



## EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**v**

**Mr J Browne**

**Southwark Travellers Action  
Group Ltd**

**Heard at: London South Employment Tribunal via CVP**

**On: 26-29 April 2021**

**Before: EJ Webster  
Ms V Blake  
Mr J Havard**

### **Appearances**

**For the Claimant:**

**In person**

**For the Respondent:**

**Ms S Causer (Lay rep)**

## **JUDGMENT**

1. The Claimant's claim for wrongful dismissal is well founded. The claimant is awarded £2,261 as compensation for 1 months' net salary.
2. The claimant's claim for unauthorised deductions from wages is upheld in respect of the three ½ days of sick pay and the claimant is awarded £201.57 (gross) and £156.53 net. As this is wages the payment must be paid subject to all normal tax deductions.
3. The claimant's claim for unauthorised deductions from wages in respect of holiday pay and 3% pension contributions is not upheld.
4. The claimant's claim for direct disability discrimination is not well founded and is dismissed.

5. The Claimant's claim for discrimination arising out of disability is not well founded and is dismissed.
6. The Claimant's claim for failure to make reasonable adjustments is not well founded and is dismissed.

## WRITTEN REASONS

### The Hearing

7. The hearing took place by way of CVP due to the global pandemic. Neither of the parties objected to this format which was necessary given the lack of in person hearings and it was in the interests of justice for the matter to be heard this way.
8. The claimant had made two applications for further respondents to be added to the case by way of applications in January 2020 and March 2020. The Tribunal dealt with the applications in the first morning and rejected the claimant's application. Oral reasons were given at the time and will not be repeated here. One of the proposed respondents made an application for costs against the claimant but then withdrew the application on hearing the means of the claimant.
9. We were provided initially with two bundles, referred to as the main bundle (MB) and a supplementary bundle (SB). The claimant made an application for a further third bundle to be accepted (numbering 26 pages) on the second day. This was not objected to by the respondent and we accepted that the documents were relevant. We have called this the claimant's additional bundle (AB).
10. We were provided with 5 witness statements:
  - (i) 1 from the claimant,
  - (ii) 2 from Ms Causer (the claimant's line manager and Chair of Trustees) for the respondent,
  - (iii) 1 from Mr Redding (a Trustee) for the respondent and
  - (iv) 1 from Ms Green (the dismissing officer and a Trustee) for the respondent.
- All 4 witnesses also gave oral evidence and were cross examined.
11. It is of note that this was a very badly prepared case by both parties. Whilst non legal representatives are always given a wide latitude by this tribunal, we note that respondent's representative is also the director of a law centre (though we accept not a lawyer) and the claimant is a qualified solicitor. Despite this the bundles were so badly prepared that they were a hindrance as opposed to a help and we the tribunal had to spend a large amount of time deducing what

documents were being referred to by the parties throughout the hearing. From the explanations provided by both parties for this state of affairs both blamed the other and we conclude that both were equally responsible for the poor preparation. Neither were able to provide a satisfactory reason for this. The disclosure exercise that led to the poor bundles was clearly substandard by both parties and that has also not been adequately explained. We do not wish to go into further detail on this point save to say that based on what we heard we hold both parties equally responsible for failing to comply with the Tribunal's preparation orders.

12. Oral reasons were given for the above decision at the hearing on 29 April 2021. The Judgment was sent to the parties on 20 May 2021. The claimant applied for written reasons on 3 June 2021.

### **The issues**

#### **13. Disability**

- 13.1 The respondent accepts that the claimant was, at the material time, a disabled person by reason of the fact that he is HIV+.

13.2 Was the claimant, additionally a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following conditions:

- a. Dilated myocardiopathy; and/or
- b. Sleep apnoea.

#### **14. EQA, section 13: direct discrimination because of disability**

- 14.1 It is not in dispute that the respondent subjected the claimant to the following treatment:
- a) dismissal

14.2 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on a hypothetical comparator.

- 14.3 If so, was this because of the claimant's disability?

#### **15. EQA, section 15: discrimination arising from disability**

15.1 Did the following thing(s) arise in consequence of the claimant's disability:

- a) (If they are found to have been genuine) the performance concerns identified by the respondent in its ET3.

15.2 Did the respondent treat the claimant unfavourably as follows:

a) Dismissing him?

15.3 Did the respondent treat the claimant dismiss the claimant because of performance concerns which arose in consequence of his disability?

15.4 If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim?

15.5 Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

16 Reasonable adjustments: EQA, sections 20 & 21

16.2 Did the respondent not know and could it reasonably have been expected to know that the claimant was a disabled person?

16.3 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

- a) Expecting employees to spend core hours in the office; and/or
- b) Expecting a manager to participate in networking activities?

16.4 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

16.5 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

16.6 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage?

16.7 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

17 Unpaid annual leave – Working Time Regulations

17.2 When the claimant's employment came to an end, was he paid all of the compensation he was entitled to under regulation 14 of the Working Time Regulations 1998?

