EMPLOYMENT TRIBUNALS

Claimant: Mr A Monks

Respondent: PJD Mechanical Engineering Limited

Heard at: West Midlands (Birmingham) Employment Tribunal

On: 22 to 30 April 2024 (29 April 2024 in Chambers)

Before: Employment Judge Childe

Mr Virdee

Mr Palmer

REPRESENTATION:

Claimant: In person (assisted by his wife Mrs Monks)

Respondent: Mr Quickfall (counsel)

REASONS

Summary of the case

1. The claimant had been absent from work due to sickness for five and a half years at the point he was dismissed. This is a claim for unfair dismissal, direct age discrimination in connection with that dismissal and that the dismissal was discrimination arising from disability. The claimant also alleges that he was victimised by Matthew Warwick's failure to deal with the long-term absence policy. Finally, the claimant brings a complaint for breach of contract and unlawful deduction from wages due to an alleged failure of the respondent to pay enhanced contractual sick pay.

Introduction

2. We had access to an agreed tribunal bundle which ran to 493 pages including the index.
3. Witness evidence was provided by the claimant himself. From the respondent, we were provided with witness statements from Matthew Warwick, site engineer and operations manager, Alex Elliot, Management Accountant who became Finance Director and Victoria Shaw, resource manager.
4. The hearing took place in hybrid format. An adjustment had been made for the claimant to have the case heard in the Manchester employment tribunal.

Employment Judge Childe sat in person in Manchester and Mr Palmer and Mr Verdee together with the respondent's counsel and witnesses attended remotely (other than on the first day where respondent's counsel and witnesses appeared in person).

5. The tribunal arranged for Palin typists to transcribe the hearing in real time for the claimant. The claimant was provided with a device by the tribunal to enable him to read the transcribed text in real time. Adjustments were made by the tribunal and Mr Quickfall to communicate with the claimant during the hearing. We spoke more slowly and clearly. We checked for the claimant's understanding when communicating with him. We gave additional time to enable the claimant to receive, process and respond to any points necessary during the hearing.
6. We spent a significant proportion of the first day locating and sharing the bundle of documents and witness statements with the parties due to incorrect versions of documents and statements being uploaded to the tribunal's document upload centre.
7. For the reasons we gave at the time, the respondents were permitted to rely on supplemental witness statements.
8. We spent the latter part of the first day and the morning of the second day defining and confirming the issues in dispute between the parties.
9. On the second day the claimant withdrew his claim for a failure to make reasonable adjustments. On the first day the claimant had said that he wasn't a disabled person during the period to which this claim related. He also withdrew his unlawful deduction from wages claim for expenses due in 2015-2016.

10. For the reasons we gave at the time, the claimant was permitted to amend his victimisation claim, in accordance with the issues that we have set out below.
11. The respondent initially indicated they would seek to withdraw a concession made at the previous case management hearing on 30th October 2023 in which they accepted that the claimant was a disabled person at the relevant time due to tinnitus and depression. Once the issues were clarified, the respondent decided not to withdraw this concession.
12. At times, during the claimant's cross examination of the respondent's witnesses, he asked questions which were not relevant to the issues the tribunal had to determine. On one occasion the tone of the claimant's questioning was threatening towards a witness of the respondent. The tribunal reminded the claimant that he should only ask questions about matters which were relevant to the issues the tribunal had to determine and should not threaten the respondent's witnesses. The claimant was able to consider the questions he had prepared for the respondent's witnesses and only ask questions relevant to those issues, following this direction from the tribunal.

Issues to be determined

13. The issues in dispute are as follows.

Unfair dismissal

14. What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence).
15. If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and

administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The Tribunal will usually decide, in particular, whether:

a. The respondent genuinely believed the claimant was no longer capable of performing their duties.
b. The respondent adequately consulted the claimant.
c. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position.
d. The respondent could reasonably be expected to wait any longer before dismissing the claimant.
e. Dismissal was within the range of reasonable responses.
f. The respondent acted reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant. The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Direct age discrimination (Equality Act 2010 ("EqA 2010") section 13)

16. The claimant's age group is 69 and they compare their treatment with people aged 60.
17. Was the claimant dismissed because of his age?
18. 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?

Discrimination arising from disability (EqA 2010 section 15)

19. Did the respondent treat the claimant unfavourably by dismissing him?
20. Did the following things arise in consequence of the claimant's disability:
    a. The claimant's sickness absence between March 2016 and 27 June 2022?
21. Did the respondent dismiss the claimant because of that sickness absence?
22. Was the treatment a proportionate means of achieving a legitimate aim?
23. The Tribunal will decide in particular:
    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?
24. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Victimisation (EqA 2010 section 27)

25. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 April 2022 may not have been brought in time.

