# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| Mr Antar Zaka | **v** | Weetabix Ltd |

**Heard at:** Cambridge

**On:** 26-28 June 2023

26 June – In Person
27 June – Judge and Members in Chambers
28 June – Hybrid CVP

**Before:** Employment Judge L Brown

**Members:** Mrs Smith
Mr Holford

**Appearances**

**For the Claimant:** Mr Henry, Counsel.
**For the Respondent:** Mr Platts-Mills, Counsel.

**JUDGMENT** having been sent to the parties on the 14 August 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Background to the case

1. The Claimant worked as a Production Operator having commenced employment with the Respondent on the 17th of February 2001, and was still employed by them as at the date of the hearing.

2. In 2009 he was promoted to the position of Technical Operator.

3. The Respondent produces the well-known breakfast cereal Weetabix.

4. It was accepted by the Respondent that the Claimant was disabled at all material times as set out in the Equality Act 2010. He suffered with a back problem in that he had bulging discs in his spine.

5. On the 27th of March 2020 he was advised to shield, and this was set out in a letter to him from the NHS as he was classed as being clinically extremely vulnerable. This was because he took immunosuppressant injections as part of his treatment for his long-term back problems.

6. Thereafter the Claimant took various amounts of time off work to shield due to Covid-19, and latterly in May 2021 for an operation for his bulging disc problems.

7. The Claimant used up his entitlement to Company Sick Pay ('CSP') when he was shielding, and when he then had to self-isolate, prior to and following an operation in March 2021, he claimed a reasonable adjustment to the CSP policy for the period for which he was unpaid.

8. During his employment the Claimants mother died for which he also claimed two weeks bereavement leave.

## Issues

9. The issues we had to determine were as set out in the Issues contained in the Case Management Order of Judge Postle dated the 4 August 2022 as follows: -

**UNLAWFUL DEDUCTION FROM WAGES**

**9.1 Jurisdiction**

8.1.1 Was the claim form submitted more than 3 months after the alleged unlawful deduction from wages?

1.1.2 If so, was it reasonably practicable for the claim to have been submitted within the time limit?

1.1.3 If it was not reasonably practicable for the claim to have been submitted within the time limit, was the further delay beyond the end of the 3-month period reasonable?

### 9.2 Deduction from Wages

9.2.1 Did the Respondent make an unlawful deduction from wages within the meaning of s.13 of the Employment Rights Act 1996 ('ERA 1996')? The Claimant claims that the Respondent should have paid him four days' paid bereavement leave between 1 May 2021 and 15 May 2021.

9.2.2 In particular, the Tribunal will need to consider:

(a) Does the four days' paid bereavement leave claimed by the Claimant constitute 'wages' for the purposes of s.27 ERA 1996?

(b) If so, was there a deduction of those wages for the purposes of s.13(3) ERA 1996?

(c) If so, were those wages properly payable for the purposes of s.13(3) ERA 1996?

**DISCRIMINATION**

### 9.3 Jurisdiction

9.3.1 Was the claim form submitted more than 3 months after the conduct complained of?

9.3.2 If so, did that conduct form part of a chain of continuous conduct which ended within three months of the claim form being submitted?

9.3.3 If so, would it be just and equitable for the Tribunal to hear the claim?

### 9.4 Was the Claimant disabled?

9.4.1 The Respondent confirmed on 23 June 2022 that it accepts that the Claimant was disabled, by reason of his 'chronic back condition caused by bulging discs at multiple locations in his spine', at all relevant times for the purposes of the Equality Act 2010 and for the purposes of his claim.

### 9.5 Failure to Make Reasonable Adjustments Sections 20 and 21 of the Equality Act 2010

9.5.1 Did the Respondent apply a provision, criteria, or practice (a 'PCP')? The Claimant relies on the following PCP:

(a) 'only paying 67 days' company sick pay before that entitlement is exhausted'.

9.5.2 If so, did that PCP place the Claimant at a substantial disadvantage in comparison with employees who were not disabled? The Claimant alleges that:

> 'as a disabled person he was at a particular disadvantage through this PCP because he was required to shield during the pandemic because of his disability... he was disadvantaged because he had no CSP to use in cases of actual sickness [because his entitlement had been exhausted whilst shielding]'.

9.5.3 If so, did the Respondent take such steps as it was reasonable for it to take in all the circumstances to avoid the disadvantage?

9.5.4 The Claimant contends that the Respondent ought to have 'made a reasonable adjustment to remove this disadvantage by agreeing not to include days where CSP was paid during periods of shielding when calculating his remaining CSP entitlement for the purposes of paying sick pay for other absences'.

**9.6 REMEDY**

If the Claimant's claims are upheld what financial compensation is appropriate in all the circumstances?

## Findings of Fact

10. We found as follows: -

(i) On the 27 March 2020 the Claimant was sent a letter by his GP asking him to shield because of COVID and he notified his manager [p.123].

(ii) From the 3 August 2020 to the 25 August 2020 the Claimant returned to work on a phased return further to the advice of his GP [Para 6 of witness statement of Claimant].

(iii) From the 26 of August 2020 to the 3rd of November 2020 the Claimant returned to work on a full-time basis [Para 7 of Claimant's witness statement].

(iv) From the 4 November 2020 to the 23 November 2020 the Claimant was suspended from work for reasons unrelated to this claim.

(v) From the 24 November 2020 to the 2 December 2020 the Claimant was absent from work shielding [Para 9 of Claimant's witness statement]. At this point the Claimant asserted that he wanted to return to work, something we return to below.

