Case No: 2303317/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr J Umoren

Respondents: Transport for London (1) and Mr N Kindrat (2)

Heard at: London South ET by hybrid hearing **on** 4th, 5th, 6th, 7th, 8th and 11th March 2024

Before: EJ Rea
Ms Leverton
Ms Mitchell

Representation
Claimant: In person
Respondent: Ms Stroud, counsel

JUDGMENT

1. The complaints of direct disability discrimination are not well-founded and donot succeed:
2. The complaints of indirect disability discrimination are not well-founded and donot succeed:
3. The complaints of discrimination arising from disability are not well-founded anddo not succeed:
4. The complaints of failure to make reasonable adjustments are not well-foundedand do not succeed:
5. The complaints of disability-related harassment are not well-founded and donot succeed:
6. The complaint of constructive unfair dismissal is not well-founded and does notsucceed:
7. The complaint of unlawful deductions from wages is well-founded and **does** succeed. The First Respondent made an unlawful deduction from the Claimant's wages in respect of 19 days accrued but untaken holiday entitlement from the 2019 leave year.

WRITTEN REASONS

Background

8. The Claimant was employed by the First Respondent from 15 March 2015 until10 July 2020 when his resignation took effect. He was employed in the role of Incident Response Coordinator. The Claimant had previously been engaged by the First Respondent as a contractor since 2012.
9. The Second Respondent, Mr Kindradt, was employed by the First Respondentas Incident Response Lead at the relevant times. He took over some line management responsibilities in respect of the Claimant, in particular managing his sickness absence, from September 2019 onwards.
10. The Claimant notified the First Respondent of his resignation on 1 July 2020 and his resignation took effect on 10 July 2020.
11. Early Conciliation commenced on 7 July 2020 and ended on 6 August 2020. The claim form was presented on 8 August 2020.

Claims and Issues

12. A Preliminary Hearing was conducted on 7 October 2021 at which the list ofissues was agreed. The case management summary appears at pages 45-55 of the bundle. This was based on the letter of claim submitted by the Claimant's former representative, ELS, dated 19 June 2020 which is at pages 15-29.
13. The Claimant is making the following complaints:
    - 13.1. Constructive unfair dismissal
    - 13.2. Direct disability discrimination
    - 13.3. Discrimination for a reason arising as a consequence of disability.
    - 13.4. Indirect disability discrimination
    - 13.5. Failure to make reasonable adjustments.
    - 13.6. Disability-related harassment
    - 13.7. Unlawful deductions from wages

Procedure, documents and evidence

14. The Tribunal heard evidence from the following witnesses:
    - 14.1. The Claimant
    - 14.2. Ms Maria Budnikova (a former girlfriend of the Claimant's)
    - 14.3. Mr Cobbold (by way of CVP)
    - 14.4. Mr Kindradt
    - 14.5. Ms Brown; and
    - 14.6. Mr Owen

15. The Tribunal also considered written witness statements which had beenprepared in respect of Mr Page and Mr Singh, both of whom were line managers of the Claimant during parts of the relevant period of his claim. The Respondents had made an application under Rule 42 in respect of these witnesses which was granted. The Claimant's mother, Ms Asu-Adinye, had also prepared a witness statement but the Tribunal was told at the outset of the

hearing by the Claimant that she was too ill to give evidence. In the interests of justice, the Tribunal agreed to also consider this witness statement in accordance with Rule 42. It was explained to the parties that only limited weight could be attached to the evidence in these witness statements as it could not be tested by way of cross-examination.

16. A bundle of documents comprising 595 pages was produced, in both paper andelectronic form, together with a bundle of disability documents running to 57 pages. In the course of the hearing the Respondent was granted permission to add an additional document relating to the Claimant's holiday pay calculation and a copy of the email the Respondent had sent to the Tribunal on 29 December 2022 confirming the legitimate aims relied upon in respect of the disability discrimination complaint.

The Law

17. Time limits in which to present complaints to the Employment Tribunal aregoverned by section 123 of the Equality Act 2010. Given the date that the claim form was presented 8 August 2020 and the dates of early conciliation (7 July 2020 to 6 August 2020), any complaint about something that happened before 7 April 2020 is potentially out of time.
18. However, an act of discrimination which "extends over a period" shall be treatedas done at the end of that period under section 123(3) of the Equality Act 2010.
19. In some situations, discrimination continues over a period of time, sometimesup to the date of leaving employment. If so the time limit in which to present a Claim Form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is 'continuing discrimination'.
20. In *Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96*, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents was evidence of a 'continuing discriminatory state of affairs'.

