EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102860/2023

Hearing held in Glasgow on 23 & 24 October 2023

Employment Judge McCluskey
Members D McFarlane and P McColl

Ms A	**Claimant** **Represented by** **Mr B -** **Father**
Greater Glasgow & Clyde Health Board	**Respondent** **Represented by:** **Mr R Davies -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

1. The complaints of failure to comply with the duty to make reasonable adjustments under sections 20 and 21 Equality Act 2010 are not well founded and are dismissed.

2. The complaint of unlawful deduction from wages under section 23 Employment Rights Act 1996 was not insisted upon by the claimant and is dismissed.

3. In accordance with Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Rule 50 (3)(b) the identity of the claimant and her father should not be disclosed to the public, whether in the course of any hearing, or in its listing or in any documents entered on the Register or otherwise forming part of the public record. The claimant should be referred to as Ms A and her father as Mr B only.

REASONS

Introduction

1. The claimant commenced ACAS early conciliation on 14 April 2023, and it ended on 2 May 2023. She presented her claim form on 2 May 2023. She brings complaints of disability discrimination – failure to comply with the duty to make reasonable adjustments and unlawful deduction of wages. Those complaints are defended by the respondent. The claimant remains employed by the respondent.

2. The claimant gave evidence on her own behalf. Mr Robert Cast - who attended first meeting, Ms Lorraine Lappin - HR representative who attended first meeting and Ms Fiona Elliot – HR representative who attended second meeting, gave evidence on behalf of the respondent.

3. Each party produced their own folder of documents for the final hearing.

4. The claimant has a condition of bipolar disorder and complex ADHD The respondent conceded that the claimant is disabled by reason of this condition in accordance with section 6 Equality Act 2010. The respondent conceded that it has been aware of the claimant's condition since 2014.

5. The claimant made an application for an order under Rule 50 to anonymise her identity. The respondent did not oppose this application. We considered that it was within the terms of Rule 50 and the overriding objective to do so. The claimant is accordingly referred to as Mrs A and not by her name. As the claimant was represented by her father, we have also anonymised his name, to preserve the anonymity of the claimant. He is accordingly referred to as Mr B.

Issues

6. Prior to the final hearing parties had agreed a final list of issues for determination by the Tribunal at the final hearing.

7. At this final hearing both parties had a copy of the agreed final list of issues, to which they could refer. Parties were reminded at the outset of the final hearing,

and on various occasions throughout the final hearing, that these were the only issues to be determined by us.

8. At the outset of the final hearing the claimant's father, who is her representative, clarified that the complaint of unlawful deduction from wages under section 23 Employment Rights Act 1996 was no longer insisted upon.

9. The agreed issues are as follows:

Meeting 1 (on 10 February 2023)

a. Whether or not the respondent applied the provision criterion or practice of failing to take disability into account when making arrangements for attendance meetings.

b. Whether or not this resulted in the claimant being put at a substantial disadvantage when compared with non-disabled people due to the fact that at the meeting she was unable to raise concerns regarding the serious decline in her mental health, as she did not want to share such details with the colleague who was accompanying her.

c. Whether the respondent knew, or should reasonably have known, that the claimant was put at a substantial disadvantage by the application of the alleged PCP, when compared with non-disabled people?

d. Whether or not it would have been reasonable to make the proposed adjustment of permitting the claimant to attend the meeting with her father as a companion.

Meeting 2 (on 11 May 2023)

e. Whether or not the respondent applied the provision criterion or practice of failing to take disability into account when making arrangements for attendance meetings.

f. Whether or not the claimant was put at a substantial disadvantage when compared with non-disabled people by the fact that the meeting was not recorded, insofar as she did not receive the opportunity to refer to what was said at the meeting, in circumstances where much of her day to day functioning is based on trust.

g. Whether the respondent knew, or should reasonably have known, that the claimant was put at a substantial disadvantage by the application of the alleged PCP, when compared with non-disabled people?

h. Whether or not it would have been reasonable to make the proposed adjustment of recording the meeting.

Half pay

i. Whether or not the respondent applied the provision criterion or practice of moving the claimant on to half sick pay on 20 April 2023, six months into her sickness absence.

j. Whether or not the claimant was put at a substantial disadvantage when compared with non-disabled people, in circumstances where her **TUPE** terms and conditions allowed for a greater period of full sick pay.

k. Whether the respondent knew, or should reasonably have known, that the claimant was put at a substantial disadvantage by the application of the alleged PCP, when compared with non-disabled people?

l. Whether or not it would have been reasonable to make the proposed adjustment of adhering to her TUPE terms and conditions.

