Case Number: 3303863/2018, 3331147/2018, 3332432/2018, 3334809/2018, 3300650/2019, 3319453/2019 and 3325841/2019

EMPLOYMENT TRIBUNALS

Claimant
Mr James Murphy

Respondent
(1) Royal Mail Group Limited
(2) Mr Adam Hinckley

v

Heard at: Watford

On: 16,17, 18, 19 March 2020

Before: Employment Judge R Lewis
Mrs I Sood
Mr C Sutton

Appearances

For the Claimant: In person
For the Respondent: Mr N Hartley - Solicitor

RESERVED JUDGMENT

The claimant's claims of detriment on trade union grounds, and of disability discrimination, all fail and are dismissed.

REASONS

1. This was the combined hearing of seven claims presented by the claimant on dates between 4 February 2018 and 18 November 2019. The claimant has at all times throughout these proceedings acted in person. There had been case management hearings on 10 August 2018 and 28 May 2019 (Employment Judges Manley and Bedeau respectively). The Tribunal was greatly assisted by a summary of facts set out by Judge Manley (48-50). References in these Reasons to 'the respondent' are to the first respondent, Royal Mail.

2. At the start of this hearing there was a list of issues which the claimant confirmed was agreed. The agreed bundle was about 650 pages.

3. The parties had exchanged witness statements. Apart from the claimant, there was on his behalf a statement from one further witness, Mr David Bharrat, CWU Branch Secretary.

4. In order of giving evidence, the respondents' witnesses were:

   Ms Ligin Netto
   Mr Ben Fletcher
   Mr Mark Charlton
   Mr Adrian Owen
   Mrs Jane Long (previously Fairhurst)
   Mr Adam Hinckley (the second respondent)
   Mr Dale Lang.

5. The claimant had no questions for Ms Netto or Mr Fletcher, who were interposed at the end of the first day. The evidence of Mr Hinckley and Mr Lang was given via Skype, as both were self-isolating. The claimant had very few questions for either of them. The major witness on behalf of the respondent, whom the claimant cross-examined at greatest length, was Mr Charlton.

6. Management of this hearing was affected by the public health emergency. The case concluded on what turned out to be the last day of public hearings for the time being at the Watford Tribunal. Completion of these Reasons has been delayed as a result, for which we apologise to the parties. We were grateful to everyone on both sides for their thoughtful co-operation in assisting the work of the Tribunal.

Summary

7. The claimant, who was born in 1973, has been employed by the respondent since 1990, and remains its employee. In 2003 he began what became over 14 years on full-time paid release to trade union duties on behalf of CWU. Disputes arose about the release in January 2018; and about the management of the claimant between 6 January 2018, and the date of presentation of his last ET1 on 18 November 2019. Those disputes formed the subject matter of this case. At the heart of the case was a complaint that the claimant had not been agreed to be on full time paid release throughout that period. The list of issues set out claims brought under three headings: unlawful deductions; trade union detriment; and disability discrimination.

8. It was conceded that at all material times the claimant met the definition of disability in s.6 of the Equality Act as a result of anxiety/depression. He did not ask the tribunal to make any adjustment to the hearing procedure.

9. We were told that in late February 2020, the respondent paid the claimant a sum which the claimant agreed represented the totality of all net sums which he considered to be due and owing to him as arrears of pay, and which were the subject of all the unlawful deductions claims. The list of issues and the witness evidence had not been amended in light of this payment.

10. We explained to the parties, and it was agreed, that as the claims for unlawful deductions had been satisfied in full before the start of this hearing,

the Tribunal could not hear any of those claims. The claimant was entitled to proceed with the other two categories of claim. Those claims touched on the reasons for the management decisions which led to what the claimant considered to have been unlawful deductions. We considered that we continued to have jurisdiction to hear those claims.

11. It might help if we illustrate the point with an example. The claimant was on a lengthy period of sick leave. He was paid for six months on full pay, and his pay then reduced to half pay. He complained that he was contractually entitled not to have his sick pay entitlement reduced to half pay after 6 months sickness absence on full pay. As he had been paid the full net balance by the start of this hearing, his claim to have suffered an unlawful deduction fell away. The tribunal proceeded on the agreed basis that, in principle, if the decision to place the claimant on half pay was a detriment covered by Section 146 TULRCA 1992, he would be entitled to compensation for injury to feelings. In addition or alternatively, if the same was an act of discrimination, contrary to the Equality Act, he would be entitled to interest in accordance with the appropriate Regulations, as well as a declaration.