<u>Constructive unfair dismissal</u>

21. Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.
22. In "Harvey on Industrial Relations and Employment Law" at paragraph DI [403]. *"In order for the employee to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law. (3) He must leave in response to the breach and not for some other, unconnected reason. (4) He must not delay too long in terminating the contract in response to the employer's breach,*

otherwise he may be deemed to have waived the breach and agreed to vary the contract.”

23. The Tribunal’s starting point would the test laid down by the Court of Appeal inWestern Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of their resignation was the respondent’s fundamental breach of contract? In other words, what was the effective cause of the employee’s resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal “made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of ‘reasonable conduct by the employer’” (see Harvey DI [411]).

Disability status

24. Section 6 of the Equality Act 2010 (“EA”) says that.
    a person (P) has a disability if.
    (a) P has a physical or mental impairment, and
    (b) The impairment has a substantial and long-term adverse effect on P’s abilityto carry out day-to-day activities.

Direct discrimination

25. Section 13 of the EA says 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.

Indirect discrimination

26. Section 19 of the EA says that.
    (1) A person (A) discriminates against another (B) if A applies to B a provision,criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.
    (2) For the purposes of subsection (1), a provision, criterion or practice isdiscriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share thecharacteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at aparticular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Discrimination for a reason arising as a consequence of disability.

27. (1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B'sdisability, and

(b) A cannot show that the treatment is a proportionate means of achieving alegitimate aim.

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

Duty to make adjustments.

28. Section 20 says that.

    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.

29. Section 21 says that.

    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.

Harassment

30. Section 26 says that.

A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic,and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensiveenvironment for B.

Unlawful deductions from wages

31. The statutory prohibitions on deductions from wages are contained in Part II ofthe Employment Rights Act 1996 (ERA). The general prohibition on deductions is set out in s.13. A right arises where monies have not been paid which are “properly payable”. There must be an actual failure to pay, and it must relate to money that is due to the individual.

13.— Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutoryprovision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent tothe making of the deduction.

…………….

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

Findings of fact

32. We decided all the findings referred to below on the balance of probability,having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.
33. We have only made those findings of fact necessary to determine the issues.It has not been necessary to determine every fact in dispute where it was not relevant to the issues between the parties.
34. Allegation 1 - We don't consider that the facts bear out that the Claimant wascoerced into signing the permanent contract for the role of Incident Response Coordinator. No documentary evidence was presented to the Tribunal to show that he complained at the time. If the Claimant did mention it to Mr Josephs as he claimed, when Mr Josephs left the Respondent's employment, the Claimant didn't raise it as an outstanding issue with anyone else. Although the Claimant was aggrieved that the lower pay of the substantive role was applied to him sooner than he had expected, the start date of the contract was in fact changed to his benefit to ensure he would qualify for a pay rise in that year.
35. Allegation 2 - The First Respondent didn't consider retraining was needed ashe was familiar with the role. He was working alongside at least two, if not three people, at all times so a buddy would not have been needed and was not recommended by Occupational Health ('OH'). Mr Cobbold's evidence was that the Claimant did not specifically request a buddy. The Tribunal finds that there were no major changes for the Claimant to adapt to but, in any case, he was told in the 22 June 2019 meeting about any such changes that had occurred in the control room in his absence. Managers had also checked in with him during his shifts throughout his phased return. The Tribunal finds that the Claimant did have a return to work ('RTW') interview on 19 July 2019 conducted by Mr Cobbold as Mr Page was absent due to sickness.
36. Allegation 3 - Mr Cobbold acknowledged the Claimant could have beencontacted by managers prior to the RTW interview as there was an

element of confusion about his working hours during the phased return. This was corrected by an email sent by Mr Cobbold. The evidence presented to the Tribunal was that any such calls would not have been made after about 10pm or before 6.30am given the shift patterns. If it did happen, we find it wouldn't have happened more than twice on the balance of probabilities.

