



EMPLOYMENT TRIBUNALS

Claimant: Mrs O Kayongo

Respondents: (1) London Underground Limited
(2) Joseph Blake
(3) Mercilina Adesida

Heard at: East London Hearing Centre (in public; by CVP)

On: 31 October 2023, 1 November 2023, 2 November 2023
12 December 2023 (in chambers)

Before: Employment Judge Gordon Walker
Members: Mrs G Forrest
Mr M Wood

Appearances

For the claimant: Mr C Carroll, friend
For the respondents: Mr R Kohanzad, counsel

RESERVED JUDGMENT

1. The claim of indirect race discrimination is dismissed upon withdrawal by the claimant, pursuant to rule 52 of the Employment Tribunal Rules of Procedure 2013.
2. The claim of indirect sex discrimination is dismissed upon withdrawal by the claimant, pursuant to rule 52 of the Employment Tribunal Rules of Procedure 2013.
3. The claim of breach of contract is dismissed upon withdrawal by the claimant, pursuant to rule 52 of the Employment Tribunal Rules of Procedure 2013.
4. The claim of direct race discrimination contrary to section 13 Equality Act 2010 is not well founded and is dismissed.
5. The claim of direct sex discrimination contrary to section 13 Equality Act 2010 is not well founded and is dismissed.
6. The claim of victimisation contrary to section 27 Equality Act 2010 is not well founded and is dismissed.

7. The claim of unauthorised deductions from wages contrary to section 13 Employment Rights Act 1996 is well founded. The first respondent made an unauthorised deduction from the claimant's wages on 17 December 2022 in the sum of £584.42 gross. The first respondent is ordered to pay to the claimant the sum of £584.42 gross.

REASONS

1. By claim form dated 18 October 2022, the claimant brought claims of direct race and sex discrimination, indirect race and sex discrimination, victimisation, unauthorised deductions from wages, and breach of contract.
2. The claimant withdrew her claims of indirect discrimination and breach of contract. The claimant agreed that those claims could be dismissed upon withdrawal pursuant to rule 52 of the Employment Tribunals Rules of Procedure 2013.

The issues

3. The issues were agreed at a preliminary hearing on 19 April 2023 as set out below:

1. **Direct race and sex discrimination (Equality Act 2010 section 13)**

- 1.1 The claimant describes her race as Black African.

- 1.2 The alleged detriments are:

- 1.2.1 It is admitted that on or around 27 July 2022 the first respondent suspended the claimant's company sick pay, backdated to 18 June 2022. It is admitted the second respondent communicated the decision to the claimant.

- 1.2.2 The claimant says that the second respondent made the decision himself or alternatively he was acting on behalf of the third respondent. This is not admitted by the respondents.

- 1.3 Was that less favourable treatment?

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

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

The claimant relies on hypothetical comparators. The claimant has been ordered to provide further information about actual comparators.

- 1.4 If so, was it because of sex or race?
- 1.5 Did the respondents' treatment amount to a detriment?

2. Indirect race or sex discrimination (Equality Act 2010 section 19)

- 2.1 A "PCP" is a provision, criterion, or practice. Did the first respondent have the following PCP: to suspend company sick pay from employees if they bring claims (i.e. litigate) against the first respondent.
- 2.2 Did the first respondent apply the PCP to the claimant?
- 2.3 Did the first respondent apply the PCP to persons with whom the claimant does not share the protected characteristic(s) or would it have done so?
- 2.4 Did the PCP put persons with whom the claimant shares the protected characteristic(s) at a particular disadvantage when compared with persons with whom the claimant does not share the protected characteristic(s) in that the claimant says that those of her sex and/or race would be more likely to litigate against the first respondent.
- 2.5 Did the PCP put the claimant at that disadvantage?
- 2.6 Was the PCP a proportionate means of achieving a legitimate aim? If the first respondent advances a justification defence it must set this out in its amended response.
- 2.7 The Tribunal will decide in particular:
 - 2.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
 - 2.7.2 could something less discriminatory have been done instead;
 - 2.7.3 how should the needs of the claimant and the respondent be balanced?

3. Victimisation (Equality Act 2010 section 27)

- 3.1 It is admitted that the claimant made protected acts by bringing Employment Tribunal claims with claim numbers 2302682/2020 and 2301561/2021?

- 3.2 Was the COT3 agreement between the claimant and the first respondent dated 6 July 2022 a protected act? The respondents say that the claimant has not pleaded this protected act and that the claimant would need to make an application to amend to rely on this, and that they are not able to deal with such an application today. I cannot on the face of it see that the inclusion of this additional protected act, which arises from the other protected acts, would cause prejudice to the respondents. If the respondents object to its inclusion, they must set this out in the amended response and explain the prejudice that they would suffer from the proposed amendment.
- 3.3 The alleged detriments are:
- 3.3.1 It is admitted that on or around 27 July 2022 the first respondent suspended the claimant's company sick pay, backdated to 18 June 2022. It is admitted the second respondent communicated the decision to the claimant.
- 3.3.2 The claimant says that the second respondent made the decision himself or alternatively he was acting on behalf of the third respondent. This is not admitted by the respondents.
- 3.4 By doing so, did the respondents subject the claimant to detriment?
- 3.5 If so, was it because the claimant did a protected act?

4. Remedy for discrimination or victimisation

- 4.1 Should the Tribunal make a recommendation that the respondents take steps to reduce any adverse effect on the claimant? What should it recommend?
- 4.2 What financial losses has the discrimination caused the claimant? The claimant says that she has lost company sick pay from 18 June 2022.
- 4.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 4.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? The respondents are likely to assert that the claimant unreasonably failed to comply with it by failing to raise a grievance before commencing ACAS early conciliation and lodging her claim? If the respondents wish to advance this case they must set this out in their amended response.
- 4.5 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

4.6 Should interest be awarded? How much?

5. Unauthorised deductions from wages

5.1 It is admitted that on 27 July 2022 the first respondent suspended the claimant's company sick pay, backdated to 18 June 2022.

