is likely to do so. "Likely" in that context means it "could well happen": see paragraph C3 of the Guidance and the decision in *SCA Packaging Ltd v Boyle* [2009] ICR 1056, HL. This is to be judged at the date of the alleged discriminatory act and not at the date of the Tribunal hearing. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if the effect is likely to recur. Again, likely means it "could well happen".

4.3 The right not to suffer unauthorised deductions from wages is provided by s 13 Employment Rights Act 1996. By virtue of s 13, employers are not permitted to make deductions from wages unless those deductions are required or authorised by statute or a relevant provision of the worker's contract, or the worker has previously agreed in writing to the making of the deduction. Where the total amount of wages paid on any occasion is less than the total amount of wages properly payable on that occasion the amount of the deficiency is treated as an unauthorised deduction.

4.4 Under s 1 Employment Rights Act 1996 an employer is obliged to give an employee a written statement of particulars of employment containing certain specified employment particulars. Those include particulars of any terms and conditions relating to incapacity for work due to sickness, including any provision for sick pay. Under s 4, if there is a change in any of those particulars the employer must give the employee a written statement containing particulars of the change. Under s 11, where an employer has given a statement and a question arises as to the particulars that ought to have been included or referred to in it, the employee may require the question to be referred to and determined by an Employment Tribunal.

**Application of the law to the facts**

5.1 Against the detailed findings of fact set out above, we turn to the issues in this case. The first question is whether the Claimant was disabled within the meaning of the Equality Act at the time of the events about which he complains, May 2017 to November 2017.

5.2 The Tribunal found that when the Claimant initially went off work in May 2017 he was not suffering from a mental impairment that had a substantial adverse effect on his ability to carry out normal day-to-day activities. However, there came a point where his mental health had deteriorated and he was suffering from such an impairment. In view of the Claimant's account, taken together with the Occupational Health records, the Tribunal found that by the end of June 2017 at the latest he was suffering from the mental impairment of depression and that by that stage it had a more than minor or trivial effect on his ability to carry out normal day-to-day activities. That continued until his return to work in November 2017.

5.3 Plainly, the impairment had not lasted 12 months by November 2017. The question for the Tribunal was therefore whether at any point between June and November 2017 it was likely to last for at least 12 months. The Tribunal reminded itself that it was necessary to consider what the effect of the mental impairment would have been without the medical treatment the Claimant was receiving. The Tribunal found that the Claimant's impairment was not likely to last for at least 12 months at any point between June and November 2017. The Tribunal did not consider that this "could well happen." We did not have any medical evidence from the Claimant's doctor and we therefore considered the Claimant's evidence about his medical history and the Occupational Health information. We noted that the Claimant had had one episode of depression previously, more than 20 years ago. That episode, while serious, had not lasted 12 months. The Claimant was on medication for 3 to 4 months. The episode did not last more than six months. He had not suffered any further episode of depression that had a substantial adverse effect on his ability to carry out normal day-to-day activities until the episode with which we were concerned. That was the case even though he had encountered a very serious issue in his personal life in November 2016. By October 2017 the current episode had lasted around five months. Given that the only previous episode had lasted no more than six months and had been more than 20 years ago the Tribunal did not consider that as of October 2017 the Claimant's depressive illness "could well" last another seven months. At around this time, the Claimant was reporting an improvement and worked towards a phased return to work in November 2017. The view of Occupational Health in

September 2017 was that he was fit to return to a different work location at that stage, with conditions. The likelihood of the episode lasting 12 months was in the Tribunal's view less at that stage. In those circumstances the effect of the Claimant's mental impairment had not lasted 12 months and was not likely to do so. For the same reasons, it was not likely to recur. Therefore, he did not meet the definition of disability in the Equality Act 2010 and his claim of disability discrimination cannot succeed.

