EMPLOYMENT TRIBUNALS

Claimant: Mr D Bakary

Respondent: Royal Mail Group Ltd

Heard at: London South Croydon

On: 25-27 August 2020

Before: Employment Judge Tsamados
With Members:
Mr D Clay
Ms B Leverton

Representation

Claimant: In person (and through an interpreter, Mr K Chehboni)
Respondent: Miss R Cairney, Solicitor

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

The Claimant's complaints of indirect disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and victimisation fail. His claim is therefore dismissed.

REASONS

These written reasons are provided at the request of the Claimant.

Claims and issues

1. By a claim form presented to the Tribunal on 7 April 2019, following a period of early conciliation between 23 January and 9 March 2019, the Claimant brought complaints of disability discrimination and victimisation. The Claimant relies on the following impairments: a weak left leg condition and depression/anxiety. In its response presented to the Tribunal on 26 June 2019, the Respondent denied the claim in its entirety.

2. A Preliminary Hearing on case management was held on 10 October 2019 and was conducted by Employment Judge Ferguson. At that hearing, EJ Ferguson identified complaints of discrimination arising from disability, failure to make reasonable adjustments and indirect discrimination as well as a complaint of victimisation. In addition, she identified the issues and made a number of case management orders in order to prepare case for hearing on 25-27 August 2020.

3. Following that hearing, the Claimant provided a victim impact statement and medical evidence, as well as a schedule of loss. The Respondent provided amended Grounds of Resistance within which it accepts that the Claimant is a disabled person by virtue of the weak left leg condition and depression/anxiety. The Respondent has also provided a counter schedule of loss.

4. The Respondent provided a list of issues which is attached as appendix to this Judgment. These were agreed as the issues to be determined by the Tribunal.

5. It is fair to say that those complaints are narrowly pleaded. In essence they are as follows:

    a. The indirect discrimination complaint relies on a provision criterion or practice (PCP) of the Respondent's limit on the payment of sick pay for a maximum of 12 months in any four-year period under its sick pay policy placing the Claimant with his disabilities at a particular disadvantage compared with others not sharing his disability;

    b. The failure to make reasonable adjustments complaint relies on the same PCP, the suggested adjustment being to not apply the policy to him;

    c. The discrimination arising from disability complaint relates to 3 periods of absence in 2017, 2018 and 2019 and the failure to pay the Claimant company sick pay in 2018 and 2019, to inform him that he was not entitled to company sick pay because he had exhausted his entitlement and causing him to lose two weeks annual leave in 2019 because he could not afford to be off sick;

    d. The victimisation complaint relies on the protected act of bringing a previous Employment Tribunal claim and the detriments as a result are said to be the same as the unfavourable treatment relied upon in respect of the discrimination arising from disability complaint.

Preliminary matters

Interpreter

6. The Claimant requested and had available a French/English interpreter for use at this hearing. The Claimant indicated that he would use the interpreter if he did not understand anything although I did indicate to the interpreter that he should intervene at any point if he thought it was necessary.

Claimant's application for leave to amend

7. At the start of the hearing, the Claimant raised the matter of an application he had made to amend his claim. This is contained within a letter addressed to EJ Ferguson and dated 28 July 2020. It is not obvious on the face of it that this was an application for leave to amend. The Respondent objected to his application on 24 August 2020. The Claimant's letter and the Respondent's objection had not been dealt with by the Tribunal. I explained that EJ Ferguson has been away from the Tribunal for some time and this may well explain why the matter has not been dealt with and the Respondent's objection was only made last Friday.

8. The Claimant's application runs to 12 pages and raises matters going back a number of years as well as those post-dating his claim. In essence, the application relates to matters that were determined at a previous Employment Tribunal claim which was heard by Employment Judge Freer and members over five days in July/August 2017. We were referred to a copy of the Judgment at pages 68 and 69 of the bundle. This does not contain the written reasons for the Judgment.

9. In his letter, the Claimant is seeking to rely on events which gave rise to that claim as relevant to the matters to be determined in the claim we are dealing with. In particular, he asserts that the Respondent did not implement the recommendations made by the previous Tribunal and this gave rise to his further absences from work due to ill health. In addition, his application also raises events which he asserts took place after the claim which we are dealing with was issued and go up to the present day. The Claimant stated to us that he is not raising new matters and they were only put forward by way of background.

10. The Respondent's position is that these are completely new matters not raised before as part of this claim and it is not in a position to deal with. Miss Cairney explained that the Respondent had only belatedly expressed its objection to the application because it was uncertain whether it was a formal application to amend and the parties had gone through the process of judicial mediation albeit unsuccessfully and which only concluded last Friday.

