



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4106361/2022 Hearing at Glasgow on 5, 6 and 7 September 2023

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**Employment Judge: M A Macleod
Tribunal Member: J S Anderson
Tribunal Member: J Burnett**

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Sharlene Cannon

**Claimant
Represented by
Mr M Cannon
Husband**

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South Lanarkshire Council

**Respondent
Represented by
Mr S O'Neill
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous Judgment of the Employment Tribunal is that the claimant's claim of disability discrimination contrary to section 13 of the Equality Act 2010 fails, and is dismissed.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 22 November 2022 in which she complained that she had been discriminated against on the grounds of disability by the respondent.
2. The respondent submitted an ET3 response in which they resisted all claims made by the claimant.

3. A Hearing was listed to take place at the Glasgow Tribunals Centre on 5 to 7 September 2023. The claimant attended and was represented by her husband, Mr M Cannon. Mr O'Neill, solicitor, appeared for the respondent.
4. A joint bundle of productions was presented to the Tribunal and relied upon by both parties in the course of the Hearing.
5. The claimant gave evidence on her own behalf, and called as witnesses Stephen Smellie and Sandra Garry. The respondent called as witnesses: Lyn Boag, Paul Murphy, Liam Purdie, Andrea McIntosh and Faye Meldrum.
6. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

7. The claimant commenced employment with the respondent as a Social Worker on 15 April 2019. Her date of birth is 12 July 1972.
8. On 16 August 2021, the claimant's son, Mark, who had just turned 11 years of age, collapsed, and required to be taken to hospital. Following blood tests the claimant was informed that her son appeared to be suffering from leukaemia. He required to be taken to the Royal Sick Children's Hospital in Glasgow from Hairmyres Hospital, where they had originally taken him, and so the claimant and her husband drove him to Glasgow for this purpose. Her son, Mark, was admitted to the Schiehallion Ward, and he was an in-patient there for some 7 months while he was treated and kept under close observation by medical and nursing staff.
9. The claimant contacted her friend and colleague, Sandra Garry, by telephone to let her know what was happening. She then contacted Lyn Boag, her line manager and team leader, on 17 August 2021 to advise her of Mark's diagnosis. The claimant was very anxious and upset about the situation which her son was facing.
10. Ms Boag sent the claimant a text message at 10.09am on 17 August 2021 (64):

“Sandra shared with me your news about your boy. Thinking of you and I’m here if need to talk or need anything else. X”

11. On 17 August 2021, the claimant met with the treating medical staff and were advised that her son was suffering from an aggressive form of leukaemia, confirming that this was a very serious situation. Sandra Garry came to the hospital with gifts from colleagues for Mark as a mark of support for her. Ms Garry mentioned special leave to the claimant. She had not previously been aware of the concept of special leave, so Ms Garry confirmed that she would raise this with Ms Boag. She told the claimant that she had heard of someone who had been granted 6 months’ special leave. The claimant was too concerned about her son to do anything about special leave at that point.

12. Ms Boag contacted the Fieldwork Manager, Paul Murphy, to confirm that the claimant’s son was unwell, and that the claimant was therefore unable to work. She did not, at this stage, advise Mr Murphy of the diagnosis of what the claimant had been told about her son’s condition. She told him that the claimant’s current sickness absence was about to come to an end, having been absent for the previous week for unconnected reasons, and said that they needed to work out what kind of leave the claimant should be on.

13. Ms Boag sent a text message to the claimant on 20 August 2021 (65) in which she said *“Paul didn’t get back to me before end of today, I will chase up again for you on Monday...don’t be worrying about work, will get sorted next week.”* On 23 August, she texted again (65): *“Hi, Paul has come back and advised personnel worker off until tomorrow. If u want to give me call tomorrow when you have a minute can have a chat about time off and what’s best.”*

14. Ms Boag then contacted Personnel herself, and told them that the claimant’s son was significantly unwell. She asked for advice about what kind of leave should be granted to the claimant, and was advised that she should give her 5 days’ special leave, then review and have a further

discussion with her. At this point, Ms Boag was not familiar with the Special Leave Policy, but sought advice from Personnel due to her unfamiliarity with the provisions available to her and the claimant.