18 Unauthorised deductions

18.1 Did the respondent make unauthorised deductions from the claimant's wages in accordance with ERA section 13 by:

- a) deducting pension contributions from his final salary payment;
- b) not paying him for his period of sickness absence at his full contractual rate of salary; and/or
- c) paying his accrued but untaken holiday pay after deducting tax;

18.2 If the answer is yes to any of the above, how much was deducted?

## 19 Breach of contract

19.1 To how much notice was the claimant entitled?

19.2 Did the claimant fundamentally breach the contract of employment?

## 20 Remedy

20.1 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

## **Facts**

21 We have only made findings of fact that are relevant to our conclusions.

## Background

22 The claimant was employed by the respondent as a manager from 1 October 2018 until his dismissal on 6 August 2019. The respondent is a small charity that provides support to the Traveller Community in Southwark, London. The claimant was in effect employed to run the organisation and manage its 2 other staff. He reported directly to the Chair of Trustees, Ms Causer.

23 In around May of 2019 the respondent began to notice what they asserted were issues with the claimant's performance and ultimately this led to the claimant's dismissal for what the respondent has stated was gross misconduct. This claim arises out of that dismissal and the process leading up to it.

## Claimant's Health

24 It has been accepted by the respondent that the claimant has the following conditions:

- (i) HIV+
- (ii) Dilated cardiomyopathy
- (iii) Sleep apnoea

25 The respondent conceded that the claimant had all the above conditions and that they amounted to disabilities for the purposes of the Equality Act 2010. HIV+ status is a deemed disability for the purposes of the Equality Act 2010. The claimant provided us with evidence that the second two conditions affect (and affected at the relevant time) his day to day activities. He stated, and we accept, that the sleep apnoea affected his energy levels and oxygen levels particularly whilst he was asleep. So much so that he had to have oxygen via a machine at night.

26 We accept that the dilated cardiomyopathy (a heart condition) affected his mobility at the relevant time, to the extent that climbing stairs was a challenge. The

claimant's impact statement (pg 92-94) was largely unchallenged by the respondent and the medical evidence from doctors in the bundle (pgs 76-86) clearly confirmed all three diagnoses.

- 27 However, the respondent disputed that they knew about the claimant's health conditions. Taking each in turn. The claimant stated that his junior colleagues were aware of his HIV status. No evidence has been provided to us of this nor that they in turn informed the trustees. We think it more likely than not that even if the junior staff members did know, they would be unlikely to share such personal information with others unless expressly asked to do so. We find that those staff members did not inform the trustees of his HIV status.
- 28 The claimant states that he directly informed Ms Causer on a day just before Christmas in December 2018 when he attended her offices to get some accounts signed off. Ms Causer disputes this. On balance, we don't accept that this conversation took place in the way that Mr Browne suggests. We do not accept that these were circumstances that would have induced Mr Browne to make such a disclosure nor that the reasons he gave for doing so at that time were plausible. Mr Browne has never referred to this conversation in earlier pleadings or documents about the case. He has also made assertions about the clarity of his communications about other health conditions (see below) which we do not accept are as clear and unequivocal as the claimant asserts and overall consider that Mr Browne was not forthcoming with the respondent about his health at this time. Further, we have been given no reason (save for these proceedings) as to why Ms Causer would lie about knowing about such a condition given that later in the chronology the claimant's health is discussed at the meeting of 22 July and no reference is made by anyone about them being aware of any health issues whatsoever. (pg 26 AB). Given that his health was discussed in some detail we consider that had they known about any of the above conditions, they would have been mentioned at this meeting. We therefore find that the respondent was unaware of the claimant's HIV status.
- 29 The claimant stated that he informed those who interviewed him (Ms Causer and Ms Green) about his heart condition when he applied for the role. He stated that he explained this to them because he arrived at the interview bathed in sweat and felt that he needed to explain it. We do not accept that this occurred in the way that the claimant asserts. Both Ms Green and Ms Causer gave unchallenged evidence that he had not said this and we accept their evidence for the same reasons we give regarding their knowledge of his HIV diagnosis.
- 30 We accept that the claimant informed Mr Redding and possibly others about him attending hospital appointments and perhaps even that he had regular stomach upsets, but we do not accept that this was sufficient to amount to knowledge by the respondents that the claimant had any or all of the conditions he now relies upon. The messages we were shown were vague and did not divulge any specific condition. One refers to an overnight stay in hospital for observations but with no

further detail. The claimant did not provide us with any evidence that he had, at this time, raised any issues about being able (or not) to do his job, attend the office or meetings, or by stating that he required any adjustments whatsoever. We therefore consider that in that context, the respondent's knowledge that he needed to go to a hospital appointment would not bestow upon them knowledge, actual or inferred, that would suggest the claimant may have a health condition that affected his ability to carry out day to day activities or in fact that he was particularly unwell with any condition. He had relative autonomy regarding how he organised his work and what time he attended the offices and he therefore had no need to raise his conditions as, on his case, he did not require any adjustments or assistance in order to perform his role.