5.2 In so doing, did the first respondent make unauthorised deductions from the claimant's wages, and if so how much was deducted?

4. Prior to the final hearing, the claimant withdrew her claims of indirect discrimination and breach of contract. The claimant confirmed at the outset of the hearing that she did not wish to rely on the alleged protected act at paragraph 3.2 of the list of issues.

5. It was agreed that the final hearing would deal with issues of liability only.

Procedure and evidence heard

6. There was an agreed file of documents of 436 pages. The following documents were added to the file during the hearing:

- a. Additional pages of the AMT contact log were inserted at pages 437-460;
- b. The judicial mediation case management order in relation to the protected acts at paragraph 3.1 of the list of issues;
- c. Two page aide memoire document for the second respondent, consisting of notes of the AMT contact log;
- d. Three page aide memoire document for the claimant, consisting of notes of the AMT contact log.

7. The Tribunal heard evidence from the claimant, the second respondent and the third respondent, all of whom produced written witness statements.

8. We had regard to the parties written closing submissions and replies, which speak for themselves.

9. The following adjustments were made at the parties' request:

a. The claimant was given regular breaks when requested. She said that she was able to identify when she needed such breaks. The claimant was permitted to make a note of the questions she was asked when she was a witness. The claimant was permitted to refer to an aide memoire document when giving her evidence.

b. The second respondent was permitted to refer to an aide memoire document when giving his evidence.

10. The hearing was heard remotely by CVP. There were technical difficulties on the third day of the hearing which meant that the hearing commenced at 1pm.

Findings of fact

11. We took all the evidence that we were referred to into account. We only made findings on matters relevant to the issues in the claim. We reached our findings of fact on the balance of probabilities, based on the evidence. Numbers in square brackets refer to pages of the agreed file of documents.
12. The claimant commenced her employment with the first respondent transport operator on 31 March 2004. The claimant remains employed by the first respondent as a customer services manager. The second respondent was an area manager at the material time. He managed the claimant's sickness absence in February 2022 and from July 2022 until her return to work in December 2022. The third respondent's job title is senior trains delivery manager. She line managed the second respondent at the material time.
13. In 2020 and 2021 the claimant brought two employment tribunal claims against the first respondent which were consolidated and compromised following judicial mediation, formalised in a COT3 agreement dated 6 July 2022 and signed by the claimant on 15 July 2022. The third respondent was involved in that judicial mediation process. Following that process, the claimant was transferred to work in the Marylebone area in early 2022.
14. The claimant commenced a period of sickness absence on 12 January 2022 [92]. The claimant returned to work on 19 December 2022 [194-198]. The reason for her sickness absence was anxiety [119; 122; 146; 156; 168; 355]. There were some days at the outset and conclusion of her period of absence when the reason for her absence was to care for her children [92; 190].

Sick pay policies and contractual terms

15. The first respondent provides contractual company sick pay to employees who have been employed for more than one year.
16. The claimant's employment contract has not been produced as it cannot be found. There is a dispute between the parties as to the written terms of the claimant's contract of employment. The respondent says the contract was in the same terms as the document which starts at page 409 of the bundle. The claimant says that it was in the same terms as the document that starts at page 381. The terms about sick pay in those contracts of employment are at pages 412 (clause 15.1) and page 382, respectively. The claimant's unchallenged evidence at paragraphs 7 and 8 of her witness statement was that the only contract of employment she signed with the first respondent was one in the terms set out at pages 381 to 382. We find that this was the contract of employment in force at the material time.
17. That contract of employment states that the claimant "*will be eligible for sick pay in accordance with the company's sick pay scheme as detailed at appendix 1*" [382]. The parties did not adduce any evidence as to which sick pay scheme was at appendix 1 and they could not, or did not, identify that sick pay scheme.

18. The parties agreed that there were attendance management policies and procedures that applied to the claimant's employment (the attendance at work procedure which starts at page 80; and the attendance support pack which starts at page 59). The claimant's evidence, which we accept, was that she was aware of those policies, which had been provided to her electronically in writing on the intranet and which were also saved on her work email.
19. The claimant says that she was not aware of the undated sick pay policy which starts at page 86. The respondents did not challenge that evidence and we accept the claimant's evidence about that. We do not know when that sick pay policy came into force and whether it pre or post-dated the claimant's contract of employment. The procedure sets out terms about the conditions upon which sick pay will be granted (clause 3) and the forfeiture of sick leave and sick pay (clause 4) [87]. At page 91 (the last page of that policy) there is a reference to a date of November 2016, but it is not clear whether that is the date when additional clauses were inserted into the procedure, or the date when the policy was drafted and first came into force.
20. The claimant's oral evidence was that her eligibility for sick pay was contingent on compliance with the attendance support pack, and in particular pages 62-63. She accepted under cross examination that sick pay would not be payable if (1) she failed to provide medical certificates or (2) she failed to adhere to the contact arrangements agreed with her manager, save that it was her evidence that:
 - a. Relying on the second bullet point on page 62, contact arrangements must be reasonable and dependent upon individual circumstances;
 - b. Relying on the fifth bullet point on page 62, sick pay should not be suspended for breaching the agreed contact arrangements unless the first respondent had attempted to contact the employee first to ascertain the reasons why the procedure had not been followed;
 - c. Relying on the second bullet point on page 63, sick pay should not be suspended for failure to provide a medical certificate immediately if there were mitigating circumstances that prevented that being done; and
 - d. Relying on the final bullet point at page 62, sick pay should not be ceased before a fact finding or disciplinary interview is conducted.
21. We were hampered in our ability to make factual findings and conclusions on the precise contractual terms because (1) the claimant's contract of employment could not be found; and (2) the parties did not know which sick pay procedure was appended to the contract, as referred to at page 382.
22. Based on the evidence set out above, we reach the following conclusions and findings of fact:
 - a. The only contract of employment signed by the claimant is in the terms at pages 381-382 of the bundle. This was the contract that applied to the claimant's employment.

