EMPLOYMENT TRIBUNALS

Claimant: **Ms K Phelan**

Respondent: **Leeds City Council**

Heard at : Leeds by Teams video link **On:** **24,25 and 26 August 2022**

Before: **Employment Judge Shepherd**
Members: **Ms Norburn**
Ms Hiser
Appearances
For the claimant: **Ms Johnson, counsel**
For the respondent: **Ms Miller, counsel**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unauthorised deduction from wages is not well-founded and is dismissed.

2. The claims of direct disability discrimination, discrimination arising from disability and indirect disability discrimination are not well-founded and are dismissed.

REASONS

1. The claimant was represented by Ms. Johnson and the respondent was represented by Ms. Miller. The Tribunal heard evidence from:

Kirsty Phelan, the claimant;
Sally Anne Richards, team manager;
Claire Matson, Head of Human Resources.

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2. The Tribunal was provided with a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 525.

3. Both parties indicated that they would be requesting reasons for this judgment and, in the circumstances, it was agreed that the Tribunal would provide a reserved judgment.

4. The complaints and issues to be decided had been identified at a Preliminary Hearing before Employment Judge Armstrong on 29th of March 2022. These were as follows:

The Complaints

1. The claimant is making the following complaints:

1.1 Unlawful deductions from wages

1.2 Direct disability discrimination

1.3 Discrimination arising from disability

1.4 Indirect discrimination.

The Issues

2. The issues the Tribunal will decide are set out below.

1. Disability

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1. Did she have a physical and/or mental impairment, namely long covid?

1.1.2. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

1.1.3. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.1.4. Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

1.1.5. Were the effects of the impairment long-term? The Tribunal will decide:

1.1.5.1. did they last at least 12 months, or were they likely to last at least 12 months?
1.1.5.2. if not, were they likely to recur?

2. Direct disability discrimination (Equality Act 2010 section 13)

2.1 It is accepted that the respondent did the following things:

2.1.1. Failed to pay the claimant full pay for the full duration of her sickness absence i.e. from 26 June 2021 when she was placed on half pay until her phased return to work at the end of February 2022.

2.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant says that she was treated less favourably than a hypothetical employee who was disabled as a result of another infectious disease (i.e. not long covid) would have been.

2.3 If so, was it because of the claimant's disability, specifically long covid?

3. Discrimination arising from disability (Equality Act 2010 section 15)

3.1 It is accepted by the respondent that it treated the claimant unfavourably by not paying the claimant full pay for the full period of sickness absence i.e., from 26 June 2021 until her phased return to work at the end of February 2022.

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

3.2.1. A period of sickness absence from April 2021 to February 2022?

3.3 It is agreed that the unfavourable treatment was because of her sickness absence.

3.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.4.1. requiring its employees to attend their contractual role on a regular basis; and

3.4.2. managing long-term sickness absence to safeguard and responsibly administer public funds and to allow the Respondent to plan its workforce and operational needs with certainty.

3.5 The Tribunal will decide in particular:

3.5.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

3.5.2. could something less discriminatory have been done instead;

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

3.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

4. Indirect discrimination (Equality Act 2010 section 19)

4.1 A "PCP" is a provision, criterion or practice. It is accepted that the respondent has the following PCP:

4.1.1. the Respondent's policy on sick pay i.e. that this is reduced to half pay after two month's absence and nil pay after a further two month's absence

4.2. It is accepted that the respondent applied the PCP to the claimant.

4.3. Did the respondent apply the PCP to all employees, or would it have done so?

4.4. Did the PCP put persons with long covid at a particular disadvantage when compared with non-disabled persons, in that they are more likely to have lengthy sickness absence and therefore receive reduced pay?

4.5. Did the PCP put the claimant at that disadvantage?

4.6. Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

4.6.1. requiring its employees to attend their contractual role on a regular basis; and

4.6.2. managing long-term sickness absence to safeguard and responsibly administer public funds and to allow the Respondent to plan its workforce and operational needs with certainty.

4.7. The Tribunal will decide in particular:

4.7.1. was the PCP an appropriate and reasonably necessary way to achieve those aims;

4.7.2. could something less discriminatory have been done instead;

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

5. Remedy for discrimination

5.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant?

5.2. What financial losses has the discrimination caused the claimant?

5.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4. If not, for what period of loss should the claimant be compensated?

