EMPLOYMENT TRIBUNALS

Claimant: Mr M Downs

Respondent: Pilgrims Food Masters UK Ltd

Heard at: Manchester (in person) **On:** 5th 6th 7th February 2025 & 11th February in Chambers

Before: Employment Judge Sharkett
Ms A Berkeley- Hill
Mr D Mockford

REPRESENTATION:

Claimant: Mrs V Downs (Claimant's wife)
Respondent: Mr R Grove – Solicitor (EEF trading as Make UK)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant claim was submitted outside the three months' time limit for submitting his claims. It was just and equitable to extend the time limit and the claims were accepted.

2. The Claimant's claim of direct disability discrimination under s.13, Equality Act 2010 is not well founded and are dismissed.

3. The Claimant's claims of unfavourable treatment because of something arising in consequence of his disability are not well founded and are dismissed

4. The Claimant's claims of a failure on the part of the respondent to make reasonable adjustment for the claimant's disability are not well founded and are dismissed.

REASONS

1. The Claimant brings claims of unlawful discrimination under s13, s15 and s20-23 Equality Act 2010 (EqAct 2010). At the time of the events leading to his claims he had been in the respondent's employment since February 2002. The claimant commenced early conciliation on 17 May 2023 with an ECC issued 28 June 2023. He submitted a claim of unlawful discrimination on the protected characteristic of disability on 12 July 2023. It is the claimant's case that his claims are in time and should be allowed to continue on the basis that the actions of the respondent amounted to a course of conducted which ceased when his second appeal was unsuccessful. In the alternative he argues that it would also be just and equitable to extend time. At the hearing today Mr Grove has indicated that the Respondent takes no issue with the time limits. However, time limits are a jurisdictional issue that cannot be simply agreed between the parties. At the Preliminary Hearing (PH) for case management purposes of 22 February 2024 it was agreed that it was appropriate to consider the issue of time at the final hearing.

2. Since filing his claim in June 2023, the claimant had resigned from his job with the respondent. He confirmed however at the same PH that he did not intend to pursue any further claims against the respondent following his resignation. At the PH a list of issues was agreed and the respondent was permitted to file an amended response. An amended response was filed on behalf of the respondent in accordance with the case management orders. Whilst the claimant was asked to provide further details in relation to a comparator, that information was not provided and the Tribunal was informed that the claimant was not able to provide the same.

3. At the hearing today, Mr Grove made an application to amend the amended response. He explained that the application was made to enable further clarification of the claim. He submitted that the application was only being made today because there had been a change of representative. The Tribunal noted that the change of representative had involved only a change if the identity of the person with conduct of the case and the respondent remained a client of the same organisation providing representation. Having heard from Mr Grove the Tribunal determined to allow the application save for the words in paragraph 11 of the application set out below. The Tribunal refused to allow this part of the amendment, because it found that this was an additional 'aim' that was to be introduced almost twelve months after the original amended response had been filed and was only put before the claimant today. The Tribunal noted that the legitimate aims of the respondent were clearly set out in the relevant policy and dealt with in the witness statements. The Tribunal refused the application because in addition to any reasonable explanation for the delay in amendment, the balance of hardship would fall more heavily on the claimant , a litigant in person, if it was to be allowed. The relevant words are:

"based on attendance, and to exercise discretion to pay CSP outside the limitation period" and

"only in exceptional circumstances is a proportionate means of supporting absence management and control the CSP which would , if not restricted outside these limits, impact the business by imposing a burden on the business"

4. A further preliminary matter arose prior to hearing evidence from the parties. At the PH in February 2024 which was conducted by CVP, the claimant was unable to come on screen to attend the hearing because of the presence of the respondent HR officer. I discussed this with Mr Warren-Jones who appeared on behalf of the respondent. It was accepted that the respondent did of course have a right to be present in the hearing, however, it was agreed that where the presence of an individual had a detrimental effect on both the health of a claimant and their ability to give their best evidence, it would be reasonable to find someone else to attend in her stead, especially in light of the size and resource of the respondent. This morning I noted the presence of the same HR officer who was attending in the capacity of note taker. Mr Grove was not fully apprised of the situation discussed at the PH having not been present on that occasion. The HR officer spoke out to express her view that it was a public hearing so had the right to attend. However, Mr Grove understood the implications of her presence on the hearing and alternative arrangements were quickly made when one of the respondent witnesses agreed to act as note taker for Mr Grove.

5. The claimant's wife appeared on behalf of the claimant. She produced a written witness statement and answered questions in cross-examination by Mr Grove and from the Tribunal. The Claimant also produced a written witness statement and answered questions in cross examination by Mr Grove and from the Tribunal. Prior to giving his evidence the Tribunal reassured the claimant that he would be given any assistance required by the giving of breaks and the clarification of questions etc in order that he would be able to give his best evidence. The claimant also produced a brief written witness statement from Karen Craddock, the full time regional officer for Unite the Union and former union convener when previously employed by the respondent. Ms Craddock did not attend the Tribunal to give evidence and consequently the Tribunal attached only as much weight to this statement as it considered appropriate. This was explained to the claimant and his wife at the hearing.

6. Mr R Grove, solicitor, appeared in behalf of the respondent and called the following witnesses who gave written and oral evidence.

    a. Mr M Curtain – Logistics and Planning Manager of Supply Chain Department. (original decision maker)

    b. Mr D Shaw – Op-EX Co-ordinator and first appeal officer

    c. Mr D McKee – General Manager on site and second appeal officer

7. All witnesses gave evidence in chief by way of written witness statements which had been exchanged and had been read by the Tribunal prior to hearing oral evidence. The Tribunal was also provided with a joint bundle of documents consisting of 257 pages along with a chronology and cast list which had all been prepared by the respondent. All references to page numbers within the body of this judgment are references to pages in the bundle provided unless otherwise stated.

8. The Issues to be determined by the Tribunal were identified as:

(i) Time Limits

i. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the act to which the complaint relates?

ii. If not, was there conduct extending over a period?

iii. If so, was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the end of that period?

iv. If not, were the claims made within such further period as the Tribunal thinks is just and equitable? The Tribunal will decide:

1. Why were the complaints not made to the Tribunal in time?

2. In any event, is it just and equitable in all the circumstances to extend time?

(ii) **Direct disability discrimination (Equality Act 2010 section 13)**

a. What are the facts in relation to the following allegations:

i. The respondent failed to exercise its discretion to extend the payment of sick pay.

b. Did the claimant reasonably see the treatment as a detriment?

c. If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without the claimant's disability was or would have been treated? [The claimant says he was treated worse than a hypothetical comparator – although he also relies on the employees named by the respondent in evidence today If so, has the claimant also

proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

d. If so, has the respondent shown that there was no less favourable treatment because of disability?

