EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Rehman**

Respondent: **Department for Work and Pensions**

Heard at: **East London Hearing Centre (via CVP)**

On: **Wednesday 31 August 2022**
Thursday 1 September 2022 and
Friday 2 September 2022

Before: **Employment Judge Frazer**
Members: **Mr J Webb**
Mr M Wood

Representation
Claimant: Mr B Supiya (Tribunal representative)
Respondent: Mr R Talalay (Counsel

JUDGMENT

The Claimant's claims for unpaid wages (holiday pay), victimisation and direct discrimination on grounds of disability are not well founded and do stand dismissed.

REASONS

1. By ET1 dated 17th January 2021 the Claimant, Miss Mariam Rehman, brought a claim before the tribunal for disability discrimination, victimisation and arrears of pay. The EC notification was made on 23rd December 2020 and the issue by ACAS of the certificate was on 23rd December 2020.

2. Under Paragraph 2 of the Particulars of Claim the Claimant stated that while she had been issued with an ill health retirement certificate on 2nd October 2020 she had not yet been paid or informed when she would receive her retirement package and be paid the correct holiday pay. It was also claimed that since the Respondent had taken her off the payroll and then put her back on again there had been emergency tax deductions made to her holiday pay. The Claimant claimed further that she had asked for HR advice and had not been given any.

The Claimant brought a claim for victimisation on the basis that the real reason the Respondent had acted in the manner cited was because she had brought proceedings under the Equality Act 2010 by virtue of the claim that she had brought against the Respondent under case no: 3202850/ 2018. In its Response dated 2nd March 2021 the Respondent denied the claims but accepted that the Claimant was a disabled person by reason of recurring meningioma tumours.

Case Management history and the identification of the claims

3. The case came before EJ Burgher on 25th April 2022 having been listed for a telephone preliminary hearing. He listed the complaints and issues at Schedule A to that order.

4. At paragraph 1 there was a claim identified for breach of contract on the basis that the Respondent failed or delayed to process her ill health retirement within a reasonable period. At paragraph 2 there was an issue as to whether the Claimant had suffered any consequential loss and the losses were identified as £300 in respect of interest payments for loans and debts; £17000 for emergency taxes and a miscalculation of the pension as £15688 rather than £28400.

5. The unlawful deduction from wages claim was identified at paragraph 5 as holiday pay. The Claimant's claim was for £2702.37.

6. At paragraph 11 there was a claim for direct disability discrimination in that the Claimant stated that her line manager refused to refer her to HR for advice on pension options. It is alleged that such a referral would have been made for someone not suffering from the Claimant's disability/ a non-disabled person.

7. At paragraph 12 the Respondent conceded that the Claimant had carried out a protected act by pursuing her claim under 3202580/ 2018. The Claimant claims that she was victimised in that she was subjected to a detriment by the Respondent in that it failed or delayed to process her ill health retirement because she had brought proceedings.

Amendment Application

8. On the first day of the hearing we heard an amendment application by the Claimant's representative Mr Supiya. This has been made on 24th August 2022 and was opposed by the Respondent. Mr Supiya also indicated that he may want to change the direct discrimination claim to one of 'arising from'.

9. The amendment application concerned the allegation that there had been a miscalculation of the Claimant's pension which was brought as a breach of contract. This had been recorded as a loss but not a specific breach of contract as at Schedule A of EJ Burgher's issues. It was said that the breach of contract was the breach of the implied term by the Respondent to ensure that there was a reasonable and fair application of payment of pension payments for what the employee has paid in contributions. It was said that this was not a new claim. It was a loss to the Claimant of £12000 a year. The Respondent objected on the

basis that it was a new claim only articulated at the point of the witness statement exchange and had been presented out of time. The Respondent said that it would need to call evidence which would necessitate an adjournment.

10. We did not allow the amendment having regard to the principles under **Selkent v Moore [1996] ICR 836.** We found that it was an entirely new claim, not pleaded in the original claim form. The Claimant first knew of the claim on 16th April 2021 when she informed the pension administrator that the information was incorrect. By around mid-July 2021 she ought to have put in claim or amendment whereas the application was made over a year later and heard on the first day of the final hearing after disclosure and witness statements had been prepared. The Claimant got the calculation in 2021. That was done post termination. There was a strong likelihood that it did not arise on termination such that the Tribunal did not have jurisdiction to hear it and we took into account the absence of prospects of success. There would likely need to be an adjournment and actuarial evidence may need to be called which would cause further cost and delay to the Respondent. It would be open to the Claimant to bring a claim in the county court.

