



EMPLOYMENT TRIBUNALS

Claimant: Mr S Rigby

Respondent: Royal Mail Group

Heard at: Manchester

On: 30 July to 3 August 2018

Before: Employment Judge Sherratt
Mr R W Harrison
Ms B Hillon

REPRESENTATION:

Claimant: In person

Respondent: Mr C Bailey-Gibbs, Solicitor

JUDGMENT having been sent to the parties on 16 August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant was employed by Royal Mail Group Limited as an operational postal Grade (“OPG”) from 26 October 2015 at Chorley and the claimant remains employed, although off sick. He brought his Employment Tribunal claim on 29 September 2017 based on disability discrimination. He provided only seven lines of information as to the nature of his claim and he was therefore invited by the Tribunal to provide further information. The claimant did this over several submissions, and on 29 November 2017 he and a representative of the respondent met with Employment Judge Slater for a preliminary hearing.

2. Employment Judge Slater read the submissions that had been put in by the claimant, the initial response of the respondent and discussed matters with the claimant and the respondent’s representative. She summarised that as follows:

“I explained to the claimant the different types of disability discrimination. I sought to clarify his complaints of disability discrimination. I set out in Annex A to these notes what I understand from our discussion to be his complaints. The claimant informed me that he is a member of a trade union. I suggested he seek advice from his union to help him decide whether the list is accurate and complaint and whether he should pursue all the complaints set out in the

list. In accordance with the orders the claimant is to write to the Tribunal if the list is not a complete and accurate list of his complaints of disability discrimination.”

3. The claimant did not write to the Tribunal to say that they were not the complaints, and Employment Judge Slater at Annex A set out complaints 1-8, and she also allowed the claimant to amend his claim to include complaints of unlawful deductions from wages in respect of failure to pay 22 hours worked around April 2017 and deductions of £114 and £150 made from pay in June and September respectively. The claimant also had leave to include another matter of disability discrimination which is taken account of in items 1-8. The respondent then provided its amended response.

4. The Tribunal when reaching the conclusions that follow has taken into account the oral and written evidence, the documents that we have been taken to or referred to in the bundle and the oral and written submissions from both sides.

5. This judgment will not go into the law in any detail except in one particular claim. Mr Bailey for the respondent in his helpful written submissions has set out the law and the claimant has had the benefit of that in writing yesterday, so because of that and accepting that the law is in simple terms as he sets it out, we will not go into that in detail.

6. As to the evidence before the Tribunal, the claimant gave evidence on his own behalf and he called Richard Wright, the CWU Area Representative, and Neville Halewood, the CWU representative at Chorley. He also produced two written statements from persons not before the Tribunal. We have read those statements but they do not really add anything to the claimant's case other than to support it.

7. The respondent called a number of witnesses: Paul Hayhurst was the Delivery Office Manager at Chorley; Diane Owens was an Acting Manager; Christopher King, Delivery Line Manager; and Craig Brown, another line manager. They all had dealings with the claimant during the course of his work in the period in question. We also heard from Sharon Forsyth, a manager from Southport, who was tasked with investigating the claimant's grievance.

8. We had 630 or so pages in a bundle and each side made later additions to the bundle.

Findings of Fact

9. This claim is based on the claimant's disability. The respondent has acted that the claimant has Type 1 Diabetes.

10. The claimant did not disclose this when applying for or on getting the job. Although he stated he had made management aware of his diabetic condition in or about December 2015 there is no documentary evidence that supports this and in his submission the claimant accepted that the respondent's knowledge of his condition was gained on 6 February 2017 when in a text he sent the information to management, in particular to Mr Hayhurst.

11. As to his role, I have set out that the claimant was employed as an Operational Postal Grade. From the evidence we have heard the Tribunal accepts

that although there may be one title or grade this covers many different OPG roles. We have been taken to the rotas that are used at Chorley and within the rota various different roles are there; some are on collections, some are on bulk deliveries, some are on rural vans, but of interest here there is a category of “full-time reserves” and a category called “spare”. Mr Rigby was on the list as “spare”, meaning that he could in theory be asked to move around doing different jobs because he had not been allocated his own particular round or other task.

12. Having said that, Mr Rigby was, apart from three days, always working with a colleague on round 115. It is also important to say that the claimant was employed for 24 hours a week but working over five days.