26. Was the victimisation complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
    a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    b. If not, was there conduct extending over a period?
    c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
        i. Why were the complaints not made to the Tribunal in time?
        ii. In any event, is it just and equitable in all the circumstances to extend time?
27. Did the claimant do a protected act as follows: On 19 January 2016 the claimant said in an email to Andy Graham, HR director, that the company were discriminating against him on the grounds of age.
28. Did the respondent do the following things: Mathew Warwick's failure to deal with the long-term absence policy from 9th April 2016 and failure to maintain regular contact with him up until the termination of his employment.
29. By doing so, did it subject the claimant to detriment?
30. If so, was it because the claimant did a protected act?
31. Was it because the respondent believed the claimant had done, or might do, a protected act?

Unauthorised deductions from Wages

32. Is the claimant entitled to any damages for unlawful deduction from wages prior to 22 July 2020 (i.e two years before the claim for unlawful deduction from wages was lodged) in accordance with section 23 (4A) Employment Rights Act 1996?
33. Were the wages paid to the claimant between 22 July 2020 and 27 June 2022 less than the wages they should have been paid?
34. Was any deduction required or authorised by a written term of the contract? The respondent says the claimant's contract allowed it to not pay wages whilst the claimant was absent from work due to sickness.
35. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?
36. How much is the claimant owed?

Breach of contract

37. Is the claimant entitled to claim compensation for breach of contract for any period prior 28 April 2017, which is the date that the claimant's first employment tribunal claim was brought?
38. Did this claim arise or was it outstanding when the claimant's employment ended?
39. Did the respondent do the following:
    a. Not pay the claimant what he says is full contractual sick pay due, which he says is from March 2016 to the date of his dismissal on 27 June 2022.
    b. Was that a breach of contract?

Failure to provide written particulars

40. When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?
41. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.
42. Would it be just and equitable to award four weeks' pay?

Findings of fact

43. The relevant facts are as follows. Where we have had to resolve any conflict of evidence, we indicate how we have done so at the material point.
44. There is a dispute between the parties about when the claimant commenced employment. We don't need to resolve that dispute. The parties agree that the claimant was working as an employee for the respondent at the earliest from 18th November 2012 up until the termination of his employment on 6th July 2022.
45. We turn to deal with the claimant's contractual entitlement to contractual sick pay. We conclude that the claimant had no contractual entitlement to be paid enhanced contractual sick pay. The claimant's contractual entitlement was to statutory sick pay only. We have reached this conclusion for the following reasons:
    a. The claimant and Victoria Shaw both agreed, and we find as a fact, that the claimant was issued with a written contract of employment whenever

he worked at Fiddlers Ferry Power Station. The claimant and Vicki Shaw both agreed in evidence that he worked at Fiddlers Ferry Power Station on many occasions.

b. The respondent did not keep a record of all the contracts of employment issued to the claimant. However, we were provided with a contract of employment signed and dated by the claimant on 23rd April 2012 ("the *April 2012 Contract*"). Section 9 of the April 2012 Contract entitled the claimant to be paid sick pay in line with HMRC statutory sick pay (SSP) regulations.

c. We accept the evidence of Alex Elliot, which was unchallenged, that permanent monthly staff or white-collar workers at the respondent were entitled to company sick pay. What he described as weekly staff, which he said included the claimant, were entitled to statutory sick pay only, if absent due to sickness.

d. The claimant accepted in evidence he was never informed that he was entitled to anything other than SSP by the respondent.

e. The claimant was only paid SSP during his absence due to sickness from the respondent.

46. We find the April 2012 Contract was incomplete and wrongly recorded the claimant as being on a temporary contract when in fact he was employed permanently by the respondent from at least as early as 18 November 2012, as a coded welder, up until the termination of his employment on 6th July 2022.

47. The claimant had a dispute with an individual named Steven Atkinson in 2015 regarding alleged failures to honour financial promises and to comply with health and safety duties. We do not need to go into the detail of that dispute or

the merits of the claimant's concerns. However, unfortunately this incident triggered a chain of events which ultimately led to the claimant's absence due to sickness and his eventual dismissal.

