



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH**

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**Judgment of the Employment Tribunal in Case No: 4110449/2021 Heard at  
Edinburgh on the Cloud Based Video Platform on 15<sup>th</sup> of February 2022**

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**Employment Judge J G d’Inverno**

**Ms P Gray**

**Claimant  
In Person**

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**Royal Mail Group Ltd**

**Respondent  
Represented by:  
Ms L McKenna  
per Morton Fraser LLP**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that

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**(First)** In the period 14<sup>th</sup> April 2021 to 22<sup>nd</sup> September 2021, the respondent made an unauthorised deduction from the claimant’s wages in the amount of £3,893.21, the same being the difference between the value of 23 weeks full pay, that is £5,707.91 (gross) less 23 weeks statutory sick pay received by the claimant in that

35 period, (being the sum of £1,814.70).

**(Second)** Orders the respondent to make payment to the claimant of wages in a net amount which, after normal deductions, is equivalent to the gross amount of £3,893.21 which the respondent withheld from her pay.

5 **(Third)** In the period 23<sup>rd</sup> September to 2<sup>nd</sup> December 2021 the claimant had no entitlement in law to receive contractual sick pay, no element of contractual sick pay were wages properly payable to her in terms of section 13(3) of the ERA in that period and the claimant's complaint of unauthorised deduction from her wages in the period 23 September to 02 December 2021 fails.

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**Employment Judge: J d'Inverno**  
**Date of Judgment: 14 April 2022**  
15 **Entered in register: 19 April 2022**  
**and copied to parties**

**I confirm that this is my Judgment in the case of Gray v Royal Mail Group Ltd**  
20 **and that I have signed the Judgment by electronic signature.**

## **REASONS**

25 1. This claim called for Final Hearing at Edinburgh on the Cloud Based Video Platform at 10 am. The claimant appeared on her own behalf. The respondent Limited Company was represented by Ms McKenna, Solicitor.

### **The Issue**

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2. The issue before the Tribunal for determination at Final Hearing, being the only issue focused by the initiating Application ET1 and Response Form ET3 was:-

“Whether, in the period 14<sup>th</sup> April 2021 to 2<sup>nd</sup> December 2021 the respondent had made an unauthorised deduction from the claimant’s wages by reason of their withholding from her, in that period, “contractual sick pay” and paying to her only statutory sick pay, and, if so, in what amount.”

### Procedural History

3. The case is one in which the Final Hearing originally set down for 2 hours on the 30<sup>th</sup> of September 2021 was postponed on the application of the respondent’s representative, the claimant not objecting, to allow for completion of the then ongoing internal appeal process. A rescheduled Final Hearing set down to proceed by CVP on the 7<sup>th</sup> of December 2021 was postponed on 3<sup>rd</sup> December 2021, on the claimant’s application the respondent’s representative ultimately not objecting on the grounds of the claimant’s medical unfitness to participate on the 7<sup>th</sup> December. The case was relisted for Final Hearing by CVP on 15<sup>th</sup> February 2022 at 10 am with a time allocation of one day.

### Documents

4. In an attempt to comply with the requirement that a Joint Bundle of Documents to be referred to at Final Hearing be compiled and lodged with the Tribunal, the respondent’s representative made contact with the claimant on three occasions in November and December of 2021 regarding the bundle and requesting that the claimant provide them with any documents which she wished to rely upon for inclusion in the Bundle. The claimant did not respond to those emails, the claimant provided no such documents to the respondent’s representative. The respondent’s representative, in consequence intimated to the claimant and lodged with the Tribunal a “Respondent’s Bundle” of Documents to be referred to at the Hearing. In advance of the Hearing the respondent’s representative identified, intimated to the claimant and tendered to the Tribunal four additional documents in

respect of which they sought leave of the Tribunal, to add to the Bundle being:-

- 5                   • The complete six pages of the respondent's sick pay policy some of which pages had been erroneously omitted from the Bundle as lodged (document 6 on the List of Documents)
- 10                  • The respondent's updated Counter Schedule of Loss (document 15 on the List)
- A spreadsheet showing the pay received by the claimant in the period 1<sup>st</sup> April 21 to 11<sup>th</sup> February 2022 (new document 16 on the List); and
- 15                  • The signed copy of the claimant's Contract of Employment (which they had previously been unable to locate) – new document 17 on the updated List.

20           5. The respondent's Application for Leave to include those additional documents in their Bundle was not opposed by the claimant.

25           6. On the 11<sup>th</sup> of February 2022 at 16:04 hours, that is one working day prior to the commencement of the Hearing, the claimant tendered to the Tribunal and sent to the respondent's representative, an electronic bundle of 28 documents comprising 179 pages. By email of the same day sent at 16:50 hours the respondent lodged objection to any application to be inferred on the part of the claimant for Leave to lodge those documents and intimating that:-

- 30                  • While the claimant in her covering email referred to the Bundle as a Joint Bundle, it was not a Joint Bundle and its content had not been agreed by the respondent.

- For the avoidance of doubt it had not been provided to the respondent in any form prior to the claimant's email of some 45 minutes earlier that day
- 5 • The tendered Bundle contained a number of documents that the respondent had not had sight of before
- There was only one working day left prior to the full Hearing and that were the documents to be received,
- 10 • The respondent would be put at disadvantage as they had insufficient notice to allow them to ascertain what the documents were and to discuss them with their currently scheduled single witness and or with any other potential
- 15 witness whose evidence might go to their provenance, content, veracity or reliability
- The Bundle contained documents which were irrelevant to the determination of the only complaint before the Tribunal namely
- 20 one of unauthorised deduction from wages contrary to the provision of section 13 of the ERA
- One of the documents entitled "Summary of Issues and alleged loss", referred to other matters which did not form part
- 25 of the claim before the Tribunal
- There had been no application at any time in the history of the case for Leave to Amend the claim
- 30 • A number of the documents bore to be/contain the evidence of witnesses in written form, the same being witnesses who were not to be present at the Hearing and that, in circumstances, where:

- The Tribunal had made no Order allowing the receipt of evidence by way of written witness statement and as such, the documents in question could not be competently admitted and relied upon at the Hearing.

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7. In summary the respondents objected to the Bundle as tendered variously on the grounds of lack of fair notice, relevancy and, in the case of purported evidence in written form, competency.

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8. By Order of 14<sup>th</sup> February 2022 the Hearing Judge directed that when the case called for Hearing at 10 am on the following day, parties would each be heard in support of and, as required in opposition to, their respective Applications for Leave, in the case of the respondent to add documents to their already lodged Bundle and, in the case of the claimant, to lodge her tendered Bundle (tendered documents).

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9. The Hearing Judge, with a view to proportionately considering and disposing of those preliminary applications, further directed that the respondent's representative be in a position to identify, at the outset of her remarks, which documents if any in the claimant's tendered Bundle, the respondent upon such further consideration as they had been able to give, in the intervening, working day, did not maintain objection to.

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25 10. The hearing of parties in respect of and the determination of the applications utilised the first two hours of Hearing. In the end the claimant did not maintain objection to the additional documents which the respondent's representative sought to add to the Bundle and the Tribunal being separately satisfied as to the irrelevance, allowed those documents to be received. The respondent's representative did not maintain objection to the following documents tendered by the claimant:-

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- Document number 8 in the claimant's Bundle, being text exchanges between the claimant and her Trade Union representative during the claimant's sickness absence
- 5 • Document number 9 being a letter from Mr John Bryce to the claimant, dated 2<sup>nd</sup> June 2021, dealing with the claimant's grievance
- 10 • Document number 12 being the claimant's letter to the respondent appealing and setting out grounds of appeal against the grievance outcome and dated 1<sup>st</sup> of July 2021
- 15 • Document number 14, a copy of the notes of the internal appeal hearing generated by Henry Aitchison, the Internal Appeal Officer
- Document number 22 a rehabilitation plan in respect of the claimant
- 20 • Document number 27 copies of the claimant's fit notes in the period 6<sup>th</sup> April 21 to 31<sup>st</sup> January 22
- Document 28 wage slips received by the claimant for the period 1<sup>st</sup> April 21 to 11<sup>th</sup> February 22

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11. The Tribunal being separately satisfied as to the relevant/potential relevance of those documents in respect of which the respondent no longer maintained objection, allowed documents numbers 8, 12, 14, 22, 27 and 28 in the claimant's tendered Bundle to be received and relied upon at the Hearing.

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12. The respondent's representative reiterated and stood upon her objection to the remaining documents in the claimant's tendered Bundle, doing so variously upon the grounds of lack of fair notice, relevancy and, in relation to

the apparent statements of written evidence, also competency; these being, for the avoidance of doubt, documents numbers 1, 2, 3, 4, 5, 6, 7, 10, 11, 13, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26. The Tribunal was satisfied and determined, that the purported uncertified written witness statements, tendered in the absence of the witnesses whose evidence they purported to be should not be received nor reliance placed upon them at the Hearing, either by the parties or the Tribunal.

13. Otherwise, not being able to be satisfied as to the relevancy of the documents at this juncture in proceedings and for the purposes of ease of reference to those documents which were received, the Tribunal allowed the documents in respect of which objection was maintained, to be received subject to objections as to relevancy, lack of fair notice and, where appropriate competency; and recorded the respondent's continued objection to those documents on those grounds.

14. The Tribunal delivered its determination of the two applications to the parties orally at around 11.45 am together with its oral reasons which accordingly are not reiterated here. Thereafter, following a short adjournment for the usual purpose, the case proceeded to Final Hearing at 12 noon.

### **Sources of Documentary and Oral Evidence**

15. Each party lodged a Bundle of Productions, in the case of the claimant as set out above, some of which were received by the Tribunal subject to objections as to relevancy, lack of fair notice and competency; and to some of which reference was made in the course of Hearing.

16. The claimant gave evidence on her own behalf and answered questions put in cross examination and questions from the Tribunal. For the respondent the Tribunal heard from Mr Aitchison, the Internal Appeal Manager who answered questions in cross examination and from the Tribunal.



17. Each witness gave their evidence on oath on affirmation.
18. No challenge as to the credibility of either witness was advanced by the other party. The Tribunal found both witnesses to be generally credible and  
5 accepted their evidence to the extent that it also considered it reliable.