Categorisation of absence

m. Whether or not the respondent applied the provision criterion or practice of adhering to NHS Agenda for Change terms and conditions, and more specifically wrongly marked her absence as sickness absence rather than being due to workplace injury.

n. Whether or not the claimant was put at a substantial disadvantage when compared with non-disabled people insofar as she was moved on to half pay as a result.

o. Whether the respondent knew, or should reasonably have known, that the claimant was put at a substantial disadvantage by the application of the alleged PCP, when compared with non-disabled people?

p. Whether or not it would have been reasonable to make the proposed adjustment of marking the absence as being due to workplace injury.

Findings in fact

10. We made the following material findings in fact necessary to determine the complaints. All references to page numbers are to the bundle of productions produced by either the claimant or the respondent.

11. The claimant has been employed by the respondent for the purposes of continuous employment since 27 January 1997. She remains employed by the respondent. Her employment transferred to the respondent on 4 December 2012 from her previous employer (name not used to due to anonymity order). She remains on her pre-transfer terms and conditions of employment.

12. On 2 November 2022 the claimant commenced a period of absence from work due to a physical injury at work. She remains absent from work.

13. On 24 January 2023 there was an exchange of emails between the claimant and Mr Steven Harrower, a manager in the respondent. In those emails the claimant asked various questions about pay whilst absent and how she would be supported back to work following her absence which began on 2 November 2022. She asked for a response the same day as her mental health was deteriorating badly. Mr Harrower responded shortly thereafter in a supportive manner. He signposted her to various resources within the respondent. This included a referral to Occupational Health about her mental health. The claimant responded that she had support for her mental health via her GP and did not wish to attend Occupational Health. The claimant emphasised in her correspondence that the absence was because of a workplace injury and not because of sickness. This was agreed by Mr Harrower.

14. During the email exchange with Mr Harrower the claimant said, “I do not feel safe discussing this [her mental health disability] with Mr Cast” She also referred to a previous absence for mental ill health and said, “I have zero faith in Mr Cast”.

15. During the email exchange with Mr Harrower, he said that a meeting would be arranged under the respondent’s Attendance Management Policy to discuss her

absence due to the workplace injury. The claimant said she would like to have her father with her at any meeting. She said her father was a lawyer. She said she was aware she couldn't have an acting lawyer with her but that he would only be present as support and as a witness. The claimant did not at any time prior to or at the meeting on 10 February 2023 say that she wished her father to attend due to confidentiality or that she did not wish a colleague or trade union representative to have knowledge of her mental health medical history.

16. In advance of the meeting the claimant was told she could be accompanied by a colleague or trade union representative in accordance with the respondent's Attendance Management Policy. The claimant elected to be accompanied by a colleague.

17. On 10 February 2023 a long-term absence meeting was held with the claimant. The meeting was conducted by Mr Robert Cast. The meeting was to discuss the claimant's absence from work because of her workplace injury. The meeting took place on Microsoft Teams and was recorded by the respondent.

18. At the meeting on 10 February 2023 the claimant was told that she would move to half pay after six months of absence. The claimant was encouraged to apply for Injury Allowance and told she was eligible to do so. This was an allowance payable by the respondent which had the potential to increase her pay, once it moved to half pay, to a level equivalent to 85% of full pay. The rules of the scheme required the claimant to make an application for Injury Allowance. It is not paid automatically.

19. The claimant's absence was recorded on the respondent's electronic absence system. The details of her absence were inputted by her manager Mr Cast. There were various boxes to be completed with drop down options. In the Absence Type box, Mr Cast selected "Sick Leave" from the drop-down options. Further down the page he also ticked a box confirming "Workplace Injury". The information in the Absence Type box was later changed by the respondent to "Work Related Injury" or similar from the drop-down options. This change did not affect the claimant's pay arrangements in relation to her ongoing absence. With either option she was entitled to receive six months full pay, then move to half pay. With either option the respondent told her she was entitled to apply for Injury Allowance when she moved to half pay.