- 31 We consider, in the circumstances, particularly those where the respondent starts to be concerned about the mental health of the claimant in early June 2019, that if the respondent had been aware of any of these 3 conditions, a different approach would have been adopted or, at the very least, the trustees would have discussed the claimant's health issues with each other when the issue of the alleged office break in occurred at the beginning of June.

#### Events between April and June 2019

- 32 The claimant was primarily responsible for the organisation of the respondent's AGM. The trustees giving evidence all said that it was poorly organised and badly attended. The claimant states that it was not and that any disorganisation was the fault of Ms Causer and not him. Ms Causer states that she then had a complaint from one of their key funders that he had not been properly invited to the AGM. The claimant disputes this.
- 33 Ms Causer invited the claimant to a meeting on 14 May 2019 to discuss his performance overall. This was prompted by the allegedly poor AGM and an email from a funder stating that they had not been properly invited to the AGM. We accept that it is more likely than not that the meeting became heated as the claimant felt strongly that the funder had been properly invited to the meeting. Ms Causer told the claimant at the meeting that she felt threatened by his behaviour (though not physically) and the claimant left the meeting.
- 34 We accept that this meeting took place as described by Ms Causer. She did not in evidence overstate that she felt physically threatened simply that the claimant was aggressive in the way that he expressed himself. We accept that he was. We base this conclusion on the subsequent written communications we have seen from the claimant which he has stated to us were not aggressive either but which objectively, we find, were aggressive in their tone. Whilst these emails relate to different matters, and are sent later, the claimant stated during the hearing that they were not aggressive emails and we find that they were. This reflects badly on the claimant's assessment of what constitutes aggressive communication generally.

One example is an excerpt from an email from the claimant to the trustees dated 2 July 2019 (pg 200 MB):

*For the reasons that you as a Board have already decided and stated publicly the outcome of whatever process was employed and used by you to consider whatever issue or matter was placed before you in respect of my ability or suitability, and to do so without even offering me the opportunity to put before you my submissions on the matter either orally or written shows in the sharpest clarity, that a fair, unbiased and objective hearing of the facts did not take place and for you to expect me to believe that you as a board are capable and willing of conducting a disciplinary hearing in such an unbiased and fair and objective manner going forward, would be akin to asking me to believe that as someone was tearing the heart from my chest they were really conducting an observational study of my heart for the purpose of keeping me alive sometime in the future. Such a scenario may indeed keep someone else alive in the future but it will most certainly not be me as the final beats of my heart cease in the grip of the hand that has ripped it from my chest!"*

*I consider your letter with the contempt with which it was written and suggest that if you as a board are serious in bringing this matter to a mutually agreeable conclusion then you should provide me the courtesy of entering into a negotiated process that allows for the views and interests of both parties to be considered and taken account of in any mutually agreed final proposal and settlement. If such a process is beyond your contemplation then please let me know and I will consider your position in deciding what actions are open to me going forward. However, for the avoidance of doubt it is clear that having read and considered the content of your letter there now exists a complete breakdown of trust. This fact cannot be underestimated or set apart from the decision making going forward."*

Another example is from an email dated 4 September 2019:

*"Dear Trustees*

*This is all really getting rather embarrassing, is it really possible that between so many of you there can be so little intelligence?*

*Catherine, your feeble efforts at providing me with information in regards to the NEST Pensions Scheme is laughable. I do not need lessons on how the stakeholder pension scheme works. I have helped to correctly prepare and put the scheme in place in 3 different organisations in which I am involved either as a company director and Charity Trustee. I continue to monitor it's operation in those organisations to ensure that the employer continues to meet its duties and responsibilities and remain compliant. So the time you are spending trying to educate me you would be well advised to try and get some help to educate yourself! I am sure that your local library will have all the information you require to identify the relevant courses that may provide you with the basic level of skills*



*required to fulfill the tasks that you are required to in your various roles. I have wasted enough time trying to help you. The Pensions Regulator will be taking the matter up with STAG and I will now leave this matter in their hands.” [pg252] MB*

- 35 We also accept that this meeting took place as described by her because the relationship between Ms Causer and the claimant subsequently deteriorated to such an extent that Mr Redding took over communications with the claimant for a period. We do not believe that Ms Causer would have asked for this to happen had the meeting not become very difficult for her.
- 36 Shortly after this meeting, by email dated 7 June 2019, the claimant asserted that there had been a break-in at the respondent’s offices and that he had been called by an unknown person from the landline within the office. He asked in an email whether any of the trustees were responsible for this. (pg197-198 MB)
- 37 Mr Redding called the claimant and spoke to him. It is not clear if this is before or after the claimant sent the email. Mr Redding asserts that the claimant was making quite erratic statements and refusing to divulge important information to him about the incident preferring instead to call the police about it. It subsequently turned out that the call the claimant had alleged came from the respondent’s offices, had been from a friend of the claimant and did not originate in the office. We think it was reasonable for all the trustees to find the claimant’s behaviour regarding this alleged incident and the suggestion that they had been responsible for the call, bizarre at best and certainly concerning. This is particularly the case in light of the tone of emails that the claimant was also sending at the time. Another email also sent on 7 June 2019 reads;

