EMPLOYMENT TRIBUNALS

Claimant: Mr L Barker

Respondent: Wirral University Teaching Hospital NHS Foundation Trust

Heard at: Liverpool **On:** 30 September & 26 October 2022 in chambers

Before: Employment Judge Sharkett (By Cloud Video Platform)

REPRESENTATION:

Claimant: Ms A Beech, Counsel instructed by Sater & Gordon
Respondent: Mr M Smith, Solicitor

JUDGMENT ON PRELIMINARY HEARING

(a) The Tribunal has jurisdiction to hear the claimant's claim under Regulation 30 Working Time Regulations 1998.

(b) In respect of the claim of unlawful deduction wages, and in as far as any allegation formed part of the application at this Hearing, the claimant is allowed to rely on Allegations (i) (ii) and (iii) as set out in paragraph 9 of this Judgment

(c) In respect of the claim of unlawful deduction wages, and in as far as any allegation formed part of the application at this Hearing the claimant is NOT allowed to rely on Allegations (iv) (v) and (vi) as set out in paragraph 9 of this Judgment, on the basis that they have no prospects of success and are struck out under Rule 37 of the ET rules

(d) The respondent's application that the 'sick leave discrimination complaints' in respect of claims brought under s15 and s21 Equality Act 2010 be either struck out under Rule 37 or subject to a deposit order under Rule 39 is refused

(e) The respondent's application that allegations (c) and (e) of the s15 Equality Act 2010 be either struck out under Rule 37 or subject to a deposit order under Rule 39 is refused

REASONS

1. This Preliminary Hearing was an application made by the respondent to:-

(a) Determine whether or not the Tribunal has jurisdiction under regulation 30 of the Working Time Regulations 1998 ("WTR") to consider the complaint that the respondent breached 13(10) of WTR.

The Respondent has now conceded that as a result of the amendment to the WTR the Tribunal does have jurisdiction to hear such a claim under 13 (10) WTR, by virtue of the amendment to 30 (1)(a) WTR but maintains that the claim is brought out of time and therefore the Tribunal does not have jurisdiction to hear the same. This was not a matter previously identified for consideration today but the Respondent has put the claimant on notice of its intention to raise the same today

(b) To consider whether or not part of the complaint of unauthorised deduction of wages should be struck out under rule 37, on the ground that it has no reasonable prospect of success. The respondent's argument is that the claimant has failed to assert any contractual basis on which the allegedly deducted wages were properly payable. The respondent seeks to have the whole complaint struck out on this ground, save so far as it relates to the two periods of annual leave from 7th - 20th September 2020 and 1-7th April 2021.

(c) To consider, alternatively in relation to the same part of the unauthorised deduction of wages complaint, whether or not the claimant should be ordered under rule 39 to pay a deposit as a condition of proceeding with that part of the claim on the ground that it has little reasonable prospect of success,

(d) To consider whether or not the Tribunal has jurisdiction to consider the complaint of unauthorised deduction from wages on any occasion prior to 16 April 2021, and in particular:

(i) Whether or not it was reasonably practicable for the claimant to have presented the claim (in respect of the pre-16th April occasions) within the statutory time limit; and,

(ii) If it was not reasonably practicable, whether or not the claim was presented within such further period as the tribunal considers reasonable.

(e) To consider whether or not the "sick leave disability discrimination complaints" should be struck out under rule 37 on the ground that they have no reasonable prospects of success. It was agreed at the last PH that the 'sick leave disability complaints" are complaints of failure to make adjustments and s15 discrimination allegedly done whilst the claimant was on sick leave from April 2021 onwards. The respondent's argument is that whilst the claimant was on sick leave (a) the alleged PCP cannot have put the claimant at a substantial disadvantage and (b) the alleged unfavourable treatment cannot have been unfavourable and/or cannot have been because of something arising in consequence of his disability

(f) To determine whether or not the Tribunal has jurisdiction to consider the remaining disability discrimination complaints and in particular whether or not the claim was presented within such time period as the tribunal considers just and equitable (this issue only arises if the sick leave disability complaints are struck out and will otherwise be dealt with at the final hearing)

