



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111716/2021

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Held in Glasgow on 27 – 29 June and 15 August 2022

Employment Judge A Strain

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Members – J McElwee & R Taggart

Mr D Duployen

Claimant  
In Person

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Whyte & Mackay Limited

Respondent  
Represented by:  
Ms K Norval -  
Solicitor

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the Claimant's claim of constructive dismissal is successful;
2. the Claimant's claims of disability discrimination under sections 15 and 20 of the **Equality Act 2010 (EA 2010)** are successful;
- 25 3. The tribunal orders the Respondent to pay the Claimant the sum of **£14,028.64** (comprising a Basic Award of £1,731.48 and a Compensatory Award of £12,297.16).

#### Background

- 30 1. The Claimant represented himself. He asserted claims of (i) Constructive Unfair Dismissal and Disability Discrimination under sections 15 and 20 of the **Equality Act 2010 (EA 2010)**. The Claimant sought a Basic Award, Compensatory Award and damages for injury to feelings as detailed in his schedule of loss.
2. The Respondent was represented by Ms K Norval, Solicitor.

3. The Parties had lodged a Bundle of Documents and Witness Statements with the Tribunal for the purposes of the Hearing.
4. Disability status was agreed between the Parties in respect of the condition of depression and anxiety.
5. The Tribunal heard evidence from the Claimant, Emma Docherty (**ED**) (HR Assistant), Mihai Linea (**ML**) (Warehouse Manager) and Pierluigi Ratti (**PL**) (Head of Supply Chain) for the Respondent. Witness Statements had been lodged and exchanged in advance.

### **Findings in Fact**

6. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:
  - a. The Claimant was employed by the Respondent from 20 March 2017 until the termination of his employment on 29 September 2021. He was employed as a Forklift Truck/Warehouse Operator under a contract of employment dated 14 March 2017 (Production 8).
  - b. His duties involved loading/unloading lorries, picking customer orders and stowing stock. He was one of 11 drivers in the Warehouse.
  - c. Whilst working reduced hours the Claimant's net weekly pay was £303.20.
  - d. The Respondent paid an employer pension contribution of £45.56 per week.

### *Employee Handbook*

- e. The Respondent's had an Employee Handbook containing policies and procedures for employees which were contractual and binding. (Excerpt from the Employee Handbook is Production 9):
  - i. Company Sick Pay was declared to be "at the discretion" of the Respondent (paragraph 1.6). In practice employees were

paid 12 weeks full pay and then up to 6 months full pay at directors' discretion;

- ii. The Respondent operated a Disciplinary Procedure for Absences (page 76-77).

5 *Final Written Warning*

f. Following a hearing under the Respondent's disciplinary procedure for absences on 15 June 2020 the Claimant was issued with a final written warning for unacceptable absence levels. This was confirmed by letter of 16 June 2020 (Production 25). The final written warning was to remain live for 12 months and stated to expire on 16 June 2021. The Claimant was warned that any further periods of absence could result in dismissal.

g. None of the absences up to 15 June 2020 were related to the Claimant's disability.

15 h. In or around September 2020 the Claimant was prescribed Fluoxetine antidepressants for depression and anxiety. His medication and treatment was regularly reviewed by his GP and in November 2020 his medication was doubled to 40mg per day.

20 i. In January 2021 the Claimant suffered from fatigue alongside the depression and anxiety. He felt unmotivated and on days off work required to nap 2-3 times per day.

*Flexible Working Request*

25 j. On 18 January 2021 the Claimant emailed ED to explain the difficulties he was experiencing due to his mental health and to request reduced hours. (Email exchange is Production 30).

k. ED advised that the Claimant's request would be best made under the Respondent's flexible working request process.