37. Allegation 4 - Mr Kindrat accepts that he offered the Claimant the opportunityfor preferential consideration for overtime which was oversubscribed and so therefore many colleagues missed out. Mr Kindrat's evidence was that he only did so in light of the Claimant confiding his financial difficulties during the meeting of 22 June 2019. We accept that this was a well-intended gesture on the part of Mr Kindrat which was misunderstood by the Claimant.
38. Allegation 5 - OH advice did not cover a requirement to provide a stress-freeenvironment for the Claimant. What the advice did say was to "conduct a returnto-work meeting with a view of resolving the causative factors" p185. This is precisely what the First Respondent did.
39. Allegation 6 – We find that the amount of correspondence from the SecondRespondent was proportionate and necessary given the Claimant's failure to respond to him during September and October 2019. There was only one telephone call after which Mr Kindrat corresponded by email as requested by the Claimant. The limited text message exchanges were also seen by the Tribunal.
40. Allegation 7 - It was clear in the Claimant's evidence, that it was the fact MrKindrat was contacting him rather than Mr Page that was problematic for the Claimant, rather than the number or nature of those communications. Mr Page was seriously unwell, but the Claimant was resistant to accepting the need for someone else to take over managing his sickness absence, even after this was explained to him.
41. Allegation 8 - The First Respondent needed to obtain more information aboutthe Claimant's condition and what needed to be put in place to support him in returning to work. This was an entirely reasonable thing to do and in compliance with its policy. The Claimant has unhelpfully taken the position that he should not be expected to attend an OH appointment until he was well enough to attend work. That would have frustrated the purpose of the referral.
42. Allegation 9 - The Respondents were simply following the policy in reducing theClaimant's salary to half pay. Informing him three times was done to ensure he was fully aware at a time he was not engaging in contact with the Respondents.
43. Allegation 10 and 11 - Suspending the Claimant's company sick pay was adecision the Second Respondent was entitled to make in line with the policy. The Claimant had not been engaging for 8 weeks and was refusing to meet with Mr Kindrat or attend an OH appointment.
44. Allegations 12 and 13 - Mr Kindrat's evidence is that he did take account of theClaimant's email of 21 November p201. This contained a number of reasons for the lack of contact over September, October and part of November 2019. The Claimant also said he expected to be fully fit for work by January 2020. None of this explained why he was unable to attend an OH appointment in December 2019. Mr Kindrat did not disregard the email but did not agree with the request to delay the OH appointment until January. Mr Kindrat explained the reason for this in his email p204 "I would really like to help support you and understand our role in your absence".

45. Allegation 14 - Mr Kindrat's evidence was that the typo in his contact numberin this one email was a genuine error. The Claimant's belief that this was done deliberately to prevent the Claimant from contacting him during this period is irrational. There are plenty of other typos in his emails to the Claimant that are quite clearly innocent. The Claimant could easily have checked the phone number from previous emails (including one of 15 November 2019) even if it was the case, he no longer had the number stored due to changing his mobile phone.
46. Allegation 15 - Mr Kindrat took the view that the Claimant's email stating hewas not available to attend the scheduled OH appointment did not put forward any reasonable explanation for this (p206). This email was sent only one working day prior to the scheduled appointment in any event.
47. Allegation 16 - Mr Kindrat had sent the Claimant a copy of the Attendance atWork Policy by email on 18 September 2019 (p193). This contained a section confirming that SSP was only payable for 28 weeks which the Claimant confirmed in cross-examination he had seen. The email informing him his company sick pay was being stopped suggested he should contact HRS if he would like any specific details on the exact pay to which he was entitled. It is surprising that the Claimant did not take any steps to find out what pay he would receive given his difficult financial situation. This did all come about as a result of the Claimant failing to engage properly with the Second Respondent which led to his company sick pay ceasing. However, it was an error for the First Respondent to fail to send the SSP booklet to the Claimant which would have made clear that his SSP entitlement had run out and he would receive no pay at all from 1 January 2020. Had he been told in advance; the Claimant would have had an opportunity to plan for this rather than being taken by surprise. This would not have changed the fact that his statutory entitlement had ceased.
48. Allegation 17 – We find that this is an accurate description of the Claimant'sactions during this time. There is no evidence to support the assertion that the Claimant was asked to provide updates 'continuously' as alleged.
49. Allegation 18 – We find it was not reasonable to expect the Second Respondentto have arranged cover over the Christmas holidays in relation to specifically managing the Claimant's absence. This would have been impractical given the short duration of his holiday and there was no reason to expect that anything urgent would arise. The Claimant did not try to call Mr Kindrat's mobile which he said he answered during holidays. He also didn't email him during that week. Mr Kindrat addressed the issue as soon as he was back at work on 7th January 2020.
50. Allegation 19 - It was unclear what the Claimant felt had not been done in termsof treating his email as a formal complaint. He acknowledged in crossexamination his intention was that it would be resolved informally as a first step to raising a grievance. Mr Kindrat gave a full and comprehensive explanation of what had happened and where the First Respondent had got it wrong. Mr Kindrat also invited the Claimant to discuss this further in person at a meeting. The Claimant's objection was to Mr Kindrat discussing the Claimant's ongoing absence from work as well as his pay issue. This was an unreasonable approach.
51. Allegation 20 - This was not the first time Mr Kindrat had informed the Claimantthat he had taken over line management functions in respect of him. The complaint was about the decision to stop his pay but was not a complaint

about Mr Kindrat, certainly nothing about him bullying the Claimant at this stage.