### Findings in Fact

19. On the oral and documentary evidence presented the Tribunal made the  
10 following essential Findings in Fact, restricted to those relevant and necessary to the determination of the issue before it.
20. The claimant is employed by the respondent as an Operational Postal Grade  
15 (“OPG”). She is based at the respondent’s Bo’ness Delivery Office and her role is part-time. The claimant commenced employment with the respondent on the 24<sup>th</sup> of November 2008.
21. On 29<sup>th</sup> March 2021 the claimant was absent from work until her return to  
20 work on 2<sup>nd</sup> December 2021. In the period 29<sup>th</sup> March up to and including the 13<sup>th</sup> April 2021, that being the first two weeks of the claimant’s absence, the claimant received full contractual sick pay from the respondent. In that period the claimant had and, it is separately a matter of concession by the respondents, an entitlement in law, to receive full contractual sick pay under and in terms of her Contract of Employment and the respondent’s sick pay  
25 policies.
22. The respondent’s “Sick Pay and Sick Pay Conditions Policy” to which the  
30 claimant was subject, (pages 41(a) to 41(f) of the respondent’s Bundle) (“R-41(a) to 41(f)”) state, at page 41(c) that “Entitlement to sick pay is always subject to strict observance of the following condition:
- Self certificates or medical certificates, including “fit notes”, must be received by the business for all sick absences

- The business must be satisfied that an employee's absence is necessary and due to genuine illness
- 5           • The business reserves the right to refuse sick pay if an absence is due to, or is aggravated by, causes within the employee's control, or if the employee has neglected instructions given by a doctor
- 10           • An absent employee shall remain at their normal home address (other than to receive in-patient treatment) unless they have consent of their Line or local Personnel Manager
- 15           • Employees who are sick immediately before they are due to go on holiday must confirm to their Manager that they are going on holiday on the due date (unless sick absence continues and the employee remains at home)

23. The respondent's "Absence Notification and Maintaining Contact, Guide for Employees" R-27 to R-31) states:-

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(a) At (R-28) that it "should be read in conjunction with the *Sick Pay And Sick Pay Conditions Policy* and the *Attendance Policy*";

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(b) At (R-28) "*Employees must follow the appropriate absence notification process when they are absent due to illness, provide appropriate medical certificates in a timely manner and maintain contact with their Manager throughout their absence.*"

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(c) At (R-30) that, "If an employee on long term sickness absence fails to maintain contact or fails to provide a further medical certificate, the Manager should again make all reasonable efforts to make contact, including sending contact letters by

Special Delivery and first class post, ensuring that a record is kept of all the attempts to make contact; and

- 5 (e) At (R-30) *“If the employee does not make contact or fails to provide a further medical certificate, following written notification giving the employee two days’ notice, any sick pay they may be entitled to from Royal Mail Group may be stopped.”*

10 24. The respondent’s “Attendance Policy” (R-32 to R-40) states;

- 15 (a) under the heading “General Points” at R-34/35 “• Regular contact between the Manager and the employee who is absent is vital and they should seek to agree an appropriate time and date for reviewing together all but very short absences”

- 20 (b) at R-34 – “The aim of maintaining contact during an absence is to encourage an early return to work wherever possible”

- (c) at R-34, “Employees need to provide an absence declaration form for the first 7 days of absence and a medical certificate or fit note for any absence over 7 days

- 25 (d) at R-34 “In the rare event that contact is not maintained following the expiry of a fit note the employee will (the Tribunal’s emphasis) be given 2 days’ notice before any suspension of sick pay;

- 30 (f) at R-34 “Occupational Health Service advice will be sought as appropriate to assist Managers in making decisions”

- (g) at R-38, “under the heading “Long Term Absence” “This process will be followed when an employee is absent from

work for more than 14 days. It can also apply when repeated absences are due to an ongoing health condition. The aim is to enable a return to normal work activities at the earliest opportunity or, if that is not possible, to find an alternative outcome

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25. The respondents define, in terms of their “Attendance Policy” (R-38) an absence from work for more than 14 days as a “long term absence”.

10 26. The first day of the claimant’s absence was 29<sup>th</sup> March 2021 and she was continuously absent from that date until her return to work on the 2<sup>nd</sup> of December 2021. As at midnight on the 11<sup>th</sup> of April 2021, at the latest, the claimant had been absent on sick leave for 14 days. Her continued absence beyond that date and time was “a long term absence” for the purposes of the requirements of the respondent’s Sick Pay Policy, absence notification and  
15 Maintaining Contact Guide and Attendance Policy”, all three of which policies were interrelated and each falling to be read, construed and applied in conjunction with the others.

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### **Managing Long Term Absence**

General Points which apply:

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- Regular contact between the Manager and employee is vital and requires the active participation of both parties

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- Involvement of the relevant Union representative can be helpful in maintaining contact and resolving cases promptly

- The aim is to encourage an early return to work as this is beneficial to both the employee and Royal Mail Group

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- Occupational Health advice will (the Tribunal's emphasis) be sought as appropriate to assist Managers in making decisions
  - Employees defined as disabled under the relevant legislation will be supported appropriately"
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27. The respondent's policies accord to the respondent a discretion to stop a claimant's contractual sick pay entitlement (R-30) in circumstances where the conditions specified in their Sick Pay and Sick Pay Conditions Policy at R-41(c) are not strictly observed.
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28. The right to so stop an employee's contractual sick pay entitlement is not absolute. It is a discretionary right. In exercising that discretion the respondents must reasonably do so in the context of and in accordance with the requirements of their Sick Pay and Sick Pay Conditions Policy, their
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- Absence Notification and Maintaining Contact Guide and their Attendance Policy. The discretion must not be exercised arbitrarily and must be exercised reasonably which includes in terms of and in compliance with the requirements of those policies.
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29. The discretion to so stop an employee's entitlement to contractual sick pay is not always a present or "live" discretion. It is only awakened on the occurrence of and following certain pre-requisite conditions including, at R-30, "*Following written notification giving the employee 2 days notice,*" [the Tribunal's emphasis] "Any sick pay they may be entitled to from Royal Mail
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- Group may be stopped". That requirement is reiterated in the respondent's Attendance Policy at R-34 viz "*In the rare event that contact is not maintained following the expiry of a fit note, the employee will be given 2 days written notice before any suspension of sick pay*".

30. The commencement of the claimant's absence on 29<sup>th</sup> March 2021 was due to anxiety and stress experienced by her and was precipitated by the return to the appointment of Malcolm Aien, Delivery Office Manager in her place of employment, and to the function and role of her direct Line Management and Manager.
31. The claimant considered that she had previously been subjected to bullying and harassment by Mr Aien and the prospect of having to be directly line managed by him and to be in direct contact with him caused her to become ill such that she was unable to remain in the work place.
32. On the morning of the 29<sup>th</sup> of March, the first day of the claimant's absence the claimant spoke directly and face to face with Lynn Jamieson, her then Delivery Office Manager who was to be replaced by Malcolm Aien. She communicated to Lynn Jamieson her state of anxiety and stress and the cause of it, namely the fact that she, Lynn Jamieson, was to hand over the role of Delivery Office Manager to Malcolm Aien with whom the claimant felt unable to be in contact.
33. The claimant explained to Lynn Jamieson why that was the case, namely that in the past the claimant considered that she had been subjected to bullying and harassment by Mr Aien. She told Lynn Jamieson that such was the state of her anxiety and stress that she was unable to have contact with and be in the work place carrying out her work when Malcolm Aien was also present.
34. Lynn Jamieson instructed the claimant to leave the work place and to wait in her car in the car park. When in the car park Ross Hutchison, the claimant's second Line Manager came to the car and spoke to the claimant. The claimant communicated to Ross Hutchison directly in that conversation all that she had disclosed to Lynn Jamieson.
35. Later that day, 29 March 21, after the claimant had been sent home, Ross Hutchison telephoned the claimant. In that telephone conversation he told the claimant that there was no paper trail of Malcolm Aien having previously

subjected the claimant to any bullying or harassment nor of any formal complaint about that made by the claimant. He told her that in his view therefore “*It didn’t happen, it didn’t happen*”. He dismissed her concerns and the whole premise, in the claimant’s assessment, of the reason for her sickness and absence from work.

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36. As at the 29<sup>th</sup> of March 2021, the respondent was aware, in the person of the claimant’s former first Line and then current second Line Managers and separately are deemed to have been aware, that the claimant considered herself unable and, therefore for immediate purposes, should be regarded as unable, to maintain contact with Malcolm Aien during her absence, for the purpose of complying with the respondent’s policies, he being the Manager who on the one hand the policies at first instance required her to maintain contact with but on the other hand was the individual whom she alleged had in the past subjected her to bullying and harassment.

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37. In the above circumstances, and in the context of the importance attached by the respondents, in their policies, to contact being maintained between an absent employee on the one hand and the appropriate Manager on the other and in circumstances where, for the reasons explained by the claimant to Lynn Jamieson and Ross Hutchison on the 29<sup>th</sup> of March, Malcolm Aien was not the appropriate Manager, that is to say was a Manager with whom the claimant did not feel able or capable of being in direct contact with, there was readily available to the respondents the option of, as Mr Aitchison, the respondent’s witness put it in evidence “*involving another Manager*”; that is to say of identifying a Manager other than Malcolm Aien as the point of contact with whom, the claimant should maintain contact during her absence and with whom she should seek to agree an appropriate time and date for reviewing her absence.

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38. The respondents did not identify an alternative point of managerial contact for the claimant. The respondent caused what the claimant described to Malcolm Aien in her letter of 30<sup>th</sup> April 21 and to Mr Aitchison in the course of

the Appeal Hearing before him as, "standard absence letters" to be sent to the claimant.