(g) Whether or not the complaint of discrimination arising from disability, in respect of allegations (c) and (e) of the s15 complaints should be struck out under rule 37 on the ground that they have no reasonable prospects of success for the reasons given in paragraphs 107 – 108 and 116 of the respondent's grounds for resisting the complaint

2. At the last PH EJ Horne made a number of case management orders in preparation for the hearing today. Unfortunately there was some difficulty locating the respondent's SA which had been filed in good time for the hearing but was not put before me until a little before the hearing started. In preparation for the hearing I have also been provided with a written SA on behalf of the claimant, and a bundle of documents consisting of 344 pages. Given the nature of this application and the fact that it would be inappropriate for me to conduct a mini trial in order to reach my decisions of the questions of merits, I have had regard to only such documents as are required of me at this stage having regard to the different tests I am required to consider in respect of rule 37 and rule 39. The claimant has also provided a written witness statement and he has answered questions put to him in cross examination by Mr Smith.

3. In addition to the oral evidence of the claimant, I also heard further submissions from Ms Bayliss and Mr Smith and have had regard to the same in reaching my decisions.

4. I deal with each issue in the order in which they appear above.

The Holiday pay claim under the WTR

5. In bringing this claim the claimant relies on Regulation 13(10) WTR which was amended as a result of the Pandemic to provide:

   (10) *Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11)*

6. It is the claimant's case that as a result of his disability (which is conceded by the respondent) he was unable to attend work due to the fact that he had been identified as a clinically vulnerable person. He brings a number of complaints about the manner in which he was treated during this time, some of which relate to the calculation of his pay during 'absences' and include complaints of unlawful discrimination. In April 2021, the claimant was awaiting his second vaccine before being able to return to work and had sought to take annual leave from 2020-2021 to cover his continued period of absence. On 19th April 2021, he was advised by his manager that he was entitled to carry over only one week (37.5 hours) holiday from the year 2020/2021. On 23rd April 2021, the claimant challenged his right to carry over 4 weeks leave and requested that be taken from 1st – 28th April 2021. It is the claimant's case that he did not receive any response to this email and it was only when he did not receive his full pay on 27th April 2021 that he realised his request for holiday had not been granted.

7. Mr Smith for the respondent, submits that in accordance with Regulation 30 WTR the time limit for submitting a claim starts to run "*beginning with the date on which it is alleged that the exercise of the right should have been permitted"* which in the circumstances of this case he says is 1st April 2021. It is the respondent's case that the primary time limit for bringing this claim expired on 30th June 2021. Mr Smith submits that on this interpretation of regulation 30 time started to run from the date on which the claimant would have commenced his leave had it not been refused by the respondent which I accept on his interpretation and at first blush would appear to be 1st April 2021.

8. However, this request for leave was not made in the usual circumstances where a worker puts in a request prior to taking annual leave. The circumstances of this request were entirely different. The claimant had already been on a prolonged absence from work due to his vulnerable status during the pandemic. He was unable to return to work until he had received his second vaccine which was a requirement of the respondent. The respondent had decided that the claimant would have to take unpaid leave during this period and there had been ongoing dialogue between the respondent and the claimant's union representative in early April 2021 in response to the respondent's decision. It is against this backdrop that the claimant made his request to be retrospectively allowed to allocate a portion of his annual leave to absence that had already taken place so that he would receive pay for the same at the end of the month. I find that on the facts of this particular claim, the date upon which the right to annual leave should have been permitted to

begin in accordance with Regulation 30 WTR was the date on which the request was made and the claimant was notified that his request was denied which was 19th April 2021 (p246) It could not have been permitted to commence before that date as the request had not been made. I find therefore that time ran from 19th April 2021. The claimant commenced early conciliation on 16th July 2021 with an early conciliation certificate being issued on 27th August 2021. His ET1 was submitted 27th September 2021, which was within the time period permitted, allowing for early conciliation. Consequently the claim was submitted in time and the Tribunal has jurisdiction to hear the claimant's claim.

