EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104174/2023

Held in Glasgow on 13 and 14 May 2024

Employment Judge M Robison
Tribunal Member L Grimes
Tribunal Member L Hutchison

Miss C Gallacher	**Claimant In Person**
Foundever Ltd	**Respondent Represented by Mr N Akram - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims for disability discrimination are not well-founded and are therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 1 August 2023, claiming unlawful deductions from wages. On 8 September 2023 the claimant made an application to add a claim of disability discrimination. On 26 September 2023 the claimant made an application to add a claim for failure to maintain reasonable adjustments.

2. The respondent conceded disability status but otherwise resists the claims. The claimant remains in employment, although is on long term sick leave.

3. At a preliminary hearing which took place on 9 November 2023 when the claimant was legally represented, the issues for determination at this final hearing were discussed and the claimant's applications to amend considered.

4. It was then confirmed that this claim relates to withheld or delayed payments in regard to income protection payments (IPP) which the claimant is entitled to on account of her disability, and failure or delay in paying SSP, in respect of which she claims unlawful deductions from wages and disability discrimination.

5. With regard to the disability claims, although the applications to amend were granted, in regard to the claim for reasonable adjustments, the claimant appeared to accept that the adjustment was in place (although the claimant was by then on long term sick leave).

6. The note following the preliminary hearing set out three allegations which the claimant asserts amounted to direct disability discrimination.

7. Following an application made on 11 April 2023, the claimant was permitted to add an additional claim relating to the delay in payment of a final advance payment to the respondent in respect of the claimant's income protection.

8. Upon confirming outstanding issues for determination by the Tribunal at the outset of this final hearing, the claimant advised that she is not pursuing any claims for unlawful deductions from wages since she has how been paid. The claimant also advised that she is not pursuing the claim of disability discrimination in respect of the delay in payment of IPP in May 2023.

9. The remaining disability claims were therefore as follows:
    a. the withholding of SSP;
    b. the delay in repaying deductions made in March and April 2023;
    c. the delay in paying over the advance on the final payment of income protection payment in January 2024;
    d. failure to maintain reasonable adjustments in respect of 15 minutes catch up time at the beginning of each shift in both 2021 and 2023.

10. It had been decided previously that this hearing would consider liability only. During the final hearing, the Tribunal heard evidence from the claimant and from Ms J Dey, HR business partner for the respondent.

11. Following evidence and prior to submissions, the respondent made an application to add a plea of time bar in regard to the claim for the failure to make reasonable

adjustments in late 2021. Mr Akram explained that when he agreed at the outset that a claim for failure to make reasonable adjustments was to be considered by the Tribunal, there was a lack of clarity regarding the timing of that. Having heard evidence, the respondent now seeks to argue that the claim for failure to make reasonable adjustments in 2021 was out of time, although it was accepted that the claim in relation to March 2023 was in time.

12. We accepted that there was a lack of clarity about the timing of the reasonable adjustments claim, so we allowed this application. That was however subject to recalling the claimant who gave evidence to support her argument that it was a "continuing act" and/or that it would be just and equitable to extend time to lodge the claim.

Findings in Fact

13. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

14. The claimant commenced employment with the respondent as a customer service adviser in 1998. Following various mergers, the name of the claimant's employer became Virgin Media. Following a TUPE transfer in August 2018, the claimant transferred to Sitel UK Limited, which on 2 March 2023 changed its name to Foundever GB Limited.

15. Between 1998 and 2006 the claimant worked 30 hours per week. In 2006 the claimant became unwell with a (benign) brain tumor/cyst and was unable to work more than 16 hours per week. The claimant made an insurance claim in respect of the additional 14 hours, and upon return to work in 2007 was in receipt of income protection payments to supplement her pay.

16. Around that time, on return to work, a number of adjustments were made. This included an adjustment which allowed the claimant to take 15 minutes at the start of each shift, before she started taking calls, to catch up on e-mails and otherwise prepare for the shift. This was variously known as "catch up time", "meeting time", "admin time" or "off phone time".