52. Allegation 21 - Only Mr Kindrat was in a position to answer the complaint aboutpay so this was the correct approach.
53. Allegation 22 - The half pay was being reinstated and an explanation had beengiven for what had transpired. The Claimant had refused to attend a meeting to discuss this further. This was no reason to delay a sickness review meeting taking place. Indeed, returning to work would have assisted the Claimant's financial situation considerably.
54. Allegation 23 - Mr Kindrat was simply repeating to the Claimant what he hadsaid in his email at p272, and this is also what he had said to his GP when requesting a further fit note signing him off work for another month.
55. Allegation 24 - Mr Kindrat accepts he put forward two alternative shift patternsfor the Claimant's phased return to work, one of which contained night shifts, or more accurately evening shifts. The OH report had recommended avoiding night shifts for the phased return, but Mr Kindrat had valid reasons for saying that it would be good for the Claimant to work evenings so that he got experience of closing tunnels which only happened during these shifts. However, the Claimant was being given the choice of whether to work these shifts or not which is why there were two alternative rotas drawn up by him.
56. Allegation 25 – We find this allegation is very selective and does not reflect thesequence of events that happened on 7 April 2020. In the course of the evidence given by the Claimant and Mr Kindrat, the Tribunal established that Mr Kindrat telephoned the Claimant at 2pm when the meeting was scheduled to begin but the Claimant's line was busy. The Claimant telephoned back a little later to explain he had been on a call with his GP. Mr Kindrat tried to dial in the Claimant's union representative, but he was not available. The Claimant tried calling Mr Kindrat again later in the afternoon when both he and his union representative were available, but Mr Kindrat was in a meeting. Mr Kindrat therefore corresponded by email to arrange that the sickness review meeting take place at 2pm the following day instead.
57. Allegation 26 - The Claimant accepted during the hearing that there was nopossibility of him working remotely and remote access was only given to him to facilitate him making a hardship loan application. He accepted this was misunderstood by his representative at the time. What he was really unhappy with was the suggestion that he incur more debt. The Claimant could not explain why he had not clarified this allegation during the lengthy time period that elapsed before this case came to a final hearing.
58. Allegations 27 and 28 - Mr Owen explained in his evidence why he decided tokeep Mr Kindrat managing the Claimant's absence for continuity reasons despite the Claimant raising a formal grievance against Mr Kindrat. Mr Owen felt it would have caused more stress to the Claimant and additional delay to start from scratch. The panel noted that the Claimant himself complained about the high turnover of managers that had been involved in his case. Alongside this, a new line manager was arranged to take over when the Claimant returned to work. Mr Weaver was put in place and then when he moved roles Mr Singh took over. The Policy offered Mr Owen the choice whether or not to remove Mr Kindrat from all line manager duties in respect of the Claimant. The Tribunal takes into account that this was a very difficult time as the pandemic was starting to take hold and the First Respondent placed approximately 45% of staff in this department on furlough. It would be wrong to ignore this important

context. However, the Claimant was being asked to continue meeting with Mr Kindrat who he was saying had bullied him which was not ideal. It is important to note the Claimant had a history of struggling to communicate with previous managers in addition to Mr Kindrat (Mr Josephs and Mr Page in particular). The Tribunal finds that there was an element of Mr Owen prejudging the merits of the Claimant's grievance when reaching this decision. This should not have been taken into account although the Tribunal can see why it appeared to the First Respondent that the Claimant was intent on delaying his return to work by this stage and that its patience was therefore running out.

59. Allegation 29 - It would have been patently inappropriate for Mr Kindrat todiscuss the Claimant's grievance with him given it was about Mr Kindrat in part. The Tribunal does not accept this meant the Claimant was 'trapped in a circle' as he puts it. Ultimately, the Claimant was unwilling to return to work until in his mind his grievance had been resolved to his satisfaction. This was part of a pattern of the Claimant changing the goalposts in terms of what needed to have happened to allow him to return to work as the Respondents said in their submissions.
60. Allegation 30 - The delay in hearing the Claimant's grievance was down to theimpact of the pandemic. There was plenty of evidence before the Tribunal that the First Respondent was actively trying to make arrangements for the Claimant's grievance to be heard despite these unprecedented circumstances. Even after the Claimant resigned, the First Respondent followed through with the arrangements to hear and determine his grievance, although it was understandably deprioritised by this point.

