



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Williams

**Respondent:** Driver & Vehicle Licencing Agency

**Heard at:** Cardiff (remotely)

**On:** 3-6 October 2023

**Before:** Employment Judge Lloyd-Lawrie, Mr P Bradney and Mrs M Humphries

## Representation

Claimant: In person

Respondent: Mr Bunting, counsel

**JUDGMENT** having been sent to the parties on 10/10/2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The Claimant claims that he has been discriminated due to his disability by the Respondent.
2. The Claimant has withdrawn his claims of age and sex discrimination and his claim of unfair dismissal was struck out as he had less than 2 years' service.
3. The Claimant is bringing the following claims: -
  - i. Direct disability discrimination (Equality act 2010, section 13)
  - ii. Discrimination arising from disability (Equality Act 2010, section 15)
  - iii. A failure to make reasonable adjustments (Equality Act 2010 sections 20 and 21)
  - iv. Unauthorised deduction from wages
4. The case was listed for 4 days, starting 3/10/2023 remotely at the Cardiff Employment Tribunal. The case was fully effective in this manner. The evidence in the case concluded on 04/10/2023 and submissions were heard from both parties on 05/10/2023.

## The Issues

5. In relation to the claim of direct disability discrimination, the questions that the Tribunal must answer are as follows: -
- i) On or around 15 January 2022 did Nia Davies of the Respondent ask the Claimant to go on special leave instead of sick leave?
  - ii) Was that less favourable treatment?
  - iii) If so, was it because of disability?
6. In relation to the claim of discrimination arising from disability: -
- i) did the respondent treat the Claimant unfavourably by:-
    - a. Delaying replying to correspondence;
    - b. Refusing to consider alternative roles;
    - c. Dismissing the Claimant?
  - ii) did the following things arise in consequence of the Claimant's disability.
    - a. The Claimant's sickness absence?
  - iii) was the unfavourable treatment because of any of those things? Did the Respondent dismiss the Claimant because of that sickness absence and or his refusal to go on paid special leave?
  - iv) Was the treatment a proportionate means of achieving a legitimate aim?
    - a. Was the treatment an appropriate and reasonably necessary way to achieve those aims;
    - b. Could something less discriminatory have been done instead;
    - c. How should the needs of the Claimant and the Respondent be balanced?
  - v) Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?
7. In relation to the claim for reasonable adjustments: -
- i) Did the Respondent know, or could it reasonably have been expected to know that the Claimant had the disability? From what date?
  - ii) A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCPs;
    - a. A requirement to attend work;
    - b. Reducing pay to half pay and then nil for sickness absence.
  - iii) Did the PCPS put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that he was unable to maintain an acceptable attendance at work?

- iv) Did the Respondent know or could it reasonable have been expected to know that the Claimant was likely to be placed at a substantial disadvantage?
  - v) What steps could have been taken to avoid the disadvantage?  
The Claimant suggest:
    - a. Replying to correspondence in a timely manner;
    - b. Placing him in an alternative role;
    - c. Allowing him six months' special leave;
    - d. Maintaining him on full pay;
    - e. Not dismissing him.
  - vi) Was it reasonable for the Respondent to have to take those steps, and when?
  - vii) Did the Respondent fail to take those steps?
8. In relation to the unauthorised deductions from wages, the following issues apply:
- i) Was the claim made to the Tribunal within 3 months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
  - ii) If not, was there a series of deductions and was the claim made to the Tribunal within 3 months (pus early conciliation extension) of the last one?
  - iii) If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
  - iv) If it was not reasonably practicable for the claim to be made within the time limit, was it made within a reasonable period?
  - v) If the Tribunal has jurisdiction to hear the claim, did the Respondent make unauthorised deductions from the Claimant's wages and if so, how much was deducted?

### The Facts

- 9. The Claimant was employed by the Respondent as a Customer Support Officer from 12/10/2020 until 16/01/2022.
- 10. The Respondent is the Driver and Vehicle Licencing Agency.
- 11. The Claimant contracted covid which led to his period of absence which started on 04/11/2020. The Claimant never returned to work after this date.
- 12. The Claimant was subject to a 9-month probation period which was due to end on 11/07/2021.