17. Between 2007 and 2018, the claimant was paid her 30 hour salary directly by Virgin Media Limited, representing 16 hours for time worked and 14 hours income protection payment. From 1 August 2018, following the TUPE transfer, the insurance company, then Unum Limited, began paying the 14 hour balance directly to the claimant.

18. From January to July 2020, the claimant was absent from work on sick leave, but on her return, she switched to working from home (as a consequence of changed practices due to the pandemic).

19. On 24 September 2021, the claimant received an e-mail from her team leader Donna Sheridan, copied to her community manager Helen Breslin, which stated, "On checking Catherine, the 15 minutes meeting time has not been added in this month, so you should not be taking this time. I understand this was agreed while you were working in the office, however as you are now working from home and don't have any travel time to and from work, we would expect you to use this time to catch up and keep yourself up to date. I will catch up with you on Tuesday, when you come into the office".

20. On 28 September 2021, the following Tuesday, the claimant noticed that the 15 minutes adjustment had not been added to her schedule. She attended the meeting with Ms Sheridan to discuss this, but after around 15 to 20 minutes the claimant received a phone call about a death in the family. She was thereafter absent on bereavement leave and subsequently on sick leave.

21. The claimant did not return to work until around 9 November 2021, and it was only then that she raised this issue with Ms Sheridan again. Ms Sheridan told her not to take the 15 minutes at that time. The claimant stressed that she did still require the adjustment. She asked Ms Sheridan to speak to Ms Breslin who had been her manager when she became ill in 2006 and when the adjustment was implemented.

22. On or around 14 November 2021, the claimant sent an e-mail to Ms Sheridan stating, "Donna did you speak with Helen yesterday re my 15 mins off phone each morning?".

23. By e-mail dated 29 November 2021 headed up "catch up time" sent to the claimant with Ms Breslin copied in, Ms Sheridan advised the claimant that "as this was an agreement with Virgin Media, this is not something we can support. We can arrange a meeting to review your working hours, while also covering any queries you may have. Let me know when you are able to come into the office. I can then check when Helen would be available".

24. In response, the claimant tendered her resignation at around 8.30 am the next day. Ms Sheridan telephoned her around 10 am and asked her to reconsider. The claimant spoke to her family and decided to withdraw her resignation.

25. On or around 3 December 2021, Ms Sheridan sent an e-mail to the claimant, copying Ms Breslin, which stated, "I have caught up with Helen and she agreed it would be good to get a catch up to review your hours and incorporate a Sitel OCC Health Review. Let me know if you would be happy for us to complete a referral and we can get the ball rolling. In the meantime – we have reinstated the 15 mins at the start of your shift. I can give you a call on Tuesday and we can have a catch up, in the meantime you know where I am if you need anything".

26. The reasonable adjustment of 15 minutes catch up time before taking calls was included in the claimant's schedule from that time.

27. On 27 January 2023, Unum Limited wrote to the claimant (by post) to advise that they had been paying her the IPP directly in error and that a similar tripartite arrangement to the one that existed with Virgin Media Limited should have been in place (ie they should have paid her via Sitel UK Limited from 1 August 2018, rather than directly). Unum Limited advised that they would pay the income protection payment via Sitel Limited from 1 February 2023.

28. A letter also dated 27 January 2023 in almost identical terms was sent to the respondent's HR department in Motherwell via post. They asked the respondent to confirm the claimant's current working arrangements and salary to ensure future calculations were correct, and asked for the respondent's bank details.

29. On 30 January 2023, the claimant received the final income protection payment direct from Unum.

30. On 3 February 2023 not having received a reply to the letter of 27 January 2023, Unum sent a follow up letter to the respondent by post, requesting further information.

31. On 28 February 2023, not having received a reply to that letter either, the claims manager at Unum e-mailed the respondent's central payroll e-mail address, attaching copies of the two letters and asking for a response.

32. On 7 March 2023 when the claimant had gone into the office to change her hard drive, she was asked by Ms Sheridan to sign out to attend a meeting. At that meeting, Ms Sheridan asked the claimant to explain her illness since 2006, and she recorded her answers. The claimant found this surprising because she believed that the respondent knew all about it, not least because her then manager Ms Breslin had been her manager in 2006/2007.