5 15. The respondent operates, and operated at that time, a “Scheme of Special Leave” (85ff). The scheme provided that Special Leave was available to all employees of the respondent “for a wide range of reasons which may be with or without pay”. It also stated in the introduction that when approving requests for special leave, managers should consider the operational requirements of the respondent as well as any requests which had
10 previously been granted, outstanding annual leave and requests governed by legislation.

16. The scheme then set out a number of provisions under different headings. Under “Family Emergencies”, paragraph 1 set out the following guidance:

15 1.1 *“If employees are required to be absent from work to make alternative arrangements arising from family emergencies leave with pay for up to one day will normally be granted for each incident. Family emergencies may include incidents such as the sudden and unexpected illness of a relative, partner or child, disruption to the care of a dependant or an incident involving children at school/childcare.*

20 1.2 *In the case of the **emergency** hospitalisation of a child and an employee has been advised by medical staff to remain with their child whilst they are in hospital, leave with pay for up to 5 days will normally be granted. Additional time off may be agreed at the line manager/Head Teacher’s discretion.*

25 1.3 *In the case of a critically ill or injured relative/partner, an employee may be granted up to 5 days leave with pay. Additional time off may be agreed at the line manager/Head Teacher’s discretion.*

1.4 *Where the illness of a near relative or partner is of a serious nature and an employee wishes time off work to allow them to care for that person,*

an employee with one year's continuous service may be granted leave of absence without pay, subject to monthly review."

17. The scheme sets out, under paragraph 4, a separate section relating to bereavements.

5 18. The claimant was assisted at this time by her trade union representative, Stephen Smellie. He contacted Ms Boag on the claimant's behalf on or around 25 August 2021 following the granting of 5 days' special leave, to confirm that the claimant would require a longer period. Ms Boag understood that it was not for her to make such a decision, but that she
10 should consult both Personnel and Mr Murphy about this.

19. Mr Smellie sent Ms Boag an email dated 25 August 2021 to Ms Boag (109):

"Lynn,

*I was contacted yesterday by Sharlene re her son and the question of Special leave. I understand Caroline Murray at Personnel has said she can
15 get 5 days Special leave. She will be referring to the formal Corporate Policy. However, there is within the policy and in the practice discretion where Resources and managers can be more supportive than that.*

I will pick this up with Personnel and Caroline.

*I tried to explain to Sharlene that there can be no set rule that says you can
20 have months of paid special leave. The best practice is to discuss what support she needs immediately and will need in future and to keep this under review as the situation develops with her son and the treatments that he will be going through. However, understandably, she was not able to discuss this at the moment. She also referred to others who have had
25 longer periods of special leave, which is true, but each case is different, and discretion applied by managers can vary.*

I will contact you after I have spoken to Personnel to see if we can get a more sensitive and sympathetic response and guidance for you as the manager.

I advised Sharlene, as I am sure you have too, to take what ever time she needs to look after her son and we will worry about whether it is special leave for her.

Stephen”

5 20. Mr Smellie advised Ms Boag that he had discussed the matter with Personnel, and that they had told him that discretion could be exercised by management about granting a further period of special leave.

21. Ms Boag responded by saying that she was trying to be as supportive as she could be, and had explained that she did not want the claimant to be
10 worrying about work, and that they would support her as well as they could.

22. On 26 August 2021, the claimant sent a letter to Soumen Sengupta, Head of Service (111). This was a letter which was composed for her by colleagues who considered that she was not being supported as well as she should have been. The claimant signed the letter herself.

