Case Number _ 2211485.2022

EMPLOYMENT TRIBUNALS

Claimant: **MA**
Respondent: **Drifters Girl Ltd**

Heard at: **London Central (by CVP)**

On: **13-17/11/2023**
Before: **Employment Judge Mr J S Burns**
Members Dr J Holgate and Ms C Marsters

Representation
Claimant: **In person**
Respondent: **Mr N Ashley (Counsel)**

JUDGMENT

1. By consent, the Respondent must pay the Claimant £2363.34 holiday pay by 28/11/23.
2. Not by consent, the remaining claims are dismissed.
3. By consent, the Rule 50 Order made in this matter on 5/10/23 is extended to the period ending 28 days after the date this Judgment is sent to the parties, and if during that period the Claimant delivers to the Tribunal an application for it to be further extended, until such time that any such application has been determined.

REASONS

(for paragraphs 1 and 2 above.)

The conduct of the hearing

1. The Tribunal panel discussed before the FMH started, and in several private sessions over the 5 days following, how we could manage best the hearing days to ensure the fullest participation possible from the Claimant, and provide the fairest trial possible in the circumstances, and we did our best to achieve these objectives throughout.

2. The Tribunal treated the Claimant as a vulnerable party/witness and made all reasonable adjustments requested by him and in addition a few more suggested by Mr Ashley.

3. The CVP format and a 5-day listing to start at 11am each day had been chosen previously as part of this. I asked the Claimant at the beginning to tell me immediately if there was anything we could do during the course of the hearing which would make things easier for him. The Claimant had been provided with a paper bundle as well as an electronic version. In addition

to starting at 11am each day, we adjourned at 3pm on the third day at his request. The Claimant and I kept our cameras on but everyone else including the members and Mr Ashley kept their cameras off on the CVP platform except when they were speaking. Mr Ashley slowed down the pace of questioning during cross-examination. We had frequent arranged breaks and in addition the Claimant took short breaks away from the screen whenever he felt like it. The Claimant was supported by various friends whom he had arranged to accompany him throughout the hearing

4. The Claimant managed to remain calm through most of the 5 days of the hearing and at moments when he became visibly upset we stopped to allow him to calm down. During the hearing the Claimant showed for much of the time that he was articulate and able to identify and focus on the relevant issues and to present his case eloquently and forcefully. His several literate emails to the Tribunal in the run-up to and during the FMH are also evidence of his satisfactory intellectual function at least when they were written. The occasions when he withdrew from participation in the hearing appeared to coincide with him becoming angry/frustrated and not wishing to listen to question, answers, or submissions which challenged or rebutted his version of events.

5. Thus, after several hours of cross-examination over two days (14th and 15th November) and when Mr Ashley was starting a more challenging area of questioning, and seeking to put various discrepancies to the Claimant, at 3pm on the second day of such questioning, the Claimant stated that he refused to answer any more questions from Mr Ashley under any circumstances, as they were "triggering him".

6. Mr Ashley then offered to put his remaining cross-examination points to the Claimant in a summary written form, before the parties made their closing oral submissions, and with his agreement this written note (entitled "*Respondent's Walk-Through of Cross-examination Not Able To Be Put To The Claimant"*- referred to hereafter as "the XX-Note") was then provided to the Claimant during the evening of 16/11/23 before he was called upon to make his final submissions during the morning of 17/11/23.

7. The Claimant was able to conduct confidently his cross-examination of the Respondent's first witness Mr Barker (who was a fairly friendly witness from his point of view) during the morning of 16/11 but became upset when faced with cross-examining the more challenging witnesses Mr Hine and Mr Bouchier that afternoon.

8. Unfortunately, the hearing was made more difficult at that juncture by technological problems over about 30 minutes caused firstly by Mr Bouchier's weak internet connection and then, when that was cured by Mr Bouchier moving to another location, by a persistent disruptive echo in the CVP audio which we eventually forced us to change CVP rooms.

9. When we resumed at about 3.15 pm on 16/11, the Claimant said he did not want to/was unable to cross- Mr Bouchier and Mr Hine. He accepted my offer that I should question them instead, and I then did so for about an hour - asking them considerably more questions than I would otherwise have done, over the main contentious points in the case. We wound up the witness evidence in that way at about 5pm on 16/11/23, and adjourned for final submissions the next day.

10. Early on the morning of the 5th day (17/11/23) the Claimant emailed the Tribunal complaining that the process had been unfair, that he was unwell and that he sought a general adjournment. He suggested he had not been given enough time to cross-examine and that he would not have enough time to make his final submissions on 17/11. (In fact the Claimant's cross-examination time had been restricted to Thursday 16/11 because he had declined to start cross-examining at 3pm on 15/11 and had then requested an adjournment to the next day, saying at the time that he recognised that he would thereby be limited to one day to cross-examine the witnesses. Furthermore, he had stopped cross-examining mid-afternoon on 16/11, when there was at least another hour of cross-examination time left and the technology was working again).

11. His further concerns about time available on 17/11, as expressed in his adjournment application, included the misconception that he would be further cross-examined on 17/11, and that he would be required on 17/11 to discuss the renewal of his Rule 50 anonymity order (a matter which the Tribunal had already decided - before the hearing on 17/11 started - to deal with in a manner explained to him by email from Mr Ashley the previous evening,- and favourable to the Claimant-- now set out in paragraph 3 of the judgment above).

12. The Claimant's application to adjourn was opposed by the Respondent in a response email sent at 10.19 on 17/11, which contains some cogent and accurate observations on the matter.

13. We concluded that nothing positive would be gained by adjourning final submissions to another day and that it would in fact disadvantageous for all concerned to do so, and that, having regard to the stage we had reached, it would be disproportionate and contrary to the overriding objective. We refused the adjournment request.

14. When the hearing started at 11am on 17/11, the Claimant was present and we explained to him that he would have 45 minutes to make his closing submissions, and that he could choose to do so either first (after a further 12 minute break to allow him to gather his thoughts) or to make his submissions after hearing the Respondent's closing submissions. He chose the former course and after a break addressed us for about 40 minutes out of a permitted 45 maximum. During those submissions the Claimant spoke eloquently but at times raised his voice and became emotional. Taken as a whole, his final submissions were reasonably satisfactory, and much better than many others that the Tribunal has come to expect from some litigants-in-person.