48. During 2015 and early 2016 the claimant was line managed by Matthew Warwick.

49. We find that Matthew Warwick genuinely believed that from 18 January 2016 he was no longer the claimant's line manager, after a redundancy process into the claimant's role began. By this point Matthew Warwick believed HR, by which he meant Andy Graham in HR, was dealing with the management of the claimant through the redundancy process and then afterwards when the claimant was absent due to sickness. We've accepted Matthew Warwick's evidence on this point which was not effectively challenged by the claimant.

50. In 2016 the claimant raised issues about his pay (hourly rate, holiday pay, overtime) and his start date, which impacted his redundancy payment, non-payment of a bonus and standby pay which his colleagues allegedly received while he did not. We do not need to determine the merits of these complaints.

51. On 19th January 2016 the claimant sent an e-mail to Andy Graham only. The claimant said in this email "*As for standby payment I believe I have been discriminated against as other employees for the company were paid standby and these people are tradesmen just the same as myself*." The claimant made no reference to discrimination on the grounds of age, or any other protected characteristic as defined in the EqA 2010, in this email.

52. The claimant said in evidence that he used the terms 'unfair', 'different' and 'discrimination' interchangeably in the context of this email. We find that the claimant's reference to discrimination here was a complaint that it was unfair

that he was not receiving a standby pay, despite it allegedly having been promised to him by Mr Atkinson and despite his colleagues (other tradesman) allegedly receiving it. We find that this sense of unfairness had nothing to do with age discrimination, or discrimination of any kind. The claimant was comparing himself to other tradesmen who he said were in a similar situation to himself. The claimant was not suggesting those tradesmen were a different age to him and this was the reason why they were receiving the standby payment and he was not. Discrimination on the grounds of age or otherwise was not in the claimant's mind as the reason he did not receive a standby payment. This is why it did not feature in the e-mail communication to Andy Graham.

53. We find that Matthew Warwick never saw this e-mail. We've accepted Matthew Warwick's evidence on this point, which was not challenged by the claimant. It is also consistent with our finding that by this point Matthew Warwick believed Andy Graham in HR was dealing with the management of the claimant through the redundancy process and then afterwards when the claimant was absent due to sickness.

54. The redundancy process did not result in the claimant exiting the business under a settlement agreement, as was envisaged by the respondent. The claimant didn't agree to the terms of the settlement agreement as the claimant disagreed with the respondent's position in relation to pay.

55. The claimant refused to sign the settlement agreement and went off sick with stress at work on 3 March 2016.

56. The respondent's long term sickness policy, applicable in 2016, provided the following guidelines for managers/supervisors. "*If an employee is absent from*

work for more than four weeks, the line manager should maintain ***regular*** *contact with the employee welfare meetings should be conducted* ***regularly****"* (our emphasis).

57. On any measure, the respondent did not follow this part of the long-term sickness policy during the claimant's extended period of absence due to sickness from 3 March 2016 to the termination of the claimant's employment in 2022.

58. We find the reason Matthew Warwick did not follow the respondent's long term sickness policy, by not meeting with the claimant at all during his sickness absence, was because he genuinely believed on 3 March 2016 he was no longer the claimant's line manager for the reasons set out in paragraph 49 above.

59. On the respondent's own case, the only time the respondent arranged a welfare meeting with the claimant between 3rd March 2016 and the termination of his employment in 2022 was on 25th October 2016. Jackie Stephenson, a member of staff in the respondent's HR department, conducted this meeting. A GP report had been obtained prior to this meeting on 6th August 2016, which stated the claimant was unfit for work due to stress at work, but he would be able to return to work once his dispute with management had been resolved. We find that in referring to management, the GP was referring to the dispute with Steven Atkinson. Unfortunately, the respondent never took any active steps to resolve the claimant's dispute with Steven Atkinson.

60. We therefore conclude that the respondent failed to follow its own long term sickness policy during this period. The reason the long-term sickness absence policy was not followed is a combination of:

a. Andy Graham and later Jackie Stephenson leaving the respondent in April and December 2016 respectively, in effect leaving the respondent without a functioning HR department.

b. The management buyout/creditors voluntary agreement in late 2016 which diverted the company's attention away from employee/HR issues; and

c. the subsequent allocation of HR duties to Alex Elliott, finance director and a non-HR specialist, in January 2017, who did not have the skills or time to effectively manage the claimant's absence in accordance with the long-term sickness absence policy.

61. The claimant did provide fit notes in 2016 which stated the claimant was unfit for work by reason of depression. There was no reference on any fit notes to the claimant having tinnitus. After 2015 no fit notes were provided until 27th September 2021. Victoria Shaw accepted in evidence that the fit notes provided to the respondents in 2021 cited endogenous depression as the reason for the claimant's unfitness to work.