13. Each office maintains a seniority list showing the OPGs based on their date of commencement. Seniority is regarded by the respondent and indeed the trade union, the Communication Workers Union, as an important factor to be used in allocating roles where, if there are a number of people interested in a particular role then, other things being equal, the most senior i.e. most long serving applicant would get first pick of the job. At Chorley the list was wrong, because Thompson D (number 117 on the list) is rightly shown as having started on 26 October 2015 whereas Rigby S (the claimant) who started in fact on the same day was shown as starting on 26 November 2015 rather than 26 October 2015, and Moss K, who started on 9 November 2015, is shown as number 116 above Thompson, who in theory started some weeks sooner. The list was clearly wrong just in those few names that we have been taken to. The list which was posted on the notice board at Chorley did invite people to check details and to make it known if there were errors. The claimant as well others did not do that and this inaccurate list formed the basis of a later decision by management as to the allocation of roles involving the claimant.

14. The claimant does not seem to have been aware of the importance of seniority in Royal Mail. It may be that in his relatively short service he was not made aware of the importance of the length of service.

15. Having dealt with the background matters I now go on to consider the allegations, as set out by Employment Judge Slater.

16. The first allegation is that throughout employment (although last time claimant worked on spare duties was circa September 2016) the claimant complains of a PCP of being liable to work on spare duties; the reasonable adjustment claimed was being on fixed duties. The respondent is the perpetrator and the allegation is of a failure to make reasonable adjustments.

17. In factual terms after his induction the claimant was regularly on round 115 from 6 November 2015 until the changes brought about in February or March 2017. On 22 and 29 February 2016 and 26 September 2016 the claimant was required to work on spare duties. In cross examination the claimant said that this claim really related to the position from February 2017 and not the earlier dates. Given that the claimant was allocated a fixed round in February 2017 and what he has said, we do not find that the claimant was put at a substantial disadvantage in the earlier period when he might have been moved to other rounds, because in simple terms he was not, and indeed from the claimant's own evidence he was not aware that he was anything other than a person employed as an OPG to do whatever task was

allocated to him, so we do not find substantial disadvantage and we do not find that the claimant succeeds on allegation number one.

18. Allegation two is something that we shall come back to later, because that is a rather more complex matter from the Tribunal's perspective.

19. The third allegation is from February to July 2017 and it is of failing to arrange an appointment for the claimant with the Occupational Health Service until August 2017. The alleged perpetrators are Paul Hayhurst, Diane Owens, Craig Brown and Christopher King, and the allegation is of direct discrimination.

20. The legal definition of direct discrimination requires there to be less favourable treatment when compared with other people who are not disabled, with the reason for the treatment being because of the disability. In this case the respondent accepted the claimant's position that he had the disability when he told them about it in his 6 February 2017 email. He invited them to get an appointment with Occupational Health if they needed confirmation, but they did not, and because the claimant was performing his role without any apparent issues the respondent saw no need to refer the claimant to Occupational Health. The Tribunal does not therefore find that the reason the claimant was not referred to Occupational Health was a reason related to his disability; it was because the respondent did not see a need to do so.

21. The fourth allegation is: "throughout employment failed to conduct a risk assessment". There is evidence from Diane Owens on this question. In her witness statement she said:

"I do not recall the claimant ever stating to me that he wanted a risk assessment to be conducted or that he had requested one elsewhere. If he had spoken to me about this then I would have relayed the information to Paul Hayhurst who would have been able to conduct a risk assessment if he deemed it necessary. The reason I did not conduct an assessment for Shane was because he didn't approach me about this and it is not within my job role, it was not because Shane Rigby is diabetic."

22. Mr Hayhurst deals with this allegation in his witness statement. He says:

"I confirm that the reason I did not conduct a risk assessment on Shane Rigby was because he did not ask me to until after he had gone off work on a sickness absence. I categorically deny that the reason I did not conduct a risk assessment was because of Shane Rigby's diabetes."

23. Looking at those reasons we accept them, and the fact that the claimant did not ask is not a reason that relates to his disability. The reason why the risk assessment was not conducted was not because of the claimant's disability, it was because the claimant had not asked for one and his performance was otherwise satisfactory. There is thankfully the statement from Mr Hayhurst that when the claimant returns to work following his sickness absence then he can arrange for a risk assessment to be carried out as soon as possible in relation to both diabetes and stress if he considers that this is still necessary. Given that the claimant is employed to do work on his own in a van in the rural areas it seems to the Tribunal

that that will be essential for the future, although we accept it was not a necessary thing from the respondent's perspective in the past.