- 5 39. The standard absence letters sent by Malcolm Aien to the claimant require the claimant, in their terms, to make contact with him Malcolm Aien during, in respect of and in order to review the claimant's absence, that being something which the claimant was unable to do because of her anxiety and apprehension caused by the prospect of doing so.
- 10 40. In causing and permitting letters to be sent to the claimant in the above terms the respondent was aware that the claimant was unable to comply with the requirement contained in them.
- 15 41. Immediately prior to and during the period of her absence the claimant who worked part-time for the respondent, concurrently, and with the respondent's consent and agreement, also worked for another employer, Royal Mail Cleaning Property Services Limited (RMPS) which although, as the claimant described it in her evidence "a division of Royal Mail" was a separate legal entity. In that separate employment the claimant provided part-time cleaning services in the same premises (Delivery Office) in and from which she performed her postal duties.
- 20 42. On the morning of the 29<sup>th</sup> of March 21, the first day of the claimant's absence, she made contact with her Royal Mail Property Services Manager and disclosed to her what she had already communicated to two of the respondent's representatives. The claimant's Royal Mail Property Services Limited ("RMPS") Manager advised her that she would adjust the claimant's hours of work such that she would be able to attend in the Delivery Office and carry out her cleaning duties at a time of day when the respondent's Manager Malcolm Aien was not present. She further advised the claimant that she would make contact with the relevant Managers of the respondent and with "HR" to confirm the agreement of the respondents and HR to that arrangement thus allowing her to continue to perform her duties under that separate employment, notwithstanding the fact that she was absent on sick
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leave from her primary employment, and to do so on an ongoing basis during her period of absence from her primary employment.

- 5 43. The claimant's RMPS Manager subsequently advised her that that arrangement had been put in place and agreed both with the respondents and with HR. The claimant accordingly continued to perform her duties under her separate employment notwithstanding her absence on sick leave from her primary employment.
- 10 44. When the claimant so continued to perform her duties she did so with the agreement and consent of the respondent. Her doing so in the circumstances of the respondent's prior consent and knowledge did not constitute a breach of, or a failure to comply with; the respondent's Sick Pay and Sick Pay Conditions Policy, of the provisions of its Attendance Policy or  
15 of its Absence Notification and Maintaining Contact Guide for Employees. It did not, of itself, provide a basis justifying, upon a reasonable exercise of its discretion, by the respondent, the stoppage of her contractual sick pay.
- 20 45. The fact that that agreement had been in place was a matter acknowledged and accepted by Mr Aitchison in the course of the Appeal Hearing and, in his evidence before the Tribunal. It was a matter of which he took no account when, after appeal hearing and in exercise of his discretion, retaking the decision to stop the claimant's contractual sick pay.
- 25 46. On 29<sup>th</sup> March 2021, the first day of her absence, the claimant also made contact with her Trade Union representative Mr Ross Johnston, disclosing to him at that time all that she had communicated to the respondent's Managers. She explained to Ross Johnston that she was unable to have  
30 direct contact with her new Line Manager Malcolm Aien, the Manager who, in terms of the respondent's policy, was the Manager with whom she was directed to maintain contact but who was also the individual at whose hands she alleged she had suffered bullying and harassment.

47. The claimant's Trade Union representative, Mr Ross Johnston, told the claimant that she did not require to have direct contact with Malcolm Aien because he, in his capacity as her Trade Union representative, could act as the point of contact between herself on the one hand and Mr Aien (the respondents) on the other hand,

- that he would represent her in all those matters of contact, and,
- that she should pass immediately to him any absence management correspondence received and he would deal with it.

48. The claimant agreed to Mr Johnston so acting as her representative and she proceeded on the basis that he would and was continuing to do so. She passed to him, as directed by him, screen shots of each and all of the letters received by her from the respondents, on the day upon which she received them (pages 54 to 64 of the claimant's Bundle ("C-54 to 64")). She also spoke with her Trade Union representative by telephone in the period 29<sup>th</sup> March to 13<sup>th</sup> April on a number of occasions.

49. The first "standard absence letter" which the claimant received from Malcolm Aien inviting the claimant to attend a meeting with him at 10 am on the 8<sup>th</sup> of April at the Bo'ness Delivery Office, was dated 5<sup>th</sup> of April 2020 whereas the year was in fact 2021. The claimant sent a screen shot of that letter to her Trade Union representative Ross Johnston on the 5<sup>th</sup> of April the day on which she received it in order that he could contact Malcolm Aien in response to the letter and attend the meeting, on 8<sup>th</sup> April 2021, on the claimant's behalf as her representative. Although the letter was received by Ross Johnston from the claimant he took no action in respect of it. He did not attend the meeting. He did not tell the claimant that he had taken no action in response to the letter. He did not tell the claimant that he had not attended the meeting of 8<sup>th</sup> April.

50. Following the 8<sup>th</sup> of April the claimant spoke with Ross Johnston by telephone. She asked him how the meeting had gone. He replied by telling her *“it went all right”* and *“I’ll deal with it all on your behalf”*.
- 5 51. Following her self-certification of the first 7 days of her absence, and in accordance with the respondent’s policy, the claimant contacted her GP on 5<sup>th</sup> April 2021. Due to the COVID restrictions then in place the claimant required to consult with her GP by telephone. Her GP certified her as unfit to work in the period 5<sup>th</sup> April 2021 up to the 26<sup>th</sup> of April 2021 because of  
10 “stress at work”.
52. The claimant’s GP dated the claimant’s fit note 6<sup>th</sup> of April 2021. Because of the then prevailing COVID restrictions the claimant was not permitted to uplift the sick note from her doctor’s surgery but rather had to await its being sent  
15 to her by post. The sick note arrived with the claimant within a few days of the 6<sup>th</sup> of April 2021. When she received it, she herself took it to the Delivery Office when next attending there in the performance of her cleaning duties and placed it in the internal mail system for the attention of Mr Aien.
- 20 53. As at the date of Mr Aien’ decision to stop the claimant’s contractual sick pay, the claimant had provided the respondents with a medical certification of her absence in compliance with the requirements of the respondent’s policies. The claimant continued to provide the respondents with medical certification of her absence compliant with the requirements of the respondent’s policies  
25 for the whole period of her absence.
54. The second “standard absence letter” which the claimant received from Malcolm Aien was a letter dated 10<sup>th</sup> April 2021, (the claimant forwarded a screen shot of that letter to her Trade Union representative Ross Johnston on  
30 the day upon which she received it namely 10<sup>th</sup> April 2021 (C-56).
55. In the letter of 10<sup>th</sup> April 2021 Mr Aien makes reference to the claimant’s “failure to attend the initial meeting arranged for the 8<sup>th</sup> of April 2021”, and going on to state that he was inviting her to attend in those circumstances a

meeting on the 12<sup>th</sup> of April 2021 at 10 am. He went on to state "*I would also like to note that you have not provided me with a medical certificate for your absence. Can you please provide me with your medical certificate.*" An inference arises from that statement that as at the time of drafting the letter, the claimant's medical certificate, which had been placed by her in the internal mail system for the attention of Mr Aien, had not yet come to his attention.

56. At that time because of the various constraints placed upon operations by COVID there were delays impacting adversely upon amongst other matters, upon the amount of time taken for internal mail to be distributed to its addressees.

57. The fact that the claimant's medical certificate delivered by her to the respondent's premises marked for the attention of her Line Manager had not yet come to his attention, did not constitute a breach on the part of the claimant of the conditions set out in the respondent's policies.

58. In the letter of 10<sup>th</sup> April 2021 Mr Aien went on to state "*Although this is an informal meeting if it would help, your Union representative can join us at the meeting. If you would like them to attend with you please let me know.*" The letter ended with the statement "*Please contact me [the Tribunal's emphasis], to confirm your attendance at the meeting.*" That same day, the claimant forwarded the letter of 10<sup>th</sup> April, by screen shot, to her Trade Union representative at 23:50 hours on Saturday the 10<sup>th</sup> of April (C-56).

59. The claimant did not understand why the letter had been written in circumstances where she believed and understood that her Trade Union representative was to and had attended the meeting on her behalf on 8<sup>th</sup> April. She expected that her Trade Union representative would make contact with her on Monday 12<sup>th</sup> April to explain what had happened in relation to the meeting of 8<sup>th</sup> April and to confirm that he would now contact Mr Aien on her behalf and arrange to attend the meeting on 12<sup>th</sup> of April. The

claimant's Trade Union representative made no contact with her on Monday 12<sup>th</sup> of April.

- 5 60. The third "standard absence letter" which the claimant received from Malcolm Aien was a letter dated 12<sup>th</sup> April 2021 (R-43). That letter was sent to the claimant either by ordinary first class post, or by "Special Delivery before 1 pm" which, in the case of the latter means that it could be delivered as late as 1 pm on that day. No record of how the letter was sent was kept or produced by the respondent. That letter was received by the claimant on the 10 13<sup>th</sup> of April. The claimant forwarded the letter by screen shot on that same day, 13<sup>th</sup> April, to her Trade Union representative Mr Johnston.

### **Stoppage of Sick Pay**

- 15 61. In the letter dated 12<sup>th</sup> April 2021 Mr Aien communicated a decision, taken by him on the 12<sup>th</sup> of April 2021, to stop the claimant's contractual sick pay. The terms of his decision and his reasons for taking it were set out by Mr Aien in the last two paragraphs on its first page and the first paragraph on its second page (R-44 and 45). Those paragraphs were preceded by a list of 20 requirements extracted variously from the respondent's three policies identified above and narrated by Mr Aien as being mandatory viz:- "*Whilst on sick leave please note you must*" [the Tribunal's emphasis].

- 25 62. The decision and the reasons for the decision to stop contractual sick pay were in the following terms:-

30 *"You need to follow the above procedures to ensure that you continue to meet the criteria to receive both Royal Mail and statutory sick pay. Failure to comply with absence reporting procedures can result in stoppage of pay and or further more serious sanctions. Since your absence on the 26<sup>th</sup> of March you have failed to comply with the above procedures as you have:*

*1 failed to communicate with your Line Manager during absence*

5 *2 failed to agree and maintain a contact strategy with your Line Manager*

*3 failed to discuss details of your absence with your Line Manager*

10 *4 continue to perform work for another employer within the same Royal Mail premises, from which you are unable to attend as you have reported sick*

15 *5 failed to attend 2 management interviews to discuss your absence*

*6 failed to notify your Line Manager directly of your failure to attend management interviews [the Tribunal's emphasis]*

20 *As a result of your failure to comply with Royal Mail sick absence procedures, I must advise you that from 13 04 2021 you will no longer be entitled to receive Royal Mail sick pay”*

25 63. The numerated failures relied upon in the letter do not include any reference to a failure to provide medical certification of her absence, which had been referred to in the letter of 10<sup>th</sup> April 2021. A reasonable inference arises from its exclusion from the letter of 12<sup>th</sup> April that, as of that date, the claimant's policy compliant medical certification had come to the attention of Mr Aien and that he no longer considered her to be in breach of the respondent's policies in that regard.

