EMPLOYMENT TRIBUNALS

Claimant: Mr R John

Respondent: Select Service Partner UK Limited

Heard at: London Central
(by Cloud Video Platform)

On: 7, 8 and 9 June 2023

Before: Employment Judge Joffe
Ms S Campbell
Ms S Plummer

Appearances
For the claimant: No appearance or representation
For the respondent: Miss I Baylis, counsel

RESERVED JUDGMENT

1. The claimant's claims of failure to comply with a duty to make reasonable adjustments, contrary to sections 20 and 21 Equality Act 2010, are not upheld and are dismissed.

2. The claimant's claims of harassment related to disability, contrary to section 26 Equality Act 2010, are not upheld and are dismissed.

3. The claimant's claims that the respondent made unauthorised deductions from his wages are not upheld and are dismissed.

REASONS

Claims and issues

1. The issues in the case were agreed at a case management preliminary hearing in front of Employment Judge Grewal on 16 November 2022 and are as follows:

   9 It has been conceded that the Claimant was disabled due to his visual disturbances and migraines at the material time. The issues to be determined are as follows.

   9.1 Whether the Respondent applied the following provisions, criteria or practices (PCPs):
   (a) A practice of not copying his union representative to emails (and actively removing the representative(s) if the Claimant copied them in) despite the Claimant using "cc" and/or asking them to do likewise;
   (b) Not allowing the Claimant to stay on full furlough prior to 8 April 2021 and on 13 and 21 April 2021.
   9.2 If it applied any of the PCPs whether they put the Claimant at a substantial disadvantage compared to those who do not have his disability. In particular,
   (a) Whether the first PCP put him at a disadvantage because his visual disturbances make it difficult for him to use screen without developing an aura, leading to a migraine which prevents him being able to read his emails;
   (b) Whether the second PCP put him at a disadvantage because returning to work would trigger his migraines and meant that he could not manage his treatment which he was just starting and doing a lot of reading of small print at work would start to trigger his aura.
   9.3 If so, whether the Respondent knew or could reasonably have been expected to know that the PCPs placed the Claimant at that disadvantage.
   9.4 If all the above apply, whether the Respondent failed to make reasonable adjustments that would have alleviated the disadvantage.
   9.5 If the Respondent failed to copy emails to the Claimant to his union representative, whether that amount to a harassment related to disability under section 26 of the Equality Act 2010.
   9.6 Whether the Tribunal has jurisdiction to consider any complaints that related to acts or failures to act that occurred before 21 April 2021.
   9.7 Whether the Claimant should have been paid more than SSP during any of his periods of sickness absence and whether failure to do so amounts to an unauthorised deductions from his wages.
   9.8 Whether the Tribunal has jurisdiction to consider any complaints about any deductions made before 21 April 2021.

2. We accepted that the issue of knowledge of disability had also been raised by the respondent and not conceded so remained an issue for determination.

Findings of fact

<u>The hearing</u>

3. We had a bundle in both hard and electronic form running to 602 pages. We had witness statements from two witnesses for the respondent, Mr J Turner

and Ms A Sidat. The claimant had not provided a witness statement. Miss Baylis had prepared a chronology and position statement.

4. We had first to consider the claimant's application to postpone. To explain our conclusions on that application, it is necessary to understand in some detail the history of the proceedings:

Chronology of the proceedings

March 2021: First claim form presented. These claims were subsequently withdrawn and were not before this Tribunal.

28 September 2021: The claimant applied for a postponement of a case management preliminary hearing listed for 29/9/2021 on grounds of health and this was granted.

30 September 2021: The claimant's second claim form was submitted. These are the claims this Tribunal had to consider.

1 December 2021: The parties were sent a notice of hearing listing a full merits hearing for five days starting 11 July 2022.

22 February 2022: There was a case management preliminary hearing in both claims in front of Employment Judge Norris,. The claimant did not attend and the hearing was part heard. The claimant wrote in midway through the hearing to ask for a postponement, which was refused. Employment Judge Norris observed:

At 10.37 on 22 February 2022, after the decision to proceed in his absence had been taken, the Claimant emailed the Tribunal to apply for a further postponement. This was not granted. The hearing was already well under way. The claims need to be progressed. The point of a PHCM is to manage cases so that they can proceed to a full hearing. At this stage, and without the details of the claim sought by the Respondents, no progress could be made.
4. While at this hearing there was no application to strike out the claims, or either of them, for not being actively pursued, there will come a time when the Claimant must make a decision of whether he wishes to have them heard or, if not, withdraws them.
I am mindful that the Tribunal must deal with cases in accordance with the overriding objective and that means having regard not only to the Claimant's needs but also those of the three Respondents.

On 23 March 2022, the resumed case management preliminary hearing went part heard:

The PHCM had been postponed at the Claimant's request from September 2021. It started on 22 February 2022 but we could not progress the matter greatly as a result of the Claimant's absence. I relisted it to continue on 23

March 2022 and reserved it to myself. The Claimant emailed in to say that had an OH appointment which he wished to attend that morning, so the PHCM was moved to an afternoon slot. The Claimant expressed concerns as to his ability to participate but was encouraged to do so. When we started the PHCM, the Claimant attended by telephone and explained that he was having migraine aura symptoms so was unable to continue. I have indicated that if he wishes to rely on medical evidence to support an assertion that he cannot do something, it should be both current evidence and evidence that addresses the issue(s) directly; and it should also give an anticipated date when he will be fit to proceed and any adjustments that might be made by the Claimant, the Respondents or the Tribunal to assist that progress.

Employment Judge Norris emphasised the need for the claimant to articulate the basis for his claim and to actively participate in the proceedings. She extended time for the claimant to provide information for the list of issues.

On 20 April 2022, there was a resumed case management preliminary hearing at which Employment Judge Norris relisted the full merits hearing for December 2022. Amongst the directions was an order that witness statements be exchanged by 29 September 2022.

On 20 June 2022, Employment Judge Norris listed a one day preliminary hearing for 28 July 2022 to consider whether claims in the first claim form had been presented out of time and whether the claimant was disabled.

14 July 2022: The respondent conceded that the claimant was disabled.

18 July 2022: The claimant withdrew his claims in the first claim form and asked for the 28 July 2022 preliminary hearing to be vacated

16 November 2022: This was scheduled to be the first day of the full merits hearing but the case was not ready for hearing. Employment Judge Grewal held a further case management preliminary hearing as well as hearing the respondent's application for costs. She found in her costs judgment:
I considered that the Claimant acted disruptively or otherwise unreasonably in the conduct of the proceedings by not raising his disagreement with the list of issues that were sent to him on 25 July 2022 until 2 November 2022, two weeks before the hearing. That had been in the context of those issues being discussed and agreed at the preliminary hearing on 20 April 2022 and it having been made clear to the Claimant that if he wished to add any further issues he would need to make the application to amend. Furthermore, the Respondent having disclosed its documents to the Claimant on 24 August 2022 and having chased the Claimant repeatedly for his documents, the Claimant did not disclose any documents until 25 October 2022, and even then only disclosed some of his documents. On 1 November the Respondent informed the

Claimant that it was ready to exchange witness statements and asked him whether he would be able to do so within seven days. The Claimant did not respond to that. All those matters amount to disruptive conduct of the proceedings by the Claimant and a failure to comply with the Tribunal's orders. Those matters led to the hearing being postponed and an additional preliminary hearing having to take place.

Employment Judge Grewal made case management orders for this hearing, including an order for witness statements to be exchanged by 20 April 2023.

10 May 2023: The respondent made an application to strike out the claim as the claimant had not exchanged statements or assisted with finalising the bundle.