33. At this meeting the claimant raised with Ms Sheridan the fact that she was not being paid IPP. Ms Sheridan believed this to be a mistake but during the meeting she walked down the corridor to the payroll department to ask them about it. She was advised that they knew nothing about it and indeed that it was nothing to do with them (the payments having been made direct to the claimant).

34. On 27 March 2023, Unum, not having had a reply to their letters or e-mails, sent a further reminder. That e-mail came to the attention of Ms Dey, HR business partner, who had recently commenced employment with the respondent.

35. On 4 April 2023, Ms Dey e-mailed Unum answering their queries.

36. On 11 April 2023, the claimant went absent on sick leave following reoccuring symptoms relating to her brain tumour as well as stress at work.

37. On receipt of her pay slip for April 2023, the claimant noted that she had a deduction from her wage of £36.93 which she could not account for; and when she checked her March pay slip she noted that there was a deduction of £6.30, which again she could not account for because she had not been absent or late.

38. She then speculated that this was related to the meeting of 7 March 2023. She believed this broadly equated to a deduction for the 15 minutes catch up time at

the start of each shift for the shifts she had worked in March and April before going off on sick leave, and talking account of the payroll cut off dates. She also noted that the 15 minutes appeared to have been removed from her March schedule for week beginning 20 March 2023, with one day described as "system error". She did not understand what that meant but she therefore believed that the reasonable adjustment had been removed, although she was not advised by Ms Sheridan that it had been removed.

39. The claimant therefore spoke to Ms Sheridan at the beginning of May and followed up with an e-mail on 9 May 2023, asking if this deduction related to the 15 minutes catch up time.

40. The claimant received no substantive reply to her e-mail. However, the deductions were reimbursed in the claimant's May pay at a figure higher than the amount which had been deducted.

41. During April, Ms Dey contacted payroll for assistance to try to understand the position with regard to the change in the IPP payments made by Unum from direct payments to the claimant to payments through the respondent. Payroll staff advised that they were not aware of an IPP for the claimant and that information should come from Legal and General, which was the insurance company which the respondent dealt with in respect of all other income protection payments to their staff.

42. Following subsequent investigation by HR, the respondent ascertained the new position, that is that they were receiving the IPP from Unum direct since the intimation at the end of January, with the expectation that this would be paid to the claimant. Steps were then taken to ascertain how to calculate arrears due.

43. As the claimant was absent on sick leave from 11 April 2023, she received SSP in May. Having not been paid IPP from Umum, which from 1 February 2023 was to be paid through the respondent, the claimant was also paid for the accrued IPP for February, March and April in May.

44. On 22 May 2023 the claimant notified ACAS of the intention to engage in early conciliation in regard to claims relating to unlawful deductions from wages relating to the delayed IPP.

45. The claimant received SSP in her pay for June.

46. When the claimant received her pay slip for July she noted that she had not received SSP. This was because Ms Dey, having researched the position with regard to IPP with Unum, requested and received a copy of the policy document from them in order to understand the interplay between IPP and SSP. In particular, Ms Dey was aware that the claimant had a large debt to the respondent following a previous overpayment which she was repaying at £50 per month. Because she was concerned that the claimant should not be receiving both SSP and IPP, she decided to stop payment of SSP to investigate the matter. However, the respondent failed to advise the claimant that she would not be receiving SSP in July pending Ms Dey's investigation.

47. In the Unum policy document (56-103), Ms Dey noted the following:

    a. Under the heading "temporary absence from work" (para 5.7, page 82), "A member who is not incapacitated and who is temporarily absent from work (for instance on unpaid leave or sabbatical) may continue to be treated by Unum Provident as an employee for the purposes of this policy subject to such terms and conditions as UnumProvident may decide, providing the policyholder obtains UnumProvident's written consent in advance of the beginning of the temporary absence".

    b. Under 6.2, notification to UnumProvident of absence of a member (page 84), "The policyholder is required to notify UnumProvident in writing of the prolonged absence of a member due to illness or inury, ten to twelve weeks before the end of the deferred period. No benefit shall be payable for any period of time before written notice of the incapacity is received by UnumProvident. If written notice of the incapacity of a member is not received by UnumProvident within 90 days from the end of the deferred period, UnumProvident shall have no liability to pay benefit to the incapacitated member".