- 5           i. The Claimant did not want to disclose the details of his mental health issues with ML (his line manager). ED informed the Claimant that the mental health issues could be kept confidential and that if he made the request his line manager would be told it was due to wellbeing. ED suggested a trial period of 8 weeks and if there was any noticeable benefit ED would refer him to Occupational Health.
- m. By email of 24 January 2021 the Claimant submitted his flexible working request and asked to have every Wednesday off for a period of 8 Weeks (Production 32).
- 10          n. ED spoke with ML and encouraged him to agree to the request. On 29 January 2021 ML emailed the Claimant to confirm his request would be granted on a temporary basis from 1 February 2021 – 29 March 2021 (Production 33).
- o. The Claimant attended Occupational Health on 16 February 2021 at ED's request and an OH Report was issued the same date (Production 35). The OH Report was shared with ML.
- 15          p. The OH Report confirmed a history of depression and anxiety. The Claimant suffered from tiredness and demotivation. The reduction to a 4 day week was of benefit to him. The OH Physician confirmed the Claimant's depression and anxiety were likely to constitute a disability and reasonable adjustments should be considered. It recommended the Claimant be reviewed in 6 weeks.
- 20          q. A further OH Report was obtained on 25 March 2021 (Production 38). This report recommended continuing the 4 day week for the foreseeable future.
- 25          r. On 26 March 2021 the Claimant emailed ED requesting the temporary change be made permanent. ED responded stating this was a business decision and the request would be forwarded to ML to make a decision (Production41).

- 5 s. A flexible working meeting took place on 8 April 2021. ML chaired the meeting with ED providing HR support. The Claimant attended alone. The Claimant informed ML that he wished to retain the 4 day working week or reduce his daily hours. ML confirmed he would consider the request and come back with his decision. Notes of the meeting were Production 43.
- 10 t. ML discussed the position with PR who was of the view that the business could not support the 4 day week for operational reasons. ML informed the Claimant of this but that they would try an eight week period of reduced hours working Monday to Thursday 10am to 4.30pm and Friday 8am to 2pm commencing 26 April until 18 June 2021. This was confirmed in a letter sent by email to the Claimant on 23 April 2021. This letter stated that the request to work 4 days was refused as the Respondent was unable to reorganise work amongst
- 15 staff and were unable to recruit additional staff to cover one working day (Production 45).
- 20 u. On 17 June 2021 ML met with the Claimant and informed him that the temporary reduction in hours would not be a permanent arrangement as the request had a detrimental impact on performance; the Respondent was unable to redistribute the workload to other staff members and the Respondent was unable to recruit an additional member of staff to fill the gap in hours. This was confirmed in a letter to the Claimant of 18 June 2021 (Production 49).
- 25 v. ML did not ask any agency workers if they could cover the reduced hours of the Claimant. Agency workers were engaged by the Respondent in the warehouse.

*Absences due to disability*

- 30 w. The Claimant was absent from work due to depression and anxiety in the week commencing 24 June 2021. He was invited to a Disciplinary Hearing on 9 July 2021 with ML and ED by letter of 6 July 2021 (Production 51). This letter provided that the purpose of the

hearing was to discuss the Claimant's periods of absence and warned of the potential for further formal action against him.

x. The meeting was postponed due to the Claimant's ill health and was rescheduled to 27 July 2021.

5 y. The Claimant was off sick 14 – 22 July 2021. He returned to the Warehouse on 21 July 2021 without prior notice and requested a phased return to work from ML. ML informed him that he could not agree a phased return to work that day without appropriate medical certificates. The Claimant accordingly left the Warehouse and resumed his sickness absence.

10 z. ML telephoned the Claimant on 22 July 2021 and informed him he was not getting paid Company Sick Pay for 21 and 22 July due to his failure to notify the Respondent in advance that he was intending to come in to work on 21 July 2021. ML considered whether or not to pay Company Sick Pay was an act of discretion and it was reasonable for him not to pay in the circumstances.

15 aa. On 23 July 2021 the Claimant submitted a fit note from his GP which recommended a phased return to work over 2 weeks (Production 59). On this date he attended a return to work meeting with ML (Production 56). ML agreed the phased return to work.

20 bb. On 26 July 2021 the Claimant left work early due to illness related to his disability. He subsequently submitted a fit note from 27 July to 17 August 2021 (Production 59).

### *Disciplinary Hearing*

25 cc. The Claimant attended the reconvened Disciplinary Hearing on 27 July 2021. The hearing was conducted by ML with support from Przemek Mielcarek (Forklift Driver Team Leader) as note taker.

dd. The Claimant's ongoing absences were discussed and he was again told the reason why he would not be receiving Company Sick pay for

21-22 July 2021. ML informed the Claimant that he intended to re-issue him with a final written warning under the company's absence procedure which would remain on his file for 12 months. ML made this decision on the basis that the previous final written warning had just expired and he could see a pattern emerging which involved an increased level of absence. ML found the Claimant's ongoing absences increasingly difficult to manage. Notes of the Disciplinary Hearing are Production 58.

ee. ML confirmed the outcome of the Disciplinary Hearing by letter of 3 August 2021 (Production 61).