Decision

Issue of disability

61. Was the Claimant a disabled person at the relevant times?
62. The Claimant relies on his depression being a recurrent condition. All but oneof his fit notes stated that he had recurrent depression (pages 196, 202, 210). The only one that didn't say this is the one on p272 which referred to low mood. As there were several occurrences of depression previously, we do find it was likely to reoccur in terms of that it could well happen. There was no specific evidence before the Tribunal as to whether the previous episodes of depression had a substantial adverse impact on the Claimant's ability to carry out day-today activities. However, there was evidence in the Claimant's impact statement about his depression during the relevant period having a substantial adverse impact on his ability to carry out day to day activities. This was substantiated by the evidence provided by Miss Budnikova.
63. The Tribunal finds that the Claimant was a disabled person at the relevant timesas he had a recurring condition of depression that had a substantial adverse impact on his ability to carry out day-to-day activities. If we are wrong on this point, in the alternative we find that the Claimant's episode of depression was in any event likely to last more than 12 months.
64. Did the Respondents have actual or constructive knowledge that the Claimantwas a disabled person at the relevant times?
65. We find that the fit notes were enough to mean the Respondents should havehad knowledge that the Claimant was disabled due to having a recurrent

condition of depression or, in the alternative that his depression was likely to last more than 12 months. This is the case even though no advice on this point was sought from or given by OH.

Discrimination allegations

66. **Allegation 1 – the 1st Respondent failed to respond to the Claimant regarding a reduction in pay when his secondment ended, and his role became permanent.**

The Tribunal determines that this was not an act of harassment. Certainly, it didn't have that purpose, and we don't find that it had that effect. The Claimant signed the contract and didn't put anything in writing to say he did so under duress, nor did he query when it would take effect.

Allegation 2 – in July 2019 not providing the Claimant with any retraining or a buddy or conducting any return-to-work meetings or overlooking his return to work.

The Tribunal determines that this was not an act of harassment or direct discrimination. No retraining or provision of a buddy was required and, a RTW interview was conducted by Mr Cobbold on 19 July 2019.

Allegation 3 – in July 2019 different managers contacting the Claimant at various times when he was not scheduled to work as they were unsure of his working hours.

The Tribunal determines this was not an act of harassment. Our finding was that this only happened twice at the most and not during the night. It was clear this did not have that purpose. The Claimant did raise the issue at his RTW meeting and we accept the Claimant's evidence that it had a negative impact on him at the time. However, we don't accept it was reasonable to have the prescribed effect. If it was genuinely as upsetting as the Claimant said, we find he would have remembered at least some of the details of these calls. This therefore falls short of being an act of harassment.

Allegation 4 – during the Claimant's phased return to work in July 2019, the Second Respondent contacting the Claimant to offer him overtime.

The Tribunal determines that this was not an act of harassment. We find that it didn't have the prescribed purpose as Mr Kindrat had good intentions. We can see why the Claimant found it disconcerting to receive this offer in the context of being on a phased return working reduced hours. However, we find this falls short of having the prescribed effect to constitute harassment.

Allegation 5 – failing to follow OH advice by not providing the Claimant with a stress-free work environment by offering overtime.

The Tribunal determines this was not harassment for the same reasons above. The Tribunal also determines this was not a failure to make reasonable adjustments as a phased return was put in place and a meeting was arranged in

accordance with the OH advice. The fact that an offer of overtime was made to the Claimant doesn't change that.

Allegation 6 – In September 2019 the Second Respondent repeatedly contacted the Claimant to request he attend a sickness absence review meeting and an OH appointment.

The Tribunal determines that this was not an act of harassment. Mr Kindrat was doing his job by managing the Claimant's sickness absence. We have found that the number of phone calls and text messages made was proportionate and so did not have the prescribed purpose. Nor did it have that effect on the Claimant.

Allegation 7 – the Second Respondent emailing the Claimant instead of Mr Page, his line manager.

The Tribunal determines that this was not an act of harassment. We can see why the Claimant initially questioned being contacted by Mr Kindrat but an explanation was provided to the Claimant. It was reasonable for Mr Kindrat to deal with the Claimant's absence as Mr Page was on sick leave. This did not have the prescribed purpose or effect.

Allegation 8 – the Second Respondent on 18 Sept 2019 inviting the Claimant to attend an OH appointment despite the Claimant saying he was unable to attend until he had seen his GP.

The Tribunal determines that this was not an act of harassment. Mr Kindrat was just doing his job. It wasn't for the Claimant to dictate the timescale of an OH appointment. This did not have the prescribed purpose or effect.

Allegation 9 – the Second Respondent on 18 September 2019 warning the Claimant his salary will reduce to half pay if he remains off sick.
Allegation 10 – on 24th September the Second Respondent reiterating that the Claimant's salary would reduce to half pay from 16th October 2019.