c. Under 8.4 page 98, “Notification of other employment or change in condition”, “the policyholder must notify UnumProvident immediately of any change in the incapacitated member’s condition or circumstance which would or might affect payment of benefit. By way of example only, changes that must be notified to UnumProvident would include: 1. the member undertaking any work or employment, even if the work is unpaid; 2. any change in the member’s health, medical condition or prognosis; 3. any change in the member’s address or residence.”

d. “Failure to comply with the provisions of this section 8 may entitle UnumProvident to decline or cease a claim or take such other steps as are appropriate in the circumstances, which may include an adjustment of benefit” (para 8.5).

48. On 27 July 2023, Ms Pengilly, HR assistant, e-mailed Unum asking if the claimant should still be paid SSP when she was absent or whether it should be stopped because she is receiving IPP. Ms Dey subsequently corresponded with Unum with a view to properly understanding the position, which was not straightforward, given the terms of the policy.

49. On 9 August 2023, Ms Dey was advised by e-mail that, “Unum have agreed to waive the payment of SSP to Ms Gallacher irrespective of whether Foundever look to reclaim this from her directly. This is on the agreement that no further SSP is paid to her”. Ms Dey responded that the claimant was considering whether she would be financially better off receiving SSP with a reduced Unum payment, or not receiving SSP and retaining the Unum benefit, but that SSP had been stopped in the meantime.

50. On 18 August 2023, Ms Dey advised the claimant that Unum had confirmed that she was due SSP alongside normal IPP payments and that she would be paid outstanding sums for July and beyond, until SSP ran out in October after 28 weeks.

51. On 24 August 2023, the respondent wrote to the claimant to advise about the situation with IPP but also that “Unum have only recently confirmed that you are eligible to receive SSP whilst in receipt of IPP. SSP will be payable to you along

with normal SSP guidelines, as set by the UK Government. We have been in contact with Unum for many weeks now, trying to find a resolution to this".

52. The claimant then received in her August pay both SSP (including arrears) and IPP payments. In September she received both IPP and SSP, at which time the claimant's general entitlement to SSP ended.

53. On 15 November 2023 Unum wrote to the respondent to advise that they had undertaken an assessment of the claimant's claim, and based on the evidence received, they had ceased liability with effect from 8 November 2023. A final benefit payment totalling £189.65, covering the period from 1 November to 8 November 2023 was to be paid as well as a transitional benefit payment of three months amounting to £2,163.21 in lieu of notice of the decision to cease payments. They advised that in total a payment of £2,352.86 would be made via CHAPS into the respondent's nominated business bank account in the next 3-5 business days. The respondent accordingly received the sum of £2,352.86 for the claimant on or around 20 November 2023.

54. Following the preliminary hearing which took place on 9 November 2023 the claim was sisted for 28 days to allow parties to have discussions with a view to resolving matters. Parties were due to get back to the Tribunal by 18 December 2023 to advise if they sought a further period of time to resolve matters. By letter dated 18 December 2023, parties were advised that an extension of time to resolve matters was granted until 5 January 2024.

55. The claimant received payment of £1,500 by CHAPS on 15 January 2024 and then the balance of the IPP final payment at the end of the month, in her pay for 31 January 2024.

56. The claimant appealed the Unum decision to cease liability and although that appeal was unsuccessful, following a complaint, the IPP claim was reinstated.

57. The claimant remains in employment but on long term sick leave.

Tribunal's deliberations and decision

58. This is a claim solely for disability discrimination. As set out in the introduction, the claim had initially been for unlawful deductions from wages, the claimant had added the disability discrimination claim by amendment, and a further unlawful deductions from wages claim. By the time of this final hearing, the claimant confirmed that she was not pursuing any of the claims for unlawful deductions from wages.

59. Again as discussed above, the scope of the claimant's disability claims had been discussed at a preliminary hearing which had taken place on 9 November 2023 when she was legally represented. At that preliminary hearing it was confirmed that the claimant was claiming direct discrimination in regard to certain treatment, and there was also a discussion about a claim for failure to make reasonable adjustments.