5.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6. Should interest be awarded? How much?

6. Unauthorised deductions

6.1. Was the claimant entitled to full pay for the full period of her absence, by virtue of clause 10.9 of the NJC agreement?

6.2. In the alternative, was the claimant entitled to only half pay from 27 June 2021 and nil pay from 27 August 2021 by virtue of the respondent's sick pay policy?

6.3. Were the wages paid to the claimant from 27 June 2021 until the end of February 2022 less than the wages she should have been paid?

6.4. Was any deduction required or authorised by a written term of the contract?

6.5. Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

6.6. Did the claimant agree in writing to the deduction before it was made?

6.7. How much is the claimant owed?

7. Remedy

7.1. How much should the claimant be awarded?

Findings of fact

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions.

6. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. In this case the essential facts were not in dispute.

7. The claimant is employed by the respondent as a social worker. She has been employed by the respondent since 3 February 2020.

8. The claimant contracted Covid-19 in January 2021. Following a few days off she returned to work but continued to be unwell.

9. The claimant's symptoms did not improve and she was certified as not fit for work by reason of Long Covid from 14 April 2021.

10. The claimant's contract of employment incorporates the respondent's Improving Attendance Policy and Procedure. Sickness pay entitlement is dependent on length of service.

11. The contract of employment provides that sickness pay entitlement is as set out in the National Joint Council for Local Government (NJC) and Local Conditions of Service and is dependent upon length of service. It is provided that:

> "10.3. Employees are entitled to receive sick pay for the full period:
> …
> During 2nd year of service — 2 months' full pay and 2 months' half pay
>
> … Authorities shall have discretion to extend the period of sick pay in exceptional circumstances"

12. The claimant was paid two months' full pay and two months' half pay. She received no pay from 27 August 2021.

13. The NJC Agreement is incorporated into the claimant's terms and conditions of employment. Within its sickness provisions it is stated:

> "10.9 An employee who is prevented from attending work because of contact with infectious disease shall be entitled to receive normal pay. The period of absence on this account shall not be reckoned against the employee's entitlements under this scheme."

14. On 14 April 2021 the Local Government Association NJC Covid 19 general update states:

> "Should sickness absence continue, albeit expected to continue, for such a period of time that the employee's return to work is unlikely within a reasonable period, employers should adopt the same practice as they would for any other long-term illness. This should include regular contact with the employee and involving Occupational Health and trade union representatives at the appropriate time."

15. On 7 December 2021 an Occupational Health report stated:

> "Unfortunately, there is currently no way to predict how long recovery from Long Covid will take. Experience from other post virus fatigue illnesses suggests that most symptoms should go within three months, while tiredness may last up to 6 months. The effects of the condition are so complex that everyone's recovery is completely unique."

16. On 26 January 2022 the claimant presented a claim to the Employment Tribunal. She brought claims of unauthorised deduction from wages, direct disability discrimination, discrimination arising from disability and indirect disability discrimination.

17. The claimant returned to work on a phased return in March 2022. The schedule of loss takes the claim to 28 February 2022.

The Law

Direct discrimination

18. Section 13 of the Equality Act 2010 states:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Burden of Proof

19. Section 136 of the Equality Act 2010 states:

> "(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

20. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved in **Madarassy v Normura International plc [2007] EWCA 33.**

21. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as it did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination:

> "They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

22 .In the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003]** the House of Lords emphasised the importance of the hypothetical comparator. Instead of relying on like with like comparators, a claimant may rely on the 'evidential significance' of non-exact comparators in support of an inference of direct discrimination, even though the evidential value will become weaker the greater the difference in circumstances. It was also stated that:

> "Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?"

<u>Indirect Discrimination</u>

23. Section 19 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

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

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

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

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

Discrimination arising from Disability

24. Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

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

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

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

25. Under section 15 there is no requirement for a Claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

26. With regard to justification, The EAT in **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EQLR 670** applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565**, CA to a claim of discrimination under section 15 Equality Act 2010. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. In effect the Tribunal needs to balance the discriminatory effect of the

stated treatment against the legitimate aims of the employer on an objective basis in considering whether any unfavourable treatment was justified.