15 23. The letter stated:

“Dear Soumen Sengupta,

COMPASSIONATE LEAVE/SPECIAL

*With regard to the above and following recent discussions with Lyn Boag Line Manager, I write to confirm that my son Mark aged eleven has recently
20 been diagnosed with Acute Lymphoblastic Leukaemia which I am sure you will appreciate is devastating news and of great concern to us as parents and indeed to Mark. Mark will be subject to four weeks of intensive Chemotherapy. It is anticipated that Mark will remain an inpatient for a minimum of six weeks, with regular treatment intervention required for a
25 period of some three years thereafter, with periods of further admission.*

As Mark’s mother, I will be supporting him unconditionally throughout his treatment and that is not something I will in any way compromise on. Given the aforementioned I was in disbelief to learn that my standard entitlement from South Lanarkshire Council for ‘Compassionate’ leave is a mere five

days, this would appear to be in stark contrast to the meaning of the word 'compassionate'! I stress my son does not have a minor condition that will routinely pass, he finds himself in a life-threatening situation, with only fifty children per year diagnosed with this disease.

5 *Given I am not personally ill, though I am under an unfathomable level of stress and anxiety this compounded with having to deal with employment related matters that could not be further from my mind. I feel vexed that the reason and need for my absence is not appropriately acknowledged and recorded, which should be reflective of a profound situation that in no way*
10 *could have been foreseen.*

I respectfully suggest that if you were unfortunate enough to find yourself in my position, how you would feel and what your priorities would be? It is disappointing that South Lanarkshire Council has not moved forward in their procedures, as is the case with the NHS, North Lanarkshire Council and
15 *Court Services to make appropriate provisions for those that find themselves catapulted into the throes of a situation such as this, which I would not wish on anybody.*

I ask that the matter be given consideration as a matter of priority, in order to gain resolve and a satisfactory outcome as soon as possible, in order that
20 *I can concentrate on all that is of importance to me at this time being my son and the 'battle' ahead.*

Yours sincerely,

Sharlene Cannon"

24. *Following a reminder on 30 August 2021, Ms Boag emailed Mr Smellie on*
25 *31 August 2021 to confirm that "I have spoke to Sharlene today and advised that it has been agreed that she will have special leave (paid) for last week and this week and then for a further 2 week period. It will then be reviewed further at that time."*

25. Ms Boag sent a text message to the claimant on 31 August (67) to ask her to call when she was not so busy so that she could let the claimant know the outcome of the discussions with Personnel about special leave.

5 26. The claimant had requested that contact in these early stages of her son's illness should be by text message rather than by telephone, as it was often difficult for her to call while she was in the ward with her son.

27. On 3 September 2021, Mr Sengupta replied to the claimant's letter of 26 August 2021 (81) to confirm that he had shared the letter with Paul Murphy, for him to consider and then respond directly.

10 28. Having received the letter from Mr Sengupta, Mr Murphy then wrote to the claimant himself (82) on 3 September 2021:

"Dear Sharlene,

I write in reply to your letter sent to the Executive Director dated 26th August 2021.

15 *Firstly, I would wish again to extend my thoughts to you and your family regarding the distressing situation you are facing, as you support your son thorough this difficult time with his health. The Council fully appreciates your family situation and will of course offer all available supports to assist you during this time.*

20 *Given the immediate stresses and strains impacting on your family, I have already authorised 4 weeks paid special leave effective from the 23 August 2021.*

25 *I will then arrange to meet with you prior to the end of this four week period, to discuss your current circumstances and consider any further supports that the Council can offer you. As you may be aware, the Council has various policies designed to support employees during events such as these. This includes the Special Leave and Parental Leave Policies, which you may wish to review prior to our discussion. They can be accessed on the interanet or I can send them onto you directly upon request.*

The Council also has an Employee Assistance Programme which you may wish to look at, and I have attached some information. In the meantime, please do not hesitate to contact me directly if you require any further supports or information.

5 *Yours sincerely,*

Paul Murphy

29. The claimant did not receive that letter until 14 September 2021. It is not clear why the letter was delayed in this way.

10 30. Mr Murphy telephoned the claimant on 14 September 2021 to ask how long she thought the situation would be ongoing for. She advised that she did not know how long, but that the doctors had told her that Mark would need 6 weeks' intensive chemotherapy, up until approximately 19 September 2021.

15 31. The claimant felt that Mr Murphy did not understand the situation which she and her son, and family, were in, and that he did not demonstrate sympathy towards her.