The Tribunal determines that this was not an act of harassment. The First Respondent was obliged to inform the Claimant about his company sick pay. Telling him more than once was reasonable to ensure he was aware. The Claimant has also alleged that not informing him of going on to zero pay was harassment – he can't have it both ways.

The Tribunal also determines that this was not an act of direct disability discrimination. The same thing would have happened to anyone absent for this duration due to sickness, whether they were disabled or not.

The Tribunal also finds that this was not discrimination arising from the Claimant's disability. The Respondents did have constructive knowledge he was a disabled person, and the act was unfavourable treatment which did arise in consequence of his sickness absence, but it was objectively justified.

Allegation 11 – on 15th November the Second Respondent emailing the Claimant to say his company sick pay has ceased as a result of him not responding to his email.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect.

The Tribunal further determines it was not a failure to make reasonable adjustments. It was not clear to the Tribunal what reasonable adjustment was being proposed by the Claimant and if he maintained he should have been dealt with differently what would that have entailed. It was clear from the evidence that a number of adjustments had been made; Mr Kindrat agreed to correspond by email rather than telephone, agreed to arrange an OH assessment first rather than a sickness absence review meeting and, gave plenty of chances for the Claimant to respond to his emails before suspending his sick pay. There was no evidence that the Claimant was incapable of responding to emails during this time and the Claimant was given a specific timescale to respond – 12th November. The importance of him responding in this timeframe and the consequence for his sick pay if he did not was reiterated and the Claimant didn't ask for a longer period to respond. When the Claimant did eventually respond very poor excuses were given. The Claimant's sick pay was reinstated as soon as he did attend an OH assessment.

The Tribunal further determines that the alleged conduct was unfavourable treatment which did arise from his sickness absence, which was a consequence of his disability, but it was objectively justified.

Allegation 12 – on 29th November 2019, the Second Respondent disregarding the Claimant's email saying he was not well enough to attend a meeting.

Allegation 13 – on 9th December the Second Respondent disregarding the Claimant's reasons for not wanting to attend an OH appointment and scheduling one on 18 December 2019

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose of effect. The evidence was that the email wasn't disregarded but the contents were. The Claimant had not put forward any medical evidence to say he was too unwell to attend a meeting in December and it was not reasonable to expect the Respondents to take the Claimant's word for it. Mr Kindrat did answer the points made by the Claimant and explained the purpose of the OH referral, but the Claimant did not take this on board. As the Claimant stated that he hoped to be fit to return to work in January it was appropriate for him to meet with OH in December to allow time for the Respondents to implement any recommended advice from OH.

The Tribunal further determines this was not an act of direct discrimination as it was not unfavourable treatment.

The Tribunal further determines this was not discrimination arising from disability as it was not unfavourable treatment and even if it was it was objectively justified.

Allegation 14 – on 9th December 2019 the Second Respondent sending the Claimant an email with his incorrect contact number.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect. It was patently clear this was a simple typographical error on the part of Mr Kindrat. We do not accept that the Claimant did not have recourse to correct contact details from earlier emails and text messages on his phone. We agree with the Respondent's submissions on this point that the Claimant's perception of events was not reasonable or borne out by the facts.

Allegation 15 – On 16th December 2019 ignoring the Claimant saying he could not make the OH appointment due to his mental health.

The Tribunal determines that this was not an act of harassment as it had neither the prescribed purpose or effect. The Claimant only sent this email one working day before the appointment and simply said he wasn't available without any reference to his mental health.

The Tribunal further determines it was not an act of direct discrimination as it was not less favourable treatment.

Allegation 16 – the Respondents failing to notify the Claimant that he would not receive any pay on 1st January 2020

The Tribunal determines this was not an act of direct discrimination as it was not because of disability.

We appreciate that unexpectedly not receiving any pay had a significant negative impact on the Claimant. However, the First Respondent's failure to inform him was only one factor leading to what happened. The Claimant didn't take steps to investigate what statutory sick pay he would receive and, if he had maintained contact with Mr Kindrat he would still have been on half pay. The Tribunal accepted that this had the effect of creating a hostile environment for the Claimant however given all of the other contributory causes we determined it was not reasonable for it to have that effect. We echo what the Respondents stated in their written submissions from paragraph 65 onwards. The Tribunal therefore determines this was not an act of harassment.

The Tribunal further determines that it was not discrimination arising from disability as it was not unfavourable treatment for the same reasons.

Allegation 17 – on 7th January 2020 the Second Respondent advising the Claimant he was concerned about "a pattern of non-engagement developing both by way of failure to provide contact updates and the failure to attend the OH appointment".

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose nor effect. Mr Kindrat was simply providing an accurate summary of events that fits with the evidence of what happened. The Tribunal further determines this was not an act of direct discrimination as it was not less favourable treatment.