16 May 2023: Employment Judge Grewal refused the respondent's application to strike out on the basis that it was still possible for the parties to be prepared for the final hearing. She ordered the respondent to finalise the bundle without the claimant's input and the parties to exchange witness statements by 26 May 2023

25 May 2023: The respondent's solicitors wrote to the claimant to arrange exchange of witness statements for the following day. There was no response.

26 May 2023: The respondent's solicitors wrote again to the claimant. The claimant wrote to the respondent and the Tribunal that he had just returned from a medical appointment. He did not accept the recent directions which did not take account of his disability but would send what he had between 11 pm and midnight that evening.

The respondent's solicitor replied that she was not working at that time of evening but if the claimant wanted to send his statements then she would send the respondent's first thing on Tuesday 30th, having undertaken not to look at the claimant's statements prior to that.

Later that evening the claimant wrote proposing an extension of time to 31 May or failing that 30 May 2023. The respondent agreed to exchange by email at 9 am on Tuesday 30 May 2023.

30 May 2023: The claimant wrote to say that due to a hospital emergency the previous Friday he was not in a position to exchange and was preparing a letter with supporting documents from the GP and hospital to send.

He then sent a further email:

I write further to my email at 08:16 today. Please also see documents attached with this letter.

1. After my last email to you at 17:51 on Friday I had an incoming telephone call at about 18:42 from one of my mother's GPs at Fernlea Surgery in South Tottenham urgently following up on the attendance and a blood test earlier

that afternoon. You will remember I mentioned this and that I had only recently returned when replying to your first email on Friday.
2. Well, unfortunately Dr Narin was urgently calling me, as my mother's carer, because she had received a similarly urgent communication from North Middlesex Hospital labs where the blood test was processed following a consultant's consideration of the results. The hospital wanted my mother immediately to attend in person regarding a suspected or potential pulmonary embolism (blood clotting in her lungs). Dr Narin had arranged for an ambulance pick up, and I therefore had to rapidly prepare to take my mother to the Emergency Department (A&E).
3. Ultimately, my elderly mother and I were in the hospital for over 15 hours and not able to leave until we were assured she was not at critical risk or in imminent danger.
4. My mother is still somewhat unwell and suffering continuing effects such as not having full or pain-free use of her left arm. I am the only person able and close enough to help her. Additionally, I shall have to balance that with finalising my witness statement (which is, realistically, all I shall be able to do in the circumstances) with some further follow up and interaction with GP and clinicians today now they are back after the back holiday.
In the circumstances, I am asking that we aim to exchange at 09:00 tomorrow (Wednesday 31 May) which I had also suggested last Friday at the same time as suggesting today's arrangement.
6. If you are especially concerned about me seeing the Respondent's witness statements onscreen before I send my own, I believe I should be able to email you my statement before the hard copy I really need is delivered by 09:00, provided you do use that specific mode of Special Delivery I previously advised. I would be happy enough with that, so please let me know?

The respondent's solicitor replied:
Thank you for your email and letter today. I am sorry to hear that your mother has been unwell and appreciate that you have been required to balance this with finalising your statement.
However, as you are aware, we have a conference with counsel this afternoon. This was set out in our application for strike out dated 10 May 2023. Exchange at 9am tomorrow is not therefore acceptable, we do need to exchange statements this afternoon. I appreciate that you were unable to finalise your statement on Friday afternoon as you originally intended, however I assume, given you were proposing to exchange before midnight on Friday that your statement is close to being finalised.
As you are aware, the parties were initially due to exchange statements on 20 April 2023. The tribunal made revised orders for exchange on 26 May 2023 in order to ensure the parties would be ready for the final hearing. We are concerned that if statements are not exchanged this afternoon, there is a real possibility that the case will not be prepared for hearing next week.
Therefore, if you are unable to exchange by 4pm today, we will have no option but to write to the tribunal.

As previously discussed, we propose to exchange by email and will then put a hard copy of the respondent's statements in the post to you once email exchange has taken place. I look forward to hearing from you.

The claimant then wrote:
Situation Ongoing
Thank you for your email of 09:44 today. Not only has my mother been unwell for days now, she continues to be worryingly so and having waited for her GP to call back, I'm on the phone now, have been advised to call NHS 111, and may need to go to a hospital emergency department again.
I do regret the current situation, but it has been due to circumstances entirely outside my control.
Some of that continues. Essentially, I have had to look after my mother in spite of my own difficulties and now additional ailments the entire time, and so I have really not had any time at all and even less ability to do what still needs to be done. For some reason, the Respondent thinks more pressure is the thing to do. Therefore I hope you and the Respondent will reconsider the course you have set upon and agree to exchange all things simultaneously tomorrow, by consent.
I regret I cannot do anything today.

The respondent replied:`
Thank you for your email. We are sorry to hear that your mother is still unwell. In the circumstances and given we have now had our conference with counsel, we are willing to agree another short extension to 9am tomorrow.
Please note that we will not be sending our statements in the post until we are in receipt of your statement, and cannot guarantee that the hard copies will be delivered any earlier than 1pm the day after posting i.e. if we are able to send before 4.30pm tomorrow, we are only able to confirm that the documents will be with you by 1pm on Thursday 1 June 2023, not before 9am as you suggest.
We reserve the right to renew our application for strike out on the basis that there is a real possibility that this matter will not be ready for hearing on 7 June 2023, and the tribunal has already granted a postponement for this reason in respect of the hearing listed for November 2022. As per our email below, the tribunal had initially listed exchange for 20 April 2023. Whether or not it is necessary to renew our application will depend on the timing of you providing your statement and the extent of that statement.
Please note also that we reserve the right to make an application for costs.

31 May 2023: At just before 9 am, the claimant wrote to the respondent:
Unresolved
Regrettably, the ongoing situation with my mother has not resolved, services where stretched at the time yesterday, and we now await a visit from her GP or another doctor later today, arranged either by Fernlea Surgery (or NHS 111 in the event matters extend beyond the surgery opening hours.

In the circumstances, please do not email any witness statements for the time being.

On 1 June 2023, the claimant provided his response to the application to strike out, attaching medical information which showed his mother had been referred to A and E on 31 May 2023 and was undergoing ongoing tests.

On 6 June 2023 at 18:05, the claimant sent the following to the respondent and the Tribunal:

Application to Postpone Final Hearing Tomorrow (7 - 9 June) for Medical and Other Reasons

Please see attached letter kindly provided by my General Practitioner, Dr Harriet Mitchell, as medical evidence in support of my application in accordance with Presidential Guidance - Seeking a Postponement, Example 1.

Whilst working on the application and waiting for this letter delayed by technical and administrative issues at the GP Surgery, my eyes have repeatedly 'given out' and have done so yet again and become too blurred for me to carry on without risking worse: a full-blown migraine; and as can be seen when comparing the letter to the email and its date and time of sending to me today, the letter is dated yesterday. Therefore, to save further delay, I shall forward it now (following a telephone call to the tribunal I have not long ended) and follow this email and its attachment with either a second email attaching the medical certificates stipulated and further medical evidence then to be followed by a third attaching the narrative part of my application as soon as I am able.

Alternatively, if I can manage, I shall send simply a second small attaching all the remainder required under Example 1 together with my explanatory narrative.

Unfortunately, the effects of my disability can make my estimation of time I need unreliable, so I must now try to incorporate some flexibility. In any case the whole postponement application shall be with the Tribunal well before the Hearing begins, which I am now told is 10:00.

I do regret having only been able to make this application terribly close to the hearing and confirm I have complied with rules 30(2), 30A(1) and 92 of the Employment Tribunal Rules of Procedure by providing a simultaneous carbon copy (Cc) of this email and supporting evidence to the Solicitors for the Respondent and by this email advising that any objection to this application must be sent to the tribunal office as soon as possible and copied to me.