12. The tribunal asked for a revised schedule of loss in light of the February payment. The claimant produced this on the morning of the second hearing day. It set out only headings of non-pecuniary loss. The claimant placed high figures on these, and would have needed professional advice on remedy had any claim succeeded. It seemed to us right to limit this hearing to liability only in that circumstance.

13. Having heard the evidence, the Tribunal's conclusions in short are that it has not been shown that any of the decisions complained of in this case was in any way whatsoever tainted by considerations of any kind relating to the claimant's trade union activities, or to his disability. There was no evidence whatsoever that any decision was made for any prohibited purpose defined by TULRCA.

General considerations

14. In this case, as in many others, the Tribunal was referred to a wide range of issues, some of them in detail. Where we make no finding about a matter of which we heard; or where our finding does not go to the depth to which the parties went; that is not a matter of oversight or omission but reflects the extent to which the point was truly of assistance to the Tribunal.

15. While that observation applies in many cases, it was of particular importance in this case. The reason was that the claimant had a number of points on which he had strong feelings, and which he considered important, but which did not appear in the list of issues, and were therefore not before the Tribunal for decision (even if they were relevant).

16. The Tribunal has experience of the difficulties faced by litigants in person. We understand that the hearing process is stressful and unfamiliar, even for an experienced trade union representative. It is our duty in accordance with

the overriding objective, to seek to place parties on an equal footing. We understand the difficulty of a claimant in person bringing a claim against a large corporation which is professionally represented. We do not criticise lay members of the public for ignorance of the technical law of the Employment Tribunal, or for unfamiliarity with the procedures.

17. That said, the claimant's understanding and analysis of his own claim fell far short of what would have enabled him to do justice to himself. He appeared to approach the case on the basis that because the events in question were related to his trade union role, and because he disagreed with how he had been managed, he had proved detriment in accordance with the statute. He appeared to take the view that any management decision about a person with disability constituted disability discrimination. His conviction was unshaken by the evidence which was given. It was striking that he made no notes during Mr Hartley's closing submission. We adjourned for about 20 minutes to enable the claimant to finalise his reply, and in a short reply, the claimant raised a number of points, none of which was an issue before the Tribunal, and a number of which had not been referred to in evidence.

Legal Framework

18. The claimant's claims were brought in part under s.146(1)(b) TULCRA, which so far as material provides as follows (emphasis added):

> "A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the actual failure takes place for the sole or main purpose of ..preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so.."

19. It was not in dispute the claimant's work throughout his period of release to the CWU was covered by the sub-section.

20. We note that the underlined wording indicates that the approach to a claim under the sub-section may be to ask first whether the employer has subjected the worker to detriment; secondly whether that has happened to the claimant "as an individual"; and third, to ask whether the sole or main purpose is that stated.

21. Section 148(1) deals with burden of proof:

> "On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act."

22. It follows that at the fourth stage, it is for the respondent to show the sole or main purpose for the action complained of.

23. Although we have in the preceding paragraphs set out what seems to us the correct formal order for analysis of a claim under the subsection, there was in this case almost no dispute about the other elements of such a claim; ie that the respondent had done things which were capable of constituting

detriments, and that they were directed to the claimant as an individual. At this hearing, both sides focused on purpose.

24. The Tribunal notes the statutory emphasis on purpose. We noted that that differs from other formulations of the test of detriment, eg under ERA 1996 s47B ("on the ground that the worker has made a protected disclosure") and under s13 Equality Act 2010 ("because of the protected characteristic"). We are directed to ask ourselves, not the broad question of 'what was the reason why' this happened, familiar from discrimination claims; but a much narrower question: what was the sole purpose of the event of which there is complaint; if more than one purpose, what was its main purpose; was either of those purposes one prohibited by statute?

