Case Number: 3303897/2020(V)

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr S Tulett	and	Readypower Rail Services Limited

Held at Reading on Hearing – 20, 21 and 22 September 2021
In Chambers (without parties) – 27 September 2021

Representation **Claimant:** In person
Respondent: Miss L Kaye, counsel

Employment Judge Vowles **Members:** Ms F Potter, Ms C Tufts

UNANIMOUS RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Disability – section 6 Equality Act 2010

2. The Claimant was a disabled person at all material times by reason of Type 2 Diabetes.

Direct Disability Discrimination – section 13 Equality Act 2010

3. The Claimant was not subject to direct disability discrimination. This complaint fails and is dismissed.

Failure to make Reasonable Adjustments – section 20 Equality Act 2010

4. The Claimant was not subject to a failure to make reasonable adjustments. This complaint fails and is dismissed.

Victimisation – section 27 Equality Act 2010

5. The Claimant was not subject to victimisation. This complaint fails and is dismissed.

Unauthorised Deduction from Wages - section 13 Employment Rights Act 1996

6. The Claimant was subject to unauthorised deduction from wages. He is entitled to 12 weeks average earnings for the period 12 December 2019 to 16 January 2020.

Reasons

7. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

8. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-Tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

REASONS

Submissions

1. On 12 April 2020 the Claimant presented claims to the Employment Tribunal with complaints of disability discriminating and unauthorised deduction from wages.

2. The claims were clarified at a preliminary hearing held on 20 April 2021 and set out in a case management order sent to the parties on 20 May 2021.

3. On 18 May 2020 the Respondent presented the response and resisted all claims.

The evidence

4. The Tribunal heard evidence on oath from the Claimant, Mr Samuel Tulett (Heavy Goods Vehicle Driver).

5. The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Liam Slattery (Logistics Manager and the Claimant's Line Manager), Mr Tony

Buckland (Transport Manager), and Ms Erin Neilson (Head of Human Resources).

6. The Tribunal also read document in a bundle provided by the parties. Both parties presented written closing submissions.

Application to amend

7. At the start of the hearing the Claimant made an application to amend the claims by adding further claims under the Equality Act 2010. The application was opposed by the Respondent and it was refused by the Tribunal. Reasons for this decision given orally at the hearing.

Background facts

8. The Claimant was employed as a Heavy Goods Vehicle (HGV) Driver from 6 March 2017 up to the present date. The Respondent's business involves transport in connection with the rail industry. The Claimant's line manager was Mr Slattery.

9. In March 2019 the Claimant informed Mr Slattery that he had been diagnosed with diabetes type 2. This required him to report the condition to DVLA which he did. The Respondent accepted that at all material times from March 2019 the Claimant was a disabled person by reason of diabetes type 2 and that the Respondent had knowledge of this disability from March 2019 onwards.

10. At that time the Claimant's duties involved driving a HGV Class 1 vehicle. His shifts were Wednesday to Monday or Thursday to Monday on a rotational basis. These shifts involved working at weekends.

11. In May, June and July 2019 the Respondent started monitoring "drop count" (the number of deliveries each driver would complete each week) for each driver. It was identified that the Claimant's drop count was one of the lowest of the Respondent's drivers. Also, during that period, the Respondent decided that because the requirement for weekend working had significantly reduced and because there were a lot of midweek deliveries that could not be completed, the Claimant's shift pattern was no longer viable and it was decided that his vehicle could be utilised better during the week when there was more demand for deliveries. Additionally, the Respondent had decided to move to optimise the vehicle fleet on a 24/7 basis and all the Respondent's drivers, including the Claimant, moved to shifts working Monday to Friday because the weekend work had considerably diminished. Neither the Claimant nor the other drivers were taken off weekend work completely, as there was some

Saturday and Sunday work still available on an ad hoc basis. The change of shifts was effected on or about 24 September 2019.

12. The Claimant was absent on sick leave on 19, 20, 21 and 22 September 2019 and on his return to work, on 24 September 2019 he was told of the shift changes.