*“The offer of moving the date for the panel Hearing cannot be seen as an effort to facilitate me. I asked for the hearing to be held within office hours on the 18 June 2019 and have proceeded to seek a representative to accompany me on that date. To have to now abandon the efforts already pursued for this date to try and facilitate a change of date to suit a trustee can in no way be seen or accepted as an effort to facilitate me or my representative!” [pg 70 SB]*

- 38 For this reason Mr Redding suggested, and the claimant accepted, that he go on two weeks paid leave. That leave did not commence until the following week (14 June) as the claimant continued working on a few matters before he left. The claimant did not return to work again after this. He remained on paid leave until 22 July at which point he then went onto sick leave. He was signed off with stress. The claimant states that he contacted the respondent on 29 July to say that he was ready to return to work. We have no evidence of this nor of any response from the respondent. This period of time is only referred to later in correspondence in August between the claimant and Ms Green around his final payslip. We conclude, on balance, given that the respondent has not sought to challenge that assertion either in their emails about the issue in August or during this hearing,

that the claimant did convey to the respondent that he was ready to return to work on 29 July 2019.

- 39 There is then a significant gap in the correspondence here that has not been disclosed by either party. No explanation has been provided for this. This means that gleaning the exact dates from which the claimant was fit and able to return has been difficult. We however note that the claimant is only claiming for three ½ days of pay which would suggest that he did not in fact expect to have returned to work on 29 July. The respondent did not respond – or at least we were provided with no evidence of them responding or requesting him to obtain updated medical evidence regarding his absence. They have not shown that they disputed that he was fit and able to return to work. However in the final pay made to the claimant they deducted £201.57 which represented three ½ days of pay from his salary because they said that as his sickness absence certificate had not expired at that date he must have still been off sick.
- 40 Whilst the claimant was on leave the trustees divided up the responsibilities of running the respondent organisation. Ms Causer then commenced her investigation into the claimant's performance. We were provided with various versions of the report. Ms Causer could not explain the existence of the various versions, nor which one was relied upon by Ms Green during the dismissal. We were not provided with a complete set of the attachments that were attached to the investigation report. No good explanation was given for the failure to provide these documents to the tribunal. We accept however that the claimant was sent all the attachments as this is evidenced in the email that was in the bundle pg 5 AB. Despite this neither party provided copies of those attachments in any of the 3 bundles.
- 41 Whichever version of the report was sent to (and relied upon by) Ms Green, it concluded that the claimant's behaviour warranted disciplinary action for misconduct. We address this further below.

#### Disciplinary Procedure - Process

- 42 The claimant has asserted that the respondent breached his contract by failing to properly follow their contractual disciplinary policy. This is not part of the case that the claimant has pleaded however, it feeds into the conclusions we reach regarding the respondent's decision to dismiss for gross misconduct so we have made factual findings where necessary.
- 43 We accept that the respondent's disciplinary policy was a contractual document. We base this on the extract from the claimant's contract which states:

#### *"19.DISCIPLINARY PROCEDURES*

*It is STAG's policy that fair and effective arrangements exist for dealing with disciplinary matters and that all employees are made aware of these*

*arrangements. Details of the STAG contractual capability and disciplinary rules and procedures (including details of the person to whom you should refer to if you are dissatisfied with any decision taken to dismiss you) are included in the staff handbook.”*

44 The letter inviting him to the disciplinary meeting (29 May 2019, p156MB) did not mention gross misconduct nor state that a possible outcome of the meeting was dismissal. It gives a list of various issues:

- . *Unsatisfactory performance in STAG Manager Role*
- . *Failure to follow reasonable requests*
- . *Lack of communication/networking locally*
- . *Failure to complete or request annual leave or other time off*
- . *Inappropriate behaviour*

It attaches the investigation report. That report also fails to make reference to gross misconduct or potential dismissal. The report raises issues of concern regarding poor performance and cites other issues which *“raise serious concerns about Joe’s professional behaviour” (154 MB)*

45. The letter dismissing him dated 6 August 2019 (page 169-170 MB) also did not mention gross misconduct as the reason for dismissal. It states:

*“The panel (Catherine Green (Chair), Rhiannon Hughes (note taker) and Princess Adeosun agreed, based on the evidence presented to them that you are incapable of fulfilling the role for which you were employed”*

46. The letter inviting the claimant to a disciplinary meeting does not set out whether the claimant’s behaviour is considered misconduct or an issue of poor performance. Although this is not a contractual requirement set out in the disciplinary process in the bundle, it is a requirement of the ACAS Code of practice regarding disciplinary processes. Further it is a basic tenet of natural justice is that the individual needs to know what the nature of the ‘charges’ against him are and the potential outcome of any such process.