60. We accepted that both the claimant and the respondent's witness were credible witnesses and indeed there was in fact little or even no dispute about the background facts in this case. Any lack of clarity could be attributed to different recollections. However, as is often the case, it was a matter of differing interpretations of the same facts.

Direct discrimination

61. With regard to the claims for direct discrimination, three events were listed, but the claimant confirmed at this hearing that she was not relying on the delay in paying the income protection payment. She was however in addition relying on the delay in paying the final advance payment of income protection payment in January 2024 as an act of direct discrimination.

62. That claim is therefore in addition to claims relating to the deductions in March and April and the withholding of SSP. We deal with each of these issues in turn.

63. The claimant claims direct discrimination in breach of s.13 of the Equality Act 2010 (EqA). Section 13 states that an employer must not discriminate against an employee by treating them less favourably than others in the same or similar circumstances because of a protected characteristic.

64. Thus, in order to establish direct discrimination, the Tribunal must find less favourable treatment by reference to an appropriate comparator in the same or similar circumstances, and that any less favourable treatment is because of the protected characteristic. There must be a causative link between the protected characteristic and any less favourable treatment. While this is a two stage test, it is often appropriate to focus on "the reason why" the employer acted as they did.

65. This is an objective test and the fact that the claimant believes she has been less favourably treated does not of itself establish less favourable treatment.

Claim for deductions in March and April 2023

66. This claim for direct disability discrimination relates to deductions of £6.30 in March and £36.93 in April 2023.

67. The context here is that the claimant was called into a meeting by Ms Sheridan on 7 March 2023, when she was asked to explain the history of her illness from 2006. The claimant was willing to do this but was surprised to be asked because she thought that the respondent knew all about this, not least because her manager Helen Breslin had been her manager in 2006/2007 when she had returned to work after her illness manifested. It was at this meeting that she brought up the fact that she was not being paid the income protection payment. During the meeting, Ms Sheridan, whose office was down the corridor from the payroll department, enquired in person to be told (erroneously as it subsequently turned out) that the income protection payment had nothing to do with them. There was no discussion about the reasonable adjustment of 15 minutes preparation time at that meeting.

68. However, subsequently, when the claimant received her April pay slip (when she was absent on sick leave), she noticed the deductions which she believed would correlate with around 15 minutes for two shifts in March (before payroll cut off) and for around 3 hours for the month of April before she went off sick. She therefore speculated that this deduction related to what she would have been paid for the 15 minutes preparation time as a reasonable adjustment. She said that she raised this with Ms Sheridan (on the telephone first, she thought, and then in an e-mail) but received no reply. She said that she had noticed on her schedule

that the 15 minutes preparation time had been removed, although in respect of one entry it stated "system error". She did not press the matter at the time because it was repaid (at a higher amount) in her May pay.

69. The claimant asserts that this was less favourable treatment because of her disability.

70. When considering the hypothetical comparator, that comparator must be someone in the same or similar circumstances to the claimant but who does not have the protected characteristic.

71. It is difficult here to construct a hypothetical comparator in the claimant's circumstances but for the disability because the deductions relate to a reasonable adjustment to accommodate the claimant's disability. As noted above, where there might be such difficulties, it may be appropriate for the Tribunal to focus on "the reason why".

72. Thus even if we were to accept that the deduction amounted to less favourable treatment and that there was evidence - namely the deductions and the fact that the 15 minutes was removed from the claimant's schedule - sufficient to raise an inference of discrimination, we considered "the reason why" these sums had been deducted from the claimant's pay.

73. The claimant said that along with the deduction, the 15 minutes had been removed from her schedule. The respondent's only witness, Ms Dey, was not able to refute that. She did however state in evidence that the deductions did not amount to any multiples of 15 minutes of the claimant's pay. The respondent's position was that this was a misunderstanding and a mistake. Their position was that Ms Sheridan had wrongly attributed a deduction which should have related to another member of staff to the claimant. We did not hear evidence from Ms Sheridan which we found surprising.

