Case Number: 3306808/2021
3300410/2022
3307258/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H Thompson	**v**	**Sainsburys Supermarkets Ltd**

Heard at: Watford Employment Tribunal (by CVP)
On: 9-12 & 15 May 2023

Before: Employment Judge Eeley
Members: Ms A Jackson
Mr M Bhatti

Representation
For the Claimant: In person
For the Respondent: Ms C Howells, counsel

JUDGMENT having been sent to the parties on 9 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant brought claims of disability discrimination contrary to section 15 and sections 20/21 of the Equality Act 2010, together with a claim for unauthorised deductions from wages arising from his employment with the respondent. The claimant is still employed by the respondent.

2. The tribunal had regard to an agreed bundle of 531 pages plus a copy of the respondent's fair treatment or grievance policy and a copy of their long-term sickness absence policy. We read the pages in the documents to which we were referred by the parties. We also heard witness evidence from the following people:

    2.1 The claimant, Mr Harry Thompson.

    2.2 Mr Tim Broughton, who was the claimant's trade union representative at the relevant time.

2.3 We were referred to the written witness statement evidence of Mrs Karen Thompson, she was not called for cross-examination as this would not be necessary unless the issue of remedy arose.

2.4 Mr David Meeks, the respondent's Operations Manager at the relevant time.

2.5 Mr Carl Spires, the respondent's Shift Manager at the relevant time.

2.6 Mr Simon Nicholls the respondent's General Manager at the Rye Park Distribution Centre.

2.7 Mr Martin Wilkinson the respondent's Regional Operations Manager at the relevant time.

We also received oral closing submissions on behalf of both parties, for which we are grateful.

3. The claimant is disabled by reason of spondylosis. The respondent has conceded that the claimant was disabled at all relevant times for the purposes of these tribunal claims. The claimant has been employed by the respondent since 2004 as a Warehouse Operative. This case is concerned with the payment of company sick pay ("CSP") as opposed to statutory sick pay ("SSP"). The claimant presented three separate claim forms to the tribunal which related to three separate periods of absence from work. The periods of absence under consideration are:

3.1 22 October 2020 to 29 November 2020,
3.2 14 to 20 October 2021, and
3.3 20 February to 11 April 2022.

4. The issues for determination by the tribunal were agreed with the parties at the outset of the hearing and were in line with the case management order prepared by Employment Judge Bloch KC on 22 February 2022, which was located at page 56 in the bundle. They are reproduced in the annex to the written reasons.

Findings of Fact

5. The relevant chronology in this case is as follows. The claimant started work for the respondent in November 2004. In September 2020 the respondent introduced a new sick pay policy which had been negotiated with the trade union, of which the claimant is a member. It was balloted on by the workforce and accepted. The respondent changed from the old policy in order to encourage, so the respondent tells us, lower absence rates and avoid abuse of the system.

6. The counterbalance (or quid-pro-quo) for that was that the staff in the warehouse would receive a pay rise of 7% over a period of three years and

would also have the opportunity to get two payments of £100 if the target for reduction in sickness absence was met on two occasions.

7. The terms of the sick pay policy are set out in the bundle at pages 128-129. The material parts of the policy for this part of the case deal with company sick pay as opposed to statutory sick pay. There are two relevant elements to the policy: eligibility; and entitlement.

8. Eligibility is the gateway to the employee obtaining the payments of sick pay and it involves the application of a 5% trigger point. The 5% trigger point is applied at the point that the individual employee goes off on sickness absence and a decision is made about whether company sick pay should be payable or not. It is applied to a rolling 12-month period. The test is whether the sickness absence within the 12-month period is above or below 5% of the employee's available annual hours in the preceding year. If the absence is below the 5% trigger-point, then the only requirement is that the employee has followed all the reporting and certification procedures. If they have done so (and if they attend any relevant occupational health or physiotherapy appointments) then they will receive their company sick pay entitlement. If the absence in the rolling 12-month period reaches 5% or more, then this triggers a review. It is not an automatic refusal of company sick pay but rather a review by a manager in order to exercise managerial discretion as to whether sick leave should be paid. The manager can either pay or withhold further company sick pay at this stage. It is a discretion and each case is to be taken on its own merits. There is no formula or 'check-box exercise' to see who passes or fails the test. The policy sets out a list of factors which will be relevant, and all such decisions will take into account the following:

   8.1 Firstly (and importantly), a review of the previous five years' attendance history. The purpose of such a review is to pick up trends and patterns. Thus, a manager may be more willing to exercise discretion in favour of paying company sick pay if the year in question is an anomaly in an otherwise good attendance record. That individual is unlikely to be penalised if there is poor attendance in the year in question. If there is poor attendance over a longer period of time, that may mean that the respondent is less likely to make the payment (depending on the reasons for those absences) as the individual will have had more of a share, relatively speaking, of the finances allocated by the respondent to sick pay.

   8.2 The second factor is to consider whether the employee has an attendance record of 95% or above for each of the previous 5 years. If they do, then generally they will receive company sick pay as long as they have followed the correct reporting procedures.

   8.3 The third factor records that, if the record shows a pattern or trend of absence or there is a reasonable belief that absence from work is unjustified, exaggerated, misrepresented or fraudulently stated, then they will not receive company sick pay and will be formally investigated, possibly leading to disciplinary action. That does not apply in this case.

There has been no suggestion that the claimant's absences were not legitimate or genuine.

8.4 The fourth factor is that consideration will always be given to any colleague on long-term sickness (which is said to be absence of over four weeks), who has medical certification and has a significant illness. If the colleague still has outstanding sick benefit, then they will probably get a company sick pay payment. Again, I note that this means that there is direct reference to the nature of the sickness causing the absence and whether it is serious or long-term. In those circumstances, there is more likely to be a payment.

8.5 Finally, it is noted that all decisions are dependent on the level of company sick pay remaining in a particular employee's case. I pause to note that the entitlement is determined in accordance with the formula set out in the box on page 128 and is based on the individual employee's length of service. So, dependent on the length of service, the employee will have a bigger or smaller 'pot' of sick pay to call upon, should he or she pass the eligibility test.

9. In any event, moving on, the respondent says that the list of considerations that it has set out in the review at pages 128-129, is not exhaustive. All decisions are on a case-by-case basis depending on individual circumstances.