20. The claimant did not make an application for Injury Allowance after the meeting. She did not consider herself eligible to do so. This was because the claimant understood that Injury Allowance was only payable for those on NHS Agenda for Change employment contracts, and she was not on such a contract. She had retained her contractual terms from her previous employer following the TUPE transfer of her employment to the respondent.

21. On or around 17 April 2023 the claimant spoke to Ms Lappin. She told Ms Lappin that the reason she wanted her father to attend the meeting with her on 10 February 2023 was because of her mental health.

22. On 11 May 2023 a second long-term absence meeting was held with the claimant. The meeting was conducted by Mr Kevin Smith, a manager of the respondent. At the request of the claimant the meeting took place by video on Microsoft Teams. At the request of the claimant, she was accompanied by her husband. The claimant had agreed with the respondent in advance that the meeting would be recorded. That message had not been passed on to Mr Smith and the meeting was not set up for recording. This was identified before the meeting started. The claimant was given the opportunity for the meeting to be postponed to allow recording to be set up. The claimant decided to proceed with the meeting, without it being recorded, as she trusted Mr Smith.

23. The claimant moved from full pay to half pay on 20 April 2023. At the meeting on 11 May 2023 the claimant was told again that she was eligible to apply for the respondent's Injury Allowance. She had not yet made an application.

24. The respondent remains on her pre-transfer terms and conditions of employment, with which she transferred from her previous employer on 4 December 2012. The respondent has been unable to locate a contract of employment for the claimant as of 4 December 2012 or at all.

25. In or around July 2023 the claimant applied for the Injury Allowance. Her application was successful. She received a backdated payment which topped up her salary to 85% of full pay from 20 April 2023.

Observations on the evidence

26. The Tribunal has only made findings of fact in relation to matters which are relevant to the legal issues to be decided. Both parties produced their own bundles of productions. The contemporaneous documentary evidence to which we were referred in evidence was of assistance to us in making our findings of fact.

27. The main area of factual dispute between the parties was about the claimant's terms and conditions of employment. The respondent agreed that the claimant remained on her pre-transfer terms and conditions of employment, with which she transferred from her previous employer on 4 December 2012. The respondent had however been unable to locate a contract of employment for the claimant with the terms and conditions from her previous employer and the claimant does not have a copy.

28. The claimant produced a document which she said was an extract from terms and conditions of her previous employer (claimant's bundle of productions – document 20). The paperwork was undated. There was nothing to show that it was a document from her previous employer. There was nothing to show that it pertained to the claimant. Some but not all pages had been provided. For example, the first page we saw started at paragraph 69. There appeared to be pages missing. The claimant said she had obtained the paperwork from Police Scotland. We were not satisfied that this paperwork produced by the claimant evidenced a contractual arrangement between her and her previous employer, at the date of her transfer in 2012 or at all.

29. Even if the paperwork did evidence a contractual arrangement between her and her previous employer, which we did not think that it did, we were not satisfied that it evidenced a contractual entitlement for the claimant to full pay for three years.

30. The claimant took us to various paragraphs in her document 20 which she relied upon.

    a. paragraph 70.9.2 "SSP is payable for qualifying days up to a maximum of 28 weeks in any single period of incapacity for work *whether linked or continuous); except where linked period of incapacity for work extend beyond 3 years, entitlement to SSP finishes at the end of that third year".

b. Paragraph 71.7.1 / paragraph 71.7.2 For continuous service of 5 years or more the period of "full allowance" is 26 weeks and the period of "half allowance" is 26 weeks. "In exceptional circumstances the Force shall have the discretion to extend the period of full allowance or half allowance provided for in this paragraph".

c. Paragraph 71.8.1.1 "Where an employee is entitled to SSP the full allowance shall be a sum equal to full normal pay..."

d. Paragraph 71.8.1.2 - Where an employee is, or becomes, excluded from entitlement to SSP, the full allowance shall be a sum which, when added to the benefits payable under the National Insurance Acts (as set out in Clause 70.13) shall secure to the employee a sum equal to normal pay".

31. Having considered these paragraphs we concluded that nothing in the documentation produced provided the claimant with a contractual entitlement to full pay for 3 years.

32. The claimant also asserted that even if there was no contractual entitlement to full pay for 3 years, the respondent ought to have exercised its discretion to pay her full pay for 3 years. She said this was because there was discretion to do so in terms of the document she had provided. The claimant did lead any evidence as to why discretion ought to have been exercised. We were unable to conclude that the respondent ought to have exercised discretion to continue her full pay for 3 years.