62. We fast forward to 23rd September 2021 when the claimant’s sickness management became the responsibility of Victoria Shaw. By this point the claimant had been absent from work due to sickness for a period of 5 and a half years.

63. Victoria Shaw followed what we consider to be a comprehensive and careful process to try and understand the reason for the claimant's absence, the claimant’s likely prognosis and likely prospect of returning to work and whether there were any adjustments the respondent could make to facilitate the claimant’s return to work.

64. Regrettably, the claimant refused to meet with Victoria Shaw, write to her or give his consent to enable her to view any medical report.
65. The upshot was the information Victoria Shaw had about the claimant's absence, at the time she made the decision to dismiss (in the claimant's absence), was he had been absent for a period of 5 and a half years and there was no indication he was fit to return to work.
66. The claimant was dismissed by Victoria Shaw on 4th May 2022 with nine weeks' notice. We find that the reason the claimant was dismissed by Victoria Shaw was his incapability to perform his role due to his long-term absence from the respondent's business. The claimant did not challenge Victoria Shaw on her assertion that the reason for dismissal was his long-term absence from the respondent's business and we have accepted her evidence on this point.
67. The claimant appealed but provided no reasons for appeal and therefore that appeal was closed.
68. The claimant's employment came to an end on 6th July 2022.

Relevant Law

Unfair dismissal

69. The relevant parts of section 98 (1) Employment Rights Act 1996 ("ERA 1996") state:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or, if more than one, the principal reason) for the dismissal;**

(2) A reason falls within this subsection if it –

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

(3) In subsection (2)(a) -

(a) 'Capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality;

70. Section 98 (4) ERA 1996 states:

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.

71. The decision of the Court of Session in *BS v Dundee City Council* [2014] IRLR 131 identifies three issues to be considered in long term sickness absence cases:

a. The Tribunal must consider whether it is reasonable to expect the employer to wait any longer for the employee to return to work.

b. An employer acting reasonably will consult the employee to see what his views are.

c. An employer acting reasonably obtains medical advice on the employee's position, the prognosis and when a return to work is likely.

Burden of Proof (section 136 Equality Act 2010 ("EqA 2010"))

72. The reversal of burden of proof applies under section 136 EqA 2010 'to any proceedings relating to a contravention of this Act'.

73. The EqA 2010 provides for a shifting burden of proof. Section 136 so far as relevant provides as follows:

    (2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

74. Consequently, it is for a claimant to establish facts from which the tribunal can reasonably conclude that there has been a contravention of the EqA 2010. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention.

75. If the claimant establishes a prima face case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong* and other cases 2005 ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.

76. *Efobi v Royal Mail Group Ltd 2021* ICR 1263, SC states that the issue for the tribunal, in deciding whether the burden of proof has shifted from the claimant to the respondent is whether, after hearing the evidence from all sources at the end of the hearing, the claimant has proved facts from which, absent any

adequate explanation, the tribunal can infer that a disadvantageous decision is unlawful discrimination.

Direct Age Discrimination (section 13 (1) EqA 2010)

77. The relevant parts of section 13 (1) EqA 2010 state:

13 Direct discrimination

(1)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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

78. Under s13(1) EqA 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of age than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

79. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of age. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the ‘reason why’ the claimant was treated as she was.

(*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285)

Discrimination arising from disability (section 15 EqA 2010)

80. Section 15 EqA 2010 states:

15 Discrimination arising from disability

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

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

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

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

81. As to justification, in paragraph 4.27 the Equality Act 2010 Code of Practice ("the Code") considers the phrase "a proportionate means of achieving a legitimate aim" (albeit it in the context of justification of indirect discrimination) and suggested that the question should be approached in two stages:-

    a. is the aim legal and non-discriminatory, and one that represents a real, objective consideration?

    b. if so, is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances?

82. As to that second question, the Code goes on in paragraphs 4.30 – 4.32 to explain that this involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts.

Time limits in discrimination cases

83. The relevant part of section 123 EqA 2010 state:

(1)… 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.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Victimisation (s.27 EqA 2010)

84. The relevant parts of section 27 EqA 2010 state:

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, ..

(2)Each of the following is a protected act—

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

85. Langstaff P said the following in *Durrani v London Borough of Ealing UKEAT/0454/2012*, when considering under section 27 (2) (d) EqA 2010 the scenario where a claimant asserts discrimination but does not say that the allegation is of discrimination in relation to one of the protected characteristics:

'22. I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies.