10. If the employee gets through the eligibility gateway, then the amounts payable, the entitlement, is based on the formula I have just referred to in the table at page 128.

11. The claimant is a long serving employee and so has a higher benefit entitlement (provided that he gets through the eligibility test on any given occasion.) Page 129 also gives examples where the payment may be withheld, which include unacceptable attendance levels in the record.

12. There is no other document available to enlighten us as to the considerations taken into account apart from pages 128-129. It is, by its very nature, a broad discretion which is exercised on a case-by-case basis depending on what factors are relevant to the particular case under consideration.

13. I note that the respondent made a change to the process which was used to implement the policy. This came into play in March 2021, as a result of the claimant's first claim. It changed the level of manager at which the decision would be taken, and reduced the number of appeals available to an employee by taking it outside of the respondent's fair treatment/grievance policy. The actual basis for the decision and the ambit of the available discretion remained unchanged by this amendment. The other matter to note is that the sick pay policy ran alongside the respondent's attempts to make reasonable adjustments to the job that the employee did in order to get them back to work. Indeed, consideration of whether the respondent had made all the necessary adjustments to facilitate a return to work would form part of the relevant decision-making considerations when it came to company sick pay.

14. So, with that in mind, we arrive at the first period of sickness absence for these claims: 22 October 2020 to 29 November 2020. The initial decision on company sick pay for this period was taken by Robert Thomas, who was the claimant's former line manager. He decided to withhold the payment for the five-week absence. Pages 305 and 526 are relevant in setting out his reasons for the decision. In particular, when asked after the event to set out some of his reasoning, Mr Thomas noted that if the new pay process (March 2021 amendment) had been in place at this time, he would still have made the same decision. He based this on the facts that: firstly, the business had followed all available occupational health guidance; secondly, the claimant's absence was far in excess of the 5% decision making threshold; and thirdly, the claimant's 5 year 'lookback' did not support any argument that the last year was an isolated year of poor attendance. Finally, it was noted that the claimant's personal record demonstrated that he had been given a huge amount of support over the years.

15. At the date this decision on company sick pay was made, the claimant's rolling 12-month absence from the date of the decision was 19.38%, so nearly four times the 5% trigger point.

16. On 7 December 2020 the claimant raised a fair treatment complaint (i.e., a grievance.)

17. On 8 December 2020, the respondent produced a document which summarised the occupational health and medical evidence available to date in relation to the claimant's case (page 233). It summarised the Rehab Works reports from October & December 2011 and April & August 2014. They noted the adjustments to the claimant's work role, which had been implemented at those points in time. It also summarised the Vita Health reports from September 2019 and November 2020.

18. On 15 December 2020, there was a conciliation meeting as part of the process. Present at that meeting were the claimant, his trade union representative (Mr Broughton), Mr Thomas (as decision maker) and Mr Meeks. The notes from the meeting are at page 246. It was Mr Thomas who was to make the decision but Mr Meeks was there to support him. A theme throughout these meetings was the claimant saying that it was the process followed which he had a problem with. It is fair to say that the respondent alighted on that, that it was about the 'process' but not the 'pay.' In reality (and taking all the evidence into consideration) it had to be about <u>both</u> the process <u>and</u> the pay.

19. The claimant thought that the process had been wrongly applied to him and that, as a result, he should have been paid company sick pay for the absence in question. So, where the claimant says at one point "it's not about the money" his concern is the process that had been followed and he felt that not enough empathy had been shown in order to look beyond the figures. He noted that the process he had experienced and the call on day two of his absence (to confirm that he would not be paid), was not good, in his opinion. He asked the respondent to think more deeply about the situation as part of a review.

That was what triggered the respondent to review who took the decisions, at what level and how the process worked in practice.

20. During the course of this conciliation meeting the claimant noted that he felt that the physios had been 'patching him up' and sending him back out to pick, and that this had not helped his health. Mr Thomas offered to have the claimant's file reviewed by a medical professional and the claimant agreed to this. The outcome of the meeting was two action points: firstly, gathering a medical professional's view on the claimant's physiotherapy treatment; and secondly, proposing the new process for handling the absence pay decisions. The subsequent proposed change to the process was that the decision would be taken at C5 level, and the employee could request a review at C6 level. That would be the end of the process so it would remove one level of appeal. Employees would use this process instead of the grievance or fair treatment policy and this would simplify matters (pages 123 & 124).

21. There was a follow-up conciliation meeting on 18 December. The same people were present. The notes are at page 250. By the date of this meeting, the occupational health report had not come back to the parties. Mr Thomas shared the proposed new process with the claimant using two slides. The claimant's trade union representative said that the absence pay should not be stopped until 12 months had passed under the new policy. The respondent's side said that this was not the case and that the financial savings from the 5% policy were what had paid for the three-year pay rise, lump sum payments and extra days of holiday. The trade union representative also queried whether there should be a five-year look back to periods which were actually covered by the old policy. The respondent confirmed that this was how this part of the new policy worked and pointed out that, if the trade union suggestions were followed, then the new policy would not come fully into play for another five years and that this was not feasible.

22. Mr Thomas also confirmed that the five-year look back was not used as a punishment, but to recognise people's previous excellent attendance records, if that was the case for them individually. The respondent reiterated that the new policy had been fully communicated to the employees and the union, was balloted on, and was accepted. At the meeting Mr Thomas shared a document showing that since 27 October 2020, there had been 31 pay decisions relating to employees with more than the 5% trigger. Twenty-seven of the colleagues received full pay (71%), four colleagues received partial pay (13%) and five colleagues received no sick pay (16%). The tribunal was shown a copy of that document too. It did not go beyond the raw figures and carry out any form of analysis as to the individual circumstances of the people to whom the figures related. We do not know which of these individuals (if any) had any form of disability, but they did give us an indication of the trends in terms of the decisions made.

23. On 23 December there was a further conciliation meeting, again with the same attendees (notes at page 252). The occupational health report had still not been received. The claimant and his trade union representative confirmed

that they were happy with the proposed amendments to the review process going forwards. As I note above, the new process streamlined the procedure. In the first claim, the claimant had got a decision maker (Mr Thomas) to review his case and then went through conciliation. The claimant was then able to go to a grievance and then to an appeal on top of that. Once the amendment came in, there was one review at C5 and C6 but no further appeal. If someone tried to mount an appeal against a decision not to pay sick pay under the guise of a grievance, this would not be allowed and would be handled under the company's sick pay policy.