74. However, as Ms Dey explained in evidence, there was no other evidence to suggest that the reasonable adjustment had been removed. Mr Akram submitted that the claimant had not adduced sufficient evidence to that effect. Unlike the position in 2021 (discussed later) when the claimant had been advised that the

reasonable adjustment of 15 minutes preparation time would be reviewed (at least), there was no suggestion, at the meeting on 7 March or subsequently in writing, that the reasonable adjustment was to be removed or even reviewed. Ms Dey explained that there was a process to go through in terms of reviewing reasonable adjustments and no process had been initiated at that time. The claimant accepted that the 15 minutes had not in practice been removed.

75. On balance, we accepted the evidence of the respondent and we find that the explanation for these deductions was that this was done in error, and therefore was not "because of" the claimant's disability and does not amount to direct discrimination.

Claim relating to SSP

76. With regard to the payment of SSP, the claimant argued that she had been less favourably treated than another member of staff in her position who worked the same number of hours. She said they would get paid SSP. The claimant's position was that she should be treated the same as any other employee entitled to SSP and that income protection has nothing to do with SSP.

77. Mr Akram's position was that the claimant had not satisfied the Tribunal that there was less favourable treatment compared with a comparator in the same circumstances, so she fails at the first hurdle.

78. While we accept that any other member of staff who worked over 16 hours per week would be entitled to SSP, we considered that the correct comparator, that is someone in the same or similar circumstances as the claimant, was a colleague also in receipt of income protection payment, as well as repaying a debt to the respondent. We considered that such a comparator may well have had SSP suspended in order to investigate the interplay with the relevant income protection payment scheme. The fact the claimant was not told was unfortunate, but that does not of itself suggest discrimination.

79. Even if we were to accept that the claimant was less favourably treated than a comparator in the same or similar circumstances without a disability, and that an inference of discrimination is raised by the very fact of the SSP being suspended

and the claimant not being told, we turned to consider the reason why the SSP was suspended when it was.

80. We heard from Ms Dey that she had decided that the SSP should be suspended. She had been investigating the IPP payments with Unum, and realised that the interplay between IPP and SSP might mean that the claimant was being overpaid. She had asked to see the policy and when she read it she thought that perhaps the claimant ought not to receive SSP and IPP at the same time, because she was no longer working 16 hours, so the 14 hour payment could not be said to be "proportionate" and that the IPP may be reduced by the SSP. It was not clear from the policy but the policy did advise, essentially, that Unum had to be informed if there was any change in circumstances. Ms Dey corresponded for several weeks with Unum and it was apparent from the correspondence we were referred to that the matter was by no means straightforward. Ms Dey did however get the impression that there may be an issue with both being paid and that this may result in an overpayment. She was concerned to ensure that the claimant did not find herself in that position, not least because she was already repaying a large debt which had been an overpayment. For that reason Ms Day advised payroll that the SSP should be suspended in the meantime. It was reinstated, with arrears, when Unum confirmed that the claimant was entitled to be paid both.

81. Ms Dey accepted that the claimant should have been informed about the suspension of the SSP before it happened.

82. We accept therefore that the respondent has provided a plausible explanation why SSP was suspended, and we accept that the reason was essentially to ensure no overpayment and was not because of the claimant's disability.

83. The claimant also raised concern about the fact that the respondent had been contacted by Unum on 15 August 2023 to advise that she could receive both. She was not however not informed until 18 August 2023 that she was after all entitled to SSP. She argued that they could have paid her immediately by CHAPS but she did not receive the payment until her August salary. There was a delay in payment but again this could not be explained by the fact that the claimant was disabled.

Delay in payment of IPP

84. The claimant argued that the delay in payment of the final sum before IPP ceased amounted to direct discrimination. She argued that a comparator would not have had payment delayed and that the reason related to her disability.

85. Mr Akram argued that the claimant had not established less favourable treatment than a comparator. He argued that any comparator who also had a debt and an ongoing claim would have been treated in the same way.

86. We considered "the reason why" and noted that the respondent's position was that, although they had received the money in or around mid to late November 2023, they had delayed in paying it to her while settlement negotiations in relation to this claim were negotiated on her behalf by her then solicitor, taking account of the debt which she owed.