15. After that we asked the Claimant to remain on the CVP platform and listen quietly to the Respondent's closing submissions, (after which we would give him a short opportunity to reply) and he did so for about 20 minutes before disconnecting himself. We ended the live hearing about 20 minutes later at 1.10 when the Respondent's closing submissions ended, by which time the Claimant had not returned.

16. After the live hearing ended the Tribunal received an email from the Claimant sent at 13.29 in which he apologised for his "sudden removal" and made some further submissions in response to what he had heard of the Respondent's submissions.

The issues

17. There had been a holiday pay claim but this was conceded at the beginning of the hearing so we entered judgment against the Respondent in that regard.

18. The disputed claims were disability discrimination and victimization, as initially set out in a draft list of issues compiled by EJ Lewis in the Case Management Summary/Record of a Preliminary Hearing dated 11/4/2023.

19. The Claimant complained that he had not agreed the draft list. Mr Ashley told us that it had been discussed and agreed by Mr Nacif (Claimant's Counsel) on the Claimant's behalf at the later PH before EJ Clark on 5/10/23. Unfortunately, this was not referred to in EJ Clark's written summary which she produced after that hearing, and the Claimant then told us that he had contacted Mr Nacif by email on the evening of 14/11/23 and had been informed by him that the draft list had not been agreed by him. Rather than resolve this dispute we decided to consider an informal application to amend the draft list by adding to it. After some discussion and explanation of what the Claimant wanted to add, we acceded to his application by (i) adding a further reasonable adjustment claim (as set out now in paragraph 1.15.6 of the List of Issues appended to these reasons ("LOI")) which amendment ultimately the Respondent did not oppose, and (ii) adding a wages/breach of contract claim for sick-pay (now set out in 1.22 of the LOI) which amendment the Respondent unsuccessfully opposed. We allowed that (second) amendment because the Claimant had referred to the matter in his ET1, and his union rep had raised it in the aftermath of the termination of his employment, and it was a matter for submissions only, and did not require further evidence. The claim was still in time for a separate claim in the county court, but could be considered with less expense and greater convenience before us.

20. By the time the hearing started the Respondent had admitted that at the material time the Claimant was disabled at the material time by HIV infection, Emotionally unstable personality disorder and Cyclothymia. Although the Claimant has other medical problems, and has been diagnosed with other mental health impairments, he did not rely on those for purposes of his claims.

The documents

21. The documents were in a main bundle of 902 pages including some supplementary pages, and in a medical bundle of 440 pages. In addition, Mr Ashley provided an opening note and two chronologies and a note of his outstanding cross-examination points. The paper version of pages 614-652 of the bundle sent to the Claimant were apparently poorly copied so he could not easily read them, but the Respondent did not refer to them and at the Claimant's request we read them in our electronic version during the Claimant's closing. The paper version of pages 896 to 902 arrived by post with the Claimant at about noon on 14/11 in good time before he was cross-examined on them.

Witnesses

22. The Claimant's witness Katie Weatherley's evidence was agreed so she was not called or cross-examined. We then took the Claimant's evidence, (although his cross-examination was cut short as described above). We then took the evidence of the Respondent's witnesses: Mr Barker (cross-examined by the Claimant in full) Mr Bouchier (partly cross-examined by the Claimant and then questioned by the ET judge) and then Mr Hine (questioned by the ET judge).

Credibility

23. It is agreed that the Claimant suffers and suffered at the material time from mental health impairments which at times cause him to suffer problems such as psychotic episodes and confusion. It is likely that this contributed to what we find is his distorted view and recall of events. His version on the whole is not supported by the contemporaneous documents.

24. The Claimant's case is plainly false in some obvious respects and the evidence shows that, at some times at least, he was less than frank and straightforward in his dealings with the Respondent. We give some specific examples of this below.

25. In addition, the Claimant in disclosure provided only heavily redacted medical records and refused to accede to the Respondent's request before trial that unredacted or less-heavily-redacted versions of probably important medical documents should be provided. It is impossible for us to make any positive findings of what the redactions conceal, but we share the Respondent's misgivings about the extent of the redactions.

26. As is often the case with evidence which is not tested in cross-examination, the weight to be given to the Claimant's evidence is further called into question by his refusal to answer questions in cross-examination over important areas of the Respondent's case, as summarised in the XX-note.

27. We were impressed by Mr Hine and Mr Bouchier as honest and convincing witnesses.

28. To the extent that the version of events of the Claimant and the Respondent's witnesses differ, we prefer the latter.

Main findings of fact

29. The Respondent is a company jointly owned by theatrical producers Michael Harrison and Crossroads Live UK Ltd, formed for the purpose of bringing to stage the musical The Drifters Girl. The musical show opened at the Garrick Theatre in London's West End on 4/11/21.

30. The Respondent was a small recently-formed organisation with limited managerial staff and no HR department, putting on a show in difficult conditions in the theatre industry caused by the recently concluded Covid19 pandemic lockdowns. The show ran until 15/10/22 when it closed permanently, having made a substantial loss.

31. The Claimant was employed by the Respondent with effect from 8/3/22 in the position of Sound Engineer No.3. This was a fixed term contract, expiring on 15/10/22, and subject to a collective agreement with the Society of London Theatre ("SOLT") and the Broadcasting Entertainment Communications and Theatre Union ("BECTU").

32. Before being recruited by the Respondent, the Claimant had a long history of mental ill-health, and he had also been diagnosed recently as HIV-positive, and was receiving new medication for that.

33. The Claimant was recruited to the role of Sound No.3 and for the specific purpose of providing additional sound support to the live shows. The role encompassed approximately 32 hours of work, spread across 8 live shows per week.

34. He was recruited by Mr Barker who told him in interview that if he took employment with the Respondent, there would be a possibility of his being promoted to Sound 2. There was no firm promise in this regard.

35. The Claimant's areas of work were (i) the "rack" which is the backstage sound area where radio mics are monitored, and a naturally noisy area, where sound engineers need to work to do their job, and (ii) the substage, which is under the stage, not a quiet area, but away from people.

36. In the Garrick Theatre, which is a 200 year old building, space is limited and there are few quiet spaces (other than dressing rooms, which are needed for cast). Throughout the Claimant's employment he did not ask to be provided with a quiet space, despite being asked repeatedly if there was anything that could be done to help him. Even if he had asked, it is not shown that such a space could have been provided. When the Claimant felt unwell his response was not to seek a quiet space, but to leave the Theatre altogether.

37. Almost from the moment the Claimant commenced working for the Respondent it was apparent that he suffered from significant mental health issues making it impossible for him to fulfil his role satisfactorily.