24. Returning to the chronology, on 24 December 2020 there was the occupational health report (page 254). It confirmed that the claimant was currently fit to continue in his role of marshalling. This was a vehicle-based role which removed most of the bending and lifting involved in other tasks. Marshalling is only one component of the wider warehouse job role. It would not normally make up 100% of someone's role but this was the adjustment that was made in order to help the claimant: he was given 100% marshalling duties. In the report, occupational health confirmed that the claimant was 'not for any heavy lifting greater than 5 kilos', was 'not for bending' and was to continue with 'micro-breaks.' Occupational health explained the symptoms and problems caused by the claimant's conditions and stated:

> "In terms of the Equality Act 2010 Mr Thompson's spondylitis could be managed in accordance with Sainsburys relevant policies and procedures, line management may wish to record sickness absences associated with the spondylitis separately and adjust trigger points at their discretion".

25. In passing, the tribunal notes that the respondent has relied on the contents of this report a great deal during these proceedings. However, the respondent did not really explicitly address the issue of recording of some absences separately or adjusting the trigger points in response to the contents of this report. We do not really know whether they picked up and considered those suggestions off the back of the occupational health report, or not. The witnesses we heard from pointed out that this part of the report sets out *options* which are available to the respondent, rather than *requiring* the respondent to make these amendments. That is indeed correct, but the tribunal can understand why the claimant may have felt that these options had not even been considered by the respondent once they had been suggested. The respondent's focus was very much on the workplace adjustments rather than on the sickness recording or pay elements of the suggestions. Of course, the reason for this may be that the suggestion in relation to the recording of absences relates perhaps more to a business/commercial decision than to an occupational health type of recommendation.

26. The occupational health report confirms that the provisions of the Act in relation to disability were likely to apply i.e., that the condition is likely to be classified as a disability under the Equality Act 2010. Occupational health confirmed that work was unlikely to be the *cause* of the condition, although work can contribute to an *exacerbation* of the claimant's symptoms. Occupational health could not rule out future sickness absences in the

claimant's case, as he has a chronic ongoing condition, which is without any cure, and which is prone to exacerbation.

27. The respondent effectively followed all the job role recommendations in the occupational health report in order to get the claimant back to work as best they could.

28. On 6 January 2021, there was a grievance hearing chaired by Mr Meeks at stage 1 of the grievance (page 256). The claimant seems to have felt that any decisions that had been made before receipt of the occupational health report confirming his disability must automatically have been wrong as a result. The claimant maintained that his work did exacerbate his condition.

29. On 20 April 2021, there was a further grievance meeting, this time chaired by Mr Wilkinson at stage 2. Mr Wilkinson asked the claimant to clarify what it was about the process that he was unhappy about and how he felt that he had been treated differently. The claimant maintained that the occupational health report said that his condition *was* exacerbated by his work, whereas the respondent pointed out that it said, it *can* be exacerbated by his work. The claimant clearly felt that he had previously been 'patched up' and sent back to do picking work and that this had exacerbated his condition, thereby leading to a higher level of absence. He wanted the respondent to accept that and to decide to pay him as a result. Mr Wilkinson made the valid point that not all of the absences over the past five years had been back related. He also made the point that the respondent could only make decisions on the basis of the medical evidence that was available at the time the decision was made. They might not have known, in the past, what they knew now.

30. On 11 May 2021, there was a re-convened stage 2 grievance meeting (page 304). Mr Wilkinson conveyed his decision to uphold the original decision to refuse company sick pay. He confirmed that the respondent could only support the claimant in line with the medical evidence and prognosis available at the time. He believed that the respondent had supported the claimant in line with medical advice and the relevant prognosis. He concluded that the claimant had been treated in line with the negotiated and agreed policy and that all of the claimant's concerns had been listened to and answered. He concluded that there were, therefore, no grounds for the grievance.

31. On 12 May 2021, the claimant appealed the stage 2 grievance outcome (page 311).

32. On 14 May 2021, the first Early Conciliation certificate was issued and on 17 May 2021, the claimant presented his first ET1 claim form to the tribunal.

33. On 18 May 2021, there was a meeting. The claimant appealed the Wilkinson decision, so the meeting was convened by Mr Jacob (notes at page 324). We did not hear witness evidence in relation to this as Mr Jacob has now left the respondent's business.

34. On 2 June 2021, the meeting with Mr Jacob was reconvened (page 334) and on 25 June 2021 a meeting took place where the decision on the outcome of

the appeal was communicated to the claimant (page 346). That was subsequently confirmed in writing in a letter of 5 July 2021, confirming that the decision was fair and in line with the policy.

35. We then moved to the second period of absence: 14-20 October 2021. On 20 October 2021 Mr Dean Quinlan made the decision to withhold company sick pay for this period (page 527). He noted the absence in the rolling 12-month period was 13.5%, he noted that the absences in the last three years had been predominantly back related but that on the most recent occasion there was also a personal situation where the claimant's mother-in-law sadly passed away from Covid-19. Mr Quinlan offered assistance to the claimant from the Employee Assistance Programme. The claimant did not feel he needed this. There was also a discussion with the claimant about physiotherapy and rehabilitation and no update was required.

36. The claimant asked for a review of that decision. On 15 November 2021 a meeting took place to review it and the notes are at (page 392). The review was carried out by Mr Meeks.

37. The Covid-19 absences had been disregarded and Mr Meeks did not dispute that the claimant had an issue with his back. He asked, "can we make adjustments for you, yes and we have." The claimant asked him to 'up the figure' i.e., raise the trigger percentage. Mr Meeks refused to do this: the policy said 5% and he was not going to change the policy. He did say, however, that it was not 'black and white,' it was just the trigger to *review* the absence. He confirmed, however, that he would not be changing Mr Quinlan' decision.

38. The second Early Conciliation certificate was issued on 23 December 2021 and the second claim form went to the tribunal on 21 January 2022.