25. The claimant also brought claims of disability discrimination under Sections 13, 19 and 27 Equality Act 2010. They provide as follows.

26. Section 13 of the Act defines direct discrimination as occurring where "A discriminates against B if because of a protected characteristic, A treats B less favourably than A treats or would treat others".

27. Section 15 (which we mention for sake of completeness, although it was not relied on by the claimant) provides that "A discriminates against B if A treats B unfavourably because of something arising in consequence of B's disability". The provision is disapplied "If A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

28. Section 19 states that "A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's" … (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

29. Section 23 provides that "On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

30. Section 27 provides that "A victimises B if A subjects B to a detriment because (a) B does a protected act". Section 27(2) includes in the definition of a protected act "doing any other thing for the purposes of or in connection with this Act; … making an allegation (whether or not express) that A or another person has contravened this Act". Section 27(3) provides: "Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information that is given, or the allegation is made, in bad faith".

31. A number of points arising out of these sections were material in this case. In the case of direct discrimination, it is necessary to prove less favourable treatment than a comparator. The claimant was unable to challenge Mr Hartley's assertions that when on sick leave he was treated exactly in the same way as a non disabled long term absentee would have been treated.

32. A better analysis of the claimant's claims in relation to pay, when viewed through the spectrum of the Equality Act, was that they were complaints of indirect discrimination, namely that the respondent's pay system disadvantaged the claimant, as a person with disability; and / or complaints under s.15, of unfavourable treatment because of something arising from his disability, namely his absence.

33. It was conceded that the claimant had been the subject of a provision, criterion or practice; the claimant did not demonstrate the pool for comparison, or how he was impacted compared to with another pool; or the disadvantage to him.

34. The omissions in the claimant's analysis of the victimisation claim were clear. Although it is obvious that a step in Tribunal proceedings under the Equality Act is a protected act for the purpose of Section 27, the claimant did not challenge the assertion of the witnesses who were actually responsible for the alleged victimisation that they had no knowledge of the protected act (or indeed of the Tribunal claim out of which it arose).

Findings of fact

35. We preface our findings of fact with general comments. The bundle contained over 650 pages. Much of it was in email. When we consider office based correspondence we must, in this as in many cases, bear in mind that it is the working correspondence of every day, not written for artificial analysis in the Tribunal years later.

36. When we consider events at work, we must apply a standard of realism. An important element of realism is that we do not expect anyone at work to attain and sustain a standard of perfection. On the contrary, we make allowance for the human reality that people at work make mistakes. We must take care to avoid the benefit of hindsight and in this, as in other areas of our work, we must take particular care not to substitute our own view for that of management making operational decisions at the time in question.

37. We very briefly set the scene as we understand it. Royal Mail employs, according to the earliest response form, some 120,000 employees. Many are members of the Communication Workers Union (CWU). The CWU is organised into branches, which we understand to be based on the work area. We were concerned solely with the Harrow and District Branch of the CWU. Mr Bharrat said that the Harrow branch has about 17,000 members and a number of officials. It seemed to be common ground that Harrow branch has had, and continues to have, a history of confrontation with management, and that there was a particularly difficult dispute in about 2003.

38. Royal Mail and the CWU have entered into a number of collective agreements. Some have stated that they form legally binding contracts, a point to which the claimant returned many times (but which we find did not assist us). Many Royal Mail employees are released from operational work to trade union duties, with or without pay, part-time or full-time. It was agreed at this hearing that usual practice is that employees on paid release for trade union activities are from levels recognised as Local, or Area, or Division or National; but that holders of branch office (e.g. branch chair or secretary) are not usually entitled to paid release. The reason is that while the officials on paid release form part of the structure of collective employment relations, branch officials are, in the eyes of Royal Mail, primarily engaged on a CWU role, which is a matter for the CWU, its members and the individual officials.

39. In 2003, and following the difficult dispute at Harrow referred to, an agreement was entered into called "Greenford Collections Network Facilities Agreement 2003" (388). The version in the bundle was signed on the CWU's behalf by the claimant and on the respondent's behalf by Mr Deer of management. The document should be read in full. It is in brief an agreement by Royal Mail to give a branch official of Harrow Branch full time paid release to union duties. It therefore was a departure from what we have described above as usual practice. It provides that it is an agreement made, not with the CWU, but with "Harrow and District Branch". It states, "Full-time release will be granted along with credentials to the Branch Chair." It provides for a substitute in the event of the Chair being on annual leave or long-term sick leave. It states, "It is recognised that the Chair will receive additional responsibilities and shall receive financial remuneration."