38. Between 10/3/22 and 21/4/22, the Claimant missed about 19 of the 32 shows he was scheduled to cover due to sickness absence, and was late for work on three occasions. The absences were sporadic and usually came without any or any warning, which caused a significant impact on the Claimant's colleagues in the Sound Department, who were having to cover them as well as perform their own duties.
39. At a late stage before performances and when busy with other things, the managers would be forced to spend much time phoning and searching to find a replacement ("dep") to cover the Claimant's work.

40. This chaotic attendance defeated the purpose of the Claimant's recruitment which was to ease operational pressures in the Sound Department.

41. On 16/4/22 Mr Bouchier telephoned the Claimant to see whether the Respondent could offer him any support. During the conversation the Claimant openly discussed both his being "bipolar", and a form of personality disorder, and revealed that he also had occasional psychotic episodes - which had happened when he had been off work the previous week (including hearing voices, and seeing people in light sources). The Claimant also disclosed his HIV status. Mr Bouchier reassured the Claimant that he should take whatever time off he needed in order to look after his health.

42. On 18/4/22 Mr Bouchier emailed Mr Jake Hine, Executive Producer, to update him regarding the Claimant's health issues generally. He passed on to Mr Hine what he had been told by the Claimant, and ended *"I think we just need to chat to Harry and check he and Adam are ok with their #3 being so wobbly at the moment but we need to treat it like any other illness really.....Another one for the MHE clinic!"*

43. MHE is an acronym for Michael Harris Entertainment and there is no such clinic. This reference to a clinic was a piece of private levity not intended for the eyes of the Claimant. As a whole the email shows that Mr Bouchier was concerned, from the start, for the Claimant's welfare and also to ensure that the Respondent should not overreact to the Claimant's impairments but try to manage them as it would any other illness.

44. Against this background, a welfare meeting was convened on 21/4/22 in the Respondent's office at the Garrick Theatre. Mr Hine had arranged for Mr Barker to attend, as the Claimant had felt particularly supported by Mr Barker during the previous weeks. This was an informal meeting and Mr Hine did not see the need to give the Claimant advance notice of it.

45. We accept that in this type of environment it is customary to deal with staff issues informally. Mr Hine intended the meeting to be helpful and supportive and he made this clear to the Claimant from the outset and throughout, repeatedly inviting the Claimant to say if there was anything the producers could do to assist him. At no point did the Claimant express any discomfort regarding the convening of the meeting. We do not find that it was unreasonable for the meeting to be convened without advance warning.
46. The meeting was warm, supportive and convivial. Mr Hine did not have a particular agenda beyond *"checking whether the Claimant was OK, to ensure that he was aware that (the Respondent) wanted to support him, and to try to gain a better understanding of the likelihood of absences in future and how these could best be managed*".

47. During the meeting the Claimant volunteered that he had been suffering extreme mental health problems including 'psychosis' and that he had been self-harming at home (where he lived with his partner). Mr Hine asked him some questions about this out of concern and in order to ensure that he understood the Claimant's difficulties and needs. The Claimant also raised both his attendance at A&E and his HIV status himself, although the latter point was not discussed in detail because it was not relevant to the matters being discussed. It was thus from the Claimant himself that Mr Barker learnt that the Claimant was HIV positive.

48. There was no complaint made by the Claimant about this meeting at the time. On the contrary, the Claimant subsequently told Mr Barker that the meeting had been very useful for him and that his health should be "an open conversation".

49. We reject the Claimant's version that he was ambushed, or 'interrogated' or that his HIV status was revealed without his prior permission at the meeting.

50. Following the meeting of 21/4/22 the Claimant's attendance remained sporadic and he continued to have sudden difficulties at work including claimed psychotic episodes.

51. On or around 30/3/22 Mr Barker had advised that he would be leaving the show (his departure date was 4/6/22) . It was agreed by Mr Hine that Mr Adam Fenton, Sound No.2, was to be promoted to the Head of Department role, creating a vacancy at the level of Sound No.2. The role of Sound No.2 includes operating the show mixing-desk and is more pressured than that of Sound No.3. Given that the Claimant was unable to perform his own role; had been absent for more than two thirds of his shows; and had missed all opportunities to be introduced to the Sound No.2 duties, he could not have undertaken the role of Sound No.2 and it would not have been in his interests for him to do try to do so. Furthermore, he had not been promised the role, (but rather told at interview that it was "a possibility"). Hence the Respondent did not promote the Claimant into the Sound 2 role, but decided to advertise for someone else to fill the Sound 2 role. Mr Barker messaged the Claimant to tell him about this on 25/4/22.

52. The Claimant was signed off sick once again on 6/5/22 to 13/5/22.

53. On 13/5/22 the Claimant contacted the Respondent advising that he proposed to return to work the following Tuesday (17/5/22). The Respondent was concerned for the Claimant's welfare and specifically with regard to his continuing psychotic episodes, and about the possible effect on other staff. Mr Bouchier therefore telephoned the Claimant and asked him for permission to refer him to a doctor for occupational health advice regarding his absence and how he could be supported in returning to work. Mr Bouchier followed this request up by email on 16/5/22.

54. The Claimant agreed to the referral and he saw Dr Khalifeh from Doctorcall Limited on 17/5/22. By a written report of the same date, Dr Khalifeh noted a diagnosis of 'Cyclothymia' – a mild form of Bipolar – and recommended that the Claimant could return to work but on a 'gradual' basis with simultaneous support from the community mental health team.

55. The Respondent agreed with the Claimant that he would try a phased return to work, with a less intense timetable. The Claimant agreed to this. The phased return had no pre-specified duration.

56. The Claimant commenced his phased return to work with a single show on 19/5/22 on which day he was late for work. On 20/5 he was off work although marked on the record as a "float". On 21/5 he attended work but left the second show early. On 24/5 he missed 1 show. On 25/5 and 26/5 he attended work.

57. The Claimant claims that on about 24/5 May he overheard a telephone call in which Mr Bouchier said to a third party "*with Harry leaving and Adam stepping up, I am worried about the department with* (the Claimant) *being so unstable at the moment – we need to speak to HR and tread carefully"*. This cannot have been on 24/5 because the Claimant did not attend work that day. When this was pointed out the Claimant suggested it must have occurred on 26/5.