27.The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

28. In the case of **Homer v Chief Constable of West Yorkshire [2012] UKSC** 15 it was provided that to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so). In weighing this up, the ET needs to undertake a fair and detailed assessment of the respondent's business needs and working practices.

29. In the case of **MacCulloch v ICI [2008] IRLR 846** the question of objective justification was considered and it was provided as follows

> "(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 862 .
>
> (2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (paragraph 36). This involves the application of the proportionality principle, which is the language used in reg. 3 itself. It has subsequently been emphasised that the reference to "necessary" means "reasonably necessary": see Rainey v Greater Glasgow Health Board (HL) [1987] IRLR 26 per Lord Keith of Kinkel at pp.30–31.
>
> (3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it (Hardy & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], per Thomas LJ at [54]–[55], and per Gage LJ at [60]).
>
> (4) It is for the ET to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter.
> There is no "range of reasonable response" test in this context: Hardy & Hansons plc v Lax [2005] IRLR 726, CA."

30. The Tribunal had the benefit of written submissions from Ms. Johnson on behalf of the claimant and Ms. Miller on behalf of the respondent. Neither of whom wished to add to their written submissions orally. These submissions were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Disability

31. It is conceded by the respondent that the claimant was disabled from June 2021 and that it had knowledge of that disability from 23 March 2022. There is an Occupational Health report of that date which states that most symptoms should go within three months while tiredness may last up to 6 months. The claimant had been off almost a year at that date.

32. The Occupational Health report before that was dated 7 December 2021 in which it was stated that long Covid is a condition in which coronavirus survivors still suffer some of the symptoms weeks or even months after they originally contracted the disease. It was indicated that it was hoped the claimant would make a full recovery and was hoping to return to work when the current fit note expired.

Direct discrimination

33. The claimant was paid in full for two months and half pay for a further two months. She then went on to nil pay.

34. The claimant has identified no actual comparator and the Tribunal has to consider a hypothetical comparator. The identified issues provide that would be an employee who was disabled as a result of another infectious disease.

35. The Tribunal is satisfied that the claimant's treatment with regard to pay was because of the claimant's absence and length of service and it was not contended that it was because of her protected characteristic of disability by reason of Long Covid.

36. It was submitted by Ms Johnson on behalf of the claimant that the Respondent would not have treated any other employee with an infectious disease as they treated the claimant. They would be paid pursuant to paragraph 10.9. For example hepatitis.

37. The Tribunal has considered this submission. It appears to be predicated on the basis that the claimant had an infectious disease at the time of the alleged discriminatory treatment. This is not the case. The claimant was not infectious at the time her pay was reduced.

38. There was clear and credible evidence provided by both the respondent's witnesses that another employee with long-term absence as a result of contact with infectious disease or, indeed, long-term illness as a result of any other medical condition, would have been treated in the same way. The applicable sick pay would have been determined by the length of service.

39. The Tribunal is satisfied that a hypothetical comparator would have been treated the same as the claimant.

40. The claim for direct discrimination does not succeed.

Discrimination arising from disability

41. It is accepted that the respondent treated the claimant unfavourably. This is a result of the claimant's sickness absence which was something arising from her disability.

42. The Tribunal has to consider whether the treatment was a proportionate means of achieving a legitimate aim. The legitimate aim is identified as requiring the respondent's employees to attend their contractual role on a regular basis and the respondent managing long-term sickness absence to safeguard and responsibly administer public funds and to allow the respondent to plan its workforce and operational needs with certainty.

43. The Tribunal accepts that is a legitimate aim.

44. The Tribunal is satisfied that this was an appropriate and reasonably necessary way to achieve those aims. The respondent is a public authority and it is necessary to place a reasonable limit on wages paid to those on long-term sickness absence.

45. The policy is known, and it is within the National Joint Committee policy and is in accordance with guidance provided in respect of Covid 19 working arrangements.

46. In a weekly update to managers dated 10 December 2020 it is provided that if, on investigation, Covid was found to have been contracted through work then it must be treated as an industrial injury. This would mean that, following an enquiry, full pay would be provided.

47. This would have to be on the basis of a report from the employee that Covid had been contracted through work and a health and safety investigation carried out. This was not the position in this case. The claimant indicated to her line manager in January 2021 that she was unsure where she had caught Covid as she had been at been work and had shopped in a supermarket. It was not reported or investigated as an industrial injury.