24. Moving on to issue number 5, this is that the claimant was allocated round 426 rather than other easier rounds that he had applied for, thus setting him up to fail. We know that it was Mr Hayhurst who allocated the claimant to round 426 and the allegation is of direct discrimination.

25. We have been provided with a notice that appeared on the notice board saying, "applicants may now apply for the following vacant duties". Once or twice a year at Chorley a list goes up on the notice board and staff are asked if they want to apply to be allocated to a different duty from the one that they are on, and it says that "please be aware you can only apply for a duty that has the same number of hours as you are currently employed on or less than you are currently employed on", in other words you can have a reduction in your contracted hours but not an increase at this time.

26. There were a number of duties available but for people working on 24 hour contracts there were three. The description is, "408 [which is the round number] three day week (Thursday, Friday and Saturday), 412 three day week (Thursday, Friday and Saturday), 426 three day week (Thursday, Friday and Saturday). Rural vans".

27. The claimant sent in his application noting that there were only three roles that he could have applied for. The claimant sent a text on 6 February, the day before the deadline, at 15:36 to Paul Hayhurst:

"Hi Paul, just going to forward my application for any of the 24 hour duties on offer so as not to miss the deadline."

He then went on in a further text to say:

"I would like to apply for any of the 24 hour three day walks. I'm Type 1 diabetic which is classed as a disability. It's imperative to my diabetic management control that I don't have hypos, low blood glucose, or hypers, high blood glucose. Both can cause long/short glucose. Both can cause long/short complications. Having a regular round I know, will help eliminate hypo/hypers. Whereas a spare duty has an increased level of stress attributed to it (the topography of each walk is different, etc). Stress plays havoc with the blood glucose levels. So on health grounds I'm asking for (reasonable adjustment) be given. If medical verification is needed to support then could it be arranged that I discuss the above with the work's doctor. Yours sincerely Shane Rigby."

28. The claimant applied for one of the three jobs; he did not apply for any particular one.

29. The evidence of Mr Hayhurst is that he looked at the applicants for the three jobs, luckily there were only three of them, and based on the seniority list the other two were shown as having started in the employment of the respondent before the claimant; they were therefore shown on the list as senior to the claimant. The first one, or the most senior, was asked which job he/she wanted; the second was asked

the same question which then left the remaining job for the claimant. That was for round 426, the rural van duty.

30. The claimant, we find, was allocated that duty not because of its difficulty but because it was the only one left. Had there been more than three applicants then there would have been the need to consult an agreement between the respondent and the CWU which we were told by Mr Wright from the CWU provides for how someone with a disability would have that disability taken into account when allocating jobs, most particularly based upon length of service.

31. Here the claimant was allocated a job without the need to consider the question of his disability. The allocation was in our judgment a non discriminatory one based on the seniority list only and was not related to the claimant's disability. This was not, in our judgment, direct discrimination.

32. Allegation 6 is said to relate to late September 2017, stopping the claimant's company sick pay when he notified them he was to be away from 19-22 September. The claimant says he was going away to relax, which would have a beneficial impact on his diabetes. The decision maker there was Paul Hayhurst It is said to be discrimination arising from disability. The claimant, by chance, probably two or three weeks after he had booked a holiday and about the day before he was due to go, told them he would be away in Madrid from 19-22 September. The claimant has accepted that he did not follow the company's rules for taking holidays whilst on sickness absence. He had had those rules made known to him. The claimant accepts that the decision to stop the sick pay did not arise from his disability but from his own failure to follow the rules on the sick pay and the taking of holidays. This I think was accepted, certainly in evidence but if not then during the course of the claimant giving his final submissions.

33. Allegation 7 is said to be "lying in evidence in the grievance investigation by saying the claimant had only applied for round 426". The allegation is against Paul Hayhurst and it is of direct discrimination. We know that it relates to an interview on 30 September 2017 between Sharon Forsythe, investigating the grievance, and Paul Hayhurst, delivery Office Manager at Chorley.

34. The complaint that was being dealt with, put in very simple terms, was that the claimant applied for a duty and has yet to be appointed to both the duty and the rotation. Bearing in mind that the application was made in February, the role was notified to the claimant around the end of February and the interview was in September 2017.