32. On 24 September 2021, Mr Murphy contacted the claimant again, by text message (71): *"Hi Sharlene contacting you on my own phone the workers one stopped working. Hope you're son had a good week. When you have the opportunity please give me a call on this number Paul."*

20 33. The claimant replied: *"Hi Paul my son has ecoli infection and is very ill as he is fighting both cancer and this infection. I cannot speak as I am in the hospital with him now and I cannot form words without crying and I don't want him to know I am terrified. He is in a lot of pain he is going to get an x Ray and surgery today his Hickman line is getting removed as the ecoli is now in this line he will not be leaving hospital anytime soon and is fighting for his life. Can you let everyone know in the office how much I appreciate their kind well wishes. If you require me to take sick leave that is fine as I am absolutely terrified my son may Die. Many thanks Sharlene."*

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34. Mr Murphy texted in response: *“Sharlene only concentrate on the important things the rest will take care of itself I will send you an email next week Take care”* The claimant asked him to text her rather than email, because she was in the hospital. She said she was trying to stay strong for her boys (she has two sons), and described it as a “living nightmare”. (72)

35. On 30 September 2021, Mr Murphy texted the claimant again: *“Hi Sharlene I can only pray that news was better this week and that your boy is making progress. If you are finding to difficult to talk I fully understand. The options going forward are working from hom but unsure how practical this is for you, unpaid leave or you accessing unfit for work note. If you think it is best to access an unfit for work note it should be dated from the 27 September. If you want to discuss I am available on the phone Paul.”* (72)

36. The claimant responded later that day: *“Thanks so much he is still in. Very ill got ecoli infected his Hickman line they had to take that out and now his kidneys are not working it is actually torture watching your kid go through this knowing I can’t help. His cancer treatment cannot progress as he is so ill and although he’s has ALL he has a rarer form where chromosomes 4 and 11 have reattached so it’s more aggressive. Just his luck I am staying at the hospital with my son therefore working from home is not an option right now so it will be sick leave. Thanks again for your kind thoughts please let the team know as I am too exhausted to individually Sharlene.”*

37. On 4 October 2021, the claimant commenced a period of sick leave, submitting a fitness for work certificate citing stress as the reason for her absence. Her sick leave ended on 31 July 2022, and after taking a period of annual leave she returned to work on 12 August 2022. She remains at work to date.

38. On 4 January 2022, the claimant submitted a Stage 2 grievance (50) in which she complained about (1) the unfair treatment she had received from the Fieldwork Manager, and (2) the inconsistent application of the Council’s Special Leave policy.

39. In her grievance, she wrote:

5 *“The Grievance relates to how I was treated when my son was ill and required emergency hospitalisation due to a life threatening condition. I was required to be by his bedside whilst he fought for his life. I contacted my manager to advise of the situation and requested special leave. I was initially told I would get one week’s leave. After contacting UNISON this was extended to 6, although I was not notified of this till the fourth week. During this time, whilst my son was still at risk of dying, my manager and Paul Murphy, Fieldwork Manager, contacted me weekly wanting updates. This added to the considerable stress I was under and felt like harassment. After 6 weeks I submitted a sick line. Since then, I and my husband have had to alternate staying with my son in hospital. I believe I had to fight to get a limited amount of Special Leave agreed when my son was at risk of dying. I am aware of other members of staff, in similar circumstances, that had much more support, did not have to fight for Special Leave and were granted considerably more Special Leave than I was.”*

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40. The outcome she sought was (1) an acknowledgement that she was not given the support she was entitled to, including extended Special Leave; (2) Special Leave to be backdated so that she would not have to be reduced to half pay after being absent on sick leave for more than 6 months; and (3) a review of the Special Leave policy.

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41. The claimant’s grievance was heard by Liam Purdie, Head of Children and Justice Services, on 26 January 2022, with feedback on 3 March 2022, both by Microsoft Teams. The claimant attended and was accompanied by her trade union representative, Mr Smellie. Ms McIntosh, Personnel Officer, accompanied Mr Purdie.