11. I explained to the Claimant that the Tribunal had to determine whether the amendment that he was seeking raised new matters and if so whether they have been raised within the requisite time limits or whether they are simply details relating to the existing complaints before the Tribunal or, as he asserts, are simply background. I further explained that we had to weigh up the prejudice that was caused to either party by allowing or refusing the application to amend.

12. I stated that at first glance it did appear to me that he was raising substantive matters and it was not clear what amendment he was asking for because he had not given a succinct explanation. I also advised him that if we were to allow his amendment one consequence might be that it was not possible to continue with this hearing because the Respondent is not prepared and/or does not have the right witnesses to deal with any new matters and so we might have to postpone to another day. I did warn him that a further three-day listing is unlikely to be before a date in August 2021.

13. The Claimant stated that he had the reasons for the previous Tribunal's decision and a copy of the bundle with him. This was 273 pages and about 4 inches thick. I explained to him that we could not go behind the written Judgment and that did not contain the reasons for the decision. The Claimant asked if we could get the reasons and I explained to him we could not and in any event it was too late to apply for them, although of course I could not speak for EJ Freer to whom the request would have to be made. The Claimant responded that he had asked for the reasons and had been told that they had been lost. I explained further that even if the parties could agree what happened at the previous hearing or he were to seek the written reasons then it was inevitable that the hearing could not proceed over the next three days.

14. After consultation with the members, the Tribunal adjourned to allow the Claimant to write down his amendments to his claim because it seemed clear that until he had done so we were not in a position to continue.

15. The Tribunal reconvened after an hour. The Claimant stated that he would rely on the matters set out in his letter to EJ Ferguson as background only. However, his

further response was somewhat equivocal and there was further discussion as to whether he was making an application for leave to amend or as I suggested he might be looking at a new claim dealing with matters he believes are outstanding and/or arise from the alleged failure of the Respondent to implement the recommendations made by the previous Tribunal. At the end of this discussion, the Claimant was adamant that he simply wanted to rely on those matters as background only and was anxious that the case went ahead rather than being adjourned.

Evidence

16. The Tribunal heard evidence from the Claimant by way of a written statement and the attachment to paragraph 8.2 of his claim form as well as in oral testimony. This was because his written statement was very short and only consisted of a number of bullet points with references to page numbers in the bundle.

17. The Tribunal heard evidence on behalf of the Respondent from Mr William Holbrook by way of a written statement and in oral testimony. We also had a written statement from Mr John Cuomo. However, he did not attend the Tribunal to give evidence and I explained to the parties that this would affect what weight if any we could attach to the contents of his statement.

18. The Respondent provided a bundle of documents consisting of 111 pages. I refer to this as "B" and the relevant page number where necessary. During the course of the hearing we were provided with additional documents from the Claimant: correspondence relating to the Claimants entitlement to SSP and miscellaneous letters relating to medical attendances (which I refer to as "C1" where necessary); correspondence relating to the Claimant's previous Employment Tribunal claim in 2017 (referred to as "C2" where necessary); and the Claimant's GP medical notes (which I refer to as "C3" where necessary).

19. At the start of the hearing, the Claimant expressed concern that pages were missing from the bundle. He had not brought a copy of the bundle with him, but I invited him to take the bundle from the witness table and to go through it during our reading adjournment and to check whether any documents were missing. He did not raise any further concerns on resumption of the hearing.

Findings

20. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues that we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. We have, however, considered all the evidence provided to us and have borne it all in mind.

21. The Claimant brought a previous Employment Tribunal claim against the Respondent in case number 2301641/2016 which was heard in July and August 2017. Whilst we have a copy of the Judgment of that Tribunal setting out the headline decision and remedy, we do not have the reasons for the decision (at B 68-69).

22. That Judgment records that the unanimous decision of the Tribunal was that the Claimant's complaints of failure to make reasonable adjustments and part of his complaints of discrimination arising from disability are successful. However, it does not give any further details of those complaints. By way of remedy the Tribunal awarded the Claimant the sum of £37,582.75 comprising of £18,802.75 in respect of loss of earnings, £18,000 injury to feelings and £1000 personal injury general damages plus interest of £3,251. However, it does not give any details of how these figures were assessed. The Judgment also sets out a number of recommendations:

when addressing issues relating to the Claimant's disability the Respondent's management should seek HR support and advice (the period of this recommendation is one year from the date of this judgment being sent to the parties); Mr Pickford (the Claimant's then line manager) shall within six weeks of this judgment being sent to the parties receive refresher training on equality issues; and within four weeks of this judgment being sent to the parties, the parties are to enter into the Respondent's internal mediation in an attempt to seek agreement on the basis of the Claimants return to work. The Judgment is dated 12 September 2017 and was sent to the parties on 5 October 2017.