13. The Claimant was disabled by way of long covid and diabetes during the material times of his claim 15/01/2021 to 16/01/2022 as decided at a preliminary hearing.
14. The Claimant had first weekly, then, at this request, fortnightly keeping in touch calls with the Respondent during his absence.
15. The Claimant was told by Nia Davies on 22/01/2021 that a risk assessment had been undertaken and he would be placed on special leave which meant that he would not have to come into the office or work at home, should he come off sick leave at any point. It was confirmed that this would be on full pay.
16. The Claimant was told by Nia Davies on 16/02/2021 that she had taken advice and that he would retrospectively be placed on special leave from 22/01/2021. The Claimant confirmed that he understood this. He was not given an option.
17. The Claimant was then told by Nia Davies on 22/02/202 that he would not be placed on special leave and his sick leave was reinstated and he therefore needed to submit a doctor's note to cover the period.
18. The Claimant advised the Respondent on 17/03/2021, by email, that he had a recent downturn in his health and suggested that the only thing he could attribute it to was the mention of him going on special leave and the confusion and delay after it. He asked in that email to move to one call every 2 weeks, rather than weekly.
19. The Claimant was referred to Occupational Health and a report was prepared on 30/03/2021. The report stated that the Claimant was not fit to carry out his normal duties, that it was difficult to predict a return and that symptoms "can last several months". The view was given also that the claimant was unlikely to be classified as disabled under the Equality Act at that time. It was pointed out that the decision was legal, not medical. It was further said that it was too soon to consider reasonable adjustments.
20. The Claimant notified Ffion Jones during a call on 17/06/2021 that his diabetes had worsened and was now controlled by medication.
21. A second Occupational Health report was undertaken on 22/06/2021. This confirmed that the Claimant had said that he was unlikely to return to work after his current fit notes ended on 11/07/2021 unless his symptoms significantly improve. This confirmed that the Claimant was off sick due to his long covid, not diabetes and that the diabetes condition was likely to be classed as a disability but there was not any clarity on whether the long covid condition would also. It was stated that there would be no reasonable adjustments that could be made at that time to facilitate a return to work.
22. The Respondent wrote to the Claimant regarding an attendance review on 02/07/2021, the Claimant then responded on 08/07/2021.
23. The Respondent wrote to the Claimant on 12/07/2021 to advise that they would be a delay in responding to him in relation to the attendance review process.

24. The Respondent's staff had regular "keeping in touch" telephone meetings with the Claimant during his sickness absence. At this request, these were changed to fortnightly as he explained he found the weekly contact too much. He also delayed this on occasion. From the Respondent writing to the Claimant on 02/07/2021 to the outcome of that part of the process, the Respondent's staff spoke to the Claimant on 15/07/21 and 29/07/2021. The Respondent then received a new doctor's note for 1 month sickness on 10/08/2021. The next call took place on 14/08/2021. During these calls the Claimant did not mention feeling any anxiety regarding the delay.
25. The Claimant wrote to the Respondent for an update on 06/08/2021. The Claimant did not state that the delay was causing him any anxiety. The Respondent replied on 10/08/21, essentially providing another holding letter.
26. The Respondent then provided a reply on 19/08/2021 agreeing to support the Claimant's absence longer and stating that they would not refer the case to a manager to consider dismissal or downgrading at that stage.
27. The Claimant and Vicki Graham had a telephone conversation on 09/09/2021 where the Claimant advised on his worsening health. The Claimant advised that he thought he was wound up about his return to work and the 6-week delay with Ffion's outcome letter. The Claimant then confirmed this in an email on 14/09/2021.
28. A new Occupational Health report was commissioned which was provided on 20/09/2021. This stated the Claimant's belief that he had experienced long delays and that he had become anxious from the lack of communication. The report states that it is difficult to estimate a return to work as the Claimant said he was getting worse and had a fit note until 09/10/2023. This report stated that they did not think that the illness would be classed a disability as it is under 12 months duration. Some adjustments were suggested, such as a phased return and breaks.
29. On 20/10/2021 the Claimant emailed Vickie Graham asking to postpone their keeping in touch call for the next day as the thought of it made him tired and caused him to go to bed. He also asked if a return to work in an alternative role where he would not have to answer many questions or pass DPA was an option, or a 6 month leave of absence would be possible.
30. The Respondent's Ffion Jones wrote to the Claimant on 04/11/2021 regarding a formal health and attendance meeting, albeit in paper form again, due to the pandemic. In this response, she declined the Claimant's request for an alternative role, or a 6 month leave of absence.
31. The Claimant provided his answers on 16/11/2021.
32. The Claimant's pay reduced to nil on 18/11/2021. On that day, he emailed to say that he had attended his GP and advised that his brain fog and fatigue had been lifting over the previous month.
33. On 23/11/2021 the Respondent provided their outcome to that stage of the attendance review process and highlighted that the Claimant had said that

until his brain fog ends and his fatigue lessens, retuning was not an option and he had discussed it with his GP. The respondent confirmed that the case would now be passed to Nia Harris to decide if the Claimant should be dismissed or if his sickness absence level can continue to be supported.