35. The way Sharon Forsythe records the interview is by first of all giving her question:

"Mr Shane Rigby has on February 6th 2017 contacted you to apply for a duty that had been advertised. He did this by text as he was off sick with flu. He didn't think he would be back to apply for the only one he could, 425, which is a three day Thursday-Saturday. He says that he has not yet been trained despite asking regularly and all of the successful applicants had moved onto their new walks."

The answer from Mr Hayhurst:

“Shane picked the duty that needed the training on it. The others didn’t as they are town walks. The duties we advertised are 68, 69, 90, 65, 115, 117 and the cover duty 425 which Shane applied for. None of these needed any training on them but Shane’s was three different deep rural deliveries. These can be tricky to train someone on. We have trained him on one of the duties but he is struggling with it. I have explained this to Shane and can understand his frustration but due to being both overspent and high sick leave we have not been successful in gaining authorisation for training.”

36. This is the passage that is complained of; the specific complaint is an allegation that the claimant saying he had only applied for round 425/426. This is not said by Mr Hayhurst, it is in the question from Sharon Forsythe. Mr Hayhurst does not correct the question in his answer, but in his answer he is still incorrect because he says “Shane picked the duty”. Shane did not pick the duty, the duty came to Shane because he was seen as the last person in, therefore he got the only job that was left after the two seemingly “senior” employees were allocated to the first two. We do not find, notwithstanding that Mr Hayhurst was incorrect in his answers that he lied in evidence to the grievance interview, and therefore we do not find that amounted to direct discrimination.

37. Allegation 8 is of not dealing with the claimant's grievance within a 28 day period in accordance with its policy, an allegation of direct discrimination. The claimant accepts that there is no 28 day period in the grievance policy applicable at that time. The Tribunal having looked at the policy confirms that there is no 28 day period applicable; however it also notes that in the amended response the respondent did not simply state that there was no 28 day period in the grievance policy applicable at the time. If it had things might have been rather more straightforward.

38. The grievance was investigated by Sharon Forsythe. She had, I think, 21 grievances from the claimant sent in together. She was allocated those grievances to deal with as well as her normal fairly time pressured role, and we find that she dealt with them in a reasonable time period, and when giving evidence she obviously and openly accepted that it would have been better had she responded to the claimant when he was asking her how long she was going to take to deal with those grievances, but apart from that failure on the part of Ms Forsythe we are satisfied that she did deal with the grievances in a reasonable time period.

39. Turning next to the financial matters. The claimant alleges he was underpaid in April 2017. Mr Hayhurst for the respondent explains in his witness statement the reasons why the claimant was in his view correctly paid. The claimant has not dealt with this matter in either of his witness statements, but he has pointed to where it is shown in his grievance. The grievance outcome on this particular matter is, “I can’t find anything, if you still think there’s anything wrong you should put in another grievance setting it out more clearly”. The claimant did not do so. We cannot be satisfied on the evidence before us that the claimant was underpaid in April 2017.

40. As to June, that pay relates to the sick pay removed by Mr Hayhurst. It was not stated above but it is appropriate to say now that having had a meeting with the claimant and his trade union representative Mr Hayhurst ordered the reinstatement of the sick pay and so the claimant accepts there is now no claim to be made of an underpayment.

41. As regards September, that appears to be the deduction made when the claimant did not follow the correct policy in taking holiday whilst on sick leave. The respondent, therefore, in our judgment did not make any unauthorised deduction from the claimant's pay in September.

42. So far, the claimant has not succeeded in any of the claims.

43. We now come to allegation 2 which is set out by Employment Judge Slater succinctly as follows: the date is 10 June 2017 and the allegation is of stopping the claimant's company sick for the period 5-23 June because claimant said he could not attend an absence management meeting on 10 June because he had a medical appointment on that day relating to his disability. The allegation against Paul Hayhurst is of discrimination arising from disability.

44. We must consider carefully the factual matrix here. On 5 June at 08:07 the claimant sent a text message to Chris King, his line manager:

“Good morning Chris, I won't be in today due to a recurring pain in my eye. I have asked Craig to arrange an appointment with the works doctor so I can discuss this private matter with him. If you wish to discuss why I'm off with me by phone please arrange time by text and I will get back to you ASAP but the detail about my eye issue is a private matter until I discuss it with the works doctor.”