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64. The decision and the reasons notified in the letter of 12<sup>th</sup> of April were predicated upon a number of factual inaccuracies. At paragraph 4 the statement that the claimant had continued to perform her work for another

employer from within the same Royal Mail premises which she was unable to attend as she had reported sick, was not the case. The claimant was able to attend the premises to carry out the particular work for the other employer by reason of the agreement between that employer, the respondent and HR, put in place and confirmed before the claimant's continued attendance, that she was able to do so, notwithstanding her having reported sick. She was so able because of the adjustment to her hours which the other employer had made such that she was able to attend and perform those duties at times when Malcolm Aien, the author of the letter, was not present.

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65. The decision and reasoning stated that the claimant had failed to comply with the respondent's procedures since her absence on the 26<sup>th</sup> of March. The claimant had not been absent since the 26<sup>th</sup> of March and no question of her non-compliance with absence policies was focused prior to the first day of her absence on the 29<sup>th</sup> of March.

15

66. Separately, the letter of 12<sup>th</sup> April did not constitute a competent notice, compliant with the respondent's own policies, of a discretionary stoppage of the claimant's contractual sick pay. The letter, although dated the 12<sup>th</sup> of April, was received by the claimant and came to her notice on the following day the 13<sup>th</sup> of April 2021. In its terms, the letter bore to give the claimant notice of the stoppage of (removal of her entitlement in law to) her contractual sick pay on the same day on which the sick pay was to be stopped viz "As a result of your failure to comply with the Royal Mail sick absence procedures, I must advise you from the 13<sup>th</sup> of the 4<sup>th</sup> 2021 you will no longer be entitled to receive Royal Mail sick pay."

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67. As the Tribunal has found in fact at paragraphs 22 to 29 above, the respondent's policies specify, unequivocally, that the discretion accorded to the respondents to stop sick pay in the circumstances founded upon by them, only arises:- "Following written confirmation giving the employee 2 days notice, ..." (R-30 and again at R-34):- "In the rare event that contact is not maintained following the expiry of a fit note, the employee will be given 2 days written notice before any suspension of sick pay."

30

68. As at 12<sup>th</sup> April 2021 the claimant's then applicable sick note (C-121) had not expired, it covering the period from 6<sup>th</sup> April up to and including 28<sup>th</sup> April.
- 5 69. The requirement applying to the respondent, in terms of their own policy as employers, that they give an employee "2 days' notice" of a decision taken in exercise of their discretion before the day upon which they stop sick pay, is unambiguous. It is an unqualified requirement. It is not a requirement which the respondents have any discretion to waive or vary. It is a pre-requisite, absent which the respondent's discretion to stop sick pay is not awakened.
- 10
70. The amount of notice connoted by the term "2 days" is not ambiguous. Applying the normal rules of construction and according to the words their normal English language meaning "*Following written notification giving the employee 2 days notice,*" means written notification giving the employee fully
- 15 48 hours' notice.
71. The notice upon which the respondent's decision, of 12<sup>th</sup> April 2021, to stop the claimant's sick pay was predicated, was not compliant with the respondent's own mandatory requirements. It was not an effective notice. As at the date and time the decision was taken and the pay was stopped, it was not habile for the purposes of awakening and had not operated to awaken the discretion, which is accorded to the respondents in terms of their policies, to stop an employee's sick pay.
- 20
72. The respondent's purported discretionary decision, taken by Mr Aien on 12<sup>th</sup> April 2021 said to be effective on the face of the notice on 13<sup>th</sup> April 2021, was a "non-decision", a nullity, and did not have the effect of removing the claimant's entitlement in law to receive contractual sick pay which
- 25 entitlement continued.
- 30
73. The respondents, in fact, stopped paying the claimant her contractual sick pay with effect from the 14<sup>th</sup> of April and not with effect from the 13<sup>th</sup> of April.



74. The defective notice was not capable of being rectified and was not rectified retrospectively by the respondents stopping the claimant's sick pay one day later than they purported to give notice of.

5 75. Separately and in any event, notice received by the claimant on the 13<sup>th</sup> of April of a stoppage of her sick pay the following day, 14<sup>th</sup> of April, being less than 2 days' notice, would have been, and was, equally non-compliant and ineffectual resulting in any decision, to stop sick pay on 14<sup>th</sup> April 21, which was predicated upon it also being a nullity.

10

76. In order to be effective in removing the claimant's entitlement in law to receive contractual sick pay the apparent, but in fact non-decision, required to be taken:-

15

(a) Of new

(b) In the reasonable exercise of the respondent's discretion, in circumstances in which

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(i) The respondent's discretion to stop sick pay had been awakened by the giving to the claimant of notice compliant with the mandatory requirements of the respondent's policies that is to say

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- *“Following written notification giving the employee 2 days' notice”*

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77. Insofar as bearing to be founded upon the letter of 12<sup>th</sup> April, which was received by the claimant at some indeterminate time on the 13<sup>th</sup> of April 2021, only a decision of the respondent, taken of new, to stop the claimant's contractual sick pay with effect from 15<sup>th</sup> of April 2021, at the earliest, or from some later date, has the potential to be a decision taken, following “written notification giving the employee 2 days' notice”.

78. In the period from 12<sup>th</sup>, and after 14<sup>th</sup> April and 22<sup>nd</sup> September 2021, no discretionary decision to remove the claimant's entitlement to contractual sick pay was taken, of new, by the respondent and communicated to the claimant.

5 79. On 30<sup>th</sup> April 2021 the claimant wrote to her Line Manager Malcolm Aien. A copy of the letter is produced by the claimant at C-7. The claimant personally delivered the letter placing it on Mr Aien's desk on or about the 30<sup>th</sup> of April 01 when in the premises discharging her cleaning duties at a time of day when Mr Aien was not present.

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80. The letter was in the following terms:-

“

30/4/21

*To whom it may concern*

15

*Please let me start off by apologising for my lack of correspondence. I was advised by Union that they could speak for me with yourself during this time. So I assumed Ross letting you know I couldn't attend face to face or telephone appointments was sufficient.*

20

*You and everyone else are well aware that I am off work because of previous issues with yourself, so there is no way these “standard absence letters” are making me feel any better or supported as they completely ignore this issue.*

25

*Gary Clarke told me he would call you yesterday to let you know I wouldn't be attending 1<sup>st</sup> of May meeting. He said he would get another time arranged with another Manager. [The Tribunal's emphasis] – I do hope he has!!*

30

*Make no mistake, I want to be working but at this time I hope my sick line from doctor's will do.*

*As far as wages being stopped well that's been done without notification (according to Union).*

*I'm very happy to contact through email or text. Email is [cakethat@hotmail.co.uk](mailto:cakethat@hotmail.co.uk), phone: 07794603669*

*Pamela Gray*

5  
10 81. Mr Aien subsequently confirmed to Emily Bembow that he had received and read that letter but did not consider it worthy of any response. Mr Aien did not respond to the letter.

15 82. Mr Aien (the respondent) determined to treat the claimant's letter of 30<sup>th</sup> April 21 as a grievance against his decision communicated in his letter of 12<sup>th</sup> April 21, to stop the claimant's contractual sick pay.

20 83. Mr John Bryce, one of the respondent's Managers who was of an equal grade to Mr Aien was appointed as a Grievance Officer. At Mr Bryce's request, the claimant, accompanied by her new Trade Union representative Emily Bembow attended a grievance meeting with Mr Bryce on 7<sup>th</sup> June 2021.

25 84. The respondent did not include amongst the papers passed to Mr Bryce for the grievance hearing, a copy of the claimant's letter of 30<sup>th</sup> April 21 (C-53).

30 85. Mr Bryce's determination of the claimant's "grievance" is set out at pages 51 to 53 of the respondent's Bundle (R-51 – 53). At R-52 Mr Bryce sets out, by way of quotation shown in italic, the question put by him to the claimant regarding what the claimant's grievance was and the claimant's response:-

*"JB: Pamela could you list the aspects of your grievance individually and I will capture them as points to investigate.*

*PG: My wages were stopped with no notice. Only the standard absence letter was received saying wages could be stopped."*

86. In her response to Mr Bryce's question the claimant identified two aspects of her grievance for investigation:-

- 5                   (1) The fact that her wages were stopped without notice; and
- (2) That only standard absence letters were received advising her that wages could be stopped.

10 87. The second aspect of the claimant's grievance echoed the terms of her letter of 30<sup>th</sup> April. The point being made by the claimant and the matter about which she was aggrieved arose from the fact that she had advised both her then first Line and her second Line Managers, on the first day of her absence, that she could not be in contact with Mr Aien because of her perception and  
15 allegation that she had been subjected to bullying and harassment by Mr Aien on an earlier occasion. Thus, that a Manager other than Mr Aien should have been identified as the Manager with whom she should keep in contact for the purposes of the respondent's policies. The respondent, however, had not identified another Manager but rather had caused Mr Aien  
20 to send to her "standard absence letters", that is to say letters which directed her to make contact with Mr Aien, something which she had made the respondents aware for the first day of her absence that she was not able to do, and informed her of Mr Aien's decision to stop her contractual sick pay because she had not kept contact with him.

25

88. In the course of the grievance hearing, the claimant had accepted that Mr Aien's letter of 12<sup>th</sup> April, which she had received, did contain some notification of his decision to stop her contractual sick pay.

30 89. Upon the basis of that acceptance Mr Bryce determined the claimant's grievance, deciding not to uphold it. In so doing he addressed only one of the two aspects of the grievance which the claimant had communicated to him in response to his questions. His determination, at pages R-51 to R-53, discloses no consideration or determination of the second aspect of the

grievance namely, that no alternative Manager had been appointed and that despite knowing of her inability to do so and reasons therefor, the respondents caused letters to be sent to her requiring her to make and keep in contact with Mr Aien.

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90. In so determining the claimant's grievance Mr Bryce did not take, of new as at 26<sup>th</sup> June 2021, any discretionary decision to stop the claimant's contractual sick pay.

10 91. Rather, by not upholding the grievance on the ground that he set out, Mr Bryce merely affirmed or endorsed the apparent decision taken by Mr Aien and communicated by him in his letter of 12<sup>th</sup> April 20 [*sic* 21] to stop the claimant's contractual sick pay as at 13<sup>th</sup> or, on the respondent's alternative predication on 14<sup>th</sup> April 21. That decision of Mr Aien was, as the  
15 Tribunal has found in fact above, a decision which was not predicated upon the giving of written notice which was compliant with the respondent's policies such as to awaken Mr Aien' discretion to take it. It was a non-decision.

20 92. By letter dated 1<sup>st</sup> July 2021, (R-54 to R-58), the claimant appealed against the decision taken by Mr Bryce to not uphold her grievance.

25 93. The claimant's grounds of appeal are fully set out in her appeal letter of 1<sup>st</sup> July 21 (R-54 to R-58, the terms of which letter are referred to here for their full term which are held incorporated by reference for reasons of brevity).

94. The claimant's appeal letter of 1<sup>st</sup> July 21 set out 13 separate bullet pointed grounds of appeal. Those grounds, amongst others, included:-

30 (a) the claimant's assertion that her then Trade Union representative had agreed to "*act as my voice ... stand in for me as contact with my Manager, so I should not be penalised for failure to attend meetings as he was meant to be attending these on my behalf according to our contact strategy*"

- 5 (b) That she believed that her Trade Union representative, to whom she had forwarded each of the standard absence letters received by Mr Aien, was in contact with Mr Aien and was attending meetings on her behalf
- 10 (c) that in the case of employees who are unable to attend absence related meetings, Trade Union representatives are able to attend those meetings on the employee's behalf, or that contact in writing is acceptable as contact,
- 15 (d) that a referral to Occupational Health should be made as part of the decision making process on whether an employee is well enough to attend meetings.
- 20 (e) That as soon as the claimant became aware of the fact that her Trade Union representative had not attended the meetings and had not been in contact with Mr Aien (she had delivered to the respondents addressed to him the letter of 30<sup>th</sup> April, (C-53), making contact with him, explaining what she had understood to be the position in relation to her Trade Union representative and offering a telephone number and an email address for contact.
- 25 (f) That the letter of 12<sup>th</sup> April, received from Mr Aien contained errors in the dates
- (g) that the decision to stop her contractual sick pay had been taken without any Occupational Health advice.
- 30 (h) That her continued attendance in the premises to carry out her cleaning duties for her other employer ROMEK had occurred following agreement between ROMEK and the respondents and HR that she may do so and thus was not a breach of the respondent's conditions

95. The respondents did not include the claimant's letter of appeal amongst the papers which they provided to the Internal Appeal Officer Mr Aitchison.
- 5 96. Mr Aitchison confirmed in evidence before the Tribunal that he had not seen the claimant's appeal letter at R-51 to R-53 before seeing it in the Hearing bundle.
- 10 97. He further confirmed in evidence, in relation to instances of failure to comply with the respondent's policies upon which the respondents (Mr Aien) relied in his erroneously dated letter of 12<sup>th</sup> April 2020 and or referred to in his preceding letter of 10<sup>th</sup> April 2021, he, Mr Aitchison, for his part, was satisfied and accepted:
- 15 (a) that the claimant continuing to perform work for another employer within the same premises was not, in the circumstances of the agreement which he accepted had been put in place, a breach of the respondent's conditions.
- 20 (b) That he accepted that the claimant had provided the respondent with compliant medical certification of her absence throughout her period of absence.
- 25 (c) That whereas the claimant had told him that her then Trade Union representative Mr Ross Johnston had agreed to maintain contact and attend meetings with Mr Aien on her behalf, Mr Johnston had told him that he could not recall the claimant asking him to represent her in relation to her absence.
- 30 (d) That he had not disbelieved either Mr Johnston or the claimant in relation to the question of representation.
- (e) That he had accepted that at the time at which Mr Aien took his decision to stop the claimant's contractual sick pay, the claimant

had genuinely believed that her Trade Union representative Mr Johnston was representing her in her absence, maintaining contact with Mr Aien and attending meetings with Mr Aien but, as a matter of fact

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(i) Mr Johnston had not so acted and that no-one made contact with Mr Aien nor attended the meetings proposed by Mr Aien on the claimant's behalf and that,

10

(ii) The claimant herself did not contact Mr Aien or attend meetings with him in the period 29<sup>th</sup> March to 12<sup>th</sup> April 21

15 98. In his appeal outcome communication dated 22<sup>nd</sup> September 2021 (R-59 to R-61), Mr Aitchison identifies only two grounds of appeal upon which he based his decision (R-60) these being that of a failure to inform the claimant (give her notice) that her contractual sick pay would be stopped in relation to her current absence and the second, relating to the "non-cooperation" [*sic* non-compliance with] Royal Mail sick absence policy and in particular  
20 maintaining contact with the Delivery Office Manager in relation to the absence.

25 99. In his decision Mr Aitchison explains that he had not upheld the appeal on either of these grounds because the claimant had accepted before him that she had received the letter of 12<sup>th</sup> April 2020 [*sic* 2021] and because there was no evidence that Ms Gray had had contact with the Delivery Office Manager [Mr Aien] in relation to her then current absence.

30 100. Mr Aitchison's determination of the second element takes no account of the claimant's ground of appeal set out at the second sub bullet point at R-56 being:-



- (a) her explanation as to why she was not able to directly make contact face to face with Mr Aien and,
- 5 (b) her assertions that she had made contact with Mr Aien in writing once she had become aware of the fact that her Trade Union representative had not attended the meetings on her behalf (the letter of 30<sup>th</sup> April 21 (at C-53), in which she; apologised for what she now understood to be the lack of contact, explained why she was unable to have face to face contact with Mr Aien and offered two alternative means for him to contact her by (telephone or email)).
- 10

101. Neither the claimant's written grounds of appeal nor her letter of 30<sup>th</sup> April 21 both of which were received by the respondents were included by them in the appeal papers provided to Mr Aitchison.

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102. In explaining the basis of his decision Mr Aitchison confirmed in his evidence before the Tribunal that the conditions set out in the respondent's sick pay and sick pay conditions policy, (R-41(c)), made clear that "entitlement to sick pay is always subject to strict observance of the following conditions:-

20

- (a) Self-certificates or medical certificates including fit notes must be received by the business for all sick absences
- 25 (b) The business must be satisfied that an employee's absence is necessary due to genuine illness
- (c) The business reserves the right to refuse sick pay if an absence is due to or is aggravated by causes within the employee's control, or if the employee had neglected instructions by a doctor
- 30 (d) An absent employee shall remain at their normal home address (other than to receive in patient management treatment) unless

they have consent of their Line Manager or local Personnel Manager

- 5 (e) Employees who are sick immediately before they are due to go on holiday must confirm to their Manager that they are going on holiday on the due date (unless sick absence continues and the employee remains at home)”

10 103. Mr Aitchison confirmed in his evidence before the Tribunal that in determining the appeal he had revisited the original decision and, in not upholding the appeal and that he had himself taken, of new as at the 22<sup>nd</sup> of September 2021, the decision to stop the claimant’s sick pay.

15 104. In the penultimate paragraph of his decision (R-61) he states: *“It is also important to note that I have revisited the case given Ms Gray’s concerns about John Bryce, DOM Linlithgow, hearing the original case. In normal circumstances the appeal would consist of new evidence or where the original decision could be seen as inherently unfair. I have reviewed all of the previous information and evidence before coming to a decision.”*

20 105. In his evidence before the Tribunal Mr Aitchison accepted that maintaining contact with their Manager during sickness absence was not one of the conditions listed in the respondent’s policy as requiring strict observance in relation to entitlement to sick pay. His decision to stop the claimant’s contractual sick pay was not taken on the ground that she had failed to do so.

30 106. Mr Aitchison referred the Tribunal to the anti-penultimate paragraph of his decision (R-61) in which he makes reference to having himself offered to the claimant, in the course of the Appeal Hearing, the opportunity to transfer to an alternative Delivery Office where there would be no requirement for her to have contact with Mr Aien but that she had declined that offer.

107. Mr Aitchison stated that in the above circumstances, while being satisfied that the claimant’s absence was due to genuine illness, he could not be satisfied

that the claimant's absence was necessary and on that ground and basis took, of new, the decision to stop the claimant's sick pay. That ground was not one which was engaged as at the time of Mr Aien's decision of 12<sup>th</sup> April.

5 108. As at 22 September 2021, Mr Aitchison (the respondent) took, of new, a decision to stop the claimant's contractual sick pay.

109. The requirement that an employee satisfy the respondent that, amongst other matters, their absence is necessary is, in terms of the respondent's sick pay and sick pay conditions policy (R-41(c)) one of the conditions to the strict observance of which entitlement to contractual sick pay is subject. The non-observance of that condition by the claimant was the basis upon which Mr Aitchison, on 22<sup>nd</sup> September 2021, took, of new, the discretionary decision to stop the claimant's contractual sick pay.

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110. In the circumstances presented to him, in relation to the observance/non-observance of that condition Mr Aitchison's decision to stop the claimant's contractual sick pay on that ground, constituted a reasonable exercise of discretion.

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111. The discretionary decision taken by Mr Aitchison on the 22<sup>nd</sup> September 2021 was a decision predicated upon the notice contained in the respondent's letter to the claimant of 12<sup>th</sup> April 2020 [*sic* 2021].

25 112. The decision of 22<sup>nd</sup> September 2021 was a decision taken "following written notification giving the employee 2 days' notice the letter of 12<sup>th</sup> April 2020 [*sic* 2021] and was effective for the purposes of awakening the respondent's discretionary power to stop the claimant's contractual sick pay in respect of the decision taken after 15<sup>th</sup> April 2021.

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113. In the period from, and including 23<sup>rd</sup> September 2021, up to her return to work on 2<sup>nd</sup> December 2021 the claimant did not have entitlement in law to contractual sick pay, her prior entitlement having been removed in terms of

the decision of the respondents taken, in reasonable exercise of their discretion, by Mr Aitchison on 22<sup>nd</sup> September 2021.

5 114. In the period 23<sup>rd</sup> September to 2<sup>nd</sup> December 21, no element of contractual sick pay was properly payable to the claimant as wages.

10 115. In the period 23<sup>rd</sup> September to 2<sup>nd</sup> December 21, the respondent's non-payment to the claimant of contractual sick pay did not constitute a deduction from the claimant's wages for the purposes of section 13 of the Employment Rights Act 1996.

15 116. The claimant's Contract of Employment, which is copied and produced at R-64 to R-77 and is dated 12<sup>th</sup> November 2008, contains at R-72 the following clause:-

*"Employment Rights Act 1996 sections 13-27 (Deductions from Wages)*

20 24.1 *You agree that Royal Mail may at any time deduct from your salary or any other benefit payable to you any sum including any overpayment of salary or loan made to you by Royal Mail or any deductions arising from disciplinary action (including deductions resulting from a reduction in pay, downgrading or disciplinary transfers) which, in the reasonable opinion of Royal Mail, is owing by you to it, whether by reason of any default on your part or otherwise at the time of such*

25 *deduction is made."*

30 117. On application of the normal rules of construction and, according to the words used their normal English language meaning, clause 24.1 of the contract would have the effect of authorising in law, for the purposes of section 13 of the ERA, a deduction from the claimant's wages which was in the nature of a recovery by the respondent from sums properly payable to the claimant as

wages, in respect of an overpayment of contractual sick pay earlier made by the respondent to the claimant in circumstances where the claimant had no entitlement in law to receive the same.

5 118. Applying to the same wording the normal rules of construction and, according to the words their normal English language meaning, the words used at clause 24.1 would not be effective in rendering authorised a deduction from sums properly due as wages to the claimant constituted, by the respondent's withholding from her contractual sick pay, in circumstances where the  
10 claimant had an entitlement in law to receive the same.

119. In the 24 week period from 14<sup>th</sup> April to 22<sup>nd</sup> September 21 inclusive, the claimant had entitlement in law to receive from the respondent full contractual sick pay at the gross rate of £248.17 per week being a total entitlement of  
15 £5,707.91 gross. In the same period the respondent made payment to the claimant only of statutory sick pay in the sum of £78.90 per week resulting in a total pay received by the claimant of £1,814.70.

120. In the period 14<sup>th</sup> April to 22<sup>nd</sup> September 2021 the respondent made an  
20 unauthorised deduction from the claimant's wages in the sum of (£5,707.91 - £1,814.70 which equals) **£3,893.21 gross**.

121. The claimant is entitled to receive from the respondent a sum equivalent to the amount of the unauthorised deduction made from her wages.

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122. The claimant's position had initially been that before the stoppage of her contractual sick pay with effect from the 14<sup>th</sup> of April 2021, she had not received any notice of the respondent's decision to do so. She had subsequently accepted however that the letter dated 12<sup>th</sup> April had contained  
30 some notice but under explanation that upon receiving it on the 13<sup>th</sup> of April she had failed to read it in sufficient detail such as to become aware of that notice before forwarding the letter by screen shot that same day, to her Trade Union representative for him to deal with.

123. The respondent's Mr Bryce in deciding not to uphold the claimant's grievance, (R-52), did so on the basis that the claimant had acknowledged before him that she had indeed received the letter of 12<sup>th</sup> April and thus, that what he perceived and recorded as the only ground of grievance, (R-52), fell away. Mr Bryce did not reconsider or retake the decision to stop (remove the claimant's entitlement to), contractual sick pay. That is to say he did not take of new the decision of 12<sup>th</sup> April which had been predicated upon the non-compliant notice of the same date.

## 10 **Summary of Submissions**

### **Summary of Submissions for the Claimant**

124. In submission, the claimant reiterated the following points made by her when giving evidence:-

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(a) That despite being told at senior Line Manager level on the first day of her absence that she could not be in direct contact with Malcolm Aien, the respondent had dismissed those concerns and had not appointed an alternative Manager to be her point of contact during her absence.

20

(b) That was reflected in the fact that they just sent her what she described as "standard absence letters" which required her to make contact with Malcolm Aien, the individual with whom she had an issue.

25

(c) That her Trade Union representative had told her not to be concerned about that because he would represent her under the Policy, would act as the point of contact and attend any meetings with Malcolm Aien on her behalf.

30

(d) Although she had subsequently become aware that her Trade Union representative had not attended the meeting, despite her forwarding to him all the correspondence as she received, it was

not right that she should be punished for a failing on her Trade Union representative's part.

5 (e) As far as an explanation for why her Trade Union representative might have behaved in that way, the claimant advised the Tribunal that because he had at that time been applying for and had obtained a Royal Mail management appointment she believed that he would have been motivated not to stand up for her interests.

10 (f) The respondent's policies under the heading "Employees Who Are Unable Or Refuse To Attend Absence Related Meetings Guide" envisaged that Trade Union representatives would be able to attend meetings on their behalf and so the course of action which she had followed had been a proper one it also went on to state  
15 that contact in writing was acceptable as contact and, after she became aware that Mr Ross Johnston had not attended the meetings on her behalf she had made contact in writing with Mr Aien leaving on his desk her letter of 30<sup>th</sup> April which provided  
20 him with both telephone and email points of contact, as an alternative to face to face meetings with her. That letter although accepted as received had not been responded to by the respondents nor, according to Mr Aitchison's evidence before the Tribunal, had it been included in the papers passed by the respondents to him for the Appeal Hearing.

25 (g) The same policy stated that a referral to Occupational Health should be made as part of the decision making process, whereas Mr Aien' decision to stop her pay was made on the 12<sup>th</sup> of April without any reference to Occupational Health.

30 (h) There were problems with the letter of 12<sup>th</sup> April giving notice. The dates on it were wrong and although the respondent's representative had suggested to her in cross examination that that was just as a result of mistakes on the part of the respondents they

were still wrong, and no other letter giving her the required 2 days' notice of stoppage of her contractual sick pay on the 13<sup>th</sup> or for that matter the 14<sup>th</sup> of April 2021 had ever been issued to her.

5 (i) Her Line Manager in her other employment (her ROMEK  
Manager), Lynn Jamieson, and her second Line Manager in her  
principal employment, Ross Hutchison, and HR, had agreed that  
she could continue to attend and carry out her other, cleaning  
duties at times when Malcolm Aien was not present in the  
10 premises but that was one of the reasons given by Mr Aien for  
stopping her sick pay.

(j) She had sent all three of the letters of the 5<sup>th</sup>, the 10<sup>th</sup> and the  
12<sup>th</sup> April to her Trade Union representative by screen shot on the  
15 day in which she had received them that being in the case of the  
first two letters on the 5<sup>th</sup> and the 10<sup>th</sup> of April respectively and in  
the case of the third letter on the 13<sup>th</sup> of April.

### **Summary of Submissions for the Respondent**

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125. The respondent's representative accepted that in the first two weeks of the  
claimant's absence, that is in the period from 29<sup>th</sup> March up to and including  
the 13<sup>th</sup> of April 2021, the claimant did have legal entitlement to receive  
contractual sick pay. After that date however she fell to be viewed as having  
25 no entitlement in law to receive contractual sick pay because, in  
circumstances where she had failed to strictly observe all of the "Conditions  
on which Sick Pay is payable" as set out in the Royal Mail Group Sick Pay  
and Sick Pay Conditions Policy, page 3 of 6 (R-41(c)), and following the  
written notification dated 12<sup>th</sup> April 2020 [sic 2021] received by the claimant,  
30 possibly the same day, which failing the following day 13<sup>th</sup> April 2021, the  
respondent had exercised its discretion, as set out in their "Absence  
Notification And Maintaining Contact Guide For Employees", page 4 of 5  
(R-30), to stop her contractual sick pay thus removing her entitlement to  
receive it with effect from the 13<sup>th</sup>, which failing the 14<sup>th</sup> of April 2021.



- 5 126. The letter of 12<sup>th</sup> April 2020 [*sic* 2021], the (“12<sup>th</sup> April”) letter, set out 6 failures on the part of the claimant which the respondent founded upon in the exercise of its discretion to remove her entitlement to contractual sick pay.
- 10 127. Of those asserted failures, number 4 was:- “continue to perform work for another employer within the same Royal Mail premises from which you are unable to attend as you have reported sick”. The respondent’s representative accepted, on the evidence of Mr Aitchison, the Internal Appeal Manager, that that was a state of fact which had in fact been the subject of approved agreement.
- 15 128. Grounds 1, 2, 3, 5 and 6 were all aspects of the claimant’s failure to maintain contact with her Manager Mr Aien which, in the respondent’s representative’s submission, was something which the claimant had come to accept in the course of the internal grievance/appeal process she had in fact failed to achieve.
- 20 129. Given the requirement for strict observance of the conditions set out in the Sick Pay and Sick Pay Conditions Policy, the fact that the claimant may have genuinely believed that her Trade Union representative was maintaining contact on her behalf, did not operate to undermine the decision to stop her sick pay.
- 25 130. The claimant’s entitlement to receive contractual sick pay having ceased with effect from 14<sup>th</sup> April 2021, no such element of pay was “properly payable to her as wages” for the purposes of section 13(3) of the Employment Rights Act and thus, the respondent’s representative submitted, the respondents withholding of it in the period 14<sup>th</sup> April to 2<sup>nd</sup> December inclusive did not constitute a deduction, authorised or unauthorised from the claimant’s wages for the purposes of her section 13 complaint, which complaint should be dismissed.
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131. Regarding the letter of 12<sup>th</sup> April the respondent's representative invited the Tribunal to conclude that it having been dated 12<sup>th</sup> April 2020, as opposed to 2021 was self evidently a clerical error and that nothing should turn upon that fact.

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132. Likewise, she invited the Tribunal to infer that the fact that the letter dated 12<sup>th</sup> April purported to give notice of stoppage of the claimant's sick pay on the following day, 13<sup>th</sup> April, was also an error because when one looked at the terms of the Absence Notification and Maintaining Contact Guide for Employees (Policy), (R-30), it provided that *"if an employee on long term sickness absence"*, which the claimant's absence had become as at the 11<sup>th</sup> of April 2021, *"does not make contact or fails to provide a further medical certificate then, "Following written notification giving employees 2 days' notice, any sick pay they may be entitled to from Royal Mail Group may be stopped"*. Standing that requirement she invited the Tribunal to infer that the date of 13<sup>th</sup> April had been erroneously inserted in the letter and it should be read by the Tribunal and should have been read by the claimant as meaning *"14<sup>th</sup> of April"* thus constituting the requisite 2 days' notice. Separately, it could be seen from the claimant's payroll information that her contractual sick pay was stopped not with effect from the 13<sup>th</sup> but rather from the 14<sup>th</sup> of April 2021.

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133. Regarding the date of delivery of the letter of 12<sup>th</sup> April, that is to say the date upon which its contents should be deemed to have come to the notice of the claimant, the respondent's representative accepted that there was no evidence placed before the Tribunal that went to establish whether the letter had been hand delivered to the claimant (Special Delivery) some time on the 12<sup>th</sup> of April the date which it bore, or, had been received by first class post on the 13<sup>th</sup> of April. Both methods of communication were identified as methods to be used by Managers in communicating with employees who were absent on sick leave. The respondent's representative invited the Tribunal to infer from the fact that the two previous letters, although letters inviting informal contact as opposed to a letter giving notice of stoppage of sick pay, had, on the claimant's evidence, been hand delivered to her some

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time on the day on which they were dated, that likewise, the letter of notice should be held to have been received by her on the day of its date, namely 12<sup>th</sup> April.

5 134. In the alternative let it be assumed, in the absence of any evidence  
contradicting the claimant's, that the letter of the 12<sup>th</sup> April was received by  
the claimant on the 13<sup>th</sup>, that should still be construed as 2 days' notice of the  
stoppage of contractual sick pay on the 14<sup>th</sup> of April which failing at worst,  
with effect from the 15<sup>th</sup> of April. In the respondent's submission that would  
10 be the only impact of the appearance of the 13<sup>th</sup> as opposed to the 14<sup>th</sup> of  
April in the letter as the date of effective stoppage and or of the effective date  
of the notice coming to the claimant's attention being regarded the 13<sup>th</sup> as  
opposed to the 12<sup>th</sup> of April. In the respondent's representative's submission  
it would not otherwise undermine or adversely impact upon the respondent's  
15 decision, taken by Mr Aien on the 12<sup>th</sup> and communicated in the letter of the  
same date, to stop the claimant's sick pay with effect from 13<sup>th</sup> April.

135. In the further alternative, let it be assumed that the notice was ineffective for  
the purposes of awakening the respondent's discretion in respect of a  
20 decision of 12<sup>th</sup> April to stop the claimant's contractual sick pay with effect  
from the 13<sup>th</sup> and or 14<sup>th</sup> of April, which was denied by the respondent, and  
thus that the decision to stop the claimant's sick pay required to be taken of  
new "*following written notification giving the employee 2 days' notice*", the  
respondent's representative invited the Tribunal to view Mr Bryce's grievance  
25 outcome of 26<sup>th</sup> June which failing, Mr Aitchison's appeal decision of  
22<sup>nd</sup> September, as a retaking of that decision.

136. Regardless of when the letter of 12<sup>th</sup> April was delivered to the claimant and  
regardless of whether the date appearing in it accurately reflected the date  
30 upon which the respondents had initially intended to stop the claimant's  
contractual sick pay, the letter in the respondent's representative's  
submission was effective notice, compliant with the requirements of the  
respondent's own policy, to awaken the respondent's discretion in respect of  
a decision to stop the claimant's sick pay taken at any time after the 15<sup>th</sup> of

April, that is to say the requirements of the respondent's policy "*following written notification giving the employee 2 days' notice*".

137. The respondent's representative, on the basis of the above, invited the Tribunal, in the alternative, to regard the claimant as having no entitlement to receive contractual sick pay from the 26<sup>th</sup> of June 21, that is the date of Mr Bryce's grievance outcome, which failing and in the further alternative, with effect from 22<sup>nd</sup> September 21, the date of Mr Aitchison's appeal outcome.

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### **Discussion and Disposal**

138. On the oral and documentary evidence presented and upon the Findings in Fact which it has made, the Tribunal was satisfied that the letter of 12<sup>th</sup> April did not constitute compliant notice as required by the respondent's Absence Notification and Maintaining Contact Guide For Employees (Policy) (R-30), of the discretionary decision taken on 12<sup>th</sup> April by the respondent (Mr Aien) to remove the claimant's entitlement to) contractual sick pay with effect from 13<sup>th</sup> April 21, which it bore to do on its face, or, for that matter, with effect from 14<sup>th</sup> April 2021 being the date from which the respondents in fact withheld the contractual sick pay.

139. In terms of the provisions of the Policy relied upon by the respondent, their discretionary power to stop sick pay is awakened, all other things being equal, only following written notification "*giving the employee 2 days' notice*". There is no ambiguity arising from the terms of their own policy upon which the respondents rely. The application of the normal rules of construction to the wording of the policy and requirement at R-30, and, according to the words their normal English language meaning, identifies a requirement for written notification giving the employee 2 days' notice of the stoppage. In this context the term "2 days" means 48 hours. It does not mean something less than 48 hours for example one day. Nor does it mean 1½ days, let it be assumed that the letter was delivered to the claimant at some time up to 1 pm on the 12<sup>th</sup> of April, a state of fact which the Tribunal has not found

established. Nor again, let it be further assumed that it fell to be read as notice of a stoppage which was to occur on the 14<sup>th</sup> and not, contrary to the terms of the notice itself, on the 13<sup>th</sup> of April i.e. on the day of the stoppage itself.

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140. The notice relied upon, by the respondent was not effective to awaken the respondent's discretion to stop the claimant's contractual sick pay on the 13<sup>th</sup> or on the 14<sup>th</sup> of April 21, the latter being the date upon which it was stopped.

10 141. In those circumstances the stoppage of contractual sick pay which occurred on the 14<sup>th</sup> of April, did not occur in circumstances where the claimant's acknowledged pre-existing entitlement in law to receive it had been removed by the respondent in the reasonable exercise of its discretion.

15 142. The claimant's entitlement in law to receive contractual sick pay continued, uninterrupted beyond the 14<sup>th</sup> of April 2021 until removed by a decision taken, of new, by the respondents in the reasonable exercise of their discretion, to stop, and remove, the claimant's entitlement to, sick pay on a subsequent date, one taken, to quote the requirements of the policy relied upon by the  
20 respondents at (R-30), "*Following written notification giving the employee 2 days' notice*", [when revising insert all 3 of the above as Findings in Fact].

25 143. On the issue of what fell to be regarded as the effective date of the notice, that is to say on what date was it delivered to the claimant, the Tribunal rejected the respondent's representative's invitation that it should infer that the letter of 12<sup>th</sup> April was received by the claimant some time in the course of the 12<sup>th</sup> of April on the basis that the claimant had confirmed in evidence that the two preceding letters inviting her to meetings had been received by her on the days upon which they had been dated. The only direct evidence  
30 before the Tribunal as to the date of delivery was that of the claimant which was to the effect that that letter, which was a letter in a different category from the two which preceded it, was received by her on the 13<sup>th</sup> of April and not on the 12<sup>th</sup>. That was a position, the credibility of which was not directly challenged in cross examination and the Tribunal accepted the claimant's

evidence in this regard. That evidence was consistent with the requirements imposed upon the respondents which under the same section at R-30 headed "What happens if the employee does not make contact and is absent?" impose on Managers the obligation to again make all reasonable efforts to make contact including sending contact letters by Special Delivery and first class post which ensuring that a record is kept of all attempts to make contact. In relation to the letter of 12<sup>th</sup> May which is founded upon by the respondents, no record was kept (or at least presented in evidence to the Tribunal, beyond a photocopy of the letter itself bearing the date 12<sup>th</sup> April). Such a copy does not prove that the letter was sent by Special Delivery such as to be delivered to the claimant on the 12<sup>th</sup> nor indeed the time of day at which it was delivered.

144. The claimant's position in evidence was also consistent with her evidence that she had forwarded all three letters to her Trade Union representative, for his attention by screen shot and text on the day on which she received them. C-58 is a screen shot and text message from the claimant to her Trade Union representative dated 13<sup>th</sup> April attaching a screen shot of the letter of 12<sup>th</sup> April with the message "Just got another one".

145. Additionally to the respondent's reliance upon what the Tribunal has found to be a non-compliant and ineffective notice (the letter of 12<sup>th</sup> April), the Tribunal separately considered that the respondent's decision (the decision of Mr Aien taken by him on the 12<sup>th</sup> of April) was not, in the circumstances pertaining, a decision taken in the reasonable exercise of the respondent's discretion under their own policies.

146. The letter of 12<sup>th</sup> April expressly sets out the grounds (the specific failures on the part of the claimant, upon which the decision is based "Since your absence on the 26<sup>th</sup> March you have failed to comply ... as you have:- ..

"(1) failed to communicate with your Line Manager during your absence

(2) failed to agree and maintain a contact strategy with your Line Manager

5 (3) failed to discuss the details of your absence with your Line Manager

(4) continue to perform work for another employer within the same Royal Mail premises, from which you are unable to attend as you have reported sick.

10 (5) failed to attend 2 management interviews to discuss your absence (*with your Line Manager implied*)

15 (6) failed to notify your Line Manager directly of your failure to attend management interview (The Tribunal's emphasis).

147. Of the above alleged failures, failure number (4) did not, at the material time, in fact constitute a failure on the part of the claimant to comply with any of the respondent's conditions or requirements in relation to sick pay. No such  
20 requirement or failure is itemised in any of the three policy documents relied upon. Separately and in any event, the respondents had, on the first day of the claimant's absence 29<sup>th</sup> March been aware and had agreed with the claimant's other employer that she could continue to attend at the premises to discharge those other duties but at a time when her Line Manager Mr Aien  
25 was not present, all as the Tribunal has found in fact. In those circumstances the claimant's so attending, and discharging at the premises her cleaning duties for her other employer did not provide any basis under the applicable policies, upon which to remove her entitlement to receive sick pay as at the date of its purported removal, namely 14<sup>th</sup> April 21.

30 148. The remaining five alleged failures are all variations on the failure on the part of the claimant to maintain contact and or attend meetings with her Line Manager Mr Malcolm Aien. That failure occurred in circumstances where the respondent, in the person of its Manager Ms Jamieson and its Senior

Manager Mr Robertson were made aware by the claimant directly on the first day of her absence, 29<sup>th</sup> March 2021, that she considered that Mr Aien had subjected her to bullying and harassment on earlier occasions and that she was physically and mentally unable to be in contact with him. In those  
5 circumstances it was open to the respondent, as was confirmed by Mr Aitchison in his evidence before the Tribunal, to have as he put it “involved another Manager”. That is to say, to have identified for the claimant a different Manager with whom she was to maintain contact under the respondent’s policies during her absence. They did not do so. *Per contra*,  
10 Mr Robertson when speaking to the claimant by telephone later in the day on the 29<sup>th</sup> of March, advised her that he considered “that it”, being the alleged bullying and harassment, “did not happen”. He dismissed the claimant’s concerns. The respondents went on to cause Mr Aien, the person with whom the claimant had made clear she could not be in contact, to write two letters  
15 to the claimant inviting her to attend meetings with himself and, following the claimant’s failure to attend those meetings or otherwise be in contact with him, purported to exercise their discretion through the person of Mr Aien in his deciding to stop the claimant’s sick pay. Mr Aien did so without taking any account of the reason, which had been communicated to the respondents by  
20 the claimant on the first day of her absence as to why she could not maintain contact with him and in circumstances where they took no steps to put in place the readily available alternative of identifying another Manager as the point of contact for her. In so purporting to exercise their discretion, the respondents failed to take into account a matter which they ought to have  
25 taken into account, that being a matter which went directly to the reason for the claimant’s failure to meet with or maintain contact with Mr Aien in the period between 5<sup>th</sup> and 12<sup>th</sup> April 2021. There was no requirement on the part of the respondents to seek to take a decision to stop the claimant’s contractual sick pay at the earliest possible moment permitted under their  
30 policy.

149. There was no requirement on the part of the respondents to hold an enquiry into and/or to establish, as a matter of fact, whether the claimant’s allegation of bullying and harassment at the hands of Mr Aien was founded in fact. It



was equally wholly unrealistic on the part of the respondents to require the claimant to prove and establish such allegations in the same short period while absent on sick leave. It was sufficient for both the claimant's and the respondent's immediate purposes complying with and of applying the relevant policies, that the claimant should have identified those allegations as the reason for her being unable to maintain contact with her then Line Manager Mr Aien.

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150. The respondent's Attendance Policy at page 7 of 9, under the heading "Long Term Absence", while stressing the importance of regular contact imposes upon both parties a requirement for active participation. In the circumstances of the claimant's disclosure, the sending to her of two letters requiring her to meet with her Line Manager, the person whom she had identified she was physically and mentally unable to meet with, fell short of the requirement, to engage in active participation, which was incumbent upon the respondents. The respondents could have, and in those circumstances ought reasonably to have, caused another Manager to actively make contact with the claimant.

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151. The same section of Policy makes clear that its aim is to encourage an earlier return to work as this will be beneficial to both employee and Royal Mail Group. In the circumstances disclosed by the claimant on the first day of her absence, requiring her to meet with the Manager whom she had identified she could not be in the premises with, did not encourage an earlier return to work and was beneficial to neither the claimant nor the respondent.

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152. The same section of Policy indicates that Occupational Health advice will be sought as appropriate to assist Managers in making decisions. No Occupational Health advice was sought by the respondents to assist them in making the decision to stop the claimant's sick pay. If the respondents were truly of the view, as appeared to be communicated by the claimant's second Line Manager Mr Robertson, that her concerns were not genuine, regardless of whether or not they could be proved, an appropriate course of action, in the circumstances, would have been to seek Occupational Health advice.

153. As the Tribunal has found in fact Mr Bryce's decision, "to not uphold, the claimant's grievance, which was taken by him and communicated to the claimant on or about the 26<sup>th</sup> of June 21, did not constitute a retaking of Mr Aien's decision, of 12<sup>th</sup> April, to stop the claimant's contractual sick pay, her entitlement to which had continued to run from the 13<sup>th</sup> of April, unstopped.

154. As is made clear at R-26, in the penultimate paragraph of Mr Aitchison's internal appeal hearing outcome dated 22<sup>nd</sup> September 2021, his determination did involve a reconsideration and did constitute a retaking, as at the 22<sup>nd</sup> of September 21, of a decision by the respondents to stop the claimant's sick pay in exercise of the discretion accorded them under their policies. (R-61); viz,

*"It is also important to note that I have revisited the case given Ms Gray's concerns about John Bryce, DOM Linlithgow, hearing the original case, in normal circumstances the appeal would consist of new evidence or where the original decision could be seen as inherently unfair. I have reviewed all of the previous information and evidence before coming to a decision.*

*As mentioned above, allegations of bullying and harassment are extremely serious and should be investigated. ..."*

155. Taken as it was on the 22<sup>nd</sup> of September 2021, and founded upon the respondent's letter of 12<sup>th</sup> April 21, the decision of Mr Aitchison was one which was taken "following written notification giving the employee 2 days' notice".

156. Separately, the decision was one taken by the respondents in the reasonable exercise of the discretion accorded them under their policies. The decision taken by Mr Aitchison was not taken for the same flawed reasons as those underpinning Mr Aien' decision of 12<sup>th</sup> April. None of the six grounds set out by Mr Aien in his letter of 12<sup>th</sup> April were relied upon by Mr Aitchison.

Mr Aitchison made clear in his evidence that he was satisfied that the claimant's attendance at the premises to carry out her cleaning duties for her other employer at times adjusted by that employer, such that Mr Aien was not present, was something which occurred in terms of prior agreement between the respondent and the other employer. He did not consider that that action provided any basis for the removal of the claimant's entitlement to contractual sick pay.

157. Nor did Mr Aitchison take the decision because the claimant had failed to be in contact or to maintain contact with Mr Aien. He made clear in his evidence that he believed the claimant when she explained to him at the Appeal Hearing that she had genuinely thought that her Trade Union representative was functioning as a go between herself and Mr Aien for the purposes of sickness absence policy contact, recognising, as he did, that maintaining contact through a Trade Union representative would be one appropriate method of addressing what at R-61 he describes as an extremely serious situation of allegations of bullying and harassment at the hands of the claimant's Line Manger. He also identified in evidence an appropriate alternative method of contact for the respondents to follow, namely identifying for the claimant another Manager with whom she should maintain contact in the circumstances. In exercising his discretion Mr Aitchison did not fail to take account of the reason for the claimant's non-contact with Mr Aien.

158. Although not immediately apparent on the face of his grievance outcome letter, Mr Aitchison explained in evidence which the Tribunal accepted as both credible and reliable, that his decision was based upon the second bullet point set out in the respondent's Sick Pay and Sick Pay conditions policy at page 3 of 6 (R-41(c)) under the heading "Conditions on which sick pay is payable". There are enumerated there, five conditions upon the strict observance of which entitlement to sick pay was said always to be subject. The second of these was "*The business must be satisfied that an employee's absence is necessary and due to genuine illness.*"

159. Mr Aitchison stated that while not doubting that the claimant's illness was genuine, as at the 22<sup>nd</sup> of September 2021 he was not satisfied and could not be satisfied that the claimant's absence was necessary. This because, in the course of the Appeal Hearing he had offered to transfer the claimant to another Delivery Office within her immediate area at which she would be able to carry out her postal duties in circumstances where Mr Aien was not present in the premises. That was the same basis upon which the claimant had continued to attend the Bo'ness Delivery Office to carry out her cleaning duties for her other employer. It had not ever been and continued not to be necessary for her to be absent from her duties where she could carry them out in premises where Mr Aien was not concurrently present. The claimant had, for her own reasons, declined that offer and, in those circumstances while accepting her decision, Mr Aitchison could not be satisfied as to the second condition upon the strict observance of which, amongst others, the claimant's entitlement to sick pay was dependant.

160. In taking his decision Mr Aitchison accepted that no question of the claimant having to prove the allegations of bullying and harassment arose. He accepted that it was sufficient for her purposes, and for his, that she made the allegation.

161. In taking his decision Mr Aitchison reviewed all of the previous evidence and took account of all that the claimant raised with him. He did not fail to take account of any matter which he ought to have.

162. In the circumstances, Mr Aitchison's decision taken on 22<sup>nd</sup> September 2021, to stop the claimant's sick pay, was one taken in the reasonable exercise of the respondent's discretion. It was a decision which, was compliant with the respondent's policies and one which, as at the 22<sup>nd</sup> September 2021, they were entitled to take.

163. In the above circumstances and on the finding in fact which it has made, the Tribunal determined that the claimant's entitlement to sick pay continued, unremoved, from the 13<sup>th</sup> April to the 22<sup>nd</sup> of September and that in

withholding the claimant's sick pay in that period the respondent did make an unauthorised deduction from her wages in a sum equivalent to the difference between the full contractual sick pay which she should have received in that period and the statutory sick pay which she did receive, all as set out in the Tribunal's Findings in Fact and in its Interlocutory Judgment.

164. The Tribunal held that the claimant had no entitlement in law to receive contractual sick pay in the period from 23<sup>rd</sup> September to 2<sup>nd</sup> December 2021 and that her complaint of unauthorised deduction from wages in that period fails.

165. It was not entirely clear to the Tribunal whether, in relation to the deduction which had been made, the respondent's representative did ultimately seek to found upon clause 24.1 of the claimant's Contract of Employment, produced at R-72, as a clause which rendered the deduction authorised. The Tribunal, for its part, makes clear, that it rejected that submission. On an application of the normal rules of construction and on according to the words their normal English language meaning, the Tribunal concluded that while the clause might have been relied upon for the purposes of recovering an overpayment of contractual sick pay, its effect was not to authorise the withholding of sums otherwise properly payable as wages.

**Employment Judge: J d'Inverno**  
**Date of Judgment: 14 April 2022**  
**Entered in register: 19 April 2022**  
**and copied to parties**

**I confirm that this is my Judgment in the case of Gray v Royal Mail Group Ltd and that I have signed the Judgment by electronic signature.**