5.4 That brings us to the complaint of unauthorised deduction from wages. The parties were agreed that unless the removal of the Claimant's sick pay was permitted under the terms of his contract, it was an unauthorised deduction. As set out above, the relevant contractual terms were set out in the Blue Book. That allowed for sick pay to be suspended and then forfeited if the absence arose from or was attributable to the Claimant's own misconduct. As a matter of plain reading, that clearly allowed sick pay to be withdrawn if the Claimant's misconduct caused his absence. Further, it required that before a final decision was taken to remove the Claimant's sick pay he must be given a written report, have the opportunity to make observations on it, and be given the chance to appear or be represented before the Council or its appropriate committee.

5.5 The Tribunal found that the withdrawal of the Claimant's sick pay was not permitted under the terms of his contract in the circumstances of this case.

5.6 There was a complete lack of clarity in the evidence before the Tribunal about the precise basis for removing the Claimant's sick pay. It transpired that neither of the relevant decision makers – somebody at HRplus and Mr Hartley – gave evidence to the Tribunal. It appears that the initial decision to remove the Claimant's sick pay in May 2017 was taken on the basis that the onset of his illness was "related to" the investigation letter that was issued to him. That arose from a telephone conversation in which Mr Bassi asked whether the two were related and the Claimant confirmed that they were. No further investigation or discussion took place. No consideration appears to have been given to whether the Claimant was actually unwell as a result. It is not clear how that led to the conclusion that the Claimant's absence arose from or was attributable to his own misconduct. Mr Barker, who advised shortly afterwards, appeared to have advised on the basis that it was a combination of committing the underlying (and un-investigated) misconduct and being the subject of a management investigation as a result, although his evidence was neither clear nor convincing. The Tribunal did not consider that the fact that the Claimant's departure from work on Friday, 20 May 2017 was "related to" being given the investigation letter, without more, fell within the contractual provision that his absence from work arose from or was attributable to his own misconduct.

5.7 At the appeal stage all the HR advice set out in Mr Wolstenholme's report appears to have been based on the Sick Pay Guide rather than the Blue Book. In his outcome email to Mr Kerry, Mr Hartley referred in terms to the HRplus advice and relied on their view that the Claimant's absence was due to his own misconduct or neglect because misconduct included being the subject of a management investigation or disciplinary/capability procedure. The Tribunal did not consider that the Sick Pay Guide was consistent with the contractual terms in this respect. The Tribunal did not consider that misconduct could rationally be defined for these purposes to include "being the subject of a management investigation or disciplinary/capability procedure". That definition would justify removal of sick pay even if the management investigation was wholly unjustified

and regardless of the employee's actual state of health. The Tribunal did not consider that the fact that the Claimant was subject to a disciplinary investigation for as yet uninvestigated misconduct allegations meant that his absence arose from or was attributable to his own misconduct within the meaning of the Blue Book.

5.8 In any event, the contractual process which is required before a final decision is taken to remove sick pay was not followed. The Claimant was not provided with a written report, given the chance to comment on it, or given an opportunity to address the relevant decision maker. The importance of such a process was well illustrated by the facts of this case. Neither the underlying allegations of misconduct nor the reasons for the Claimant's absence were ever properly investigated and there was a total lack of clarity about the basis for removing his sick pay. The procedure was a contractual requirement and pre-requisite to a final decision to remove sick pay.

5.9 The Tribunal understood from the evidence that the Respondent was trying to address a recurring difficulty with its employees going off on long-term sickness absence when they are subjected to disciplinary or other investigations. There can be something of a vicious circle because it is difficult to resolve the underlying issue while the employee is absent but the employee is often unwilling to return to work until the underlying issue is resolved. This can lead to significant sums of public money being spent. However, the Respondent appears to have attempted to address that difficulty without proper consideration of the contractual position.

5.10 Accordingly, removal of the Claimant's sick pay was not justified by the terms of the contract and his claim for unauthorised deduction from wages succeeds.

5.11 The last issue is the reference under section 11 Employment Rights Act 1996. We have dealt with that in our findings of fact above. The relevant terms of the Claimant's contract relating to sick pay were those set out in the Blue Book. To the extent that the Sick Pay Guide is inconsistent with the Blue Book, the Blue Book must take precedence. The Sick Pay Guide is non-contractual.

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**Employment Judge Davies**

**4 June 2018**