11. Mr Talalay brought our attention to some correspondence in respect of the issues. In particular we were shown an email dated 11th July 2022 from the Respondent's solicitor that the case management order from EJ Burgher had not contained the following directions which were in fact articulated at the hearing: the Claimant was to confirm any adjustments for her reasonable adjustments claim by 9th May 2022: she was to have paid a deposit of £50 by 16th May 2022 and she was to have applied to amend her claim by 16th May 2022. At 1539 on 11th July 2022 Mr Supiya wrote back to say that the s.19 indirect disability discrimination claim was withdrawn, there was no claim for a failure to make reasonable adjustments and *'the claim for breach of contract is only being pursued in respect to holiday pay as the Claimant has since received her tax rebate from HMRC*. *This part of the claim is therefore withdrawn.'* He went on to say *'for the avoidance of doubt the matters being pursued are holiday pay and victimisation.'* A deposit order was sent to the parties on 1st August 2022 in respect of the claim for breach of contract regarding the £17000 losses.

12. Mr Supiya wanted to proceed with the claim for breach of contract in respect of the delay point relating to the losses of £300. Mr Talalay objected on the basis that there had already been a withdrawal and his solicitors had acted in reliance. We determined that the Claimant had unequivocally withdrawn this breach of contract claim. We took into account the express statement and that the Claimant had prepared the schedule of loss to reflect only the holiday pay and victimisation. We found that it would not be in the interests of justice not to dismiss the claim under Rule 52.

13. We did not find that there had been an express withdrawal of the direct discrimination claim and Counsel had said that he would be able to deal with that so we allowed that to proceed.

14. Therefore the issues are as follows. We specifically confirmed these with the parties twice before we started and they agreed. The Claimant did not pursue

her amendment application in respect of a claim for arising from and confirmed she was proceeding with direct discrimination and victimisation as the only discrimination claims.

THE ISSUES

15. **Unlawful Deduction from Wages (holiday pay)**

15.1 Has the claimant been properly paid the wages (including holiday pay) owed to her by the Respondent under her contract of employment or has there been a deduction?

15.2 If such a deduction was made was such a deduction required or authorised to be made by virtue of a statutory provision or a relevant provision of the Claimant's contract?

15.3 If the Respondent has made a deduction from wages, has the Claimant previously signified in writing her agreement or consent to the making of the deduction?

16 Direct Discrimination

16.1 Did the Respondent treat the Claimant less favourably because of disability? The Claimant states that her line manager refused to refer her to HR for advice on pension options. It is alleged that such a referral would have been made in respect of someone not suffering from the Claimant's disability.

17 Victimisation

17.1 The Respondent concedes that by pursuing her employment tribunal claim with case number 3202580/ 2018 she made a protected act.

17.2 Was the Claimant subjected to a detriment by the Respondent? The Claimant relies on the following detriments:

17.2.1 The failure or delay by the Respondent to process her ill health retirement.

17.3 Was any detriment found to have occurred because of the protected act?

17.4 Was the Claimant treated less favourably than others were or would have been treated?

17.5 If the Claimant was discriminated against had the Respondent taken reasonable steps to prevent such acts of discrimination occurring?

Disclosure

18 On the morning of the second day the Claimant applied for an adjournment on the basis that the Respondent had disclosed a number of documents including

from its policy and intranet on the calculation of annual leave. The Claimant's representative wanted to obtain union advice. We decided to proceed. There was a witness the Respondent had indicated it would call for provenance of those documents and we agreed to that course of action. We didn't accede to the application to adjourn. We had regard to the overriding objective. The Respondent should have disclosed the documents before but the Claimant had had the documents for several days and only asking to adjourn now. The WS and intranet screenshot would go to provenance. The Claimant had had some time this morning to take instructions. There was nothing on the face of it which suggested that the documents were inauthentic. The nature of the Respondent's case had not changed in that the Respondent would maintain their method of calculation and the Claimant would disagree with that method. The Respondent's witness could be cross-examined and we were willing to give the Claimant's representative a further half an hour to prepare. We were mindful of the delay any adjournment would cause in this case and we did not think this would be proportionate.