#### *Ongoing Absence*

ff. The Claimant had a Return to Work Interview on 10 August 2021 (Production 63, Page 208). On 12 August the Respondent agreed to a phased Return to Work 3 days the first week, four days the second week and normal hours the following week (Production 63, Page 211).

gg. A further Occupation Health Report was obtained on 23 August 2021 (Production 68). The OH Report confirmed the Claimant was fit for work, had a likely disability and reasonable adjustments should be considered but that the Respondents could not sustain reduced hours in the longer term.

hh. The Claimant made a holiday request on 25 August 2021. This request was not at any stage granted. The Claimant was informed it was refused.

ii. On 31 August 2021 the Claimant went on sick leave again. He submitted medical certificate from his GP confirming he was unfit for work due to mental health issues from 31 August 2021 to 21 September 2021 (Production 72). A further medical certificate was submitted for the period 21 September to 5 October 2021 for the same reasons (Production 75).

*Resignation*

5           jj. On 28 September 2021 the Claimant emailed ED informing her of his resignation with immediate effect. The reasons stated for his resignation were that he was unfit to work full time hours and couldn't survive on SSP (Production 77). This email also informed the Respondents that he had found a part time job.

10           kk. The Claimant believed (at the point of resignation) that he was going to be dismissed sooner or later due to the Respondent's actions in requiring him to work full time hours, failing to adjust trigger points, failure to make reasonable adjustments and issue of a Final Warning on the basis of his absence on 24 June 2021.

          ll. The Respondent acknowledged the Claimant's resignation and informed him that his final day of employment would be 29 September 2021 by email of that date.

15           mm. The Claimant suffered upset and distress since the initiation of disciplinary action against him in July 2021. The Claimant felt angry and not valued by the Responent. His absences were treated as conduct issues. He felt humiliated, embarrassed and ashamed to inform the Resondent of periods of absence and frustrated at the Respondent's response.He had suicidal thoughts and felt his position was hopeless.

          nn. The Respondent's refusal to reduce his hours left him feeling unsupported, stressed and and worthless. This in turn put stress on his relationship with his wife and exacerbated his mental health issues.

25    *Loss*

          oo. Since his resignation the Claimant continued to be unfit to work full time hours as confirmed by his GP in a report dated 18 May 2022( Production 102).



pp. The Claimant applied for 5 jobs since the termination of his employment and prior to the tribunal hearing as detailed in his Schedule of Loss (page 277 paragraph 4).

5 qq. The Claimant secured temporary employment with Angard Staffing and Royal Mail (as a Christmas Seasonal Worker for 3.5 weeks) during which time he earned £326.22 and £867.57 respectively.

rr. The Claimant secured part-time employment with Bakkavor in March 2022 on a 16 hour per week contract. He resigned this position on 12 June 2022. Since then he has been unemployed.

10 ss. His earnings whilst employed with Bakkavor were £1,346.35.

tt. Since termination of his employment the Claimant has received £2,230.46 Universal Credit.

uu. The Claimant has failed to mitigate his loss.

15 vv. The Claimant's relationship with the Respondent and in particular his line managers has broken down.

### The Relevant Law

7. The Claimant asserts constructive unfair dismissal.

#### *Unfair Dismissal*

20 8. 'Dismissal' is defined in s 95(1) ERA 1996 to include 'constructive dismissal', which occurs where an employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct (s 95(1)(c)).

25 9. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***).

10. Was there a repudiatory breach of the claimant's contract? If so, was the breach a factor in the claimant's resignation? If so, did the claimant affirm the breach? Was there a repudiatory breach of contract?
11. There must be a breach of contract by the employer. The breach must be "a significant breach going to the root of the contract" (*Western Excavating*). This may be a breach of an express or implied term. The essential terms of a contract would ordinarily include express terms regarding pay, duties and hours and the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (*Malik v Bank of Credit and Commerce International Ltd [1998] AC 20*).
12. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively there may be a continuing course of conduct extending over a period and culminating in a "last straw" which considered together amount to a repudiatory breach. The "last straw" need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (*London Borough of Waltham Forest v Omilaju [2005] IRLR 35*).
13. Whether there is a breach is determined objectively: would a reasonable person in the circumstances have considered that there had been a breach. As regards the implied term of trust and confidence: "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of..." (*Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*).