(iii) **Discrimination arising from disability (Equality Act 2010 section 15)**

a. If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

    i. In calculating eligibility for sick pay the respondent included absences from work because of disability.

    ii. Refused on a number of occasions to exercise its discretion and disapply its practice of stopping sick pay when the employee had been absent for the maximum number of times/occasions

b. Did the following things arise in consequence of the claimant's disability:

    "i) the claimant's sickness absence during the relevant period for calculating sick pay.

c. Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment was because of any of those things? / Did the respondent refuse to subsequently pay sick pay to the claimant because of that sickness absence]?

d. If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

e. If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

    i. As set out in the respondent absence management policy and to improve the poor sickness absence levels on site.

f. The Tribunal will decide in particular:

    i. was the treatment an appropriate and reasonably necessary way to achieve those aims;

    ii. could something less discriminatory have been done instead;

    iii. how should the needs of the claimant and the respondent be balanced?

(iv) **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

a. Did the respondent have the following PCPs:

i. Provision of company sick pay for a defined period of time after which all right to sick pay stopped
ii. A managerial discretion to extend sick pay in exceptional circumstances.

b. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant had cause to be absent from work on a number of occasions because of his disability. It is his case that this placed him at a disadvantage because he lost his entitlement to sick pay where his illness was not by reason of his disability.

c. Did the respondent know, or could it reasonably have been expected to know, that the claimant was likely to be placed at the disadvantage?

d. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

i. To exercise the discretion to extend sick pay

ii. To discount from any calculation for entitlement to sick pay, any periods of absence due to disability.

e. By what date should the respondent reasonably have taken those steps?

Submissions

9. For the respondent Mr Grove provided written submissions, a copy of which had been provided to Mrs Downs so she could have an opportunity to consider the same before making submissions of her own. Mr Grove reminded the Tribunal of the evidence it had heard about the two occasions when the respondent had exercised its discretion to deviate from the CSP scheme, and highlighted the material differences between those two employees and the claimant. He accepted on behalf of the respondent that the handling of the claimant's grievance might have been better in hindsight, particularly in regard to the appointment of Mr Sutton to hear the grievance. He further reminded the Tribunal of the purpose of the CSP scheme and the difficulties encountered by the respondent in respect of high sickness levels and the stance taken by the union in circumstances where it has made allowances to other agreed policies.

10. On behalf of the claimant, Mrs Downs asked the Tribunal to consider her husband's case carefully. She reminded the Tribunal of the manner in which

her husband ‘s grievance had been mishandled and how the respondent had treated him during that process. She submitted that the respondent had failed to follow its own policies and procedures and had deprived the claimant the opportunity to resolve the situation, which in turn, she submits led to his resignation.

11. Prior to retiring to consider our decision I reminded Mrs Downs of the issues to be determined by the Tribunal. I reminded her that although she had raised a number of complaints about the way in which the respondent had treated the claimant, it was only the claims before the Tribunal that it would be able to decide. I also reminded her that consideration of an uplift in relation to a failure to follow the ACAS code would arise only if the claimant succeeded in any of his claims as the failures relied on were not before the Tribunal as a freestanding claims of discrimination.

Findings of Fact

12. Having consider all the evidence, both oral and documentary, in the round, and having regard to the submissions of the parties, the Tribunal make the following findings of fact on the balance of probabilities. This Judgment is not a rehearsal of all the evidence heard, but is based on the reevant parts of the evidence on which the Tribunal has based its decision.

13. At the time of the events that have led to this Tribunal, the claimant had worked for the respondent since February 2002 and was a dispatch team leader. His immediate line manager was a Mr Sutton who left the business in August 2023. When the claim was commenced the claimant remained in the employment of the respondent but he has since resigned. He brought no further claim arising out of his resignation.

14. The claimant was employed under a written contract of employment a copy of which was provided to the Tribunal (p46). The Tribunal noted that this was neither dated nor signed but it was not disputed that this was the contract issued to the claimant. The terms of the contract were supplemented with various policies and procedures contained in the Respondent handbook.

15. The main thrust of the Claimant’s claim relates to the fact that when he became ill and required hospitalisation in January 2023, he was only paid Statutory Sick Pay (SSP) because he had already exhausted his right to Company Sick Pay (CSP) in that rolling 52 week period . The entitlement has been used up sue to a 13 week disability related absence. The relevant policy and procedure for the purposes of this claim is that of Absence Management (the Policy), and entitlement to Company Sick Pay (CSP), which had been agreed under the terms of a Collective Agreement with the Union.

16. The Policy sets out its aims and objectives and the obligations of both the respondent and its employees. It provides inter alia: (p54)

‘The Company has identified the need for an absence policy to benefit the overall efficiency of the organisation and the interests of its employees. A high

level of attendance at work will contribute to and provide positive assistance in, the planning and provision of quality services and high morale.
The aims of the absence policy are to create and maintain a culture where all parties work together to achieve high levels of attendance and make absence controls effective. To establish appropriate monitoring and control procedures and to ensure that employees receive fair and consistent treatment'

17. The policy sets out in some detail the different types of leave anticipated by the respondent and how they will be dealt with. In respect of notification of absence the respondent sets out what is required of the employee so that:

"Your manager can understand the reasons for, and likely duration of your absence. In this way your absence can be dealt with in an appropriate and confidential manner, and the earliest possible return to work facilitated'.

18. Under the terms of the policy the Respondent operated a generous company sick pay scheme. The scheme was available to all employees on the following terms:

"Once you have completed 6 months' continuous service with the Company and provided you comply with the Company's sick pau requirements you may, at the discretion of the Company be paid your normal basic salary (for the avoidance of doubt basic salary does not include shift premium) in any consecutive 52 week period. Calculation of any allowance for Company Sick Pay shall be taken from the first day you go sick and what entitlement (if any) you have to Company Sick Pay in the next 52 weeks will be dependent upon how much Company Sick Pay you have already received in the previous 52 weeks.
Any payments made are inclusive of any statutory sick pay or social security benefits to which you may be entitled.
The Company reserves the right to withhold this discretionary payment under the Company's Sick Pay scheme in any case where the circumstances so justify. …."