The Tribunal further determines it was not an act of indirect discrimination as the PCP relied upon of requiring the Claimant to give continuous updates on his condition was not in fact applied to the Claimant.

Allegation 18 – in late December 2019 to early January 2020 failing to assign someone in the Second Respondent's absence to deal with any issues the Claimant may have.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it did have such an effect this was not reasonable.

The Tribunal further determines this was not an act of direct discrimination as it was not less favourable treatment. We found there was no need for Mr Kindrat to assign someone else to manage the Claimant's sickness absence while he was taking holiday over the Christmas period. We accept Mr Kindrat's evidence that there was no reason for him to expect any significant developments in his absence.

Allegation 19 – failing to treat the Claimant's email of 15 January 2020 as a formal complaint as requested by him.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose nor effect. The Tribunal further determines it was not an act of direct discrimination as it was not less favourable treatment. The Claimant said in cross-examination that he expected it to be treated under the informal stage of the grievance process. The Claimant did get an explanation in writing and Mr Kindrat said he would discuss it with him at their meeting. That was the appropriate way of dealing with it at this stage. It was treated as a formal complaint and responded to properly.

Allegation 20 – on 22 January 2020 the Second Respondent informing the Claimant he would be managing the Claimant's absence despite the Claimant raising a formal complaint.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it did this was not reasonable. The Tribunal found it was reasonable for Mr Kindrat to deal with the complaint as it was raised with him, and he was the manager who had all the background knowledge in relation to the Claimant's long-term sickness absence.

The Tribunal further determines this was not an act of direct discrimination as it was not an act of less favourable treatment.

Allegation 21 – on 30th January 2020 suggesting the Claimant meet with the Second Respondent when the Claimant was having difficulties communicating with him.

The Tribunal determines this was not an act of harassment as it did not have the prescribed purpose or effect. The Tribunal finds that Mr Owen's reasoning about the importance of continuity is sound, particularly in light of the Claimant being unhappy about the frequency of changeover of managers in the past. We do not accept that the Claimant was having particular difficulties communicating with Mr

Kindrat, he just did not want to cooperate with the efforts being made to manage his sickness absence. These steps were in accordance with the First Respondent's policy and would not have changed regardless of the identity of the manager assigned. For these reasons, The Tribunal determines it would not have been a reasonable adjustment to assign a new manager to manage the Claimant's absence until his pay issue was resolved.

Allegation 22 – on 19th February 2020 the Second Respondent seeking to arrange a further sickness review meeting to discuss a phased return to work despite the Claimant's pay issue being unresolved.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it did have such an effect this was not reasonable.

Allegation 23 – on 3 March 2020 the Second Respondent saying in an email "there is no reason you have to remain sick in order to submit a grievance".

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it had such an effect this was not reasonable. Mr Kindrat was simply repeating back to the Claimant what he had stated in his email.

Allegation 24 – on 18th March 2020 the Second Respondent proposing a phased return to work that included night shifts in direct contradiction to OH advice.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect. The OH advice only suggested avoiding night shifts and this did not take into account good reasons why it might be beneficial for the Claimant to work some later shifts during his phased return.

Mr Kindrat offered two proposed alternative shift patterns only one of which involved nights. The Tribunal therefore determines this was not an act of indirect discrimination as the PCP of requiring night shifts to be worked was not applied to the Claimant.

Allegation 25 – on 7 April 2020 the Second Respondent not answering the Claimant's call on the agreed date of a sickness review meeting.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect. The Tribunal's finding is that the framing of this allegation is highly selective and misleading and does not accord with the events as they unfolded on this day.

Allegation 26 – discussing the Claimant being set up for remote working when he was still signed off work and his complaints had not been resolved.

The framing of this allegation was again highly misleading. The Claimant accepted during the hearing that there was never any possibility or suggestion of him performing his role remotely. He was only given remote access to facilitate him applying for a hardship loan. The Claimant's allegation is that the Respondents

were trying to coerce him into taking on more debt which he felt would worsen his financial situation. However, the Claimant was under no obligation to apply for a hardship loan and chose not to do so.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it did have such an effect this was not reasonable.

The Tribunal further determines that this was not an act of direct discrimination as it was not less favourable treatment.

Allegation 27 – requiring the Claimant to still communicate with the Second Respondent after he raised a grievance.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it did have such an effect this was not reasonable.