58. In his evidence Mr Bouchier had no recollection of this particular conversation, and pointed out that he would not have referred to 'HR' as the Respondent did not have an HR department and it was not a term he would use anyway. However, he agreed that he would have discussed, from the privacy of his office, on the telephone, and by other means, with other managers, his concerns about the Claimant's ill-health and non-performance of his role. It was

reasonable and natural that Mr Bouchier would have done so. If the Claimant overheard one such conversation, he must have been eavesdropping.

59. On 27/5 the Claimant was late for work and then left work mid-show, having advised that he was suffering extreme anxiety and psychosis. During that evening Mr Barker observed that the Claimant was struggling and needed extra support. Mr Barker knew that for the Claimant's own sake he should not be in work and suggested booking a taxi to take him home, , and he then followed this up later with texts to make sure the Claimant got home safely. This was typical of the kindness which Mr Barker showed for the Claimant throughout the period up to early June 22 when Mr Barker left the show.

60. On 28/5 Mr Bouchier told the Claimant not to come in to work that afternoon because by then, given the Claimant's recent unreliable attendance and problems, Mr Bouchier had already arranged a "dep" to cover the Claimant's work. We reject the Claimant's suggestion that this instruction was given to cause the phased return to fail or to create a situation in which the Respondent could dismiss the Claimant.

61. The Claimant sent a text to Mr Barker that day saying that he was experiencing *"random moments of disassociation and extreme paranoia*".

62. At this point the Respondent reasonably concluded that the Claimant continued to be incapable of fulfilling his role and that the phased return had not succeeded and could not continue. The Respondent had been left in a position where it did not know whether or not the Claimant would turn up for work, stay for the duration of the show, or be able to cope with his duties.

63. This was not simply a case of the Claimant being unable to provide a higher level of attendance or full attendance immediately or sooner. A principal concern was about the negative effect on him and others caused if he attended work when ill. The Respondent was also incurring substantial fees by paying alternates to be on standby in case they were required.

64. The list of issues identifies Matt Henry as a comparator for the direct discrimination claim in connection with the cessation of the Claimant's phased return. The Claimant did not develop this comparison at the hearing. Mr Hine told us that Matt Henry was a dancer who was unable to dance some nights because of a bad knee. We did not get facts about him beyond that. The Claimant has not shown that Matt Henry is a valid comparator.

65. On 31/5/22 the Claimant was in work but as a float only. He was invited to a further welfare meeting which was held with Mr Hine and Mr Bouchier. At the meeting Mr Hine told the Claimant that the phased return had not worked and he advised him to take a further period of sickness absence due to his clearly being unfit for work by reason of his continuing mental health difficulties. Mr Hine did not say that the Claimant was unfit to work on the show or in the theatre sector generally. Mr Hine suggested that the Claimant might want to "elegantly step away" from his work until he was better and return to work if he recovered and was able to perform his role before the contract expired. In the meantime the Respondent wanted to support him and enable him to get "focussed help".

66. Mr Hine referred to the Equity contractual terms which he (erroneously) thought the Claimant was on and he referred to the significant number of sick-days which the Claimant had had. Neither Mr Hine or Mr Bouchier told the Claimant he was dismissed or would be dismissed.

67. On 1/6/22 the Claimant wrote to his union rep giving his version of the meeting on 31/5/22, which version is broadly in accordance with our findings above. In his message the Claimant did not complain about ill-treatment by the Respondent's managers and nor did he suggest that he had been dismissed. On the contrary he showed a clear understanding that his job would be available for him if and when he was in a fit state to perform it.

68. Also on 1/6/22 the Claimant had a consultation with his GP. We have a heavily redacted copy of the doctor's note suggesting that he told the GP that he (the Claimant) had "lost his job". We do not accept this as evidence that the Claimant really thought he had been dismissed because he not dismissed and the suggestion is contradicted by the Claimant's email that day to his union rep.

69. On a balance of probabilities we accept the Respondent's submissions that "*the Claimant told the GP that he had "lost his job" because he was facing significant financial problems and wanted to make a claim for benefits whilst simultaneously holding his position at work – albeit, without having to actually attend work".*

70. We are fortified in reaching this conclusion by the fact that although the Claimant was signed off work for three months from 1/6/22 by the doctor for "*mental disorder, MENTAL CRISIS, HIV*" he failed to disclose this to the Respondent until 25/7/22, shortly after his full pay had come to an end on 18/7. This failure to disclose was notwithstanding the fact that in the days and weeks immediately following 1/6/22 the Claimant was in communication with Mr Hine about subjects such as his contract and his pay.

71. We accept the Respondent's further submission that the reason for the prolonged non-disclosure of the 1/6/22 sick-note was that "*if he told them the truth – that he was signed off for 3 months and in all probability would not return at all (before his contract expired) - he was likely to be moved to SSP sooner than if he maintained the illusion that he may be able to return pending a meeting to discuss the situation*"

72. The GP note of 1/6/22 does not contain any recorded criticism of the Respondent by the Claimant but confirms the 'mental health crisis' the Claimant had had; including psychosis symptoms - and that he thought his HIV (probably his HIV medication) was causing some of his symptoms and that a rejection of an ADAPT referral had upset him because "*his mental health was severe*".

73. We reject the Claimant's complaint that the breakdown of his mental health was caused by the meeting on 31/5/22. On the contrary it pre-ceded the meeting and its causes were described by him differently to his GP at the time.

74. We also reject the Claimant's complaint that his sick-leave from 1/6/22 was forced on him by the Respondent. The Claimant was unable to attend work safely and it would have been wrong for the Respondent to allow him to continue. It is clear from the objective evidence of the Claimant's severe mental ill-health at this time that he was unfit to work even on a phased return basis.

75. We also reject the Claimant's complaint that the Respondent acted unreasonably in telling him about his pay in June 22. He was told by Mr Bouchier on 3/6/22 that he would continue to receive full pay for the time being (and he then received full pay continuously until 18/7/22 after which he received SSP until the expiry of the contract on 15/10/22).

76. The payment of full pay from 1/6/22 to 18/7/22 was in excess of his contractual entitlement, (which was to receive SSP only), and was thus an act of generosity by the Respondent.

77. Mr Hines email to the Claimant of 10/6/22 "*For clarity, so you aren't worried about money, I absolutely know the BECTU Agreement sets out that, in a worst case, you should receive 28 weeks statutory sick pay but I'm trying to find the best way for you to return to The Drifters Girl so things are better than that"* was not intended to withdraw what Mr Bouchier had said and it did not do so. It was written to re-assure the Claimant that "*in a worst case*" …ie if the sickness absence lasted beyond the point when the Respondent could continue to pay him his basic

pay, he would have his SSP to fall back on. This email also made it clear that the Claimant had not been dismissed and that his contract was continuing.