- b. The claimant's eligibility for contractual sick pay was contingent on her complying with the respondent's sick pay policy. That is clear from the written term at page 382 of that contract and the claimant's oral evidence.
- c. We do not know which version of the sick pay policy was appended to the contract at pages 381-382. We conclude that the applicable policy required the claimant (1) to comply with contact arrangements as agreed with her manager; and (2) to provide medical certificates to evidence sickness absence of more than seven days. We reach that conclusion because:
 - i. The policy of the same name ("sick pay policy") at page 87 sets out those requirements;
 - ii. It is likely that even if an earlier version of this policy was in place at the relevant time it would have included such requirements since we find that these are standard requirements placed on an employee when absent on sick leave, so that they can evidence their ill health and so that their absence can be managed;
 - iii. This finding is consistent with the claimant's oral evidence, which was that she was required to adhere to these requirements, save that she said pages 62-63 provided nuance, or exceptions, to those requirements.
- d. As to the claimant's arguments about pages 62-63. We find that this contained guidance to managers for managing sickness absence. We find that:
 - i. The second bullet point on page 62 states that contact arrangements must be reasonable and dependent upon individual circumstances;
 - ii. The fifth bullet point on page 62 advises the manager to attempt to contact an employee who does not adhere to the notification requirements to ascertain the reasons why the procedure has not been followed. We do not find that this is a necessary step before suspension of sick pay, because it does not say that in that bullet point, and the following bullet point which expressly deals with that the suspension of sick pay does not say that either;
 - iii. The second bullet point on page 63 requires the employee to provide a medical certificate immediately upon expiry of the previous certificate, unless there are mitigating circumstances that prevent that being done. We reach this finding as this is what is expressly stated;
 - iv. We find that the final bullet point at page 62 states that the permanent cessation of sick pay should not take place before a disciplinary interview is conducted. We find this is different to

“suspension” of sick pay, as referred to at the preceding bullet point. Suspension implies an arrangement that is not permanent, and which can be reversed.

Management of the claimant’s sickness absence

23. The claimant’s absence was initially managed by Mr Lopez, area manager. The claimant accepted under cross examination, and as is evidenced by the contact log at pages 92-93 and 97, that she agreed with Mr Lopez that they would have weekly telephone contact on a Friday, between 9am and 4pm [97]. We find that this level of contact was reasonable and was not an onerous demand on the claimant’s time.
24. The claimant did not adhere to this agreed contact. For example, she apologised on 28 March 2022; 25 April 2022; 3 June 2022 [96-97] that she had not contacted Mr Lopez sooner. We find that the claimant was apologising for not complying with the agreed contact arrangements.
25. The claimant said in oral evidence that there were mitigating circumstances for her failure to contact Mr Lopez as agreed. She principally relied on her domestic situation, namely her three children (now aged 17, 25 and 6), two of whom have health issues. She said that her own ill health did not prevent her from contacting the respondents but that this was an additional factor. She said that her children were in school at the relevant time. She said that they needed some time away from school due to ill health, but she could not provide any details of that. The claimant made some mention of these factors to Mr Lopez. Initially, in January 2022, she took leave due to her daughter’s ill health [92]. On 18 February 2022 she reported that her household had tested positive for covid-19 [94]. On 25 April 2022 she informed Mr Lopez that her son had chicken pox [96]. The claimant provided some information about her ill health. She was unwilling to discuss the reason for her anxiety [95] but she informed Mr Lopez that she was attending her GP and she was being referred for NHS counselling sessions.
26. We accept that the claimant had domestic responsibilities and that there were some occasions, as mentioned above, when her family were unwell. We find that the requirement to telephone the first respondent once a week on a Friday during working hours, was a reasonable requirement that took account of the claimant’s individual circumstances. Whilst the claimant was mother to three children, they were all at school at the material time and there was no evidence that they required a significant time away from school during the material time (i.e. the period of time we are concerned about for this claim).
27. Mr Lopez did not suspend the claimant’s sick pay.
28. The claimant’s sickness absence was managed by the second respondent (Mr Blake) in February 2022 when Mr Lopez was on leave. The claimant did not maintain the agreed contact with Mr Blake. She contacted him on 11 February 2022 outside of office hours. Mr Blake asked her to contact him the following Wednesday, which she did not do. Mr Blake did not suspend the claimant’s sick pay at this time.