48. The Tribunal has an enormous amount of sympathy with the claimant. However, the policy is well-established and applies to those on long-term sickness. The respondent is a public authority and cannot continue to pay employees who cannot perform their duties over a long period.

49. The guidance in respect of Covid was followed and it was clear that Long Covid cases should be dealt with under the employer's sickness policies.

50. A less discriminatory way of dealing with the matter would be to continue to keep the claimant on full pay. However, that would not achieve the legitimate aim.

51. In the balancing exercise the Tribunal must consider the needs of both the claimant and the respondent. As has been said, the Tribunal has an enormous amount of sympathy for the claimant, but the respondent has its sickness policy and this is required to preserve the need for employees to continue to perform their role and for the respondent to administer public funds.

52. The clamant returned to work on a phased return and received full pay. She worked limited hours from home followed by a limited amount of time working in the office for which she received full pay. The phased return was extended after this was suggested in two occupational health reports. All the recommendations were implemented, and reasonable adjustments made. To give a disabled person higher sick pay than would be paid to a non-disabled person would not normally be a reasonable adjustment and may, in some circumstances, act as a disincentive to return to work (**O'Hanlon v HM Revenue and Customs ICR 1359**).

53. Sally Anne Richards, the claimant's team manager, said that if large numbers of staff contracted Long Covid, and they were all then placed on full pay, it would put the respondent local authority in a difficult position and endanger its ability to perform its duties to the public and manage public funds appropriately. It would have significant financial and policy implications for the respondent.

54. The Tribunal accepts that this legitimate aim is achieved through the Improving Attendance Policy and NJC guidance which balanced against the discriminatory effect on the claimant is a proportionate means of achieving the legitimate aim.

Indirect discrimination

55. The respondent's policy on sick pay is dependent on the employees' length of service and in the claimant's case reduced to half pay after two months' absence and nil pay after a further two months. This is a PCP that applied to the claimant and to all employees.

56. This did place persons with Long Covid at a particular disadvantage when compared with nondisabled persons as they are more likely to have lengthy sickness absence and receive reduced pay.

57. The Tribunal has to consider whether the PCP was a proportionate means of achieving a legitimate aim.

58. Once again, the legitimate aim was identified as requiring the respondent's employees to attend their contractual role on a regular basis and managing long term sickness absence to safeguard and responsibly administer public funds and to allow the respondent to plan its workforce and operational needs with certainty.

59. The Tribunal accepts that the PCP was an appropriate and reasonably necessary way to achieve those aims for the same reasons as set out above in respect of discrimination arising from disability.

Unauthorised deductions

60. The Tribunal has given careful consideration to the interpretation of clause 10.9 in the claimant's contract of employment and all the circumstances.

61. It was submitted by Ms Johnson on behalf of claimant that the wording of the policy is clear. If the claimant is off sick "because of contact with an infectious disease", she

will be paid her normal pay. Covid is an infectious disease and Long Covid arises due to contact with that infectious disease.

62. The Tribunal finds that the clause cannot bear this construction. It is intended to provide for normal pay when an employee is prevented from attending work because of contact with an infectious disease to avoid them spreading the disease. It cannot be intended to cover employees' indefinite absence from work which would be unsustainable.

63. The Tribunal finds that clause is intended to cover a period of absence when employees are potentially infectious and to avoid financial hardship in those circumstances.

64. The Tribunal is satisfied that the clause is intended to cover absence where the employee is potentially infectious. This is clarified in the guidance given by the NJC guidance consistently on a number of occasions that if the employee continues to be absent following the self-isolation or quarantine stage, then it is appropriate to manage such cases under the respondent's sickness policies.

65. There is provision for exercising discretion within the contract of employment and it is also stated in the Frequently Asked Questions in guidance provided in an advisory bulletin to Councils. However, the guidance says that employers may want to consider exercising their discretion to extend pay where that might be appropriate.

66. The Tribunal finds that the exercise of such discretion must be with regard to individual circumstances and not solely because the employee has contracted Long Covid.

67. In all the circumstances, the unanimous decision of the Tribunal is that the claims of disability discrimination and unauthorised deduction from wages are not well-founded and are dismissed in their entirety.

Employment Judge Shepherd

Date: 7 September 2022