EMPLOYMENT TRIBUNALS

Claimant: Ms H Gahunia

Respondent: Rotherham Metropolitan Borough Council

This has been a remote hearing, by cloud video platform (V): A hearing in person was not practicable because of the present restrictions due to Covid 19.

Heard at: Leeds

On: 16, 17 and 18 September 2020.
22 September (in chambers).

Before: Employment Judge D N Jones
Mr M Firkin
Ms AS Brown

REPRESENTATION:

Claimant: In person
Respondent: Mr E Beever, counsel

JUDGMENT

1. The respondent did not treat the claimant unfavourably because of something arising in consequence of her disability. The complaint of disability discrimination is dismissed.

2. The respondent failed to pay to the claimant the sums due upon the termination of her employment in respect of untaken leave in accordance with the Working Time Regulations 1998 and shall pay to the claimant the sum of £51.07 gross.

3. The respondent made unauthorised deductions from the wages of the claimant in respect of the 10% market supplement for flexible hours worked in the sum of £32.40 gross and shall pay to her that sum.

4. The respondent made unauthorised deductions in respect of a failure to pay sick leave at the full rate in respect of 10 and 11 October 2019, because it had wrongly attributed 22 April and 23 April 2019 as sick leave, leading the trigger point for a reduction to half pay entitlement to arise two days too early. It shall pay to the claimant the sum of £96.31 gross in respect of the shortfall for two half days pay.

5. The respondent made a further unauthorised deduction from the wages of the claimant in the sum of £89.54 net, as identified by the respondent's Payroll Manager and it shall pay to her that sum.

6. The claim for unauthorised deductions in respect of a 10% market supplement for a repayment with regard to the salary sacrifice scheme is not well founded and is dismissed.

7. The respondent was not in breach of contract in respect of a failure to pay to the claimant the final sums owing to her on 18 November 2020 and that claim is dismissed.

8. No itemised pay statement was provided at or before the payment made to the claimant on 20 November 2019, but the particulars in the statement dated 18 December 2019 are what should have been provided.

REASONS

Introduction and issues

1. After the withdrawal of a number of claims those remaining are for disability discrimination, contrary to section 15 of the Equality Act 2010 (EqA), failure to pay for untaken leave at the date of termination of her employment, breach of contract, unauthorised deductions from wages and a failure to provide an itemised a statement containing the necessary particulars.

2. The issues in the claim are identified in an annex to an order following a preliminary hearing before Employment Judge Cox on 21 August 2020. Each issue from the annex is analysed below.

Evidence

3. The Tribunal heard evidence from the claimant and from Mr Stephen Clark, formerly a solicitor employed by the respondent. The respondent called evidence from Ms Diane Stevenson, Payroll Manager, Ms Theresa Caswell, HR Business Partner, and Ms Bal Nahal, Head of Legal Services.

4. A bundle of documents of 97 pages was also submitted. Both parties adduced further emails and documents during the course of the hearing.

Background/Facts

5. The claimant is a solicitor. She was employed by the respondent in its Legal Childcare Team from 7 January 2019 until 6 November 2019. She resigned with notice by letter dated 6 September 2019. She had worked as a locum in the same department between November 2016 and August 2018. She was interviewed for the permanent role by Mr Concannon, service manager, on 16 June 2017. She was offered the post some 14 months later, on 15 August 2018.

6. The claimant worked compressed full time hours, four days per week. It had been agreed she could discharge much of her work from home. This was an adjustment which followed a request of the claimant at interview because of a medical condition.

7. It is accepted that the claimant is a disabled person. She has myalgic encephalomyelitis (M.E) – chronic fatigue syndrome – and hypothyroidism – an underactive thyroid condition. She attends regular treatment. M.E is a multisystem disease characterised by fatigue which is overwhelming and debilitating. During an episode the claimant is sapped of energy and finds even the simplest of tasks difficult. It is exacerbated by stress.

Analysis and Conclusions

Disability Discrimination

At the relevant time, did the respondent know, or could it reasonably have been expected to know, that the claimant was a disabled person as a result of chronic fatigue syndrome and hypothyroidism?

8. By section 15(1) of the EqA, 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.

9. By section 15(2) of the EqA, subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

10. The claimant informed Mr Concannon of these conditions at interview. She also spoke with the former service manager, Mr Williams about them. At a return to work meeting in May and June of July 2019, the claimant explained the condition to her line manager Lucy Barnes. This was the evidence of the claimant and we accepted it.