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42. Following the meetings, Mr Purdie wrote to the claimant confirming the outcome of her grievance and his investigations (54). He set out his findings, and then confirm his decision.

43. In the course of his findings, Mr Purdie stated: *“Your line manager Lyn Boag then contacted Personnel immediately to gather some further information about what your entitlement would be and how to record the absence. Lyn*

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at that point in the interest of confidentiality did not divulge the seriousness of your son's condition and personnel's response was the standard that is held within the policy of one week."

5 44. He also noted that Mr Murphy, as Fieldwork Manager, took advice from Personnel and following discussions, reached the decision to exercise his discretion to grant the claimant a further 4 weeks.

10 45. In his Outcome, Mr Purdie said he believed that the Special Leave policy had been applied appropriately. He went on: *"...the purpose of the Special Leave Policy is to allow employees to have grace period during an unpredictable or unforeseen time in their life to determine the most appropriate way forward. The purpose of the policy unfortunately is not for an indeterminate period of paid extended leave and if an employee finds themselves (sic) unable to come to work for a period of time that extends into months, then it is appropriate that alternative options are looked at."*

15 46. Mr Purdie could not find any evidence to support the claimant's claim that she had been treated unfairly in the interpretation of the policy nor in the way in which the managers had treated her. He was satisfied that the management discretion to extend the leave to a 6 week period was in keeping with the policy. In addition, Mr Purdie said *"The review of the other staff members referenced also does not indicate that you were treated differently or unfairly in relation to the policy."*

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25 47. He did say: *"I do agree that employees in your position should be granted special leave beyond 1 week without feeling that they have to challenge management to receive it and if this is how you felt at the time then on behalf of the service, I would like to offer my apologies. We will take learning from this and implement change to ensure that the experience of others is better in the future."*

30 48. Prior to issuing his decision, Mr Purdie had carried out some further investigations. In particular, the claimant had advised him of the identity of 3 individuals whom she believed to have been treated better than she was, in the length of special leave granted to them.

49. The 3 individuals whose names were mentioned by the claimant and her representative were Karen McDonald, Keli Alexander and Sandra Garry. Mr Smellie provided these names with information to Mr Purdie by email dated 28 January 2022 (134):

5 *"Liam, Andrea*

Here are the screenshots of text messaging from Sharlene.

She believes the colleagues who got additional special leave are

10 *Karen McDonald and Keli Alexander who she thinks are both home carers. Sandra Garry, Family Support Worker, who she believes got 3 weeks special leave when she had a marital break up. The worker in East Kilbride Justice was called Nic. There are a number of social workers in EK called either Nicola or Nicole. Nicola Meiklejohn is listed as in the Justice Team but we do not know for sure if she is the worker.*

Sharlene has this information from colleagues."

15 50. Andrea McIntosh, Personnel Officer, checked the information available on these 3 individuals, leaving "Nic" out as there was no identifiable information as to who she was.

51. On 28 January 2022, Ms McIntosh emailed Mr Purdie to confirm the following information (133):

20 *"Hi Liam*

A couple of interesting finds:

Karen McDonald:

13-31 December (18 days) – family emergencies

01-26 January (25 days) – bereavement leave

25 *Keli Alexander*

08-NOV-2019 – 26-MAY-2020 (100 days) – bereavement leave loss of her son

Sandra Garry

01-JUL-2019 – 1 days special leave – did have a long term stress sickness absence”

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52. None of these decisions were made by Mr Murphy or Mr Purdie, neither of whom had granted special leave for a period as long as the claimant's.

53. The claimant remained dissatisfied with the outcome of the grievance, and decided to appeal against Mr Purdie's decision. She submitted an appeal form on 4 April 2022 (60), and asked for the same outcomes she had sought in the original grievance.

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54. The respondent's Grievance Procedure (100ff) provides for the appeal process as the final stage, as follows:

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5.3.1. “Where an employee remains dissatisfied, a written appeal may be submitted to Personnel Services through the trade union within 14 days of the date of the letter, requesting that the matter be heard by the Grievance & Disputes Panel. The Grievance & Disputes Panel will be held in accordance with the terms of reference...”