78. The Claimant never returned to work before the expiry of his fixed term contract on 15/10/22.

79. Between the meeting on 31/5/22 and early July 2022 the Claimant largely disengaged from the Respondent.

80. A further welfare meeting was held on 6/7/22 attended by Messrs Hine and Bouchier. The Claimant appeared to remain very unwell. The Claimant stated that he did not wish to talk about his health any further. Mr Bouchier commented - *"it is all taking a long time now"* or words to that effect. We do not regard these words as objectionable as the Claimant's absence had been lengthy.

81. The meeting was not productive. The Claimant was visibly shaking and the meeting did not last long for this reason. The Claimant was nervous and not making sense. Mr Hine asked a follow-up question about medication. The Claimant had not given much detail about how the Respondent could help, but he had previously indicated there might be an issue with his medication and he was waiting for a review. Mr Hine also offered to pay for private treatment, for example from a psychiatrist or counsellor, but the Claimant did not take up the offer.

82. The managers did not tell him that he would need to get his own occupational health assessment. They did not interrogate the Claimant as alleged. Nor did the managers refuse his request to end the meeting to get trade union advice. The meeting was fairly brief and the managers agreed to the Claimant's wish to reschedule so he could have his trade union representative with him.

83. Mr Hine emailed the Claimant on 6/7/22 after the meeting, summarising what had been discussed and suggesting a further meeting with the Claimant being accompanied. The Claimants complaint in the list of issues that the Respondent failed to summarise in writing this meeting is unfounded.

84. On 7/7/22 in the Claimant's email to his union representative he wrote: "*With this I'm unsure as to whether I can return to the building"*

85. A further welfare meeting was arranged with the Claimant for 13/7/22 in order that his trade union representative could attend to support him.

86. Having still not been able to return to work, the Claimant was moved from full to statutory sick pay from 18/7/22.
87. Nothing at all was heard from the Claimant thereafter for a prolonged period although on 25/7 the Claimant sent his three-month sick-note to the Respondent for the first time.

88. On 27/7/2022 the Respondent advertised for a Sound Assistant. The Respondent needed sound support for the show. This was reasonable and necessary from an operational point of view. Although the new role was the same as the Claimant's role, the Respondent gave the new role a different name so the Claimant would not feel he had been replaced and that his role would remain open for him. If the Claimant had been able to return, he would also have been accommodated.

89. On 18/8/22 in an email to his union representative the Claimant wrote: "*With returning to work, I asked this as obviously I am not and cannot return to work due to the anxiety stress, panic and worry they've created and ACAS said I didn't have to return to work";*

90. On 22/8/22 the Claimant was signed off again "*for mental disorder*" by his doctor right through to 11/12/22; (ie well beyond the contract expiry date of 15/10/22). Again, the Claimant did not tell the Respondent about this at the time.

91. In the light of this, the Claimant's message to the Respondent dated 21/9/22 "*Hi Bouche, I hope you're well and the shows going well. Just emailing to check-in, as you know my sick note expired on 1st September and I've still not heard from the team or anyone about a return to work meeting or the plan moving forward?"* appears to be contrived.

92. The lack of contact on the part of the Respondent between the expiry of the sick note on 1/9/22 and the Claimant's message of 21/9/22 was the result of mere oversight, brought about in part due to the Claimant's lack of communication with the Respondent up to that point.

93. Mr Bouchier however, not knowing about the new sick note, responded immediately offering the Claimant a choice of dates for a return to work meeting the following week. The Claimant then delayed until 27/9/22 before reverting to Mr Bouchier with his proposals for meeting which the Respondent promptly accommodated.

94. A further welfare meeting was held with the Claimant on 4/10/22. At this meeting, Mr Hine continued to try to support the Claimant. This included inviting the Claimant to return in a supernumerary capacity for the last couple of weeks of the show, primarily so that he could be part of the show 'family' and be able to attend the show closure party. The Claimant declined to do this.

95. The Claimant's fixed-term contract terminated with effect from 15/10/22, in accordance with its express terms. As the show closed, no-one had their contracts renewed or extended.

96. The Respondent was then confused as to how to calculate the Claimant's holiday pay on termination. The Claimant had already received approximately £3500 more pay than he was legally entitled to as a result of the Respondent paying him basic pay while he had been off sick. The Respondent did try to contact the Claimant's BECTU representative regarding his holiday pay, but she did not return the call. The Respondent therefore took advice from SOLT and made a deduction of holiday pay to account for the payments the Claimant had received in excess of his contractual entitlement. This decision was made no later than 27/10/22. Shortly before trial the Respondent received revised legal advice and therefore it conceded that the holiday pay was due.

97. At the end of August 22 the Claimant had taken advice from his union's legal department which advised him then about the time limits which pertained to the bringing of discrimination claims in the Employment Tribunal. The Claimant applied to ACAS on 5/10/22 but the Respondent was notified about this only by letter dated 2/11/22. The ACAS certificate was issued on 16/11/22. The ET1 was then presented on 16/12/22.

Relevant law

Re time limits

98. Section 123 of the Equality Act 2010 provides that '*proceedings on a complaint within section 120 may not be brought after the end of—(a) the period of 3 months starting with the date of the act to which the complaint relates, or b) such other period as the employment tribunal thinks just and equitable."*

99. This is known as the "just and equitable test" and applies to discrimination claims. It is for the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule - see Robertson v Bexley Community Centre 2003 IRLR 434

100. The Tribunal may have regard to the checklist in section 33 of the Limitation Act 1980 as modified by the EAT in British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT: The length and reasons for the delay, the extent to which the cogency of the evidence is likely to

be affected by the delay, the extent to which the party has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

101. However, in the applying the just and equitable formula, the Court of Appeal held in Southwark London Borough v Alfolabi 2003 IRLR 220 that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'.

102. This was approved by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050 when the Court noted that "*factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)*."

103. The decision of the Court of Appeal in Apleogun-Gabriel v London Borough of Lambeth 2001 IRLR 116 makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

Direct Discrimination

104. Section 13 EA 2010 provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.

Failure to make Reasonable Adjustments

105. Section 20 read with 21 provide that a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments.

106. Section 20(1)(3) provides that where a provision criterion or practice (PCP) of As puts the disabled person concerned at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is the duty of A to take such steps as it is reasonable to have to take to avoid the disadvantage.