(vi) From the 3 December 2020 to the 12 December 2020 the Claimant wished to return to work on a full-time basis, but he alleged he was discouraged from doing so by the Respondent and we return to this below [Para 9 of Claimant's witness statement]. From the 13 December 2020 to the 14 January 2021 the Claimant was on annual leave [ Para 9 of Claimant's witness statement].

(vii) From the 15 January 2021 to the 1 April 2021 the Claimant was absent from work shielding, apart from on the 15 and 21 of March 2021 which were taken as annual leave [Para 10 of Claimant's witness statement].

(viii) The Claimant's entitlement to his 67 days company sick pay, plus an additional 14 days of fully paid leave granted to all employees if they were absent for covid reasons, then ran out on the 5 February 2021 [P 122 of the bundle] in accordance with the Claimants most recent contract of employment containing his company sick pay entitlement ('CSP'). From this date until the 2 April 2021 the Claimant was then paid two months extra CSP to take him to the end of his shielding.

(ix) From the 2 April 2021 to the 25 of April 2021 the Claimant returned to work on a phased basis [ Para 11 of the Claimant's witness statement]. From the 26 April 2021 to the 30 April 2021 the Claimant then returned to work on a full-time basis.

(x) From the 1 May 2021 to the 21 of June 2021 the Claimant was absent from work for an operation and self-isolated prior to the operation and recuperated following the operation..

(xi) On the 1 of May 2021 the Claimant was notified of his mother's death but did not inform the Respondents straight away and stated in his witness statement that,

*'I did not notify my employer of my bereavement straight away,'*

[see Para 12 of Claimant's witness statement].

(xii) The Claimant notified the Respondent of his bereavement on the 21 May 2021 by telephone call with Debbie Baddy. [Para 14 of Claimant's witness statement] and this was 21 days after he learned of his mother's death.

(xiii) The Claimant received his pay slip on the 28 of May 2021 [Para 14 of Claimant's witness statement].

(xiv) It was at this time that the Claimant discovered he was not being paid for the recuperation time following his operation [Para 15 of Claimant's witness statement] where he asserts: -

*'... until I queried my pay, I was unaware that the previous periods of shielding were being paid with company sick pay and that it would have a negative impact on my overall entitlement. The company maintains they would not be paying sick pay for the period of my operation, the period of recuperation and the time spent shielding immediately afterwards and that I would not be receiving any pay for my bereavement.*'

(xv) On the 21 June 2021 the Claimant returned to work on a full-time basis.

(xvi) On the 29 June 2021 the Claimant raised a grievance [P143]. He asserted that he had been disadvantaged by not being furloughed during the shielding, challenged the classification of his sick days and amongst other things asserted that he had not been paid 4 bereavement days whilst off sick and that he should be paid for those days. He said [P143]: -

*'During the covid pandemic which started at the end of March 2020 I had to shield due to being classed as an extremely clinically vulnerable person by the government and was asked by the company to shield. I was informed that I would be entitled to full company sick pay, but it would come out of my sick pay entitlement. At this point the company could have chosen to furlough me which would have negated the need to use my sick pay entitlement, but they chose not to.'*

He went on to say: -

*'As a result of the company not choosing to furlough me, I feel that I have been disadvantaged /discriminated against from other employees in the company due to my disability. I asked the company if I was able to return to work when the last shielding dates were announced but was told that all of the current employees that were shielding had agreed to carry on shielding, so it was advisable that I did as well. I felt that I had no choice but to agree.'*

(xvii) Nowhere in the Claimants claim form does he complain of being prevented from being able to return to work by the Respondent. There was nothing about this put to any of the Respondents witnesses during the hearing by his Counsel. It was also not in the list of issues. In any event we do not find that he was prevented from returning to work by the

Respondent although this was not an issue set out anywhere in in this case.

(xviii) On the 6 of July 2021, he was invited to a grievance meeting [P 144 - 145].

(xix) On the 15 of July 2021 a grievance meeting took place with Linda Rogers accompanied by Simon Archer [P146 -154]. Discussions took place about why it would not have been appropriate for the Respondent to use the furlough scheme for the Claimant who was shielding.

(xx) There was then a reconvened grievance meeting on the 23rd of July 2021 [P 155 – 157].

(xxi) On the 26 July 2021 there was an outcome letter sent confirming the grievance was not upheld [P158 to 165].

(xxii) On the 2 August 2021 the Claimant lodged a letter of appeal [P 166].

(xxiii) On the 31 August 2021 there was an appeal meeting with Laura Ball [P169 to 171].

(xxiv) On the 28 of September 2021 there was a reconvened appeal meeting [P 173 – 176].

(xxv) On the 29 of October 2021 the grievance outcome was sent to the Claimant [P 179 – 188] and his appeal was partially upheld, and he was then paid 3 days of the 7 days bereavement leave he was claiming.

11. The Respondent gave evidence at the hearing about its CSP policy. In short, they gave to employees up 67 days of full company sick pay in any one 12-month period for those with the maximum level of service. Those with shorter lengths of service received less on a sliding scale.

12. Linda Rodgers on behalf of the Respondent gave evidence that they did not need to take advantage of the coronavirus government furlough scheme in 2021. She said in her witness statement [Para11]: -

*'Weetabix did not furlough anyone during the pandemic, but I wanted to understand the Claimants perspective'.*

And [Para12]: -

'W*e discussed that furlough was for companies that had needed to close or to reduce the amount of work their employees were carrying out …. however, utilising the furlough scheme was not appropriate for Weetabix as we had more than enough work and in fact work levels were actually increasing'.*

13. Evidence was given by Linda Rodgers, and we found, that the Respondent decided that for any employees that were clinically vulnerable and needed to shield due to covid that they would be classed as being on sick leave and would be paid their allowance of CSP depending on eligibility. It was the use of the CSP scheme by the Respondent to pay the Claimant as a shielding employee that was the core issue in this dispute.