The Hearing

19 We had a joint bundle of documents from the parties. We had the additional documents from the Claimant which were the header of email which was at page 175 and a payslip which were inserted as 175a and 175b. We also had a number of additional documents from the Respondent at pp268 to 287 and a screenshot from the intranet at p288. We heard witness evidence from Mariam Rehman, Habib Rehman, Jolly Rungay and Kate Gill. We heard closing submissions from both parties' representatives and we reserved our decision.

Submissions

Respondent's Submissions

20. On behalf of the Respondent it was submitted that in respect of the claims for direct discrimination and victimisation there was no less favourable treatment or detriment. The correct referral process for payroll issues was to 'SSCL' ('shared services'). It was submitted that this was the consistent evidence of both of the Respondent's witnesses and when the Claimant escalated matters to Kal Nijjar and Rizwan Ahmed she was given the email address for SSCL. At all points she was given the correct information. The Claimant has not raised a prima facie case. The Claimant's union representative sent an unusually effusive email to say thank you to Ms Jolly for all her assistance with the Claimant's case. Ms Rungay released the file on 2nd November after she had submitted the RGM32 as per the normal process. After that she referred the Claimant to SSCL. She acted promptly to expedite the Claimant's ill health retirement and sent off the paperwork within 2 weeks which was not a delay or one caused by any protected act or disability. At p.146 there was evidence of the chronology of events from the point when MyCSP had requested information from SSCL and the delay answering that query. There was no evidence that the Claimant was treated less favourably. Either the Claimant had not shifted the burden or the Respondent had provided good explanations for what had happened. In terms of the

timescale there was a period between 2nd October and 29th October between when IHR was confirmed and the information sent to SSCL. There was no delay as there was correspondence about what date would be the appropriate leave date. A request for services and medical certificate were issued to MyCSP. Six days later MyCSP sent a request to SSCL about the Claimant's salary between 2017 and 2020. It was realised that the request for information sent on 9th November 2020 had not been received by SSCL. It was re-sent on 29th January 2021.

21. In respect of holiday pay, the question is what is the correct contractual and legal basis for determining holiday pay? In **Hartley and Others v King Edward VI College [2017] UKSC 39** at paragraph 30 Lord Clarke held the most sensible approach to apportioning salary was to do so on a day-to-day accrual basis by treating each day as 1/365 of the annual salary. The Claimant's contract provided that she should be paid monthly in arrears and that 'in event of your salary being paid in respect of part of a calendar month, you will be paid a proportionate part of the monthly figure calculated with reference to the number of days in the calendar month'. The policy at p.281 makes it clear that the calculation is on the basis of calendar days. Even if you were dissatisfied that the policy applied to the Claimant both the contract alone read in conjunction with the authority makes it clear that calculation of a daily rate as per calendar day not per actual working day. The Claimant was paid the correct amount of holiday pay.

Claimant's Submissions

22. It was submitted that the Claimant gave evidence truthfully and her evidence was worthy of belief. By contrast Ms Rungay's evidence was evasive and was often conflicted. She was reluctant to concede that the DWP had a HR department and only conceded the point once questioned about Ms Gill's role.

23. In relation to the detriment claim it was submitted that Ms Rungay correctly supported the Claimant before her ill health retirement. Once the IHR had been granted her role stopped right there. It took until 29th October for SSCL ('shared services') to be notified once the date of 2nd October was confirmed. The service request was not until 9th November and then there was no action until January 2021. There was an intervention by EJ Jones at the tribunal hearing of case no: 3202850/2018 to have the matter looked into: nothing was done when the ACAS certificate was received, which was odd. There was no paper trial of the enquiries that were made in the form of email correspondence. The inference is that there were other factors at play and that those factors were the victimisation of the Claimant. The Tribunal should take into account the guidance from the following authorities: **King v Great Britain China Centre [1991] IRLR 513**; **North West Thames Regional Health Authority v Noone [1988] ICR 813** and **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205**. It is unusual to find direct evidence of discrimination. Discrimination may not be ill-intentioned. The question for the Tribunal is what inferences it is proper to draw from the primary facts. It was submitted that the primary facts from which inferences could be drawn in this case were as follows: the delay in the payment of the Claimant's pensions and no rational explanation given; why after notifying

her of her ill health retirement Mrs Rungay failed to help the Claimant and told her she could not help her anymore and why Mrs Rungay took the file with her while moving to another role. Tracey Lee Reece was not asked to give evidence. The only sustainable conclusion was that there had been direct discrimination and victimisation. The motive may be subconscious in discrimination claims – **Nagarajan v London Regional Transport [1999] ICR 877**. The motivating factor was a desire to victimise the Claimant because of the claims she had issued in the tribunal.