23. On the face of the Judgment there no express indication that the decision on liability or remedy has any bearing on the matter before us which relates to very narrow complaints which rely on equally narrow facts arising from events occurring after the previous claim.

24. The Claimant gave evidence as to what happened at the hearing and led to the Judgment but the Respondent was not in a position to deal with it. We formed the view that we were unable to take the Claimant's evidence as to the previous Employment Tribunal claim into account because we have no written reasons and cannot go behind the Judgment of that Tribunal.

25. Whilst the Claimant attempted to give evidence, mostly when he was making submissions, as to what happened after the Judgment was issued, the Respondent was not in a position to deal with it and there was little more than the Claimant's assertion as to those events. We also could not see their relevance to the narrow complaints before us.

26. It was accepted by the Respondent that the Claimant was a disabled person at the relevant times in respect of the following conditions: left leg condition; stress/depression.

27. The Claimant is a French speaker. He has been employed by the Respondent as a Postman (Royal Mail OPG) since 2005 and continues in the Respondent's employment. He is a member of the Communications Workers' Union (CWU) which is a trade union recognised by the Respondent for negotiating purposes.

28. We were referred to his written statement of terms and conditions of employment dated 11 April 2005 at B 45-52 and to the Grievance Policy and Grievance Guide for employees at B 53-61, the Sick Pay and Sick Pay Conditions Policy (in three dated editions) at B 62-67, 67.1-67.6 and 106-111.

29. It is fair to say that there was a Sick Pay and Sick Pay Conditions Policy in force at the material times which had been arrived at by a process of collective bargaining between the Respondent and the CWU.

30. At B107 the policy dated 29 March 2012 sets out the entitlement to full and part-time sick pay. In particular, this states:

- *After twelve months' service, full rate sick pay for the first six months (26 weeks) of any spell of absence, followed by half rate sick pay*

- *Full rate sick pay will not be paid in total for more than 6 months (26 weeks) during any calendar year. Further periods will be paid at half rate, but no sick pay (other than at pension rate where applicable) will be paid when the employee has been absent for a total of 12 months (with or without pay) in any period of four years.*

31. This is the same wording as set out in the 1 April 2018 version of the policy at B63

and the 1 March 2020 version at B67.2.

32. There is no discretion within any of the policies to make any exceptions to the extent of entitlement to sick pay for any reason.

33. The Claimant's statement of terms and conditions of employment makes reference to a Personnel Manual which is part of its People Management. Whilst we were not provided with a copy of the Personnel Manual, we had no reason to doubt that it existed and the Claimant, whilst stating that he had no prior knowledge of it, did not doubt this either. Indeed, Mr Orr, the Claimant's CWU representative, referred to it during the ensuing grievance brought by the Claimant.

34. The Claimant's evidence was that he was not aware of the limit on the payment of the sick pay contained within the sick pay policy and neither were the CWU representatives he spoke to at the time of the events in question. The Respondent's evidence was that these documents were arrived at through collective bargaining with the CWU.

35. We find on balance of probability that this was an incorporated policy over many years which had been arrived at through collective bargaining between the Respondent with the recognised trade union, CWU. Whilst the Claimant might not have been acquainted with these terms and perhaps neither were the CWU representatives he spoke to (which seems less probable), this did not lead us to the conclusion that the policy did not nevertheless exist with such limits on payment of sick pay and apply to the Respondent's employees including the Claimant.

36. Indeed, in oral evidence the Claimant accepted that the Respondent's employees could not be off sick from work without their being some limit on the amount of time for which they received sick pay (although he did not think this should have been applied to him).

37. The Claimant was absent from work due to ill-health from 17 to 20 December 2018. On his next pay date on 21 December 2018 he was not paid his normal weekly wage of £503 but instead was paid sick pay of £36. This was without any prior notification. He was subsequently advised by the Respondent that he was not entitled to payment under the Sick Pay and Sick Pay Conditions Policy agreed between the Respondent and the CWU which states that any absence of 12 months or more in any four-year period would mean that an employee would not be entitled to any further sick pay.

38. The Claimant attended a return to work discussion with Mr Holbrook, , who at the time was the Delivery Office Manager at Stockwell Delivery Office. The record of that meeting is at B6 9.1-69.2.