14. Evidence was given by Linda Rodgers for the Respondent that, as well as paying full CSP pay to employees who were clinically shielding, they decided that they would pay on top of CSP 14 days paid leave to any shielding employees and any other non-shielding employees who needed to take any time off for other reasons that arose from COVID.

15. In addition, they also decided in the case of the Claimant, to pay him an 2 additional months of CSP, on top of the 67 days CSP and 14 days CSP to take him to the end of the current period of shielding at that time up to the 2 April 2021 when he then started his phased return to work.

16. When Miss Ball, a witness for the Respondent, was asked how they arrived at the 2-month extra period of CSP for the Claimant and she stated that it simply was the amount of time that took the Claimant to the end of his shielding at that point in April 2021.

17. After being back at work for one month the Claimant then had to take more sick leave as he had a planned operation on his back, and he had to self-isolate from the 1 May 2021 in advance of the operation. However, while shielding, as set out above, on 1 May his mother died.

18. On the 5 May the Claimant had the operation and then had to recuperate for a period of 6-8 weeks following the operation. As set out above it was during this time that he discovered he was no longer getting any sick pay and it was not in dispute during the hearing that this came as a complete surprise for the Claimant.

19. As a result the Claimant raised a grievance to his employer and by the time of this hearing the two issues in that grievance, among other things that were no longer in dispute before this Tribunal, were that he had not been paid two weeks bereavement leave, in accordance with the company policy, and only

having been paid one week after he appealed was still owed 4 days bereavement leave, and that he should have had full company sick pay during the period of time from the 15 May to the 21 June 2021, a period of 17 extra days.

20. He claimed that a reasonable adjustment should have been made to the CSP policy and that the time he spent shielding should not have been calculated as eating into the 67 days CSP he was entitled to, and that from the 15 May onwards until the 21 June 2021 the Respondents should have paid him the gross sum of £3744.00.

21. Counsel for the Claimant confirmed during the hearing he was not seeking double recovery and that the Claimant only claimed Bereavement Leave pay if his claim for CSP claim failed as they both straddled the same period of time, but that in the alternative he claimed four days bereavement leave in the sum of £888.00.

## The Law and Conclusions

### Unlawful Deduction from Wages

22. S.13 of the Employment Rights Act 1996 ('ERA') provides as follows: -

**13 Right not to suffer unauthorised deductions.**

(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.

S.23 of the ERA provides as follows: -

**23 Complaints to employment tribunals.**

(1)A worker may present a complaint to an employment tribunal—

(a)that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),

…….

2)Subject to subsection (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 a deduction by the employer, the date of payment of the wages from which the deduction was made, or

……

(3) Where a complaint is brought under this section in respect of—

(a)a series of deductions or payments, or

(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

23. S.27 of the ERA also provides that: -

**27. Meaning of 'wages' etc.**

28. (1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including—

29. (a)any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

## Time Limits and Jurisdiction

## Unlawful Deductions and Disability Discrimination

*Was the claim form submitted more than 3 months after the alleged unlawful deduction from wages?*

24. The three-month time limit for presenting a complaint to an employment tribunal where the complaint relates to a deduction by the employer and the

operative date from which time starts to run is *'the date of payment of the wages from which the deduction was made',* in accordance with s.23(2)(a) of the ERA.

25. The question of time limits for wages claims was laid out by the EAT in **Taylorplan Services Ltd v Jackson and ors 1996 IRLR 184, EAT.** The correct approach, said the EAT, was for the tribunal to ask itself the following questions:

(1) Is this a complaint relating to one deduction or a series of deductions by the employer?

(2) If a single deduction, what was the date of the payment of wages from which the deduction was made?

(3) If a series of deductions, what was the date of the last deduction?

(4) Was the relevant deduction under (2) or (3) above within the period of three months prior to the presentation of the complaint?

26. In determining the time limit for the presentation of claims for wages claim care must be taken to determine what type of deduction it is. The EAT in **Arora v Rockwell Automation Ltd EAT 0097/06** clarified three types of unauthorised deductions as follows:

(a) a straightforward deduction,

(b) a payment that is alleged to be a shortfall of what is due and

(c) a complete non-payment.

27. The EAT referred to the relevant time limit contained in S.23(2)(a) which provides that a complaint must be presented to a tribunal before the end of the three-month period beginning with the date of the payment of wages from which the deduction was made.

28. In **Arora** it was stated that an actual deduction in breach of contract, or one where the payment from which the deduction is made has been tendered by the employer, would clearly fall within S.23(2)(a).

29. It was therefore stated that on a proper construction of S.13(3) where it was clear that '*where the total amount of wages paid on any occasion by an employer to a worker… is less than the total amount of the wages properly payable… the amount of the deficiency shall be treated… as a deduction… on that occasion'*.

30. In **Arora** the underpayment of overtime was therefore a non-payment within the meaning of S.13 (3), and therefore the three-month time limit in that case began to run on the date of payment of the wages from which the deduction was made.