24. In respect of the holiday pay claim the entitlement of 47.5 days was not in dispute. It was the method of calculation. The **Hartley** authority produced by the Respondent's representative was distinguishable on the facts as it applied to teachers' strikes. They worked evenings and weekends and seven days a week but the Claimant does not work in that way. The Claimant only works five days a week. The Respondent says that it was calculated in accordance with its policy but this was produced at the eleventh hour. This was not drawn to the Claimant's attention at the time.

The Law

Discrimination and Burden of Proof

25. s.136 Equality Act 2010

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

26. What this provision means is that the Tribunal must first decide whether a claimant has established a prima facie case of unlawful discrimination or victimisation. If he or she has then the burden shifts to the Respondent to provide a non-discriminatory explanation for the treatment alleged (**Igen Ltd v Wong [2005] EWCA Civ 142**; **Madarrassy v Nomura International plc [2007] EWCA Civ 33**.)

Victimisation

s.39(4)(d)

27. An employer must not victimise an employee of A's (B) by subjecting B to detriment.

s.27 Equality Act 2010

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
(a) Bringing proceedings under this Act. …….

Direct Discrimination

s.39(2)(d) Equality Act 2010

28. An employer (A) must not discriminate against a person (B) by subjecting B to a detriment.

s.13 Equality Act 2010

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

Holiday Pay

s.13(3) Employment Rights Act 1996

30. 13(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from a worker's wages on that occasion.

Findings of Fact (unanimous)

31. The Claimant's continuous employment was from 1st April 1999 to 1st October 2020. It was clarified that the final hearing in the Claimant's proceedings under 3203850/ 2018 took place from 26th to 29th January 2021, so after this claim was presented. The Claimant started working as a Work Coach from 2001 and this was her post on leaving. It was accepted that by way of bringing proceedings under 3203850/ 2018 the Claimant had done a protected act.

32. In 2014 the Claimant was diagnosed with brain tumours and was monitored thereafter by having MRI scans. In July 2016 she had surgery to remove one of the tumours. After this surgery she sustained an infection to her skull so had a further operation in April 2017. In consequence of the tumours the Claimant suffered seizures, blackouts leading to poor balance, loss of memory and headaches.

33. She underwent a further operation and was absent from work between 11th June 2019 and 19th January 2020 and then from 28th January 2020 until 1st October 2020 due to symptoms relating to her meningioma tumours and surgeries that she had undergone in respect of them.

34. On 31st July 2020 it was agreed between the Claimant and the Respondent that she would put in an application for ill health retirement. On 2nd October 2020 the assessing practitioner, Dr Tom Griffin, endorsed the application as at the upper tier of the Alpha Pension Scheme as the criteria for upper tier benefits had been met. An ill health retirement certificate was therefore issued (page 99). On 2nd October 2020 Dr Griffin wrote to Ms Rungay to this effect.

35. On 9th October 2020 Ms Rungay wrote to the Claimant informing her that she had been awarded ill health retirement and attaching her report and certificate (p.105). She said in the email *'I contacted you today to complete your leaving the department form. I am still waiting for your leave date from the department and to send all your paperwork to HR to start the ill health award. Please let me know in writing your last day in the department.'*

36. On 14th October the Claimant wrote to Ms Rungay to say that her leaving date needed to be 26th September 2019. Then on 15th October at 1141 Ms Rungay replied to say that she had sought guidance from Complex Case and that the conclusion was that they were unable to backdate to September 2019. The end date was the date when the Claimant had been certified for ill health retirement which was dated 2nd October 2020. Ms Rungay copied and pasted in that email the relevant guidance and informed the Claimant that she would start the process of completing the relevant forms. The guidance that she had included in that email stated that the manager needed to complete form RMG32 and send the medical ill health retirement certificate to shared services as soon as possible and no later than the 10th working day of the month the employee was leaving.