Strike Out of Unauthorised deduction of wages claim under rule 37 Employment Tribunal Rules

9. It is the claimant's case that during the periods when he did not attend work due to the pandemic, he was contractually entitled to full pay inclusive of unsocial hours. The relevant periods are:
   (i) The first shielding period of 27 March to 31 July 2020;
   (ii) The period in which the respondent continued to pay Covid -19 special leave pay of 1st August – 4 November 2020, excluding the period of annual leave between 7th- 20th September 2020
   (iii) The second shielding period of 5 November 2020 to 5 December 2020
   (iv) The period during which the respondent paid the claimant occupational sick pay of 3 December 2020 to 4 January 2021
   (v) The period during which the respondent paid the claimant statutory sick pay of 8th April to 18th May 2021
   (vi) The period during which the respondent paid the claimant contractual sick pay of 19 May 2021 to submission of his ET1 on 27th September 2021.

10. The respondent seeks to have the claimant's claims struck out under rule 37 on the ground that they have no reasonable prospect of success. (The respondent's argument is that the claimant has failed to assert any contractual basis on which the allegedly deducted wages were properly payable). In the alternative and in respect of the same unauthorised deduction of wages claim, the respondent asks the Tribunal to consider making an order under rule 39 for the claimant to pay a deposit as a condition of proceeding with that part of the claim on the ground that it has little reasonable prospect of success.

11. Ms Bayliss for the claimant submits, that the only argument set out in the previous case management summary as being for consideration today is whether the claimant had a contractual entitlement to enhancements. The arguments for consideration are set out at 8.2 – 8.4 inclusive of the case management order which includes the basis on which the respondent argues the claimant's contractual right to 'allegedly deducted wages' which, I consider does not restrict the application to a right to enhancements only. It is the respondent's case that save for the two periods of annual leave from 7th -20th September 2020 and 1-7th April 2021, the claimant had no contractual right to full payment of his wages whilst not working, and the rest of his claim for

unauthorised deduction of wages should be struck out as having no reasonable prospects of success. In the alternative the respondent submits the claimant should be made to pay a deposit as a condition of continuing with his claim.

12. Ms Bayliss submits that when the claimant was issued with a written contract of employment in 2012 the consequences of a national pandemic had clearly not been anticipated. She submits that it was only on this occasion the respondent was obliged to consider government shielding guidance and agree to a variation of the pre-existing terms and pay the claimant full pay including enhancements whilst unable to work.

13. It is the respondent's case that the payment of unsocial hours was governed by part 2 of Agenda for Change (AfC), and provides for payment of the same when the claimant was at work. Mr Smith submits that the claimant has failed to show a contractual basis for payment of these sums when the claimant was not at work. He further submits that whilst NHS employers were provided with guidance that indicated that employers 'should' follow the 'advice' in the guidance to pay full pay to staff in receipt of Covid-19 special leave, this was not mandatory and the guidance was not incorporated into the claimant's contract of employment.

14. In respect of the reference period for calculating full pay during self-isolation Mr Smith submits that the respondent did follow that guidance and used the relevant three months 'at work' reference period, as set out at part 13.9 agenda for change which provides:

> 13.9 Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work
>
> For staff who have regular hours the reference period should be based on the previous three months at work or any other reference period that may be locally agreed.

Mr Smith submits that this aspect of the claimant's claim has no contractual basis and is based on a concept of fairness only.

15. It is the claimant's case that the respondent used the incorrect months to calculate these payments because he was not 'at work' during part of the months relied on.