87. We came to the view that the reason for the delay in payment, that it was being negotiated as a part of a potential settlement, was entirely plausible given the fact of this claim and an outstanding debt. While we were of course not party to the details, we could appreciate that if a settlement was to be achieved, the repayment of the outstanding debt may have been taken into consideration.

88. We therefore accepted that the delay in payment to a comparator in the same circumstances, that is someone who owed an outstanding debt to the company, may well have had such payment delayed while negotiating. In any event, we accepted the evidence of the respondent in regard to the reason why there was a delay in payment and that related to settlement negotiations and was not because of the claimant's disability.

89. When I asked the claimant on an number of occasions during her evidence about why she believed the respondent had treated her the way they had, she said that she thought they had treated her very unfairly. She was not sure why but that it may be because of "the hassle" she had caused and problems she had created for them. She believed that they were trying to "get at her" because they had overpaid her, because she had taken a previous tribunal against them, and because they disliked her. She did not however at any point say in terms that she believed it was because of her disability or indeed related to her disability in any direct way.

90. The claimant said on a number of occasions that she thought that she had been treated unfairly, and that the treatment had been "deliberate" and we had no doubt that is what she believed. But even if it were the case that she had been treated unfairly, that is not sufficient to establish a claim of disability discrimination.

Failure to make reasonable adjustments

91. As discussed in the introduction, there was some confusion over the scope of the claimant's claim for reasonable adjustments. We accepted however that the claimant was relying on events in 2021 as well as in 2023. We allowed the respondent to argue that the events from 2021 were out of time, but also considered the claimant's argument that the two events were linked and that it was a continuing act (therefore time would run from the end of the second challenge relating to the failure to make reasonable adjustments).

92. The relevant provisions of the Equality Act 2010 relating to reasonable adjustments are contained mainly in sections 20 and 21. Section 20 sets out the employer's positive duty to make reasonable adjustments to address disadvantages suffered by disabled people. The relevant requirement is set out at s.20(3) which states that "the first requirement is a requirement, where a provision, criterion or practice (PCP) [of the employer] 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". A failure to comply with the duty amounts to discrimination under s.21(2).

93. The duty will be triggered only where the employer knows or ought to know that any potential applicant is disabled, and where the employer knows or ought to know that they are likely to be placed at a substantial disadvantage by the PCP as well (schedule 8 (work: reasonable adjustments), part 3 (limitation on the duty), paragraph 20 (lack of knowledge of disability), subparagraph (1)(b)).

94. In this case the respondent had accepted that reasonable adjustments were owed to the claimant in respect of her disability, and that included permitting her an extra 15 minutes at the start of her shift to prepare, which had been in place since

she returned after her illness in 2007. This is why the claimant presented her argument as a failure to "maintain" reasonable adjustments.

Events in 2021

95. The claimant's position was that the reasonable adjustment of 15 minutes preparation time at the start of her shift was removed in or around 24 September 2021. She only worked around 20 minutes on 28 September whereafter she was absent on bereavement leave and then sick leave, not returning until around 9 November 2021, when she raised the issue again. Her position is that the reasonable adjustment was not reinstated until 4 December 2021.

96. The respondent's position is that the adjustments were to be reviewed and that they were not in fact removed.

97. We did not of course hear from Ms Sheridan but we did not accept the respondent's interpretation of the e-mail chain around this time. We read these as having removed the 15 minutes catch up time. This is because of the wording of the e-mail of 24 September 2021, "the 15 minutes meeting time has not been added in this month, so you should not be taking this time". The claimant's position was that it had been removed from her schedule. Further the e-mail dated 29 November 2021 stated, "as this was an agreement with Virgin Media, this is not something we can support". Further, and in particular, in the e-mail we accepted was sent on 3 December 2021, **"**we have reinstated the 15 mins at the start of your shift".

98. Ms Dey tried to explain this by suggesting that it was due to inexperience and unfortunate or inappropriate phraseology by Ms Sheridan which did not have the intended meaning. However, on the basis of the language used, and without hearing evidence from Ms Sheridan herself, we took that e-mail at face value which is that the 15 minutes was re-instated after it had been removed. We took account also of the claimant's evidence that this had been removed from her schedule.