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5.3.2. The Panel hearing the grievance will normally be convened within 28 days and the employee should normally be accompanied by a trade union representative or companion. At the hearing the employee will be asked to state their grievance to the Panel.

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5.3.3. The employee's Head of Service (or nominated Officer) will also attend and having heard both sides, the Panel will decide on a course of action which will be advised in writing to all parties, as soon as possible.

This is the end of the internal procedure.

NB Prior to the appeal being heard by the Panel, a meeting of the parties concerned will be convened in an attempt to resolve the matter. this will be

co-ordinated by Corporate Personnel. If it is not within the Appeal panel's powers to grant the resolution sought, or is contrary to existing Council policies and/or agreements, this will be deemed as the end of the internal process."

5 55. This last section, after "NB", was known as a "Stage 3a" appeal.

56. Faye Meldrum, a Personnel Adviser, decided that since the appeal related to a management decision, which the Corporate Appeals Panel (CAP) would not be able to overturn, she should review the appeal as a stage 3a appeal.

10 57. She met with the claimant and Mr Smellie on 27 June 2022, and following that meeting, having also spoken with Mr Purdie, she wrote to the claimant on 5 July 2022 (58).

58. In that letter, Ms Meldrum stated:

15 *"I outlined at our meeting that my role was to ensure that any relevant policy and procedures have been adhered to, and that a reasonable decision has been made at the previous stages of the Grievance Procedure. I also confirmed that I am responsible for reviewing your appeal to ensure that what you are looking for as an outcome is in line with Council policy, and is therefore something that can be presented to the Corporate Appeals Panel*

20 *for their consideration...*

It was outlined in the Stage 2 decision by Liam Purdie, that you had been granted 6 weeks paid special leave to be with your child in hospital and that this period increased from an initial 5 days to 4 weeks and then to 6 weeks during the course of your absence. I have reviewed your People Connect

25 *Record and note that you are recorded as being on paid special leave from 23 August 2021 to 27 September 2021. This falls short of the agreed 6 weeks detailed on your outcome letter and I have therefore asked for this to be rectified and your paid special leave will now be from 23 August 2021 to 3 October 2021...*

I have reviewed the information presented to me to determine what further outcomes you are seeking that can be provided by the appeals panel. Therefore, given my comments above, I would advise that it is not within the gift of the Appeals Panel to grant your required outcome, and this now concludes the internal grievance process.”

59. Mr Smellie disagreed with this conclusion, and he and the claimant were of the view that the appeal should have been remitted to the CAP for their decision. That option was not open to them, however.

60. The claimant notified ACAS of her intention to submit a claim to the Tribunal on 18 July 2022; and the ACAS Early Conciliation Certificate was issued by email on 28 August 2022. She presented her claim to the Tribunal on 22 November 2022.

61. The claimant has returned to work, in a different department to that within which she worked prior to her son's illness. Her son was able to respond to the treatment he received, leave hospital and begin to resume his life.

Submissions

62. Parties made short oral submissions to the Tribunal at the conclusion of the evidence. We took these submissions into account in full in our deliberations, and reference is made, where relevant and appropriate, in the decision section below.

The Relevant Law

63. Section 13(1) of the 2010 Act provides:

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

Discussion and Decision

64. The issues in this case were set down by Employment Judge Maclean in her Note following Preliminary Hearing dated 20 January 2023 (33):

1. Did the respondent fail to consider or decline extending the claimant's period of special leave?

2. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. if there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

3. If so, was it because of the claimant's son's disability?

10 65. The first issue which we address is whether the respondent failed to consider, or declined, extending the claimant's period of special leave.

15 66. The evidence on this is a little unclear. It seemed to us that there was no specific discussion about extending the period of special leave beyond the end of September 2021. Mr Murphy sent a text message to the claimant on 30 September 2021 (73) in which he set out the options he considered to be open to her. There was no mention of extending the special leave already granted to her. In reply, the claimant indicated that since working from home was not an option, she would take sick leave.