29. We find that the claimant failed to comply with the procedure to provide her statement of fitness for work certificate for the period 19 June 2022 to 19 July 2022 in accordance with the procedure i.e. immediately upon the expiry of the previous certificate. We find that there was a delay between 18 June 2022 and 10 July 2022 when the claimant failed to provide the certificate. We do not find that there were any mitigating circumstances to explain this delay. We find that the claimant provided all other medical certificates to the first respondent in accordance with her duties under the company sick pay scheme. Specifically, we find that:
- a. Although the contact log does not record the claimant having provided every medical certificate prior to 19 June 2022, we are satisfied that she did this, as no issue was raised with the claimant about this. We accepted the oral evidence of Mr Blake that the first respondent's data base for managing sickness absence had a separate part where the manager inputs the medical certificate information, and that if there is a valid certificate in place it turns green, whereas if there is not it goes red. We therefore find that Mr Lopez and Mr Blake were alerted if the claimant's medical certificate had expired, and that this is something they would then raise with her, so that the information could be inputted to turn the system from red to green.
 - b. On 17 June 2022 Mr Lopez informed the claimant that her medical certificate was out of date and that she needed to get a new one [97]. We find that the information provided by Mr Lopez was accurate. We reach that conclusion because (1) we have found that Mr Lopez would be alert to this issue given the way that the data base operated (red and green); and (2) the claimant did not say to Mr Lopez that her medical certificate was in date. That is not recorded in the call log, and was not the claimant's evidence in her witness statement or in her oral evidence; and (3) the claimant attended her GP two days later to obtain a new certificate [119], which shows that she was acting on the instruction of Mr Lopez and, we find, she did this as she knew that the most recent medical certificate she had provided to the first respondent had expired.
 - c. We find that on 10 July 2022 the claimant provided Mr Lopez with a medical certificate for the period 19 June to 19 July 2022 as that is evidenced by the documents at pages 119-121.
 - d. The claimant did not state to the first respondent at the time, or in her witness statement that there were mitigating circumstances to explain her delay in obtaining a new certificate and in providing this to the first respondent. The claimant was able to see her GP on 19 June 2022. This was a prompt appointment, given that her conversation with Mr Lopez on 17 June 2022 was around 5pm [97]. The claimant inexplicably failed to submit that certificate until 10 July 2022.
 - e. We find that the claimant was not eligible for company sick pay during the period from 18 June 2022 to 9 July 2022, inclusive by virtue of her failure to provide the first respondent with an up-to-date medical certificate.

30. Mr Lopez commenced a period of sickness absence around 14 July 2022. Prior to this he was managing the sickness absence of the claimant and one other customer services manager. The third respondent appointed the second respondent to manage the claimant's absence and that of the other customer services manager. We find that Mr Blake was appointed as he was the only appropriate and available manager to do so. Specifically:
- a. Mr Lopez was absent on sick leave;
 - b. There was another area manager (Mr R Gilmour) but ,due to his own ill health, he had an agreed adjustment to work from home four days a week. He was therefore not available to manage sickness absence;
 - c. A customer services manager was appointed to act up to cover Mr Lopez's absence. The third respondent reasonably decided that it was not appropriate for that person to manage the sickness absence of other customer services managers, as they were at the same grade.
31. We do not find that Mr Blake was appointed to manage the claimant's sickness absence as he was a firm or harsh manager of sick leave, or because the third respondent knew that he would suspend the claimant's sick pay. We find he was appointed as he was an experienced manager, and he was the only available and appropriate person to do so.
32. At some time between 1 and 26 July 2022, management of the claimant's sickness absence was transferred to Mr Blake.
33. We accept Mr Blake's evidence about his knowledge of the terms under which the claimant transferred to the Marylebone area. We found his evidence to be clear, consistent, and straight forward. There was no evidence that he had any knowledge to the contrary. Specifically, we find that:
- a. Mr Lopez informed Mr Blake that he thought that the claimant had transferred to the Marylebone area under a settlement agreement;
 - b. Mr Blake sought further information from the third respondent, but she said she could not discuss the matter;
 - c. Mr Blake was not aware of the claimant's employment tribunal claims;
 - d. If he had thought about the matter, he would have inferred from what Mr Lopez had told him that there had been a dispute between the claimant and the first respondent, hence the settlement between them. However, Mr Blake did not specifically consider this at the time as he was concerned only with matters relevant to the management of the claimant's sickness absence;
 - e. Even if (contrary to that finding) Mr Blake had inferred that there was a dispute between the parties, given his lack of knowledge of the tribunal and ACAS process, it would not have followed that he would have formed a belief that the claimant had started employment tribunal

proceedings, let alone that her claims contained allegations of discrimination;

- f. Mr Blake did not know about the claimant's employment tribunal claims or that these contained allegations of breach of the Equality Act 2010.
34. Save for managing the claimant's absence in February 2022, Mr Blake had no prior knowledge of the claimant. He did not meet her in person or see her on video. He knew that the claimant was a woman. We find that he assumed that the claimant was black and of African heritage, because her surname is consistent with that assumption. We accept Mr Blake's evidence that he did not recall forming a view of the claimant's race at the time. However, we find that he probably did do so, even if it was an automatic or unconscious process, whereby he formed an image of her in his mind when he first saw her name. The third respondent said, and we accept, that she thought that the claimant was a black woman. Although she had not met the claimant, she inferred the claimant's race from her surname.
35. We find that Mr Blake was unaware that the claimant had provided Mr Lopez with the June 2022 certificate on 10 July 2022, as Mr Lopez had not informed him of this (it may have been that their handover occurred prior to 10 July 2022) and he did not have access to Mr Lopez's emails, as he made clear to the claimant in correspondence. Mr Blake requested that certificate on 26 July 2022 [98]. The claimant did not immediately explain that she had sent it to Mr Lopez [98]. Mr Blake requested it again on 27 July 2022 [99]. On 29 July 2022 the claimant explained that she had sent the certificate to Mr Lopez [99-101]. The claimant provided the certificate to Mr Blake by email on 8 August 2022 [137].
36. When Mr Blake took over management of the claimant's sickness absence in July 2022, he received a handover from Mr Lopez and read the contact log. We find that he reached a genuine belief from this that the claimant had failed to adhere to the contact arrangements and that she had not provided the June 2022 medical certificate. The claimant accepted under cross examination that that was Mr Blake's belief. We find that was a reasonable belief on the evidence before Mr Blake in the call log, and the fact that Mr Lopez omitted to inform him or update the log to record to reflect the fact that the claimant had provided the June 2022 fit note on 10 July 2022.
37. We find that the claimant was in breach of the requirement to maintain contact with the first respondent, as agreed with Mr Lopez. The claimant had contacted the Mr Lopez on Friday 17 June 2022 as required. However, she did not make contact on the following five Fridays. We find that she was therefore in breach of this requirement from 24 June 2022 (the first Friday that she failed to make contact after 17 June 2022).
38. Mr Blake's first contact with the claimant was a text message to her on 26 July 2022. In the contact log, Mr Blake said *"if I do not hear from her today, I will send her a letter tomorrow and advise her that should I not hear from her by the end of the week, I will be suspending her company sick pay"* [98].