99. We conclude that the claimant's reasonable adjustment, of 15 minutes catch up time at the start of each shift, was removed, and that this would have in practice impacted on the claimant from 9 November until 3 December 2021.

100. The respondent argues that, even if the Tribunal were to find that there was a failure to maintain reasonable adjustments, that this claim was out of time, the adjustments having been reinstated in December 2021, and there having been no further issue, as accepted by the claimant, until the claimant raised concerns in May 2023.

101. The claimant argues that this failure to maintain reasonable adjustments was a continuing act. That is she argues that the discriminatory act continues because of the removal, as she argues, of the reasonable adjustments in 2023, to which we now turn.

Events in 2023

102. The claimant's position is that this failure to maintain reasonable adjustments is evidenced by the deductions which were made in her March and April pay. She did not become aware of these deductions until she reviewed her April pay slip at which time she checked her March pay slip. It was only then that she linked this to the meeting on 7 March 2023 when she had been asked to go over the background to her illness. She noted that the deduction for March was around 30 minutes which would be two shifts, which she would have completed before payroll cut off date, and for April for around 3 hours, which she would have completed before going off sick.

103. Ms Dey's evidence was that these figures did not correlate exactly with two shifts in March or with six shifts in April. She thought that they were random times, which might equate with a member of staff being late. This referenced the fact that Ms Sheridan had told her that she had made a mistake in both March and April by attributing deductions to the claimant when they should have been in put in regard to another member of staff. (We did not hear from Ms Sheridan so could not know if that was the same member of staff or not).

104. The claimant also gave evidence that around this time the 15 minutes had been removed from her schedule. We did not in fact see the schedule, which the claimant said she thought she had on her phone, but in any event, there was no evidence to refute that, as Ms Dey was not able to say that this had not been removed. Although we understood Ms Dey to have looked back at schedules, and she said that they did not go as far back as 2021, she made no reference to the position of schedules in May 2023. In any event these were not produced by the respondent.

105. The claimant did however advise that on looking back at her schedule she noted that against 20 March, it was stated to be a "system error".

106. However, all other circumstances at the time point to these deductions having been made in error. In particular, the claimant said that she did take the 15 minutes catch up time and that was of course because no-one had informed her that it was to be removed. Although she went off sick from 11 April 2023, she accepted on questioning that in practice the 15 minutes had not in fact been removed. Unlike the position in 2021, she had received no communications and no e-mail about a review or about the fact that the 15 minutes was to be removed. Ms Dey said that there was a formal process to be undertaken to review any reasonable adjustments before they would be removed and this had not happened. In all the circumstances, we decided that there was no removal of the 15 minutes catch up time and therefore there was no failure, in 2023, to maintain reasonable adjustments.

107. This means that the claimant has not succeeded in her argument that there was a failure to make reasonable adjustments in 2023, that is that there was no discrimination at that time, so it cannot be said that there is any link with what happened in 2021. In other words, it cannot be said that there was a "continuing act" of discrimination when there was no discrimination in 2023 and accordingly any claim about discrimination taking place at the end of 2021 must be out of time.

108. For the avoidance of doubt, we could not say that it was, in the circumstances, just and equitable to extend time, given the matter was rectified in December 2021

and we have found that the reasonable adjustment has not been removed from the claimant since then.

Conclusion

109. We should say that we had some concerns about how the respondent conducted itself in regard in particular to communications with the claimant, especially in regard to the withdrawal of SSP. We were concerned too that we did not hear evidence from Ms Sheridan which might in other circumstances have caused difficulties for the respondent. We have however concluded, based on the evidence that we have heard, that the claims for disability discrimination are not well founded. That is not to say that we did not also have a good deal of sympathy for the claimant. We understood that delays in receiving payments can have a significant impact on an individual's financial position and wellbeing, but we could not say that these delays had anything to do with the claimant's disability. All claims must therefore be dismissed.

Employment Judge: **M Robison**
Date of Judgment: **06 June 2024**
Entered in register: **07 June 2024**
and copied to parties