39. The third period of absence was from 20 February through to 11 April 2022. On 21 March 2022, a decision was taken by Mr Carl Spires, to pay company sick pay until the end of the fit note on 25 March 2022, but to withhold company sick pay thereafter. The decision was to pay until the medical certificate ran out, then the entitlement would cease. The claimant had indicated that he might well return to work upon expiry of the fit note. The rolling 12-month absence was 10.38%, so still two-times the trigger percentage. This was, therefore, a decision to make a partial sick pay payment. Despite having heard from the relevant witness the tribunal has to say that it is still unclear as to why Mr Spires decided to pay for part, but not all, of the period of absence. Why was a decision taken to pay the claimant at all, given the applicable figures and given the previous decisions? We can see that the fit note's expiry date might have been a *convenient* point at which to stop the claimant's pay, but we cannot see its significance, apart from mere convenience. There was certainly no suggestion at the time that any further absences would not be supported by a relevant fit note. If the claimant was still signed off from work on sick leave, why did the company's sick pay decision change? It was, to some extent, arbitrary. The witness had thought that the claimant would be coming back to work and then he didn't, but no change was made to the decision as a result. We really did not hear much reasoning or rationale to explain the difference in approach to the last two

weeks of leave (which was unpaid) and the earlier part of the absence (which was paid.)

40. On 6 April 2022, the claimant met Mr Spires (page 410). During this meeting Mr Spires mentioned to the claimant the possibility of alternative roles which might be more suitable for him (such as clerical jobs and transport jobs.) There was also a discussion about reducing the claimant's hours in order to get him back into work and a phased return to work at four hours, but which would be paid (it was clarified) at the full rate of eight hours.

41. On 7 April 2022, there was a review meeting with Mr Simon Nicholls (page 425). He said that he expected the claimant's back condition to be covered by the Equality Act but confirmed that this did not mean that he was excluded from the respondent's company sick pay policy. Rather, it meant that the respondent was required to consider reasonable adjustments. As part of his decision, he said he would look to see if this had been done in the claimant's case.

42. The meeting was reconvened on 12 April 2022 and Mr Nicholls gave his reasons for his decision. He decided to uphold the original decision. He noted that, although the back condition was covered by the Equality Act, this did not mean that he was excluded from the company's sick-pay policy. The claimant's 'rolling 12-month' absence at the date of the decision was 10.38%. The adjustments made over the years had been in line with the guidance. Each of the five years showed an absence above the 5%, even though some years were better than others. Mr Nicholls decided not to overturn the original decision given that it was in line with the 5-year lookback and taking account of the other support that had been offered to the claimant by the respondent over time.

43. The claimant tried to appeal that decision using a grievance on 10 May 2022 (page 434). On 16 May 2022, Mr Nicholls confirmed that there was no right to a further appeal (page 435).

44. On 12 April 2022 the third Early Conciliation certificate was issued and the third claim form was presented to the tribunal on 21 June 2022.

45. As indicated, I have already set out the details of the company sick pay policy, the entitlement and the eligibility considerations, and noted that there is no 'tick-box' document allowing us to predict with certainty, which individuals will get company sick pay and which will not. The data from Mr Thomas setting out the decisions on the 5% cases since 27 October was at page 218. As previously indicated, it just contained figures without the context. We do not know why each of the decisions was made in the way that it was or which cases, if any, involved disabilities. I also note that the reference to 'partial pay' is a reference to cases where some of the sick leave is paid at full rate, but part of the absence period does not carry sick pay at all. So, for example, the employee is paid up to a certain intended return to work date, but then nothing thereafter. For clarity, it is *not* a reference to an employee being paid for the duration of the whole period, but at something less than 100% of the pay rate for the days in question. So, for example, it does not refer to two

weeks of absence paid at 50% of the full rate of pay. The partial pay option is not specifically referred to in the policy.

46. I also set out the claimant's absence record (page 220):

    2015 to 2016, he had an absence rate of 16.15%, with 0% of that being due to the back condition.

    2016 to 2017 the absence rate was 27.69%, with 0% of that being due to the back condition.

    2017 to 2018 the absence rate was 32.31%, with 4.62% of that being due to the back condition.

    2018 to 2019 the absence rate was 16.15%, with 0% of that being due to the back condition.

    2019 to 2020 the absence rate was 13.85%, with 9.62% of that being due to the back condition.

    2020 to 2021 the absence rate was 11.92%, with 2.3% of that being due to the back condition.

47. The figures set out above are based on the financial year. It is not the information on a rolling 12-month basis. However, it does give an idea of absence levels apart from those that were disability related. So, we can see that in most years, even if the back-related absences are disregarded, the respondent would be recording more than a 5% absence rate for the claimant. Thus, the trigger point would be hit by the claimant even in the absence of his disability related absences.

The applicable law

Reasonable adjustments

48. The relevant sections of the Equality Act 2010 are sections 20 and 21. Section 20 (so far as relevant) states:

    (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
    (2) The duty comprises the following three requirements.
    (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.
    (4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

…

Section 21 states:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3) …

49. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in Environment Agency v Rowan 2008 ICR 218 and is as follows:

(a) Identify the PCP applied by or on behalf of the employer,
(b) Identify comparators (if necessary),
(c) Identify the nature and extent of the substantial disadvantage suffered by the claimant.

50. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.

51. A substantial disadvantage within the meaning of this part of the Act is one which is more than minor or trivial.

52. Only once the employment tribunal has gone through the steps in Rowan will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather, it is sufficient that a tribunal concludes on the evidence that there

would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

53. A holistic approach should be adopted when considering the reasonableness of the adjustments, in circumstances where there may be a number of adjustments which are required to work in combination to ameliorate the substantial disadvantage (Burke v College of Law 2012 EWCA Civ 37). The test of reasonableness is an objective one (Smith v Churchills Stairlifts plc 2006 ICR 524.) Where the disruption of a proposed adjustment is in issue, the tribunal has to look at the extent to which the proposed adjustment would be disruptive and the extent to which the employer reasonably believed that such disruption would occur. It is necessary for the tribunal to look at the adjustment from both the point of view of the claimant and of the employer and to make an objective determination as to whether the proposed adjustment is reasonable or not. The tribunal has to focus on the practical result of the proposed adjustments rather than the process by which they are arrived at. The focus of a reasonable adjustments claim is on practical outcomes rather than procedures. (See also Royal Bank of Scotland v Ashton 2011 ICR 632).