Relevant Legal Principles

16. The power to strike out arises under rule 37 of the Employment Tribunals Rules of Procedure 2013. Rule 37 so far as material provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –

(a) that it is scandalous or vexatious or has no reasonable prospect of success…"

18. As far as "no reasonable prospect of success" is concerned, a helpful summary of the proper legal approach to an application to strike-out is found in paragraph 30 of **Tayside Public Transport Co Ltd v Reilly** [2012] CSIH 46, a decision of the Inner House of the Court of Session:

"Counsel are agreed that the power conferred by Rule 18(7)(b) may be exercised only in rare circumstances. It has been described as draconian (*Balls* v *Downham Market High School and College* [2011] IRLR 217, at para 4 (EAT)). In almost every case the decision in an unfair dismissal claim is fact-sensitive. Therefore where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the Tribunal to conduct an impromptu trial of the facts (*ED & F Mann Liquid Products Ltd* v *Patel* [2003] CP Rep 51, Potter LJ at para 10). There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions (*ED & F Mann Liquid Products Ltd* v *Patel*, supra; *Ezsias* v *North Glamorgan NHS Trust* [[2007] ICR 1126]). But in the normal case where there is a "crucial core of disputed facts," it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out (*Ezsias* v *North Glamorgan NHS Trust*, supra, Maurice Kay LJ, at para 29)."

19 There is no blanket ban against there being a strike-out, for instance in particular classes of cases such as discrimination, although in **Lockey v East North East Homes Leeds** UKEAT/0511/10/DM, a decision of 14 June 2011 before HHJ Richardson sitting alone, the EAT said at paragraph 19:

"…In cases of discrimination and whistleblowing there is a particular public interest in examining claims on their merits which should cause a Tribunal to consider with special care whether a claim is truly one where there are no reasonable prospects of success: see *Ezsias* at paragraph 32, applying *Anyanwu v South Bank Student's Union* [2001] IRLR 305. …..The Tribunal is in no position to conduct a mini-trial; issues which depend on disputed facts will not be capable of resolution unless it is clear that there is no real substance in factual assertions made, as it may be if they are contradicted by contemporaneous documents."

20 In **Chandhok v Tirkey** [2015] IRLR 195, at paragraph 20 the Employment Appeal Tribunal observed that there were occasions when a claim could properly be struck-out where, for instance, on the case as pleaded, there was really no more than an assertion of a difference of treatment and a difference of protected characteristic, which according to Mummery LJ, at paragraph 56 of his Judgment in **Madarassy v Nomura International plc** [2007] ICR 867:

"… only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

21 The EAT in **Chandok** went on to add that the general approach was nonetheless that the exercise of a discretion to strike-out should be sparing and cautious, adding:

22 "

… Nor is this general position affected by hearing some evidence, as is often the case

when deciding a preliminary issue, unless a Tribunal can be confident that no further evidence advanced at a later hearing, which is within the scope of the issues raised by the pleadings, would affect the decision."

23 In respect of an order for a claimant to pay a deposit Rule 39 provides;

39(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (the paying party) to pay a deposit not exceeding 1,000 pounds as a condition of continuing to advance that allegation or argument.

24 The test of whether a case has little reasonable prospect of success is different to that of determining whether a claim has no prospect of success. It requires the Tribunal to make a provisional, albeit non-binding assessment of the specific allegations or arguments. Whilst the test is not as rigorous as the test for no prospect of success the Tribunal must give clear reasons for the reason upon which it reaches its decision of whether or not the test is met.

Decision on unlawful deduction of wages application

25 It is not disputed that the claimant had been identified as being at high risk of severe illness from covid-19 from the outset of the pandemic and had been advised to 'shield' at home by the government to reduce the risk of infection. Whilst the claimant was not 'unfit' for work he was unable to carry out his normal duties because he could not be physically present at his place of work. In accordance with the shielding pay guidance issued to NHS employers the claimant was placed on Covid-19 special leave pay which gave him the right to full pay inclusive of any enhancements. His enhancements were calculated in accordance with the provisions of Agenda for Change based on his last three months 'in work'. Ms Baylis submits that it is the claimant's case that the payment of Covid-19 special leave represented a variation to his contractual rights which would continue throughout the period he was unable to attend work because of his need to shield. The claimant continued to be paid Covid-19 special leave for a short time beyond the period when shielding had ended. This was because the respondent was awaiting information about the claimant's health and the category of vulnerability he would fall in now shielding had ended. The second period of shielding ended on 2nd December 2020, and in accordance with the current shielding guidance, the respondent placed the claimant on sick leave, this was because he remained unable to attend work because he had not received his vaccine. During this period the claimant was entitled to receive pay in accordance with the provisions of part 14 AfC, which, by reason of his length of service, entitled him to six months full pay and six months half pay. These payments did not include any unsocial hours enhancements. On 4 January 2021 a third period of shielding commenced which ended on 31 March 2021. During this time the claimant was again placed on Covid-19 special leave which included enhancements. The claimant had not received his second vaccine by the end of the third period of shielding and was therefore unable to return to work. The claimant asked the respondent to consider paying him one of the options set out in the shielding guidance pending him receiving his second vaccine. He asked for