Relevant law

Reasonable adjustments

33. Sections 20 and 21 EqA say as follows:

"*20 Duty to make adjustments*

(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...."

"21 Failure to comply with duty

(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...."

34. Schedule 8 EqA paragraph 20 says as follows:

"*Part 3 Limitations on the Duty*

20 Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—...

(b) [in any case referred to in Part 2 of this Schedule] that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

Time limits

35. Section 123 (1) EqA says as follows: "*Subject to section 140B 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*". For the purposes of this section (a) conduct extending over a period is to be treated as done at the end of the period.

Burden of proof

36. Section 39 EqA says as follows:

"39 *Employees and applicants …*

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) …..; (b) …..; (c) …..; (d) by subjecting B to any other detriment.

37. Section 136 EqA says as follows: "1*36 Burden of proof If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision*."

38. We have taken into account the well-known guidance given by the Court of Appeal in **Igen Ltd v Wong [2005] ICR 931** which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054**. **Ayodele v Citylink Ltd [2018] ICR 748, CA** confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in **Igen Ltd**.

39. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the possibility of discrimination and a mere possibility is not enough. Something more is required, see **Madarassy** (above).

40. In **Project Management Institute v Latif [2007] IRLR 579**, the EAT established that the claimant must establish not only that the duty to make adjustments has arisen, but also that there are facts from which it could be inferred, absent a lawful explanation, that the duty had been breached by the respondent. Therefore, there must be evidence of some apparently reasonable adjustment that could have been made. Once a potentially reasonable adjustment has been identified the burden shifts to the respondent to prove that the adjustment could not reasonably have been achieved. The level of detail required of the claimant will vary from case to case, but it is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to be able to engage with the question whether it could reasonably have been achieved or not.

41. In **Jennings v Barts and the London NHS Trust UKEAT/0056/12** the EAT held that **Latif** did not require the application of the concept of shifting burdens of proof, which '*in this context*' added '*unnecessary complication in what is essentially a straightforward factual analysis of the evidence provided*' as to whether the adjustment contended for would have been a reasonable one.

42. In **Hewage** (above) the Supreme Court observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination, but they have nothing to offer where the Tribunal is able to make positive findings on the evidence one way or the other. More recently, a similar endorsement was given by the Supreme Court in **Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC**.

Submissions

43. Both parties made oral submissions. The respondent also provided written submissions to the Tribunal and to the claimant, in advance. We carefully considered the submissions of both parties during our deliberations and have dealt with the points made in submissions, where relevant, when setting out the facts, the law and the application of the law to those facts. It should not be taken that a submission was not considered because it is not part of the discussion and decision recorded.

Discussion and decision

Time limits

44. The claimant' submitted her claim to the Tribunal on 2 May 2023. Early conciliation commenced on 14 April 2023 and ended on 2 May 2023.

45. She brings complaints of failure to comply with the duty to make reasonable adjustments. She makes four complaints where she asserts that the duty has been breached. She proposes adjustments which she asserts ought to have been made. The dates when she asserts they ought to have been made are:

    a. 10 February 2023 (meeting 1);

    b. 11 May 2023 (meeting 2);

c. 20 April 2023 (pay); and

d. 20 April 2023 (categorisation of absence).

46. The complaints have accordingly been presented in time.

Reasonable adjustments

47. A complaint of failure to make reasonable adjustments requires that a provision, criterion or practice, or a physical feature, or the absence of an auxiliary aid put the claimant at a particular disadvantage compared with people not sharing her disability, and that it would be reasonable for the respondent to make an adjustment which would wholly or partly alleviate the disadvantage. The respondent must have known or reasonably been expected to know about the disability and the disadvantage caused at the time the adjustment allegedly should have been made. Knowledge in this regard is not limited to actual knowledge but extends to constructive knowledge (i.e. what the respondent ought reasonably to have known).

First meeting on 10 February 2023

48. The claimant's disability is bipolar disorder and complex PTSD. The provision, criterion or practice (PCP) relied upon by the claimant is:

    a. on 10 February 2023 the respondent had a PCP of failing to take disability into account when making arrangements for the attendance meeting.