54. Factors which may be relevant to the reasonableness of a proposed adjustment are referred to in the EHRC Employment Code. They include the effectiveness of the proposed step and the extent to which it was practicable for the employer to take the step. The financial and other costs incurred by the employer in taking the step and the extent to which it would disrupt any of the employer's activities are also relevant. The extent of the employer's financial and other resources, and the availability of financial or other assistance in respect of taking the step are also apt for consideration. The nature of the employer's activities and the size of its undertaking can also be considered.

55. It has been noted in the reported cases that, in principle, it is not a reasonable adjustment to ignore disability related absences entirely when calculating sickness levels etc (see e.g. Bray v London Brough of Camden EAT 1162/01). Otherwise, the logical consequence would be that the disabled employee could be absent throughout the working year, without the employer being able to take any form of action in relation to the absence. However, the reported cases do not rule out the possibility of an employer coming under the statutory duty to adjust aspects of sickness or absence management policies in order to eliminate or reduce the substantial disadvantage that the application of such policies might cause to disabled workers. However, they indicate that it will rarely be a reasonable adjustment to require an employer to disapply the terms of such policies to disabled employees by discounting *all* sickness-related absence. An employer is entitled to manage the issue of ill health and absence within the workplace, and a disabled employee cannot expect to be removed entirely from the scope of a policy that is put in place as a management tool for this purpose.

56. The Employment Code indicates that, although there is no automatic obligation to extend contractual sick pay beyond the usual entitlement, an employer should consider it where it would be reasonable to do so.

57. In relation to sick pay, we have been referred to the two cases of Meikle (Meikle v Nottinghamshire County Council 2005 ICR 1) and O'Hanlon (O'Hanlon v Revenue and Customs Commissioners 2007 ICR 1359). The Meikle case indicated that where the claimant had been on sick leave for an extended period due to a failure to make reasonable adjustments, there was no reason to exclude the payment of sick pay from the scope of the duty to make reasonable adjustments. O'Hanlon seems to have narrowed the scope of Meikle. Whilst it may have been thought that adjustments to sick pay were necessary reasonable adjustments, O'Hanlon suggests that it would only be in highly exceptional circumstances that it could be considered a reasonable adjustment to give a disabled person higher sick pay than would be payable to a non-disabled person, who in general does not suffer the same disability related absences. That was thought not to be an appropriate adjustment by the EAT because it would require tribunals to usurp the management function of the employer by deciding whether they were financially able to meet the costs of modifying policies to make the enhanced payments. The purpose of the legislation was also noted to be to assist disabled workers to obtain employment and to integrate them into the workforce, rather than simply put more money into their wage packets. In some circumstances this might act as a disincentive to return to work. Particular reference may be made to paragraphs 67-74 in the Employment Appeal Tribunal's judgment in the O'Hanlon case.

58. The other point to make is that it has been noted that the Meikle case is in a different category because the employee's absence had, in itself, been caused or contributed to by the employer's failure to make reasonable adjustments. That is not the position in Mr Thompson's case.

59. An employer has a defence to a claim for breach of the duty to make reasonable adjustments if it does not know and could not be reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP etc. The question is what, objectively, the employer could reasonably have known following reasonable enquiry.

Section 15 discrimination arising from disability.

60. Section 15 Equality Act 2010 states:

(1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

61. Four elements must be made out in order for the claimant to succeed in a section 15 claim:

(i) There must be unfavourable treatment. No comparison is required.
(ii) There must be something that arises 'in consequence of the claimant's disability.' The consequences of a disability are infinitely varied depending on the particular facts and circumstances of an individual's case and the disability in question. They may include anything that is the result, effect or outcome of a disabled person's disability. Some consequences may be obvious and others less so. It is question of fact for the tribunal to determine whether something does in fact arise in consequence of a claimant's disability.
(iii) The unfavourable treatment must be because of (i.e., caused by) the something that arises in consequence of the disability. This involves a consideration of the thought processes of the putative discriminator in order to determine whether the something arising in consequence of the disability operated on the mind of the alleged discriminator, whether consciously or subconsciously, at least to a significant extent.
(iv) The alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

See Secretary of State for Justice and another v Dunn EAT 0234/16.

62. Treatment cannot be 'unfavourable' merely because it is thought that it could have been more advantageous or is insufficiently advantageous (The Trustees of Swansea University Pension & Assurances Scheme and anor v Williams [2015] IRLR 885; [2017] IRLR 882 and [2019] IRLR 306.)

63. The consequences of a disability 'include anything which is the result, effect or outcome of a disabled person's disability.' Some may be obvious, others may not be obvious (paragraph 5.9 EHRC Employment Code 2011).

64. Following the guidance given in Pnaiser v NHS England [2016] IRLR 170 at paragraph 31 the correct approach to a section 15 claim is:

(a) A tribunal must first identify whether there was unfavourable treatment and by whom. No question of comparison arises.
(b) The tribunal must determine what caused that unfavourable treatment. What was the reason for it? An examination of the conscious or unconscious thought processes of A is likely to be required. There may be more than one reason or cause for impugned treatment. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is irrelevant

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability.' That expression 'arising in consequence of' could describe a range of causal links. The causal link between the something that causes unfavourable treatment and the disability may include more than one link. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(e) The knowledge that is required is knowledge of the disability only. There is no requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. (See also City of York Council v Grosset [2018] ICR 1492).

(f) It does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of 'something arising in consequence of the claimant's disability.' Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

65. The first limb of the analysis at section 15(1)(a) is to determine whether the respondent treated the claimant unfavourably "because of something arising in consequence of the claimant's disability". This analysis requires the tribunal to focus on two separate stages: firstly, the "something" and, secondly, the fact that the "something" must be "something arising in consequence of B's disability," which constitutes a second causative (consequential) link. It does not matter in which order the tribunal takes the relevant steps (Basildon & Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305 at paras 26-27) also City of York Council v Grosset [2018] IRLR 746 paragraph 36).

66. When considering an employer's defence pursuant to section 15(1)(b) the 'legitimate aim' must be identified. The aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration. The objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. (Bilka-Kaufhaus GmBH v Weber von Hartz [1986] IRLR 317.)