20 67. There is no evidence that as at 30 September 2021, the claimant or her union representative sought to have the special leave period extended further. It is understandable that the claimant may not have done so, given that she was so caught up with her son's illness, but it means that there is simply no evidence that the respondent declined to extend the claimant's special leave, since they were not asked to do so.

25 68. Mr Murphy did not clearly give evidence that he had considered extending the special leave. It seems to have been his understanding that the length of the special leave granted to the claimant was exceptional, and longer than he had heard of before. As a result, it appears that he may have proceeded on the basis that no such extension was going to be granted.

69. The reality, therefore, is that while it cannot be said that the respondent clearly failed to consider or declined extending the special leave period, it is clear that they did not extend it, and that when 30 September arrived, they were of the view that extending it would not be appropriate.

5 70. It may have been helpful if both parties had sought to have a specific discussion about this, but this did not happen at that time.

71. We have found that the respondent did not consider extending the period of special leave beyond 30 September 2021, nor were they asked to do so.

10 72. The second issue for us to determine is whether the claimant was less favourably treated than others were in relation to the granting of special leave.

15 73. The 3 comparators who were named were Karen McDonald, Keli Alexander and Sandra Garry. We consider that the information which the claimant had about these individuals was slightly vague, perhaps as a result of having come from third parties, other than Sandra Garry.

20 74. Karen McDonald was given two periods of special leave, totalling 43 days (not 43 working days), relating to family emergencies and bereavement leave. Neither of these periods was longer than the 6 weeks granted to the claimant as special leave. We have very little information as to the precise reasons for the grant of special leave in Ms McDonald's case, as there was no witness who gave direct evidence about this.

25 75. As a result, we are unable to conclude that Ms McDonald's circumstances were not materially different to those of the claimant. The provisions in relation to bereavement leave are different, though similar, to those for family emergencies such as the one the claimant was facing, and it would not be safe for the Tribunal to conclude that the circumstances were not materially the same as the claimant's.

30 76. In any event, it is not clear that the claimant was granted less special leave than Ms McDonald. The total of special leave granted to each appears to have been approximately the same, but in our view it is each grant of

special leave which must be taken into account, and in that regard, Ms McDonald was not granted more time off than the claimant. As a result, it cannot, in our judgment, be found that the claimant was treated less favourably than Ms McDonald.

5 77. Keli Alexander was granted 100 days' special leave due to the death of her son. The evidence confirmed that the manager who granted this period of paid leave was no longer employed by the respondent, and accordingly it is not clear why such a long period of time was allowed to this individual. The circumstances are not known in any detail, in the absence of any direct
10 evidence, and accordingly no conclusion can be drawn that the circumstances of Ms Alexander and the claimant are not materially different. We formed the impression that such a period of special leave was granted without the knowledge of the managers from whom we heard, and that had they been aware of it they would have questioned it with the manager
15 involved. As a result, we cannot conclude that the claimant was treated less favourably than Ms Alexander.

78. Sandra Garry gave evidence to the effect that she was granted special leave when a relative died and also when her marriage broke down. She did not say in evidence exactly how long her period of special leave was. The
20 claimant suggested that she was granted a period of 3 weeks for the breakdown of her marriage, but there was no direct evidence to this effect.

79. In any event, the information provided by Personnel confirmed that Ms Garry only had one day of special leave, but had an extended period of sickness absence thereafter. As a result, it appears that the claimant was or
25 may have been mistaken as to the nature of leave granted to Ms Garry, and Ms Garry's evidence did not make the matter clear for us.

80. Accordingly, there is no convincing evidence that the claimant was treated less favourably than Ms Garry.

81. What the evidence never addressed was whether or not any of the
30 individuals concerned were disabled or not, and therefore whether it could be said that the difference in treatment was as a result of the claimant's

son's disability. It may be, for example, that Ms Alexander was absent for a lengthy period of time due to a depressive illness following a tragic bereavement, but the Tribunal cannot draw any conclusion either way owing to the absence of evidence before us about that. What it does undermine, however, is the claimant's contention that she was treated less favourably than others were because her son was disabled.