The attached GP letter said that the claimant was seeking a postponement because of worsening of his recurrent migraine and worsening anxiety which was triggering further migraines and visual symptoms that prevented him from being able to complete tribunal-related tasks. The claimant's migraine was triggered by visual stimuli such as using screens or print which was too large

or too small and by stress. His mother was currently acutely unwell and he had to care for her and coordinate hospital care which was very stressful and tiring. Until his mother's health had settled and the claimant had had a period of rest, his GP could not see the claimant's health improving to a state of being able to perform to deadlines or attend a tribunal hearing. 'I would suggest a postponement of at least two months'.

5. On 7 June 2023, the claimant did not attend but his friend, Ms M Stewart, attended to take notes on his behalf. We commenced the hearing and the respondent made oral submissions resisting the postponement. Counsel pointed in particular to the history of non compliance with orders leading to a previous postponement of the full merits hearing, the ongoing effect on witnesses of the proceedings and the effect of postponement on the respondent, the claimant and other Tribunal users.

6. The claimant continued to send emails during the course of the morning.

At 11:18 he wrote[1]:
Dear Employment Judge Joffe
Roger John (Claimant) v Select Service Partner Limited (Respondent)
My Application to Postpone the Final Hearing and Requested Hearing of the Respondent's Strike Out Application
I deeply regret that I am still struggling to complete and get my full written application to you. It has been another bad night for me and, despite all my anxiety and exhaustion, I must immediately after doing that, deliver a number of pathology samples to the Rapid Diagnostic Centre at North Middlesex University Hospital for urgent testing. After that, if I can briefly leave my mother again, I am due at Moorfields Eye Hospital to collect and have checked some specially-tinted glasses to prevent visual strain - another migraine trigger - that I was informed only came in yesterday and that I would have in any event needed for these three days of the hearing(s). See information leaflet and letter attached.
Whilst working to complete my application, arguably the most important and critical part of which being the Medical Evidence I emailed to the Tribunal at 18:05 yesterday, I have been alerted to the email of 08:28 today on behalf of the Respondent, which attempts to muddy the waters in circumstances where I shall be unable to attend whilst it is fully-armed with counsel.
It seems best, then, for me to break off from my own completion and briefly respond to the first three numbered paragraphs because I respectfully submit they concern the only things relevant and at the crux of what must happen this morning.
1. Logic dictates that my urgently intervening application to postpone the hearing primarily for medical reasons, which includes any hearing of the Respondent's renewed strike out application, supersedes and must come before its premature application previously disallowed by the Tribunal.

[1] The email is quoted in full as we considered it carefully in his absence as being the claimant's further submissions in support of his postponement application.

Paragraph 11 of Employment Judge Grewal's Notes of the Discussion relating to the Preliminary Hearing (a Closed Preliminary Hearing or CPH) on 16 November 2022 observed that, "This case has already been adjourned twice and any further adjournment will only be considered in the most exceptional circumstances".

What is also means is that of the most exceptional or as the rules say, exceptional circumstances occur, the conditions for consideration will have been met. They indeed have been met.

Further, it is the Respondent through its solicitor having day-to-day conduct of the matter who misled the Employment Judge into thinking the final hearing had been adjourned twice on my application or because of me. The Respondent now says something different contradicting itself in the final sentence of the third bullet of its strike out application by letter of 10 May. Today it says something different again returning to the two postponements formula.

2. As required under Action by Parties, paragraph 5 of the Presidential Guidance - Seeking a Postponement, I telephoned and tried to discuss my application with Ms Fiona Hamor of the Solicitors for the Respondent. Though I outlined the crux of the matter I shall briefly set out here, Ms Hamor essentially refused to hear me or take instructions without her first seeing the completely finished application to the Tribunal. At that point we clearly were but in agreement. When I tried to draw her attention to some of my other reasons the postponement that might be avoided, such as key documents in the Hearing Bundle being fabricated and not mine and missing. After constantly interrupting and not wanting to listen to me, Ms Hamor hung up the phone on me, so to speak. If she had not done any of the above things, there is a good possibility that the travel and other expense and inconvenience of today could have been completely avoided.

3. With regard to point I have just made above in relation to the issue of a fair hearing within a reasonable time and efficiency and so on. I shall on due course be able to present or have presented on my behalf precisely how the Respondent through its solicitors has itself repeatedly not complied fully and properly with case management orders, especially those that may have aided me in my disability challenges I have been facing in the proceedings. It instead presumably instructed its solicitors to deflect blame for noncompliance towards me, personally, as though it were intentional, rather than a result of my disabling symptoms that often they had triggered. However, that is rightly for another day.

Today, I respectfully request the hearing postponed along the lines suggested by my GP.

Action by the Employment Judge - Presidential Guidance - Seeking a Postponement

I will continue to complete my full application, but if that can come later as permitted under paragraphs 1 – 3 of the above, or is not necessary or becomes unnecessary, I should be grateful; and all the more grateful if I am told as soon as possible.

7. He attached some evidence which showed that he had had a number of health issues and health investigations over recent months and been prescribed tinted glasses.

8. It appeared that the claimant was continuing to send further emails as the morning wore on and we concluded prior to the lunch break that the fairest course was to adjourn for the remainder of the day to allow the claimant to make any more submissions he wished to make. The respondent was supportive of that approach. The Tribunal wrote to the claimant:

   Employment Judge Joffe has asked me to write to you to say:

   We have agreed to postpone further consideration of your postponement application until tomorrow morning to allow you the opportunity to set out any further representations you wish to make and please answer the following questions:

- *What efforts have you made to prepare a witness statement? Please provide as much detail as possible and dates when you have worked on the statement over the course of these proceedings;*
- *Are you able to provide more information about your mother's health and events in that respect since the medical information sent previously relating to her attendance at hospital on the evening of 31 May 2023? Is there any prognosis for her conditions?*
- *Are you able to tell the Tribunal when you believe you will be fit for a full merits hearing and why you believe that you will be fit at that time?*
- *Are you able to attend the Tribunal remotely tomorrow by telephone or video?*

   You must send any representations and answers to these questions to the Tribunal, copied to the respondent, by 5 pm today.

   We will reconvene the Tribunal tomorrow at 10 am to decide the postponement application. If the postponement application is unsuccessful, we will go on to hear the respondent's strike out application.

   We have explained what is happening to Ms M Stewart, whom we understand to be present to take notes on your behalf, and understand that she will alert you to expect this communication.

9. Nothing further was received from the claimant on 7 June 2023.

10. The hearing recommenced on 8 June 2023 and we eventually concluded our deliberations on the postponement application. We waited until the lunch period as we were informed that Ms Stewart was intending to attend with some instructions from the claimant.

11. The claimant provided further materials which we considered, including an 8 page letter in support of his postponement application. He again explained the health conditions of himself and his mother. He provided more details

about his migraine symptoms. He blamed the respondent for causing him anxiety. He said that he was trying to avoid triggers for his migraine:

'The most easily identifiable trigger to date has been and continues increasingly to be matters to do with the Respondent, especially individuals involved in its Human Resources or now employee Relations and these proceedings in which it is at the centre.'

12. The claimant said that he was not in a condition to attend. He referred to having been told at an in person hearing in November 2022 that the Tribunal was not able to provide a quiet darkened room.[2]

13. The claimant said: 'Postponing the hearing to enable me to attend (or, preferably, free representation to advise, prepare and attend on my behalf) to present my case once I have recovered would be in accordance with the overriding objective…'

14. There was a heading in the letter for 'Late Disclosure and Failure to Disclose Information and Documents'. Under this heading, the claimant said: 'I shall need to set this out as soon as possible after today.'

15. He made a similar remark under the heading, 'Abuse of Process and Misconduct'. He attached a large number of sickness certificates referring to anxiety disorder and visual symptoms.