34. On 1/12/2021, the Respondent wrote to the Claimant to invite him a formal attendance meeting. He was given a list of all documents that the decision maker would be relying on and the letter reads that they were attached to the email. The letter warns that the meeting could lead to the termination of his employment. He was referred to the probation policy in that letter.
35. On 08/12/21 the Claimant attended the formal meeting with Nia Harris. He advised that 3 weeks before the meeting he noticed his fatigue fading but that his memory was still not right and that he hoped the next thing to improve would be his brain fog and short-term memory loss. He advised that he had suffered from pressure build up, as well as fatigue which had put him in bed. He was asked that with the adjustments occupation health recommended, why he could not have returned before and he said that he could not possibly have returned before now. He advised that he speak to his GP first as he was scared to relapse and if they thought it was a good idea, he could try but he did not want to risk going backwards.
36. The Respondent wrote to the Claimant on 13/12/21 dismissing him for failing probation. The Claimant then emailed the same day, confirming his GP said he could return to work.
37. The Claimant was placed on special leave on 14/11/2021 until his effective date of termination on 16/01/2021.
38. The Claimant raised a grievance/appeal, that being the name of the document, on 24/12/2021. An appeal meeting was heard on 16/02/2022 by a senior manager. What was contained in the document was essentially an appeal against dismissal.
39. The dismissal was confirmed on 23/02/22.

### The Law

40. Section 13 (1) of the Equality Act 2010 provides that “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others”.
41. This means that in this case, it is necessary to establish if the Respondent has treated the Claimant less favourably than it treated or would treat others and the difference in treatment is because of the protected characteristic, namely disability.
42. Section 15 (1) of the Equality Act 2010 provides that a person (A) discriminates against a disabled person (B) if:
  - A treats B unfavourably because of something arising in consequence of B’s disability and

- A cannot show that the treatment is a proportionate means of achieving a legitimate aim
43. Section 15 (2) makes it clear that Section 15 (1) does not apply if A did not know and could not reasonably have been expected to know, that B had the disability.
44. The duty to make adjustments under s 20 of the Equality Act is made up of 3 requirements, any one of which will trigger an obligation on an employer to make any adjustments that would be reasonable to make. Any failure to do so will be regarded as an act of discrimination against the disabled person under section 21 of the Equality Act. The requirements are as follows: -
- Where a provision, criterion or practice (PCP) has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.
  - Where a physical feature puts a disabled person at a similar substantial disadvantage in relation to a relevant matter
  - Where the lack of provision of an auxiliary aid puts a disabled person at a substantial disadvantage in relation to a relevant matter.

#### Decision and Reasons

45. Whilst we appreciate more potential claims were discussed by the Claimant in his summing up, the Tribunal is limited to consider the case as originally brought by the Claimant and summarised in the 2 case management orders of the Tribunal. We will therefore go through the claims brought in turn.
46. In relation to the Claimant's claim of direct disability discrimination, that claim was brought in relation to a single allegation, that being that on or around 15 January 2021, Nia Davies of the Respondent asked the Claimant to go on special leave, instead of sick leave.
47. The Claimant originally claimed that the above occurred but in answer to cross examination, agreed the timeline as set out by Nia Davies. This is that he was told by Nia Davies on 22/01/2021 that he had been assessed as qualifying for special leave due to his "at risk" score and that he would be placed on special leave, which is leave at full pay, if and when he was fit to return to work. On 16/02/2021 the Claimant and Nia Davies had a conversation and he was told that Nia had taken advice and he would now be placed on special leave, retrospectively, from 22/01/2021. A further call then occurred on 22/02/2021 when Nia Davies told the Claimant that the special leave was being cancelled and he would be put back on sick leave from 22/01/2021 and that he was required to submit fit notes to cover the absence.
48. The agreed facts are that, therefore, the Claimant was not asked to go on special leave, instead of sick leave at any point. Therefore, this claim must fail. In any event, if this had occurred, the panel would not have found that this was less favourable treatment as it would have meant that the

Claimant would have remained home, on full pay and that his time not in work would not be classed as sick leave so would not count towards his entitlement to sick pay. This would have made the Claimant in receipt of full pay longer. This is therefore more favourable treatment, rather than less favourable treatment.