37. On 15th October 2020 at 1206 the Claimant wrote to Ms Rungay asking her not to accept the date of 2nd October as she was getting some further advice. At 1302 she then confirmed she was ok with the date given of 2nd October. She stated '*as you know I do get confused. Please go ahead with this date and complete the form.'*

38. The Claimant then sent two emails to Ms Rungay on 19th October 2020 requesting that she send copies of any calculations to HR.

39. On 2nd November 2020 Ms Rungay wrote to the Claimant letting her know that she had completed the RMG32 form for the last day as 1st October 2020 and to start ill health from 2nd October 2020.

40. We find that there was no significant delay between 2nd October 2020 where the Claimant was certified for ill health retirement and when Ms Rungay notified her that she had completed form RMG32 on 2nd November. If there were any delays in the process they were not substantial and were attributable to the Claimant's request for an earlier date for her ill health retirement and Ms Rungay taking advice from Complex Case. On the evidence that we heard the Claimant had no issues with how Ms Rungay had progressed her case prior to November and December, however her evidence was that it was in November and December that she felt Ms Rungay had changed her attitude towards her. We had regard also to an email from the Claimant's union representative that

was sent to Ms Rungay on 17th November (p.127). This was an effusively written 'thank you' to her for the way that she had dealt with the Claimant's case.

41. When writing to the Claimant on 2nd November 2020 Ms Rungay informed her that her total annual leave accrued was calculated at 47.5 days. On 3rd November 2020 at 0930 the Claimant wrote to Miss Rungay querying her annual leave entitlement was 57.5 days. On 3rd November 2020 at 1016 Miss Rungay sent to the Claimant details of her annual leave calculation that she was owed which was 47.5.

42. On 9th November 2020 Catherine Peart of SSCL ('shared services') wrote to the Claimant to advise her that her annual leave payment would be processed. She was told that confirmation of her ill health retirement had now been sent to MyCSP, the pension administrators.

43. The Claimant was issued with a P45 on 16th November 2020. This was because the RGM32 (leaver's form) had been completed and forwarded on to shared services by Ms Rungay and therefore the issuing of the P45 would follow from that process.

44. On 30th November 2020 the Claimant emailed Ms Rungay. By that time she had received her annual leave payment and had been subject to emergency tax. She asked Ms Rungay for her help to ask HR to resolve the matter as soon as possible. She had been on zero pay hitherto so was concerned this was inaccurate. She said that she had phoned shared services and that they had informed her to make a claim against HMRC in respect of her tax code. She complained that payroll knew that she was an employee with zero pay so queried why she had been put on an emergency tax code. Ms Rungay emailed back that day to say that she was unable to assist any further with HR queries and that she would have to communicate with shared services regarding any errors. At 1530 the Claimant emailed Ms Rungay to request the complaints procedure for Human Resources and Ms Rungay wrote back at 1550 to say that she did not know the complaints process for HR and that she had sent the Claimant details of shared services and she should contact them. The Claimant also sent Ms Rungay an email on 3rd December 2020 to say that she had communicated with shared services, complaining about the method of calculation of her holiday pay and her pay being emergency taxed. The Claimant said that she felt like she was going round in circles trying to get some resolution to her queries.

45. On 3rd December 2020 Ms Rungay forwarded the Claimant's email off to Bindu Sirish, Ubha Bitu and Nijjar Kalvinder to say that she had completed all of the paperwork for the Claimant, that she had sent her the contact details for shared services and that she was no longer able to assist with the Claimant's queries with HR details. We accept her evidence that she had done what she could and that she had therefore passed the Claimant's email to her more senior managers.

46. On 8th December the Claimant wrote to Rizwan Ahmed (Ms Rungay's line manager) about her *'concerns regarding errors that have been made by my line manager and DWP Human Resources to my final pay'*. On 10th December 2020 Kalvinder Nijjar (PA to Rizwan Ahmed) wrote to the Claimant copying in Rizwan Ahmed providing her with the email address for shared services payroll queries. We noted that the provision of this address was consistent with Ms Rungay's assertion that the Claimant needed to take the matter up with shared services, the single operating platform who dealt with HR and payroll queries.