47. We do not accept that the panel hearing the disciplinary matter was faulty or bias. Small organisations frequently include friendships amongst the staff and the Trustees were reasonable in concluding that an experienced trustee along with more junior trustees should consider the disciplinary case against the claimant. We do not consider that this was an unreasonable step despite Ms Green’s friendship with Ms Causer. This was a small organisation and the decision to have Ms Green was reasonable in all the circumstances and not in

breach of either the respondent's contractual disciplinary policy or the ACAS code of practice.

48. The disciplinary hearing was scheduled for 5 August. This was over 2 months from the initial invitation letter. The delay was due to various matters including the claimant's health and subsequently Trustee availability. However it was not until the morning of the hearing that the claimant raised a grievance alleging, amongst other things, that the panel was unfair and that Ms Green ought not to be the person chairing the disciplinary hearing because she was friends with Ms Causer.
49. The claimant asserted that the failure to have his grievance investigated separately and prior to his disciplinary hearing was contrary to the respondent's policy and a breach of contract. We disagree. The contractual policy is silent on this point. We note that the claimant had had ample time to raise the grievance about Ms Green's involvement prior to the day of the hearing. He did not take any such steps. The ACAS code recommends that where a grievance is about the disciplinary process itself as opposed to a separate issue, then any concerns about that process ought to be handled within that process. The claimant refused to do that as he refused to take part in the disciplinary meeting itself. When Ms Green refused to consider his grievance separately and prior to the disciplinary meeting the claimant refused to take part any further and left. The panel then considered the report put together by Ms Causer and made their decision in the claimant's absence.
50. When the claimant was sent the outcome of the disciplinary hearing which stated that he had been dismissed for gross misconduct, he was given the right to appeal against that decision.
51. The claimant states that he did appeal the decision by way of the email dated 8 August 2019 p233 MB. We disagree. In that email he stated his intention to appeal but very clearly states in that email that he will forward the basis for his appeal within the relevant deadline. He did not do that and he did not correspond further with the respondent regarding any internal process. We therefore consider that it was reasonable for the respondent to conclude that he had chosen not to appeal after all. The respondent's behaviour in this regard did not breach their own policy nor the ACAS code of conduct.

#### Disciplinary procedure - substance

52. The respondent asserted that the claimant had committed an act of gross misconduct but they based their allegations of misconduct on what they confirmed in oral evidence to us were issues around his competence and capability. The examples relied upon were:
- (i) Unsatisfactory completion of funding applications

- (ii) Failing to attend meetings that he had said he would attend
- (iii) Poor preparation for the AGM
- (iv) Failing to send formal invitations for the AGM
- (v) Failure to work on the website
- (vi) Failure to write up the Trustee meeting minutes
- (vii) Failure to visit the traveller sites/lack of engagement with the community
- (viii) Failure to complete or request annual leave or any other time off

53. It was accepted by Ms Green in evidence that all of the matters raised and relied upon were issues relating to the claimant's competence to do his job. She said what tipped the allegations into misconduct was his failure to do things once he had been expressly asked to do them. There was no suggestion however that the claimant had received any warnings regarding his performance prior to this investigation. We accept that issues were raised as part of the supervision meetings with Ms Causer in February and April 2018 but they were raised as things 'To Do' as opposed to performance-related concerns. Therefore, until the investigation report we believe it was reasonable for the claimant not to have understood that there were any significant concerns with the way that he was performing the role.

54. The claimant disputed that any of the concerns regarding his performance were legitimate. We consider that although some of the attachments to the disciplinary report by Ms Causer were missing for us – Ms Green did consider the situation carefully. The report as we saw it (even in its various versions) was a comprehensive report that provided clear evidence of significant performance problems that potentially serious repercussions for the respondent. The claimant chose not to take part in either the disciplinary or appeal process and therefore it was reasonable for Ms Green to rely on the report and the evidence therein when considering whether there were concerns regarding his ability to do his job. The claimant provided us with no evidence that either these performance concerns were unfounded or in some way entirely fabricated as he now asserts.

55. In evidence to the tribunal Ms Green confirmed that all the incidents relied upon were issues concerning the claimant's capability and that there was no 'malice' or 'intent' in the claimant's failure to do these things. However she had grave concerns about the impact that these failures could have on the organisation and in particular its financial viability if grants were not made. She said that she considered that the only way to be able to dismiss the claimant with immediate effect and with no further process, was to dismiss him for gross misconduct. However we find that the real reason for dismissal was the claimant's capability, not gross misconduct. Ms Green and Ms Causer both based their desire to dismiss the claimant on the fact that they felt he was unable to do the job properly. They only referred to it as misconduct because they thought that this was the only way to dismiss him with immediate effect not because it was the

real reason for his dismissal. His inability to fulfil the role is what is cited in the dismissal letter (see paragraph 45 above).

56. We therefore find that whilst the respondent had legitimate concerns regarding the claimant's ability to do the job, and that they have evidenced this to us with the investigation report and their oral evidence, they wrongly stated that the dismissal was for gross misconduct as opposed to poor performance. Their motivation for doing this was because they saw it as a means to dismiss the claimant immediately, not because it was the genuine reason for the claimant's dismissal. We therefore conclude that the claimant had not committed any act or acts of gross misconduct and this was not the reason for his dismissal.