39. On 17 January 2019, the Claimant raised a grievance regarding this underpayment of wages. This is at B70-72A and is addressed to Mr Holbrook as the first port of call within the Respondent's grievance procedure (at B54). This letter expresses concern that he was not given any prior warning that his pay would be withheld or offered an opportunity to explain his absence and queried when this policy, which he described as a "new sickness policy… changed the practice to date." The grievance also asked whether the period of sickness was discounted as required by the Tribunal in his earlier claim or whether that claim was now being held against him regardless of the ruling. The letter requested a written response within the next 10 days.

40. By a letter to the Claimant dated 25 January 2019 at B72.1-72.3, Mr Holbrook responded to the points raised in the Claimant's grievance letter. In particular, Mr Holbrook advised the Claimant that the sickness policy came into effect on 27 May

2013, that he was logged off sick for three days and in accordance with that policy was not paid for those three days, that the decision not to pay his wages was not made by anyone personally but was dealt with through the payroll which is an automated system and that there was nothing on the file to reflect the terms of the previous Employment Tribunal claim as the Claimant had suggested.

41. We were also referred to Mr Holbrook's internal notes of his enquiry and advice received at B 72.3 which he stated in evidence provided him with no evidence that the previous Tribunal's decision stated that the Claimant's sickness absence record should be amended or that the sick pay policy should not be applied to him.

42. Mr Holbrook is currently employed as the Delivery Office Manager based at Brentford Delivery Office. He was previously employed at the Stockwell District Office from July 2018 to July 2020. His first month at Stockwell was spent in training. He was responsible for 44 employees and it was not part of his responsibility to oversee their attendance records.

43. Mr Holbrook only worked with the Claimant upon commencing employment at Stockwell. He explained in evidence that he only knew of the 2017 Employment Tribunal Judgment because the local CWU representative told him about it. However, he did not know any of the details.

44. Mr Holbrook gave evidence that the Claimant was absent on sick leave for a period of 475 days resulting from stress, that absence commencing on 17 April 2016 and ending on 4 August 2017. We were referred to the Claimant's absence records at B 83-84.2. His further evidence was that as this absence lasted for over 12 months, the Claimant would not be entitled to receive company sick pay for any absence occurring in the following three years, i.e. until 3 August 2020. He further stated that this cut off is automatically applied to the payroll system (PSP) and there is no way for managers to override it. As a result, when the Claimant reported sick between 17 and 19 December 2018 (three days) with stress, PSP would automatically have recorded that he was not entitled to company sick pay for this absence. In addition, when the Claimant reported sick between 11 and 16 May 2019 (six days) with lower back pain, PSP would again automatically have recorded that he was not entitled to company sick pay for this absence. The Respondent's position put through Mr Holbrook in evidence is that because company sick pay is calculated automatically by PSP, it was not a discriminatory act and not something that was done purposefully with intent.

45. We were referred to a number of sick pay and non-payment of contractual sick pay letters (at the first page of C1 and at C2). Mr Holbrook said in evidence that such letters are computer generated and whilst they have to be signed by the line manager, as District Officer he had no direct involvement in this process beyond signing the letters. He would only be involved in any sickness review process if the triggers points were brought to his attention.

46. We had no reason to disbelieve Mr Holbrook's evidence and found him to be a credible witness.

47. We further accepted that Mr Holbrook had no personal involvement in the sick pay policy and its application to the Claimant until the Claimant drew to his attention that he had not been paid in December 2018 at his return to work interview. Whilst the Claimant did not receive his "first day letter", as it was referred to, we do not find anything untoward in this. Whilst the Claimant thought it of some significance that Mr Holbrook would have signed the first day letter, but at his return to work meeting said he did not know why the Claimant had not been paid for his sickness absence, would speak to HR and then took sometime over the Christmas and New Year period to report back to the Claimant, again we do not find anything untoward in this. We

accepted Mr Holbrook's explanation.

48. Mr Holbrook gave evidence that there were no exceptions to the sick pay entitlement for any reason, this allowing the Respondent to apply the policy fairly and consistently between all employees as per the agreement with CWU. His further evidence was that the sick pay policy is designed to support employees whilst out of work as part of the Respondent's wider management of ill health/attendance/sickness absence and that the rules of entitlement provide a structure around how the Respondent can support those employees back to work, which is the ultimate aim if any employee goes off sick. He also gave evidence as to the Respondent being subject to a Universal Service Obligation (USO), which sets statutory national minimum standards of customer service and delivery/collection specifications that must be adhered to and against which the Respondent is independently audited and held to account for any failings. His further evidence was that when employees were absent on sick leave, whether short or long term, this had an impact on the Respondent's ability to deliver mail on time.