107. In the absence of a provision or criterion, there has to be something that can qualify as a "practice" in order for the duty of reasonable adjustment to apply. The term "practice" has something of the element of repetition about it. A one-off application of a disciplinary process cannot reasonably be regarded as a practice. If it relates to a procedure, it must be something that is applicable to others than the disabled person. If that were not the case, there would be no comparative disadvantage between the disabled person and the others to whom the alleged practice would also apply. (Nottingham CT v Harvey 2013 EAT).

108. A PCP connotes a *'state of affairs, indicating how similar cases are generally treated or how a similar case would be treated if it occurred again*.' In relation to practice, this implies the way in which things are generally done or will be done. It is not necessary for a practice to already

have been applied to another person, "*if there is an indication that it would be done again in future if a similar case were to arise*." (Simler LJ in Ishola v TFL EWCA Civ 112 7/2/2020.0

109. Employment and offering employment are relevant matters and Schedule 8 sets out the various detailed provisions in different scenarios.

110. The EHRCs code at 6.28 sets out various matters which must be considered in determining whether it is reasonable to make an adjustment, ie effectiveness, practicability, cost, size of undertaking etc.

111. Para 20(1) of Part 3 of Sch 8 provides that there is no duty to make adjustments if the employer does not know and could not reasonably be expected to know both that a disabled person has a disability and is liable to be placed at the disadvantage.

112. The test whether or not the Respondent has fulfilled or breached its duty to make reasonable adjustments is an objective one. The Respondent does not have to show that it consciously considered what steps it ought to take in the context of its statutory duty nor that it consulted with the Claimant about what reasonable adjustments should be made. The question is not one of awareness but what steps the Respondent took or did not take (British Gas Services Ltd v. Mr. B J. McCaull EAT/379/99, Tarbuck v. Sainsbury's Supermarkets Ltd[2006] IRLR 664).

Disability Related Discrimination

113. Section 15 provides that a person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of Bs disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. 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.

114. The law does not require that employers indefinitely retain employees who are not capable of performing their duties under their contracts. It is not controversial that an employer is entitled to manage the absence of its workforce to meet its business objectives and minimise disruption to its output services.

115. In Homer -v- Chief Constable of West Yorkshire Police [2012] UKSC 15, the SC made clear that, to be proportionate, a PCP must be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. The burden of proof is on the Respondent. "Appropriate" means that there must be a rational connection between the legitimate aim relied on and the measure by which it is sought to give effect to the aim. "Reasonably necessary" means that the PCP should disadvantage the protected group no more than is reasonably necessary in order to achieve the legitimate aim.

116. It is for the ET to weigh the reasonable needs of the R's business against the discriminatory effect of the decision to dismiss and to make its own assessment of whether the former outweigh the latter (Hardys & Hansons Plc -v- Lax [2005] EWCA Civ 846).

Indirect Discrimination

117. Section 19 of the EA provides that a person discriminates against another if he applies to that other a provision, criterion or practice which he applies or would equally to persons with whom the other does not share the protected characteristic, it puts persons who do share the characteristic at a particular disadvantage when compared with persons who do not share it, and he cannot show it to be a proportionate means of achieving a legitimate aim.

Harassment

118. Section 26 provides that a person harasses another where the harasser engages in unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating the others dignity or creating an intimidating hostile degrading humiliating or offensive environment for him. In deciding whether conduct has this effect the following must be taken into account : the perception of the other, the other circumstances of the case and whether it is reasonable for conduct to have that effect.

Victimisation

119. This is defined in section 27 of the EA and it occurs where the victimiser subjects another to detriment because the other has done a protected act or the victimiser believes the other has done or may do a protected act. A protected act is defined to include bringing proceedings under the EA or giving evidence in such proceedings or doing anything in relation to the Act or alleging a breach of the Act. A detriment is an act or omission by the employer which would cause an employee to have a legitimate sense of injustice- in other words- treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment

Onus of proof

120. Section 136 provides that it there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

Conclusions

Time limits.

121. We find that the matters complained of in paragraphs 1.3.1 to 1.3.5 of the list of issues in the Schedule were each single acts/omissions and not part of an act/omission continuing into the primary limitation period. They were respectively time-barred on the following dates: 1.3.1 on 20/7/22; 1.3.2 on 25/7/22; 1.3.3 on 25/8/22; 1.3.4 on 30/8/22 and 1.3.5 on 9/9/22.

122. The matters in 1.3.6 to 1.3.12 are in time.

123. The Claimant told us that at the end of August 22 he was advised by union lawyers specifically about discrimination time-limits. He nevertheless delayed in applying to ACAS until 5/10/22 by which time the time-bars referred to above had fallen, and then, after receiving his certificate, waited another month before finally presenting his ET1 on 16/12/22.
124. We bear in mind the fact that he is a disabled and vulnerable person but this did not prevent him taking advice, applying to ACAS and drafting a detailed and sophisticated ET1 and attachment. When we asked him to account for the delay, he failed to explain how, if at all, his disability had contributed to the delay.

125. Having taken into account the above matters and all the circumstances of the case, we find that the Claimant has not provided a reasonable or acceptable explanation for the delay and has not shown that it is just and equitable to extend time for his time-barred discrimination claims, and for this reason alone we dismiss all the claims which rely on the allegations in paragraphs 1.3.1 to 1.3.5 of the list of issues.

126. However, for the sake of completeness, and in case we are mistaken in so doing, we deal with them on their merits anyway.

Direct Discrimination

127. We do not find that the Claimant was unfavourably treated as alleged in paragraphs 1.3.1 to 1.3.11. We refer to our findings of fact. We do not find that the facts as found about those matters amount to unfavourable treatment. If we are wrong about that, the matters as found by us were not because of the Claimant's disability.

128. Insofar as 1.3.12 is concerned, the refusal and delay in paying holiday pay was unfavourable treatment but it was not because of the Claimant's disability but because of the legal advice the Respondent had received.

Discrimination arising from disability.

129. We do not find that the Claimant was unfavourably treated as alleged in paragraphs 1.3.1 to 1.3.11. We refer to our findings of fact. We do not find that the facts as found about those matters amount to unfavourable treatment.

130. If we are wrong about that, then we find that matters 1.3.1 to 1.3.10 did arise from the Claimant's disability - ie his HIV and/or mental health disabilities, past sickness record or anticipated sickness absence or his need at a certain point for a staggered return to work or because of the claimant's perceived 'lack of stability'.