#### Impact of the claimant's health on his dismissal

57. We have found that the respondent dismissed the claimant for the reasons they outlined in the dismissal letter (p169-170 MB) namely a catalogue of genuine and well-founded concerns regarding his performance and the position this placed the charity in. They have evidence some of those concerns in the bundle and we have accepted evidence in their witness statements that suggest that the claimant was not performing his role to the standard that they needed him to.

58. The claimant has provided no evidence whatsoever to link the dismissal to his health. We have concluded above that the respondent did not know about the claimant's conditions at this time. The perception of the claimant's health was limited to concerns regarding the episode in early June when he believed someone had broken into the offices and subsequently when he was signed off sick in July. There was no suggested link either before us, or at the time, between this episode and any of his health conditions. The claimant has maintained that the apparent break in was an episode of genuine concern to him and that he was not unwell or erratic during this period nor that this behaviour was linked to any of his conditions.

59. There was also no suggestion by the claimant that he had previously raised concerns about his health with the respondent or, more importantly, that it had, in any event, had any impact on his ability to do his job. During the tribunal hearing the claimant sought to defend his performance and stated that any concerns the respondent had regarding his performance were unfounded and could not have justified his dismissal. He did not say that any of his conditions affected his capability. He has provided no evidence to suggest that any of his conditions affected his ability to do his job save that he gave oral evidence regarding the impact that his medication regime could have on his ability to leave the house in the mornings. He stated that this may have meant that he sometimes missed meetings. Not attending meetings was one of the issues Ms Causer had concerns about – but it was not in the context of poor time keeping, it was in the context of unexplained absences and a difference of opinion between

Ms Causer and the claimant as to which external meetings were more important for the claimant to attend. However the claimant provided no evidence of him informing the respondent of this problem or explaining why attendance at some morning meetings may be challenging on occasion.

60. He has stated that there was a requirement for him to be in the office for core hours as per his contract. This is confirmed by the written contract in the bundle. We also accept evidence from Ms Causer that given his position of manager, the claimant was seen to be relatively autonomous and could largely decide how and when he worked his 35 hours per week provided he performed the role satisfactorily. Given that the claimant has provided no evidence of the respondent challenging his time keeping or arrival times in the office, we conclude that this was not something that either the claimant had raised as a problem with the respondent, nor that the respondent had raised concerns about or influenced their decision to dismiss.

#### The Claimant's contract and pay

46. The respondent was contractually entitled to make deductions from the claimant's pay where overpayments or other amounts were due from the claimant to the respondent.

##### *"DEDUCTIONS FROM WAGES*

*"Any payments due from you to STAG may be deducted from your salary and from any other money due to you from STAG."* (p107 MB)

47. This is further confirmed in the respondent's Handbook

##### *"Overpayments*

*If you are overpaid for any reason, the total amount of the overpayment will normally be deducted from your next payment but if this would cause hardship, arrangements may be made for the overpayment to be recovered over a longer period."* (p115 MB).

48. With regard to the claimant's sick pay; the contract entitles the claimant to 1 week at full pay and 1 week at half pay (p 108 MB). His sickness absence certificate covered him from 22 July to 5 August.

49. The claimant states that he contacted the respondent on 29 July to say that he was ready to return to work. We have no evidence of this nor of any response from the respondent. This period of time is only referred to later in correspondence in August between the claimant and Ms Green around his final payslip. We conclude, on balance, given that the respondent has not sought to challenge the claimant's assertion either in their emails about the issue in August or during this hearing, that the claimant did convey to the respondent that he was ready to return to work on 29 July 2019.

50. There is a significant gap in the correspondence here that has not been disclosed by either party. No explanation has been provided for this. This means that gleaning the exact dates from which the claimant was fit and able to return has been difficult. We note however that the claimant is only claiming for three ½ days of pay which would suggest that he did not in fact expect to have returned to work on 29 July. The respondent did not respond (or at least we were provided with no evidence of them responding) requesting updated medical evidence regarding his absence or disputing that he was fit and able to return to work. However in the final pay made to the claimant the respondent deducted £201.57 which represented three ½ days of pay from his salary because they said that as his sickness absence certificate had not expired at that date he must have still been off sick.

### Holiday Pay

51. The respondent paid the claimant the gross sum of £2,911.58 (£1996.39 net) which roughly equates to over 21.66 days' holiday pay. We largely agree with the respondent's calculations for holiday pay as set out in Ms Green's witness statement paragraph 24 which states as follows:

*"The claimant's annual leave pay was calculated as follows: He was employed by STAG from 1<sup>st</sup> October 2018 to 5<sup>th</sup> August 2019, equivalent to 10 months' service. His annual leave entitlement was calculated as 10/12 x 28 days = 23.33 days. The claimant would have been required to take three days leave during Christmas 2018. Therefore his annual leave entitlement for this period was 20.33 days which is approximately one month's salary."*

52. We find however that any such calculation ought to have been rounded up to 20.5 days as opposed to being 20.33 days. However it is clear the claimant has been paid in excess of 21 days' holiday pay.