67. The question as to whether an aim is "legitimate" is a question of fact for the tribunal. The categories are not closed, although cost saving on its own cannot amount to a legitimate aim (Woodcock v Cumbria Primary Care Trust 2012 ICR 1126.)

68. Once the legitimate aim has been identified and established it is for the respondent to show that the means used to achieve it were proportionate. Treatment is proportionate if it is an 'appropriate and necessary' means of achieving a legitimate aim. A three- stage test is applicable to determine whether criteria are proportionate to the aim to be achieved. First, is the objective sufficiently important to justify limiting a fundamental right?

Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective? (R(Elias) v Secretary of State for Defence [2006] IRLR 934).

69. Determining proportionality involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the treatment as against the employer's reasons for acting in this way, taking account of all relevant factors (EHRC Code paragraph 4.30). The measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim, but the treatment will not be proportionate if less discriminatory measures could have been taken to achieve the same objective (see EHRC Code (para 4.31). It will be relevant for the tribunal to consider whether or not any lesser measure might have served the aim.

70. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business but it has to make its own judgment, based upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary (Hardy & Hansons Plc v Lax [2005] IRLR 726 and Hensman v Ministry of Defence UKEAT/0067/14/DM). It is not the same test as the 'band of reasonable responses' test in an unfair dismissal claim. However, in Birtenshaw v Oldfield [2019] IRLR 946 (para 38) the EAT highlighted that in considering the objective question of the employer's justification, the employment tribunal should give a substantial degree of respect to the judgment of the decision maker as to what is reasonably necessary to achieve the legitimate aim provided it has acted rationally and responsibly. However, it does not follow that the tribunal has to be satisfied that any suggested lesser measure would or might have been acceptable to the decision-maker or would otherwise have caused him to take a different course. That approach would be at odds with the objective question which the tribunal has to determine; and would give primacy to the evidence and position of the respondent's decision-maker.

71. It is necessary to weigh the need against the seriousness of the detriment to the disadvantaged person. It is not sufficient that the respondent could reasonably consider the means chosen as suitable for achieving the aim. To be proportionate a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so (Homer v Chief constable of West Yorkshire Police Authority [2012] IRLR 601.)

Unauthorised deductions from wages

72. The relevant provision is section 13 of the Employment Rights Act 1996. The question is whether the amount paid, on any given occasion, is less than is 'properly payable.' The obvious place to look to identify what is properly payable is the term of the contract: is there a contractual entitlement to a particular sum of money? Determining what wages are properly payable requires consideration of all the relevant terms of the contract including any implied terms (Camden Primary Care Trust v Atchoe 2007 EWCA Civ 714). Difficulties have arisen in relation to discretionary or non-contractual payments. The question has arisen whether the failure to make such a

payment is a deduction from wages or just the lawful exercise of a discretion by the employer. It is necessary to consider whether the sums in question fall within the definition of wages 'properly payable.' New Century Cleaning Co Ltd v Church 2000 IRLR 27 indicates that the worker has to show an actual legal entitlement to the wages, although it need not be necessarily contractual. There must be a legal entitlement before the sum in question can be considered to be part of the wages 'properly payable' such that an unauthorised deduction from wages may have been made.

Conclusions

Reasonable adjustments

73. On the basis of the evidence we have heard, the tribunal accepts that the alleged PCP in this case is proven. We find that when an employee's absence exceeded 5% of available annual hours in a rolling period of 12 months up to the date of absence, a review was triggered and a decision made at the discretion of a manager as to whether or not the employee would receive company sick pay. We also accept that this PCP put the claimant at a substantial disadvantage as compared to an appropriate non-disabled comparator. The claimant was more likely (although not certain) to have a higher absence rate and to hit the sick pay review trigger than a non-disabled employee. Consequently, he would be more likely to be refused company sick pay given the way the sick pay policy was operated by the respondent.

74. The central issue in this case is, therefore, what reasonable adjustments are required in all the circumstances of the case. The claimant's argument is that the respondent should have paid sick pay for the absences in question so as to remove the disadvantage to the claimant. Whilst that might have been an option open to the respondent, we do not accept that in failing to do so the respondent was in breach of a legal duty to make reasonable adjustments. Following the O'Hanlon line of authorities, we are not satisfied that the respondent had a duty to change its whole policy in order to allow this payment to the claimant. This is not a case, such as Meikle, where the absence of other adjustments to the claimant's job caused or contributed to the claimant being off work on sick leave. He was not on sick leave and losing money even partially because of the respondent's failure to make reasonable adjustments to the job role to enable him to come back to work. The respondent in this case had made the other reasonable adjustments to the job to ensure that the claimant was able to come back to work if at all possible. The respondent had acted on the basis of the occupational health advice and made the relevant adjustment. The absences which form the subject matter of this claim reflect the level of disability related absence which could not be avoided through other reasonable adjustments. The level of absence was not increased due to the respondent's failure.

75. We have reminded ourselves that the primary purpose of reasonable adjustments is to encourage a claimant back to work. The extra payment of sick pay in this case would not do that. The disadvantage suffered by the claimant in this case is a financial disadvantage. The claimant is 'out-of-pocket' once the decision on company sick pay has been taken by the

relevant decision maker but the policy in place is a policy including an element of managerial discretion. The policy does not provide for an automatic cut-off point at 5%. The employee does not automatically lose sick pay after 5%. There is already some flexibility built-in to the terms of the scheme. It is quite possible for an employee to exceed the 5% trigger and still be paid full company sick pay. Therefore, depending on all the relevant and particular circumstances as of the date of the decision in question, the claimant could still be paid sick pay for disability related absences in some cases. The respondent has, therefore, already drafted a scheme where the disabled individual may get more sick pay than a non-disabled person. The respondent decision maker looks at all the circumstances of the case in order to come to a decision. That is an adjustment.