*Disability Discrimination**Unfavourable Treatment*

14. Section 15 of EA 2010 provides:

(1) *A person (A) discriminates against a disabled person (B) if—*

5 (a) *A treats B unfavourably because of something arising in consequence of B's disability, and*

(b) *A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

10 (2) *Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

*Unfavourable treatment can include dismissal.*

*Failure to make reasonable adjustments*

15. Section 20 of the EA 2010 provides:

15 **20** ***Duty to make adjustments***

(1) *Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*

20 (2) *The duty comprises the following three requirements.*

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

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(1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

(2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

(a) *A applies, or would apply, it to persons with whom B does not share the characteristic,*

(b) *it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

(c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

15 16. Section 21 of the EA 2010 provides:

**21 Failure to comply with duty**

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

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

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

### *Compensation*

17. Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation where it finds there has been a contravention of sections 15 and 20.

5 18. An award in discrimination cases can include:

*i. Financial Loss*

Such as past and future loss of earnings.

*ii. Injury to Feelings*

10 A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of ***Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039)***.

15 Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

### **Submissions**

20 19. Both Parties lodged Written Submissions which were supplemented by oral submissions at the conclusion of the case and referred to the Schedule of Loss.

### *The Claimant*

25 20. The Claimant submitted that he had no wish to leave his employment but he was left with no other option due to the Respondent's breach of contract. In particular, the Respondent had breached the contract by inviting him to a disciplinary meeting following a single absence, refusing to pay him company sick pay and the references to his conduct in the disciplinary meeting.

21. The Respondent had not done enough to support him and hadn't taken his mental health or Occupational Health Reports into account. He considered that he was going to be dismissed sooner or later due to the Respondent's actions in requiring him to work full time hours, failing to  
5 adjust trigger points, failure to make reasonable adjustments and issue of a Final Warning on the basis of his absence on 24 June 2021.
22. The Claimant asserted that the unfavourable treatment in terms of section 15 of the EA 2010 was the treatment of his absences which arose from his disability.
- 10 23. In particular, the following constituted unfavourable treatment:
- a. the Respondent's invitation to a disciplinary hearing to discuss his absence commencing 24 June 2021;
  - b. the Respondent's decision to withhold company sick pay for his absence on 21/22 July 2021;
  - 15 c. the Respondent's referencing the Claimant's conduct at the disciplinary absence hearing on 27 July 2021;
  - d. ML overturning the holiday request on 25 August 2021 despite it previously having been granted by Mr Mielcarek.
24. The Claimant asserted that the Respondent had failed to make  
20 reasonable adjustments by refusing to accommodate his reduced hours request and failure to adjust the trigger points under its absence procedure.
25. The Claimant sought reinstatement.

*The Respondent*

- 25 26. The Respondent submitted that the application of its sickness absence procedure did not constitute a breach of contract. It expressly allowed for patterns of absence to be examined without limitation of time. That is

what had transpired here. No sanction had been imposed so there could not be said to be any fundamental breach of contract.

27. The Respondent's decision to withhold company sick was an application of unfettered discretion and could not constitute a breach of contract.

5 28. Referencing the Claimant's conduct at the hearing on 27 July 2021 was justified in all the circumstances.

29. Looking at the circumstances objectively the Respondent's actions did not show an intention to abandon and altogether refuse to perform the contract.

10 30. Further, the Claimant had not resigned in response to these incidents. He didn't resign until 2 months after the acts relied upon. The real reason he resigned was that he had found another job. He had affirmed the contract by remaining in employment and in receipt of sick pay.

15 31. In any event, the Respondent had objective reasons unconnected with the Claimant's disability for its actions.

32. No sanction had been imposed for his absence.

33. The Respondent was not legally obliged to pay sick pay – it was discretionary.

20 34. Referencing the Claimant's conduct was justified and not motivated by anything arising in consequence of his disability.

35. In the alternative, the actions were objectively justified and a proportionate means of achieving a legitimate aim (reducing absence).