49. The claim for discrimination arising from disability covers 3 allegations only. We will deal with these in stages.
50. The first was that the Respondent treated the Claimant unfavourably by delaying replying to correspondence. We do not accept that the Respondent did in fact delay responding to any correspondence. Whilst there was a delay in the Claimant being provided an outcome to his attendance review meeting in July- August 2021, there was no delay in correspondence. The Respondent wrote to the Claimant and told him, 4 days post meeting/letter, that there would be a delay in the process. 3 telephone calls were held with the Claimant in the gap between the original letter and the outcome letter and the Respondent sent a response to the Claimant's chaser email within 4 days of receiving it. The Respondent received the Claimant's responses on 08/07/2021 and provided the final outcome on 19/08/2021. We find, that therefore, there was no delay in replying to correspondence in that the Claimant was kept informed and would have had more keeping in touch phone calls, should he not have asked to limit these to once per fortnight.
51. If we are wrong in our finding in relation to delay replying to correspondence, we of course would find that the delay occurred due to the Claimant's disability as the Respondent readily concedes that they needed the input and direction of the HR direction as the Claimant was off with long covid. We find that the reason for the delay was not unfavourable to the Claimant. To the contrary, on the Respondent's evidence, but for the Claimant having long covid, he would have been recommended for dismissal after around 3 months of absence. The delay, if there was one, meant that the Claimant was allowed to continue in employment after his original probation period was due to end. This again we say is more favourable treatment, rather than less favourable.
52. Dealing next with the allegation regarding refusing to consider alternative roles. We find that firstly, the probation policy does not state that alternative roles must be considered, only that they may be considered. Secondly, we find that albeit briefly, alternative roles were discussed by the Respondent in that the Claimant was informed in the appeal outcome that there were no suitable roles available as he had indicated that he did not want to have to deal with "DPA" checks and all of their roles involved this process. Further, we note that on the 3 referrals to Occupational Health, questions regarding reasonable adjustments were raised each time by the employer and it was at no point suggested that the Claimant could return if given a new role. The Claimant, in his own evidence, stated that he could not have returned to do any work before 18/11/2023. The Claimant has provided no evidence, other than a comment that he would be surprised if an organisation as big as the DVLA did not have suitable roles, that any suitable vacancies existed during the time to be considered. We find that this limb of the claim must therefore fail.



53. Moving now to the decision to dismiss the Claimant. This is obviously unfavourable treatment as he was dismissed for his sickness absence which was due to his disability. The question therefore was this a proportionate means of achieving a legitimate aim. The Respondent says its legitimate aim was to ensure staff provide regular and effective attendance and/or enabling the respondent to ensure the efficient and effective delivery of its services to the public.
54. We find that it relevant to note that the Claimant was actually only ever in work, doing his role, for 3 weeks of the time he was employed. His probation period was due to end on 11/07/2023 and he was still allowed to remain employed, on sick leave, for months after this date. The Respondent sought to avoid dismissal we find, by 3 occupational health referrals and requests that the Occupational Health team advise them on reasonable adjustments. Whilst post decision to dismiss, but on the same day, the Respondent were notified by the Claimant that he was now fit to return to work. We consider it reasonable for the Respondent to have concluded that from his email, what he said in the dismissal meeting and what he had said in the appeal meeting, that he was unlikely to be able to provide regular and good service for some time at the very least. This is as he advised that his GP wanted better terms for him that the phased return suggested and that he was not sure he would be able to return to work successfully but that he would try. We find then when faced with an employee who has been off sick for over 8 months of a 9 month probation period, who is still not sure that he can return to work and sustain work, some 15 months after first going off sick, that dismissal was an appropriate means of achieving its legitimate aim.
55. We will now deal with the claim relating to reasonable adjustments.
56. We find that the Respondent is fixed with knowledge of disability from 22/06/2021. We find that that was due to the receipt of the Occupational Health report. We accept that until that point, the Respondent could not have been expected to know that the Claimant's long covid was likely to be deemed a disability or that is diabetes was causing such a functional effect as to be considered a disability also.
57. We find that the Respondent did have the following PCPs, they were a requirement to attend work and reducing pay to half pay then nil for sickness absence.
58. We find that the PCPS did put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that due to his long covid, he was unable to maintain an acceptable attendance at work.
59. We find that the Respondent knew that the Claimant was placed at this disadvantage or should have known as they were aware that he was off sick, with long covid, and due to this condition, could not return to work.
60. We find that the steps suggested by the Claimant to avoid that disadvantage, namely replying to correspondence in a timely manner, placing him in an alternative role, allowing him 6 months special leave, maintaining him on full pay and not dismissing him are things that potentially could have prevented the disadvantage.