19. The amount of CSP an employee may be entitled to was dependent on length of service as follows:

Number of Year's Service	**Period of Sickness Pay**
0-6 months	Statutory Sick Pay only
6 months – 5 years	4 weeks' pay
5 years – 10 years	8 weeks' pay
10 years +	12 weeks' pay

20. The Tribunal accepted the respondent evidence, which was not disputed, that, whilst not in writing, the maximum number of weeks that CSP was now paid

was 13 weeks and that there was a management discretion to extend it beyond that period if there were exceptional reasons for doing so.

21. The Tribunal was further told that if an employee was absent on three occasions they would lose their right to CSP for the rolling 52 week period. In oral evidence Mr Shaw also told the Tribunal that periods of absence relating to the same type of illness would only count as one absence, but he was entirely unclear about how this 'policy' was applied and over what period. The Tribunal noted that the policy states that three periods of late time keeping will amount to one period of absence but neither of the additional matters raised by Mr Shaw were included in it. However, this evidence was not challenged by the claimant.

22. The Tribunal was told that, to the knowledge of the witnesses who appeared before this Tribunal, a discretion to deviate from the Policy in respect of CSP had only been exercised on two occasions. Mr McKee explained that any agreement to deviate from the CSP scheme would need to be authorised by him. He explained that if a manager wished to exercise their managerial discretion in favour of an employee, the manager would approach him for approval. He explained that it would only be in instances where a manager was willing to exercise the discretion that he would be involved. He explained that if a manager was asked to exercise their discretion to deviate from the Policy in respect of the CSP scheme and declined to do so, there would be no requirement for his involvement.

23. As set out above at the time of the alleged events the claimant had worked for the respondent for over 20 years. There had been a TUPE transfer to this respondent in 2021, but the terms and conditions of his employment remained the same.

24. The respondent accepts that, at the time of the alleged events the claimant was a disabled person for the purposes of s6 Equality Act 2010 by reason of OCD, PTSD and dissociative personality disorder.

25. The claimant explained that following the death of his father in 2013 he started to experience a decline in his mental health which culminated in a severe mental breakdown in 2019. As a result of the breakdown the claimant was unable to attend work and commenced a period of sick leave on 18 March 2019. The claimant explained that he had struggled with mental illness over a long period of time but that it had previously had little impact on his work life which had given him some sense of normality. He further explained that prior to the decline in his mental health in 2014, he had a good attendance record with no record of either prolonged or intermittent periods of sickness absence. During his absence in 2019 the claimant had complied with the terms of the Policy and had been afforded his full 13 week entitlement to CSP.

26. During this absence the Claimant attended three Occupation Health consultations but failed to attend a further one arranged for 5 June 2019. In last occupational report relating to this absence a phased return to work was recommended when he was fit to return. It was the claimant's evidence that although he was not fully recovered, he returned to work on 14 June 2019,

because he had exhausted his CSP. He explained that as the sole earner in the household he felt he had no choice but to return to work The Tribunal noted that the claimant attended a further occupational health appointment on 3 July 2019, in which he confirmed that he had returned to work on a two week phased return. At the appointment the claimant had confirmed that although he was experiencing some difficulties with memory and anxiety, he was able to fulfil all of his duties and did not feel that work could put in any measures that could further ease his symptoms. He was assessed as being fit to remain in work. In oral evidence the claimant accepted that he did not ask for any additional support or assistance when he went back to work.

27. Following his return to work in June 2019, the claimant had no further periods of absence until 4 November 2020 when he was absent for a period of two weeks with back pain. He returned to work having taken 10 days absence on 18 November 2020.

28. His next period of absence occurred at the end of December 2020 and he attended an Occupational Health assessment on 26 January 2021. The Tribunal has been made aware that prior to this period of absence there had been an allegation made against the claimant which the respondent intended to investigate. It is referred to as a 'scurrilous' allegation by the health care assessor in the OH report which also explained the impact this complaint had on him and his family and how it had had adversely affected his mental wellbeing. He was diagnosed as unfit for work and it was suggested that a period of 4 weeks absence would be needed before a return to work could be attempted. No further occupational health appointments were recommended and the claimant returned to work on 16 March 2021.

29. The claimant had two further periods of absence in July 2021 and January 2022 when he was required to absent himself from work in accordance with the respondent guidelines relating to Covid. Neither of these absences were counted under the Policy or for the purposes of CSP at that time (p81).

30. On 17 May 2022 the claimant commenced a further period of absence. The Tribunal has not been provided with the full detail of what led to this absence but it was triggered by a traumatic event relating to his new-born daughter whose heart had stopped and she had required resuscitation. The absence contact log for that period was completed by the claimant's line manager, Mr Sutton. In it Mr Sutton records the reason for the absence as ' very sick child' and records that the claimant had been in contact throughout his absence (p82). Following this traumatic event, the claimant was diagnosed with Post Traumatic Stress Disorder (PTSD). His treatment required a change in his medication and counselling sessions. He was reviewed by Occupational Health by telephone on 5 July 2022, and whilst not fit for work at that time was assessed as being expected to return to work on 8 August 2022 with a phased return.

31. The Tribunal noted that following his return to work the claimant was, for what would appear to be the first time, required to attend a counselling meeting with his line manager and told he must improve his attendance. It would appear that the trigger for this meeting was that his absence was the second absence in a rolling 52 week period (p85). The Tribunal questioned Mr

Curtain, who was Mr Sutton's line manager about this meeting and the fact that it was stated that a disciplinary hearing may follow if there was no improvement. Although Mr Curtain had told the Tribunal that he met daily with Mr Sutton and had a weekly catch up meeting where sickness absence was discussed, he was unable to shed any light on the matter. In particular he was unable to say what if any steps had been discussed or put in place to improve the claimant's attendance. It is not disputed however that the claimant's attendance was not managed under the absence management policy and no action was ever taken against him. Mr Curtain further confirmed that the respondent believed all the claimant's sickness absences were genuine.