49. The respondent's submission is that there is no evidence of such a wide PCP. It says the claimant could have framed the PCP as a rule that only colleagues or union representatives can act as companions at meetings, but she has not done so. We considered that the claimant had provided evidence of a PCP in these terms.

50. The claimant in her email exchange with the respondent on 24 January 2023, said that her mental health had deteriorated badly. Thereafter, there was no discussion with the claimant about her mental health when making arrangements for her attendance at the meeting on 10 February 2023. Although wide, we were satisfied that a PCP of failing to take disability into account when

making arrangements for the attendance meeting, had been applied to the claimant.

51. The substantial disadvantage relied upon by the claimant compared to someone without the claimant's disability is:

    a. at the meeting she was unable to raise concerns regarding the serious decline in her mental health as she did not want to share such details with the colleague who was accompanying her.

52. We considered whether the PCP had put the claimant to this substantial disadvantage compared to someone without the claimant's disability. We found that it had not. The claimant in her email correspondence with Mr Harrower on 24 January 2023 said that "I do not feel safe discussing this [her mental health disability] with Mr Cast" She also referred to a previous absence for mental ill health and said "I have zero faith in Mr Cast". The claimant had emphasised to Mr Harrower that the reason for her absence was the physical injury which she had sustained. The meeting was to discuss her absence because of the physical injury.

53. For these reasons we concluded that the claimant was unlikely to have raised concerns regarding the serious decline in her mental health at this meeting with Mr Cast. In fact, she had specifically said that she did not feel safe doing so and that she did not trust him.

54. Accordingly, we concluded that the claimant had not established that she was put at the substantial disadvantage she asserted. Having done so, there is no requirement for us to consider the subsequent parts of the duty. The claimant's complaint of failure to comply with the duty to make reasonable adjustments in relation to the first meeting is therefore not well founded and is dismissed.

Second meeting on 11 May 2023

55. The PCP relied upon by the claimant is the same as for the first meeting, namely:

    a. on 11 May 2023 the respondent had a PCP of failing to take disability into account when making arrangements for the attendance meeting

56. The respondent's submission is that there is no evidence of such a wide PCP. In relation to this meeting, the claimant has not led evidence about why she says there was a PCP of failing to take disability into account when making arrangements for this attendance meeting. She had told Ms Lappin in April 2023 that the reason she had wanted her father to attend the first meeting with her on 10 February 2023 was because of her mental health. The claimant asked to be accompanied by her husband at the next meeting and the respondent agreed. The claimant's dissatisfaction with this meeting appeared to be that the agreement she had with the respondent for her meetings to be recorded was not passed on. The Microsoft Teams meeting was therefore not set up for recording, which required to be done in advance. This was identified at the outset of the meeting and the claimant was given the opportunity for the meeting to be re-arranged. Her evidence was that she decided to proceed without recording as she trusted Mr Smith. That of course, goes to the substantial disadvantage identified by the claimant, namely that the meeting was not recorded. As a first step, the claimant must show that the PCP relied upon was applied to her. From the evidence led we did not identify that there was a PCP applied to in relation to the second meeting of failing to take disability into account when making arrangements for the second attendance meeting.

57. Having concluded that the PCP identified was not applied to the claimant there is no requirement for us to consider the subsequent parts of the duty. The claimant's complaint of failure to comply with the duty to make reasonable adjustments in relation to the second meeting is not well founded and is dismissed.

Half pay

58. The third PCP relied upon by the claimant is:

    a. Moving the claimant on to half sick pay on 20 April 2023, six months into her sickness absence.

59. We considered whether this PCP was applied to the claimant. We concluded that it had. There was no dispute that the claimant had gone on to half sick pay on 20 April 2023, six months into her sickness absence.

60. The substantial disadvantage relied upon by the claimant compared to someone without the claimant's disability is

    a. Her TUPE terms and conditions allowed for a greater period of full sick pay.

61. We considered whether the PCP had put the claimant to this substantial disadvantage compared to someone without the claimant's disability. The respondent submits that the relevant period of absence was for the physical health condition caused by her accident on 2 November 2022. Thus, she cannot show that she is put to the substantial disadvantage pled, compared to someone without her mental health disability.

62. The reason for the claimant's absence was not in dispute. Her absence from work was not due to her mental ill health disability of bipolar disorder and complex PTSD. Her absence was due to her physical injury which was a workplace injury.