45. We know from Chris King's evidence that he was not made aware that the claimant had his diabetic condition notwithstanding that he was deputed to manage the claimant. Mr Hayhurst knew, other senior managers may have known, but the man on the ground, as it were, was not made aware of the claimant's condition.

46. We then see that at 15:57 on the same day, 5 June, the claimant again sends a text to Chris King:

“Hi Chris, Just got a work/health related stress sicknote for two weeks 5-19/6/17 from my doctor's. I will forward it on to work tomorrow so won't be popping down. I still wish to speak to the works doctor ASAP so if you can arrange it. Also I haven't received my lost wage slip from when you ordered it for me from Finance. It's payment date 21 April 2017. Please could you sort both my two requests ASAP. Thank you.”

47. The note from the claimant's GP stated that the claimant was assessed on 5 June and because of “stress (work and health related)” the doctor advised the claimant that he was not fit for work from 5 June to 19 June 2017, and Mr Hayhurst has acknowledged that this sick note was provided to him.

48. Mr King, deputed to manage the claimant, did not respond to the claimant at all. He passed the information on to Mr Hayhurst who, they agreed, would deal with the claimant's sickness absence, but they did not bother to tell the claimant that that was the case.

49. Also on 5 June at 07:35 the claimant sent an email to Craig Brown, another of his managers:

“Good morning, At approx. 9:10 on Friday 2 June whilst in a meeting with yourself and my line manager, Chris, I suffered a sharp pain in my left eye. With this recurring pain over the weekend and this morning I am unable to work today. Also could you please book an appointment for me ASAP with the works doctor so I can discuss this private matter with him and seek his advice. If you wish for me to phone please advise, etc.”

50. Then there was a text exchange between the claimant and Paul Hayhurst.

51. On Tuesday 6 June there was an email from Mr Hayhurst to the claimant:

“Shane, As you are off work claiming work related stress I urgently need you to come in to talk to me.”

52. The claimant replied to Paul Hayhurst:

“Morning Paul, I’m off work with work and health related stress. The health issue has been party due to my disability Type 1 Diabetes. Coming into work will have an adverse effect on my current health diagnosis so I will not be attending a meeting until my current sick note 5-19 June has elapsed or my health situation changes or doctor advises otherwise. You or any member of your management team are invited to come down to my home to discuss my current state. All I ask for is to be given prior warning. If you are willing to forward your work’s email address I will forward details of my reasons why I’m off with work/health related stress. I believe it would be in everybody’s best interests to send you these issues before anyone chooses to come to my home so that answers to my questions can be relayed to me. Due to preparation time to document my grievances I would say anytime from 10.00am on Thursday morning 8 June would be ok to come down for a meeting at home. Thank you. Kind regards, Shane Rigby.

53. The claimant on 7 June wrote:

“Afternoon Paul, I’m unable to find my daily start times for duty 115. It’ll help be corollate wage slips and see how many hours I’ve worked and if I’ve been underpaid, which is part of my grievance.”

54. Later, I think on 7 June, Mr Hayhurst told the claimant that he needed something from him by email on 12 June. Presumably the claimant's email setting out details of why he was off with health/work related stress and what his grievances would be, an important extract from that text from Mr Hayhurst:

“As it stands I do not know your real reason for being off apart from workplace stress. If I do not receive the said email from you I will write to you to state where we go from here.”.

55. We then have an email sent by the claimant on 8 June sent at 16:51 explaining details of an alleged overpayment and wanting to know the position, and saying part of his grievance was with Chris King, his line manager, regarding what he thought was an error on his payslip for 21 April. The claimant raised that issue with his management.

56. On 9 June the claimant sent an email to Mr Hayhurst at 11:09:

“Paul, I’m still feeling sick so any grievances I may or may not have will have to go through the formal channels when I go back to work. Any issues regarding this matter you can discuss with my union representative at work at your convenience. You can phone me regarding my health when is an appropriate time and within my working hours.”

57. We then move on to Mr Hayhurst on 9 June composing a letter to the claimant; a letter that was later proofread and approved by Mr Craig Brown. The letter says:

“Dear Mr Rigby,

Current absence from work

On 5 June 2017 you went sick from your duty stating workplace stress. I invited you to a meeting in an effort to support you but you failed to attend. I have also noted that your sick note claims workplace stress and health related, however as it stands I do not know what your health related absence is. I have attached the sick pay conditions to this letter and as it stands I do not believe you are meeting point (b) which states:

‘the business must be satisfied that an employee’s absence is necessary and due to genuine illness.’