40. The agreement provides for annual review; it was common ground that after about 2004 no annual review took place. It provided for dispute resolution in the following way: "The Agreement does not alter in any way the IR Framework, although using this agreement if disagreements are raised and an informal resolution cannot be found, the IR Framework will be used."

41. That apparently cumbersome wording was in context clear to those affected by it. It meant that the dispute resolution procedure of the collectively agreed IR Framework applied to any dispute about the 2003 Agreement.

42. One puzzling provision was, "This Agreement is made in strictly in confidence and must not be disclosed publicly." Mr Bharrat's evidence was that he certainly knew about the Agreement in 2003, and that members of the branch in general knew about it. The claimant said that he did not know why that clause had been inserted, which he said had been done at the request of management. At the time in question, the claimant was Branch Chair, and signed the Agreement, stating that it was "for the CWU".

43. We take the first phase of the events before us to be 2003 to 2009. The claimant was Branch Chair. He was subject to re-election every two years (although in the event some elections were unopposed). There was in addition an Area Representative, Mr Jeffries, who the claimant said had paid release of 2.5 hours per week. No more turns on events in that period.

44. The second phase of events began in 2009. By that time, and in circumstances which we were not told about, the role of Area Representative had become a full-time role on paid release. It was subject to annual re-election. The claimant was elected in 2009, and re-elected every year up to and including 2017. He said in evidence that of his eight re-elections, five were unopposed.

45. The claimant was therefore between 2009 and 2018 released from duties, and paid full-time, both as Branch Chair and as Area Representative. He of course received only one salary. We accept, as a matter of general common sense, that with the passage of time, and with staff turnover, management lost such awareness as they might have had of the duality of his roles. The duality may not have been important to anyone except the claimant at the time. By January 2018 the claimant had been away from an operational role for over 14 years. We accept that the claimant may generally have been thought of as Area Representative, a role with seemingly wider and greater authority than that of Branch chair. We heard no criticism of any aspect of how he carried out his union duties, whether from management or the union.

46. The second phase of these events ended when in elections held at the end of 2017, the claimant lost his position as Area Representative to Ms Kelly Joyce. It was striking that when the claimant gave evidence about this, he said that he lost office "at 1:00pm on 5 January 2018." The precision of that evidence, and the manner in which it was said, left us confident that the hurt and shock of losing an election remained vivid with the claimant, and indeed may have formed the emotional driver of this dispute.

47. In accordance with usual procedure, the CWU reported the outcome of the election to management. The claimant's line manager, if he had been working operationally, was Mr Owen, who reported to Mr Hinckley. On 6 January Mr Hinckley emailed the claimant (415):

> "I understand that unfortunately you lost your Area Reps position in the recent elections? Can you please confirm your return to the late shift at the end of your two week annual leave?

48. The claimant replied in less than five minutes (416):

> "I'm not in a position to return to my role. My reasons are that as Branch Chair full time release was granted following the national dispute."

49. That exchange summarised the factual basis of the dispute which was before us, and which we understand remains unresolved. The respondent understood from 6 January 2018 onwards that as the loser in a CWU election, the claimant returned to his operational Royal Mail duties. The claimant's reply was that he held two posts, each of which entitled him to full time paid release from duties, and that having lost one of them (Area Representative) he remained full time and on full pay in the other (Branch Chair). The respondent's response to that included (1) that Royal Mail does not give paid release to Branch officials; and (2) that whatever the

considerations in 2003, and irrespective of what had been agreed then, there was, in 2018, need for only one full time CWU official on paid release for Harrow, and that official was Ms Joyce.

50. We noted in that context Mr Charlton's evidence, which was that it was not unusual for CWU representatives to lose elections, and that he understood the sensitivity of an employee who may have been away from operational duties for some time, returning to them after the perceived public humiliation of electoral defeat. Mr Charlton's evidence was that that was a matter to be managed discreetly and sensitively.

