



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss S Syed

v

Marks and Spencer plc

Heard at: London Central (by CVP) **On:** 16, 17 & 18 November 2022

Before: Employment Judge Khan
Mr F Benson
Mr N Brockmann

Representation:

Claimant: In person
Respondent: Dr C Hill, counsel

JUDGMENT having been given orally on 18 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By an ET1 presented on 6 December 2021 the claimant brought claims for disability-related harassment, whistleblowing detriment and unauthorised deductions from wages. The respondent resists these claims.
2. By a judgment dated 15 March 2022, the whistleblowing claim was dismissed on the claimant's withdrawal.
3. We granted the claimant's application to amend the claim on the first day of the hearing to add new allegations of unauthorised deductions from wages which post-dated the date of the claim, for the reasons we gave. Some of the allegations of unauthorised deductions were subsequently withdrawn by the claimant and others were conceded by the respondent which left a single disputed allegation.

The issues

4. We were required to determine the following issues which were based on the issues enumerated in the Case Management Order dated 15 March 2022 and refined during the final hearing:

(1) Disability (Equality Act 2010 (“EQA”), section 6 & Schedule 1)

- 1.1 It is agreed that the claimant was disabled at all relevant times by reference to depression and anxiety.
- 1.2 Did the respondent know, or could it reasonably be expected to have known, that the claimant was disabled? The respondent concedes that it had constructive knowledge of the claimant’s disability from 17 April 2021.

(2) Harassment related to disability (EQA, section 26)

- 2.1 Did the respondent do the following things:
 - 2.1.1 During an ill-health meeting on 28 September 2021 with the claimant (during her sickness absence which commenced on 16 July 2021), the claimant’s line manager Ms Rizwan saying the claimant should find another job working from home as a customer assistant job was no longer suited to her due to her ill health.
 - 2.1.2 On 27, 28 or 29 November 2021 when the claimant was undergoing a phased return, when the claimant told Ms Rizwan that she could not stand for more than five hours due to swelling in her leg and asked for a reduction to her hours, Ms Rizwan saying that was not possible and the likely outcome would be the claimant’s dismissal.
 - 2.1.3 On 3 December 2021, when the claimant informed Ms Rizwan that her leg had swollen up after a five-hour shift on 2 December 2021 and that she would not be able to work more than five hours, Ms Rizwan saying that the claimant would have to do six hours and this was not acceptable as the claimant had agreed a phased return to work
- 2.2 If so, was that unwanted conduct?
- 2.3 Did it relate to disability?
- 2.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- 2.5 If not, did it have that effect? The tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

(3) Unauthorised deductions

- 3.1 Was it reasonably practicable for the claimant to have presented these claims within the primary limitation period and if not, was

the further period taken by the claimant to bring these claims reasonable?

- 3.2 Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted? The following claim remained in dispute, the respondent having conceded liability for deductions totalling 7.5 hours pay (i.e. 5 hours wages worked in the week ending 27 November 2021, 1 hour's wages worked in the week ending 22 January 2022 and 1.5 hours' wages worked in the week ending 26 February 2022) and the claimant withdrawing the other allegations:
 - a. 5 hours of paid special leave on 11 December 2021, deducted on 10 January 2022 [*claim added by amendment on 16 November 2022*].
- 3.3 Was this deduction required or authorised by a written term of the contract?
- 3.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 3.5 Did the claimant agree in writing to the deduction before it was made?
- 3.6 How much is the claimant owed?

Relevant legal principles

Harassment

5. Section 26(4) EQA provides that:

- (1) *A person (A) harasses another (B) if –*
 - (a) *A engages in unwanted conduct related to a relevant protected characteristic, and*
 - (b) *the conduct has the purpose or effect of –*
 - (i) *violating B's dignity, or*
 - (ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
- ...
- (4) *In deciding whether conduct has the effect referred to in section (1)(b), each of the following must be taken into account –*
 - (a) *the perception of B;*
 - (b) *the other circumstances of the case;*
 - (c) *whether it is reasonable for the conduct to have that effect.*

6. The “related to” formulation connotes a wider test than the “because of” test (see the EHRC Code of Practice on Employment (2011), at para 7.9). In deciding whether the conduct related to a protected characteristic consideration must be given to the mental processes of the putative harasser (see *GMB v Henderson* [2016] IRLR 340, CA). Whilst the knowledge or perception of the claimant's disability by the putative harasser is a relevant factor, it should not be treated as conclusive of whether the impugned conduct is related to the disability at issue (see *Hartley v Foreign and Commonwealth*

Office Services UKEAT/0033/15/LA); nor will it be sufficient for the claimant to believe that the conduct relates to the protected characteristic (see *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 490).

7. In *Pemberton v Inwood* [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336, EAT, as follows:

"In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

8. In *Grant v HM Land Registry* [2011] EWCA Civ 769, CA, Elias LJ emphasised that "violating dignity", and "intimidating, hostile, degrading, humiliating, offensive" are significant words:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

The same point was made in *Dhaliwal*:

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

This was endorsed by the EAT in *Betsi Cadwaladr University Health Board v Hughes & Ors* UKEAT/0179/13/JOJ which said this:

"The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. Violating may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence."

Burden of proof

9. Section 136 EQA provides that 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.

10. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted, the claimant must establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination. This requires something more than a mere difference in status and treatment (see *Madarassy v Nomura International plc* [2007] ICR 867, CA).
11. A two-stage approach is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see *Chief Constable of Kent Constabulary v Bowler* UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal can make positive findings of fact (see *Hewage v Grampian Health Board* [2012] IRLR 870).

Unauthorised deductions from wages

12. Section 13 of the Employment Rights Act 1996 (“ERA”) provides that:
 - (1) *An employer shall not make a deduction from wages of a worker employed by him unless—*
 - (a) *the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
 - (b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*
 - ...
 - (3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

Time limits

13. Section 23 ERA provides that:
 - (2) *Subject to (4), an [employment tribunal] shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
 - (a) *in the case of a complaint relating to the deduction by the employer, the date of payment of the wages from which the deduction was made...*
 - (4) *Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.*

Thus, where a claim has been presented outside of the primary period, it may still be considered by a tribunal but only where a tribunal is satisfied that it was not reasonably practicable for the claim to have been presented in time and it was presented within a reasonable period thereafter.

The evidence and procedure

14. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net.
15. We ensured that the claimant was afforded as many breaks as necessary and that she was given sufficient time to prepare closing submissions after the evidence had been completed.
16. The claimant gave evidence herself.
17. For the respondent, we heard from Tessa Bresnihan, Case Manager for the Line Manager Advisory Service. The respondent also relied on the witness statement of Asma Rizwan, the claimant's former line manager. Ms Rizwan was unable to give oral evidence from Pakistan, as she lacked the requisite consent.
18. There was a primary hearing bundle of 230 pages and a supplemental bundle of 50 pages, admitted by agreement at the start of day two. We read the pages to which we were referred.
19. We also considered the respondent's written and the parties' oral closing submissions.
20. References in square brackets are to pages in the primary bundle.

The facts

21. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to facts that are relevant to the legal issues.
22. The respondent is a high street retail business.
23. The claimant has been employed as a Customer Assistant since 15 May 2016 based in the Stratford City store. At the material time, she was contracted to work for 22.5 hours per week over three days. Her contractual hours were subsequently amended to 15 hours per week on 3 April 2022 i.e. five hours per day for three days a week. She began a nine-month career break on 25 September 2022.
24. It is accepted that the claimant is and was disabled at all relevant times by reason of depression and anxiety.
25. The claimant returned to the Stratford City store, from furlough, in April 2021.
26. On 17 April 2021, she left work part-way through her shift. Although the record of the return to work interview on 21 April [95] gave the reason for this absence as "Headache/Migraine", it set out the following additional detail which related to the claimant's mental health:

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“Saima left work part way through her shift due to feeling unwell. Anxiety – taking medication for it regularly but takes a higher dose when necessary.

Saima was feeling a little off before and thought it would pass but it got worse until she was unable to contain.

This will count towards her triggers – however Saima is currently dealing with anxiety & depression and has been for some time.”

The claimant’s evidence, which we accept, was that she had had an anxiety attack. The respondent concedes that it had constructive knowledge of the claimant’s disability from that date, although it says that it did not understand the gravity or impact of anxiety on the claimant at this stage.

27. In late June 2021, the claimant joined the Through The Night (“TTN”) team, a move that she had requested, when her line manager became Asma Rizwan, TTN Foods Team Manager.
28. It is agreed that in her first week in the TTN team, the claimant told Ms Rizwan that she was feeling anxious and needed to remain in the rest room, and we find that it is likely in the context of that discussion and given her absence in April 2021, that she also told Ms Rizwan that she had anxiety and depression, as the claimant claims, although we do not find that she went into any detail about the extent to which these conditions impacted on her. We do not find that at this date Ms Rizwan knew that the claimant’s anxiety and depression had had a long-term and substantial adverse impact on her ability to carry out normal day-to-day activities.
29. We find that during her next night shift, and the night shifts on 10 and 15 July, Ms Rizwan was critical of the claimant’s standard of work. This is because, overall, we found the claimant to be a credible although not always reliable witness; these allegations were consistent with each other; and they were also consistent with Ms Rizwan’s undisputed comments about the impact of the claimant’s subsequent sickness absence, at the ill-health meetings (“IHMs”) on 28 September [104] and 2 November 2021 [124] (see paragraph 41). On the first of these occasions in July 2021, Ms Rizwan complained about the claimant’s work and when the claimant tried to explain that this was due to another colleague, Ms Rizwan told her not to blame others for her own mistakes. On 10 July, Ms Rizwan shouted at the claimant in front of other colleagues stating, “What the hell is this?” and told her that she had missed many items in the Italian Section and this was not acceptable, she was letting down the team and her productivity was not up to standard. When the claimant tried to explain, Ms Rizwan told her she did not want to hear her excuses. The claimant’s evidence, which we accept, was that she was in tears and walked back to fill Desserts when Saj, a new manager, asked her if she was okay and told her that Ms Rizwan should not have spoken to her like that. On 15 July, Ms Rizwan told the claimant that she needed to pull her weight and start working properly as she was too slow and unproductive. The claimant does not allege that this conduct was related to her disability. It is clear that, on each of these occasions, Ms Rizwan felt that the claimant’s work did not meet the standard she required of her team.
30. The claimant was on sick leave from 16 July to 18 November 2021.

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31. On 16 July, the claimant messaged Ms Rizwan on MS Teams to inform her that she was unwell, her heart rate was up to 155 bpm, and she would not be coming in to work that night or the following night. In the next week, when the claimant was next due to be at work, she messaged Ms Rizwan to explain that she had been referred to a cardiologist and would not be coming in to work. She forwarded a fitness for work certificate (“fit note”) dated 27 July which referred to “Palpitations & Chest Pain” [178]. She told Ms Rizwan that she had been prescribed beta blockers for her heart. On 31 July, the claimant messaged Ms Rizwan to confirm that she would not be coming into work, she was having side effects from her medication, and would need to reduce her hours when she returned to work. The claimant continued to send in fit notes each week which referred variously to her cardiac symptoms: “Palpitations & Chest Pain” (dated 3 August) [180], when she explained that her GP had lowered the dosage of her medication; “Palpitations” (dated 11 August) [179]; “Palpitations and chest Pain – has cardiology appointment 2/9/21” (dated 17 August) [183]; and “Palpitations – awaiting cardiology review” (dated 24 August) [182].
32. On 21 August, the claimant requested that her hours were reduced [147]

“as the medication I’m taking is causing swelling to my feet and I won’t be able to stand for an 8 hour shift. Also if possible if I can go to morning shift”.

Ms Rizwan replied that there was a process to be followed which they would discuss when the claimant returned to work.
33. On 27 August, Ms Rizwan messaged the claimant to confirm that her sickness absence was now deemed to be long-term, and she would be invited to an IHM. The respondent’s Sickness Absence Policy (“SAP”) defined long-term sickness absence as either one which exceeded four weeks or which was related to a disability. We accept Ms Bresnihan’s oral evidence that in managing this long-term sickness absence it would have been necessary for Ms Rizwan to review the claimant’s health records in order to consider whether there were any earlier sickness absences which were, or could have been, related to her current absence. We therefore find that as of this date, it is likely Ms Rizwan accessed the claimant’s records, including the return to work record dated 21 April 2021, from which she would or ought to have understood that the claimant had a history of anxiety and depression which were long-term conditions. However, from the medical information the claimant had provided in relation to her current sickness absence there was no basis on which Ms Rizwan could reasonably have understood that it was related to the claimant’s absence in April 2021 or to her history of anxiety or depression.
34. The IHM was delayed because Ms Rizwan went on holiday at the start of September.
35. Following her cardiology appointment on 2 September, the claimant updated Ms Rizwan that she was having seven-day ECG monitoring, a scan for her swollen leg, ankle and foot, and a scan of her liver and kidneys, and she forwarded another fit note which referred to “chest pain [and] palpitations [181]. The claimant updated Ms Rizwan on 17 September 2021 to confirm that she had kidney cysts and had been referred urgently to a specialist. She forwarded a fit note dated 20 September which referred to “Simple renal cyst, palpitations, feet swelling” [187].

36. Ms Rizwan contacted the claimant on 21 September to arrange an IHM. They agreed to meet on 24 September. The claimant had now been on sick leave for more than two months.
37. On 23 September, the claimant messaged Ms Rizwan to request that the meeting took place in the Foods Office instead of the meeting room

“as I have swollen feet and can’t walk much. And because my anxiety has got worse I don’t think I would be able to go in the lift” [148].

Although this was the claimant’s first reference to anxiety in her correspondence with Ms Rizwan since her sickness absence began, her reference to this condition absent any further explanatory information, suggests that the claimant understood that Ms Rizwan was already cognisant that she had anxiety, and is consistent with our finding above that she discussed this with her manager in her first week in the TTN. Ms Rizwan was now on notice that the claimant’s anxiety prevented her from using the lift.

38. The claimant was unable to attend the IHM on 24 September because of a raised heart rate.

The first IHM on 28 September 2021 (issue 2.2.1)

39. The first IHM took place on 28 September. For a meeting which took place from 22.00 to 22.50 and from 23:13 to 23.16, with an adjournment in between these times, the notes of this meeting [102-4] are relatively brief, and we find they are incomplete in some important respects. The outcome letter had more detail. The claimant agrees that she did not refer to anxiety or depression during this meeting because she did not understand at this time that her ongoing sickness absence was or could be related to either condition.
40. When, shortly before the adjournment, Ms Rizwan asked the claimant if she was able to provide any further support, the claimant requested a reduction in her working hours “since my health limits my productivity”, by which we find she was referring to her swollen feet, as per her request on 21 August, and she explained why this was necessary:

“so I can get used to the routine and be able to slowly work my way back. This will also give a chance to be able to understand whether or not I can continue” [103].

The claimant therefore acknowledged the possibility that she would be unable to return to work on health grounds.

41. We prefer the claimant’s evidence, against Ms Rizwan’s denial, that when their discussion continued during the adjournment which followed, which was not recorded, Ms Rizwan told her she should find another job working from home as her Customer Assistant job was no longer suited to her due to her ill-health. This is because we find that Ms Rizwan repeated the same comment at the next IHM which took place on 2 November 2021, which the claimant referred to in contemporaneous correspondence [151, 156] (see paragraph 57 below). That this comment was made is also credible in the context of the claimant’s admission that she was uncertain about whether she would be well enough to return to work and her request to work reduced hours. In fact, we find that it is

likely that Ms Rizwan's statement related to both of these factors. Firstly, the claimant had been absent for over two months, her symptoms were evolving and required further investigation which meant that her prognosis and her fitness to return to work remained uncertain. Secondly, as it became evident in relation to the other impugned statements we find that she made, Ms Rizwan objected to the claimant working shorter shifts, on operational grounds (see paragraph 65 below). Overall, we find that this statement reflected her concern about the likelihood of the claimant being able to return to work to fulfil her full contractual duties and the ongoing impact of her absence, which she conveyed to the claimant at this meeting [104] (as well as the next IHM that the claimant attended, on 2 November [124]), in the following terms:

"Saima has been informed of the impact of her absence has had on operation and productivity of the team. I have also informed her of the impact it has had on the business. How the team struggle to complete the daily tasks without her".

42. We do not find that the impugned statement related to the claimant's disability because it was neither patently related to anxiety or depression (the claimant was unable to say, in her oral evidence, in what way Ms Rizwan's comment related to her disability) nor do we find that this was part of Ms Rizwan's mindset because the claimant's ongoing sickness absence and potentially reduced capacity to work did not appear to be related to either condition, including to the claimant herself, but to the claimant's swollen feet caused by the medication she was taking to manage her cardiac symptoms which made it difficult for her to stand for lengthy periods and to withstand an eight-hour shift. This is underlined by the contents of the outcome letter dated 2 October [105-6], in which Ms Rizwan referred to the claimant's cardiac symptoms of palpitations, increased and irregular heart rate, chest pains, and the claimant's medication which caused side-effects of breathlessness and swollen feet and she noted:

"I asked you how you are coping from a wellbeing perspective and you told me that it is hard for you to even stand and cook for longer periods of time but your sister and daughter are supporting you with daily tasks..."

This letter also referred to the claimant's "enlarged fatty liver & kidney cists [sic]". No reference was made to anxiety or depression. Neither condition had featured in this discussion.

43. In respect of the claimant's return to work, Ms Rizwan's letter stated:

"In the meeting, I explained that our primary goal is to support you to return to work and I will consider providing any reasonable additional support that we agree would help you to return to work carry out your role effectively. This is also the main focus of Occupational Health.

However, we also discussed that if your absence continues [at the current level] and/or worsens, you remain signed off from work, one of the possible outcomes of this process could be that I decide to dismiss you on the grounds of your incapability to return to work/fulfil your role due to your ill health."

Although Ms Rizwan referred to the claimant's potential dismissal at this first IHM which, under the SAP, was not something which could be contemplated until a final IHM, we do not find that she told the claimant that she should resign instead of being dismissed on ill-health grounds, as the claimant alleges, because the claimant did not refer to this allegation in any contemporaneous

correspondence, nor in her claim form or any other document prior to the witness statement she drafted for these proceedings.

44. Following this meeting, Ms Rizwan messaged the claimant on 4 October [148] to offer her the option of returning to work on 7 October, working four hours for three consecutive nights. This would be agreed as part of a Wellbeing Adjustment Plan which they would be able to discuss when the claimant was back at work. However, the claimant updated Ms Rizwan the next day that she was waiting on a call back from her cardiologist in relation to the ECG results, an appointment in relation to her kidneys and liver, and she had arranged an appointment with her GP because she had some swelling in her arms. She forwarded a fit note dated 5 October confirming that she remained unfit for work by reference to “Palpitations [and] Swelling of feet” [184]. Ms Rizwan confirmed that her offer of 4 October “is off the table for now as it depends on the CSP [company sick pay] you have left” [149]. She invited the claimant to an interim IHM on 9 October.

Interim IHM on 11 October 2021

45. The claimant was unable to attend this meeting on 9 October because her son was unwell. They agreed to meet instead on 11 October. The claimant was also unable to attend this meeting as her cousin had had a heart attack and was in ICU. Ms Rizwan decided to proceed in the claimant’s absence which she stated in her outcome letter of the same date [113-4] was in accordance with the “company policy”. We accept Ms Bresnihan’s evidence to the contrary.
46. In her outcome letter, Ms Rizwan explained [113]:

“You have not provided me with any further detail of your condition except for another sick note that states the reason being palpitations and swollen feet...No further information has been shared regarding the reason for your swollen feet and how long it will take for the matter to resolve...At this moment in time, I do not understand what impact your condition has on your life and how it explains your inability to work.”

Ms Rizwan told the claimant that she would await the outcome of an OH referral and arrange another meeting. She warned the claimant that if she remained on sickness absence a possible outcome would be “I decide to dismiss you on grounds of your incapability” [113]. We find that the content of this letter was unsympathetic and critical of the claimant. We accept Ms Bresnihan’s evidence that under the SAP, a line manager was dutybound to put the affected employee at the forefront of their concerns. Ms Rizwan had evidently failed to do this, albeit for reasons which were unrelated to the claimant’s disability. The focus was on the claimant’s palpitations and swollen feet which neither she nor the claimant understood were related to the claimant’s anxiety or depression and there was a lack of clarity in relation to the claimant’s prognosis. It is also evident from this letter that Ms Rizwan had lost patience as she felt that the claimant’s stated intention of returning to work was contradicted by the sequence of fit notes, and pattern of rescheduled and cancelled meetings, when she wrote:

“In the initial ill health meeting, you mentioned being eager to return to work to which I responded by supporting you with phased return to work from last week.

You then proceeded to send me another sick note saying you were still unable to come to work.

You have now sent me a total of 10 sick notes, each time telling me that you will come in to work and then sending me another sick note instead.

All meetings arranged for you have either been rescheduled or cancelled, all alternatives including phased return have been exhausted, which leads me to believe that you are not taking the matter seriously leading to an element of doubt as to whether you really do wish to return to work at all.”

47. The claimant replied to Ms Rizwan the next day that she was disappointed with the outcome of this meeting. She confirmed that she was still waiting to hear from her cardiologist and the Renal Department which was causing her some anxiety. She told Ms Rizwan that her cousin had died. She sent Ms Rizwan another message, on 16 October, when she explained that she had been referred for urgent tests to investigate nodules in her thyroid gland and asked about the procedure for taking a career break which was her preference to the alternatives of “coming back and getting ill or getting dismissed on grounds of ill health” [150].
48. Ms Rizwan told the claimant that she would not be paid for 14, 15 and 16 October 2021 as her fit note had ended on 11 October and she had not provided an update in the interim. It is likely that she made this decision without investigating why the claimant had omitted to provide a fit note for the first time in three months of sickness absence. As her recent correspondence demonstrated, she had grown impatient with the claimant. The claimant explained that thought she had sent in her current fit note which it was likely that she had overlooked because she had been dealing with her recent family bereavement.
49. The claimant forwarded a fit note dated 18 October which referred to “Thyroid nodules, palpitations under investigation” [189]. She explained that she had a scan for her neck scheduled later that month, was still waiting for an MRI for her kidneys and liver, and for a call back from her cardiologist. When Ms Rizwan queried “what impact does all this have on your ability to work” [150] the claimant replied:

“I have a high level of ferritin aswell [sic]. Firstly my depression and anxiety gets the better of me and I think the worst of all the tests I am having. Secondly I have swelling that hasn’t [sic] gone down. My intention was to always come back to work. As one test gets done I find out something else is wrong and so on all at once. Which is why I did ask if I could go on Career Break so I can deal with all my health problems.

I am also having therapy and being referred for CBT to help me cope with everything that’s going on on [sic] my life...”
50. Later that day, the claimant told Ms Rizwan she had requested career leave for four months “due to my health, depression and anxiety” [150].
51. On 21 October, the claimant forwarded Ms Rizwan an isolation notice from NHS Track and Trace. On 24 October, Ms Rizwan sent the claimant an invite to attend a final IHM.
52. The claimant sent in a fit note dated 26 October 2021 which referred to “Mixed anxiety and depressive order [and] Palpitations” [192].

53. According to the claimant's unchallenged evidence it was at around this time, on 23 or 24 October, when she was advised by her GP that her palpitations were not caused by a heart defect but could possibly be related to her anxiety. This was self-evidently inconclusive and it is notable that the claimant made no mention of this during the Occupational Health ("OH") consultation which took place days later, nor, as will be seen, the next one on 6 December.
54. The claimant attended an OH telephone appointment on 28 October, the report of which [118-9] provided the following summary under "Current Issues":

"Saima has been absent from work since 16/07/2021 due to swollen feet, left leg, creating pain and a fast heart rate, without trigger. She told me, despite numerous investigations, there is no diagnosis for [the] cause of these symptoms. She reports she awaits further investigations. She explained that prolonged standing and walking increases her pain. She advised she is under GP and specialist care with daily medications. She advised she has help with some of her daily activities due to symptomology. She expressed concerns at work with her current contracted hours, she does not feel she will manage these due to symptoms. She also advised she does not think she can-do heavy-duty tasks until symptoms improve."

The report confirmed that the claimant had "moderate levels of pain" and recommended that she avoid heavy lifting, pushing and pulling, and instead undertake lighter duties with microbreaks, and consideration be given to reducing her working hours "until [her] symptoms improve". It referred to an anticipated return to work date of 4 November, subject to a forthcoming review by her GP. The focus therefore remained the claimant's swollen feet and leg and the impact this had on her ability to stand and walk for prolonged periods. The report made no reference to anxiety or depression.

55. Ms Rizwan scheduled a final IHM on 1 November which she agreed to postpone by one day when the claimant reported that she had a fever.

First final IHM on 2 November 2021

56. At the meeting on 2 November, the claimant explained that she had been referred for a biopsy to investigate a lump in her throat and her iron levels were being investigated. She said that she wanted to return to work the next week and would prefer mornings. In light of her recent fit notes, Ms Rizwan asked the claimant how her anxiety would affect her work. The claimant referred to a previous anxiety attack (i.e. in April 2021) and said they could be "severe sometimes" [124]. Ms Rizwan then asked the claimant how she would be able to cope with the manual handling and lifting that the OH report had advised that she avoid, if she returned to work, to which the claimant said she would be "willing to give it a try". The meeting was adjourned pending further investigation into the claimant's capacity to return to work.
57. Ms Rizwan sent the claimant her record of this meeting the next day and asked her to confirm whether it was "a true likeness of the conversation we had" [151]. The claimant replied that the record was incomplete:

"You haven't written that you advised me to find a job working from home which would be more ideal for me as you dont [sic] think a Customer Assistant role is no longer suited to me due to my health!"

Ms Rizwan replied: "I never mentioned working from home" but she neither disputed nor confirmed the veracity of the rest of what the claimant had alleged she had said. She failed to respond when the claimant made the following point:

"You said find a job where you could work from home due to your health a customer Assistant role is no longer suited to you due to your health. this isn't the first time that you [sic] said the same thing in the first ill health meeting as well [sic]."

We accept the claimant's evidence that she was only raising this issue now in order to correct the note of what was discussed during the meeting and that she had not taken the same step in relation to the same comment which Ms Rizwan had made on 28 September because this had taken place during an adjournment which had not been recorded and did not therefore, in her view, require rectification. A further factor was that this was the second time that Ms Rizwan had made this comment. The claimant also complained about this comment, and Ms Rizwan's management of her sickness absence, to Andrew Icke, Store Manager, on 5 November 2021 [156].

58. On 3 November, Ms Rizwan wrote to the claimant to query whether the ongoing investigation into arrhythmia and the "new health issues that surfaced after the OH referral" [151] meant that she could not return to work over the next two weeks. When the claimant replied that she had confirmed at the last IHM that she would be returning to work on 11 November, and queried why this had not been included in the ill-health report, Ms Rizwan responded in the following terms which echoed the frustrations she had set out in her letter of 11 October:

"Oh I'm more than happy to update it for you...But you've been saying that for a long time now. Even in the initial health meeting you said you were ready to come back and I even told you we will offer you a phased return and then last moment you were too unwell to come back. This has happened numerous times since the beginning of your absence. I'm following all procedures and am in constant touch with the LMAS who have access to everything. Please rest assured that we have given you every possible opportunity we possibly could've. We can no longer sustain the absence."

59. The claimant submitted another fit note dated 3 November which referred to "Anxiety and depression, swollen feet" [190]. She contacted Ms Rizwan again on 9 November when she explained that owing to complications from a throat biopsy she would not be able to return to work that week and forwarded a fit note dated 10 November which referred to "thyroid procedure, anxiety and depression" [193].
60. Ms Rizwan sent the claimant an invite to the final IHM on 12 November 2021. This was rescheduled for 18 November. In the intervening period, the claimant missed an OH appointment on 15 November because of a hospital appointment on the same date.

Second final IHM on 18 November 2021

61. At the meeting on 18 November, the claimant updated Ms Rizwan on her medical conditions and investigations: her swollen feet had improved, she still

had palpitations, her fatty liver and kidney cysts remained under investigation, and her anxiety had worsened because of recent family bereavements. She said that she wanted to return to work as soon as she could, and was prepared to come in that night, working a two-hour shift. She explained that CBT and therapy were “helping a lot but the latest symptoms have brought me down” [130]. Noting that the claimant was agreeing to return to work in the context of a meeting at which a potential outcome was dismissal, Ms Rizwan agreed that she could commence a phased return to work the following day if she obtained clearance from her GP. The meeting was adjourned in order to obtain a further OH report, because the claimant had missed her recent appointment, further to which, as Ms Rizwan confirmed, the IHM would be reconvened and a decision made. In oral evidence, the claimant agreed that Ms Rizwan was doing everything she could to ensure that she was able to return to work safely.

62. The claimant forwarded a fit note on 19 November [191] covering the next three months which referred to “thyroid investigations including procedure, anxiety & depression” and confirmed that she was fit to commence a phased return to work on altered hours, amended duties and workplace adaptations, to include no heavy lifting and reduced hours. She returned to work that night from midnight to 4am.
63. Later that day, the claimant messaged Ms Rizwan that working four hours was too much for her.

The night shift on 28 November 2021 (issue 2.1.2)

64. At 23.15 on 27 November, 45 minutes before her shift was due to start, the claimant messaged Ms Rizwan to report that her leg was swollen, she was concerned that if it got worse she would need to go to hospital and she was waiting on a call back from 111. Ms Rizwan asked to be kept updated. When the claimant sent another message querying whether she should come in to work, Ms Rizwan replied that the claimant should follow the advice from 111. In oral evidence, the claimant agreed that Ms Rizwan’s responses were supportive. The claimant came in to work without obtaining advice from 111.
65. During this shift the claimant told Ms Rizwan that she was unable to work more than five hours and requested that her working hours were reduced permanently. We prefer the claimant’s evidence, against Ms Rizwan’s denial, that Ms Rizwan told her that a reduction to her hours was not possible and the likely outcome would be dismissal. We find that this is likely for the following reasons. When Ms Rizwan, who we find was the “LM” referred to in the relevant LMAS record [213], contacted LMAS two days later, she was recorded as stating “Talked through with EE based on last IHM what process would be if she was off again” which was likely an allusion to dismissal. This allegation is consistent with Ms Rizwan’s repeated warnings to the claimant about potential dismissal since the initial IHM on 28 September. We also take account of Ms Rizwan’s evidence (at paragraph 65 of her witness statement) that she viewed the claimant’s request as a refusal to work and

“was concerned that this would not be operationally feasible within the business...I wanted to ensure I was being fair to the rest of my team, who had been struggling with the Claimant working limited hours...”

and agreed (at paragraph 66) that she did discuss the need to “explore other options” if the claimant “was unable to fulfil her contractual hours, which were calculated on operational requirements”, from which we conclude that she was evidently resistant to accommodating this potential adjustment within her team, on operational grounds.

66. We accept the claimant’s oral evidence that when she discussed this issue with Ms Rizwan on this date (and also on 3 December), she related this to her swollen leg, which was consistent with the OH reports. We do not accept the claimant’s oral evidence that she also told Ms Rizwan that her request to reduce her hours or her ability to stand for prolonged periods were related to her anxiety. This detail was not in her witness statement. Nor was it something she relayed to the OH specialists on 28 October or 6 December (which also, in our view, makes it less likely that she would have discussed it with Ms Rizwan). Her evidence on this point was inconsistent in that she initially agreed, without qualification, that her swollen leg and her capacity to work more than five hours were unrelated to her anxiety or depression before she modified her evidence to say that her anxiety affected the work she was able to do and her ability to work the hours that had been agreed. We do not therefore find that Ms Rizwan’s impugned statement related to the claimant’s anxiety or depression.
67. The claimant messaged Ms Rizwan again on 30 November to query “Have you spoken to LMAS about me changing my hours?” Although Ms Rizwan did not reply to the claimant we find that this prompted her to contact LMAS on the same date, notwithstanding her antipathy to this adjustment, when she made no reference to the claimant’s anxiety or depression but to the claimant’s swollen leg which is consistent with our finding that this was the only reason the claimant provided to explain why she needed to work shorter shifts.

The nightshift on 3 December 2021 (issue 2.1.3)

68. On 3 December 2021, when the claimant informed Ms Rizwan that her leg had swollen up after the five-hour shift she had completed the day before and she would not be able to work more than five hours, we find that Ms Rizwan told her that this was not acceptable and she was required to work six hours as per the agreed phased return to work plan. We find for the same reasons we have given above (see paragraphs 65 and 66) that it is likely that this statement was made and also that it was not related to the claimant’s disability.
69. The next day, the claimant messaged Carolina Michael-George, Foods DSM, to complain about Ms Rizwan. Ms Michael-George agreed to investigate. When the claimant contacted Ms Michael-George again, on 7 December, to state that she no longer wanted to deal with Ms Rizwan directly, “as I feel disrespected, intimidated and threatened by her” [154], Ms Michael-George confirmed that she had assigned a different ill-health manager to the claimant, pending her investigation, who would meet with the claimant to discuss the latest OH report and to support her continued return to work, including her request to permanently reduce her working hours. The claimant replied that she did not want to work the same days as Ms Rizwan to which Ms Michael-George responded that this would not be practicable over the next fortnight but other managers would be present and this could be explored further.

70. The claimant had a further appointment with OH on 6 December, the report for which confirmed that the “cause of her swelling and palpitations remain undiagnosed at this time” with the claimant awaiting a cardiology review, and honed in on the impact of the claimant’s swollen leg on her capacity for work [139]:

“...she continues to have significant leg swelling. She tells me she wears compression stockings, however, is struggling to stand or walk at work for longer than 5 hours at this time...It [is] advised that Saima continues to work a maximum of 5 hours per shift, on an ongoing basis. This will be required until her leg swelling improves...”

Although this report referred to anxiety and depression, and noted that the claimant had recently begun a course of CBT it made no link between the claimant’s swollen leg and ability to stand or walk for extended periods with her anxiety or depression.

Paid Special Leave (issue 3.2 (a))

71. On 9 December 2021, the claimant’s grandfather died and she was absent for three shifts. We accept the claimant’s evidence that when she called the absence line and spoke to a duty manager on this date, it was agreed that she would have two days of paid special leave. We found her evidence credible and took account of the records which showed that she had initially been credited for two days’ leave before it was modified without notice or explanation, on 24 December 2021, to a single day, for which she was paid on 10 January 2022 [219]. We also took account of the respondent’s Time Off Policy, which provided for two weeks’ paid bereavement leave for members of the immediate family of the deceased for which there is a non-exhaustive list, including grandchildren, and a day to attend the funeral of another family member or close friend, and also provided [93]:

“If you feel the need for more time off, speak to your Line Manager and they may be able to extend this and support you further during this difficult time...”

72. We therefore find that the claimant requested and was authorised to take two days’ special leave, that she relied on this agreement and took the next three shifts off work, and that this decision was then modified without the claimant’s agreement. We would therefore have found that the failure to pay the claimant for the second day of special leave, on 10 January 2022, constituted an unauthorised deduction from her wages, had we also found that this claim was presented in time.

Time limit – unauthorised deduction on 10 January 2022 (issue 3.1)

73. This claim was added by amendment on 16 November 2022. We find that it was reasonably practicable for the claim to have been presented within the primary limitation period so that the claim is out of time. In oral evidence the claimant agreed that she knew about the decision on 24 December 2021 on the same day, which resulted in the deduction on 10 January 2022, and she agreed, initially, that there had been no reason why she had failed to present this claim within the primary limitation period which expired on 9 April 2022. She then clarified her evidence to explain that she had had therapy, from October 2021 to February 2022, and high intensity CBT to manage her severe

anxiety, from June to September 2022. She did not provide any medical evidence to show that this had impacted on her ability to bring a claim. It is relevant that the claimant had been able to present her claim form on 6 December 2021 which included a complaint about payments that had not allegedly been made. It is also relevant that the claimant had attended a preliminary hearing for case management on 15 March 2022 when the list of issues had been enumerated and she was ordered to provide further particulars of the unauthorised deductions she claimed. Nor we find that the additional period the claimant had taken to bring this claim, by way of amendment, of more than seven months, was reasonable, not least because the claimant had during the same period been able to prepare her claim for trial which included a 27-page witness statement in advance of the final hearing which was initially listed in July 2022.

Conclusions

Harassment

74. This claim fails and is dismissed because of our findings that the impugned conduct was not related to the claimant's disability.
75. We pause here to emphasise that whilst we have found that Ms Rizwan made the statements that the claimant has alleged, and whilst we also find that they were likely to have exacerbated the claimant's anxiety (as were some of the other comments we have found that Ms Rizwan made, and also aspects of her management of the claimant's sickness absence, which the claimant does not say related to her disability), there was nothing about the statements made on 28 September, 28 November or 3 December 2021 that was patently related to the claimant's anxiety or depression nor have we found that Ms Rizwan had these conditions in mind when she made these comments for the reasons we have given above. We have found that against a background of an evolving set of symptoms, ongoing medical investigations, and an uncertain prognosis, the focus became the claimant's swollen feet/leg which the claimant explained, and OH agreed, necessitated a reduction in her working hours because of the impact on her capacity to stand and walk for extended periods, which was an adjustment that Ms Rizwan was evidently resistant to accommodating within her team.

Unauthorised deductions from wages

76. The claim for unauthorised deductions in respect of special paid leave was presented out of time and is dismissed.
77. The respondent conceded that it made a series of unauthorised deductions totalling 7.5 hours pay in the gross sum of £103.50 which it was ordered to pay the claimant.
78. Finally, I would like to apologise to the parties for the delay in promulgating these written reasons.

Employment Judge Khan

15.05.2023

REASONS SENT TO THE PARTIES ON

15/05/2023

FOR EMPLOYMENT TRIBUNALS