16. Ms Stewart had spoken with the claimant about the Tribunals questions and she wrote down what he said in an email for the Tribunal:

Q1: What efforts have you made to prepare a witness statement…
Roger said he is not capable of engaging in such a task currently for medical reasons. However, with respect, once rested and recovered, Roger feels everyone, including himself, would be better off if the time and energy he then would have working to a new and final deadline and hearing date were put to him fixing any defects. This would go towards referencing to what he described as a proper bundle rather than the one-sided bundle currently lodged. Or alternatively, referenced to what he called a complementary bundle of his own, as he had recently been advised, if a joint bundle cannot be agreed.

Q2: Are you able to provide me with more information about your mother's health…

[2] There was no evidence that the requirement for a quiet darkened room was raised as an adjustment that the claimant would require at the full merits hearing either at the case management hearing or in correspondence. Had it been raised at the November 2022 case management hearing, the likelihood is that it would have been recorded and that the Judge would have investigated whether and how provision could be made. The Tribunal is not unable to make provision of a private room for the purposes of breastfeeding for example and many rooms are equipped with blinds. It appears that the claimant was unwell on the day of the case management hearing and it may well be that a room was not available at short notice.

Roger said yes, however it will take until tomorrow morning to send provided he recovers sufficiently and his current migraine attack subsides because he can't see what he is doing at the moment. Better information on his mum's health is available from the Rapid Diagnostic Centre doctor that Roger and his mum saw last Sunday. The Tribunal only needs to ask them for this information which is the same regarding a prognosis for her condition or perhaps from her GP. Please note that Roger and his mum do not share the same GP, nor the same GP practice.

Roger's understanding of what the prognosis is that it has improved in terms of initial investigations but he says that his mum is very anxious nonetheless. I believe that anxiety and acute illness should be more under control by the time the RDC complete the tests that they aim to complete within the next couple of weeks, and begin treatment, if necessary.

Q3: Are you able to tell the Tribunal when you believe you will be fit…
Roger said that he trusts his GP, Dr Mitchel, and relies on her judgement and advice, therefore believes he would be taking her leave as a guide but with Roger's own personal knowledge of himself and the pattern of his performance that he would hope to be fully fit if given at least two months complete rest from these proceedings and engagement with the respondent. However, given his current knowledge of how things have gone and how he is affected, he would much prefer to have a full three months on the basis that:

1. *It would be a final postponement.*
2. *He has been referred by City and Hackney Improving Access to Psychological Therapies (IAPT) to a Solicitor who Roger believes will either assist him or go on the record to represent him and also prepare an application to the free representation unit or advocate or both. Alternatively, he has also made contact with Civil Legal Advice who has given him a list of local solicitors who, given that amount of time to prepare will assist him through legal aid.*
3. *Roger will have rested and recovered.*
4. *He would have received his special glasses from Moorfields.*
5. *His mum's situation will be largely resolved or identified and in treatment.*
6. *I will personally assist Roger.*
7. *He will have had time, with assistance, to have put in place contingencies with regard to all of the above and the final hearing itself.*

Q4: Are you able to attend…
No, Roger is unable to attend as he was suffering when I spoke to him. I am sure he will be able to explain when he is fully recovered.

Law on postponement

17. Rule 30A of the Employment Tribunals Rules of Procedure provides:

> 30A.—(1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.

(2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;
(b) the application was necessitated by an act or omission of another party or the Tribunal; or
(c) there are exceptional circumstances.
(3) Where a Tribunal has ordered two or more postponements of a hearing in the same proceedings on the application of the same party and that party makes an application for a further postponement, the Tribunal may only order a postponement on that application where—
(a) all other parties consent to the postponement and—
(i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
(ii) it is otherwise in accordance with the overriding objective;
(b) the application was necessitated by an act or omission of another party or the Tribunal; or
(c) there are exceptional circumstances.
(4) For the purposes of this rule—
(a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date;
(b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability

18. There is a long line of authorities on the issue of postponing Tribunal hearings because of the ill health of a party. These authorities are reflected in the Presidential Guidance on the subject.

19. We had regard to the following principles:

- The right to a fair trial will usually require an adjournment where a litigant cannot attend a hearing through no fault of his or her own. The tribunal is entitled to be satisfied that the inability of the litigant to be present is genuine and the onus is on the party making the application to prove the need for the adjournment: Teinaz v London Borough of Wandsworth [2002] ICR 1471, CA;
- The fact that a person is certified on medical grounds as not fit to attend work does not automatically entail that that person is not fit to attend a tribunal hearing. It may be sensible for a tribunal to give a litigant the opportunity to make good deficiencies in the medical evidence provided. Fairness to the claimant must be balanced with fairness to the respondent: Andreou v Lord Chancellor's Department [2002] IRLR 728, CA;
- There are two sides to a trial and the proceedings should be as fair as possible to both sides. The tribunal has to balance the adverse consequences of proceeding with the hearing in the absence of one party

against the right of the other party to have a trial within a reasonable time and the public interest in the prompt and efficient adjudication of cases: O'Cathail v Transport for London [2013] ICR 614, CA;

- There was no error of law in a case where the Tribunal struck out claims where the medical evidence indicated that a claimant would not be fit to proceed for two years. The Court of Appeal considered that it would be wrong to expect tribunals to adjourn heavy cases, which are fixed for a substantial amount of tribunal time many months before they are due to start, merely in the hope that a claimant's medical condition will improve. If doctors cannot give any realistic prognosis of sufficient improvement within a reasonable time, and the case itself deals with matters that are already in the distant past, strike-out must be an option available to a tribunal: Riley v Crown Prosecution Service [2013] IRLR 966, CA;
- Guiding principles derived from the authorities were set out in Phelan v Richardson Rogers Ltd and anor [2021] ICR 1164, EAT. Where a party seeks to postpone a hearing on medical grounds, his or her right to a fair trial is engaged (at least where the outcome of the hearing may determine the complaint). Proper weight must be given to the serious implications for him or her of refusing a postponement. These serious implications would usually outweigh the inconvenience and cost to the other party of granting the postponement, such that a tribunal properly carrying out the balancing exercise would be bound to grant the application. However, the implications for the other party's right to a fair trial, and the wider public interest, of not postponing, must also be weighed in the balance, and may tip the scales the other way. The tribunal's assessment of when, realistically, the matter is likely to come to an effective hearing if the application is granted, and what the medical evidence indicates about that, will often be important considerations. The tribunal may also properly draw on other relevant evidence and information, including in relation to the course and conduct of the litigation hitherto, when forming a view on that question.

20. The relevant Presidential Guidance says that where medical evidence is produced in support of an application to postpone for medical reasons, it should include a statement from the medical practitioner that, in his or her opinion, the applicant is unfit to attend the hearing, the prognosis of the condition, and an indication of when that state of affairs may cease.

Conclusions on postponement

21. We gave careful consideration to the evidence and submissions provided by the claimant.

22. We had a great deal of sympathy for the situation the claimant had found himself in and the worry he must be feeling about his mother.

23. We had however to ask ourselves whether the medical and other evidence gave us any indication as to when a fair trial might be possible. Taking into account the claimant's history of non compliance with orders and non attendance at various hearings and the issues with production of a witness

statement, did we have any confidence that the claimant would attend a full merits hearing within a reasonable further period of time?

24. The claimant had not answered the questions posed by the Tribunal about the state of preparation of his witness statement and there was no explanation as to why he had chosen not to answer those questions. It appeared to us that he probably had not prepared a draft but we were baffled as to why. There are only a few issues in the claim and the respondent's witness statements amounted in total to twelve pages. The claimant said that he had difficulty working at a screen because of his migraines, and we did not doubt that was the case, but he had nonetheless sent numerous and sometimes lengthy letters and emails in support of his postponement application. It appeared to us that the claimant had had many months to work on a draft of his witness statement and that, even if he was constrained to work on it for short periods in order to avoid provoking a migraine, he could certainly have had it ready for the hearing.