49. In May 2019 the Claimant was unable to work due to low back pain. The Claimant's oral evidence was that he went to his doctor who recommended he was only fit for indoor duties until some insoles had been made for his shoes and tried out. However, during that time, his condition got worse and so he went back to his GP after the first four days and was given a further certificate stating that was unfit to work.

50. We were referred to a medical certificate at B91 which indicates that the Claimant was only fit for amended duties and states: "Please can he be on indoor duties until his insoles have been made and tried out". The period of incapacity on amended duties was between 10 and 18 May 2019 and the reason for the incapacity was "low back pain".

51. We were also referred to a further medical certificate for the overlapping period of 14 to 20 May 2019 which indicated that the Claimant was not fit to work due to "lower back pain and new gastrointestinal condition making it hard to walk".

52. The Claimant was only absent from work due to his back pain from 11 to 16 May 2019, this being the second period for which he was not paid any sick pay. The Respondent does not accept that this was a disability related absence. The Claimant's evidence was in effect that it was caused or exacerbated by stress and so it was related to his disability. However, there was no evidence beyond his assertion that this was the case. Moreover, there was a letter from his GP surgery dated 24 September 2019 (at B100) which pointed to this being work-related.

53. In oral evidence the Claimant stated that he had already booked annual leave of three weeks in May/June 2019 and that he had to use two weeks of that to recover from this ill-health because he knew that if he took it as sick leave he would not be paid by the Respondent.

54. This was for the period of 20 May to 9 June 2019 for which there is no medical certificate, the Claimant's explanation being that if there was, he would not have got paid. He further stated that the only medical evidence as to his ill-health at that time is that at B91-92 although he hastened to add that what he had said was true.

55. Mr Holbrook said in evidence that he does not recall having any specific conversation with the Claimant about this, although his annual leave was approved and so there must have be enough staff working in those weeks to accommodate his request.

56. The Claimant was not satisfied with Mr Holbrook's response to his grievance and

progressed his grievance to stage 2 of the procedure (at B55). The Claimant's Stage 2 Grievance Form is at B74-75 and is dated 4 February 2019. We refer to the notes of discussion of the grievance meeting with Mr Peters, the DRM at Battersea District Office, at B75.1-75.3. We were also referred to Mr Peters' deliberations and conclusions dated 10 April 2019 at B76-77.

57. Mr Peters' rejected the Claimant's grievance. In essence, he found that there was no recommendation in the previous Employment Tribunal's Judgment to amend his sick pay record or his right to company sick pay, there was no leeway within the policy to make exceptions to the rules and so his sick absence record would not be amended accordingly.

58. The Claimant was dissatisfied with Mr Peters' decision and appealed to Stage 3 of the grievance procedure (at B56). This was dealt with by Mr Cuomo, Operations Manager.

59. The Claimant met with Mr Cuomo on 14 June 2019 and we were referred to notes of the meeting at B78-79. We were also referred to Mr Cuomo's decision report dated 22 January 2020 at B81-82 in which he found that the non-payment of sick pay had not been intentional and was simply a process/administrative error as opposed to any line manager behaviour. He further determined that any further sickness absences incurred in relation to the Claimant's disability or otherwise will be managed in accordance with the Respondent's Attendance Policy, but as a matter of goodwill, the Respondent had compensated him for the period of sick absence that he had in December 2018.

60. The Claimant received a payment of £728.30 gross in respect of the three days of absence in December 2018 as well as the six days of absence in May 2019. We were referred to the Claimant's pay slip at B85 issued on 20 September 2019. However, the Claimant received a further payment of the same amount in his pay slip dated 27 December 2019 at B86.

61. Mr Holbrook's evidence was that he understood that the Claimant's sick pay record has also been amended on PSP so that the 475-day absence between April 2016 and August 2017 (of disability related absences) is no longer recorded as sickness absence. He referred us to an amended absence record reflecting this at B84.1-84.2. As a result, any further sickness absences incurred by the Claimant should not trigger a nil payment on PSP and he will be managed going forward in accordance with the sick pay policy notwithstanding that particular absence or his previous Tribunal claim.

62. In his witness statement Mr Holbrook apologised to the Claimant for the fact that he did not receive company sick pay for the December 2018 and May 2019 sickness absences at the time but assured him that this should not happen again.

63. Further Mr Holbrook stated that whilst the Claimant had been paid twice for those periods of sickness absence, he understood that the Respondent has not sought to recover the overpayment from him.

64. Part of the Claimant's case is that his grievance process was delayed. However, we find generally that there was nothing obviously untoward in any delay in dealing with the various stages of the grievance process, although we acknowledge how unsatisfactory the delay was for the Claimant.