51. The management of Royal Mail's response to the claimant's email of 6 January was at the heart of the first group of his complaints under TULRCA. Although he expressed them a number of ways, and directed his complaints to a number of points, we approach them as a single, overarching issue, which was whether any response of management to the claimant's electoral defeat was a contravention of s.146. We have no difficulty in rejecting all these parts of the claimant's claim. There was no evidence beyond bare assertion that any manager ever responded to the claimant for the prohibited purpose. There was no evidence of general animosity against the CWU by any of the managers in these events, and no evidence that the claimant, as a CWU representative, had attracted animosity. We accept that managers dealt with what they perceived as a difficult situation: a long serving employee who was unwilling to return to operational duties after many years absence from them, who relied on a long-forgotten confidential document to justify his actions, and who had suffered a painful electoral defeat, and at the same time had a prolonged ill-health absence.

52. Mr Hinckley asked for the Agreement to be sent to him, "As no one has any record of that here". The claimant replied, "I do not have anything in writing". He explained that in evidence later as meaning that he did not have anything in writing at the moment when he was sending the email.

53. The matter was escalated within management, on the understanding that the claimant was relying on "an unwritten, verbal agreement." (421). We accept that with the passage of time and management turnover, there was no one within the respondent who could verify the existence of written release for the claimant to the duties of Branch Chair; and there was scepticism that such release existed, because of the shared knowledge of the nationally agreed procedure which stated that, "The Branch Treasurer, Chairman… are purely CWU posts and have no role in the IR Framework, so should not attract pre-scheduled release" (269). We do not agree with the claimant that any member of management is to be criticised for not knowing in 2018 about the Agreement of 2003.

54. On 15 January, Mr Hinckley wrote to the claimant to tell him that, "There is no facility release for CWU Branch Chairs" and instructed him to return to operational duty after appropriate retraining. He indicated that on behalf of Royal Mail he did not consider the 2003 Agreement to remain in force. Mr Hinckley also offered the possibility of relocation of the claimant to work at a unit closer to home than his substantive post at Greenford. The claimant

replied (431), "We have an agreement in place with Royal Mail since 2003. I will be expecting Royal Mail to adhere to this agreement."

55. We take the third phase of this matter as the period from 6 January to 6 February 2018, when the meeting described below took place. In that period, the respondent refused to permit the claimant to revert to the full time, fully paid release role of Branch Secretary, and instructed him to return to an operational role. We find that the reasons for those decisions were entirely operational, in the light of the knowledge and understanding of the decision makers at the time, and wholly unrelated to the claimant's trade union activities.

56. Mrs Long, then Ms Fairhurst, was Industrial Relations Director. The discussion about the claimant had escalated to her, and she in turn had spoken to the CWU Assistant Secretary. She met the claimant and Mr Bharrat on 5 February at Mount Pleasant. It was common ground that the claimant showed Mrs Long a copy of the 2003 Agreement (388), that she looked at it, and then handed it back. She did not retain a copy. We understood Mrs Long to have made a point with a gesture, namely refusing to accept the document.

57. In evidence she said that the version, at page 388 of the bundle, was the same wording, but not the document which she was shown that day, which she said included more than two signatures and may have included a date.

58. We take the next phase of this matter to be the phase from 5 February 2018 until the end of September 2018. Throughout that period that respondent did not have a copy of the Agreement. The claimant's evidence on this point was little to his credit. He agreed that the respondent asked for a copy. He said that he had declined to release it because it was confidential. That reply was mere gaming: while the document said that it was confidential, that could not mean confidential from the other party to it. He said that he did not overlap on shift with Mr Hinckley so did not know how to get a copy to him: that was a surprising point to be made by a lifelong employee of Royal Mail, who could have used ordinary post. We find that the claimant did not release the document because he saw, much more quickly than did Mrs Long, that she had made a tactical error in not keeping a copy, and had decided to take advantage of the error for as long as he could.