82. As a result, we are unable to uphold the claimant's argument that the reason for her treatment was on the grounds of her son's disability, based on the evidence before us.

83. Further, we concluded that the claimant's claim cannot succeed because it is plainly stated in the respondent's policy that granting special leave, or any extended period of special leave, is a matter for the manager's discretion. A Tribunal must be very slow to interfere with the exercise of a discretion, and in this case we see no reason to suggest that Mr Murphy was not entitled to grant special leave for no more than 6 weeks.

84. The claimant has been very critical of a number of aspects of the respondent's handling of this matter. We find ourselves sympathetic to some of those criticisms. For example, it is plain that the claimant felt that she had to press for an answer about special leave at the earliest stages when she was having to cope with a frightening diagnosis for her young son, involving her trade union representative. There is no doubt that the communications between management and the claimant were at times rather sparse and not helpful, but we do not consider that those criticisms amounted to unlawful discriminatory acts on their part.

85. She also suggested that there is no guidance for managers in how to exercise discretion under the policy. Our conclusion on that was simply that managers must be left to exercise discretion according to the individual circumstances with which they are confronted. We do not consider that the granting of 6 weeks' special leave and no longer than that was unreasonable, in the circumstances. There are a number of factors which a manager has to take into consideration, and we were of the view that Mr

Murphy, with the advice of Personnel, sought to exercise his discretion in a way which fitted the circumstances. Clearly the claimant would have preferred to have paid leave for longer, but it did not amount to discrimination on the grounds of disability to terminate the special leave at the point which they did.

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86. The proposition that the terms of the policy under bereavement should be read over into the relevant section for the claimant is not one which we considered to have any merit. It is reasonable for an employer to apply the provisions of their own policy to the circumstances which fit that part of the policy said to apply to it.

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87. The claimant also placed considerable emphasis on the fact that she had to seek trade union representation in order to obtain special leave in the first place. She was plainly upset that, at a time of great stress, she needed to harness the resources of the trade union to persuade her employer to grant her a period of absence from work.

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88. We understood and sympathised with the claimant, to a degree, about this, but ultimately we could not find that this amounted to unfavourable or less favourable treatment on the grounds of disability.

89. It was our impression that the managers involved in this process were more or less inexperienced in the handling of an application for special leave, or, more particularly, in the decision to grant special leave when circumstances such as the claimant's arise. Each of the managers involved tended to defer to the views of Personnel, and although Mr Murphy insisted that he took the decisions himself, it was clear that he only did so after checking the position with Personnel. We understood why managers were anxious to do this, and in particular why they would want to ensure that their dispositions were consistent with the overall picture within the organisation. Certainly, few of the managers involved had had to make such a decision before, and none of the managers who gave evidence before us had any direct experience of such a long period of special leave being granted by the respondent before.

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90. What was unfortunate was the failure to communicate clearly with the claimant that her initial period of absence was being treated as special leave. Had the respondent ensure that she was told this at an early stage, and kept her advised as to the status of her leave, it would have provided reassurance to her at such a time of distress and anxiety. It seemed to us that the respondent accepted that, in hindsight.

91. We have therefore concluded that while matters could have been handled more sensitively, in relation to the grant of special leave to the claimant, the respondent did not discriminate against the claimant on the grounds of her son's disability, and as a result, her claims must fail, and be dismissed.

92. We appreciate that this will come as a disappointment to the claimant, who was passionate in her belief that she had been unfairly treated by the respondent. However, we would wish to repeat the observations made at the conclusion of the Hearing, namely, that the claimant and her husband conducted themselves before us in a dignified and respectful manner, particularly having endured such a difficult and distressing experience with her son; and to convey to them the relief of the Tribunal in discovering that their son had made a recovery and was able to resume school and other normal activities, and our very best wishes for young Mark, and for them all as a family, for the future. We are also grateful to Mr O'Neill for the assistance which he gave both to the claimant and her husband, and to the Tribunal, in presenting his case.

Employment Judge: M A Macleod
Date of Judgment: 25 September 2023
Entered in register: 29 September 2023
and copied to parties