65. Whilst it is not ideal that Mr Cuomo was not called to give evidence to the Tribunal, it did not hinder our ability to determine the matter before us. However, except where his witness statement was supported by contemporaneous documents, we attached no weight to its contents.

66. We accept that Mr Cuomo arranged for the Claimant to be paid an amount of money to reflect his absences in December 2018 and May 2019 and for whatever reason the Claimant was paid the same amount twice. We also accept that Mr Cuomo arranged for 475 days of disability-related sickness absence to be removed from the Claimant's sick record. We do not know why the 15 days of absence immediately prior to this was not included given that they were also disability-related.

67. We accept the explanation given in Mr Cuomo's decision report at B82.

68. However, we would make the following comments. Of course, if payment of sick pay is dealt with through an automated process then this does allow situations such as this to arise because no one is actually reviewing the absence reasons. We were surprised that we were not provided with a diversity or equal opportunities policy and that the Sick Pay and Sick Pay Conditions Policy did not make any mention of disability or as to any discretion whether or not to include disability-related sickness absences, although in effect Mr Cuomo has belatedly reviewed the decision, but only as a result of an individual employee raising a grievance and after a year. These might be matters that the Respondent needs to review.

Submissions

69. We heard submissions from both parties which we have fully taken into account. Miss Cairney provided us with copies of the following authorities: **O'Hanlon v Commissioners for HMRC** [2007] IRLR 404 CA, **Allonby v Accrington & Rossendale College and others** [2001] IRLR 364 CA, **Barry v Midland Bank** [1999] ICR 859 HL; **Jones v University of Manchester** [1993] IRLR 218 CA; and **Royal Bank of Scotland v Ashton** [2011] ICR 632 EAT.

The Law

70. Section 19 Equality Act 2010 – indirect discrimination

(1) A person (A) discriminates against another (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.

71. Sections 20 & 21 Equality Act 2010 - reasonable adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
(2) The duty comprises the following three requirements.
(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…

72. Section 15 Equality Act 2010 - discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

73. Section 27 Equality Act 2010 - victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

74. We also had regard to the Equality & Human Rights Commission's Employment Statutory Code of Practice.

Conclusions

Preface

75. The Claimant's case was very narrowly pleaded and related to the exhaustion of his entitlement to sick pay in respect of two periods of ill-health absence for which he was not paid, a period of annual leave which he said he had to take because he was no longer being paid for sickness absences and his resultant grievance, and victimisation because of his previous Employment Tribunal claim. This was how the case was set out in his claim form and how it was further identified at the Preliminary Hearing conducted by Employment Judge Ferguson and recorded in detail within the Case Management Summary at B 28-36.

76. Belatedly, the Claimant attempted to introduce further matters relating to his previous Employment Tribunal claim and to link the events which led to that claim and the events thereafter to this claim. The only previous mention of the earlier Tribunal claim was as background to the current claim within his claim form and as the protected act for his victimisation complaint. It was only on the morning of the first day of this hearing that it became apparent that the Claimant sought to amend his claim to include wider matters but, ultimately, he decided not to pursue his application. Whilst he made some reference to those events in his closing submissions, it was very difficult for the Tribunal to make any determination because they were not set out as part of his claim, were not raised in evidence and the Respondent was not in a position to deal with them in any event, having come prepared to answer a much narrower case. Whilst the Claimant made reference to what had happened and had been decided in the earlier Employment Tribunal claim, this went further than the Judgment which did not contain any written reasons.

Time limits

77. Given the date on which the Claimant presented his claim form to the Employment Tribunal and the dates of the Early Conciliation process, the earliest incident that he can rely upon as being in time would be on 24 October 2018 although it might be arguable that these matters were continuing discrimination. However, time limits were not raised by either party and in view of our following conclusions we did not dwell on this matter.

Standard and burden of proof

78. The standard of proof in the Employment Tribunal is what is known as the balance of probabilities, in other words what more probably happened than not.

79. The burden of proving unlawful discrimination is set out in section 136 of the Equality

Act 2010, which states:

…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision….

80. What this boils down to is the following: where the Claimant proves facts (known as primary facts) from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

81. We have followed the guidance given as to the burden of proof by the Court of Appeal in **Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webste**r [2005] IRLR 258.

82. As we set out below, the primary facts do not shift the burden of proof to the Respondent to explain how their actions did not amount to unlawful discrimination.

Disability

83. The Claimant is a disabled person for the purposes of the Equality Act 2010 by reason of a weak left leg condition and stress/depression.