either local special leave or medical suspension for health and safety reasons. At this stage the respondent informed the claimant that he would be allowed to take special leave but that this would be without pay. The claimant commenced a period of sick leave from 19th May 2021 which was backdated to 8th April 2021. The claimant remained on sick leave until his resignation and was paid in accordance with the provisions of 14 AfC.

26 In reaching my decision I reminds myself of the provisions of s13 Employment Rights Act 1996 and the issues to be determined in a claim for unlawful deduction of wages. It is for the claimant to establish what wages were properly payable and it is on this first issue that the respondent submits the claimant will fail because he has not identified any contractual basis to the amounts claimed. It is clear from the chronology provided that the Covid-19 special leave provided for the payment of full pay including unsocial hours enhancements and the claimant was paid those amounts during the period of shielding and for an extended time from September to November when the respondent was awaiting information about the claimant.

27 Agenda for Change provides for the calculation of holiday pay to take into account those enhanced payments the employees would have received had they been in work. Whilst set out above I repeat them below:

13.9 Pay during annual leave will include regularly paid supplements, including any recruitment and retention premia, payments for work outside normal hours and high cost area supplements. Pay is calculated on the basis of what the individual would have received had he/she been at work

For staff who have regular hours the reference period should be based on the previous three months at work or any other reference period that may be locally agreed.

28 It is the claimant's case that the respondent has mistakenly taken into account a period of time when he was not 'at work' when calculating payments to be taken into account when calculating holiday pay – or in this case Covid-19 special leave pay. It is his case that he was absent from work during some of the time used for the purpose of the calculation whereas Agenda for Change requires the calculation to be made on the previous three months 'at work'. He argues not only in respect of the unfairness of a literal interpretation of this provision, which may form part of a separate claim, but also on the basis that he was on a phased return to work and therefore not 'in work' in as far as his contractual hours were concerned. Whilst agenda for change makes reference to any other 'locally agreed reference period' I have not been told of there is one in place to deal with circumstances where disabled employees may have been absent from work for reasons related to their disability in the three months prior to any annual leave, However, I am satisfied that in the absence of a clear explanation of what 'in work' means for the purposes of this calculation, the claimant's claim cannot be said to have no prospect of success and is arguable for the reasons set out in the claimant's claim form. It is on the basis of the alleged miscalculation that all aspects relating to

enhanced payments during annual leave and Covid-19 special leave are predicated.

29 In respect of a contractual right to full pay including enhancements when in receipt of Covid-19 special leave, whilst not specifically argued as a variation in the grounds of complaint, the claimant was invited to explain what he argued to be the contractual basis upon which the claim was made. Ms Bayliss submits that there was a contractual variation to cover the unprecedented position caused by the pandemic which included full pay including enhancements during periods of this type of leave. Given that the claimant was in fact paid sums that included enhancements during that period, as it is asserted were all staff who were shielding at that time, I find that this is a case that is arguable and that the test for making a deposit order is not met. The claimant is allowed to rely on those allegations relevant to his pay during Covid- 19 special leave and annual leave.