Mr Blake did not warn the claimant of the potential suspension of her sick pay in his text message at page 123.

39. On 27 July 2022 the claimant emailed Mr Blake stating that since 22 July 2022 she had been dealing with various family related diagnoses and that she would ring later that week [126]. The claimant sent Mr Blake a fit note from 19 July to 19 August 2022 later that day [127-128].
40. We find that the claimant reestablished contact on 27 July 2022 and therefore the period of non-compliance with the contact arrangements was from 24 June to 26 July 2022, inclusive. We find that the claimant was not eligible for company sick pay during this period by virtue of her failure to maintain the required contact with the first respondent.
41. Mr Blake replied to the claimant by email sent at 08:07 on 27 July 2022. He informed the claimant that she had not been complying with the attendance at work policy, and that he would be writing to the claimant later that day to advise that her company sick pay is suspended [125]. At 09:51 he acknowledged receipt of the fit note and asked for the note for the previous month and for the claimant to contact him as soon as possible [127].
42. At 13:14 on 27 July 2022, Mr Blake sent the claimant a letter by email and post suspending her sick pay [129; 117-118]. The letter of 27 July 2022 stated that the claimant's sick pay was suspended backdated to 18 June 2022 and would remain suspended until the claimant had spoken to Mr Blake and updated him. The letter stated "*I therefore urge you to phone me without delay*" [17].
43. We find that the decision to suspend the claimant's sick pay was made by the second respondent alone and not at the instigation of, or on behalf of the third respondent. We accept the evidence of the respondents on this point [third respondent's witness statement paragraph 8].
44. The claimant telephoned Mr Blake on 29 July 2022 [99-100]. This was their only telephone contact. The claimant said that she had not received the letter suspending her sick pay. The claimant was asked to call again at the agreed time of 9am on Monday 1 August 2022, as Mr Blake had already left the office and had no access to the file or means of taking notes.
45. We find that Mr Blake's request for the claimant to contact him on 1 August 2022 by telephone was a reasonable one which had regard to her individual circumstances. We find that the claimant was required to adhere to this request, or she would not be eligible for company sick pay.
46. On 29 July 2022 the claimant commenced ACAS early conciliation. That process completed on 1 August 2022.
47. The claimant said that she did not start an internal grievance process first because she had found her previous internal process tortuous, and she thought it was important to commence ACAS early conciliation to ensure she was not out of time to address the matter in the Employment Tribunal

due to potential delays in any internal process [claimant's witness statement paragraph 67].

48. The claimant did not telephone Mr Blake at 9am on Monday 1 August 2022. Instead, she emailed him on 1 August 2022 at 08:10, stating that she had commenced ACAS early conciliation and therefore she did not consider it to be appropriate for them to discuss matters at 9am on 1 August 2022, or on any other date [101; 131-132].
49. We find that, by failing to telephone Mr Blake on 1 August 2022, the claimant was in breach of the requirement to maintain contact whilst on sick leave, and that she was therefore not eligible for company sick pay. We find that the claimant's decision to contact ACAS and to commence employment tribunal proceedings did not absolve her of her contractual duty to maintain agreed contact with the first respondent whilst on sick leave.
50. Mr Blake replied to the claimant at 10:09 on 1 August 2022 setting out the relevant background and stating that he remained committed to assisting the claimant to return to work, however considering the content of her email he would liaise with his manager before establishing further contact with the claimant [130-131]. On 5 August 2022 Mr Blake emailed the claimant informing her that he had sent a hardcopy of his 1 August 2022 email to her in the post and reminding her that her company sick pay remained suspended until the June 2022 fit note was provided and contact with him was re-established and maintained [133-134].
51. The claimant thereafter remained in limited contact with Mr Blake. She provided him with fit notes [137-138; 155-157; 164; 168]. In addition she sent Mr Blake twelve emails prior to her return to work on 19 December 2022. Specifically: 25 August 2022 [148-149], 6 September 2022 [151-152], 11 October 2022 [166], 19 October 2022 [167], 6 November 2022 [181], 16 November 2022 [182], 25 November 2022 [184], 2 December 2022 [186], 12 December 2022 [189], 13 December 2022 [AMT log], 14 December 2022 [190], 16 December 2022 [192].
52. Mr Blake expressed a wish to speak to the claimant and explained that her sick pay would remain suspended until she established regular and verbal communication with Mr Blake [147; 161]. We find that Mr Blake's request for regular verbal communication was a reasonable one that took into account the claimant's individual circumstances. We find that the claimant was required to maintain such contact to be eligible for company sick pay.
53. The claimant did not have any verbal contact with Mr Blake and only maintained sporadic written contact. We find that the claimant was in breach of her contractual requirements to the first respondent from 1 August 2022 onwards as she failed to maintain agreed contact. We find that she was not eligible for company sick pay for this period.
54. Mr Blake referred the claimant to occupational health [140-143; 147]. The claimant did not agree for her occupational health report to be disclosed to him [153]. She declined to attend the case conference scheduled by Mr Blake, as she did not want to prejudice these proceedings [158-160; 165-

166; 167; 169-170]. We do not find that the claimant's decision to commence employment tribunal proceedings absolved her of her contractual requirements in respect of maintaining agreed contact with the first respondent whilst on sick leave.