23. The Tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.…

27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally."

Unauthorised deductions from wages

86. Section 13 ERA 1996 states:

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 statutory provision or a relevant provision of the worker's contract, or

(b)the worker has previously signified in writing his agreement or consent to the 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."

Breach of contract

87. We have jurisdiction to hear this claim by virtue of section 3 of the Employment Tribunal's Act 1996 and the Employment Tribunal's Extension of Jurisdiction (England and Wales) order 1994. We can hear a contractual claim where it arises or is outstanding on the termination of the employee's employment and relates to damages for breach of the contract of employment.
88. We must firstly construct the relevant terms of the claimant's contract of employment and then determine whether the respondent was in breach of those terms.

Analysis and conclusion

89. We turn now to each of the issues identified to determine the claimant's complaints.

Unfair dismissal

90. We follow the issues identified in paragraphs 14 and 15 above in our findings below.
91. As we have found at paragraph 66 above, the reason Victoria Shaw dismissed the claimant was capability, in that it was the claimant's long-term absence from the respondent's business.
92. The respondent did act reasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant. The claimant did not challenge the fairness of the decision to dismiss him, or the process followed by Victoria Shaw, in cross examination. The claimant went as far as to describe the process followed by the respondent as being an "*ACAS textbook c*ase". We find that:
    a. The respondent genuinely believed the claimant was no longer capable of performing their duties. This was based on the length of the claimant's absence and the lack of any information to the contrary from the claimant or indeed any other medical practitioner.
    b. As we have found at paragraph 63 above the respondent adequately consulted with the claimant prior to making the decision to dismiss. Unfortunately, the claimant refused to engage in that consultation and

therefore Victoria Shaw had to proceed based on the information she had.

c. The respondent carried out a reasonable investigation, including taking all reasonable steps to find out about the up-to-date medical position. The claimant accepts that the respondent asked his GP for an up-to-date medical report prior to his dismissal. The GP prepared one and the claimant accepts that he refused permission for Victoria Shaw to see it. As we have found in paragraph 64 above, the claimant refused to meet with Victoria Shaw to provide her with any information about his likely prognosis and likely prospect of returning to work and whether there were any adjustments the respondent could make to facilitate the claimant's return to work, prior to his dismissal. Given the claimant was not prepared to give Victoria Shaw any of the information she required to make a decision about the claimant's continued absence, we find there were no further reasonable inquiries or further investigation that Victoria Shaw could have done.

d. It was not reasonable to expect the respondent to wait longer before dismissing the claimant. He had been absent from work for over 5 and a half years and Victoria Shaw had no information available to her to suggest there was a prospect of the claimant returning to work soon.

e. Dismissal was within the range of reasonable responses. The claimant accepts that the only alternative to dismissal was to *leave him on the books* indefinitely. Given the finding we have made at d above, dismissal for capability was a reasonable option open to the respondent in all the circumstances, based on equity and the substantial merits of the case.

Direct age discrimination (Equality Act 2010 section 13)

93. We follow the issues identified in paragraphs 17 and 18 above in our findings below.
94. Having heard all the evidence, the claimant has not proved any facts from which the tribunal can infer, absent an adequate explanation, that Victoria Shaw's decision to dismiss was related to claimant's age. This point was not put to Victoria Shaw in cross examination.
95. We conclude that the claimant has not shifted the burden of proof to the respondent.
96. If we are wrong on this point, we have already found that the claimant was dismissed by Victoria Shaw due to his long-term absence from the respondent's business, as set out in paragraph 91 above, and not his age.
97. Having reached this finding, we do not need to consider whether the treatment a proportionate means of achieving a legitimate aim.

Discrimination arising from disability (Equality Act 2010 section 15)

98. We follow the issues identified in paragraphs 19 to 24 above in our findings below.
99. We find that the respondent did treat the claimant unfavourably by dismissing him. The claimant said in evidence that he considered the dismissal to be unfavourable treatment and we find it was obviously so.
100. The claimant's sickness absence between March 2016 and 27 June 2022 arose in consequence of the claimant's disability as he was absent from work due to depression during this period.

101. The respondent did dismiss the claimant because of that sickness absence.

102. However, we find that dismissal was a proportionate means of achieving a legitimate aim in this case.

103. We accept it is a legitimate aim for the respondent to only employ people who are capable of work now or in the foreseeable future. The claimant did not challenge this legitimate aim and we find it represents a non-discriminatory, real and objective aim.