30 Ms Bayliss accepts that the claimant is not entitled to have unsocial hours taken into account for the calculation of sick pay, but argues that during the period of sick leave from 3 December 2020 to 4 January 2021 and from the period from 8th April 2021 to 27th September 2021 the claimant should have been placed on special leave and paid full pay. I find that the claimant has shown no contractual basis upon which he can pursue this claim with any prospect of success. Whilst it may be arguable that there was a temporary variation of the usual terms to deal with the unprecedented circumstances of the pandemic and the need for vulnerable employees to shield, there is no contractual basis on which it can be argued that these provisions were operational outside those periods of shielding. I have had sight of documentary evidence in the bundle which shows that matters were dealt with on a case by case basis, which is contrary to any suggestion of contractual rights. I find that the claimant's claims to a contractual entitlement to be placed on special leave on full pay during the period of time when he was in receipt of sick pay, whether contractual or statutory, have no prospects of success and the claimant cannot rely on those allegations. The allegations number (iv)(v) and (vi) in paragraph 9 above are struck out under rule 37 of the Employment Rules of Procedure.

31 <u>In summary therefore the claimant is allowed to rely on paragraphs</u>

(i) the first shielding period of 27 March – 31 July 2020

(ii) the whole period of 1st August 2020 – 4 November 2020 and

(iii) the second shielding period of 5 November 2020 to 5 December 2020

32 <u>The allegations listed below are struck out under rule 37 and claimant is not allowed to rely on:</u>

(iv)The period during which the respondent paid the claimant occupational sick pay of 3 December 2020 to 4 January 2021

(v)The period during which the respondent paid the claimant statutory sick pay of 8th April to 18th May 2021

(vi) The period during which the respondent paid the claimant contractual sick pay of 19 May 2021 to submission of his ET1 on 27th September 2021.

33 The question then arises whether the allegations set out at paragraph 31 (i) (ii) and (iii) above were submitted within the relevant time limit. Ms Bayliss submits that the if the claimant's claims relating to sick pay do not go forward, the last alleged unlawful deduction would have been the failure to pay his correct entitlement to holiday which would have crystallised when he was underpaid on 27th April 2021. I find that if found proven, the respondent's failure to pay the correct amount of pay to the claimant could be found to be part of a continuing act of deductions. It is not disputed that unsocial hours are included in the calculation for holiday pay and therefore the last alleged deduction would have taken place when the claimant received the alleged underpayment for the holiday taken in April 2021. I agree that the underpayment took place when payment was made and not when the leave was taken. The claimant commenced early conciliation within the primary time limit as set out in s23 Employment Rights Act 1996 and the claim was submitted in time having regard to the extension provided by early conciliation.

34 <u>The Discrimination claims</u>

35 The respondent's application for a strike out under rule 37 or deposit order under rule 39 are in respect of those claims set out at paragraphs 8.5 to 8.8 of EJ Horne's case management summary. I will deal with each one in turn. They are:

8.5 To consider whether or not the "sick leave disability discrimination complaints" should be struck out under rule 37 on the ground that they have no reasonable prospect of success

The "sick leave disability complaints" are complaints of failure to make adjustments and s15 discrimination allegedly done whilst the claimant was on sick leave from April 2021 onwards. The respondent's argument is that whilst the claimant was on sick leave (a) the alleged PCPs cannot have put the claimant at a substantial disadvantage and (b) the alleged unfavourable treatment cannot have been unfavourable and/or cannot have been something arising in consequence of his disability. In the alternative the respondent seeks an order under rule 39 that the claimant be required to pay a deposit on the basis that the claims have little prospect of success

36 In submissions Ms Bayliss argues that the respondent is attempting to introduce claims for consideration which did not fall within the category of 'sick leave claims' as identified in the case management summary. Ms Bayliss is right in that the way in which the application is made makes reference to

claims that include periods of times that fall prior to April 2021 which is the date identified in the case management summary as being the date after which events took place. Where that is the case I intend to identify those that I do not consider them as sick leave complaints and have not considered them.

37 As both of the representatives have taken a broad brush approach in their submissions I have identified the relevant allegations with reference to the Annex to the case management summary commencing at paragraph 6 which sets out the s 15 Equality Act claims. The first test in a s15 complaint is to identify the less favourable treatment relied upon and whether that treatment happened as a consequence of something arising from the claimant's disability. The claimant's claim was that the something arising was his inability to carry out his standard clinical facing role in the workplace. I have carefully considered paragraphs 6 to 11 of the claimant allegations under s15.

a. Paragraph 6 relates to the claimant's right to be paid with reference to an appropriate reference period under AfC and is not a 'sick leave' claim because this claim spans a period commencing in March 2020.

b. Paragraph 7 refers to the payment of statutory sick pay as a result of the claimant failing to follow the correct reporting procedures. Whilst the respondent's case is that it was entitled to do this I consider the claimant argues that he was treated differently to others and evidence will need to heard in respect of this claim before it can be determined whether the requirements of s15 are met

c. Paragraph 8 – the refusal to carry over annual leave was made prior to the claimant retrospectively commencing sick leave. Whist the respondent seeks to rely on its right to do this, it is an arguable complaint and meets neither the test for a strike out nor a deposit. Order

d. Paragraph 9 – the alleged failure on the part of the respondent to identify appropriate duties to enable the claimant to work from home or in a non-clinical environment commenced before April 2021 and is not a 'sick leave' complaint. Again the Tribunal will need to hear evidence of the circumstances relating to this allegation before reaching a determination.

e. Paragraph 10 – the subject of a phased return to work arose before April 2021 and covered as alleged a period of lengthy shielding. This allegation is arguable and does not meet the threshold for a strike out or a deposit order

38 Turning to the claimants of failure to make reasonable adjustments. The respondent asks the tribunal to make orders under Rule 37and/or Rule 39 in respect of the following PCPs

(c) requiring employees to attend the workplace to carry out their role

(d) Requiring employees to attend the workplace to complete a risk assessment when returning to work following a lengthy period of absence

39 Whilst the respondent argues that these two PCPs were not applied to the claimant as alleged or at all, it is the claimant's case that these were applied prior to the period of sick leave and do not form part of the 'sick leave' claims. In any event there is dispute as to whether the claimant was told that is what he was required to do and the Tribunal will need to hear evidence before reaching a determination on the same. Consequently the claim does not reach the threshold for either a strike out or a deposit order.

40 As I have determined not to grant an order under Rule 37 or 39 in respect of any applications made as set out in 8.5 or 8.6 the issue in 8.7 does not fall to be determined as any issues as to time will be a matter for the final hearing.

41 It remains only to deal with allegations (c) and (e) of the s15 complaints as per paragraph 8.8 of the case management summary of EJ Horne.

42 Allegation (c) in the list of issues is identified as refusing the claimant permission to carry over unused annual leave from 2020/2021. This is an arguable claim of unfavourable favourable treatment, that arose from something arising as a consequence of the claimant's disability. The fact that the respondent will argue a legitimate aim of not allowing the carry-over of annual leave, and whether that is a proportionate means of achieving that aim, is a matter for determination by the tribunal. It is not a claim that has no or little reasonable prospects of success.

43 Allegation (e) set out in the list of issues identifies the unfavourable treatment as the respondent not instigating a suitable phased return to the work environment for the claimant following a lengthy period of shielding and sick leave. The respondent appears to make this application on the basis of why it says it did not happen. The claimant disputes the respondent's version of events and it will be for the Tribunal to determine whether the provisions of s15 are met having heard evidence in relation to the same. This is not an allegation that has no or little reasonable prospect of success.

44 For the reasons given above the respondent's applications to have the claims under s21 and s15 Equality Act 2010 struck out under Rule 37 or that the claimant be required to pay a deposit as a condition of continuing with his claims are refused.

45 Because it was not possible to deal with case management at this PH it will be necessary for a further PH to take place in private by telephone. A Notice of Hearing will be sent to the parties in due course. In the meantime the parties should now in readiness for the PH

a. agree a list of issues to be determined by the Tribunal at the final hearing and

b. prepare a proposed timetable for that hearing

EJ Sharkett

Date 22 March 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 March 2023

FOR THE TRIBUNAL OFFICE