25. The representations the claimant made suggested that he had never been fit to attend a full merits hearing and that engagement in the proceedings is a trigger to his ill health. He further appeared in his most recent communication to be saying that he could not participate without legal representation. It also appeared that he had only recently begun to make enquiries about some pro bono legal advice and these enquiries seemed to be at a very formative stage. There was no explanation as to why they had not commenced sooner and the Tribunal could have no confidence in any event that they would be successful.

26. The evidence of the claimant's GP was that he should not engage in the proceedings for at least two months; the claimant's evidence was that a longer period was required. Looking at the claimant's significant inability over the entire life of the proceedings to engage to the extent required for the proceedings to be ready for a full merits hearing at which the claimant attended and gave evidence, we were unable to have any confidence that the claimant would be able to participate at any time in the foreseeable future.

27. We had to consider also what would be proportionate. The financial value of these claims is limited and the claimant is still employed by the respondent. Unresolved proceedings inevitably have an effect on all of those involved in them and these proceedings have already absorbed significant Tribunal resource at a time when there is significant pressure on the Employment Tribunal system; the interests of other Tribunal users were also a consideration.

28. Bearing all of those considerations in mind, we concluded ultimately that it was not in accordance with the overriding objective to postpone the proceedings and we proceeded to hear the respondent's witnesses. The respondent indicated that it was content not to pursue its strike out application. The Tribunal panel were careful to ensure that the basic planks of the claimant's case had been put to the witnesses.

29. We concluded evidence and submissions on the morning of 9 June 2023 and began our deliberations. We informed the respondent and Ms Stewart that we were going to reserve our decision in the afternoon and sent the parties away. Shortly after that a further email from the claimant was forwarded to me. By that stage it appeared that Ms Stewart had left the building but I asked the respondent to wait whilst we read the email.

30. In his attached letter the claimant asked the Tribunal to reconsider the decision not to postpone the hearing and proceed in his absence and/or he renewed his postponement application.

31. The claimant attached some of his own medical records and said that he was seeking further records for his mother.

32. He also set out a short list of documents which he said had been excluded from the hard copy bundle he had originally been sent.

33. An attachment to the letter included some historic messages between the claimant and a manager about the toilets at work and concerns about whether another staff member had Covid, a formal grievance the claimant had raised about issues with a manager and other matters. There was some correspondence about the withdrawal of the first claim and some material from the Migraine Trust explaining the relationship between migraine and anxiety and some other materials about migraine.

34. We concluded that it was not in the interests of justice to review the decision not to postpone since the hearing had now taken place and nothing the claimant had said in his application would have changed the decision not to postpone the full merits hearing. There was no material change of circumstances. The Tribunal accepted that the claimant's mother's health situation had deteriorated and required the claimant to support her. We had no doubt that this extremely stressful situation has also affected the claimant's own health. Our decision was based on our conclusion that the claimant would continue not to attend a full merits hearing into an indefinite future regardless of the state of his mother's health, based on the evidence we had.

35. We informed the respondent that we were not varying the decision not to postpone and caused written confirmation to be sent to the parties after the hearing.

Events in the claim

36. On 9 July 2015, the claimant commenced working for the respondent as a night shift team member at an M and S Simply Food outlet at Marylebone Station. We were not concerned with the events of his employment prior to early March 2020 and the commencement of the pandemic. Mr Turner told us that because the claimant did night work he would not be required to look at

print, whereas on day shifts employees would have to check products on shelves from a list for sell by dates.

37. Between 19 March 2020 and 26 March 2020, the claimant was absent from work with ill health connected with concerns about Covid.

38. On 1 April 2020 the claimant provided written consent for the respondent to communicate with his union but indicated that the respondent had a continued obligation to communicate directly with him unless he directed otherwise.

39. On 8 April 2020, the Marylebone outlet where the claimant worked closed for reasons related to the pandemic. From 9 April 2020, the claimant and his colleagues were on furlough and paid in accordance with the Coronavirus Job Retention Scheme.

40. On 27 July 2020, the respondent wrote to the claimant informing him that the Marylebone unit would be reopening and the claimant would be expected to return to work on 4 August 2020. The claimant was then signed off work from 2 August 2020 with work related stress and ceased to be on furlough. The claimant has not returned to work to date but remains employed by the respondent.

41. By 25 September 2020, the issue of whether the claimant should be referred to occupational health had arisen and the claimant wrote to request a referral. On 29 September 2020, Ms C Wale, HR adviser, wrote to the claimant to say that they needed to arrange a welfare meeting to progress the referral and invited the claimant to a welfare meeting.

42. The medical records showed that on 30 September 2020, the claimant had his first GP appointment at which he reported the visual symptoms which were ultimately diagnosed as symptoms of migraine.

43. On 1 October 2020, the claimant wrote to Ms Wale to say that he was unable to attend a welfare meeting due to ill health. The claimant said that having to deal with HR and management was stressful for him and he was critical that Ms Wale had not copied in his trade union representative.

44. There was further correspondence between HR and the claimant about attending a welfare meeting and on 16 October 2020, Ms Sidat again invited the claimant to a welfare meeting, in part to discuss an OH referral.

45. On 19 October 2020, the claimant wrote to Ms Sidat to ask why she had not copied in his trade union representative:
Please can you explain exactly why it is you have once again declined to copy my trade union (the RMT) into this simultaneously, as I have repeatedly requested?

I need to consult with the appropriate RMT representative before I am able to respond to you, and given the continuing difficulties of current time, to which

we all all subject, that repeated failure will both prejudice my ability to participate as you propose and also cause further delay. Hopefully, contact and consultation will be expedited by me now carbon copying the RMT into this holding response and them seeing it and making preparations in the event I cannot get through immediately.

46. Ms Wale replied apologising for the failure to copy in the claimant's trade union representative; she said it was not deliberate but was due to human error. As Ms Sidat pointed out in evidence, the only previous request that the trade union representative be copied in apparent from the documents was in the 1 October 2020 email.

47. Ms Sidat observed more generally that during this period, the claimant copied in his trade union representative to most but not all of the emails sent to the respondent. Ms Sidat said that they did not as a rule copy the trade union into emails unless specifically requested to do so. When asked to copy the trade union in, they would endeavour to do so but sometimes, due to the volume of cases, they would forget. She observed that she could see that she and Ms Wale forgot to copy in the trade union on a number of occasions. She said that they were both working from the HR Advisory inbox at the time, which was very busy, and that they were also taking telephone calls constantly throughout the day. She said that the failure to copy in the claimant's trade union representative at times was a genuine error. Because she was conscious not to copy in people to emails who were not necessary recipients of the emails, she would usually use the 'reply' rather than the 'reply all' facility.

48. On 22 October 2020, the claimant wrote to say that he would not be attending the welfare meeting arranged for the following day. He said:
Matters have developed to the point where, in addition to the health conditions of which you have already been advised, I am currently experiencing visual disturbances thought to be a sign of or caused by aura migraine, a known cause of which is stress and anxiety.

Consequently, I shall not be in any position to attend or take part in the welfare meeting you set for tomorrow (invite attached below) which you again did without consulting me or my trade union, indeed initially without even copying them into your communications. This is both discourteous to the RMT and deeply disturbing to me.

49. This was the first time the claimant had told the respondent he suffered from visual disturbances and might be suffering from migraine. His complaint about the trade union not being copied in was not expressly linked by him to his impairment.

50. On 10 November 2020, the UK head of HR shared services, Ms A Laing, agreed to be the single point of contact for the claimant, as requested by the claimant. Ms Laing copied the claimant's trade union representative into her correspondence with the claimant. At the time there were outstanding issues

relating to a grievance the claimant was pursuing and a Data Subject Access Request he had presented.