I have attached the wage slip that you claim has been lost. This has caused you some level of stress. As always I’m available to discuss your over/underpayments that have been causing you workplace stress.

As it stands I may need to consider ceasing your Royal Mail pay. However, I feel it is appropriate to give you one final chance to attend a meeting with me so that we can manage your absence appropriately and support you back to work.

With this in mind I would like you to attend a meeting with me on Saturday 9th June (sic) 2017 at 9.00am at Chorley Delivery Office and we can address these issues.

Please contact me if you need to arrange this time or you will be resuming ahead of this meeting.”

58. We note that Mr Hayhurst in his proofread letter says he does not know what the health related absence is. The letter was hand delivered to the claimant by Craig Brown, one of his managers, on the afternoon of Friday 9 June, and the claimant was advised by Craig Brown that he thought he should attend the meeting.

59. The claimant having received and considered the letter at 22:17 on Friday 9 June emailed Paul Hayhurst at his Royal Mail address:

“I am unable to attend your invited meeting at 9.00am on 10/06/17, due having a medical appointment at 08.30am. In the appointment they will be examining my eyes for burst blood vessels which can be caused through raised blood pressure and stress.”

60. We know that there was a conversation between Mr Hayhurst and Mr Rigby following that, and although Mr Hayhurst does not deal with it in his witness statement he was asked about it by Sharon Forsythe in their grievance meeting and he says this:

Question: When you sent the letter to Shane, why did you only give him 16 hours' notice?

Answer: I wrote the letter on Friday and asked Craig to deliver it for me as he lives in Wigan. He would have had it around 3.00pm but only opened it at 8.00pm. I was off on the Saturday and was only went in for a meeting with Shane as it would have been quieter time for me. Shane contacted me at 7.30 to tell me he could not attend as he an appointment at 8.30 and would be unable to drive afterwards. He confirmed that he had received his replacement payslip that I arranged for him. As he hadn't given me any more information I had sorted out his issue. Shane said that he would be unable to come to see me on the Saturday as he had no way of getting to Chorley. I then said that I would write out to him again and invite him to another interview.

Question: You sent a letter to Shane on 13 June stopping Shane's Royal Mail element of his pay. Which of the conditions had not been met to stop his pay?

Answer: Shane was refusing to cooperate and come to work for a meeting. He went off sick following a performance chat with Craig so I had reason to think that the absence may not be genuine. I wanted to see him to understand and hopefully resolve any issues he had. I invited him again to a meeting on the Wednesday 14 June with his union rep to discuss his issues that were preventing him from coming to work. We reinstated Shane's pay as soon as we received confirmation that he had hospital appointments and the reason for them.

61. I have just noted Mr Hayhurst being aware that the claimant had an appointment at 8.30 and would be unable to drive afterwards. The claimant has provided us with an appointment letter dated 12 May 2017 for an appointment on Saturday 10 June 2017:

"Following photographic screening an appointment has been made for you to attend for clinical examination of your eyes. Details of your appointment are as follows: Saturday 10 June at 8.30am. Your pupils will be dilated with drops which will cause blurring of near and distance vision which can interfere with the ability to drive. We therefore recommend that if you are travelling to the appointment by car you are accompanied by someone who can drive you home."

62. So we conclude, based on what Mr Hayhurst said in answer to the question during the grievance investigation, that the claimant had acquainted him with the information from his appointment letter for Saturday 10 June at 8.30am. The meeting with Mr Hayhurst had been arranged on 9 June, the medical appointment had been

given to the claimant on 12 May, and it was with the Diabetic Retinopathy Screening Service.

63. Notwithstanding the information available to Mr Hayhurst he made a decision to stop the claimant's company sick pay which was communicated in a letter sent on Monday 12 June:

"Dear Mr Rigby

Current absence from work

On 5 June you went sick from duty stating workplace stress. I invited you to a meeting in an effort to support you but you failed to attend. You could not attend due to an appointment, however you had refused to cooperate in attending on request. You also refused to attend at a later time that day.