### The Pension Scheme

53. The claimant's contract of employment states as follows:

*"24. PENSION AND PENSION SCHEME*

*We have by law to enter you into the company pension scheme after the first 3 months of service. STAG will make a contribution of 5% of your annual salary on your behalf. Further details are available from the Chair of STAG. (pg 109 MB)"*

54. The respondent has stated that they thought were legally obliged to make the payments to the pensions ombudsman in circumstances where they had failed to enrol the claimant in the pension fund. Ms Green's evidence was that the enrolment had not taken place until September 2019 due to difficulties in her gaining access to the fund and that prior to his dismissal, the claimant had failed



to fulfil his obligations and enrol himself in the pension fund. She therefore made all the payments into the fund retrospectively.

55. The claimant's evidence to us was that he thought he had been enrolled and thought that payments were being made on his behalf into the pension fund by the payroll provider (albeit he thought that all that was being paid was the 5% contributions made wholly by the employer). He had believed, until his dismissal, that he was already enrolled in the pension fund. He had not opted out nor objected at this point.

56. However, between his dismissal and his enrolment in the fund, the claimant made it clear in correspondence with Ms Green that he did not want to be part of the pension fund anymore and wanted the monies returning.

57. We were provided with a print-out of a conversation between the claimant and the Pension provider that stated that an employer could not enrol an employee once employment had been terminated. We were provided with no other statutory information or basis for that being the case.

## **The Law**

### 58. Unauthorised Deductions from Wages

#### *S 13 Employment Rights Act 1996*

#### *Right not to suffer unauthorised deductions.*

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

## 59. Disability

*S 6 Equality Act 2010*

### *Disability*

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability—

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

## 60. Direct Discrimination

### S13 Equality Act 2010

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

...

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

## 61. Discrimination arising from disability

### S 15 Equality Act 2010

(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.

## 62. Duty to make adjustments -s20 and s21 Equality Act 2010

### S 20 Equality Act 2010

(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.

(4) The second requirement is a requirement, where a physical feature 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.

(5)The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6)Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7)A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8)A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

....

#### S 21 Equality Act - Failure to comply with duty

(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

## **Conclusions**

### Unauthorised deductions

**63.**The respondent was contractually entitled to make deductions from the claimant's pay where overpayments or other amounts were due from the claimant to the respondent. This was clearly set out in the claimant's contract and handbook.

**64.**We found that the claimant had indicated that he was able to return to work from 19 July 2019. Despite this, the respondent refused to pay him for any time before his sick note expired.

65. We conclude that the claimant was entitled to be paid for the period between when he was ready to come back to work up to the end of his entitlement to 1 week at a rate of  $\frac{1}{2}$  pay . Although the fit note had not expired, we conclude that the claimant had indicated that he was fit and able to work. This was not challenged by the respondent at the time and they did not engage with him to ask him to provide them with updated medical evidence to prove that he was fit and able. An employee can return to work before the expiry of a fit note if they are fit and able to do so. Had the employer requested medical evidence that the claimant then failed to provide, then they may reasonably have been able to rely on that. However in circumstances where the claimant presented as fit and able to return to work and where the respondent did not challenge that state of affairs or engage with the claimant at the time about the situation, we find that failing to pay the claimant in full for those days amounts to an unauthorised deduction from wages as he was entitled to be paid as if able to work.
66. The claimant is therefore awarded the sum of  $\text{£}67.19 \times 3 = \text{£}201.57$  (gross). As this is wages the payment must be paid subject to all normal tax deductions.
67. We do not accept that the claimant is entitled to any unpaid holiday pay. The respondent paid him the gross sum of  $\text{£}2,911.58$  ( $\text{£}1996.39$  net) which roughly equates to over 21.66 days' holiday pay. We agree with the respondent's calculations for holiday pay as set out in Ms Green's witness statement paragraph 24, save that any such calculation ought to have been rounded up to 20.5 days as opposed to being 20.33 days. The claimant has been paid in excess of 21 days' holiday pay and therefore the claimant has therefore received all monies owed to him in respect of holiday pay.
68. It is worth noting that the claimant's concern regarding the holiday pay payment was that because the payment was made some 6 months after the date of termination it therefore ought to be paid tax free. This is incorrect. Any payment in respect of unpaid wages, including holiday pay, must be taxed. (Income Tax Earnings and Pensions Act 2003).
69. The issue of the retrospective pension payments has been more difficult to determine. As outlined above, the respondent had the contractual right to deduct payments from the claimant in respect of any overpayments.
70. As raised with the claimant during the course of the proceedings, any unauthorised deduction claim must be limited to the claimant's 3% contributions as opposed to the employer's 5% contributions which are not considered wages. The claimant accepted this during the hearing.
71. We consider that we are not in a position to determine whether or not the respondent could lawfully enrol the claimant in the pension fund post termination as this is a matter which falls under the jurisdiction of the Pensions Regulator. Therefore whether the 3% contributions deducted from the claimant's final

salary were unlawful is something that we do not consider we have jurisdiction to determine.

#### Wrongful dismissal/ Breach of contract

72. The claimant's claim for wrongful dismissal/breach of contract is well founded and upheld. We have found that the real reason for the claimant's dismissal was capability. No gross misconduct was proven by the respondent in this case. The claimant was therefore contractually entitled to his notice pay of one month's wages.

73. We therefore award the claimant the compensatory sum of one month's notice which was £2,911.58 gross and £2,261 net. The purpose of damages is to put the employee in the position they would have been if the contract had not been breached. Therefore, damages awarded reflect the net value of salary.

#### Disability Discrimination

74. We have determined that the claimant was disabled for the purposes of the s 6 Equality Act 2010 at the relevant time by reason of all three of his conditions. The claimant had three separate impairments which separately and cumulatively had a substantial long term negative impact on his ability to carry out day to day activities. We found that the dilated cardiomyopathy and sleep apnoea conditions affected his mobility, caused significant lethargy and disrupted sleep. HIV is a deemed disability.

#### Direct discrimination

75. The burden of proof provisions in the EqA 2010 are set out in section 136(2) and (3) and state:

"(2) If there are facts from which the court [or tribunal] 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."

76. Case law (Barton) has established that a Tribunal can take a two-stage approach to the burden of proof applies:

- Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent.
- Stage 2: is the respondent's explanation sufficient to show that it did not discriminate?

This approach has been confirmed by the CA in (Ayodele v Citylink Ltd [2017] EWCA Civ 1913). The case of Hewage has confirmed however that there does not necessarily need to be a rigid approach to the two stage test.

77. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts (Igen Ltd and others v Wong and other cases [2005] IRLR 258).

78. We consider that the claimant has failed to establish primary facts from which we could reasonably conclude that there has been any discrimination. All the claimant has established is that he was dismissed. He has provided us with no evidence to connect his dismissal with his health issues and in fact has set out in considerable detail how all the performance concerns relied upon by the respondent were in fact not real and therefore could not be related to his health. He has not suggested that any alleged fabrication occurred because of his health conditions nor provided any evidence to suggest that this was what the respondent did.
79. The claimant has also failed to provide us with any evidence that would suggest that a comparator would have been treated differently. An appropriate comparator is someone who is in materially the same circumstances save for the protected characteristic of the claimant. We have determined that in these circumstances the appropriate comparator would be someone about whom the respondent had similar performance concerns and who failed to engage with the internal disciplinary process but who did not have any or all of the health conditions relied upon. The claimant stated to us that someone with no health concerns would have been given the opportunity to go through a performance improvement programme or offered training or similar opportunities to improve. However he provided us with no evidence to support this and we consider that it is important to note that it is impossible to know whether the respondent would have offered this to the claimant or not if he had engaged with the disciplinary process and defended himself against the allegations of poor performance. He chose not to do that. Instead he wrote aggressive and combative emails to the respondent which did not engage with the issues they were raising. Without any proper engagement from the claimant in the process, the respondent concluded that the performance concerns were valid.
80. If we are wrong and the claimant has shifted the burden of proof, we consider that the respondent has demonstrated that the treatment of the claimant arose because of genuine performance concerns which had led to the respondent organisation being placed in a financially precarious position. They also took into account the fact that he had relatively short continuity of service. It was reasonable for them to reach this conclusion and choose to dismiss the claimant as opposed to put him on performance training in circumstances when he did not engage in the process which would have given him the opportunity to refute their concerns, explain his performance or request assistance/training etc.

Discrimination arising out of the claimant's disability

81. With regard to the claimant's claim that the respondent discriminated against the claimant for reasons arising out of his disabilities (s15 Equality Act 2010) we have concluded that the respondent did not know and could not reasonably have been expected to know that the claimant had the three conditions he relies upon

as disabilities. This claim must therefore fail. However, for completeness we address the questions outlined in the List of Issues above.

82. The claimant asserted that the medication he took for his HIV caused him significant stomach difficulties which led to him having issues leaving the house. Although he provided no medical evidence of this we accept his evidence in this regard.
83. The respondent's genuine performance concerns did include concerns about his failure to attend various meetings. Leaving to one side that part of the concern was that he failed to notify anyone that he was not attending and that had he done so it is likely that any concerns would have been allayed; this argument was not put before us by the respondent. We therefore conclude that at least in part, some of the respondent's performance concerns were caused by matters arising from the claimant's HIV. These concerns did, at least in part, contribute to the claimant's dismissal.
84. However, as outlined above, the respondent did not know and could not have reasonably been expected to know that the claimant had HIV. For this reason the claimant's claim for discrimination arising out of his disabilities is not upheld.

#### Failure to make reasonable adjustments

85. The same lack of knowledge of the claimant's health conditions means that the respondent had no obligation to make reasonable adjustments (s20 and s21 Equality Act 2010) for the claimant. For this reason the claimant's claim for failure to make reasonable adjustments is not upheld.

Employment Judge Webster  
Date: 1 July 2021