104. The claimant, at the point of dismissal, was incapable of work either at that point or in the foreseeable future. There was no further information available to the respondent to determine whether there was a less discriminatory approach that they could take, due to the claimant's failure to engage with the respondent at all during the ill health capability process. Given this context, we find it was appropriate and necessary in all the circumstances for the claimant to dismiss, in order to achieve the legitimate aim of only employing people who were capable of work now or in the foreseeable future.

105. Given our findings, it's not strictly relevant whether the respondent knew or could reasonably have been expected to know that the claimant had the disability prior to dismissal. However, we find that the respondent knew the claimant had depression or ought to have known that from the fit notes supplied. Those fit notes did not refer to tinnitus and we therefore find the respondent did not know the claimant had this disability at the relevant time.

Victimisation

106. We follow the issues identified in paragraphs 25 to 31 above in our findings below.

107. We have found in paragraph 58 that Matthew Warwick decided not to manage the claimant's long-term sickness absence on 3 March 2016 because he genuinely believed he wasn't the claimant's line manager at this time.

108. We therefore find, applying section 123(b) EqA 2010, that Matthew Warwick decided not to manage the claimant's long-term sickness on 3 March 2016.

109. The victimisation claim should therefore have been lodged with ACAS and then the tribunal by 2 June 2016 at the latest. The claim was not lodged until 22 July 2022, 2241 days or 6 years, 1 month and 20 days out of time.

110. There was no conduct extending over a period as we find that Matthew Warwick had made that decision on 3 March 2016. Section 123(a) EqA 2010 therefore does not apply when calculating time limits.

111. It is just and equitable to extend time for the following reasons:

a. The claimant has provided no reason for why this claim was submitted six years out of time. The claimant was able to submit a different tribunal claim in 2017 but chose not to bring this claim at that time, without any explanation as to why.

b. The claimant has not provided any reason why we should exercise our discretion to extend time in his case and we therefore decline to do so.

112. Even if we had extended jurisdiction to hear the victimisation claim, we find the claimant did not do a protected act on 19 January 2016. We have found in paragraph 52 that the reference to discrimination in this email was in fact a

reference to the fact that the claimant was not receiving standby pay, despite it allegedly having been promised to him by Mr Atkinson and despite his colleagues allegedly receiving it. It was not a reference to discriminatory treatment under the Equality Act 2010. We conclude the word "discrimination" was used not in the general sense of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.

113. We apply the legal authority of *Durrani v London Borough of Ealing EAT 0454/12* and conclude that the bare assertion of discrimination in the claimant's e-mail did not amount to an allegation of a breach of the Equality Act 2010.

114. For completeness, we have found that Matthew Warwick did fail to deal with the long-term absence policy from 9th April 2016 (in fact we have found he made this decision on 3rd March 2016) and failed to maintain regular contact with the claimant, as the claimant was sick with stress at work, up until the termination of his employment.

115. However, we find Matthew Warwick did not do so because the claimant did a protected act on 19 January 2026 for the following reasons:

a. Matthew Warwick was unaware of the e-mail from the claimant alleging discrimination on 19 January 2016, which is said to be the protected act, and therefore this was not the reason for him to act in the way that he did.

b. As we have found at paragraph 49 above, the reason Matthew Warwick did not follow the long-term absence policy and failed to maintain regular contact with the claimant was because he did not believe he was the claimant's line manager after 3rd March 2016.

Unauthorised deductions from Wages/Breach of Contract

116. We have found at paragraph 45 above that the claimant's contract of employment gave no right to company sick pay.

117. We conclude that the claimant had no contractual entitlement to contractual company sick pay because we have found at paragraph 45 that under his contract of employment he was entitled to SSP only.

118. There was therefore no unlawful deduction from the claimant's wages nor was there a breach of the claimant's contract of employment in failing to pay the claimant contractual sick pay.

119. The claimant is due no compensation in connection with unlawful deduction from wages or breach of contract.

Failure to provide written particulars

120. We do not need to make a finding in respect of this claim as none of the claimant's other claims have succeeded. This claim can only succeed if one of the other claims succeeds.

121. However, we would find that the respondent was in breach of the requirement to provide a written contract of employment. The reason for this is that the April 2012 Contract does not record a start date for continuous employment, the claimant's place of work or the claimants job title and grade.

Case No. 1303296/2022

Employment Judge Childe

11 June 2024

Note

Public access to employment tribunal decisions

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