51. On 1 December 2020, the claimant asked to be placed immediately on furlough as a reasonable adjustment 'in response to be current state of health, most notably migraine affecting vision and now increasingly with pain, presenting as a disability for the purposes of the Equalities Act 2010.' and because a night shift colleague had been returned to furlough.

52. On 2 December 2020, Ms Laing responded to the claimant:
Any decision about furlough leave will and must be based on business need related to the impact of Coronavirus pandemic. In fact we are only allowed to claim under the Government's scheme where an individual's employment activities have been adversely affected by the coronavirus or measures taken to prevent or limit its further transmission.

Unfortunately that means it is not appropriate for us to consider furlough leave as a reasonable adjustment for a medical condition (whether a disability or otherwise) as you have requested.

53. Mr Turner's evidence was that the respondent did not know what colleague the claimant was referring to.

54. On 3 December 2020, Mr G Watson, the claimant's trade union representative, wrote to Ms Laing to ask 'Are there any others staff requesting the same or similar treatment?'. Ms Laing informed Mr Turner and he wrote to other HR business partners to see if there had been any other similar requests. The other HR business partners were not aware of any such requests and Ms Laing informed Mr Watson that was the position on 7 December 2020. Although the claimant's unit had remained open there had been less work to be done.

55. In mid December 2020, it became apparent that the claimant had in fact been placed on furlough in error from 5 November 2020. The respondent decided to leave him on furlough rather than remove him from furlough and then put him back on furlough when his whole unit closed on 25 December 2020. From 26 December 2020, all of the staff at the claimant's unit were placed on furlough.

56. On 26 January 2021, Ms Laing wrote to the claimant to ask him for information required to make a referral to occupational health. She had previously asked for that information on 25 November 2020. She also asked about the claimant's fitness to attend a meeting about his grievance.

57. On 1 February 2021, the claimant wrote to say that he was not well enough to attend a meeting. He also wrote:
As you know, your HR Advisory Team initially obstructed my early requests to be referred to Occupational Health. When that time and opportunity passed, I had to take the matter of my health, and disabling migraine in particular, more

into the hands of my general practitioners and Moorfields Eye Hospital consultants.

I shall try to update you further towards the end of this week, including what I am able to say on the referral form, if possible.

58. In April 2021 the claimant's unit reopened and on 13 April 2021 the claimant was sent a letter asking him to return to work on 20 April 2021 on flexible furlough. 13 April 2021 is also the date of the first sickness certificate provided by the claimant which refers to eye problems as opposed to work related stress or anxiety disorder. On 12 April 2021, the claimant had written to Ms Laing asking that his furlough be extended as a reasonable adjustment in response to her email of 8 April 2021 informing him that the unit would be reopening.

59. On 16 April 2021, Ms Laing wrote to the claimant:
I have previously outlined the reasons why Furlough could not be used to support a colleague's absence, namely that we are only allowed to claim under the Government's furlough scheme where an individual's employment activities have been adversely affected by the coronavirus or measures taken to prevent or limit its further transmission. Fortunately, we are now in a position where the business is slowly starting to reopen and therefore we no longer need to rely on the scheme for your location.

60. She said that the respondent would like to make an occupational health referral so that they could investigate whether any adjustments could be made to the claimant's role to facilitate his return to work.

Furlough guidance

61. Mr Turner told us that Ms Laing relied on the Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme, CJRS) Direction of 12 November 2020.

62. Paragraph 2.1 provides:

2.1 The purpose of CJRS is to provide for payments to be made to employers on a claim made in respect of them incurring costs of employment in respect of employees who are within the scope of GRS arising from the health, social and economic emergency in the United Kingdom resulting from coronavirus and coronavirus disease.

63. Paragraph 2.3 provides:

2.3 Integral to the purpose of GRS is that the amounts paid to an employer pursuant to a GRS claim are only made by way of reimbursement of the expenditure incurred or to be incurred by the employer in respect of the employee to which the claim relates whose employment activities have been adversely affected by the coronavirus and coronavirus disease or the measures taken to prevent or limit its further transmission.

64. Mr Turner said that the respondent's understanding was that the furlough scheme could only be used where an employee's activities or role had been adversely affected by Covid. The respondent had taken legal advice on the scheme and had taken care with how they made use of the scheme because a failure to comply with the rules could have had very serious consequences for the respondent.

65. The respondent also had regard to guidance provided by the government which included the following:

If your employee's health has been affected by coronavirus or any other conditions

Your employee is eligible for the grant and can be furloughed, if they are unable to work, including from home or working reduced hours because they:

• are clinically extremely vulnerable, or at the highest risk of severe illness from coronavirus and following public health guidance (https://www.qov.uk/government/publications/guidance-on-shieldinq-and-protecting-extremely-vulnerable-persons-from-covid-19/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19) - these employees remain eligible for the Coronavirus Job Retention Scheme even whilst shielding guidance is not in place

• have caring responsibilities resulting from coronavirus, such as caring for children who are at home as a result of school and childcare facilities closing, or caring for a vulnerable individual in their household

If your employee is self-isolating or on sick leave

If your employee is on sick leave or self-isolating as a result of coronavirus, they may be able to get Statutory Sick Pay (SSP) (https://www.gov.uk/statutorv-sick-pay).

The Coronavirus Job Retention Scheme is not intended for short-term absences from work due to sickness.

Short term illness or self-isolation should not be a consideration when deciding if you should furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and would be classified as a furloughed employee.

Employers can furlough employees who are clinically extremely vulnerable or at the highest risk of severe illness from coronavirus. It's up to employers to decide if they will furlough these employees. An employer does not need to be facing a wider reduction in demand or be closed to be eligible to claim for these employees.

….

If your employee becomes sick while furloughed

Furloughed employees retain their statutory rights, including their right to SSP. This means that furloughed employees who become ill, due to coronavirus or any other cause, must be paid at least SSP. Subject to eligibility this includes those self- isolating or clinically extremely vulnerable because of coronavirus. It is up to employers to decide if they will move these employees onto SSP or to keep them on furlough, at their furloughed rate.

If a furloughed employee who becomes sick is moved onto SSP, employers can no longer claim for the furloughed salary. Employers are required to pay SSP themselves, although may qualify for a rebate for up to 2 weeks of SSP if the sickness is related to coronavirus.

If employers keep the sick furloughed employee on the furloughed rate for the period that they are sick, they remain eligible to claim for these costs through the furloughed scheme.

66. On 15 April 2021, the claimant wrote objecting to being placed on flexible furlough and saying:

4. Please note going forward, that all communications should either be by email carbon copied to my RMT trade union representative (identified within the relevant email address field above) or later confirmed by email if urgent contact is made by telephone. Again, I request this as a reasonable adjustment in light of my current disability and limitations on screen time with overexposure being a migraine trigger. It should also be noted that your letter gave only one clear day to respond. This will normally not be enough time for me to see and respond to anything.

67. On 16 April 2021, Ms Laing again explained why the claimant would not remain on full furlough and again said that the respondent would like to refer the claimant to occupational health.

68. On 20 April 2021, the claimant wrote to Ms Laing saying that he now had a referral to Moorfields and was on a waiting list for an appointment with the neuro-ophthalmology clinic He said that he had consulted with his GP, who was of the opinion that occupational health involvement would best take place after the claimant's attendance at Moorfields. He said that he had had an initial diagnosis of migraine with aura (visual disturbances) 8 months previously, in September 2020.

69. On 21 April 2021, Ms Laing wrote again to the claimant explaining why the respondent was unable to place him on furlough:

It is correct to say that where an employee's activities have been adversely affected by Coronavirus, for example because their workplace has been closed, an employer can choose to claim for that employee under the furlough scheme where they also present as unfit to work. The CJRS Guidance states: If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees.

The key words in the Guidance are 'for business reasons'. There has to be an underlying business reason within the scope of the furlough scheme to put an employee on furlough, whether or not they are off sick.