Indirect Disability Discrimination

84. Indirect discrimination is defined in section 19 of the Equality Act 2010. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

85. The Respondent accepted that the limits on payment of sick pay for a maximum of 12 months in any 4-year period under its sick pay policy amounts to a PCP, ie a policy.

86. The Respondent also accepted that it applied to all employees whether disabled or not.

87. However, the Claimant did not put forward any evidence that disabled persons are or would be put at/to the particular disadvantage (ie those with a weak left leg condition and stress/depression) are more likely to exhaust their rights to sick pay when compared with those not sharing that disability. This is not something which we can find to be self-evident.

88. As a result, this complaint cannot succeed.

Reasonable adjustments

89. Under sections 20 and 21 of the Equality Act 2010, there is a duty upon employers to make reasonable adjustments in relation to a disabled person. Failure to do so constitutes unlawful discrimination. Where an employer applies a provision, criterion or practice ("PCP") which puts a disabled person at a substantial disadvantage compared with people who are not disabled, the employer must take such steps as

are reasonable to avoid the disadvantage. The purpose of the adjustment is to address the disadvantage.

90. The adjustment has to be reasonable. In considering whether an employer has met its duty to make reasonable adjustments, the tribunal must apply an objective test. Although we should look closely at the employer's explanation, we must reach our own decision on what steps were reasonable and what was objectively justified. Relevant factors can include the extent to which the adjustment would prevent the disadvantage, the practicality of the employer making the adjustment, the employer's financial and other resources, and the cost and disruption entailed.

91. There is no duty to make reasonable adjustments if the employer does not know and cannot reasonably be expected to know that the worker has a disability and does not know or cannot reasonably be expected to know that the worker is likely to be placed at a substantial disadvantage as a result.

92. The Respondent accepted the PCP, ie limiting payment of sick pay for a maximum of 12 months in any 4-year period under its sick pay policy.

93. The Respondent accepted that the operation of the PCP put the Claimant at a substantial disadvantage in relation to persons who are not disabled.

94. The Respondent accepted that it knew that the Claimant was put to such a disadvantage.

95. But the Respondent denied that it did not take such steps as were reasonable to alleviate that disadvantage. The only relevant adjustment advanced and that we could identify would be disapplying the limit of sick pay entitlement within the policy.

96. We were referred by the Claimant to the ECHR's Employment Statutory Code of Practice at Chapter 6 in relation to the duty to make reasonable adjustments (at page 86 onwards). The Claimant submitted that this contained examples of adjustments which the Respondent should have applied so as to allow for his disability. In particular he stated that the Respondent should have transferred part of his duties to another employee or transferred him into another position or allowed him to be absent from work because of his disability.

97. We considered this and the examples which start at page 89 onwards, but did not find these examples to be relevant or appropriate to the case before us and in any event go beyond the complaint and the issues we are required to determine.

98. The Claimant accepted in evidence that the Respondent cannot pay sick pay to employees indefinitely and that there should be a limit on this. However, he did not put forward any evidence as to why this should not apply to him at all.

99. Miss Cairney referred us to the Court of Appeal case of **O'Hanlon v Commissioners for HMRC** as stating that it can very rarely be a reasonable adjustment to give higher sick pay to a disabled person except in exceptional cases. **O'Hanlon** deals with a claim under the legacy legislation to the Equality Act 2010, namely, the Disability Discrimination Act 1995. The Court of Appeal found that it will rarely be a reasonable adjustment to pay full sick pay which has otherwise run out in respect of disability-related absences, especially if the original sick pay was generous. They upheld the decision of the Employment Appeal Tribunal below and at paragraph 28 set out paragraphs are 67-69 of the EAT judgment which we set out below:

67. In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does

not suffer the same disability related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.

68. First, the implications of this argument are that Tribunals would have to usurp the management function of the employer, deciding whether employers were financially able to meet the costs of modifying their policies by making these enhanced payments. Of course we recognise that Tribunals will often have to have regard to financial factors and the financial standing of the employer, and indeed section 18B(1) requires that they should. But there is a very significant difference between doing that with regard to a single claim, turning on its own facts, where the cost is perforce relatively limited, and a claim which if successful will inevitably apply to many others and will have very significant financial as well as policy implications for the employer. On what basis can the Tribunal decide whether the claims of the disabled to receive more generous sick pay should override other demands on the business which are difficult to compare and which perforce the Tribunal will know precious little about? The Tribunals would be entering into a form of wage fixing for the disabled sick.