131. However the treatment referred to in those paragraphs as found by us constituted reasonable management responses as a proportionate means of achieving the legitimate aims of dealing appropriately with the Claimant's illness and absences, and at the same time keeping the show going within the financial and restrictions applicable at the time.

132. The non-renewal of the contract (1.3.11) did not arise from the Claimant's disability but from the closure of the show.

133. The non-payment of the holiday pay (1.3.12) did not arise from the Claimant's disability but from the legal advice which the Respondent had received.

Harassment related to disability

134. The matters in 1.3.1; 1.3.3; and 1.3.7 – 1.3.10 are relied on
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135. We refer to our findings of fact. The matters as found by us did not have the prohibited purpose or effect referred to in section 26(1)(b). In reaching this conclusion we have taken into consideration the matters in section 26(4).

Victimisation.

136. Applying to ACAS was a protected act. However, the Respondent learnt about this on or after 2/11/22 whereas the decisions not to pay basic pay beyond 18/7/22 and not to pay holiday pay had been made before 2/11/22. Hence the matters complained of were not because of the protected act.

Reasonable Adjustments.

137. The find that the Respondent had the following PCPs referred to in the List of Issues: (i) not training staff on HIV or mental health in the workplace (ii) Requiring the claimant and sound engineers to work in a noisy space under the stage and not providing any quiet space and (iii) Taking absence from work into account in dealing with employees.

138. Insofar as (i) is concerned, we find that all the Claimant's managers, albeit that they did not have such training, treated the Claimant kindly and appropriately, so he was not placed at a disadvantage and nothing would have been gained if they had been trained. In any event given the financial and other limitations of the employment situation, such training would not have been reasonable for the Respondent to have to provide.

139. Insofar as (ii) is concerned, the Claimant not ask for a quiet space and the evidence does not suggest that he needed one. His preference when feeling unwell was not to come to work or to leave early, so he was not placed at a disadvantage. Furthermore, his role required him to be in a noisy area and it is not shown that there were any available quiet spaces in the Garrick Theatre so the adjustment could not have been supplied anyway.

140. Insofar as (iii) is concerned, the Claimant was not placed at a disadvantage at the meetings on 21/4 and 31/5. What was said and done at those meetings was to his advantage because they were sensible responses to the Claimant's circumstances, which responses were in his interest from a health point of view, even if he could not see it at the time.

141. The Claimant was also not placed at a disadvantage by PCP (iii) in terms of the termination or non-renewal of his contract as it continued until expiry.

142. In any event it was reasonable for the Respondent in a general sense to respond to and consider the Claimant's disability-related absences as they affected the show as well as the Claimant, and it would not have been a reasonable adjustment to discount them.

143. We do not find it proved that the Respondent had the following claimed PCPs referred to in the List of Issues: (iv) a higher level of attendance or full attendance immediately or sooner (v) not providing workers with a detailed written summary of meetings concerning their health and welfare and (vi) not maintaining full confidentiality of staff health and welfare matters. These are not an accurate reflection of how, on our findings, the Claimant himself was treated and furthermore there is no evidence or even an allegation that any such claimed PCPs were or would be applied to others or would be applied again in similar circumstances.

Indirect Discrimination

144. The PCPs that we have found were applied did not place the Claimant at a disadvantage and in any event were proportionate means of achieving legitimate aims for the reasons already given.

Sick-pay claim.

145. The Claimant relies on a collective agreement to claim the difference between SSP £98.35 per week and basic pay £715 per week for the period from 6/9/22 until 15/10/22, a sum of about £4000.

146. The Claimant's contract included a collective agreement, the relevant terms of which entitled the Claimant to 28 weeks SSP up to 26 weeks service; and 28 weeks SSP made up to full basic wage for 8 weeks after 26 weeks service. This was subject to a rule: *"Sick pay will be paid from the first day of absence*."

147. On a proper construction, which entitlement applies depends on how much service has been provided when the first day of absence occurs.

148. On 1/6/22 the Claimant started a long, single and unbroken period of absence which lasted until the expiry of his contract on 15/10/22. On 6/9/22 he completed 26 weeks of "service" (albeit peppered with absences which were fully paid until 18/7/22).

149. We find that the "*first day of absence*" was either 1/6/22 or some earlier date. Therefore his entitlement to sick pay fell to be considered on the basis that by that date he had not achieved 26 weeks service. His entitlement was to a maximum of 28 weeks SSP (only). He had no further or later "first day of absence".

150. Hence the Claimant by staying employed while continuously absent on SSP until 26 weeks had elapsed since the contract started could not then qualify for the 8 weeks full basic wage after 26 weeks, because he did not have “a first day of absence” after 26 weeks service.

151. If we are wrong about that then, in any event, before 6/9/22 the Claimant had been paid full basic pay for at least 8 weeks’ worth of absence days in total, to which pay he was not contractually entitled and the Respondent is entitled to an equitable set-off to extinguish any such liability.

Section 38 Employment Act 2002.

152. We suggested at the beginning of the hearing that as the holiday pay claim succeeded, the Claimant may be entitled to an award under section 38 but, as he was provided with a contract which contained his basic terms and conditions in June 22, long before his ET1 was presented, in fact he is not entitled to any such award.

Employment Judge J S Burns
20/11/2023
For Secretary of the Tribunals
Date sent to parties: 20/11/2023

SCHEDULE
LIST OF CLAIMS AND ISSUES

Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, the tribunal needs to check that the claims were brought in time. The time limit is in s123 of the Equality Act 2023. The issues are:

Disability

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

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

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

1.1.4.1 Why were the complaints not made to the tribunal in time?

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

Direct disability discrimination (Equality Act 2010 section 13)

1.3 Did the respondent treat the claimant less favourably because of his HIV infection and/or because of his mental health disabilities compared with how it treated or would have treated someone without those disabilities in the following actions:

1.3.1 Being ambushed into a 'welfare' meeting on 21 April 2022, at which he was 'interrogated' including questions about self- harming and at which his HIV status was revealed to his Head of Department without his prior permission.

1.3.2 The respondent advertising externally for the position of Sound No.2, instead of promoting the claimant to that position as had been informally promised at his interview. The reason given was 'due to your health conditions'. The relevant health conditions were HIV and mental health, since those were what had been discussed in the meeting just before.

1.3.3 On about 24 May 2022, the Company Manager talking about the claimant on the telephone in a setting where it could be overheard (the claimant overheard it) and saying, 'With Harry leaving and Adam stepping up, I am worried about the department with (the Claimant) being so unstable at the moment – we need to speak to HR and tread carefully'.