76. We have considered what other adjustments the respondent should be required to make. Should they be required to remove the trigger points altogether? We have concluded that such a step would not be in line with the rationale in O'Hanlon. It would basically mean that disabled employees would always be entitled to company sick pay and that any limits on sick pay would be completely removed from disabled employees. That would not balance the interests of the business and provide an objectively reasonable solution. It would not take into account the other relevant factors that the respondent has to consider. It does not take into account the financial constraints under which the respondent operates. The potential increase in financial outlay across the respondent's business would be unlimited if all disabled employees were removed from the trigger point system. Furthermore, it would not provide any incentive for disabled employees to return to work from sickness absence. It would fly in the face of the agreed policy which was negotiated with the trade union and balloted on by the workforce. Nor would it take account of the fact that the respondent has awarded a counterbalancing pay rise and lump sum payment in return for changes to the policy. The respondent would have paid out the money associated with that pay settlement without obtaining any cost savings which could be required or intended to fund it. It would provide disabled employees with automatic benefits, which might well cause a degree of bad feeling within the wider workforce and undermine workforce cohesion. That may be a more minor element, but it is a factor, nonetheless. Any such change would also fail to take account of the fact that the trigger point in this policy is a trigger for a review and not for the automatic withdrawal of company sick pay. Flexibility to take account of individual circumstances is already written into the review process, so a fair result can be achieved for individual employees without disapplying the trigger point altogether. It would not allow the respondent to bring in a new policy to reduce the potential abuses under the old system.

77. The tribunal considered whether the respondent could apply a different trigger point, perhaps a higher trigger point for disabled employees than the rest of the workforce. We asked ourselves how such a trigger point could be fairly set. An alternative trigger point would be entirely arbitrary. There is no reason to think that one particular trigger point is fairer than another. In particular, in this claimant's case the trigger point could have been doubled and in most cases the claimant would still have exceeded it. His was not a marginal case where his absence was only slightly above the trigger point. This means a

significantly higher trigger would be required in order to remove this claimant's disadvantage. This would mean a significantly higher financial outlay across the board for the respondent, when looking at the application of the policy to whole workforce. Any different trigger point would not have been negotiated with the trade union and would not take into account the cost of the pay rise. We also note that the claimant was, in effect, subject to a higher trigger point in substance. None of the reviews in his case took place at or around the 5% mark. No withdrawal of pay took place at that level. The respondent even paid partial company sick pay in relation to period 3. In reality, the pay policy was drafted and was carefully designed to balance the potentially competing interests of employees and the business. It did that by providing a discretion which would be exercised on a case-by-case basis, so that even those with high percentages might still get sick pay. The list of relevant factors was non-exhaustive, there was no limit on it, so relevant factors were not unfairly excluded. There was also the safeguard against anomalous years: the five year 'lookback.' This meant that if an employee had one bad year but a good record overall, the employee would be likely to get the sick pay. There was also a direction to look at the reasons for the absence in order to specifically consider the impact of long-term sickness. We have concluded that requiring the respondent to make an adjustment by rewriting the sick pay policy would be to usurp the management function of the respondent in an impermissible way.

78. So, if the adjustment is not to re-write the policy, should a specific adjustment have been made, purely in the claimant's case? In substance, that is an argument that the claimant should not have had the policy applied to him, as an individual. We consider that it is not reasonable to require the respondent to take the claimant, as an individual, outside the remit of the company sick pay policy. If we examine the decisions taken in relation to the claimant, we can see that the respondent applied the policy to the claimant in a fair way. There was nothing malicious in the decision making in relation to the claimant. Indeed, in claim 3, he did get some payments. The decision makers have apparently taken into account all the relevant factors (as they were required to do) and have come to individual decisions based on the available evidence. The respondent took decisions that were reasonably open to it in all the relevant circumstances of the case. In particular, this claimant's rolling 12-month percentage was always considerably above the 5% trigger, his five-year lookback showed high levels of absence and a lot of the absence was not related to the disability. In many cases, even if the claimant's disability related absence was left out of account, the claimant would still have hit and exceeded the 5% trigger point. The respondent had made all the relevant reasonable adjustments to the job role, so it was not a Meikle type scenario where the claimant's attempts to return to work were being hampered by the respondent's failure to make adjustments to his job role. The claimant had had the benefit of significant amounts of sick pay and support. Making further sick pay payments was not going to help him back into work. In relation to the later period of the claim, the respondent offered the claimant the opportunity to change jobs to less physically demanding work and agreed to pay him in full, even during a phased return to work on reduced hours.

79. The reality is that there are pros and cons to a discretionary sick pay policy. One of the disadvantages is that an employer will not get uniformity of decisions across the entire workforce. The countervailing positive is that an employer is able to take into account every individual's particular circumstances even though this means that the outcome will not always be entirely predictable. We are satisfied that it is reasonably open to the respondent to take this approach, as it is less likely to disadvantage the disabled employees than a hard or strict cut-off point where there is an automatic removal of pay. For the avoidance of doubt, the tribunal is not saying that there was any inconsistency in the application of the policy in the claimant's case. There were three different decisions taken by different managers at different times and based on different evidence due to the changes in the data over time. The decision makers were not required to all come to the same conclusion. The only element which was more difficult for the tribunal to understand, was the partial pay decision in claim period number three (as previously indicated above.) Why was this stopped half-way through the period? In any event, it would have been open to the respondent to withhold *all* of the pay in claim period number three, given the available data. This would not have resulted in a benefit to the claimant.

80. The duty to make reasonable adjustments is not a duty to put the employee in the same position as other employees, as if they had no disability and without the regard to the other implications of the adjustments in question. It is a duty to make *reasonable* adjustments and not a duty to make *all possible* adjustments. The tribunal has to take an objective stance and consider the issue from both points of view: the claimant's and the respondent's. Consideration of reasonable adjustments is a balancing act between the (often) competing interests of employer and employee.

81. In light of the foregoing, the claimant's reasonable adjustments claim fails.

Section 15

82. Section 15 applies a different test. We find that withholding the sick pay is unfavourable treatment and that it was because of the 'something arising in consequence of disability.' The sickness absence arose, in part, because of the disability. The absences were the reason for the sick pay decision. It passes the causation test as the disability related absences were an effective cause of the sick pay decisions. (They did not have to be the sole cause of the decisions.)

83. The real issue for determination here is whether the sick pay decision was a proportionate means of achieving legitimate aim. The respondent relied on the legitimate aims of ensuring a fair and consistent application of the sick pay policy and ensuring a fair and appropriate allocation of the company's financial resources. We accept that these are legitimate aims in all the circumstances. They are linked to the real needs of the business and are not intrinsically tainted by discrimination. We also accept that the respondent was trying to encourage the claimant back into work, which is a legitimate aim, albeit not determinative in this case.