31. In this claim the Claimant was claiming a partial under-payment of his wages, due to the Respondent not paying him for the part of the month in which he took and claimed bereavement leave from the 1 May to the 14 May 2021. This is significant for this claim as in accordance with **Arora** and paragraph 26(b) and paragraph 30 above we found that this was a partial underpayment of wages. We found this claim therefore amounted to a payment as defined in **Arora,** and as referred to in paragraph 26 (b) above, in that he claimed he should have been paid wages in full for the month in question and was only paid in part, and it was therefore a payment which was a shortfall of what was due as opposed to a complete non-payment as defined at paragraph 26 (c) above. We return to this below.

32. The Respondents on appeal, and after these proceedings were issued, then paid him for part of the bereavement leave claimed of 3 days leaving a balance due, according to the Claimant, of 4 days.

33. The Claimant in particular claimed bereavement pay for the period 1 May 2021 to the 14 May 2021 as set out in his Schedule of Loss [P54]. If this had been approved by the Respondent on the date that bereavement leave started it would have then been paid on the usual payroll date on or before the 31 May 2021.

34. If limitation had in fact started to run on the date of the alleged underpayment of his wages on or before the 31 May 2021 then primary limitation would expire at the latest on the 30 August 2021. ACAS conciliation started on the 16 August 2021, and if limitation is calculated from the date of the alleged underpayment on the 31 May 2020, then the claim for the unauthorised deductions from wages would be in time.

35. However, the Respondent's Counsel stated that presumably the 1 May 2021 would be the date of entitlement to the payment as claimed, as approval was required from the 1 May 2021, this being the date claimed from as being the date of the death of the Claimant's mother and so the Claimants claim was out of time. This was because on this analysis the ACAS notification date would have been three months less 1 day from the 1 May 2021 which would be the 31 July 2021 and ACAS conciliation started on the 16 August 2021 and on this analysis the claim would have been brought out of time by 16 days.

36. Counsel for the Respondent relied on **Group 4 Nightspeed Ltd v Gilbert [1997] IRLR 398** on the issue of when the clock started ticking for the purposes of the three-month limitation period. That case concerned a worker who was paid a salary plus a quarterly commission. In practice, the commission was paid with the relevant month's salary – although under the worker's contract it was not strictly due until the last day of the month following the relevant quarter. There was a dispute about the level of commission that had been paid and the Claimant brought an unauthorised deductions claim. The EAT had to decide

when time started to run. Was it the date on which the relevant commission payments had been paid into the worker's bank account (20 January 1995) or the date on which payment was due under the contract (31 January 1995)? The EAT held that it was the later date. As a matter of law, it is only when an employer fails to pay a sum due by way of remuneration at the 'appropriate time', meaning the contractual date for payment, that a claim for an unlawful deduction can arise. It was only at that point that the employer could be said to have failed to pay that which was properly payable on a given occasion within the meaning of ERA 1996 s 13(3).

37. Counsel for the Claimant submitted that time began to run on the date of the underpayment which was on the date of the payment of his wages (which we assumed was on or before the 31 May 2021) and was therefore in time.

38. We found that this was a different scenario to the case of **Gilbert.** This bereavement leave was not a commission payment as in that case, and while it was in effect a contractual right claimed by Claimant, it was still a claim for partial under-payment of his wages based on his usual salary for the time he wanted his bereavement pay, and it was a not performance related payment, such as commission, where pay is related to sales figures and not the agreed salary due, and where payment dates may differ between wages and commission earned as in the **Gilbert** case.

39. We found that the date limitation started to run was when the Respondent failed, as set out in **Gilbert,** to pay a sum due by way of remuneration at the 'appropriate time', meaning the contractual date for payment.

40. In this case the ‘appropriate time’ and contractual date for payment was when payroll was run on or before the 31 May 2021 and the partial underpayment occurred, as referred to in paragraphs 26 (b) to 31 above, and so we found this claim was brought in time.

41. We found this case was different to the case of **Gilbert** where the ‘appropriate time and contractual date’ for payment was at the end of the quarter after the commission was earned. Here the ‘appropriate time and contractual date’ for payment was the date that payroll was run, this being the date contractually that the Respondent was obliged to pay the Claimant in accordance with the terms of his employment, and that was either the week ending the 27 May 2021 or by the 31 May 2021 for the purposes of payroll, and whichever date the Claimant was paid, and the deduction was made, in May 2021, the ACAS notification made on the 16 August 2021 was still made within the primary limitation period, which we found ended at the latest on the 30 August 2021, and thereafter the claim was brought in time.

42. Having found that the claim for unauthorised deductions from wages was brought within the statutory time limits we also find that the claim for a failure to make adjustments contrary to s.20 and s.21 of the EqA was also brought within the statutory time limits.

**Claim for entitlement to bereavement leave.**

*a) Does the four days' paid bereavement leave claimed by the Claimant constitute 'wages' for the purposes of s.27 ERA 1996?*

43. We firstly asked ourselves if they were wages properly payable for the purposes of s.13(3) ERA 1996? We found they were wages for the purposes of s.13 (ERA) as bereavement leave is simply paid leave for a period of bereavement and as such is a payment of his salary at the agreed rate. In any event, it was not in dispute between the parties that the payment of bereavement leave amounted to the payment of wages.

*(b) If so, was there a deduction of those wages for the purposes of s.13(3) ERA 1996?*

44. It was not in dispute that when payroll was run for the period of May 2021 that the Claimant was not paid in full for that month, so we found there was a deduction from the wages of the Claimant for the purposes of s.13(3) of the ERA 1996. In any event, it was not in dispute between the parties that there was a deduction from his wages for this period of time.