69. Second, as the Tribunal pointed out, the purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce. All the examples given in section 18B(3) are of this nature. True, they are stated to be examples of reasonable adjustments only and are not to be taken as exhaustive of what might be reasonable in any particular case, but none of them suggests that it will ever be necessary simply to put more money into the wage packet of the disabled. The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity which, as the Tribunal pointed out, may in fact sometimes and for some people tend to act as a positive disincentive to return to work.

100. Miss Cairney also referred us to the Employment Appeal Tribunal case of **Royal Bank of Scotland v Ashton**, again a reasonable adjustments case under the Disability Discrimination Act 1995, which states that it would have to be an exceptional case to disapply employer's sick pay policy. We considered in particular paragraph 59 of the judgment, which is set out below:

The case here, of course, is one in which under the RBS Sick Pay Provisions the employee would never run out of sick pay so that the balance between the periods when she would have been absent for reasons relating to her disability and those where she was absent for other reasons would be irrelevant in her case, though it was not in that of O'Hanlon. We would wish to fight shy of a general conclusion that where there is a sick pay scheme (and even one where there is a discretion to treat those who are disabled more generously than those who are not) there can never be a proper case where discrimination by failure to make a reasonable adjustment can be shown. However, it is self-evident that it must be an exceptional case with particular features which can be clearly drawn to the Tribunal's attention which would need to be clearly identified. We do not see any such particular feature here.

101. Other than oral evidence as to the Stockwell and Brentford District Officers (from the Claimant and Mr Holbrook) we heard no substantive evidence as to the repercussions of an adjustment to disapply the limit on payment of sick pay.

102. We considered the above authorities that we were referred to and took into account the circumstances of the case before us and came to the conclusion that this was not an exceptional case in which such an adjustment would be reasonable.

103. We also note that ultimately the Respondent did pay the Claimant in respect of the periods of absence in December 2018 and May 2019 and removed 475 days of disability-related absence from the Claimant's sick record. As we have said, we do not understand why the Respondent did not remove the 15 days of absence immediately prior to that, and more so given the Respondent's admission below in respect of discrimination arising from disability, and would urge the Respondent to reconsider and to do so.

Discrimination arising from disability

104. A person (A) discriminates against a disabled person (B) if–(a) A treats B unfavourably because of something arising in consequence of B's disability; and (b)

A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

105. The Respondent accepts that the sickness absences between April 2016 to August 2017 and 17 to 19 December 2018 arose as a consequence of the Claimant's disability.

106. However, the Respondent disputes that the period of absence between 11 and 16 May 2019 related to the Claimant's disability because it was for back pain. The Claimant evidence was that it was caused or exacerbated by stress but put no evidence forward in relation to this. We have to say that the letter from his GP at B100 links it to his job.

107. The Respondent accepts that non-payment of sick pay amounts to less favourable treatment but submits that the Claimant was not paid because of the limit in the sick pay policy not because of the absences themselves. We accept this submission.

108. The Claimant also relies on his grievance not being upheld and having to take two weeks' annual leave in May 2019. The Respondent submits that his grievance was not upheld was because of the exhaustion of his sick pay and not because of the absences themselves. We accept this submission. As to the two weeks' leave, the Claimant was not covered by a medical certificate, the annual leave had been pre-booked and so this cannot amount to less favourable treatment because of his sickness absence.

109. As a result, this complaint therefore fails.

Victimisation

110. It is unlawful to victimise a worker because he has done a "protected act". In other words, a worker must not be punished because he has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010.

111. The Respondent accepts that there was a protected act, namely the bringing of the previous Employment Tribunal claim.

112. The detriments that the Claimant relies upon as victimisation following the protected act are set out at paragraph 4.1 of the List of Issues.

113. The Respondent accepts that the Claimant was not initially paid sick pay on those dates in December 2018 and May 2019 and that his grievance was not upheld initially and that he did use two weeks of his leave in May 2019. But the Respondent submits that the reason for not being sick pay was that the Claimant had exhausted his entitlement not because of his Employment Tribunal claim and had he not exhausted his entitlement he would have been paid for those absences.

114. Similarly, the Claimant's grievance was not upheld because he had exhausted his sick pay entitlement and not because of the Employment Tribunal claim. The Respondent said that of course it cannot make submissions as for the reasons that the Claimant took the annual leave in May 2019 but it relies on the lack of medical evidence and the holiday having been pre-booked.

115. With regard to the detriment of not informing the Claimant that he was not entitled to company sick pay because he had exhausted his entitlement there was nothing to suggest that this was as a result of brining the previous Employment Tribunal claim.

116. Having considered the above, we conclude that there is no causal link between the protected act and the detriments relied upon and as a result the complaint of victimisation fails.

Employment Judge Tsamados
9 November 2020