55. The claimant emailed a different manager (Fuad Hassen) on 3 November 2022 expressing a desire to return to work on 4 November 2022 [172-173] and providing her latest medical certificate [174-175]. Mr Hassen responded informing the claimant to contact Mr Blake [175].
56. Mr Blake refused the claimant's request to return to work, pending medical advice [176-179]. The claimant responded on 6 November 2022 requesting salary payments to be reinstated from 4 November 2022 [181]. Mr Blake replied on 16 November 2022 asking the claimant to maintain weekly contact pending an occupational health appointment [182].
57. The claimant attended an occupational health appointment on 29 July 2022, which advised that she was fit to return to work with temporary adjustments [368]. The claimant consented to that report being disclosed to Mr Blake [187]. The claimant therefore returned to work in December 2022. Mr Blake stated that her pay would be reinstated from 3 November 2022 [188], that being the date when she had said she wished to return to work to following day.
58. We find that the claimant was not eligible for company sick pay in the period from 18 June to 26 July 2022 and from 1 August 2022 to 3 November 2022.
59. The claimant was asked to return to work on 13 December 2022 [188]. The claimant did not return to work on that date, emailing on 13 December 2022 to inform Mr Blake that she needed to take leave as her son was ill [459]. On 14 December 2022 she emailed Mr Blake stating her son was unwell and she would update Mr Blake the following day [190]. Mr Blake chased a response from her by email sent at 15:21 on 15 December 2022 stating that she would be on unpaid leave until he heard from her [190]. The claimant emailed at 17:51 on 16 December 2022 saying she could meet Mr Blake on 19 December 2022, which he agreed to [192]. The claimant returned to work on 19 December 2022 and a return-to-work interview was conducted that day [194-198].
60. We find that Mr Blake's request of 15 December 2022 was a reasonable one that took into account the claimant's individual circumstances. We find that the claimant failed to comply with the requirement to maintain agreed contact with the first respondent, as required under the terms of the company sick pay procedure. We find that the claimant was not eligible for company sick pay between the time of Mr Blake's email of 15 December 2022, and the time of her reply of 16 December 2022: a period of one day.
61. The claimant said in evidence that whilst her domestic situation remained the same throughout the relevant period, even if those difficulties had resolved, she still would not have maintained contact with Mr Blake because (1) she had engaged in the ACAS and employment tribunal process and (2) she thought Mr Blake's attitude towards her was hostile. We have found that

the claimant's decision to engage in the ACAS and employment tribunal process did not absolve her of her contractual duty to maintain agreed contact with the first respondent whilst on sick leave. We do not find that Mr Blake's attitude to the claimant was hostile as alleged. We find that Mr Blake was a firm but fair manager. His management style may have been different to Mr Lopez's, in that he was stricter about compliance with the first respondent's procedure for managing sickness absence. However, we do not find that he was hostile towards the claimant.

Pay-slips

62. Mr Blake informed the claimant that her sick pay was suspended from 18 June 2022 to 3 November 2022.
63. The claimant was paid her full salary for June 2022 [215] and July 2022 [216]. We find that the claimant was overpaid in the period from 18 June to 26 July 2022 as she was not eligible for company sick pay in this period.
64. On 27 August 2022 the claimant received nil pay [217]. That pay slip records deductions to the claimant's salary to cover sums that she was paid in the previous two pay slips, which reflect the period when the respondent had suspended her company sick pay. However, rather than making those deductions at that time, which would have resulted in the claimant owing money to the first respondent, the first respondent recorded that it had made two payments to the claimant by way of "rounding loan" of £1224,38 and £4276.63.
65. The claimant continued to receive nil pay until January 2023.
66. The pay slips for September to December 2022, inclusive, included figures for "rounding loan" but no sums were paid to the claimant.
67. The pay slip dated 14 January 2023 [374] states that it includes payment for the claimant's salary not just for 14 January 2023, but also for sums payable in November and December 2023. It also includes deductions for rounding loans in the sum of £2661,85 and £2067.52 and for five days of unpaid absence.
68. The respondent submitted that the deductions made in the November and December 2022 pay slips, and the 14 January 2023 pay slip were to recoup money that had been overpaid in June 2022 and July 2022, when the claimant's company sick pay had been suspended but she continued to receive full pay.
69. The respondent did not adduce evidence to explain what the "rounding loan" was and we find that the terminology was confusing and unclear.

Allegations of discrimination and victimisation

70. In her witness statement at paragraph 69 the claimant stated that she considered the decision to suspend her sick pay to be "*potentially discriminatory and victimising me for my previous protected act of raising*

an ET claim". The claimant said under cross examination that her understanding of the word "*potentially*" was that it meant that there "*is a chance*". She accepted that if someone had used an obvious racial slur about her, then she would not have said in her witness statement that that was potentially discriminatory, but rather she would have said that the person who said it was racist.

71. The claimant explained that the reason why she thought the second and third respondents treated her less favourably because of her sex or race was because they knew very little about her except from her race and her sex.
72. The third respondent is a black woman.
73. The claimant compares her treatment to comparator A and B [45-46].
74. The third respondent says at paragraph 11 of her statement that the respondents have not been able to find any record of comparator A on the HR systems. We accept that evidence.
75. Comparator B is a white male who was managed by the third respondent from January 2021 to October 2022. He was on sick leave from 27 September 2021 to 17 July 2022. Like the claimant, he was entitled to 39 weeks company sick pay. Comparator B provided continuous medical certification and met with the third respondent regularly to manage his absence. The third respondent extended his entitlement to sick pay on 25 June 2022. The third respondent sought and gained approval from the first respondent to extend his entitlement to sick pay to 16 July 2022 as that was the first date that they could meet to decide whether he could return to work [222-231; witness statement of third respondent paragraphs 12-15].