13. On 28 October 2019 the Claimant submitted a written grievance which included the following:

> *"I have been employed as an LGV driver artic by Ready Power since March 2017. Recently I have experienced some difficulties at work that I would like to bring to your attention so that I can get them resolved.*
>
> *I believe the underlying reason for this is that I have recently been diagnosed with type 2 diabetes, which is controlled by medication. I am surprised that the company has not asked for a medical report or suggested I see Occupational Health given the nature of the work that I do for them. I believe that has this taken place some of the issues that have arisen might have been avoided.*
>
> *Initially the medication I was given caused sleep disturbance. My line manager agreed to a later start time but that agreement has since been rescinded, without explanation. I am pleased to report that I have now adjusted to the medication, however I still have sleep disturbance from time to time.*
>
> *My shift pattern for well over 18 months was from Thursday through to Mondays with Tuesdays and Wednesdays off. This enabled me to arrange the regular medical appointments I require on weekdays. Following a bout of flu I was informed that my shifts were being changed to Monday to Friday with immediate effect from the middle of September. There was no consultation with me about this and my GP is not open at weekends. Furthermore my original working pattern fitted in with my domestic arrangements and I benefitted from the additional payments for working at weekends. I was initially told this was a temporary arrangement to see if this would help improve my absence record, however I have since been given an alternative explanation for this change, which is my "movement rate" and "drop count" is insufficient. So I am still unsure as to the exact reason for this change. I have made enquiries as to whether I can resume my original shift pattern but have been unable to obtain a satisfactory answer.*

In order to manage my diabetes I need to eat regularly, and have balanced meals. Given the long shifts that my job entails and the fact that sometimes I have to sleep in the cab of my lorry overnight (because of the restriction on driving hours) I have requested that a microwave and a fridge is purchased for use in the lorry I drive. This would assist me in being better able to control my eating while at work as I am not always able to reach or park in a service station as my medication must be taken with food. I believe there is funding available to the company to provide such items. I have requested these items but have been told that these cannot be purchased.

So I am writing to you to request that medical information is obtained about my diabetes, and recommendations made as to "reasonable adjustments" to assist me in the workplace. I am also formally requesting that I am allowed to resume my original shift pattern…"

14. The Claimant was then referred to the Respondent's Occupational Health Service and a report dated 4 December 2019 included the following:

*"**Background referral details***

I carried out a telephone consultation with Mr Tulett on 02.12.19 to assess the general health status so as to advise on any relevant occupational implications with particular regard to his fitness for work taking into account his diabetes and current sleep problems. The reason for this consultation was explained and appropriate signed and informed consent obtained.

Relevant past medical history

As you are aware Mr Tulett was diagnosed with type 2 diabetes in March 2019. He was started on metformin which caused some diarrhoea. Mr Tulett states that this led to the periods of sickness absence after his diagnosis (May and September 2019). He was then changed to a slow release version of the medication which suits him better and he no longer has gastrointestinal side effects. He has had his routine diabetic checks and is due for a follow up blood test sometime later in December.

Present medical situation

… He also complains of some sleep disturbance in that he finds it difficult to get to sleep and finds it hard to wake up in the mornings with initial sleepiness which only lasts until he has had breakfast. He denies sleepiness later in the day and says that he has full concentration when driving….

I carried out a STOP BANG questionnaire for obstructive sleep apnoea. He scored five puts him at high risk of having sleep apnoea. I have advised that he asks for urgent referral for a full investigation through his GP. In my opinion his sleep problems are more likely to be related to sleep apnoea rather than side effects of metformin, or a combination of the two. …

Summary of fitness to work/recommendations

I have reviewed the DVLA guidelines. If there is daytime sleepiness with a suspicion of obstructive sleep apnoea then the person should not drive until symptoms are controlled. In the case of Mr Tulett, he denies true daytime sleepiness but has difficulty in waking and once fully awake he functions well. He denies sleepiness when driving. I would therefore suggest that he does not work very early or very late shifts (keeping within the hours of 08.00 to 20.00 as a guide) and that there is no ability to increase his driving hours of the normal recommended hours. Ideally he should work regular hours each day to avoid sleep disruption due to shift work. If this cannot be accommodated then he should be taken off driving duties altogether until he has been investigated and he is symptom free. I would also suggest the same guidance whilst working in places that require a Sentinel pass. These recommendations should remain in place until his sleep symptoms have resolved. It is appreciated that any modifications or adjustments to his normal substantive role is a management decision based on feasibility and other business and operational considerations.