32. Following his phased return to work in August 2022, the claimant did not have any further absences from work. The Tribunal was told that there were no concerns about the claimant's ability to carry out his role and that he was a trusted and respected worker who on occasions had represented the respondent at events over the years. Unfortunately, on 13 January 2023 the claimant became unwell and required admission to hospital where his condition deteriorated further and he was transferred for a time to the Intensive Care Unit. Although the Tribunal has not seen the medical notes for this admission it is not disputed that the claimant became seriously ill with what was later diagnosed as Weils disease. Both his liver and kidneys were seriously affected by the infection and he required mechanical support for his organs whilst there.

33. It was the claimant's wife who first brought his illness to the attention of the respondent. She initially informed his manager Mr Sutton on 21 January 2023 and when she was told that the claimant was potentially infected with Weils disease, the hospital advised her to notify the respondent as Weil's is a notifiable disease.

34. It was understandably a worrying time for the claimant and his family while he was in hospital and Mrs Downs explained how this was made worse when she was told that the respondent would not agree to pay the claimant his full pay while in hospital. It was clear during the course of this hearing that the claimant and his wife firmly believed that the claimant had contracted Weils disease whist at work. Consequently, they were firmly of the belief that the respondent should pay the claimant full pay during his absence and throughout the period of his recovery. The respondent disputes liability for the disease on the basis that there was no evidence to support the claimant's allegation. This matter is subject to a personal injury claim which is being pursued elsewhere. The Tribunal is not asked to make a finding on this matter and it has not been provided with any evidence that would enable it to do so. For the avoidance of doubt, the Tribunal raised the issue of the pursuance of a personal injury claim elsewhere when this Tribunal was asked only to determine the claim of discrimination. Mrs Down's told the Tribunal that they had taken legal advice on the matter and been told that they should proceed with separate claims.

35. In respect of the entitlement to CSP, Mr Curtain explained that the claimant's line manager Mr Sutton had first approached him to tell him that Mrs Downs was asking for the claimant to receive full pay during his absence despite having used up his 13 week CSP entitlement for that rolling year. Mr Curtain

explained that whist it is not written in the policy there is a manager discretion to deviate from the CSP policy in exceptional circumstances. He also explained that in the 36 years he had worked for the respondent he had only been asked to do this once before. He explained that he discussed this with Mr Sutton and decided that although the claimant was seriously unwell, he did not consider that this warranted a deviation from the CSP scheme as he did not consider the absence to be exceptional. He explained that the respondent had a high level of sickness absence compared to other sites within the organisation and that the respondent had taken the decision to strictly apply the scheme that applied on its site unless there were exceptional circumstances. Mr Curtain explained that he had exercised his discretion in favour of another employee on one occasion but that the circumstances in that case were entirely different. This particular employee had the same right to CSP as the claimant but had lost his right to rely on it because he had taken three absences in that 52 week rolling year. The reason for the absences had been so that the employee could attend medical appointments with his terminally ill wife. Mr Curtain explained that this employee had not used up his CSP entitlement but rather he had triggered the loss of it because of his absences. Mr Curtain decided that he would re-instate the right to CSP to enable the employee to attend appointments with his wife and he also changed his shift pattern to assist him at this time. Mr Curtain explained that claimant had benefitted fully from the scheme over the previous three years without any steps being taken to require him to improve his attendance. He did not consider that having an additional period of sickness when his 13 weeks entitlement to CSP had been exhausted in the current rolling year was an exceptional reason which might warrant exercise of the discretion in his favour.

36. Mr Curtain was asked by Mrs Downs and the Union representative, to change his mind about paying the claimant. Mr Curtain explained that before he again refused, he approached both HR and Mr McKee to make sure that he was acting fairly and appropriately.

37. By email of 17 February 2023 Mrs Down's contacted the Union representative to commence a grievance against the respondent. The basis for the grievance was "*the failure to pay the claimant for his ongoing sickness absence and that manager discretion had been used in circumstances similar or less serious than the [claimant]" which was confirmed by Karen [Craddock].* Unfortunately although Ms Craddock has stated as much in her written witness statement, she has not attended the Tribunal to explain the circumstances she refers to and the Tribunal have not been provided with the names or details of the persons in whose favour the discretion is said to have been exercised, save for the two referred to by the respondent. In respect of those two, the Tribunal find for the reasons set out above and below, that their circumstances were materially different to the claimant and the claimant is unable to rely on them as comparators for the purpose of this claim. As explained in the hearing, the issue for the Tribunal is not whether one illness was more or less severe than another, but rather for the purposes of the claim of direct discrimination whether the circumstances were materially the same, which they were not.

38. By letter of 18 February 2023, the claimant raised a grievance and asked the respondent to reconsider its decision on the basis of his length of service and the fact that he was aware that the discretion had been exercised in the past and was still being used in circumstances similar of less serious than his. The grievance was acknowledged by HR 4 days later and Mrs Downs was informed that she would not be allowed to represent or speak on behalf of the claimant as the respondent does not allow family members to participate in formal meetings as it would not be appropriate. HR did agree that the claimant would be allowed to make written submission and the hearing could be held in his absence. The Tribunal note that although Mrs Down's refers to the claimant's diagnosed mental health conditions when she asks to be able to accompany him at the grievance meeting, this is not a PCP that is relied on as any part of this claim and it is therefore not required to make any observation on the same.

39. The grievance meeting was held by Mr Sutton, the claimant's line manger and took place on 21 March 2023. The claimant made written submissions and a union representative was in attendance. The meeting lasted 45 minutes during which time, Mr Sutton, the HR representative and the union representative, read through the written submissions which ran to some six pages of heavily typed text. The Tribunal noted that all issues raised by the union representative were answered by the HR officer without reference to Mr Sutton and the only input made by him was an introduction and a next steps comment. During the course of this brief meeting, the union official raised the suitability of Mr Sutton being appointed to hear the grievance as the decision to not pay the claimant had been taken by Mr Sutton's line manager and that Mr Sutton would surely not overrule his decision. In response the HR officer responded that:

"Norbett is the line manager and will have a better understanding of the colleagues/absences/history etc. In addition he is the hearing manager and it is his decision upon investigating what the outcome should be"

40. During the course of oral evidence however, it became clear that Mr Sutton did not have the authority to decide that the claimant should be paid in excess of his entitlement as that was a decision that could only be taken by a manager in the senior management team. The Tribunal did not accept the evidence that Mr Sutton would have overturned Mr Curtain's decision if he thought it was the right thing to do as there was no evidence of him having done so previously and Mr Sutton was not here to give evidence. In addition it cannot have been common knowledge , as suggested, that junior managers were happy to overrule their seniors, as it was clearly a concern to the union representative who would have had day to day knowledge of the workplace rather than more senior managers who were more removed from the situation. The Tribunal was surprised that an organisation the size of the respondent would have taken such an unsatisfactory approach to this grievance especially in light of the circumstances of the case. However, this is not relied upon as an act of discrimination and the Tribunal make no further observations on the matter. The Tribunal is satisfied that the defects at this stage were remedied to an extent in later appeal hearings and the respondent

now has an awareness of the reasons why the Tribunal has been critical on this matter.

41. By letter dated 30 March 2023, but not emailed to the claimant until 4 April 2023, the claimant was informed that his grievance had not been upheld. He exercised his right of appeal by letter of 5 April 2023 in which he also expressed his dissatisfaction at the delay in communicating the outcome to him in breach of the respondent policy. The letter also records the claimant's request that the HR officer that had been involved to date should no longer have any involvement in his grievance.

42. Mr Shaw a member of the senior management team was appointed to hear the appeal. He told the Tribunal that he was the same grade as Mr Curtain and would have had the authority, subject to final approval from Mr McKee, to overturn Mr Curtain's original decision and exercise his managerial discretion in favour of the claimant. Mr Shaw explained that he was experienced in hearing disciplinary and grievances and, that although he had not received any formal training in this area ,he had started off by taking notes in such meetings and progressed to hearing them having gained experience.

43. As the claimant remained unwell at the time of the appeal. the respondent agreed, as a reasonable adjustment ,that the claimant would be allowed to make written submissions, with his union representative attending on his behalf. The hearing took place and was attended by Mr Shaw, Ms Crabb as HR advisor and note taker and the claimant's union representative. At the meeting the union representative read out the claimant's statement. On his behalf she confirmed that his desired outcome would be the be paid from the first day of his current sickness absence until he was physically fit enough to return to work. He wanted the discretion of management to be granted and for them to show him empathy and support. By letter of 12 May 2023, the claimant was informed that his appeal had not been successful. (p171)

44. The outcome letter addressed the subject of an employer's duty to make reasonable adjustment for disabled employees in the workplace. It explained to the claimant that such adjustments did not include automatic payment for absences but could include adjustments to the absence policy in relation to trigger points for absence management. Mr Shaw explained that it was the policy of the respondent to rigorously apply the company absence policy whilst supporting the employee and encouraging an early return to work. He explained that the claimant's levels of absence would not normally be deemed acceptable by the respondent, but full allowance had been made for this in light of the claimant's disability, and occupational support and reviews had been available throughout. It was his oral evidence that he believed the respondent had provided a high level of support to the claimant in relation to his attendance record and that to make the further adjustments to the scheme and give the claimant full pay was not a reasonable step to take. having considered all the circumstances of his current absence.

45. The claimant was informed of the additional rights of appeal under the respondent grievance procedure and he exercised this by letter of 16 May 2023, which ran to 10 pages (p180). Once again by way of an adjustment the claimant was permitted to make written submissions. The meeting was

originally scheduled to take place on 26 June 2023 but due to the unexpected absence of Ms Crabb, the senior HR partner on the day, this was postponed to 19 July 2023. In oral evidence Mr McKee explained that it would have been possible to proceed with the hearing on 26 June 2023 as there was another HR officer available. However this was the same officer that the claimant had objected to and he was not prepared to proceed with her present in the meeting of the 26th. Therefore the hearing was postponed to accommodate his wishes.

46. Mr McKee as the most senior manager on site had been appointed to hear the appeal on 19 July 2023. In addition to the union representative, Ms Craddock the regional union officer and the claimant also attended. On this occasion Ms Craddock attended as the claimant's representative. The meeting lasted for over an hour, during which time both Ms Craddock and the claimant were permitted to put the claimant's case, as is evidenced from the minutes of the meeting (p205)

47. The claimant commenced a phased return to work on 1 August 2023. By letter of 8 August 2023 (p218) he was informed that his appeal was not successful. Mr McKee confirmed that he had written the outcome letter having considered all the information he had obtained. He had concluded, from the investigation that had been carried out and his own review of how the claimant's disability related absences had been managed during the previous years, that this had been reasonable and in accordance with guidelines of what was expected of an employer when supporting an employee with a disability. The letter reiterated the help and support that had been given to the claimant in relation to his disability related absences.

48. In oral evidence Mr McKee explained how he did not think that enhancement of a company sick pay scheme to discount all disability related absences for the purposes of pay, was a reasonable adjustment in this case. He also explained how the site on which the claimant worked had the highest sickness absence level within the whole group and was at the time running at 7% He confirmed that in order to address this the absence management policy was being strictly applied. He further confirmed that requests for help over and above the company sick pay scheme were extremely rare and that in the first instance the decision would be made by the relevant manager. If the manager thought it was appropriate the manager would then approach him for approval. Mr McKee confirmed that in addition to the employee mentioned above by Mr Curtain, he knew of only one other person where the discretion had been exercised in their favour. The Tribunal was told that the employee referred to by Mr McKee was an engineer with 20 years' service. This employee had not taken any sickness absence in the previously twelve months when he suffered a severe stroke leaving him paralysed and unable to speak. Following the stroke the employee exhausted his 13 week CSP but was making progress to recovery. Mr McKee explained that the respondent was hopeful that the employee would make a full recovery and return to work and therefore extended the CSP on that occasion. In the event the employee did not fully recover and his employment was terminated.

49. Although the claimant did have a further right to appeal the decision he did not exercise that right and resigned with a weeks' notice on 18 August 2023. The

respondent did not require the claimant to work his notice but at this hearing the claimant told the Tribunal that he had not been paid for this. There is no money claim before this Tribunal but Mr McKee has confirmed that the respondent will pay the claimant's notice if he makes contact with them.

50. Having issued his claims of discrimination on the protected characteristic of disability on 12 July 2023, the claimant did not bring any further claims or allegations following the end of his employment.

The Law

The burden of proof in discrimination cases

s136 Equality Act states that

"(1) This section applies to any proceedings relating to a contravention of this Act.

(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."

51. This section reflects what is often called "the shifting burden of proof." The law recognises that direct evidence of discrimination is rare and employment tribunals frequently have to infer discrimination from their findings of material facts. The law requires the claimant to show facts which could suggest that there was discriminatory reason for the treatment. It is only if the claimant shows facts which would, if unexplained, justify a conclusion that discrimination had occurred, that the burden shifts to the employer to explain why it acted as it did. The explanation must satisfy the Tribunal that the reason had nothing to do with the protected characteristic.

Direct discrimination s113 Equality Act 2010

52. In assessing whether treatment in less favourable, the test is an objective one — the fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. However the claimant's perception is still relevant. The approach we must adopt is helpfully explained in the EHRC Code of Practice as follows 'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated — or would have treated — another person.'

53. Whether less favourable treatment has occurred is assessed by comparing what has happened to the claimant with how a real or hypothetical comparator was or would have been treated. The legislation requires that there must be no material differences between the circumstances relating to the claimant and their comparator.

54. In Gould v St John's Downshire Hill 2021 ICR 1, EAT, Mr Justice Linden, helpfully explained what the tribunal must decide: 'The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… [and] the influence of the protected characteristic may be conscious or subconscious.'

55. As noted above, this is decided bearing in mind the burden of proof in s.136 of the EqAct 2010 This entails a two-stage test. At the first stage the claimant must prove facts from which the tribunal could decide that discrimination has taken place, which is commonly described as a 'prima facie case of discrimination.' At the second stage — which is only engaged if such facts have been made out to the tribunal's satisfaction (i.e. on the balance of probabilities) — the burden 'shifts' to the respondent, which must prove (on the balance of probabilities) a non-discriminatory reason for the treatment in question. Tribunals will only need to apply the provisions of S.136 if they are not in a position to make clear positive findings based on the evidence presented as to whether there has been discriminatory treatment and about the putative discriminator's motives for subjecting the claimant to that treatment. The Court of Appeal's judgment in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and others 2005 ICR 931, CA makes clear that the outcome at the first stage will usually depend upon what inferences it is proper to draw from the primary facts found by the tribunal.

<u>Discrimination arising out of disability s15 EqAct 2010</u>

56. s 15 Equality Act 33. Section 15 EqAct 2010 defines discrimination arising from a disability as follows

> "(1) A person (A) discriminates against a disabled person (B) if –
> A treats B unfavourably because of something arising in consequence of B's disability, and
> 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 a disability."

57. Section 15 EqAct 2010 is particular to people with disabilities. It recognises that the reason for discriminatory treatment might not be the disability itself (that would be direct discrimination) but because of the way the disability impacts on the disabled person, for example because they had to take a lot of time off due to sickness absence caused or related to their disability. The treatment is unlawful if it is "unfavourable" rather than "less favourable" which means that no comparator is required for this form of alleged discrimination.

58. s15 EqAct 2010 requires the unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is an effective cause the causal test will be satisfied.

59. The employer's motivation is irrelevant. It is sufficient for a claimant to show facts from which the tribunal could reasonably conclude that there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. If the claimant does that, the burden shifts to the respondent to show that there was a non-discriminatory reason for the treatment.

60. Even if a claimant succeeds in establishing unfavourable treatment arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

61. There is guidance for tribunals about how to approach s15 claims in the case of Pnaiser v NHS England and anor 2016 IRLR 170, EAT. Mrs Justice Simler summarised the proper approach to establishing causation under S.15 is as follows:

> a. First, we must identify whether the claimant was treated unfavourably and by whom.
> b. Next, we must then determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant.
> c. We must then establish whether the reason was 'something arising in consequence of the claimant's disability,' which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

<u>Duty to make reasonable adjustments</u>

62. The EqAct 2010 imposes a duty on employers to make reasonable adjustments for disabled people. The duty can arise in three circumstances. In this case we were concerned with the first of those. This is set out in sub-section 20(3). References to "A" are to an employer. "(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."

S21 of the Equality Act provides

"Failure to comply with duty
(1)A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
(2)A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
(3)A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2);

a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

63. Paragraph 20(1)(b) of Part 3 of Schedule 8 of the Equality Act says that the duty to make reasonable adjustments does not arise if the employer: "does not know and could not reasonably be expected to know –
64. "(b) …that an interested person has a disability and is likely to be placed at the disadvantage referred to…"

65. It is for the claimant to show what "provision, criterion or practice" it is alleged they have been subject to. The term is not defined in the EqA. However, the EHRC's Employment Code, explains how we should approach this in that the term

a. 'should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications, or provisions. A [PCP] may also include decisions to do something in the future — such as a policy or criterion that has not yet been applied — as well as a "one-off" or discretionary decision' (para 4.5).

b. Where a disabled person claims that a practice (as opposed to a provision or criterion) puts him or her at a substantial disadvantage, the alleged practice must have an element of repetition about it and be applicable to both the disabled person and his or her non-disabled comparators. However, para 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know: "….[not relevant] in any other case, that an interested disabled person has a disability and is likely to be placed at a disadvantage by the employer's PCP, the physical features of the workplace, or a failure to provide an auxiliary aid" – para 20(1)(b)."

66. The requirements set out in para 20(1)(b) – which apply in relation to employees in employment – are cumulative. In other words, an employer has a defence to a claim for breach of the statutory duty if it does not know and could not reasonably be expected to know that the disabled person is disabled and is likely to be placed at a substantial disadvantage by the PCP, physical feature or lack of auxiliary aid. Importantly, the words 'could not reasonably be expected to know' in para 20 give scope for an employment tribunal to find on the evidence that the employer had what if often called constructive (as opposed to actual) knowledge by lawyers, both of the disability and of the likelihood that the disabled employee would be placed at a disadvantage. Accordingly, the question is objectively what the employer could reasonably have known following reasonable enquiry. Employers do not have to make every possible enquiry in circumstances where there is little or no reasonable basis for doing so.

67. In determining a claim of failure to make reasonable adjustments, a tribunal will therefore have to consider the nature and extent of the substantial disadvantage relied on by the employee, make positive findings as to the state of the employer's knowledge of the nature and extent of that

disadvantage, and assess the reasonableness of the adjustment (i.e. 'step') that it is asserted could and should have been taken in that context. In practice, these three aspects of the duty necessarily run together. It is often the case that an employer cannot make an objective assessment of the reasonableness of proposed adjustments/steps unless it appreciates the nature and extent of the substantial disadvantage imposed on the employee by the PCP, physical feature or lack of access to an auxiliary aid, and an adjustment to a work practice can only be categorised as reasonable or unreasonable in the light of a clear understanding as to the nature and extent of the disadvantage.

68. In terms of how we should assess whether an adjustment is reasonable or not the Code of Practice says this, "What is meant by 'reasonable steps'? The duty to make adjustments requires employers to take such steps as it is reasonable to have to take, in all the circumstances of the case, in order to make adjustments. The Act does not specify any particular factors that should be taken into account. What is a reasonable step for an employer to take will depend on all the circumstances of each individual case. 6.24 There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask). However, where the disabled person does so, the employer should consider whether such adjustments would help overcome the substantial disadvantage, and whether they are reasonable."

Application of the Law and Secondary Findings of Fact

Time limit

69. The time limit for submitting a claim of unlawful discrimination is three months from the date of the alleged act of discrimination relied upon, or where there is a course of conduct, the last alleged act. It is the claimant's case that the alleged discrimination was a course of conduct and his claim is in time. The respondent takes no issue with the time limit. However, time limits are jurisdictional matters to be considered by the Tribunal and not matters to be agreed as between the parties. Given the circumstances of this case as set out below, and having heard all the evidence, the Tribunal do not find that the respondent's refusal to deviate from the CSP amounted to a course of conduct. Mr Curtain decided not to exercise his managerial discretion in favour of the claimant. There was no fresh decision made but rather the decision was upheld throughout the appeal process. However, given the circumstances that prevailed at the time that decision was made, including the severity of the claimant's illness and hospitalisation, the Tribunal is satisfied that it would be just and equitable to extend time and allow the claimant's claims to proceed.

Direct discrimination

70. It is the claimant's claim that he was treated less favourably than others, (who did not share his protected characteristic), were or would have been treated when the respondent refused to exercise the discretion to pay CSP over and above the 13 week entitlement provided for under the respondent policy.

71. The claimant has argued that the respondent has deviated from policy in the past and paid CSP to a number of employees who had exhausted their CSP entitlement. Unfortunately, this would appear to be anecdotal evidence only as the claimant has been unable to identify any employee who has benefited in this way. It would appear that his information has come from Ms Craddock who states in her witness statement that "

"In my time working onsite, I negotiated Manager's Discretionary company sick pay to extend company sick pay for members on several occasions. I negotiated the pay benefit for members who were sadly diagnosed with cancer or other life threatening conditions"

72. Unfortunately, Ms Craddock does not identify any of the employees she refers to and she has not attended the Tribunal to give evidence. Consequently neither the respondent nor the Tribunal have been able to question her on her statement and seek further clarification. The Tribunal note that the claimant was asked to provide the names of the employees referred to as being afforded this benefit at the case management hearing in February 2024. That information was not provided. The Tribunal find that on the balance of probabilities that it is more likely than not that the information does not exist, because if it did Ms Craddock would have been able to supply this to the clamant given her clear intention to seek to assist him.

73. The respondent has however provided the detail of two occasions on which managerial discretion relating CSP was exercised in favour of employees. The Tribunal accept, in the absence of any other supporting evidence, and on the balance of probabilities, that these are the only occasions that the respondent has been able to identify. The detail is set out above but it is clear that neither of these two employees are suitable comparators as there is significant difference to their material circumstances. The first employee referred to was afforded the discretion in order to attend appointments with his wife who was terminally ill with cancer. This employee, unlike the claimant, had not exhausted his 13 week entitlement to CSP. He had however hit the trigger which would bar him from access to CSP for the 52 week rolling year because he had taken time off on more than 3 occasions to attend appointments with his wife. In this case the respondent reinstated his right to CSP for that rolling year so that he would be able to support his terminally ill wife at that time. The second employee was an engineer had over 20 years' service and like the claimant was a competent worked. This employee had a previously good attendance record until he suffered a severe stroke. The Tribunal was told, and accepted, that the stroke left this employee paralysed and unable to speak properly. It is likely that this employee would have been considered to be disabled at that time. However, following the stroke the respondent was aware that the employee was making good progress with his recovery and it was hoped that with additional time he would make a full recovery and return to work. It was for this reason that when the employee's entitlement to CSP ran out after 13 weeks absence, the respondent extended it for a further five months. However, the employee was ultimately unable to return to work and his employment was terminated.

74. The claimant has not disputed the circumstances of these two employees, although he argues that the circumstances of their illnesses were not more

serious than his. That however is not the test in a claim of direct discrimination. Their circumstances however may assist the Tribunal in determining the reason why the claimant was refused additional sick pay and how the respondent may have treated a hypothetical comparator. A hypothetical comparator would be someone whose material circumstances were not materially different from the claimant, save that this individual would not share the claimant's protected characteristic and therefore absences would not be for reasons of disability.

75. Each of the respondent witnesses told the Tribunal of the high level of sickness absence that prevailed at the site where the claimant worked. We were told that it was running at 7% and was the highest in the group. The sickness absence was causing problems for the respondent and had on occasions resulted in lines not running because of lack of staff and therefore orders were not being met. One of the main differences between this site and others who did not have such high levels of sickness was the level of CSP paid to absent employees. The Tribunal also heard evidence that some employees at the site used the benefit of the CSP as a right to additional leave each year. It was however stressed that there was no suggestion that this is something that the claimant did and the respondent accepted that all the claimant's disability related absences were genuine.

76. As a result of the high levels of sickness the respondent determined it needed to strictly apply the absence management policy, both in terms of attendance and pay. It was the respondent's evidence that it had made adjustments to this policy in relation to the claimant in that although his attendance would ordinarily be considered unacceptable, the respondent had not used the policy to attempt to improve his attendance. Instead it had supported his absences with the assistance of occupational health and facilitated phased returns to work following each prolonged absence.

77. In the circumstances the Tribunal find that the treatment of the claimant was not motivated in any way by the claimant's disability. It is correct that his absences from work were related to his disability and that this was the reason that he had over the previous three rolling years exhausted his 13 week right to CSP on each occasion. However, the Tribunal is satisfied that, on the balance of probabilities, the respondent would have treated a hypothetical comparator who had exhausted their right to CSP for non-disability related absences and then commenced another period of sick leave in the same rolling year in the same manner, for the reasons that are set out in the paragraph above. Therefore the Tribunal finds that the claimant was not treated less favourably than others by reason of his disability. In addition, the Tribunal finds that the reason for the treatment was not related to the claimant's disability.

<u>Discrimination arising from disability.</u>

78. It is the claimant's case that he was subjected to unfavourable treatment by the respondent in the following ways:

i. In calculating eligibility for sick pay the respondent included absences from work because of disability.

ii. Refused on a number of occasions to exercise its discretion and disapply its practice of stopping sick pay when the employee had been absent for the maximum number of times/occasions

79. Whilst the term unfavourable is not defined, the Tribunal accept that the claimant considered that he had been placed at a personal disadvantage when the respondent included absences from work because of disability when calculating his eligibility for CSP in January 2023. The reason that it was necessary to calculate his entitlement at that stage was because he was absent due to a non-disability related illness and had exhausted his right to CSP. As a matter of causation it cannot therefore be said to have directly arisen from his disability, although the reason he had exhausted his right to CSP was for reasons related to the same, which the Tribunal find was sufficiently close in respect of this aspect of the claim to have arisen from his disability. However, the Tribunal considered the legitimate aim of the respondent CSP which was to provide a benefit to all eligible employees in accordance with the terms of the absence management policy. This is turn was:

'The Company has identified the need for an absence policy to benefit the overall efficiency of the organisation and the interests of its employees. A high level of attendance at work will contribute to and provide positive assistance in, the planning and provision of quality services and high morale.

The aims of the absence policy are to create and maintain a culture where all parties work together to achieve high levels of attendance and make absence controls effective. To establish appropriate monitoring and control procedures and to ensure that employees receive fair and consistent treatment'

80. The Tribunal considered the respondent evidence that, in all but the most exceptional of circumstances it had resolved that it must strictly apply the absence management procedure in relation to both attendance and pay. The policy made clear what the terms of that policy were and adjustments had been made to accommodate the claimant 's disability related absences as set out above. As has been established in the appellate courts, it would not be reasonable to expect an employer to automatically discount every disability related absence of all disabled employees in respect of pay. To do so would place an unreasonable financial burden on the employer and would to depending on the circumstances, not uphold the purpose of the legislation which includes enabling people with disabilities to access work. If an employee was to receive full pay for all absences related to disability there would be little incentive for the employee to return to work. The Tribunal find that the inclusion of disability related absences when calculating the right to CSP in the circumstances of this case, was a proportionate means of achieving the respondent's legitimate aims as set out above.

81. In respect of the refusal on the part of the respondent to exercise its discretion to pay the claimant for an indefinite period of sick leave when he had exhausted his right to CSP in that year due to disability absences. Again it is

clear that the claimant felt that this was unfavourable treatment as he was convinced that others had been afforded that opportunity in less serious circumstances than him. Reference to the two occasions when that discretion was exercised it set out above. However, the Tribunal find that the reason for the need to ask for that discretion to be exercised arose because he was absent from work with Weils disease and he had already exhausted his right to sick pay during that rolling year. Therefore the reason for the treatment i.e. the exercise of the discretion did not arise as a result of the claimant's disability but rather it arose because he was absent with Weil's disease and had used up all his right to CSP. The Tribunal find that the causal link to his disability is not established in these circumstances. However, the Tribunal finds that even if it was established, it notes a decision to deviate from the absence management policy relating to pay a discretionary one to be exercised only in exceptional circumstances. Whilst the Tribunal have some sympathy for the claimant who genuinely believed that his absence was due to the fault of his employer, the respondent is of the same firm belief that it was not. Therefore, it cannot be said that the decision of the respondent was arbitrary or capricious. All witnesses gave cogent reasons for why they did not consider the discretion should be exercised in favour of the claimant. Having regard to the legitimate aims of the respondent to control sickness absence and the reasons surrounding that the Tribunal find that refusing the pay the claimant CSP over and above that provided for under the respondent policy, was a proportionate means of achieving those aims.

Duty to make Reasonable Adjustments

82. The claimant relied on the following PCPs

i. To exercise the discretion to extend sick pay

ii. To discount from any calculation for entitlement to sick pay, any periods of absence due to disability.

83. The respondent did not dispute that either of the above were PCPs adopted by the respondent. The Tribunal find that although the exercise of a discretion will not usually amount to a PCP, it is clear that this is an practice that is devolved to senior managers of the respondent and is known to its employees. It is also clear that there is a possibility, depending on the circumstances of each individual, that people with the claimant's disabilities may need to take more time away from work and may therefore be disadvantaged by the terms of an absence management policy both in relation to pay an attendance. For the same reason there may be an increased need for a disabled employee, who has to take long periods away from work due to their disability to ask for additional CSP over and above what is already provided, although it is less clear how this is a substantial disadvantage. The Tribunal note that neither PCPs had proved to be a disadvantage to the claimant for the previous 20 years in which he had been employed but accepts that it need only be on one occasion that the disadvantage occurs. As it is common-sense that including disability related absences in calculating CSP could place a disabled employee at a disadvantage, it is reasonable to assume that the respondent knew of this.

84. It is the claimant's case that the steps that the claimant should have taken to remove the disadvantage at which he was placed were:

a. To disregard his disability related absences when calculating his eligibility to CSP, and,

b. To exercise the discretion to pay him CSP over and above that provided for in the respondent policy.

85. Adjustments made to remove or ameliorate the disadvantage a disabled employee is placed at by reason of a PCP should be reasonable, having regard to all the circumstances of the case. The Tribunal find that the net effect of implementing both of these steps as reasonable adjustments would mean that the claimant would be entitled to full CSP for an unspecified period of time, potentially indefinitely. The Tribunal find that it would not be reasonable to expect an employer to exercise a discretion to pay an employee in excess of the provisions of the scheme on the basis only of their disability. To do so would fetter the discretion to do so only in exceptional circumstances and would place a burden on the employer to pay for all periods of absence, however many or for what reason they were. Whilst a disability could amount to an exceptional reason it was not found to be so in this case, for the reasons set out above. The Tribunal find that this would not amount to a reasonable adjustment.

86. Similarly, the Tribunal find that to discount all disability related absences when calculating eligibility to CSP would not be a reasonable adjustment for the same reasons we have set out in respect of the claim of discrimination arising out of disability.

Conclusion

87. The claimant's claims were not presented within the prescribed time limit but the Tribunal consider that it would be just and equitable to extend time to the claims to proceed.

88. The claimant claims of direct discrimination of the protected characteristic of disability, discrimination arising out of disability and, failure to make reasonable adjustments are not well founded and are dismissed.

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Employment Judge Sharkett

Date 20 February 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
Date: 11 March 2025

FOR THE TRIBUNAL OFFICE

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