*(c) If so, were those wages properly payable for the purposes of s.13(3) ERA 1996?*

45. However, in determining whether the wages for the claimed bereavement leave amounted to wages properly payable for the purposes of s.13(3) ERA 1996 pursuant to the Respondents bereavement leave policy we had to determine if the Claimant had a contractual right to claim and be paid bereavement leave.

46. In **Braganza v BP Shipping Ltd [2015] UKSC 17** the Supreme Court dealt with the exercise of discretion under the contract and found that not only must the claimant be able to argue that the decision was unreasonable; they must also demonstrate that it was irrational under the administrative law Wednesbury principles, a much more stringent test to satisfy. The basis of this reasoning was that it must restrict the judge to consideration of the process adopted by the employer, rather than re-making the decision judicially.

47. The policy on bereavement leave [P99] was at page 99 of the bundle. In the Claimant's contract of employment, it stated that 'you may be entitled to' bereavement leave' …….'.

48. The Claimant accepted during cross examination that he did not tell the Respondent about his mother dying until the 21 May 2021 and we noted she died on the 1 May 2021. He also accepted that he never formally requested bereavement leave at the time.

49. It was the Claimants case that during the period of the 1-21 May he should have had two weeks bereavement leave which amounted to seven days – 3 days in one week and 4 days in the other, this being his usual work pattern.

50. After he raised his grievance, it was upheld in part, and although the Respondent never accepted that they were legally obliged to pay any bereavement leave to the Claimant they decided in any event to pay 3 days. The Claimant contended that only amounted to one week and in effect he should be paid the other four days to represent the week that would have followed the 3-day week.

51. It was the Respondents case that bereavement leave had to be requested at the time the leave was to commence to ensure staff cover and we found that this was a commercially justifiable reason for requiring immediate notification that bereavement leave was being requested.

52. R's bereavement leave policy is described as discretionary as set out in the wording of the Bereavement Policy [99] which states:

*1. Purpose.*
*Weetabix is committed to offering employees the opportunity to maintain a balance between their home and working lives.*

*This policy explains where employees can request discretionary leave to support in a bereavement situation.*

53. Counsel for the Respondent stated that it is a pre-condition of the exercise of the discretion that bereavement leave is requested and approved as follows:

*Approval for leave*

*Any leave in this policy must be approved by your line manager and your Line Manager will notify HR that leave is approved.*

*A request for time off can be refused if a manager feels a request is inappropriate. Should you take leave that is not approved, this will be classed an unauthorised absence and will be managed in-line with the Unauthorised Absence policy.*

54. Counsel for the Respondent stated that the Claimant had accepted during cross-examination that bereavement leave had to be requested and had to be approved at the point the leave was to start. It was not in dispute that the Claimant notified the Respondent on the 21 May 2021, some three weeks after his mother's passing, and that the claim must fail.

55. Counsel for the Respondent also said in summary that firstly there was no contractual entitlement, but in any event, it was a precondition to the exercise of any discretion that a request be made and approved. He said a request was not made, and it was not approved.

56. We found that the bereavement policy of the Respondent must oblige any request to be made at the time of the leave required for operational purposes, as was stated in evidence by the Respondents witnesses, and the policy could not apply to requests made after the bereavement leave period claimed for was over [Pg 99-100]. In effect the Claimant was alleging he should be paid for it retrospectively whilst he was at the same time on unpaid sick leave. We found that the request being made after the event of bereavement leave was not validly made.

57. However, despite our finding above we still deal with the issue of whether, in the alternative, if it was validly made whether the discretion was properly exercised by the Respondent.

58. Counsel for the Respondent said that the Claimant had conceded in cross examination, in relation to the bereavement claim, (and the relevant policy [P99], stated that the payment of it is at the Respondent's 'discretion') that payment of it was at their discretion.

59. Counsel for the Respondent also said that for the avoidance of doubt, even if it were a contractual entitlement, it would not be open to the Claimant to challenge the exercise of the discretion based on Wednesbury unreasonableness.

60. In **Braganza** the Supreme Court held that if what the Claimant is objecting to is the way that the employer exercised a discretion under the contract (to the Claimant's detriment), it is not enough for the Claimant to argue that the decision was unreasonable; he or she must show that it was irrational under the administrative law Wednesbury principles, a much tougher test to satisfy; the rationale for this is to restrict the judge to consideration of the process adopted by the employer, rather than re-making the decision judicially.

61. Counsel for the Claimant on this point however said that the policy referred to as follows: -

*Each case will be treated individually and based on its merits however the following level of leave will normally be authorised on the death of an immediate family member of the employee for each bereavement which includes time to attend the funeral. 2 weeks leave.*

62. We noted that as the Claimant 's mother lived in Egypt, and as it was during the pandemic, the Claimant did not then travel abroad for the funeral. At this point the Claimant was not at work as he was shielding. He gave evidence however that he did deal with funeral arrangements from the UK.

63. Counsel for the Claimant said that on the point in **Braganza** that if it was a matter of pure discretion whether to exercise it in the Claimant's favour it still had to be exercised logically not arbitrarily. He said that the choice of one week's bereavement leave, rather than two, (and he said he didn't want to criticise the Respondent's witness Ms Ball for her sympathy to the Claimant) as per the policy was a figure 'plucked out of the air.'