Law

Direct discrimination

76. Section 13(1) Equality Act 2010 (EqA) provides: *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
77. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question about their reasons for acting as they did. The test is subjective (Nagarajan v London Regional Transport [1999] ICR 877 at 884; Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065 at 29).
78. It is sufficient that the protected characteristic had a '*significant influence*' on the decision to act in the manner complained of. It need not be the sole ground for the decision (Nagarajan at 886).
79. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical

comparator; and then going on to consider whether that treatment is because of the protected characteristic.

80. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the '*reason why*' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: Martin v Devonshires Solicitors [2011] ICR 352 at 30.
81. In Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 at 36, the Court of Appeal confirmed that the employee who did the act complained of must themselves have been motivated by the protected characteristic.
82. The less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if '*a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment*' (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 at 35). An unjustified sense of grievance does not fall into that category.

The burden of proof in discrimination cases

83. The burden of proof provisions are contained in s.136 EqA:

*(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

84. The operation of the burden of proof provisions was explained in Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648 at 18:

'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

"56. ... The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. ..."

(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'

85. As for the 'something more' required to shift the burden, Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279 at 19:

'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'

86. The consequence of the way that s.136 EqA works is that, if a respondent fails to show that the relevant protected characteristic played no part in its motivation for doing the act complained of, a tribunal is not obliged to make a positive finding as to whether or how it did so: indeed one of the reasons for the (partial) reversal of the burden of proof which it effects is that it can often be very difficult for a claimant to prove what is going on in the mind of the putative discriminator (per Underhill LJ in Otshudi at [44]).

Victimisation

87. As to victimisation, section 27 provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

*(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.*

(2) Each of the following is a protected act—

*(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

(3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

88. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (West Yorkshire Police v Khan [2001] IRLR 830).

89. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in Dunn v Secretary of State for Justice [2019] IRLR 298 at [44]:

'In the context of direct discrimination, if a claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. [...] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'

Unauthorised deductions from wages

90. The right not to suffer unauthorised deductions from wages is contained in section 13(1) Employment Rights Act 1996 (ERA) which states:

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) 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
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

91. Section 14(1) ERA states:

14 Excepted deductions.

(1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—
(a) an overpayment of wages, or
(b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
made (for any reason) by the employer to the worker.

92. Employment Tribunals may construe a contract where necessary to decide if a sum is properly payable: Agarwal v Cardiff University and anor [2018] EWCA Civ 2084.

Conclusions

93. We took all the findings of fact and law into account when reaching our conclusions.

Direct discrimination

94. The detriment at paragraph 1.2.1 of the list of issues is admitted.
95. In respect of paragraph 1.2.2 of the list of issues, we find that the second respondent made the decision to suspend the claimant's sick pay. We do not find that he was acting on behalf of the third respondent.
96. We do not find that the actual comparators A and B are valid comparators:
- a. There is no evidence on which we can draw any conclusions about comparator A;
 - b. We find that comparator B was in a materially different situation to the claimant as he complied with the contractual requirement to maintain agreed contact with the first respondent whilst on sick leave, whereas the claimant did not.
97. We constructed hypothetical comparators:

- a. A male employee in materially the same situation as the claimant i.e. employed under the same contractual terms, on long term sick leave and who was not maintaining agreed contact with the first respondent.
 - b. An employee not of the claimant's race, in materially the same situation as the claimant i.e. employed under the same contractual terms, on long term sick leave and who was not maintaining agreed contact with the first respondent.
98. We find that these hypothetical comparators would have been treated in the same way as the claimant was. We find that they would have had their company sick pay suspended. This was because they had failed to comply with the contractual requirements for eligibility for company sick pay. There was no evidence on which to reach a conclusion that they would have been treated differently by the first respondent.
99. We find that the claimant has not proven that she was treated less favourably than a comparator of a different sex or race.
100. Even if the claimant had proven less favourable treatment, we find that she would only have proven a difference in status and a difference in treatment. Something more is required to discharge the claimant's initial burden of proof. There was no evidence of something more. The claimant could not and did not point to something more. She only said that she thought that the treatment was potentially discriminatory. Her reasoning was because of a difference in status. Her assertion was that because she was a black African and woman, this was the reason for the treatment. She did not put forward any other basis on which to reach that conclusion.
101. Therefore we find that the claimant has not discharged the burden of proof.
102. We also considered the reason why question. We found that there was evidence on which we could make conclusions about the reason for the suspension of the claimant's company sick pay. We find that the reason why was that the claimant was contractually required to comply with the first respondent's procedure for providing medical certificates and maintaining agreed contact whilst on sick leave. We find that the claimant's company sick pay was suspended because the claimant failed to comply with these requirements, and the second respondent reasonably (albeit erroneously) concluded that the claimant had also failed to provide her medical certificate for the period 10 July 2022 to 8 August 2022.
103. We therefore dismiss the claims of direct discrimination.

Victimisation

104. The protected acts at paragraph 3.1 are admitted. The protected act at paragraph 3.2 was withdrawn.
105. The detriment at paragraph 3.3 mirrors those at paragraph 1.2. The findings on those detriments set out at paragraphs 94-95 above apply.