84. Having reviewed all the evidence in the case, we have concluded that this is not just a cost *saving* exercise, it is about *fair allocation* of financial resources across a pool of employees who may be off work on sick leave at any one time. The respondent is trying to balance its obligations to all of the workforce. It is trying to come up with a policy which has enough flexibility to take the individual employee's circumstances into account, whilst still being sufficiently transparent so that everyone knows and understands the applicable rules. The respondent has done this by providing a well-publicised and objective trigger point whilst still allowing a review based on available evidence and the relevant circumstances of each case. The discretion is to be exercised having regard to all the relevant factors, of which examples are given. The five-year 'lookback' is also an added safeguard to ensure that individuals are not unfairly disadvantaged by anomalous years.

85. The respondent's aims are legitimate. Was this policy a proportionate means of achieving those aims? The difficulty is that the tribunal cannot think of a more proportionate alternative to the system deployed by the respondent. Neither could the claimant when he was asked about this during the hearing.

86. The conclusions set out above, in relation to reasonable adjustments, show the difficulties and potential pitfalls in devising an alternative and ensuring that it is fair and rational. Although sick pay entitlement *amounts* are tied to length of service (i.e., the 'pot' of cash available for any given employee), the trigger point plus the review system plays an important part in balancing the competing interests of longer-term employees and short-term employees, so that the latter are not left unable to take the sick leave that they need, whereas the longer-term employee can take it without fear. It is something of an anti-abuse mechanism. (Albeit I make it clear that no one is making any suggestion that this claimant has sought to abuse the system, or that any of his absences were not legitimate.)

87. As a result of the above the tribunal has concluded that the respondent's actions were a proportionate means of achieving the legitimate aims. The section 15 claim therefore fails and is dismissed.

<u>Unauthorised deductions from wages.</u>

88. The remaining claim poses the question as to whether the claimed sick pay was 'properly payable' to the claimant within the meaning of the 1996 Act. The respondent says that the company policy provides for a discretionary payment, that is an express term of the policy and, therefore, that the express terms of the contract give no right to company sick pay in the circumstances of this case. We are satisfied that this is clear from the terms of the relevant documents and is demonstrated by way that the policy has been implemented. There is no evidence to suggest that the policy does not reflect reality or is some sort of a sham.

89. As there is no express contractual term for the claimant to rely on, he would have to demonstrate that an implied term in the contract gives him the right to the pay. We have considered whether there is a custom or practice which implies the right into the contract, in contravention of the express terms. As

the respondent submitted, in order for a term to be implied by custom and practice, it must be reasonable, notorious and certain. The term will not be implied if it is inconsistent with the express terms of the contract. On that basis, we are unable to imply a term into the contract giving the claimant the right to such a payment. Nor can we find any other basis on which to find that he was legally entitled to payments of company sick pay in the circumstances. It cannot be said that company sick pay was 'properly payable' to the claimant on the occasions claimed. Consequently, there was no unauthorised deduction from wages and that claim, too, must fail.

90. In light of the failure of the claimant's claims on their substantive merits, there was no need for the tribunal to consider the issue of time-limits. We have, therefore, not addressed the jurisdictional question of time limits as part of the judgment and reasons.

_____
Employment Judge Eeley

Date: 25 September 2023

Sent to the parties on:
29 September 2023

For the Tribunal Office

ANNEX

LIST OF ISSUES FROM CASE MANAGEMENT ORDER

The claimant makes the following claims:

Unlawful deduction from wages;

Discrimination arising from disability; and

Failure to make reasonable adjustments.

The Issues

Time limits

1 In regard to the claim relating to absence in 2020, was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates, namely the decision on 25 October 2020 not to pay discretionary company sick pay?

2. If not, was the conduct extending over a period?

3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

4.1 Why were the complaints not made to the Tribunal in time?

4.2 In any event, is it just and equitable in all the circumstances to extend time?

Unlawful deduction from wages

5. Was the payment of company sick pay properly payable to the claimant for his absences? The claimant relies on a five-week period of absence in 2020 and a six-day period in 2021. The claimant says that he was entitled to have the discretion under the company sick pay policy exercised in his favour given that his absences in 2020 and 2021 were because of certified serious illness, namely spondylosis. The respondent conceded that the claimant suffered from a disability in regard to this condition at the relevant time as defined in s.6 of the Equality Act 2010.

6. Did the respondent withhold such payment? It is clear that such payment was not made.

7. Was the withholding of the company sick pay an unlawful deduction from

the claimant's wage?

Failure to make reasonable adjustments.

8. Did the respondent operate a PCP? The claimant says that the absence management policy included a PCP in that it provided that when an employee's absence exceeded 5% of available annual hours in a rolling period of 12 months up to the date of absence, a review was triggered and a decision made at the discretion of a manager as to whether or not the employee would receive company sick pay.

9. Does the PCP place the claimant at a substantial disadvantage in relation to a matter when compared to people who were not disabled? The claimant will say it does as he was more likely to require time off due to being unfit for work.

10. Did the claimant suffer that substantial disadvantage? In not receiving his company sick pay for absences relating to his disability the claimant says he did suffer the substantial disadvantage.

11. Were there steps that the respondent could have taken to avoid the disadvantage? The claimant will say the respondent could have paid for the absences related to his disability to avoid the disadvantage.

12. Were such steps reasonable? The claimant will say that payment in the circumstances was a reasonable step.

Discrimination arising from disability.

13. Was the claimant treated unfavourably because of something arising in consequent of his disability? The claimant will say he was treated unfavourably by not being paid for his absences and his absences arose in consequence of his disability.

14. Was the action of the respondent a proportionate means of achieving a legitimate aim? The respondent maintains that it was and identifies the legitimate aim as:

    14.1 Ensuring fair and consistent application of the company's discretionary sickness pay policy;
    14.2 Ensuring fair and appropriate allocation of the company's financial resources.

Remedy

15. The claimant claims the amounts of company sick pay which he alleges he should have been paid during the two periods of absence.

16. In respect of the disability claims he also claims injury to feelings