That is no longer the situation in your case. We have re-opened your unit, your job is available for you to do, so we no longer need to use the furlough scheme for you or anyone in your unit.

It is clear from the Treasury Direction that the furlough scheme cannot be used for any purpose other than as set out in its rules. Clause 2.6 states: No CJRS claim may be made in respect of an employee if it is abusive or is otherwise contrary to the exceptional purpose of CJRS.

That means where there is no underlying reason to use the scheme within the scope of its rules and purpose, the scheme cannot simply be used as a way of making reasonable adjustments for employees, in fact it would be an abuse of the scheme and so unlawful to do so.

70. In May 2021, Ms Laing left the respondent's employment. Ms Sidat took on some of the respondent's correspondence with the claimant. All of Ms Sidat's subsequent correspondence with the claimant was copied to the claimant's trade union representative. Mr Turner corresponded with the claimant and on three occasions failed to copy in the claimant's trade union representative: 27 July 2021, 2 August 2021 and 3 September 2021. He told the Tribunal that at the time the claimant had seven active cases (HR matter). It was a genuine oversight not to have copied the claimant's trade union representative on these occasions. He received about 100 emails per day at the time and sent about 60 responses. He and Ms Sidat were managing the HR team with four new starters and were extremely busy. The respondent had no software which would have automated the process of always copying in the claimant's trade union representative, if such software exists.

71. The claimant has been pursuing a grievance about the refusal to maintain him on furlough as a reasonable adjustment. That grievance has yet to be concluded broadly because the claimant has declined to attend a hearing.

Evidence from the claimant's medical records

72. The claimant first attended his GP with symptoms of what was subsequently diagnosed as migraine on 30 September 2020. The history was recorded as follows:

Had a couple of episodes where he has noticed 'strobe lights' in his vision.

This is in the L eye. He says he has been feeling more stressed recently and wondered if this could be a trigger.

He has no hx of migraines. He says he feels like there is a slight ache in the eye.

The symptoms were transient and last happened the other day. Denies black spots/changes in visual field. He has just googled migraine with aura and doesn't think the same as this.

He is not sure if they are floaters.

Doesn't have them at the minute

73. The GP referred the claimant to Moorfields Eye Hospital to urgently rule out retinal issues. The claimant saw an optician and was told there was no detachment of his retina and his issues might be migraines.

74. The claimant consulted the GP again on 20 October 2020 and the following history was recorded:

blurring of vision(both sides) since yesterday -has had this frequently but usually settles with rest - this time c/o that still has blurring this am -letters not clear/long distance is not as blurry

has been seen by optician -said to him had normal eye exam- feels it may be a migraine and that he needs glasses - no strobing in peripheral vision

works with screen/phone a lot

no headache, no eye pain/no double vision

no new floaters

tci for exam and BP check

5 hours sleep

75. At an appointment on 7 December 2020, the claimant had not had further 'strobe' episodes in his left eye but still felt that his vision was blurred. He had had a dull right-sided headache over the past week which could last a few hours at a time.

76. There was a number of GP appointments about the visual symptoms and headaches at the end of 2020 and into 2021. The claimant was on a waiting list to see an ophthalmologist at Moorfields. The occupational health physician, Dr Basu, later reported that the claimant had had escalating difficulties with sleep disturbance, anxiety and painful migraines lasting up to 72 hours.

Occupational health report

77. We saw an occupational health report dated 15 June 2022. The consultant occupational health physician, Dr Basu, said: 'I believe his migraines are driven by stress-related trigger which he associates with work matters. I am doubtful of significant improvement until these matters are resolved, although his treatment may provide some symptom relied'. The claimant had discussed work issues which he said had driven his symptoms including

interpersonal difficulties, in particular a ‘fractious and hostile’ relationship with a team leader as well as ‘concerns about procedural and process injustice’. Dr Basu did not believe the claimant would be fit for work until his grievance and Tribunal processes had been completed.

Law

Harassment

78. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant’s dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant’s perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

79. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> ‘an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so...Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.’

80. An ‘environment’ may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Definition of disability

81. Section 6(2) of the Equality Act 2010 provides that a person has a disability if that person:

- Has a physical or mental impairment
- The impairment has a substantial adverse effect on that person's ability to carry out normal day-to-day activities;
- That effect is 'long-term'.

82. 'Substantial' is defined in S.212(1) EqA as meaning 'more than minor or trivial'. In considering whether there is a substantial adverse effect on normal day-to-day activities, the focus should be on what the person cannot do and not what he or she can do: Goodwin v Patent Office [1999] ICR 302, EAT.

83. Schedule 1, paragraph 2(1) provides that the effect of an impairment is long-term if it has lasted for at least 12 months, or is likely to last for at least 12 months, or is likely to last for the rest of the person's life. When looking at whether an effect is 'likely' to last for at least 12 months, a tribunal should consider whether 'it could well happen': Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL.

Failure to comply with a duty to make reasonable adjustments

84. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.

85. In considering a reasonable adjustments claim, a tribunal must consider:

- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
- The identity of non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

Environment Agency v Rowan [2008] ICR 218, EAT.

86. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.

87. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable

adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.

88. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.

89. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

90. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: Rider v Leeds City Council EAT 0243/11, Tarbuck v Sainsbury's Supermarkets Ltd [2006]IRLR 664, EAT.

91. It will not generally be a reasonable adjustment to pay a disabled employee more sick pay than a non disabled employee; the purpose of the legislation is to assist disabled workers to enter and remain in the workplace: O'Hanlon v Revenue and Customs Commissioners [2007] ICR 1359, CA.

92. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:

- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
- The extent to which it was practicable for the employer to take the step
- The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance in respect of taking the step
- The nature of the employer's activities and the size of its undertaking

- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

Knowledge

93. An employer is not subject to a duty to make reasonable adjustments if it did not know or could not reasonably be expected to know:
- That the employee has a disability; and
- That the employee is likely to be placed at a disadvantage by a PCP: Schedule 8, para 20(1)(b) Equality Act 2010.

94. An employer must do all it can reasonably be expected to do to find out whether an employee has a disability: EHRC Employment Code, para 5.15.

Unlawful deductions from wages

95. Section 13 of the ERA 1996 provides that an employer shall not make unauthorised deductions from a worker's wages, except in prescribed circumstances. Wages are defined in section 27 as 'any sums payable to a worker in connection with his employment', including 'any fee, bonus, commission, holiday pay or other emolument referable to [the worker's] employment, whether payable under his contract or otherwise' with a number of specific exclusions.

96. On a complaint of unauthorised deductions from wages, a tribunal must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion: Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT.

Conclusions

Issue: 9 It has been conceded that the Claimant was disabled due to his visual disturbances and migraines at the material time.

97. The respondent conceded disability from March 2021. We had to consider whether the claimant was disabled at any earlier time. We understood that the complaints about failure to make reasonable adjustments first arose at an earlier time.

98. We gave careful consideration to the evidence which we had which was contained in the claimant's medical records. We considered the issue of whether there was a point earlier than March 2021 (some six months after

the claimant commenced having symptoms of migraine) when it was appropriate to conclude that the impairment was long term.

99. We could not find any basis on which we could so conclude. In the early period after the claimant presented with the symptoms, there was uncertainty as to the diagnosis and, it would seem to follow, the prognosis. That uncertainty continued up until at least March 2021. It was also not clear to us, without further evidence, that the symptoms had a substantial adverse effect on the claimant's day-to-day activities at that point in time.

100. We therefore did not find that the claimant was disabled any earlier than the date conceded by the respondent.

Knowledge

101. The claimant first mentioned his impairment to the respondent in his email of 22 October 2020, where he described the issue in this way: "I am currently experiencing visual disturbances thought to be a sign of or caused by aura migraine, a known cause of which is stress and anxiety."