During our telephone conversation I stated that one of your grievances had now been dealt with and at any time I was available for you to come in and discuss your other grievance relating to your pay. As it stands you have refused to attend, and I am not aware of any other work or home issues that you are suffering from. Due to the above I am unable to justify your absence and therefore your Royal Mail element of your pay has now been ceased and you will only receive the statutory sick pay.

As always I am available to talk to you at any time regarding your issues and would advise that you do so as a matter of urgency so we can close this case. I have attached the sick pay conditions to this letter.

For the record I am now inviting you to attend at Chorley Delivery Office on Wednesday 14 June at 9.30 for a discussion with myself regarding your absence. You can attend this meeting with a union representative or a colleague from the business.

Please contact me if you need to rearrange this or you will be resuming ahead of this meeting."

64. The conditions for sick pay were set out on the back of the letter:

"Entitlement to sick pay is always subject to strict observance of the following conditions:

- (a) Certificates of incapacity must be received by the business for all sick absences;
- (b) The business must be satisfied that an employee's absence is necessary and due to genuine illness;
- (c) The business reserves the right to refuse sick pay if an absence is due to or is aggravated by causes within the employee's control or if an employee has neglected instructions given by a doctor;
- (d) An absent employee shall remain at their normal home address other than to receive inpatient treatment unless they have consent of their line

or local personnel manager. Employees who are sick immediately before they are due to go on holiday must confirm to their line manager that they are going on holiday on the due date unless sick absence continues and the employee remains at home.”

These are the conditions and in our judgment the only questionable one there is (b), although the claimant had provided a GP's note which did make reference to an illness.

65. The claimant quite rightly consulted his trade union in the form of Mr Richard Wright who took up his case with Mr Hayhurst. In an email sent on 13 June Mr Wright set out the facts as he saw them and Mr Hayhurst responded by email with his answers and he also told his manager of the response that he had given. It was put by the union:

“Question: Shane could not attend the interview on Saturday as he had already had a hospital eye appointment related to his diabetes. He informed the Delivery Office Manager who then said, ‘if you can't make it at 9 then come it at 10'. Shane explained that he would not be able to drive after the treatment on his eyes and that he did not appreciate the way he felt he was being bullied into meeting with the manager.

Answer: Of course I did ask Shane to come in at a later time as our aim is to accommodate him and resolve his issues. At no stage would I class trying to help Shane to resolve his pay issues as bullying him.

Question: Today Shane has received a special delivery letter inviting him to another meeting tomorrow, Wednesday morning, repeating that his pay could be stopped if he didn't attend because the manager was not satisfied that the absence was genuine/necessary. Shane has informed me that he is not well enough to attend tomorrow's meeting because he actually feels worse and the aggressive approach from his managers was contributing to his symptoms/stress.

Answer: Our aim is to maintain contact with the employee when they are off sick from work and I am unsure as to how this could be classed as an aggressive approach. It has to be noted that if I personally had been underpaid I would also want the issue resolving, however Shane is not giving us the opportunity to help him. There is no evidence whatsoever to support his case that we have an aggressive approach.

Question: Shane has been signed off sick by a medical professional who is duly concerned about his health. He has high blood pressure, constantly feels nauseous and is suffering from intense headaches that is affecting his vision.

Answer: I am in receipt of his sick note which does refer to work and health related stress. I am satisfied that his doctor has signed

him off and believe that he is entitled to SSP. However, I do not believe it is appropriate to pay him the Royal Mail element of his sick pay. The reason for this is that Shane is quoting workplace stress, he is not prepared to state exactly what this stress, apart from the fact that he has an issue with his wages and furthermore he is not prepared to cooperate. If Shane were to cooperate surely this would reduce his stress and get the burning issues he has around his wages resolved. I am happy to meet Shane at any time and can guarantee that I will sort his wage issue within minutes. Again I must quote that I do not believe the absence to be necessary. Shane has quoted in previous emails that he has raised issues with pay to myself, however at no stage has he raised any issues.”

66. That sets out Mr Hayhurst’s thinking at the time. The reason for stopping the claimant’s sick pay was that the claimant was, in the mind of Mr Hayhurst, unable to justify the absence because he had failed to attend meetings due to an appointment and had refused to attend later than day. Mr Hayhurst was not aware of any other work or home issues he was suffering from, having in the invitation letter said to the claimant that he did not know what the health related absence was. When he wrote his letter to the claimant he had the knowledge of the claimant’s medical appointment that he set out in his discussions with Ms Forsythe.

The Law

67. Against that factual background we have to consider section 15 of the Equality Act 2010 which provides that:

“A person (A) discriminates against a disabled person (B) if –

- (a) A treats B unfavourably because of something arising in consequence of B’s disability; and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.”

68. There is an exception if the respondent did not know or could not have known of the disability, but clearly this is not relevant because Mr Hayhurst had known of the claimant’s disability since February.

Conclusion

69. Moving on from there we ask the first question: was the claimant treated unfavourably by the respondent? The answer is: yes he was because company sick pay was stopped. There is no doubt in the Tribunal’s judgment that it amounts to unfavourable treatment.

70. Was that decision done because of something arising in consequence of the claimant’s disability? In our judgment the claimant was treated unfavourably because he could not reasonably attend the meeting called at short notice by Mr Hayhurst on 9th June for the 10th because of a prior and longstanding medical appointment on a Saturday morning at a Diabetic Retinopathy Screening Service, something that he made known to Mr Hayhurst. In our judgment, the need for the claimant to attend

that medical appointment and thus his inability to attend his appointment with Mr Hayhurst clearly arose in consequence of his disability: it is an eye condition relating to his diabetes at the Diabetic Retinopathy Clinic.

71. Having answered the first two questions in favour of the claimant we move on to consider whether the respondent can show that the treatment was a proportionate of achieving a legitimate aim.

72. I have stated above that "legitimate aim" was not pleaded. However, it was introduced by Mr Bailey-Gibbs as part of his response, and in his written submissions to the Tribunal in paragraphs 31 and 32 he has stated this:

"The respondent is entitled to require the claimant to attend a meeting to discuss his sickness absence, particularly whilst in receipt of company sick pay. If the claimant fails to adhere then the respondent is justified in withholding company sick pay in those circumstances. The legitimate aim is ensuring that the sick pay provisions are not subjected to abuse and misuse. The proportionate means of achieving that is the application of the respondent's sick pay policy which may ultimately result in pay being withheld."

73. In our judgment the actions of Mr Rigby did not amount to abuse of misuse of the sick pay policy. In our judgment the claimant had complied with all of the conditions imposed upon him and the manager was aware from the sick note that he was genuinely off sick for the reasons stated and he was aware of the Diabetic Retinopathy appointment, the claimant having told him. The claimant told him of his conditions; he told the manager that he had grievances; he told the manager of a genuine disability related reason as to why he could not attend the meeting, and in our judgment the decision to withhold the sick pay was one that related to the failure to attend the meeting because of a genuine disability related reason.

74. Whilst we accept that management must be entitled to impose its sick pay policy on all employees including those with disabilities, we do not accept that the decision of Mr Hayhurst in this case was a proportionate means of achieving a legitimate aim. The proportionate means in our judgment was as he flagged up in his discussions with the grievance officer, that he should have merely said "ok, no meeting on the Saturday". He should then invite the claimant to another meeting. He did not do that, he made the decision to stop company sick pay when he clearly knew why the claimant could not attend. That decision was based, in our judgment, on the claimant's condition not upon a need to enforce the policy on that Saturday morning.

75. In our judgment the claimant succeeds in relation to allegation number two that there was an act of discrimination arising from disability.

Remedy

76. Before we give our conclusions on the question of remedy we are pleased to note that through their solicitor the respondent has formally apologised to the claimant. We are pleased to note that Mr Hayhurst has steadfastly remained in the Tribunal throughout notwithstanding our findings against him. We hope that the

claimant is able to, after this judgment, put these matters behind him and that he will be able to return and will be well received on that return.

77. In terms of remedy, we have heard the submissions from the claimant and we have heard from the respondent. We note that the Tribunal is compensating the claimant for the one finding in his favour. There is no doubt in our mind that this is in the lower band of Vento which places it somewhere between £800 and £8,400. Having regard to the submissions made by Mr Bailey-Gibbs and the cases he has quoted, and the submissions of the claimant, the Tribunal's view is that the appropriate award is the sum of £4,000 which will attract statutory interest of £368.22.

Employment Judge Sherratt

7 September 2018

REASONS SENT TO THE PARTIES ON

24 September 2018

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FOR THE TRIBUNAL OFFICE

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