47. We heard Ms Rungay's evidence that she had reiterated that she was unable to assist further with the Claimant's queries and that SSCL was the appropriate port of call. We do not consider that she was being unhelpful or blocking off the Claimant. We find that as far as she was concerned, once she had completed the leavers form that was the end of her involvement. Her evidence was that she had kept open the Claimant's account even though she had moved to a different office in September. The Claimant asserted that this was because she wanted to keep control over the Claimant's case in a way that would delay the processing of her ill health retirement. However, we heard from Ms Rungay that she had dealt with the Claimant's case for two years and that for her to hand over the paperwork to a different manager to process would not have been fair. We found this explanation entirely plausible. We did not find that Ms Rungay deliberately removed the Claimant from payroll so that she could be emergency taxed or that she delayed the processing of the Claimant's case. Once the leave date was agreed as being 2nd October 2020 we found that she acted promptly in completing the necessary RGM32 form in accordance with protocol and forwarding it to shared services. We found that she compiled the Claimant's holiday pay from the records that she had for her and passed that information on to shared services to process through payroll.

48. The Claimant's case was that Ms Rungay's attitude changed towards her in November and December. Ms Rungay indicated that she could no longer assist the Claimant and this we find was correct as it was not her domain. We see no reason why Ms Rungay would suddenly change her stance in November and December because of the employment tribunal claim the Claimant had brought. Ms Rungay was aware of the claim well before then and yet was helpful to the Claimant for the period of her ill health retirement process. The Claimant posited that the change was because she was preparing her witness statement for the Tribunal in November. Ms Rungay said that she had been asked for her availability as early on as March 2019 so she knew at that point that she was going to be requested to attend the Claimant's tribunal. She said that she had prepared the witness statement in June 2019 but the case had been adjourned. It was put to her in cross-examination that the statements had not been exchanged until November 2020 but she could not remember. We accepted her evidence that she had done what she could for the Claimant as she repeated under cross-examination that the queries that the Claimant had were not for her to deal with but were for shared services, a contracted out HR service for public sector organisations such as the DWP. Once Ms Rungay had completed Form RGM32 on 2nd November the matter was passed to shared services to progress the pension payment.

49. We found that Ms Rungay and others during the correspondence in November and December perhaps did not explain to her the difference between the shared services and Complex Case divisions of labour in relation to the Respondent's HR. We heard from Ms Gill that Complex Case mainly managed queries from managers about policies and disciplinary and capability proceedings. Payroll and individual HR issues were for shared services.

50. We had regard to the correspondence between Tracey Lee and Reece Reece dated 12th February 2021 (p.146) which detailed the chain of events surrounding the processing of the Claimant's ill health retirement from 29th October 2020 and 11th February 2021. This detailed that on 2nd November a service request had been received by shared services (which was from Ms Rungay) requesting leaver action. This was actioned and a medical certificate was issued to MyCSP, the pension providers, on 3rd November 2020. On 9th November 2020 MyCSP requested information from shared services about the Claimant's earnings between April 2017 and September 2020. Unfortunately this query was not actioned and during the employment tribunal hearing in January 2021, it came to the Respondent's attention when the Claimant complained about the delay in processing her ill health retirement. On 29th January 2021 the Supplier Management Team then escalated a query to MyCSP and shared services. At that point it was discovered that shared services had not received the query that had been issued by MyCSP on 9th November. The query response was provided by shared services on 2nd February 2021 and the quote was issued to the Claimant on 11th February 2021.

51. We find that the timetable given was consistent with a query having gone missing. By that time the matter was out of the hands of Ms Rungay and was being managed as between shared services and MyCSP who had no reason to victimise the Claimant or discriminate against her. They were following processes. The quote was issued quickly after the query was answered.

Direct Discrimination

52. In conclusion therefore we did not find that the Claimant had raised a prima facie case of direct discrimination. Alternatively we found that if the burden had shifted the Respondent provided a reasonable explanation for any failure to do more than it had done as regards to the Claimant's complaints. We find that she was not treated less favourably than someone who was not suffering from her disability or than someone who was not disabled. They would still have been referred to shared services by Ms Rungay because shared services were the single operating platform who managed individual HR queries and payroll queries. The Claimant was referred not only by Ms Rungay but also by Rizwan Ahmed.

Victimisation

53. We also did not find that the Claimant had raised any prima facie case of victimisation. The Claimant had done a protected act by bringing tribunal proceedings. We find that if there was any delay in processing the ill health

retirement it was caused by an error in shared services picking up a query from MyCSP about the Claimant's earnings. We did not find that there was any significant delay beyond that. We found that Ms Rungay had done what was required of her until she processed the Claimant's leaver's form and had referred the Claimant to shared services. We did not find that there was any detriment or that if there was, it was not because the Claimant had brought proceedings against the Respondent.