64. We did not find the figure was 'plucked out of the air' by the Respondent in giving the Claimant one weeks leave and not two weeks. Miss Ball, the appeal hearing manager, explained in evidence that when deciding to show sympathy to the Claimant on this point she thought 1 week's pay based on a 3-day week would be a fair outcome to his grievance. We found that the Respondent acted generously to the Claimant on this matter when they said that: -

*'Notwithstanding that R is under no obligation to pay C any bereavement leave, pursuant to the grievance appeal outcome letter dated 29.10.21, R has already paid three days' bereavement leave to C in acknowledgement of the fact that he did inform his line manager that his mother had passed away, and that this must have been an extremely difficult time for him and his family [187].'*

65. Counsel for the Respondent also said that, for the avoidance of doubt, hypothetically, had approval been sought and all the facts been put before the Respondent, a decision that it would not have been appropriate to grant such leave would not have been Wednesbury unreasonable. As recorded in the Grievance Appeal outcome it was said that [187]:

*You also explained to me at our meeting that, owing to the pandemic, your operation, and your own family responsibilities here in the UK, you were unable to take bereavement leave in order to return to Egypt to support your family there and to attend your mother's funeral.*

66. We found that the policy on bereavement leave was a discretionary policy, and we did not find that they applied their discretion in a 'Wednesbury unreasonable fashion' by giving him one weeks leave instead of two weeks leave.

67. We accepted the submissions of Counsel for the Respondent on the bereavement and found as follows; -

(a) firstly, that it was not a request validly made and so the claim for bereavement leave pay must fail, /or

(b) in the alternative this Tribunal having found that this was a discretionary policy, and such discretion was applied reasonably we therefore found that this claim for four days' pay under this policy fails and the claim for unauthorised deduction for wages is dismissed.

**Reasonable adjustments under s.20 and s.21 of the EQA 2010**

**Time limits and Jurisdiction**

*8.3.1 Was the claim form submitted more than 3 months after the conduct complained of?*

*8.3.2 If so, did that conduct form part of a chain of continuous conduct which ended within three months of the claim form being submitted?*

*8.3.3 If so, would it be just and equitable for the Tribunal to hear the claim?*

68. Having found that this claim was brought in time for the reasons set out above we find that the claim was not submitted more than 3 months after the conduct complained of.

**Adjustments under s.20 and s,21 of the EqA 2010**

69. Section 20 of the Equality Act 2010 ('EqA') defines the duty to make adjustments as follows,

> 20 Duty to make adjustments:
>
> (1) …
> (2) …
> (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

70. The reasonable adjustments duty is contained in Section 20 of the EqA and is further amplified in Schedule 8. In short, the duty comprises of three requirements. If any of the three requirements applies, they impose a duty to make reasonable adjustments.

71. Section 21 provides that a failure to comply with one of the three requirements is a failure to comply with the duty to make reasonable adjustments by A (A being the employer or other responsible person) and amounts to discrimination, Section 21(1) and (2).

72. The approach that a Tribunal should take was set out in the judgment of **HHJ Serota QC in Environment Agency v Rowan [2008] IRLR 20**. We are required to identify:

    (a) the relevant arrangements (PCP) made by the employer,
    (b) the identity of non-disabled comparators (where appropriate), and
    (c) the nature and extent of the substantial disadvantage suffered by the Claimant (as a result of the arrangements).

    After determining the above, we then must consider whether any proposed adjustment is reasonable; in particular, to determine what adjustments were reasonable to prevent the PCP placing the Claimant at a substantial disadvantage.

73. A substantial disadvantage is one that is more than minor or trivial. Whether or not such a disadvantage exists in a particular case is a question of fact. It is the PCP that must place the claimant at the disadvantage **Nottingham City Transport Ltd v Harvey UKEAT/0032/12,** and the 2011 Code paragraph 16. Using a comparator may help with this exercise as the purpose of the comparator is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question, as set out in paragraph 6.16 of the 2011 Code of Practice on Employment.

74. The substantial disadvantage should be identified by considering what it is about the disability which gives rise to the problems and effects which put the claimant at the substantial disadvantage identified, **Chief Constable of West Midlands Police v Gardner UKEAT/0174/11.**

75. In **Griffiths v Secretary of State for Work and Pensions [2014] UKEAT/0372/13**, a case concerning the management of sickness absence, it was also explained that the fact that the disabled and non-disabled were treated equally and may both be subject to the same disadvantage when absent in the same period of time does not eliminate the disadvantage if the PCP bites harder on the disabled or category of them than it does on the able-bodied.

76. What amounts to a PCP is not further defined within the EqA, though the expression is to be construed broadly, avoiding an overly technical approach. The EHCR's Employment Code extends to any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites,

qualifications, or provisions. The existence or otherwise of a PCP is to be assessed objectively.

77. In **Carerras v United First Partners Research Ltd. EAT 0266/15** the term 'requirement' was said to be capable of incorporating an 'expectation' or assumption', which might be sufficient to establish the existence of a practice.

78. The case of **Ishola v Transport for London (TfL) [2020] EWCA Civ 112** established that in a reasonable adjustment context, the function of a PCP was to establish what it was about the employer's treatment of the employee that caused substantial disadvantage to the employee (para. 36). Having regard to the operation of a PCP in the EqA, 'all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated it if occurred again'. A 'practice' connoted 'some form of continuum in the sense that it is the way in which things generally or will be done' (para. 38). The ET, therefore, was entitled to conclude that the employer's failure to investigate CI's grievance was not a practice of requiring him to return to work without a proper and fair investigation into his grievances as in this case it was a 'one-off act'.

**Claim for an extension to the company sick pay policy.**

*The PCP*

79. To bring a claim for a failure to make reasonable adjustments under s.20 and s.21 of the EQA the Claimant must first establish what the PCP was that caused him a disadvantage by comparison to non-disabled employees.