59. During that period a number of the pay related events with which we were concerned took place, to which we now turn. The claimant had returned to operational duties for a few days in January 2018. He went off sick, originally with back problems and subsequently with stress. After six months on full pay his pay reduced in August 2018 to six months half pay. The reduction was made in accordance with the national sick pay procedure, agreed between the respondent and the CWU. We do not need to decide if the reduction was unlawful as a deduction.

60. As an issue arising under section 146, we find that the reason for the reduction in pay in August was that the claimant had exhausted his

entitlement to full sick pay, and had begun a period of half pay. He was treated in accordance with the agreed national procedure, and there was no evidence whatsoever that the reduction was in any way related to his trade union activities. There was no evidence of any extraneous or improper purpose for the reduction. We do not need to decide any of the peripheral issues raised by the claimant as to whether his was an exceptional case (he claimed to have suffered an industrial assault or injury) or about shift allowance.

61. The reduction in pay was not an act of direct disability discrimination. The claimant agreed in cross-examination that a non-disabled comparator would have been treated in the same way in the same circumstances. We agree.

62. In the course of these proceedings, in the last week of September 2018, the parties underwent the disclosure exercise. On that occasion the claimant provided to the respondent a copy of the 2003 Agreement. The precise procedure by which the document was then managed was entirely clear to us. We find that after disclosure the 2003 Agreement was carefully considered by management; identified as a collective agreement and not an individual matter; and as a collective agreement it was identified as suitable for dispute resolution in accordance with the IR Framework. The respondent therefore entered a dispute about the 2003 Agreement into the appropriate procedure, starting with its proposal that it wished to terminate the agreement. It was a logical consequence of that approach that in closing submission at this hearing, Mr Hartley conceded, in reply to questions from the tribunal, that the first decision in January 2018 to terminate the 2003 Agreement without any formal process was wrong.

63. The IR Framework provided, not altogether clearly, that once an issue had been placed into the Framework for dispute resolution, the status quo which prevailed seven days before initiating the procedure should be preserved (176). Although that begs the question as to how that precise date would have been calculated at the time, Mr Hartley conceded that the claimant's point about status quo was right in principle. That point was that if termination of the 2003 Agreement was going through the Framework process, the 2003 Agreement, and its benefits, constituted the status quo which should have remained in place until the end of the Framework process. That point was reached on 10 December 2019, following which the claimant was paid all arrears of pay. In our view, the final phase in the process lasted up to 10 December 2019, and we do not need to go into it in great detail.

64. At the first step of the Framework, Mr Hinckley and a colleague had a meeting with the claimant and Mr Bharrat on 4 December 2018 to discuss the proposal to end the 2003 Agreement. The respondent's reasons were that the industrial relations issues which prevailed in 2003 no longer existed, and that in the 2018 structure, there was no place for a Branch Chair to be on paid release and not enough work to justify his release.

65. Mr Bharrat put a counter argument, and as there was failure to agree, the parties moved to Stage 2 of the procedure with the possibility of mediation.

In the event, neither of those took place, and at Stage 3, a further meeting took place, attended by the claimant and Mr Bharrat and the Divisional CWU officer on 18 February 2019 (569). That also failed to agree, and led to 'national intervention,' which was an attempt to resolve the issue at national level. That also failed to reach agreement.

66. The respondent's interpretation of the Framework was that once national intervention had failed to reach agreement, the matter reverted to the respondent, as the party which had initiated the procedure, to review matters unilaterally and reach its final decision. That review was undertaken by Mr King on 10 December 2019 (638-639). He decided that the 2003 Agreement should be terminated with effect from that day. On 21 February 2020 Mr Lang wrote to the claimant to tell him that that had been decided, and that he would receive arrears of net pay for the period 16 February 2018 to 10 December 2019 (less payments received) on 28 February 2020 (640-641). Those payments were then made. It was not clear to us why it took over two months to communicate Mr King's decision to the claimant.

67. The claimant's response was that this outcome was not satisfactory. He did not agree that after the failure of national intervention the respondent had the unilateral right to review and decide the matter: he insisted that no final decision could be made unless CWU agreed. The tribunal put to him that that implied that CWU had a binding veto over any management decision, even on a significant corporate matter, and the claimant agreed that that was his position. That seemed to us as astonishing as it was absurd and unrealistic. When Mr Bharrat was asked the same question, his embarrassment was visible: he clearly did not agree with the claimant, but did not want to say so in the context of this case. The claimant was asked if he agreed that the Framework procedure had, using its own word, been "exhausted". He answered a number of times that it had been "concluded but not exhausted." That choice of words was an unconvincing attempt to match reality with his arguments.