63. We concluded that the claimant had not shown that she had been put to the substantial disadvantage pled (essentially not receiving full sick pay for longer) compared with someone without her mental health disability. The sick pay arrangements were triggered by her physical workplace injury. They were not triggered by her mental health disability. She was not at the substantial disadvantage pled due to her mental health disability but rather due to her physical workplace injury. She was not at the substantial disadvantage pled (essentially not receiving full sick pay for longer) by comparison with someone without her mental health disability of bipolar disorder and complex PTSD.

64. We also considered the claimant's assertion that her TUPE terms and conditions allowed for a greater period of full sick pay, which is a component of the substantial disadvantage part of her claim. We concluded this was not made out by the claimant. We were not satisfied that the claimant had shown that she had a contractual entitlement to full sick pay which extended beyond six months.

65. Accordingly, we concluded that the claimant had not established that she was put at the substantial disadvantage she asserted. Having done so, there is no requirement for us to consider the subsequent parts of the duty. The claimant's

complaint of failure to comply with the duty to make reasonable adjustments in relation to being put on to half pay is not well founded and is dismissed.

Categorisation of absence

66. The fourth PCP relied upon by the claimant is:

    a. whether or not the respondent applied the provision criterion or practice of adhering to NHS Agenda for Change terms and conditions, and more specifically wrongly marked her absence as sickness absence rather than being due to workplace injury.

67. We considered whether this PCP had been applied to the claimant. The respondent accepted that it applied the NHS Agenda for Change in managing the claimant's absence. It did not accept that marking her absence as sickness absence was wrong as the absence was also marked as workplace injury.

68. The evidence of the respondent and as shown at the screenshot of page 78 of the respondent's bundle is that there were two places on the electronic form where the reason for the claimant's absence was recorded. Firstly, in a drop down box to record the absence type. Secondly, further down the form where there was an opportunity to tick the box marked "workplace injury". The box further down the form which recorded workplace injury had been ticked by the respondent from the outset. The drop down box to record absence type had been completed by the respondent to show "sick leave" but was later changed to "work related injury" or similar.

69. We concluded that because the option in the drop-down box had been changed from "sick leave" to "work related injury" or similar, the reason for her absence in this particular box had been wrongly recorded. We therefore concluded that the PCP of wrongly marking the claimant's absence as sickness absence rather than work related injury or similar in that particular drown-down box was a PCP applied to the claimant.

70. The substantial disadvantage relied upon by the claimant compared to someone without the claimant's disability is:

    a. she was moved on to half pay as a result.

71. We considered whether the PCP had put the claimant to this substantial disadvantage compared to someone without the claimant's disability. We did not consider that it had done so. For reasons already given the claimant's absence was because of a physical health condition not because of her disability. It could not be said that she was at a substantial disadvantage compared to someone who does not have bipolar disorder and complex PTSD.

72. We also considered the claimant's assertion that she was moved on to half pay as result of what had been wrongly recorded in the drop down box. We found that this was not the case. We accepted the respondent's evidence, which was not disputed, that the claimant would have moved onto half pay after six months, regardless of whether the drop down box recorded the reason for her absence as sick leave or work related injury.

73. Accordingly, we concluded that the claimant had not established that she was put at the substantial disadvantage she asserted. Having done so, there is no requirement for us to consider the subsequent parts of the duty. The claimant's complaint of failure to comply with the duty to make reasonable adjustments in relation to categorisation of absence is not well founded and is dismissed.

74. For all the reasons given, each of the complaints brought by the claimant under sections 20/21 Equality Act 2010 (reasonable adjustments) fail and are dismissed.

75. In the claimant's schedule of loss, produced on the last morning of the final hearing, she included a calculation for breach of the requirement to inform and consult with her in 2012 under the Transfer of Undertakings (Protection of Employment) Regulations 2006.This was at the time her employment transferred from her previous employer to the respondent. This was not an issue which had been identified by the claimant in the agreed list of issues for the final hearing. Any such complaint is substantially out of time by over thirteen years. No evidence was led by the claimant to address any time bar issue. No evidence was led by the claimant about the issue at all beyond stating that there had been a lack of information and consultation with her in 2012.

76. Accordingly, we determined that this was not a complaint which was before us upon which we were able to reach any determination.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge: **J McCluskey**
Date of Judgment: **06 December 2023**
Entered in register: **07 December 2023**
and copied to parties