80. In relation to the question as to whether the Respondent applied a provision, criterion, or practice (a 'PCP') Counsel for the Respondent said the Claimant failed to establish the PCP.

81. The claimed PCP as set out in the List of Issues was as follows: -

'only paying 67 days' company sick pay before that entitlement is exhausted'.

82. However, we found that the Claimant was in fact paid 67 days plus 14 days. The extra 14 days was introduced by the Respondent to cover covid. The Respondents witness Linda Rodgers, gave evidence, which we accepted, that the practice for all employees was to allow 14 days paid time off for any covid related issues.

83. In addition, they also granted extra CSP in the Claimants case for another two months which took him to the end of his shielding on the 2 April 2021.

84. We were not given evidence about the remaining approximate 17 employees who were also shielding and nor did we know if any of them exceeded their CSP and were, like the Claimant, granted additional CSP.

85. We therefore found that the PCP relied on of 67 days was not as pleaded and did not exist in that form, as it was 67 days plus 14 days plus in the Claimant's case another two months and this was not as defined in the claim form. This was not disputed during the hearing and the stated PCP in reality was not applied to the Claimant as he was given significantly more CSP. Instead of 67 days he got around 141 days CSP.

86. Due to finding that the way the PCP was pleaded by the Claimant was not made out by him in this claim we did not find such a PCP was applied to him.

87. In fact, it was not at all clear to this Tribunal what the actual PCP was that was applied by the Respondent generally when this claim arose during the covid period, and we found there was no fixed PCP. For example, other employees may have, according to their circumstances received more than an additional two months on top of their allowance and the 14 days extra covid days, to take them to the end of their shielding, or they may have received much less.

88. In any event, and in the alternative, regardless of what we found above about the lack of the stated PCP being applied to the Claimant, we then went on to consider if he was at a disadvantage because of the stated PCP of not extending CSP beyond 67 days?

89. We found that he was at a disadvantage, and the Claimant said that: -

*'as a disabled person he was at a particular disadvantage through this PCP because he was required to shield during the pandemic as a result of his disability… he was disadvantaged because he had no CSP to use in cases of actual sickness because his entitlement had been exhausted whilst shielding.*

90. The reasonable adjustment contended for was that the Respondents should have done as follows: -

a) *'made a reasonable adjustment to remove this disadvantage by agreeing not to include days where CSP was paid during periods of shielding when calculating his remaining CSP entitlement for the purposes of paying sick pay for other absences'.*

91. On the issue of whether it would have been a reasonable adjustment to extend his company sick pay to cover his later operation in 2021, for which he was not paid, Counsel for the Respondent took us to a number of cases: -

(a) While extending sick pay for a disabled employee is not precluded, it would be a rare and exceptional case that it would amount to a reasonable adjustment: see **O'Hanlon v Comrs for HM Revenue & Customs [2007] IRLR 401** and **Meikle v Nottingham County Council [2004] IRLR 703,** as helpfully rationalised by the Court of Appeal in **O'Hanlon** at paras 70-74: -

*'It was never suggested that the adjustment lay simply in granting full pay. Liability arose because of the failure to make reasonable adjustments to accommodate her back into the classroom'.*

(c)In **O'Hanlon** per Hooper LJ it was said that: -

*'In our view, it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment. We do not believe that the legislation has perceived this as an appropriate adjustment, although we do not rule out the possibility that it could be in exceptional circumstances. We say this for two reasons in particular.*

*The first reason, set out in detail in para 68, 'the tribunals would be entering into a form of wage fixing for the disabled sick'.*

*The second, set out at para 69, is that the 'purpose of this legislation is to assist the disabled to obtain employment and to integrate them into the workforce.'*

92. One exceptional case was **G4S Cash Solutions (UK) Ltd v Powell [2016] IRLR 820** and which involved an engineer who following a back injury was reassigned to a less well-paid role but with his pay preserved. After a year in the adjusted position the employer wanted to reduce his pay. Mr Powell succeeded before the EAT in contending that it was a reasonable adjustment to continue his pay protection. HHJ Richardson, considering the statutory guidance and the previous case law, held at para 44:

*'I can see no reason in principle why section 20(3) should be read as excluding any requirement upon an employer to protect an employee's pay in conjunction with other measures to counter the employee's disadvantage through disability. The question will always be whether it is reasonable for the employer to have to take that step.'*

93. At para 60 he concluded that: -
*'whilst not an everyday event for an employment tribunal to conclude that an employer is required to make up an employee's pay long-term to any significant extent – but I can envisage cases where this may be a reasonable adjustment for an employer to have to make as part of a package of reasonable adjustments to get an employee back to work or keep an employee in work'.*

94. Counsel for the Respondent concluded that it was however never part of the Claimant's case that extending CSP would help him get back to work.

95. Counsel for the Claimant said that this was an exceptional case that permitted us to find that such an adjustment would have been reasonable. He said that the Claimant was in a disadvantaged situation compared to those that didn't have his disability and therefore did not need to shield because they hadn't used up all their company sick pay under the heading of 'pandemic sick' and he referred to the blue box in the table produced by the Respondent which was in the bundle [P 163-165]. He submitted that was the Claimant's disadvantage i.e., their policy had been 67 days of company sick leave used up not to be extended.

96. He submitted that as soon as the Claimant's ordinary but not pandemic sick leave was not then extended again, and ordinary sick leave was denoted in the yellow box, which was when he was recovering from his operation in May 2021, that a step could have been taken to extend sick pay for the yellow box ordinary sick leave, or when calculating if there was still some entitlement left to, in effect, not to then say *'you have been depleted by pandemic sick leave'* and that this was a step that could be taken, and that this was a reasonable adjustment that could have been made.