68. In August 2018, and again in October 2018, mistakes were made in the payment and calculation of the claimant's leave pay. He took annual leave for which he only received half pay. He was by then on general half pay in his second six months of sick leave. However, he was entitled to annual leave pay at full pay. He claimed that the application of those reductions each constituted a further detriment on section 146 grounds.

69. Ms Netto's evidence was that due to a combination of human error and IT error, she was responsible for a mistake in inputting the claimant's pay in June 2018. We accept that evidence. It was an every day office error, completely unrelated to the claimant's union activities.

70. We accept Mr Owen's evidence that there was an inputting error in relation to the claimant's August 2018 pay, which was put right as soon as it was drawn to his attention. We accept Mr Owen's evidence that there was no miscalculation of the claimant's leave pay in October 2018. . We accept that evidence. There was an every day office error, completely unrelated to

the claimant's union activities. We find in any event that none of these matters has been shown to be related in the slightest to trade union activities.

71. In the second half of 2019, the claimant was, due to further office error, twice overpaid and the respondent triggered its routine recovery procedures. Mr Fletcher gave evidence, which we accept, about how the respondent manages recovery of overpayments. We accept that the overpayments were originally made as a result of error, and that the recovery, when the overpayments were identified, was something which occurred in accordance with normal procedure. There was no evidence whatsoever that any of this related to the claimant's trade union activities.

72. The claimant's claims of disability discrimination, to which we now turn, were rooted in a raft of misunderstandings by the claimant of his own case and of disability discrimination. A powerful illustration is found in the judge's note of the claimant's third question to Mr Hinckley: "As to direct discrimination, would it have been a reasonable adjustment to follow the full terms of the Industrial Relations Framework?"

73. There was no pleaded issue about the failure to initiate the IR Framework before December 2018; given the claimant's and the CWU's response when that was done, the claimant would struggle to show that he experienced detriments; there was no evidence at all which related triggering the Framework to the claimant's pleaded and admitted disability; and it would be obvious from the first few words of the question that the claimant was using technical terms without an understanding of them.

74. The claims of direct discrimination allege that the acts of discrimination were the reduction of the claimant's pay while sick from full pay to half pay and then extinction; and the recoupment of overpayments.

75. We find that the claimant has not proved facts which cause the burden to shift. He has not shown that a non-disabled person would have been treated differently in any of three situations: after six months sick leave; after twelve months sick leave; or if over paid by mistake. Indeed, the claimant agreed in evidence that that was not the case in any of the three instances.

76. If the burden shifts, we accept that the non-discriminatory reason was that the respondent applied its policy without distinction, both in relation to sick pay and recovery of overpayment, in the same way as it would have done to a non-disabled person in the same circumstances.

77. For the purposes of the claim of indirect discrimination, it was accepted that the recovery process of overpayment was a PCP. We agree with Mr Hartley that there was no evidence whatsoever that the PCP had an impact on the pool of disabled people affected compared with the pool of others. We accept that the principle of consistent management of salary in accordance with nationally agreed policy and procedure is a legitimate aim, and recovery of overpayment, by instalments if need be, is a proportionate means of achieving it.

78. The victimisation claim alleged that after the claimant had served his schedule of loss, the respondent victimised him by recouping overpayments. We accept Mr Fletcher's evidence that the work of the Recovery Team was an IT based exercise without knowledge of the individual employee, or of any litigation brought by the individual, and that the recoupment was wholly unrelated in any respect to the protected act alleged. If we have to decide the point further, we would also find that recoupment of admitted, erroneous overpayment is objectively not a detriment, because no employee has a legitimate expectation of the windfall of mistaken overpayment.

79. All the claimant's claims fail.

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Employment Judge R Lewis

Date: ……05/05/2020……..

Sent to the parties on: .....

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For the Tribunal Office