102. There was nothing in that email which would have conveyed to the respondent that the impairment was likely to last twelve months or more.

103. The respondent was at this time doing what it reasonably could do to make an occupational health referral for the claimant which might have given the respondent more insight into his condition.

104. In April 2021, the claimant provided a sickness certificate which referred to 'ocular migraine – causing a lot of issues'. On 20 April 2021, he wrote to Ms Laing saying that he had been referred to the neuro-ophthalmology clinic at Moorfields in January and was still awaiting an appointment. He commented that the original diagnosis of 'migraine with aura (visual disturbances)' had been 8 months ago in September 2020. He said himself that the disabling effects of his migraine would almost certainly last more than a year.

105. We concluded that the respondent ought reasonably to have known that the claimant had a disability at this point. Given how long the claimant reported his systems had been continuing and the fact of the referral for specialist input and given that the symptoms were sufficient for the GP to sign the claimant off work, it would have been apparent that the symptoms were likely to last for more than twelve months. We did not consider that the respondent could reasonably have known prior to that date.

Issue: 9.1 Whether the Respondent applied the following provisions, criteria or practices (PCPs):

(a) A practice of not copying his union representative to emails (and actively removing the representative(s) if the Claimant copied them in) despite the Claimant using "cc" and/or asking them to do likewise;

106. We considered on the evidence we saw that there was a practice of copying in the claimant's trade union representative after the respondent was asked to do so in April 2021.

107. There were however occasions when the trade union representative was not copied in. We accepted that there was a large volume of correspondence with the claimant in relation to the seven separate HR matters which were open at one time or another.

108. There was a period of about six months from the date when we found that the respondent would have had knowledge of the claimant's disability to the date of presentation of the claim form. We had evidence that there was a handful of failures to copy the claimant in over this period and evidence that those failures were not deliberate but were inadvertent. We had evidence that the respondent did not have a particular software solution to the issue.

109. We concluded that there was no practice of not copying in the claimant's trade union representative, rather there were occasional failures to follow the practice of copying in the trade union representative.

Issue: (b) Not allowing the Claimant to stay on full furlough prior to 8 April 2021 and on 13 and 21 April 2021.

110. The policy under this head is better formulated as a policy of not allowing people to stay on furlough if their unit was open and required workers and they were not considered otherwise to fall within government guidelines as to which workers could be on furlough. What the claimant has identified is not a policy or practice but some individual decisions in his own case taken in accordance with the respondent's policy.

111. This policy was applied to the claimant.

Issue: 9.2 If it applied any of the PCPs whether they put the Claimant at a substantial disadvantage compared to those who do not have his disability. In particular,

(a) Whether the first PCP put him at a disadvantage because his visual disturbances make it difficult for him to use screen without developing an aura, leading to a migraine which prevents him being able to read his emails;

112. We found that there was no such practice. Had there been such a practice, would it have put the claimant at the relevant disadvantage? We concluded that, in theory, it could do so, because of what we understood to be the effect of working at a screen in provoking the claimant's symptoms, although we had no evidence as to how much screen time was tolerable and how that compared with the volume of work-related emails at any particular time.

113. Furthermore, it was obvious to us from the documents we saw that the claimant read all of the emails into which his trade union representative was copied and responded to them himself. It was difficult to see how not copying in the trade union representative disadvantaged the claimant if he was always going to read the emails and respond to them himself. It may be that if he had appeared to give evidence, the claimant would have said that if he knew his trade union representative was copied in, he could defer reading the emails to a time when he had been at a screen less and was therefore less likely to have symptoms, but we did not have any such evidence.

114. On the evidence we, had we were not able to find that had this PCP been applied it would have put the claimant at the relevant disadvantage.

Issue: (b) Whether the second PCP put him at a disadvantage because returning to work would trigger his migraines and meant that he could not manage his treatment which he was just starting and doing a lot of reading of small print at work would start to trigger his aura.

115. We had no evidence that reading small print was a significant part of the claimant's role. However it was clear from the evidence, in particular Dr Basu's report, that stressful situations at work, including interpersonal relationships, were likely to provoke migraines. Having said that, being away from the workplace and with his various grievances and concerns unresolved, largely as we understood it because the claimant was unable to attend meetings to discuss them, seemed to have left the claimant in a condition where his symptoms were certainly not improving. We note that his migraines developed after he had been off work for some period.

116. What was the nature of the disadvantage properly analysed? The disadvantage was not that he was required to be at work when he was too unwell to be there. The disadvantages was that he was off work on sick pay rather than furlough pay and was ultimately financially disadvantaged. In that sense this case is no different from cases where claimants have sought to argue unsuccessfully that it would be a reasonable adjustment for them to receive longer periods of sick pay or a higher rate of sick pay than non-disabled employees.

Issue: 9.3 If so, whether the Respondent knew or could reasonably have been expected to know that the PCPs placed the Claimant at that disadvantage?

117. So far as the first PCP alleged is concerned, we found that there was no such practice and no such disadvantage.

118. So far as the second PCP is concerned, the respondent would have been aware of the disadvantage on 21 April 2021 when they formally turned down the claimant's furlough request.

Issue: 9.4 If all the above apply, whether the Respondent failed to make reasonable adjustments that would have alleviated the disadvantage.

119. So far as the first PCP is concerned, we found there was no practice as described and no disadvantage.

120. So far as the second PCP was concerned, the adjustment contended for was keeping the claimant on furlough. We concluded that at the time when the claimant says he should have been on furlough, he did not fall within any category where the respondent could lawfully furlough him. It cannot be a reasonable adjustment for the respondent to have to behave unlawfully; it would also have posed a significant risk to the respondent to attempt to defraud the government in that way. Furthermore, an adjustment of this kind is analogous to the payment of extra sick pay to a disabled person and would not assist the claimant in being integrated into the workplace.

121. For all of the above reasons, the claimant's claim that the respondent failed to comply with a duty to make reasonable adjustments is not upheld and is dismissed.

Issue: 9.5 If the Respondent failed to copy emails to the Claimant to his union representative, whether that amounted to harassment related to disability under section 26 of the Equality Act 2010.

122. We accepted that the respondent's employees did not have a proscribed purpose, We also concluded that there was no proscribed effect. We did not consider that a reasonable employee faced with a handful of failures to copy in a trade union representative and no good evidence that any such failure was deliberate would consider that his dignity was violated or the requisite environment was created.

123. We did not consider that the failures to copy in the trade union representative had any relationship with the claimant's disability, as they were entirely inadvertent.

124. For these reasons, we did not uphold the claim of harassment related to disability and it is dismissed.

Issue: 9.6 Whether the Tribunal has jurisdiction to consider any complaints that related to acts or failures to act that occurred before 21 April 2021.

125. We did not find any of the discrimination complaints made out on the merits so did not have to consider the jurisdictional issue.

Issue: 9.7 Whether the Claimant should have been paid more than SSP during any of his periods of sickness absence and whether failure to do so amounts to an unauthorised deductions from his wages.

126. We had some uncertainty as to the ambit of this claim. There was no evidence before us that the claimant should have been paid more by way of company sick pay for example. We concluded that the claimant was complaining about a failure to pay the sum the claimant would have been paid had he been placed on furlough at the times he wished to be placed on furlough.

127. We did not uphold this claim as the claimant had no contractual right to be on furlough during periods when it would not have been lawful for him to be on furlough and/or to be paid furlough pay if he was not on furlough.

Issue: 9.8 Whether the Tribunal has jurisdiction to consider any complaints about any deductions made before 21 April 2021.

128. We were not required to consider whether any such complaints were in time since we dismissed the claims on their merits.

Employment Judge Joffe
London Central Region
03/08/2023

Sent to the parties on:

03/08/2023

For the Tribunal Office: