



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON CENTRAL  
**BEFORE:** EMPLOYMENT JUDGE ELLIOTT

**BETWEEN:**

**Ms S Budathoki** **Claimant**

**AND**

**Lexington Catering Ltd** **Respondent**

**ON:** 4 and 5 April 2022  
**Appearances:**  
**For the Claimant:** In person  
**For the Respondent:** Ms S Bewley, counsel

## **RESERVED JUDGMENT**

The Judgment of the Tribunal is that the claims fail and are dismissed.

## **REASONS**

1. By a claim form presented on 2 November 2022 the claimant Ms Sachita Budathoki brings claims of unfair dismissal and unlawful deductions from wages in respect of sick pay and holiday pay.
2. The claimant worked for the respondent as a Finance Assistant.

### **This remote hearing**

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
4. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended on day 1. No members of the public attended on day 2.

5. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.
6. The participants were told that it was an offence to record the proceedings.
7. The tribunal was satisfied that each of the witnesses, who were all in different locations, had access to the relevant written materials. I was also satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

### **The issues**

8. The issues for determination by the tribunal were confirmed with the parties at the outset of the hearing as follows:
9. What was the reason for dismissal? The respondent contends that it was for the potentially fair reason of lack of capability.
10. Did the respondent act reasonably in treating this as a sufficient reason for dismissal and did it act fairly in the procedure it followed leading to dismissal.
11. Did the respondent make any unlawful deductions from the claimant's wages in terms of sick pay?
12. Did the respondent fail to pay the claimant her accrued annual leave entitlement on termination of employment? The respondent said that some annual leave pay was paid the day before the hearing and the respondent thought that the full amount had been satisfied.
13. The claimant confirmed that she had received some outstanding holiday pay, but she said that she thought there was still some holiday pay outstanding for 2022. The claim for holiday pay remained in issue.
14. After the mid-morning reading break the respondent said that they would concede a sum in respect of any confusions over holiday pay and sick pay provided the claimant would accept this. The claimant did not accept this so these matters remained in issue

### **Witnesses and documents**

15. There was an electronic bundle of 222 pages.
16. The tribunal heard from the claimant. For the respondent the tribunal heard from 2 witnesses, (i) Ms Paulina Pamula, General Manager for the respondent's client BNP Paribas and the dismissing officer and (ii) Ms Jane Streat, Head of Client Services and the appeal officer.

17. The claimant did not provide a witness statement until the day before the hearing because she had misunderstood what she was required to do. Standard directions were given by the tribunal on 14 November 2022 ordering exchange of witness statements 2 weeks before the hearing, namely 21 March 2022. The respondent said that notwithstanding this, they were content to proceed.
18. Also at the start of the hearing the claimant mentioned that she had another witness. The respondent said that they had seen a letter from Mr David Oywer, a former Finance Manager at the respondent and the claimant's former line manager, but they did not know that she intended to call him as a witness. The respondent did not object to the introduction of this letter as his witness statement. The respondent decided that they did not have any cross-examination for Mr Oywer, so the statement was taken into account and the witness was not called.
19. I had closing submissions from both sides, to which they spoke. All submissions, whether written or oral, were fully considered, including any authorities referred to, whether or not expressly referred to below.

### **Findings of fact**

20. The claimant worked for the respondent as a Finance Assistant from 10 June 2010 until her dismissal on 5 August 2022. The claimant TUPE'd to the respondent on 6 January 2020 but had continuous service back to June 2010 and therefore had 22 complete years' service.
21. The respondent is a contact catering company providing services to a number of clients. The claimant worked on the catering contract for BNP Paribas. Prior to her health problems, she worked full time on the client's premises.
22. The respondent employs about 1,000 people in London. It is a London based company. It is part of a wider group of companies, the Elior Group, which is French owned. The Group has other associated companies in the UK. The company does not offer Permanent Health Insurance, other than at Head Office level.

### **The claimant's duties**

23. Prior to the events in question in these proceedings and excluding Government lockdowns during the pandemic, the claimant's job role was exclusively on site at the respondent's client's premises.
24. The respondent is a catering company and the contract on which the claimant worked was for their client BNP Paribas. There were about 3,500 people on site and by its very nature, catering tends to be an on-site operation.

25. Although the claimant was in a finance administrative role, the role required her to carry out a significant number of duties on site. These duties included liaising with suppliers, collecting cash from machines that provided cards to the client's staff and visitors to allow them to purchase food, helping customers who had problems with those cards, assisting with working on the tills, dealing with stock inventory and liaising with store people and engineers who came to site, for example to repair equipment. More is said below about the claimant's duties.

#### Restructuring and streamlining

26. Catering businesses were badly hit by the pandemic. In the summer of 2020 when people started to return to offices, the respondent had to restructure and streamline its operation to take account of the downturn. The respondent made some redundancies in the team in which the claimant worked. Ms Pamula, the General Manager for the client BNP Paribas, told the tribunal that the team was reduced by half and they had to adapt to new ways of working.
27. In the Finance Team, they reduced two roles of Finance Manager and Finance Assistant, to one role. The Finance Manager, Mr Oywer, who had been the claimant's line manager, was made redundant in September 2020. The claimant found that this created additional work for her which she found hard. The evidence from the respondent's witnesses was that everyone in the team had to pick up additional work.

#### Relevant contractual terms on sick pay and holiday pay

28. The claimant's contract of employment was at page 44 of the bundle. The paragraphs in the claimants contract of employment were not numbered.
29. The claimant was entitled to 28 days holiday per annum inclusive of bank holidays.
30. The contract provided that upon termination of employment she was required to take any remaining annual leave within the notice period.
31. The contract provided that after 2 years' service, she was entitled to 10 days paid sickness absence during each rolling 52 week year, after 3 waiting days on each period of absence (bundle page 45).

#### The claimant's medical condition

32. The claimant had a good work record and a good attendance record prior to becoming unwell in late 2020. Like a vast number of people, the claimant was on furlough leave in 2020, until August of that year. As set out above, in September 2020 her line manager, Mr Oywer was made redundant. The claimant began to take on some of his tasks which she found too much for her and felt that she had not been sufficiently trained to undertake these tasks.

33. On 16 December 2020 the claimant contacted Mr Daniel Spielhofen, Transformation Manager, about her medical situation. She said that she needed to leave for an operation at the end of the week (email page 51). The claimant had been diagnosed with a kidney condition and proposed to have treatment in India.
34. Although the claimant had hoped to have a kidney transplant in India, this did not ultimately happen.
35. In a meeting on 17 December 2020 the claimant told her line manager Ms Emma Griffiths, the Catering Manager and Mr Speilhofen and that she wanted to be away for 3-6 months. Mr Spielhofen asked the claimant if she wanted to resign. She made it clear that she did not want to resign. He apologised if she had thought he had indicated that she should resign. That was not his intention. The claimant was asked to provide a medical letter for extended medical leave. This was to explore allowing her to have an extended period of time off for medical treatment without instigating any absence procedures.
36. The claimant said that she would provide this once she started her treatment in India (page 49). She initially asked for 14 days annual leave to fly to India and begin her treatment. Mr Spielhofen offered the claimant 20 days holiday with a return date of 20 January 2021. He thought this would give her more time to sort things out than the 14 days requested. Mr Spielhofen attached the respondent's Staff Handbook and asked the claimant how she would like to proceed.
37. On Friday 18 December 2020 the claimant was signed off sick for a month with a stress related problem (fit note at page 123). The claimant's position was that the "*majority of [her] health issues were contributed by [the respondent]*" (final paragraph of her witness statement). The claimant said in evidence that she worked on Friday 18 December and that she obtained the medical certificate by telephone in the afternoon or evening.
38. On 4 January 2021 Mr Spielhofen emailed the claimant to find out how she was, how her treatment was progressing and what were her plans (page 48). He had not received a response to his email of 17 December 2020, so once again he asked her how she wanted to proceed. The claimant said she was felling a little better and attached a further sick note from her GP in the UK.
39. The claimant did not respond to Mr Spielhofen's proposal about her holidays or the status of her leave. She said she had told her line manager Ms Griffiths what she wanted to do, but there was no record of this. On 20 January 2021 the claimant sent in a sick note from her GP (page 47) and based on this she was signed off sick until 18 April 2021.

The first welfare meeting

40. On 8 February 2021 Ms Griffiths held the first welfare meeting with the claimant. This was by video because the claimant was in India. The claimant told Ms Griffiths that her sisters were being tested to see whether there was a match for a kidney. On 8 February Ms Griffiths emailed the claimant to confirm what had been discussed in that meeting (page 220). In evidence the claimant said it was her mother who was being tested, although this is not what was said in Ms Griffiths' email.
41. A second welfare meeting took place on 2 March 2021. The claimant returned from India to the UK on 23 March 2021. She had not received a kidney transplant during her three months in India.
42. On 12 April 2021 the claimant was given a fit note by her GP in the UK (page 125). This said that she was fit for work with amended duties, which the doctor put as working 2 days in the office and 3 days from home.

The first OH report

43. On 12 April 2022 the claimant was referred to the respondent's Occupational Health service. The claimant was assessed by telephone by a Consultant OH Physician, Dr Sperber, on 12 April 2021 leading to a report dated 20 April 2021.
44. The medical report was at page 42. Dr Sperber said that the claimant had a background history of chronic kidney disease, associated with high blood pressure. The doctor said that the condition had progressed and was now at an advanced stage. Notwithstanding this, the doctor said that the claimant currently felt generally well although she was signed off sick. It was noted that her work involved a mixture of home and office based duties.
45. The report said:

*“Based on her current functional status I would support her return to work, as I would consider her to be fit for work at present. However, I would recommend for her to be phased in order to support her workplace rehabilitation and to allow her to cope more effectively with her underlying health condition.*

*I would suggest for her to return to a maximum of two days of office space duties and three days of home based duties, at least for the first month of her return to work.”*

.....  
.....

*At present, there is no need to seek an alternative post, as long as the recommended adjustments can be accommodated by the organisation.*

*Management will need to consider whether the recommended workplace adjustments are reasonable and whether they can be accommodated....”*

46. Dr Sperber considered that the Equality Act 2010 applied, but this was not a claim under the Equality Act.
47. Ms Griffiths arranged a welfare meeting with the claimant for Monday 19 April 2021. This was confirmed in a text message at page 53. At the date of welfare meeting the claimant had been assessed by OH but the report had not been received.
48. On 28 April 2021 after receipt of the report, Ms Griffiths messaged the claimant to ask to have a meeting with her about her return to work. The claimant went into work Friday 30 April to fill out some forms for her return and she returned to work on Tuesday 4 May 2021 after the Bank Holiday.
49. In accordance with the recommendations from her GP and OH, it was agreed that the claimant would work 2 days a week from home and 3 days at work and it would be reviewed after a month.
50. The claimant was paid in full from 18 April 2021 even though she was not back at work until 4 May. When the claimant complained that some of her duties were too much for her, they were removed from her. These were duties she had taken on duties when Mr Oywer was made redundant.

#### The claimant's condition deteriorates

51. In June 2021 the claimant was rushed to hospital with kidney failure. She began kidney dialysis 3 times a week. She was put on a waiting list for a kidney transplant.
52. On 11 June 2021 the claimant was given a fit note by a Specialist Registrar at the hospital which stated: “*End stage kidney failure*”. The fit note said she may be fit for work with some adjustments. The doctor said: “*she has now started haemodialysis 3x weekly for end stage kidney disease. She is also anaemic. This will make her feel very tired and weak particularly in the first few weeks. She would benefit from reduced hours for this + working from home*”. The certificate was for a month and then to re-assess (page 126).
53. A welfare meeting took place between the claimant and Ms Griffiths on 15 June 2021. The claimant told Ms Griffiths that the doctor had said that she had to work from home all the time, because she could not travel and this was agreed. It was confirmed in Ms Griffiths email of that date at page 221. The claimant's only travel was to hospital.
54. On 20 July 2021 the claimant was given a GP fit note (page 127) signing her as fit with amended duties of working from home. This was for a further month.

55. On 2 September 2021 there was a further fit note (page 128) stating that the claimant should work from home if possible. The duration of this certificate was to 31 October 2021.
56. The claimant had regular GP fit notes stating that she should work from home.
57. From June 2021 to April 2022 the claimant's work requirements and those of her team were reduced because many people from the client at BNP Paribas were working from home due to the pandemic. By April 2022 most Covid restrictions were lifted. The claimant's managers decided that they needed an up to date OH report.

#### The second OH report

58. The claimant was assessed by OH Physician Dr S Vohra by telephone on 12 April 2022. By this date the claimant had been working from home as a temporary measure since June 2021. The OH report was dated 13 April 2022 (page 66) and said that the claimant was in kidney failure and required dialysis three times a week in the evening which necessitated admission for 3.5 to 4 hours. The claimant was on a waiting list for a kidney transplant.
59. Dr Vohra noted that the claimant was working full-time, but in a modified capacity and entirely remotely from home. The doctor said that the claimant would need dialysis until she could have a kidney transplant. The claimant accepted that there was no cure, it was dependent upon a successful transplant.
60. The report said that the claimant's fatigue levels may worsen with time and the doctor could not predict how long this would take or whether there would be an ongoing deterioration in her condition. The report said that the claimant may sometimes need to stop work early or be absent from work. The doctor went on to say: "*I am unable to offer any timescales for how long her current modified duties will be required*".
61. The doctor also said "*I am not of the opinion that an alternative post would be appropriate in this case*". Ill-health retirement was also not considered appropriate (page 68).
62. The claimant's husband and sister came forward to offer a kidney. The hospital decided that her sister's kidney was likely to be more suitable. As she lives overseas arrangements were made for her to come to the UK to see if she was a suitable kidney donor. The claimant said that due to Covid restrictions her sister could not travel to the UK until February 2022. The claimant had first told Ms Griffiths at a welfare meeting on 8 February 2021 that her sister was being tested for suitability as a donor, so this process had been ongoing for a substantial period of time.



The welfare meeting of 30 June 2022 and the consideration of alternative employment

63. On 30 June 2022 the claimant attended a Welfare meeting with Ms Griffiths and HR Manager Ms Jessica Osborn. By the summer of 2022 the workload in the claimant's team had picked up considerably as staff had returned to the client's offices and the catering requirements increased. The claimant accepted and I find that at this meeting they spoke about her health condition, her job role and she was told that if she could not go back to the office full time, the respondent would look for alternative work for her or try to accommodate her working hours.
64. The claimant told Ms Osborn and Ms Griffiths that she was essentially housebound and only left the house to attend hospital. She told Ms Osborn and Ms Griffiths that she was on the transplant waiting list and she again said that her sister was being tested to see if she was a match. The claimant told them that her consultant and GP were unable to say when she might receive a kidney transplant.
65. Ms Osborn wrote to the claimant on 1 July 2022 to confirm the outcome of that meeting (page 70). The claimant was told at the meeting and in the letter that if at the end of a 30-day review period she was unable to return to full duties, they would have to consider dismissal on grounds of incapacity due to ill-health. Ms Osborn said she would speak to the wider business about vacancies and they would send her the vacancy list and they would look at working adjustments. They wanted to see whether the claimant could either return to the workplace or whether she could carry out an alternative role, if she could not come back to work. The claimant was told in the letter of 1 July that dismissal was a potential outcome of the process.
66. Ms Osborn told the claimant that their client was keen for her role to be fully on site and they would look at her duties to see how much of her role was being undertaken at home and which ones were being undertaken on by the team on site.
67. With the letter of 1 July 2022 Ms Osborn enclosed a list of Group wide vacancies of which there were a total of 391 across the country including 13 in the respondent company (pages 72-76). The claimant said that "*maybe*" this was sent to her and I find that it was.

Discussions about the claimant's duties

68. On 4 July 2022 Ms Osborn sent an email to the claimant saying that she has asked Ms Griffiths and Ms Pamula to put together a list of the duties of the Finance Assistant and once they had done so, the claimant would be asked to contribute to it and state what she believed she was currently completing (page 77). The claimant also confirmed in the meeting on 4 July that she was not undertaking duties relating to the catering cards used by the client's staff and visitors.

69. On 15 July 2022 the claimant sent an email to Ms Osborn (page 81) regarding payroll duties which she said could be done fully on line. She said that this duty could be reassigned to her if they gave her the access. She was not able to give them a timeline as to when she would receive a kidney transplant and be able to return to the job she had been doing prior to her diagnosis. In the second paragraph of that email (page 81) she said: *“As you are aware NHS waiting list is not in anyone hand not even doctors to provide fix timeline to complete the treatments.”*
70. Ms Osborn replied on 15 July saying that although they had been able to accommodate the claimant working partial duties from home, the business and the client did not feel this was sustainable. They had been working with the client reviewing the footfall and what a normal week looked like in terms of the catering and hospitality services required. Ms Osborn said that it was a role which required being based on site, but that this was not performance related. I find that the respondent was completely satisfied with the claimant’s work performance. The difficulty was that she was in a role that predominantly needed to be carried out on site. Ms Osborn told the claimant that they would look at all the alternatives available, either for a return to work or redeployment, but that if they could not find anything, the outcome might be dismissal (page 80).
71. The claimant’s managers drew up a list of 30 tasks in her role and the claimant inputted her comments as to whether she was carrying out the tasks (pages 83-84).

#### The invitation to the review meeting on 5 August 2022

72. On 27 July 2022 Ms Osborn sent an email to the claimant (page 85) setting up a review meeting to be chaired by Ms Paulina Pamula as the 30-day review period had come to an end. With that letter the claimant was sent a vacancy list and a more detailed list of her duties which had been under discussion between them (the covering letter was at page 87). The claimant was again told that dismissal was a potential outcome of the meeting, if they were unable to make adjustments to secure her return or find an alternative role. The claimant was given access to the Employee Assistance Programme and a mental health helpline.
73. The vacancy list was at page 88-92. It was Group wide and extensive.

#### The dismissal meeting

74. On 5 August 2022 the 30-day review meeting took place by Teams, chaired by Ms Paulina Pamula together with Ms Osborn from HR. The notes were at pages 98-101. The claimant was aware of her right to be accompanied but chose to proceed unaccompanied.
75. In the meeting they went through the list of tasks. There were 30 tasks on the list and it was agreed that 8 of those tasks would be removed as the

claimant was not undertaking those. The parties carried on looking at the tasks, duty by duty, so it could be agreed which the claimant wholly undertook, partially undertook and which were undertaken by others and on site only.

76. The analysis showed that out of the 30 tasks comprised in the claimant's role of Finance Assistant, 8 tasks had been removed, 4 were being fully completed by the claimant, 11 were being partially completed and 7 were not being done at all because they were completely site based tasks. This included for example cashing up the catering cards, petty cash and banking.
77. With some of the tasks, the claimant thought that she could do these with the assistance of others on site. The respondent took the view that as the workload had picked up post-pandemic it was taking other staff members too long to assist the claimant with her tasks. Often they took on the task themselves, rather than relay all the information to the claimant for her to do it. This took them away from their own duties at a time when the workload was increasing. There were also the inevitable challenges of miscommunication when information had to be passed to the claimant who was not on site to receive the information for herself.
78. The respondent said that the parties agreed the final list although the claimant in evidence said it was not correct. The claimant said in evidence that she only agreed to 20%-30% of the tasks. Ms Pamula's evidence was that the list was an agreed list.
79. I find that the list was fully discussed but it was not completely agreed because the claimant's view was that she could do more of her role than the respondent considered sustainable. Ms Pamula said that she thought that without assistance from others the claimant could only do about 20-30% of her role but with the assistance of other team members, she could probably do about 70% of her role. Ms Pamula and Ms Osborn did not consider this sustainable in the long term, for their business or for their client.
80. The claimant was asked if she had any more information from the doctors and she said that her sister was over in the UK having tests. Ms Osborn asked whether, if the sister was a match, there was any timeline for this. The claimant replied "No". Ms Osborn asked how long it would be before she found out and the claimant was unsure. Ms Osborn asked what the position would be if the sister was not a match. The claimant did not know. In evidence the claimant said that the respondent should have waited a few months to see whether her sister was a match, but she did not any time line as to when that might happen.
81. Ms Pamula and Ms Osborn also considered publicly available information on kidney transplants, such as from the NHS and the National Kidney Federation which provides information for kidney patients and their families. It said (page 134) that the average wait for a kidney transplant is

- 2-3 years and most people on the list for 5 years would receive a kidney.
82. In terms of job vacancies, the claimant did not express interest in any of the vacancies sent to her. She asked whether any of the vacancies could be dealt with from home and was told that there were no home based roles.
83. The hearing adjourned for Ms Pamula and Ms Osborn to make a decision. During the adjournment Ms Pamula also had a discussion with their client about whether there were any alternative roles within the contract itself. There were none. Ms Osborn gave the decision verbally in that meeting and this was set out in the notes at page 100.
84. Ms Osborn said that having considered the 22 current tasks, the claimant was only wholly performing 4 of those tasks with 11 requiring assistance from the rest of the team. The claimant was unable to complete the remaining 7 tasks. Ms Osborn explained that following Ms Pamula's discussion with the client, there were no alternative roles within the contract and they had looked at making the role part-time but it could not function with a split of people undertaking the different tasks. They had considered the timeline and noted that neither the claimant, the hospital or her doctors were able to give any guidance on timing for a return to work. In view of all those matters they made the decision to dismiss and told the claimant that she would be paid in lieu of notice and she would be paid for any accrued annual leave.
85. The claimant said "*I don't think I realised that being sacked was an option*". Ms Osborn confirmed it had been stated previously and the claimant had seen this since at least 1 July 2022 in the letter of that date. I find that the claimant was aware, or ought reasonably to have been aware, from the letter of 1 July 2022 that dismissal was a potential outcome. This was repeated in correspondence from Ms Osborn on 15 and 27 July 2022.
86. At that meeting the claimant was dismissed with 12 weeks' pay in lieu of notice. The letter confirming her dismissal was sent by Ms Osborn on 10 August 2022, page 95. The claimant was given a right of appeal.

#### The appeal against dismissal

87. On 17 August 2022 the claimant appealed against her dismissal (page 104). She had five grounds of appeal. Her grounds of appeal were that (i) she had an excellent attendance record. This was not in dispute prior to her diagnosis with her kidney condition. She also said (ii) her work performance was exceptional. The respondent confirmed that they had no issue with her work performance. She said that (iii) her sickness was caused by the respondent because she was asked to do work that she was not trained or qualified to do.
88. The claimant said (iv) that the respondent did not understand her contractual tasks as the list was different from when she TUPE'd across.

The claimant's final ground of appeal was (v) that the respondent failed in their duty of care because Daniel Spielhofen had not acted "*positively*" when he knew about her deteriorating health.

The appeal hearing

89. The appeal hearing took place on 31 August 2022 before Ms Jane Streat, Head of Client Services.
90. In the appeal meeting (notes page 110) the claimant again said that her sister was "*doing all the tests and everything*". By this time, I find that the testing had been ongoing for over 18 months as the claimant had first said in a welfare meeting on 8 February 2021 that her sister was being tested.
91. The claimant relied on the fact that she told Ms Streat that she hoped to finish her treatment "*soon*" and that it would "*hopefully*" be a couple of months. I find that this did not give Ms Streat any clear time line as to when she might be able to return to carry out her duties on site. The claimant accepted in evidence that she could not give them a specific date.
92. The claimant also accepted in evidence that at the appeal hearing she was given an opportunity to say anything that she wished to say and that she did so.
93. Ms Streat did not give her decision on the day. She sent the outcome to the claimant by letter dated 9 September 2022 (pages 114-115). Ms Streat confirmed that on grounds (i) and (ii) that the respondent had no issue with the claimant's attendance record or work performance. On ground (iii) Ms Streat could not agree that the respondent had caused the claimant's ill health. In reference to the OH report, Ms Streat said that the claimant had a history of chronic kidney disease and high blood pressure. The claimant had already gone off sick prior to any changes in work duties and she did not feel that the claimant could hold the respondent responsible.
94. On ground (iv) in terms of the respondent's understanding of her tasks, Ms Streat referred to the list of tasks they had discussed and worked on during the meeting on 5 August 2022. The view from the dismissal meeting was that 4 tasks could be completed by the claimant at home, 11 could be completed partially with assistance from other team members and the balance required her to be on site. Ms Streat's view was that the respondent did understand the claimant's tasks and that steps had been taken to accommodate her health and her need to work from home.
95. On ground (v) Ms Streat did not agree that there had been any failure in any duty of care. She pointed out that concessions were made for the claimant allowing her to work from home for a prolonged period so that she could manage her health and treatment. Some tasks were taken away from her when she raised concerns about the stress they were causing. The claimant was offered the opportunity to work part time which she

declined.

96. Ms Streat confirmed that their client required the role to be on site to be able to complete all the tasks particularly as service levels had returned to pre-pandemic levels. In terms of alternative employment, there was nothing available that would allow the claimant to work from home. Ms Streat was satisfied that alternative employment had been offered but there was nothing available that was suitable for the claimant.
97. Ms Streat upheld the decision to dismiss. The outcome letter was at page 114.

#### The medical outcome

98. The claimant finally had a kidney transplant from a donor within the UK on 17 November 2022. The donor was not her sister. It took some time for the new kidney to become functional and as from 23 December 2022 she had a functioning transplanted kidney. This was set out in a medical report dated 15 March 2023 from a Renal Specialist Nurse at the Royal Wolverhampton NHS Trust (bundle page 111). Whilst everyone involved in this hearing was delighted for the claimant that this had happened, it was not a matter that either the Ms Pamula or Ms Streat could possibly have known when they made their decisions.

#### The claim for sick pay

99. The claim for sick pay was not set out in either of the claimant's Schedules of Loss. It was set out in her witness statement, sent to the respondent the day before this hearing, as a claim for 10 days sick pay.
100. The issue as to the sick pay arose from December 2020 when the claimant became unwell and travelled to India at short notice. As set out above, she did not respond to Mr Spielhofen's requests as to how she wished matters to be treated. Given her health condition, there is no criticism of the claimant for this. It meant that the information needed by payroll to some time to be clarified.
101. As set out above, my finding is that the claimant was off sick from Monday 21 December 2020 until 18 April 2021. The claimant had a contractual entitlement to 10 days of sick pay. She said she had not received any sick pay from the respondent.
102. The tribunal was taken by Ms Pamula to a sick pay record for the claimant at page 150 of the bundle. It showed the claimant's sickness absence from 21 December 2020 to 18 April 2021.
103. The respondent admitted that the payslips sent to the claimant were confusing. Payroll carried out an exercise to explain how it was worked out and paid which was set out in a document at page 149. It was further explained by Ms Pamula in her witness statement at paragraphs 37-39.

104. The table at page 149 showed, on the right hand side, an acknowledgement that the claimant was entitled to 10 days full company sick pay, after 3 waiting days.
105. The claimant's gross monthly pay was £2,087.88. The respondent calculated the daily rate of pay based on the number of working days in the month. In December 2020 there were 23 working days in the month which produced a daily gross rate of pay of £90.78. In January 2021 there were 21 working days producing a higher daily rate of £99.42.
106. For December 2020 the claimant was due 6 days gross sick pay at £90.78 per day making a total of £544.68. This was inclusive of SSP so as to arrive at the claimant's full contractual pay. The SSP rate for 2020/2021 was £95.85 per week, or £19.17 per working day.
107. In the calculation for December 2020 the reconciliation document at page 149 showed that the correct multiplication had been done at  $6 \times £19.17 = 115.02$ . Ms Pamula corrected the calculation in her witness statement when swearing to the truth of that statement and it tallied with the document on page 149. I find that the claimant was paid the correct amount of SSP and company sick pay due to her for December 2020.
108. For January 2021 the claimant was due a further 4 days sick pay at the higher daily rate of £99.42 per day making a total of £397.68. This is inclusive of SSP. The SSP element is  $4 \times £19.17 = £76.68$ . The company sick pay element is £397.68 less SSP of £76.88 = £320.08. I find that the claimant was paid the correct amount of SSP and company sick pay due to her for January 2021.
109. The claimant did not have a full understanding of the payments made to her. The respondent admitted that the payslips were "*confusing*". The respondent is strongly encouraged to provide the claimant with a calculation that is understandable and to reassure her that the correct amount of statutory deductions have been made. For the purposes of this claim, based on the documents and the evidence of Ms Pamula, my finding is that the claimant has been paid the correct amount of sick pay.
110. The claimant was of the view that Statutory Sick Pay came from the Government. This is not correct, it is a payment that employers are required to make to employees who meet the eligibility criteria. It is not a State Benefit.

#### The claims for holiday pay

111. The claimant did not provide a Schedule of Loss until 23 March 2023 despite Case Management Orders requiring this to be provided by 28 November 2022. I accept and find that November 2022 was the time when the claimant had her kidney transplant so she had good reason as to why she was not able to comply with the Tribunal's order at that time.

112. The claimant prepared a Schedule of Loss (pages 156-157) on a proforma obtained from ACAS. This was signed and dated by her on 1 December 2022. It was hard to understand why, having been well enough to prepare it, she was not also able to send it to the respondent. In that Schedule she claimed £1,099.12 for holiday pay but that figure was not quantified in any way.
113. On 29 March 2023, three working days before the hearing, the claimant produced a new Schedule of Loss titled "*Holiday Calculation*" adding a further £541.57 which appeared to be her claim for holiday pay from the date of termination through to 31 October 2022. This is dealt with under the heading "*Conclusions*" below.
114. The claimant did not provide a witness statement until the day before this hearing. In that statement she covered two points on holiday pay. The first was about carry over of annual leave from 2021 to 2022 and the second was that she was still owed 43.36 hours from 2022. I find that the second point relates to her claim for holiday pay to 31 October 2022, which is dealt with below.
115. The following findings of fact are made on Ms Pamula's evidence. The claimant did not take all her holiday from April to December 2021 and Ms Griffiths agreed to allow her to roll over 11 days of holiday to 2022. As this was not normal procedure, it was unfortunately not entered on the respondent's system and it was not paid with the claimant's final pay (page 162). The respondent admitted that the claimant was entitled to be paid for those 11 days and any holiday accrued to 5 August 2022.
116. The respondent said that they made arrangements to pay the outstanding 11 days holiday just before the start of this hearing. The claimant confirmed at the outset of this hearing that she had received an amount for holiday pay, but thought she was due more for 2022.
117. I find based on what the parties told the tribunal, that the claimant was paid for her 11 days of rolled over holiday pay from 2021 but not the amount she sought for 2022, being her claim for accrued holiday pay from 5 August to 31 October 2022. I find that the claim for holiday pay for 2021 was satisfied just before the start of this hearing.
118. The outcome of the claim for holiday pay for 2022 is dealt with in the conclusions below.

## **The relevant law**

### Unfair dismissal

119. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent relies on capability which is a



- potentially fair reason under section 98(2)(a) ERA.
120. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.
  121. In the case of long term ill-health, procedural fairness includes the employer ascertaining the true medical position, consulting with the employee and considering alternative employment prior to any decision to dismiss.
  122. Even where an employee's ill-health may have been caused by the employer's conduct, this does not mean that a dismissal is necessarily unfair – **McAdie v Royal Bank of Scotland 2007 IRLR 895 CA**.
  123. **Spencer v Paragon Wallpapers Ltd 1976 IRLR 373** is one of the leading cases on capability for long term ill-health. In that case the EAT said that every case of dismissal on grounds of absence due to ill-health depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer, and if so, how much longer. Relevant circumstances are the nature of the illness, the likely length of continuing absence and the need of the employers to have done the work which the employee was engaged to do. A discussion with the employee is required so that the situation can be weighed up, bearing in mind the employer's need for the work to be done and the employee's need for time to recover his or her health.
  124. In **DB Schenker Rail (UK) Ltd v Doolan EATS/0053/09** the EAT said that there are three questions that the tribunal is required to address: whether the respondent genuinely believed in the stated reason for dismissal, whether it was a reason formed after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did.
  125. At paragraph 37 the EAT said that the tribunal must avoid any inclination to step in to the employer's shoes and must guard against being carried along by sympathy for a long standing employee where the employers have decided that they not fit to return to their full role in circumstances where that employee is keen to try to return. The tribunal must resist the temptation to test matters according to what they would have concluded and decided if they had been in the employer's shoes.

Unlawful deductions from wages

126. Section 13(1) of the ERA 1996 provides an employer shall not make a

deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

127. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him....., the amount of the deficiency shall be treated ... as a deduction made by the employer from the worker's wages.

#### Holiday pay

128. Under Regulations 13 and 13A of the Working Time Regulations 1998 a worker is entitled to 28 days paid annual leave per annum.

### **Conclusions**

#### **The unfair dismissal claim**

129. I have found above that the reason for dismissal was the claimant's long term ill-health which required her to work exclusively from home. I have considered whether the respondent had a reasonable belief that the claimant lacked the capability to do her job. They were aware that the claimant was in end stage kidney failure and required a transplant. There was no time line as to when this might happen. The OH doctors could not give this, her GP could not give this and the claimant herself could not give this, however hopeful she might have been. The dismissal officers, Ms Pamula and Ms Osborn also considered information in the public domain about kidney transplants and this told them it could be anything from two to five years.
130. Ms Pamula and Ms Osborn had gone through the claimant's duties with her in some detail to find out what she could do, what she could do in part and what she could not do at all. Predominantly, as would be reasonably expected in the catering business, it was an on-site role. Ms Pamula as the General Manager for the client formed a reasonable belief that the claimant could carry out 20%-30% of her role without the assistance of anyone else and about 70% with assistance. Ms Pamula was of the view that the assistance the claimant needed from others was detracting from their work and the service they were able to provide to their client. The work requirements had increased post-pandemic.
131. I find that Ms Pamula and Ms Osborn formed a reasonable belief that due to ill health, the claimant lacked capacity for her role.
132. Based on the findings above, I conclude that the respondent followed a fair procedure in arriving at the decision to dismiss. There were frequent welfare meetings with the claimant. The accommodated the claimant in allowing her to spend 3 months in India in the hope that she could receive

- suitable treatment there. They allowed her to work from home from June 2021 onwards.
133. There were two Occupational Health assessments and reports and a consideration of the advice given on the GP fit notes. The respondent took steps to ensure that they had the full and up to date medical information.
  134. There was proper consultation with the claimant, in welfare meetings and then in the meeting of 30 June 2022 and in the review meeting of 5 August 2022. The consultation with the claimant included a detailed consideration of her duties.
  135. The respondent offered the claimant such vacancies as were available on a Group wide basis. The respondent was not obliged to create a vacancy for the claimant although they did consider the possibility of creating a part time role and splitting the duties which did not prove feasible.
  136. Twice during the review period the claimant was sent a vacancy list to see whether there were any suitable positions for her within the Group, not just within the respondent company. She did not express interest in any of the vacancies. None of them were on a work from home basis.
  137. The claimant put emphasis on the fact that Dr Sperber said that there was no need to seek an alternative post so she did not understand why the respondent sent her vacancies for alternative roles. My finding is that it is necessary to read the whole of the quoted above, which was that there was no need to seek an alternative post "*as long as the recommended adjustments can be accommodated by the organisation.*" I find that the OH doctor was not saying that there would never be any need to seek an alternative post.
  138. I have considered whether the decision to dismiss fell within the band of reasonable responses open to this employer. They had been supporting her since December 2020 so in excess of 18 months. At the date of the dismissal the claimant had been working from home on medical advice since June 2021, namely for 14 months. There was no way of knowing how long it might take for a suitable donor to be found. There was pressure on the business to fulfil the claimant's role in a way that did not take other members of staff away from their duties and in a way that met the client's needs. The pressure grew as more people from the client returned to the office post-pandemic.
  139. The respondent submitted that the tribunal should guard against being carried along by sympathy for a long standing employee where the employers have decided that they not fit to return to their full role, in circumstances where that employee is keen to try to return. I was reminded that it was not for me to substitute my decision for that of this employer, but to consider whether their decision fell within the band of reasonable responses. Despite my considerable sympathy for the

claimant I conclude and find that the respondent's decision fell within the band of reasonable responses. They had supported the claimant for over 18 months and had no indication of when the position might change.

140. I find that they followed a fair procedure with consultation with the claimant, consideration of the full medical picture and a search for suitable alternative employment. The claimant had an opportunity to state her case and contribute to the discussion about her job duties at the meeting on 5 August 2022 and she was given and exercised her right of appeal.
141. For the above reasons I find that the dismissal of the claimant was fair and the claim for unfair dismissal fails.

Sick pay

142. I have found above that the claimant has been paid for her entitlement to 10 days of contractual sick pay.

Holiday pay for 2021

143. I have found above that the claim for holiday pay for 2021 has been satisfied.

Is the claimant entitled to be paid for accrued holiday through to 31 October 2022?

144. The contract of employment terminated on 5 August 2022. This was the claimant's own case in box 5.1 of her Claim Form (bundle page 8).
145. As a matter of law, holiday pay only accrues whilst the contract of employment subsists. It does not continue to accrue after termination of employment. The claimant did not continue to accrue holiday after 5 August 2022.
146. The claimant accepted that she was paid in lieu of notice until 31 October 2022. If she had worked her notice, she would have been obliged, under the terms of her contract of employment set out above, to take any outstanding holiday during the notice period.
147. The purpose of annual leave under the Working Time Regulations 1998, is to allow a period of rest from work. In the period following 5 August 2022 the claimant was not required to work and she was free to take whatever leave she wished between 5 August and 31 October 2022.
148. For these reasons the claimant is not entitled to any holiday pay for the period from 5 August 2022 to 31 October 2022.

**Employment Judge Elliott**  
**Date: 11 April 2023**

Judgment sent to the parties and entered in the Register on:11/04/2023

\_\_\_\_\_ for the Tribunal