Holiday Pay

54. The Claimant's complaint about holiday pay is set out in an email that she sent to the HR Services Team on 24th December 2020. She stated, *'I was owed for 47.5 days holiday and I was paid for 47.5 calendar days i.e. this included weekends and I was incorrectly taxed on it too to compound the issue. When I queried it with SSCL payroll they said that DWP have instructed them to include weekends when calculating holiday pay. However my contract of employment specifically stated I work 5 days a week and when new contracts were issued it was agreed that I could stay on my original contract.'*

55. At paragraph 20 of her witness statement the Claimant says that essentially if you divide the annual salary by the total number of unpaid holiday days you get a daily rate of £112.32. She says that the Respondent has calculated the holiday pay on a calendar day basis which results in a daily rate of £80.01. The Claimant says that she did not work 7 days a week so the daily rate is wrong. She says that the holiday pay that was paid to her on termination ought to have been £5335.20 and not £3800, leaving £1523.21 owing.

56. At paragraph 8 of her witness statement Ms Rungay states that she did not calculate the holiday pay, which was done by shared services, but that her understanding of the calculation to arrive at the daily rate was that it was £29, 203 salary divided by 12 (months) divided by 31 days (the number of days in October) multiplied by 47.5 days.

57. The Claimant's contract of employment is set out at page 260 to 261. At the head of the letter it reads: '*The following paragraphs summarise or refer to your main terms and conditions of service as they apply at present. You will be told about any significant changes through staff circulars or personal letters. Details of conditions of service are to be found in 'The ES and You – Your Rights and Responsibilities' (copies of which may be consulted at your normal place of duty) and in the booklet The ES and You (a copy of which you have already received).'*

58. Under 'Pay' it was stated *'In the event of your salary being paid in respect of part of a calendar month, you will be paid a proportionate part of the monthly figure calculated with reference to the number of days in that calendar month.'*

59. Under 'hours' it was stated *'You will normally work a 5 day week of 41 hours including meal breaks.'*

60. We heard evidence from Katie Gill, HR Consultant for the Respondent, who stated that since around 2006 the Respondent has had a policy on Annual Leave on its intranet for all employees to view. She stated that this applied to all employees even those who had opted out of the Employee Deal collective agreement (as did the Claimant) in 2016. At p.277 paragraph 17.5 it says *'Payroll will calculate the amount due as described in the DWP Salary Calculations Table. Employees can only request to receive payment for untaken leave in the last month of their leave year.'* At paragraph 17.6 it says *'the amount of days in the last month of an employee's leave year will impact the amount they receive for untaken leave. Any decision to receive payment for untaken leave should be made on this basis.'* At p.281 the daily rate is then set out in the Calculations Table as '*gross annual salary, plus allowances reckonable for annual leave, divided by 12, divided by number of calendar days in the last month of their leave year or if leaving the month in which they leave, multiplied by the number of days annual leave due'.*

61. We find it more likely than not that this provision was incorporated into the Claimant's contract of employment by custom as it was on the intranet as a policy for all employees to see since 2006.

62. However if we are wrong on that we have had regard to the authorities presented to us by Counsel for the Respondent. In **Hartley** the employee teachers took place in a one-day strike and the College made a consequent deduction from their pay of 1/260 of their annual salary on the basis they only worked Monday to Friday throughout the year. The employees contended that the deduction should be 1/365 of their pay. It was held that applying s.2 of the Apportionment Act 1870, the correct approach was to apportion salary on a calendar basis over 365 days. We find that the principle of calendar day apportionment holds good. We have also had regard to the Claimant' original contract. The Claimant was paid on the basis of a yearly salary. If she was to be paid part of a calendar month she was to be paid a proportionate part of the monthly salary figure calculated by reference to the number of days in that calendar month. We find that this approach was consistent with the method of holiday pay calculation in the Respondent's policy and is also consistent with the approach taken in **Hartley**. While we do appreciate that this leaves some disparity between employees in that an employee who leaves in February may be better off than the employee who leaves in October, the approach is well established. We conclude that the method of calculation of the Claimant's holiday pay was correct and that she is not owed any further holiday pay.

Employment Judge A Frazer
Dated: 30th September 2022