25 36. In so far as the duty to make reasonable adjustments was concerned the PCPs relied upon were disputed by the Respondent and in any event did not place the Claimant at a substantial disadvantage. In the alternative, it was not established that the Respondent knew or could reasonably have known that the Claimant was placed at a substantial disadvantage.

37. Lastly, the adjustments were not "reasonable" in all the circumstances.

38. The Respondent asserts that the Claimant failed to mitigate loss and any award should be reduced due to his failure to appeal the Final Warning.

39. Any injury to feelings award should be at the lower end of **Vento**.

40. Reinstatement was not reasonably practicable due to the breakdown in the relationship of trust and confidence between the Parties and there was no current vacancy.

### **Observations on the Evidence**

41. The tribunal accepted that the Claimant and the Respondent's witnesses all gave their evidence in a credible and reliable way. The only issue of credibility related to ML's evidence about offering the Claimant reduced hours to facilitate a job share. The tribunal did not accept this offer had been made to the Claimant and preferred and accepted the evidence of the Claimant on this point. ML's evidence was inconsistent with the reasons he had given for rejecting the Claimant's flexible working request. ML conceded he had not asked agency workers if they could cover the Claimant's reduced hours.

42. The Tribunal then considered the various claims advanced.

#### *Constructive Dismissal*

#### *Breach of Contract*

43. The Tribunal considered the various alleged breaches of contract in turn:

*The Respondent's decision to invite the Claimant to attend a disciplinary absence hearing after the absence on 24 June 2021.*

44. The Respondent's managed sickness absence under a disciplinary procedure which they accepted was contractual. The tribunal considered this approach inappropriate and somewhat archaic. The Respondent's witnesses conceded this made no express mention of how to deal with disability related absence. The Respondent's witnesses also accepted that the absences prior to 24 June 2021 were not related to the



Claimant's disability whereas those commencing 24 June 2021 and thereafter were.

45. The Respondent's procedure specified that that a Final Warning would remain on an employee's record for 12 months. The Respondent's  
5 witnesses confirmed that after 12 months that warning expired. The explanation given by the Respondent's for inviting the Claimant to the disciplinary hearing was that the further period of absence on 24 June 2021 constituted a "pattern" of absences. They referred to the paragraph of the procedure that stated "*Patterns of absence will be examined without time limit with appropriate action*". This paragraph was in no way  
10 linked to the paragraph that stated Final Warnings would remain on record for 12 months. Furthermore, the explanation by the Respondent's witnesses that the absence of 24 June 2021 constituted evidence of a "pattern" simply did not add up.
- 15 46. The Claimant had no period of absence for the 12 months following the Final Warning. The Final Warning had (according to the Respondent's procedure) expired. There was clearly no "pattern" of absence. Further, the fact that the absences commencing 24 June 2021 were disability related (as accepted by the Respondent's witnesses) and were those  
20 which had led to the issue of the Final Warning meant that they clearly could not constitute a "pattern" as the absences were unrelated.
47. The fact that the invitation to the disciplinary hearing and the disciplinary hearing itself made no reference to a "pattern of absence" was also of significance.
- 25 48. The Respondent's procedure clearly provided that a Final Warning expired after 12 months. The only reasonable interpretation of that procedure in such an eventuality was that an employee returned to the position of a first absence following expiry of a Final Warning. In terms of the Respondent's procedure that meant the Claimant should have been  
30 invited to a return to work interview and not subjected to a disciplinary hearing.

49. The tribunal accordingly conclude that the invitation by the Respondent to the Claimant to attend a disciplinary hearing was a breach of contract.

*The Respondent's decision to withhold company sick pay from the Claimant for his absence on 21/22 July 2021.*

5 50. The Respondent's decision to withhold company sick pay was on the basis that the Claimant had failed to inform them of his attendance at the workplace on 21 July to seek a phased return to work in advance. The Respondent asserted this was a breach of the self notification procedures. It was not disputed that the Claimant remained unfit for work  
10 on 21/22 July.

51. The Respondent further sought to justify the decision to refuse to pay sick pay for these on the basis that company sick pay was payable "*at the Directors' discretion*". This wording appeared in the Employee Handbook and was contractual. The wording appears at page 75 and actually states  
15 "*Company sick pay remains at the discretion of the Company*". This, it was claimed, was an unfettered discretion.

52. The Respondent's witnesses all gave consistent evidence that company sick pay was customarily paid. It would have been paid if the Claimant had not turned up at work on 21 July. In the circumstances whilst the  
20 Respondent claims discretion the tribunal do not consider this discretion to be unfettered and consider that it does appear the Respondent's custom and practice is to consistently pay sick pay. In any event the tribunal considered that the Respondent's discretion ought to have been exercised reasonably in all the circumstances and that this would be  
25 implicit in the term.

53. The Respondent's exercise of discretion in the particular circumstances of this case was unreasonable and a breach of contract.

*The Respondent's referencing the Claimant's conduct at the disciplinary hearing on 27 July 2021*

54. The tribunal do not consider there was a contractual term specified in this regard which could have been breached.

5 *Anticipatory Breach of Contract*

55. The Claimant gave evidence and addressed the tribunal in his submissions to the fact he considered that he was going to be dismissed sooner or later due to the Respondent's actions in failing to adjust trigger points, failure to make reasonable adjustments and issue of a Final  
10 Warning on the basis of his absences commencing on 24 June 2021.

56. Leaving aside the issues of reasonable adjustments (which are addressed below) the issue of a further Final Warning by the Respondent on 3 August 2021 was a breach of contract. As explained above the invitation to a disciplinary hearing following the absence of 24 June 2021  
15 was a breach of contract. The issue of a Final Warning was the outcome of that disciplinary hearing and, in terms of the Respondent's own procedure, the Respondent should have reverted to stage one and not issued a Final Warning. To do so was a clear breach of contract.

57. The tribunal considered it reasonable in the circumstances for the  
20 Claimant to conclude that he would be dismissed for his further periods of absence and that such dismissal would be in breach of his contract in the circumstances. Any such dismissal would be based on the Respondent's procedure and the Final Warning which had been issued in breach of contract.

25 58. This was the last straw for the Claimant and the main reason he resigned.

59. Applying the law to the facts the tribunal considered and found that the Respondent's conduct was a significant breach going to the root of the contract which clearly showed that the Respondent no longer intended to be bound by one or more of the essential terms of the contract (***Western***

**Excavating**). The Claimant resigned in response to these breaches (actual and anticipatory) and there was no lengthy or significant delay.

The Claimant's claim of constructive dismissal is successful

*Unfavourable Treatment (section 15)*

5 60. The Tribunal considered whether the Claimant had suffered unfavourable treatment because of something arising in consequence of his disability.

*The Respondent's decision to invite the Claimant to attend a disciplinary absence hearing after the absence on 24 June 2021.*

10 61. The tribunal have already found the Respondent's invitation to the disciplinary hearing was a breach of contract. The Respondent accepts that the Claimant had a disability and that the absence on 24 June 2021 was due to his disability. The reason for the disciplinary hearing was the Claimant's absence on 24 June 2021 which was due to his disability.

15 62. The accepted facts give rise to ( at the very least) an inference of discrimination.

63. Calling the Claimant to a disciplinary hearing due to his disability related absence in breach of their own contractual policy was clearly unfavourable treatment. No comparator is required in such cases.

20 64. The Respondent submitted that it had objective reasons for inviting the Claimant to the disciplinary hearing. These were his previous absences and that the actions were a proportionate means of achieving a legitimate aim – namely to manage absence.

25 65. The Claimant did have previous absences in respect of which the Final Warning had expired. The Respondent did not have any objective reason for inviting the Claimant to the disciplinary hearing in breach of its own procedures.

66. Inviting the Claimant to a disciplinary hearing for one disability related absence was not a proportionate means of achieving the legitimate aim of

managing absence nor was the issue of a further Final Warning following that disciplinary meeting. It was a draconian and clearly excessive step to take against the Claimant in the circumstances.

5 *The Respondent's decision to withhold company sick pay from the Claimant for his absence on 21/22 July 2021.*

67. The tribunal note the Responent's explanation that the reason for not paying company sick pay was due to the Claimant attending at the workplace unannounced. The tribunal consider it was a rather excessive and penal step to take against the background of a Claimant with a known  
10 mental health disability. The decision to do so was also a breach of contract as referred to by the tribunal above.

68. The circumstances do give rise to the inference that the Claimant was discriminated against and singled out. He was certainly treated unfavourably and put at a disadvantage. It was normal custom and  
15 practice to pay sick pay.