Long term medical capability

With regards to his diabetes providing he is well controlled and complies with DVLA guidelines, he should be able to render reliable service in the long term. If he is diagnosed with sleep apnoea or develops any daytime sleepiness then his fitness for HGV driving needs to be readdressed urgently and he must declare this to DVLA…

Any other comments

In answer to your specific questions raised in the referral.

1. *Is the employee fit to undertake their current role? He is fit with adjustments and recommendations as detailed above. …*

6. *What is the prescribed medication regime and what are the side effects? – He is taking metformin slow release tablets two times 1000 mg after his evening meal. Since adapting to the new slow release version of this medication he does not het any gastrointestinal side effects. He has some*

sleep disturbance but this could be due to possible obstructive sleep apnoea (OSA) or a combination of OSA and side effects. His sleep problems do not cause daytime sleepiness.

7. *Must medication be taken with food? Yes it should be taken with meals.*

8. *If yes, must the food be eaten with the prescribed medication remain refrigerated and/or be heated before heating? How the food is prepared has no relation to the fact that Mr Tulett is taking metformin.*

9. *Is the provision of a microwave and refrigerator in the cab of the truck a recommended reasonable adjustment? How the food is stored or prepared has no relation to the fact that Mr Tulett is taking metformin /is diabetic and therefore this is not regarded as a reasonable adjustment. The importance of overall dietary control is important and will be discussed with a specialist dietician as advised previously in the report…."*

15. On 11 December 2019 Mr Buckland sent an email to Ms Neilson (HR) to confirm his conversation with her the day before. He had received a call from a colleague to report that he had called Mr Tulett and could hear the vehicle lane departure warning going off several times during the conversation earlier in the week. He also reported a conversation with another colleague who had the same experience when calling the Claimant. He reported that he then spoke with Thomas Goodfellow who had been double manning with the Claimant the previous day and he had told Mr Buckland that the Claimant was having difficulty staying awake at the wheel and spend a lot of time running into the kerb line.

16. Ms Neilson said that in light of the information the Respondent had received in the Occupational Health Report that the Claimant was at high risk for sleep apnoea taken together with the evidence from Mr Buckland regarding the Claimant appearing sleepy at the wheel, the Claimant should be taken off driving duties and placed on medical suspension.

17. In a letter to the Claimant dated 11 December 2019 Ms Neilson said:

> *"I write to confirm that you have been suspended from work, on full pay (as per your contracted hours), with effect from 11 December whilst your fitness for work as a Class 2 HGV Driver is being assessed. If you have any queries about the terms of your suspension, please feel free to contact me."*

18. On `16 December 2019 the Claimant's GP wrote a "To whom it may concern" letter as follows:

> *"This is a letter to confirm that Samuel Tulett attended Sheepcot Medical Centre and was reviewed by myself on 10 December 2019. He was asked to see a GP by his employer following the telephone assessment with his Occupational Health.*
>
> *He was told that he may suffer with sleep apnoea, but Samuel denied any history suggestive of sleep apnoea and his Epworth sleepiness score is 1 out of 24. Therefore, I do not feel that Samuel has/suffers with a sleep disorder and he is not eligible to be referred to a sleep clinic.*
>
> *Please do not hesitate to contact me if you require any further information regarding this."*

19. Notwithstanding the letter from the Claimant's GP, the Respondent decided to refer him to a sleep specialist clinic which reported on 15 January 2020 to his GP that there was no evidence of obstructive sleep apnoea. He was discharged back into the care of his GP.

20. The sleep specialist clinic report was passed to the Respondent's Occupational Health service who produced a reported dated 14 January 2020 as follows:

> ***"Summary of fitness to work/recommendations***
>
> *The sleep study form earlier this month was reassuring. Mr Tulett has been told by the specialist that he does not have sleep apnoea. He does not require any further investigations or treatment. Therefore the adjustments to his working hours as an HGV Driver that were recommended in the last report, and in relation to his PTS, can be removed. It is appreciated that any modifications or adjustments to his normal substantive role is a management decision based on feasibility and other business and operational considerations."*

21. Accordingly, the Claimant was able to return to work and attended a meeting on 16 January 2020 with Mr Slattery and Mr Buckland to discuss the Claimant's return to work.

22. It had been decided that Mr Goodfellow, who was now employed driving what was previously the Claimant's HGV Class 1 vehicle, should continue to do so on day shifts and not be moved to night shifts because he had only recently qualified as an HGV Class 1 Driver. Accordingly, the Claimant was offered two options as follows.

23. Work on night shifts Monday to Friday and every other Saturday night driving the HGV Class 1 vehicle.

24. Alternatively, he had the option to be employed on a HIAB lorry, a shift pattern of Tuesday to Saturday and every other Sunday on dayshifts.

25. The Claimant was dissatisfied with these offers and felt that driving a HIAB vehicle was not as prestigious as an HGV Class 1 vehicle and he saw it as a demotion.

26. The Claimant chose to work on the HGV Class 1 vehicle on nightshifts but wrote to Ms Neilson as follows:

> *"I am writing to you in regards to my informal meeting that was held this morning 16/01/20. I was offered two different options. 1. which was working on a Class 2 HIAB on my original shift pattern (Wednesday-Monday, Thursday-Monday) or 2. Working night shifts on Class 1 Low Loader (Monday to Friday).*
>
> *I have come to the decision that I will be working Class 1 on nightshifts., However, I need to make it formally known that I will be working this shift pattern under protest as I feel that neither of the options were in any way ideal."*

27. Accordingly, the Claimant returned to work on 17 January 2020 driving the HGV Class 1 vehicle on nightshifts.

28. The Claimant had been absent from work from 11 December 2019 to 16 January 2020 on a period of medical suspension. He was paid at his contractual basic rate for 40 hours per week during this period.

Claims

29. The claims for determination by this Tribunal were set out in the case management order made on 20 April 2021.

Burden of Proof

30. *Section 136 Equality Act 2010 – Burden of Proof*

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(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.

31. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

32. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

33. The Tribunal took account of the relevant provisions of the Equality and Human Rights Commission Code of Practice on Employment 2011.

Direct Disability Discrimination

34. Section 13 Equality Act 2010:

> *"13 Direct discrimination*
>
> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*."

35. The first part of this claim was set out as follows:

> *"**4.4 Has the Respondent subjected the Claimant o the following treatment:***
>
> ***4.4.1 Taking the Claimant off weekend working on or about 24 September 2019 until 1 December 2019. Prior to this the Claimant had every Tuesday off and every other Wednesday off. During this period the Claimant worked Monday to Friday on a day shift and was financially worse off.***

The Claimant relied upon a hypothetical comparator.

36. The Respondent produced evidence that the Claimant did in fact work some weekend shifts on 28 September 2019, 12 October 2019, 16 November 2019, 8 December 2019 and 9 December 2019.

37. The Claimant had no contractual entitlement to any particular shift pattern and he was not guaranteed weekend work during this period.

38. The job title/description in his letter of appointment made clear that the Respondent may change duties to be undertaken by the Claimant from time to time.

39. Additionally, during this period, the Claimant was offered some additional weekend shifts but he declined them.

40. The Respondent's witnesses confirmed that the Claimant was moved from his previous shift pattern to Monday to Friday day shifts, including some weekend work, because of concerns regarding the Claimant's performance and also because of operational changes made by the Respondent to ensure that all vehicles were used 24/7 both dayshifts and nightshifts. This would avoid using agency workers.

41. The Respondent's witnesses confirmed that there was a reduction in weekend work availability with a corresponding need to ensure that weekday work was completed. This was done to optimise the fleet of vehicles and all the Respondent's drivers (including Mr Goodfellow, Mr Challis and Mr Dimotozglou) were also moved to shifts working on Monday to Friday with only occasional weekend working available. Mr Slattery said that there were greater levels of management expertise and support available to drivers during the week compared to weekends.

42. The Tribunal found that the treatment of the Claimant in moving him to Monday to Friday work was not less favourable treatment than a hypothetical comparator or indeed his named comparators Mr Goodfellow and Mr Challis. All were treated the same as all were moved to Monday to Friday shifts.

43. Additionally, there was no evidence whatsoever of any causal link between the treatment of the Claimant and his disability. The Respondent's witnesses provided cogent evidence that the changes were implemented for proper operational reasons and showed that these were non-discriminatory reasons.

44. Accordingly, this claim fails.

45. The second part of this claim was set out as follows:

> ***4.4.2 Removing the Claimant from his role as HGV Class 1 Driver (having Tuesdays off each week and Wednesdays off every other week as above) and giving him a choice of returning to a new job role on or about 16 January 2020 either as a HGV Class 2 Driver working at weekends or as a Class 1 HGV Driver working a nightshift and sharing a truck."***

46. **The Claimant relied on the following comparators, Tom Goodfellow and Michael Challis**

47. Mr Slattery confirmed that the two options offered to the Claimant on 16 January 2020 were the only realistic options available at that time. Albeit "under protest", he accepted work on nightshifts Monday to Friday and every other Saturday night. The Claimant was given the same rate of pay as he earned previously. Although he considered that the work on the HIAB would not be as prestigious as on an HGV Class 1 vehicle, it was confirmed by the Respondent, and not challenged by the Claimant, that other HGV Class 1 drivers do shifts occasionally on HIAB vehicles and also do shifts on different vehicles depending upon demand.

48. The Respondent provided cogent evidence of a non-discriminatory reason for the changes in the Claimant's shifts and vehicle availability. It was clearly not viable to allow the Claimant to dictate which shifts he would work and which vehicles he would drive, particularly when there was an organisational imperative for all drivers to undertake work during the working week, either dayshifts or nightshifts.

49. Importantly, there was no evidence whatsoever that the treatment of the Respondent in this respect was because of disability.

50. The Claimant never challenged any of the Respondent's witnesses at the Tribunal hearing to assert that the shift changes were done was because of his disability. The Claimant's chosen comparators, Mr Goodfellow and Mr Challis were also moved to weekday shifts.

51. Accordingly, this claim fails.

Reasonable adjustments – section 20 Equality Act 2010:

> *"20 Duty to make adjustments*
>
> *(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.

52. The first part of this claim was set out as follows:

4.8.1 (PCP) The requirement for the Claimant to sleep in his cab at night.

4.9.1 (Substantial disadvantage) The Claimant found it more difficult to prepare healthy and nutritious meals while sleeping in his cab.

4.11.1 (Reasonable adjustment claimed) installing a fridge and microwave and/or an inverter into the Claimant's cab."

53. The Respondent accepted that the PCP was imposed and that the Claimant was required to sleep in his cab on occasions.

54. The Tribunal found however that there was no substantial disadvantage, or indeed any disadvantage at all in finding it more difficult to prepare healthy and nutritious meals while sleeping in the cab in comparison with persons who are not disabled.

55. Food is widely available to buy at motorway service stations, shops, cafes and restaurants. Mr Slattery told the Claimant that if he wanted the fridge and a microwave he could buy his own equipment and the Respondent would have it fitted in his cab by means of an inverter. The Claimant never did purchase his own equipment.

56. As stated in the Occupational Health report (above), although the Claimant was informed of the importance of overall dietary control, how his food was prepared or stored had no relation to the fact that the Claimant was taking medication or that he was diabetic. By not having a fridge and/or microwave, the Claimant was in no better or worse position than any other driver in terms of being able to prepare healthy and nutritious meals. Mr Slattery pointed out that some drivers use their own cool box and thermos flasks and provide such equipment themselves to use in their cabs.

57. The Tribunal found that the Claimant's request for a fridge and microwave was, at least in part, because he felt it was unfair that other drivers in Nottingham Deport have such equipment fitted in their cabs. On 26 July 2018, well before the Claimant had been diagnosed with diabetes, he had raised several questions regarding equipment and vehicles including the following:

"*10* *It has come to our attention that the new vehicles that are in Nottingham have all had fridges and microwaves installed at Ready Power's expense. When we have enquired we have been told that this is not possible for us. How is this fair that whether we do nights or not we are not being provided with the same amenities that Ready Power Nottingham employees have been given.*

Answer – *All the trucks have standard equipment which means there are fridges in the two FHs, no vehicle has a microwave fitted by the company*."

58. It follows that the Claimant was not put at a substantial disadvantage by the lack of a fridge and/or microwave and therefore the provision of this equipment was not a reasonable adjustment.

59. This claim fails.

60. The second part of this claim was set out as follows:

> **"4.8.2 (The PCP) The requirement for the Claimant to work during the week from 24 September 2019 to 1 December 2019.**
>
> **4.9.2 (Substantial disadvantage) The Claimant could not attend doctor's appointment relating to his disability during the week.**
>
> **4.11.2 (Reasonable adjustment) Restoring the Claimant to his original working hours."**

61. The Claimant accepted that during this period (24 September 2019 to 1 December 2019) he had only one GP appointment which he attended. He did not produce any evidence of any missed, cancelled or rescheduled appointments.

62. The Respondent accepted that the PCP was imposed but submitted that there was no substantial disadvantage to the Claimant compared to non-disabled persons.

63. The Tribunal found there was no disadvantage because the Claimant was able to attend doctors' appointments. He accepted that Mr Slattery was flexible and co-operative regarding the Claimant's shift start times and in accommodating attendance at appointments. When looking at the evidence of the shifts the Claimant actually worked during this period there was ample scope for the Claimant to schedule and attend GP appointments if he wished to do so. There

was no evidence of any causal link between this treatment and the Claimant's disability.

64. This claim fails.

Victimisation – section 27 Equality Act 2010:

> "*27 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.*

65. This claim was set out as follows:

> ***4.13.1 The Respondent conceded that the Claimant's grievance dated 28 October 2019 was capable of constituting a protected act within the meaning of section 27.***
>
> ***4.14.1 (Alleged detriment) Removing the Claimant form his previous role in or about 16 January 2020 and telling him that he could only return to work in a new job role."***

66. This allegation formed the basis of the claim of direct disability discrimination under paragraph **4.4.2** above.

67. The Tribunal found that the Respondent's witnesses had provided cogent evidence of non-discriminatory reasons for this treatment on 16 January 2020. The reasons were detailed and well documented. There was no evidence

whatsoever that the offer of the new shifts and vehicles was influenced anyway by the Claimant's grievance dated 28 October 2019.

68. Indeed, both Mr Slattery and Mr Buckland in their evidence at the Tribunal hearing stated that they had not seen the Claimant's grievance and they were not challenged by the Claimant on that evidence.

69. This claim therefore fails.

Unauthorised deduction from wages – section 13 Employment Rights Act 1996.

> *"13 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) ...*
>
> *(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 purpose of this part as a deduction made by the employer form the worker's wages on that occasion.*

70. This claim was set out as follows:

> ***4.16 Did the Respondent make unauthorised deduction from the Claimant's wages in accordance with ERA section 13 and if so how much was deducted?***
>
> ***4.1.7 The Claimant contends that during his suspension from 10 December 2019 to 16 January 2020 he was paid only basic hours of 40 per week and he should have been paid average pay during this period and also paid for three premium Christmas shifts that he missed."***

71. The Respondent relied upon paragraph 8 of the Claimant's statement of terms and conditions of employment under the heading "Hours of work" as follows:

> *"If there is no work available you will only receive your basic hours (at Yard rate) provided you are available for work from Monday to Sunday. Any days you are not available (including the weekend) will be deducted from your basic hours."*

72. The Respondent submitted that under this provision, in the Claimant's circumstances, the Claimant was available for work but no work was available for him to do. The Tribunal rejected that submission. In fact, the Claimant was not available because he was on medical suspension but had he not been suspended there would have been work available for him to do. Paragraph 8 was not applicable to the Claimant's circumstances.

73. The Tribunal also rejected the Respondent's submission that under the Respondent's misconduct policy where an employee is suspected of misconduct he may be "*suspended on full basic pay, whilst an investigation is carried out."* The Tribunal found this was not analogous to the Claimant's position. He was not suspected of any blameworthy conduct as he was under a medical suspension.

74. The Tribunal also took account of the suspension letter of 112 December 2019 which stated:

> *"...you have been suspended from work, on full pay (as per your contracted hours)..."*

75. Ms Neilson confirmed that there was nothing in the Claimant's contract of employment, employment handbook or terms and conditions of employment which dealt with the issue of the rate of pay during a medical suspension. Indeed, she said that because there was no existing policy the Respondent took legal advice and that advice was to be only basic pay rather than average pay.

76. The Claimant claimed that if he had been on holiday his average pay over 12 weeks would have been taken into account in determining the rate of pay. He asserted that should be done for the period of medical suspension from 11 December 2019 to 16 January 2020.

77. In response to that, Ms Neilson said that the Claimant was the first person she had ever dealt with who was suspended on medical grounds and she did not know whether the legal advice was correct. When she was asked what was her view she said that she agreed that it was not the Claimant's fault that he

was suspended and if it happened again she would agree to give him the average of his pay over 12 weeks and not follow the legal advice provided.

78. The Tribunal decided, based upon the lack of any policy on the subject, and the suspension letter confirming the Claimant would be paid "*full pay*" that the amount "properly payable" in the period of suspension was the Claimant's average pay over the previous 12 weeks.

79. Accordingly, this claim is successful in respect of the difference between the basic pay actually paid to the Claimant for the period in question and the amount that he would have received as average pay.

Christmas shifts

80. There is nothing in the Claimant's contract of employment or the handbook regarding Christmas shifts. It is clear that, if worked, they were voluntary on the part of the employee and although the Claimant had in the past worked Christmas shifts at the enhanced rate of pay, he did not do so over the 2019 Christmas period because, self-evidently, he was absent on medical suspension. The Tribunal found that not having worked the Christmas shifts the Claimant was not entitled to an enhanced rate for those periods. The enhanced rate was not properly payable unless an employee had actually worked the Christmas shifts. This part of the wages claim was unsuccessful.

Jurisdiction – time limits

81. The Respondent submitted that the Claimant having first contacted ACAS on 29 January 2020, any matters relating to events prior to 29 October 2019 were prima facie out of time.

82. The Claimant accepted in his written submissions that any claims based on acts or events on or after 30 October 2019 were in time and potentially out of time where they occurred before that date.

83. The Respondent submitted that specifically the first claim of direct disability discrimination was out of time and that the Claimant had not set out any reasons as to why the claim was brought late and/or why it should be just and equitable to extend time.

84. The Claimant claimed that all matters were part of a continuing act. The Tribunal rejected that submission. There were no grounds for saying that any of the matters referred to above in the claims form part of a continuing act. They were separate acts for well-defined and justified non-discriminatory reasons.

85. Additionally, it is for the Claimant to show why a claim was presented late before a Tribunal can find that it is just and equitable to extend the time limit under section 123 Equality Act 2010. There was no such evidence.

86. Accordingly, the first allegation of direct disability discrimination, had it not failed on the grounds set out above, would have failed for lack of jurisdiction.

I confirm that this is my judgment in the case of Mr S Tulett v Readypower Rail Services Limited case no. 3303897/2020 and that I have dated and signed by electronic signature.

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Employment Judge Vowles
Date: *18 October 2021*

Sent to the parties on:

2 November 2021

For the Tribunals Office