61. We then consider whether it was reasonable for the Respondent to take those steps, and when.
62. In relation to the point regarding delaying in replying to correspondence. We accept the submission of the Respondent that there is in fact no PCP that relates to this. In any event, as found above, we found that the Respondent did not delay in replying to correspondence. The Claimant was suffering with long covid, a new illness that has only been in place since the pandemic. We find it reasonable that the Respondent sought advice from the HR Director on this. We also take judicial notice of the fact that during the pandemic, things were changing frequently and HR departments were facing unprecedented stresses and demands on their time. We do not accept that it would have been reasonable for the Respondent to have replied to the Claimant any quicker than they did.
63. In relation to an alternative role, we find that based on the Respondent's evidence, the Respondent reasonably took the view that the Claimant was unfit for any work before the date of dismissal. Further, we find that the Respondent was justified in accepting the evidence of the Claimant to them which is that he was having short term memory loss and brain fog and that he did not want a role where he would have to deal with checking "DPA". We find that the Respondent was reasonable in thinking that they had no suitable role for the Claimant. The Claimant has brought no evidence to suggest that the Respondent did have suitable vacant roles at that point that he could have done that did not have any DPA elements. The Respondent's witnesses gave evidence that there were not any.
64. Dealing now with the allowing the Claimant 6 months special leave. We find that the assertion of the appeal officer, that special leave cannot be used to mask sickness absence, must be a reasonable position. Further, we find it also reasonable that an employer states that an employee must have 2 years' service before they can apply for a career break. We find that if this was not the case, the Respondent would have to regularly train new staff, who could not be then offered permanent jobs, to cover those people that were off. We find that the Respondent was reasonable in not allowing this request.
65. We find that maintaining the Claimant on full pay would not be a reasonable adjustment. There is a wealth of case law that agrees that when someone cannot work due to ill health, they do not have to be maintained on full pay. That places a highly onerous responsibility on an employer who must pay a replacement as well as the person on sick leave. Following the guidance of O'Hanlon v HMRC 2007 ICR 1359, CA, we do not accept that this is a reasonable adjustment that the Respondent should have made.
66. Lastly, we consider whether a reasonable adjustment would have been not dismissing the Claimant. We find here, in fact, that the Respondent did make a reasonable adjustment to their probation policy in that but for the Claimant being off with long covid, he would have been referred for a dismissal meeting after no more than 3 months absence, as stated by the Respondent's appeal chair. The fact that the Respondent waited over a year to dismiss the Claimant, we find, is an adjustment. We find that that adjustment is more than reasonable as the Respondent is entitled to ensure that its staff can provide regular and good service. The Claimant,

as late as the appeal meeting, was still not providing an emphatic response to whether he would be able to return to work and sustain working.

67. From the reasons given above, all claims of discrimination fail.

68. Moving now to unauthorised deductions from wages. The Claimant did not bring any evidence on this point. He was placed on full pay from 14/12/2021 and thus as ACAS was not contacted until 07/04/2022 and the claim not issued until 09/05/2022, the claim was out of time. The Claimant has brought no evidence as to why it was not reasonably practicable to bring the claim in time and thus the claim cannot be considered as the Tribunal does not have jurisdiction to hear it. In any event, should the Tribunal have had justification to hear it, we find that the deductions were authorised by contract as the Claimant was paid in line with the company sick pay scheme.

A N Lloyd-Lawrie

Employment Judge

Date 2 November 2023

REASONS SENT TO THE PARTIES ON 6 November 2023

FOR THE TRIBUNAL OFFICE Mr N Roche