69. The Respondent submitted that it had objective reasons. These were to ensure employees were engaged with and complied with their sickness notification obligations and refusing to pay sick pay was a proportionate means of achieving a legitimate aim.

20 70. Whilst that was a legitimate aim, the refusal to pay sick pay in the circumstances was excessive and penal. It was not proportionate.

71. The refusal to pay sick pay clearly arose from the Claimant's disability related absence and in the circumstances was unfavourable treatment and discriminatory.

25 *The Respondent's referencing the Claimant's conduct at the disciplinary hearing on 27 July 2021*

72. The tribunal did not consider that the references to the Claimant's conduct at the disciplinary hearing on 27 July 2021 was motivated by anything in consequence of the Claimant's disability. The tribunal

accepted that there was no evidence to suggest the Claimant's conduct at the meeting was impacted by his disability.

*Mr Linea overturning the holiday request on 25 August 2021 despite it previously having been granted by Mr Mielcarek.*

- 5 73. The tribunal accepted the Respondent's evidence that the reason for refusing the request was that the request had been made at short notice and the team were busy. Mr Mielcarek had not granted the request. He said that he would consult with ML before reaching a decision.

*Failure to make reasonable adjustments*

- 10 74. The PCPs relied upon by the Claimant were:
- a. The refusal of the Respondent to accommodate his reduced hours request (insistence that he work full time hours); and
  - b. The Respondent's failure to adjust the "trigger points" under its absence procedure.

15 *Reduced Hours Request*

75. The Claimant asserted that his request to reduce his hours had been treated as a flexible working request rather than a reasonable adjustment request for someone with a disability. This was borne out by the evidence from the Respondent. The Claimant was advised by ED to make a flexible  
20 working request despite her knowledge that the reason for the requested reduction in hours was the Claimant's disability.

76. The requirement was for the Claimant to work full time hours. This was confirmed by the Respondent's witnesses who all gave evidence to the effect that reduced working hours could not be accommodated due  
25 pressures the Respondent were under such as the growth of business following the pandemic, recruitment and retention issues exacerbated by Brexit, the team were all working full time so could not pick up extra hours, potential delays in sales orders and the Claimant's failure to consider a

further reduction in working hours to accommodate job share (which the Claimant disputed).

5 77. The Respondent's position was that there was no such PCP as the Claimant had been offered a further reduction in hours as this would have made it easier to recruit on a job share basis. This was disputed by the Claimant. The tribunal accepted and preferred the Claimant's evidence that he was not offered the further reduction in hours or that it was explained to him this would have made it easier to recruit on a job share basis. ML's evidence was unatisfactory on this point and vague. He also  
10 conceded that no agency workers had been asked if they could cover the Claimant's shifts which further undermined his evidence on this point.

78. The tribunal find that the Respondent did apply the PCP as claimed.

*Failure to adjust trigger points*

15 79. The tribunal considered the Respondent's Disciplinary Absence Management Procedure. It set out clear "trigger points". It did not provide for adjustment to them nor did it provide for absences related to disability. The trigger points were a PCP applied by the Respondent.

20 80. The tribunal did not accept the submission by the Respondent that the Respondent retained the ability to and adjusted the trigger points. The Respondent's procedure was rigid and inflexible and took no account of disability related absences.

*Substantial Disadvantage*

25 81. The requirement to work full time hours placed the Claimant at a substantial disadvantage in comparison to people without disability. The actual functional effects of the disability were that the Claimant could not work full time hours. As such he was clearly and substantially disadvantaged in comparison with those who did not have a disability and could work full time hours.

82. The failure to adjust trigger points also placed the Claimant at a substantial disadvantage in comparison with those who did not have a disability. The trigger points took no account of disability or indeed disability related absence. The Claimant's absences from 24 June 2021  
5 onwards were disability related. No adjustment was considered or made to the trigger points to take account of disability related absence. In fact, the Claimant was issued with a Final Warning arising from his first period of disability related absence. This showed a completely inflexible and blinkered approach by the Respondent.

10 83. The submission by the Respondent that the trigger points applied equally to all employees fails to take account of the fact the Claimant's absence was disability related.