The Tribunal concluded this was a more finely balanced decision for the First Respondent given the Claimant had used the word 'bullying' in his grievance in relation to Mr Kindrat and his pay issue. The Tribunal notes that by the time the grievance was submitted, Mr Kindrat had voluntarily made the decision to reinstate the Claimant's sick pay and to backdate it to the date he attended an OH appointment, which was the specific bullying complaint. The Tribunal considers that the safer route would have been to remove all contact between the Claimant and Mr Kindrat. However, the impact of the pandemic on the First Respondent was significant and, in those particular circumstances, we find it was not unreasonable to exercise discretion under the Policy in this way. Another manager was appointed to take over when the Claimant returned to work and so the contact between the Claimant and Mr Kindrat was expected to be of limited duration and scope.

Allegation 28 – Mr Owen informing the Claimant "it is not automatic that Nick should step away from managing your absence case on that basis".

The Tribunal finds this was not an act of harassment for the same reasons relied upon in relation to allegation 27.

Allegation 29 – the Second Respondent informing the Claimant he could not discuss the issues raised in the Claimant's grievance.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect and if it had such an effect this was not reasonable. It was entirely correct for Mr Kindrat to refuse to discuss the Claimant's grievance with him given the complaint made about Mr Kindrat personally.

Allegation 30 – failing to deal with the Claimant's grievance in a reasonable timeframe.

The Tribunal determines this was not an act of harassment as it had neither the prescribed purpose or effect.

In light of the covid pandemic the delays in hearing the Claimant's grievance were not unreasonable and the Claimant acknowledged this in correspondence with the First Respondent. Even after his resignation, the First Respondent continued its efforts to identify a grievance manager to hear his grievance and provide him with an outcome which it did.

Time limit issue

If we had made findings of discrimination the Tribunal would have been satisfied that the allegations did all form part of a continuing course of conduct by the Respondents and that the allegations prior to April 2020 were in time. We did not accept the Respondents' submissions that because different managers were involved there was not a continuing state of affairs given that the Second Respondent was a feature throughout this period from July 2019 onwards.

If we are wrong about that, we would in any event have found that it was just and equitable to extend time in relation to these earlier allegations. Having weighed up the balance of prejudice, we would have determined that the prejudice would have been more severe for the Claimant if time was not extended than to the Respondent if time was extended.

Constructive unfair dismissal

67. This claim was pursued on two grounds.
    67.1. the acts of discrimination and harassment complained of; and 67.2. an unreasonable delay in hearing the C's grievance.
68. The Tribunal has determined that no acts of discrimination or harassment havebeen made out.
69. The Tribunal has further determined that the delay in hearing the Claimant'sgrievance was reasonable given the covid pandemic context and the particular impact on the First Respondent's business.
70. The Claimant said in his submissions that the trigger for his resignation wasbeing told he could not be moved to another department. In the circumstances

    of the covid pandemic with a 45% cut in staff working the Tribunal finds it was reasonable that no suitable alternative opportunities could be found for the Claimant. This is not the basis on which this claim had been made but in any event the Tribunal does not find this was a breach of contract, let alone a fundamental breach of contract.

Holiday pay

71. The Claimant accepted he received payment for his 2020 accrued but untakenholiday entitlement. His claim was therefore limited to payment of his untaken holiday entitlement from the 2019 leave year. The First Respondent accepts this was not paid to the Claimant. The Tribunal finds the First Respondent made an unlawful deduction from the Claimant's wages in respect of 19 days accrued but untaken holiday entitlement.
72. This was not a remedy hearing and so the Tribunal makes no determination onquantum. However, based on the final payslip issued in respect of the

Claimant the calculation would appear to be £129.69 x 19 days = £2464.11 and this was shared with the parties as a useful starting point. The parties were encouraged to come to an agreement on the precise figure to avoid the need for a remedy hearing.

General observations

73. The Tribunal recognises that the Claimant has been through some very difficultand challenging experiences for which he has our genuine sympathy. Although we have not found that the Respondents unlawfully discriminated against the Claimant, we do acknowledge that some of their actions had a negative impact on him. In particular, the failure to inform the Claimant that his SSP would be ending and payroll's failure to act on Mr Kindrat's initial instruction to make a BACS payment to him once his half-pay was reinstated. It is unfortunate that this meant the Claimant's pay did not arrive for several more weeks after the decision was made.
74. The Tribunal also wishes to acknowledge that the Claimant conducted thehearing admirably well as a litigant in person, in particular with the way in which he cross-examined the Respondents' witnesses. Clearly, he is an intelligent and capable person who has much to offer as an employee. We very much hope that the Claimant is able to move forward from these events now that the case has reached a conclusion.

Employment Judge Rea

Dated 25th March 2024

JUDGMENT AND WRITTEN REASONS SENT TO THE PARTIES ON

24th April 2024

P Wing

FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

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

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/