106. We have found that the second respondent did not know about the claimant's protected act. We have found that the third respondent did know about the claimant's protected act. We have found that the second respondent made the decision to suspend the claimant's sick pay.
107. It follows that the decision maker was not aware of the protected act. Therefore, the claimant's company sick pay cannot have been suspended because of the protected act.
108. We find that the reason why the claimant's company sick pay was suspended is as set out at paragraph 102 above. The claimant's company sick pay was not suspended because she did a protected act.
109. The claim of victimisation is dismissed.

Unauthorised deductions from wages

110. This is a claim of unauthorised deductions from wages in relation to company sick pay.
111. The first respondent does not take issue with period of loss claimed i.e. to the date when the claimant's pay was reinstated. We find that the claimant can claim for this entire period. Insofar constitutes an amendment to the claim, we allowed that amendment balancing the prejudice to the parties. The first respondent did not take issue with this point, which we find indicates that they accepted it or were not unduly prejudiced by the amendment. If we refused the amendment, the claimant would be more prejudiced as she would not be entitled to claim for the full issue in dispute in these proceedings. Further the situation was complicated by the first respondent's actions in providing a series of unclear pay slips.
112. The claimant's gross monthly salary at the material time was £4469.16, as evidenced by the pay slips. The claimant's gross weekly salary was £1031.34 (monthly salary x 12 months / 52 weeks). We find that the claimant's gross daily pay was £223.46 as that is the daily gross figure given in the 14 January 2023 pay slip and this is consistent with her monthly gross salary [374]. We find that the daily pay was calculated on the basis of a five-day working week, as that is consistent with the calculations. We therefore find that the claimant was paid on the basis of a five day working week Monday to Friday.
113. We find that claimant was not eligible for company sick pay during the period 18 June 2022 to 26 July 2022; 1 August 2022 to 3 November 2022 and one day on 15/16 December 2022. The claimant failed to comply with the first respondent's contractual requirement to maintain agreed contact whilst on sick leave and to provide medical certificates. This was a condition precedent to the payment of company sick pay.
114. We find that company sick pay was not properly payable to the claimant during the period 18 June 2022 to 26 July 2022; 1 August 2022 to 3 November 2022 and one day on 15/16 December 2022.

115. We find that for the period 18 June 2022 to 26 July 2022 the claimant received an overpayment of wages. The claimant was not eligible for company sick pay during this period, but she was paid this [215-216]. The total gross sum of the overpayment is £5723.99 (one month plus one week plus one day).
116. We find that there were no deductions to the claimant's wages in the pay she received on 27 August 2022 [217]; 24 September 2022 [218] and 22 October 2022 [219]. The claimant was not eligible for company sick pay on these dates and no sums were paid to her for company sick pay.
117. We find that in the period 3 November 2022 to 3 December 2022 the claimant was eligible for company sick pay in the sum of £4469.16 gross. This amount was properly payable to the claimant. The claimant did not receive any wages in this period. We find that section 14 ERA applies, as there had been an overpayment to the claimant of her wages in June and July 2022. We find that the purpose of the deduction was the reimbursement of the first respondent in respect of an overpayment of wages and therefore this is an excepted deduction. We therefore find there was no unauthorised deduction from wages in the period from 3 November 2022 to 3 December 2022.
118. In the two-week period from 3 December 2022 to 17 December (the date of the claimant's December 2022 pay slip) we find that the claimant was eligible for company sick pay up to and including 15 December 2022. The claimant was not eligible for sick pay on one day on 15/16 December 2022. We have found that pay is calculated on the basis of a five-day working week Monday to Friday. 17 December 2022 was a Saturday.
119. The claimant was therefore eligible for company sick pay for two weeks less one day: £1839.22. This amount was properly payable to the claimant. The claimant did not receive any wages in this period. We find that section 14 ERA applies, as there had been an overpayment to the claimant of her wages in June and July 2022, the remaining balance of which was £1254.80 gross (£5723.99 less £4469.16 deducted in November 2022). We find that the purpose of the deduction was the reimbursement of the first respondent in respect of an overpayment of wages and therefore the deduction of £1254.80 gross an excepted deduction. The remaining balance is £584.42 gross.
120. The first respondent submitted that additional sums were paid to the claimant in the 14 January 2023 pay slip. The 14 January 2023 pay slip does purport to include a payment for 17 December 2022 of £2234.58 gross. However, sums were then deducted for rounding loans and unpaid absence (about which we heard no evidence). Given that the total gross pay to the claimant in her 14 January 2023 pay slip is less than her gross monthly salary (£3701.09 and £4469.16, respectively) we do not find that there was any overpayment of wages on 14 January 2023. We were hampered in our ability to make clear findings of fact about this pay slip as the first respondent did not call any evidence about this or the way in which the pay roll operated.

121. We therefore find that on 17 December 2022 the sum of £584.42 gross was properly payable to the claimant as company sick pay. This sum was deducted from the claimant's wages and this deduction was unauthorised.
122. The claimant returned to work on the following Monday 19 December 2022. After that date the claimant was not in receipt of company sick pay as she was working and not on sick leave. We do not find that there was an unauthorised deduction from the claimant's wages on 18 December 2022 as this was a Sunday, and we have found that pay was calculated on the basis of a five day working week: Monday to Friday.
123. The parties agreed that the hearing was to determine issues of liability only. We decided that it was in accordance with the overriding objective to decide the value of the unauthorised deductions from wages claim given its modest value and the fact that we had the evidence before us to do so in the form of the pay slips. We note that the respondent's arguments about the claimant's failure to comply with the ACAS code of practice [50 paragraph 21] relate to a compensatory award only and not to the unauthorised deductions from wages claim. We further note that the claimant does not make a claim pursuant to section 25(3) ERA. We are therefore satisfied that it is not necessary or in accordance with the overriding objective to have a further remedy hearing.

Employment Judge Gordon Walker
Dated: 13 December 2023