*Did the Respondent know or ought reasonably to have known that the Claimant was likely to be placed at a substantial disadvantage as a result of the PCP?*

15 84. The tribunal consider that the answer to this question is yes. The Respondent was well aware of the impact of the PCPs on the Claimant from the content of the Occupational Health Reports and from the Claimant himself. They knew or ought reasonably to have known the impact of working full time hours upon the Claimant and the impact of the  
20 trigger points on the Claimant's absences due to his disability.

*Did the Respondent take such steps as were reasonable in order to avoid the disadvantage?*

85. The tribunal consider there to have been an abject failure by the Respondent to consider reasonable adjustments in light of the PCPs and  
25 the Claimant's disability. The whole approach had been wrong from the start. The Respondent did not take into account the Claimant's disability in the application of the PCPs or their disciplinary procedure. This is underscored by the application of a procedure which is disciplinary in nature and makes no reference to disability. It is further underscored by  
30 the treatment of the Claimant's request for reasonable adjustments as a flexible working request.



86. The Respondent adopted an inflexible approach to the request for reduced hours. This was treated as a flexible working request and did not take into account his disability. The Respondent did not consider utilisation of agency workers who were in use at the workplace to facilitate the Claimant working on reduced hours.
87. The tribunal does not consider the Respondent to have advanced objective reasons to conclude that working reduced hours was unreasonable. Agency workers may have been able to cover the Claimant's hours.
88. The Respondent's approach to the application of the trigger points was equally inflexible. The Respondent took no account of the fact the absences were disability related and imposed a Final Written Warning on him in any event. There was no attempt by them to adjust the trigger points to accommodate and take account of the Claimant's disability. Adjustment of the trigger points would have been fair and reasonable adjustment to make in the circumstances.
89. The claim in respect of a failure to make reasonable adjustments is successful.

### **Remedy**

90. The Claimant is entitled to a Basic Award of **£1,731.48**.

### *Mitigation of Loss*

91. The tribunal finds that the Claimant has failed to mitigate his loss. He has made few attempts to obtain alternate employment. 5 applications since the termination of his employment is wholly inadequate (over a period of 9 months). He had secured alternate employment at the point of resignation. He remains unfit to work full time hours. The tribunal accordingly considers that any financial loss should be restricted to 6 months. The Claimant ought to have been able to secure suitable alternative employment within that time frame.

92. The Respondent submitted that any award should be reduced by the Claimant's failure to appeal the decision to issue a Final Warning. The tribunal does not consider that the Claimant failed to adhere to the ACAS Code of Practice on Disciplinary and Grievance Procedure in not doing  
5 so in the circumstances of this case. Even if it had it would not have reduced the amount of compensation.

### *Compensatory Award*

#### *Financial Loss for Discrimination*

93. The tribunal awards 6 months net pay under deduction of earnings and  
10 benefits received as compensation for discrimination.

94. This equates to 26 weeks x £303.20 = £7,883.20. The Respondent paid an employer pension contribution of £45.56 per week. This equates to 26 x £45.56 = £1,184.56. The Claimant's loss of statutory rights is accepted at £500.

15 95. The Claimant's total financial loss is £9,567.76.

96. The tribunal deducted the sum of £4,770.60 in respect of earnings and benefits received. The tribunal did not deduct the self isolation grant of £500.

97. The total compensatory award financial loss element is **£4,797.16**

#### *Injury to Feelings*

98. The tribunal considers and finds that the Claimant did suffer embarrassment, humiliation and distress as a consequence of the discriminatory treatment by the Respondent. He was occasioned stress, worry and upset. The treatment had a detrimental impact on his mental  
25 health and impacted on his relationship with his wife.

99. The tribunal considers the injury to feelings ought to reasonably be assessed at the upper end of the lower range in **Vento**. The tribunal awards the sum of **£7,500** in respect of injury to feelings.

100. The total compensatory award for discrimination is **£12,297.16**

*Reinstatement*

5 The tribunal accepted the Respondent's submission that reinstatement should not be ordered on the basis that the relationship between the Parties had clearly broken down. This was evident from the Claimant's submissions and evidence as to the credibility of his line managers and their treatment of him during his employment with the Respondent. The Claimant described ML as unhelpful, unpleasant and that the made the Claimant feel he was a nuisance. Reinstatement was not reasonably  
10 practicable.

**Employment Judge: A Strain**  
**Date of Judgment: 26 September 2022**  
**Entered in register: 29 September 2022**  
15 **and copied to parties**