97. In relation to **O Hanlan** Counsel for the Claimant stated that we were not bound by this and referred to the later case of **Griffiths.** This case involved a disabled person hitting trigger limits, and Counsel submitted that it is a valid step to amend trigger limits, and that **O Hanlan** doesn't stop that. He said in **Griffiths** if you doubled the trigger limits it didn't save her but that the principle was there.

98. Counsel for the Claimant submitted that in this case extending sick pay, and in effect discounting the pandemic sick leave when he had to shield, and therefore use up his CSP when he wasn't in fact sick but was instead clinically vulnerable, was a step that can and should have been taken as a reasonable step and was a reasonable adjustment that should have been made by the Respondent.

99. Counsel for the Claimant went on to say that **O Hanlan** does say not it is a complete barrier to extending sick pay and there can be such an extension in exceptional circumstances, He said we had here a pandemic which was exceptional circumstances. This resulted in pandemic sick shielding for vulnerable employees which ate up the whole of the Claimants 67 days CSP. He said that because of the system chosen by the Respondent's covid committee as to how shielders were going to be financed this meant a point was hit where CSP was not paid due to being depleted by covid shielding.

100. Counsel for the Claimant went on to say that the Respondents gave evidence that they did not want employees to come back unless they wanted to and they didn't want them to come back simply for lack of pay when shielding, hence the extra two months given to the Claimant to the 2 April 2021.

101. Counsel for the Claimant stated that his argument was that the adjustment for the ordinary CSP [yellow pay in the table] applied with equal force to someone having an operation and recuperation, and why could the Respondent not apply the same policy of adjustment by paying full CSP to that yellow pay period as they did to the prior shielding employees [the blue shielding pay in the table].

102. Counsel for the Claimant concluded by tying the table in the bundle back to s.20 of the EqA, in that he contended that for the pleaded PCP they sought an extension of CSP and submitted that the disadvantage to the Claimant was clear in that no sick pay was paid to the Claimant for the yellow period, and that it was a valid reasonable step i.e. a reasonable adjustment which should have been taken to extend sick pay from the 15 May 2021 to the 21 June 2021 and pay him the extra 17 days at full pay.

103. Counsel for the Claimant said this failure to pay the extra 17 days CSP was sufficient to transfer the burden of proof onto the Respondent to show why it was unreasonable of the Respondent to refuse to extend the CSP scheme.

104. Counsel for the Claimant said the reason they didn't want to extend payment of CSP was because in essence that felt they had already been generous enough but in his submission that was not sufficient.

105. He said no evidence had been given anywhere about the Respondent not being able to afford this, and we assume that he was referring to the potential defence of the PCP being a proportionate means of achieving a legitimate aim. He said their evidence was simply that they had already extended CSP for the Claimant twice i.e., an extra 14 days and then an extra two months in the CSP window.

106. We found that the Respondent having already paid the Claimant 67 days plus 14 days plus 2 months in his case, and even if the pleaded PCP, contrary to what we found above, was made out, that if we had accepted the submissions by Counsel for the Claimant and found instead that all shielding sick leave should have been stripped out of the calculation so that the Claimant was paid the claimed 17 days to the 21 June 2021, that this Tribunal would have been entering into the very 'wage fixing' referred to in the case of **O Hanlon.** This adjustment was not about helping him to get back to work in any

way it was a simple financial issue for the Claimant, and it was about improving his financial situation.

107. We considered the case of **Griffiths** which Counsel for the Claimant said assisted the Claimant. However, in **Griffiths** on the last part of the test as to whether the adjustments to the trigger points sought in that case were reasonable or not, we noted that was a case about whether once trigger points were hit the Claimant was then dismissed and that case was about extending the trigger points to avoid dismissal.

108. **Griffiths** can be distinguished from this case as, in our view, this case is simply about giving the Claimant more pay for being off sick once the allowance under the CSP scheme had been used up and was not about avoiding the dismissal of the Claimant.

109. In any event, in the alternative, even if the same argument in **Griffiths** could be deployed in this case, we were mindful of the fact that this was a long-term condition that the Claimant had, and the Respondent had already added an extra 14 days and then two months to allow for the covid effects on shielding employees. We did not find it a reasonable adjustment for an employer of an employee with a long-term disability to extend the CSP scheme again at this point, after it had already extended it twice.

110. We could not accept the submission by Counsel for the Claimant that a reasonable adjustment was to strip out shielding sick leave so that the pot of 67 days was left or to simply extend the CSP leave period which amounted to the same thing.

111. The Claimants counsel said this was an exceptional circumstance type of case i.e., the pandemic. However, we found that whilst Covid-19 was an unforeseen event the situation of the Claimant who had used up his CSP to shield did not in our view amount to an exceptional case.

112. There was some discussion about whether the Claimant should have been furloughed to avoid the using up of his CSP when shielding but Counsel for the Claimant confirmed at the end of the hearing that was not an issue relied on in the Claimant's claim nor an adjustment sought i.e., that he should have been furloughed and paid at 80% of his wages instead of being 100% CSP and so we do not address that issue in this Judgement.

113. We therefore find this claim for reasonable adjustments and the Claimant's claim for additional CSP also fails and is dismissed.

_____

Employment Judge L Brown

Date: 12 September 2023

Sent to the parties on: 14 September 2023

For the Tribunal Office