1.3.4 Telling the claimant at a meeting on 31 May 2022 that the staggered return to work was not working (despite trying it for only 1 week 2 days); that he was unfit to work on the show or in the theatre sector generally; and that he should find a way to walk away. Also telling the claimant, they could terminate the claimant's contract because of the number of sick days he had had off.

1.3.5 On 6 June 2022 telling the claimant that he would be paid his basic salary while off sick from 1 June 2022, but then on 10 June 2022 telling the claimant he would only get SSP.

1.3.6 As regards 3.1.3 and 3.1.4, (a) deciding the claimant was not fit to work on 31 May 2022 when he was fit to do so and (b) lack of clarity regarding whether he was dismissed, on full pay or on SSP.

1.3.7 In a meeting on 6 July 2022, the Company Manager stating 'it's all starting to drag on a bit now'; asking questions in an interrogating manner; ignoring the claimant's request to end the meeting so he could get trade union advice and representation; refusing the request to summarise the meeting in writing (albeit that in the event the respondent did provide a short summary email).

1.3.8 When the claimant asked the respondent during the meeting on 6 July 2022 to get occupational health advice, the respondent stated the claimant must get his own assessment.

1.3.9 In or around 28 July 2022, advertising the claimant's job role for the remainder of his contract.

1.3.10 After expiry of the claimant's sick note on 1 September 2022, not contacting the claimant regarding his return to work. Meeting the claimant to discuss his work only after the claimant pressed them and not until 4 October 2022.

1.3.11 Not renewing the claimant's contract in October 2022.

1.3.12 On 25 October 2022, failing to pay holiday pay on grounds that the respondent had previously paid 6 weeks' full salary while the claimant was off sick, which it now felt it should not have paid.

Note: the claimant's makes hypothetical comparisons. In relation to not seeing through his staggered return to work, he alternatively makes an actual comparison with the treatment of Matt Henry.

Discrimination arising from disability (Equality Act 2010 section 15)

1.4 Did the respondent treat the claimant unfavourably by the actions set out at sub-paragraphs 1.3.1 – 1. 3.12 above?

1.5 Was that unfavourable treatment because of something arising in consequence of the claimant's HIV and/or the claimant's mental health disabilities, ie because of the claimant's past sickness record or anticipated sickness absence or his need at a certain point for a staggered return to work or because of the claimant's perceived 'lack of stability'?

1.6 Was the treatment a proportionate means of achieving a legitimate aim? For this, the tribunal will decide in particular:

1.6.1 What were the respondent's aims?

1.6.2 Were the aims legitimate?

1.6.3 Was the treatment proportionate? eg

1.6.3.1 Was it an appropriate and reasonably necessary way to achieve those aims;

1.6.3.2 could something less discriminatory have been done instead;

1.6.3.3 how should the needs of the claimant and the respondent be balanced?

1.7 Did the respondent know or could it reasonably have been expected to know that the claimant had the relevant disabilities at the time of the alleged discrimination?

Harassment related to disability (Equality Act 2010 section 26)

1.8 Did the respondent do the actions described at sub-paragraphs 1.3.1; 1.3.3; 1.3.7 – 1.3.10 above?

1.9 If so, was that unwanted conduct?

1.10 Did it relate to disability?

1.11 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.12 If not, did it have that effect? The tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Victimisation (Equality Act 2010 section 27)

1.13 Did the claimant do a protected act by starting Early Conciliation with ACAS?

1.14 Did the respondent (a) fail to pay the claimant's holiday pay (b) change its mind and not pay full sick pay because the claimant had done the protected act?

Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

1.15 The claimant alleges that the respondent failed to make the following reasonable adjustments:

1.15.1 Allowing him to continue and complete a staggered return to work.

The provision, criterion or practice was a higher level of attendance or full attendance immediately or sooner.

This put the claimant at a disadvantage because of his disabilities and need to return to work gradually.

1.15.2 Providing the claimant with a written summary of the meeting or written confirmation of the respondent's position, as requested by the claimant. (this is a reference to the meeting on 6/7/22)

The provision, criterion or practice was not providing workers with a detailed written summary of meetings concerning their health and welfare.

This put the claimant at a disadvantage because as a result of his mental health disabilities, it is easier for him to have a written document which he can study and absorb afterwards and if necessary get advice.

1.15.3 Avoiding publicly discussing private and confidential matters concerning the claimant's health and adequately adhering to data protection principles.

Provision, criterion or practice = not maintaining full confidentiality of staff health and welfare matters.

This put the claimant at a disadvantage because his HIV status and mental health disabilities are private matters and wider knowledge could lead to discrimination against him by others.

1.15.4 Training staff on HIV and on mental ill health in the workplace.

Provision, criterion or practice = not training staff on HIV or mental health in the workplace.

This put the claimant at a disadvantage because he had those disabilities and his treatment would have been better handled had people been trained.

1.15.5 Providing the claimant with access to a quiet space.

Provision, criterion or practice = Requiring the claimant and sound engineers to work in a noisy space under the stage and not providing any quiet space.

This put the claimant at a disadvantage because they aggravated his mental health disabilities, made him feel more stressed and he had no quiet space to retreat to.

1.15.6 Discounting the Claimant's disability-related absences.

Provision, criterion or practice = Taking absence from work into account in dealing with employees.

This placed C at a disadvantage because his disability caused most absences and then (i) R held a meeting with him on 21/4/22 to discuss his absence (ii) Jake Hine told the Claimant on 31/5/22 that he could walk away from the show and that R could terminate his contract because of his absences and (iii) not renewing his contract because of his absences.

1.16 Did the respondent know or could it reasonably have been expected to know that the claimant had HIV and/or that he had mental health disabilities at the time of the alleged discrimination?

1.17 In each case, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage as a result?

Indirect discrimination (Equality Act 2010 section 19)

1.18 The indirect discrimination claim relates to the provisions, criteria and practices set out at sub-paragraphs 1.15 above.

1.19 In relation to each of the provisions, criteria and practices set out there, did they put people with HIV and/or with the claimant's mental health disabilities or either of them at a particular disadvantage when compared with others?

1.20 In each case, did the PCP put the claimant at that disadvantage?

1.21 If so, can the respondent prove the PCP was a proportionate means of achieving a legitimate aim?

Sick pay (a wages/contract claim)

1.22 The Claimant relies on a collective agreement to claim the difference between SSP £98.35 per week and basic pay £715 per week for the period after 6/9/22.

……..