11. The respondent disputed it, on the basis there was no documentary confirmation of either condition and, had the personnel records been properly compiled, details of disabilities would have been expected to have been included.

12. Under section 15(2) of the EqA it is for the respondent to show that it did not know of the disability. We accepted the claimant's evidence. She was a genuine and consistent witness who presented with a clear recollection of the history of her employment. Although both parties explored circumstances relating to the information provided to the human resources department during recruitment, we did not consider it assisted on this issue.

13. We do not accept the submission of the respondent that it would have been reasonable to allow the adjustment because it was able to do so without further enquiry. We would have expected an employer to ask about an employee's medical condition when it considered whether the adjustments were appropriate. Not only would it be necessary to consider the suitable allocation or redistribution of its resources, a departure from normal practice may also have a consequential effect on other employees which would require justification. In addition, the responsible employer would need to be aware of a disabled person's medical circumstances in order to discharge an ongoing duty of care to ensure the workplace was safe. These considerations support our conclusions that the claimant had had the discussions about her disabilities with her managers, as she described, because we would have expected them to have made sure they were fully informed. It also follows that, even if the respondent had not been aware of the conditions, we consider it ought reasonably to have been.

Was the claimant's sick leave something which arose in consequence of her disability? (The respondent says that her sick leave was due to "stress", not due to her disability).

14. The respondent draws attention to the fact that the fit to work note refers to stress at work and not to either medical condition. Mr Beever submits there is no evidence which satisfactorily links the absence to the disability. He drew our attention to iForce Ltd v Wood UKEAT/0167/18, in which the Employment Appeal Tribunal held that the claimant's perception of what arose from the disability was not sufficient to discharge the evidential burden.

15. We accept, from her long experience of the condition and living with it on a day-to-day basis the claimant was well placed to explain why there was a connection between the stress she had in the last weeks of her employment and the disability. It accorded with our own knowledge of such health conditions, whilst recognising we are not medical experts. This is not a comparable situation to the above case law, in which the Tribunal found that the causal link was not, objectively, established. The claimant's belief that it was, in that case, a misperception albeit one reasonably held. There was no evidence in this case to suggest the claimant's belief was erroneous, in contrast to in iForce, in which the evidence established compellingly that there was no causal link. We find that it is probable that the claimant's absences

from 23 September 2019 until the end of her employment on 5 November 2019 were because of the disability of ME.

If it was, was the claimant in fact prevented from taking her outstanding contractual holiday entitlement during the notice period because she was on sick leave? (The claimant gave notice on 6 September 2019 expiring on 5 November 2019. Her sick leave began on 23 September 2019).

16. Paragraph 9 of the terms and conditions of employment concern leave entitlement and holiday pay. “In the case of those employees unable to take the balance of their leave entitlement in their notice period they may be paid for untaken leave on leaving the Council. However, this will be limited to the proportionate entitlement of statutory leave (28 days for a full-time employee or a full year). There is no entitlement to be paid for untaken annual leave in excess of statutory leave. The 28 day entitlement includes any public (statutory) holidays that have already occurred. Holidays will be taken by mutual agreement, except in those circumstances where agreement already provides that holidays are taken during particular periods.”

17. By regulation 13 of the Working Time Regulations 1998 (WTR) a worker is entitled to 4 weeks leave in each leave year and by regulation 13A to a further 1.6 weeks.

18. Regulation 14 of the WTR provides that where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired the employer shall pay a payment in lieu of leave which is that which has accrued proportionately, by reference to the period of the leave year which has expired, less any leave which has been taken.

19. Although the respondent was obliged to comply with the provisions of the WTR, the parties were free to agree any additional entitlement, including whether she would be paid for any which remained untaken if she left partway through the leave year. The contract states that any untaken contractual leave would not be paid, in contrast to the proportion of untaken statutory leave.

20. Before she became ill but after she had given notice, the claimant intended to take her remaining leave before she finished work. She had a number of court commitments and the department was busy so she felt a professional obligation in the early part of the notice period to work. When she became ill, she believed that she could not take the remaining period of notice as holiday leave because it became sick leave. She duly wrote to Ms Nahal and informed her that because she was to take sick leave from 23 September to 5 November she would no longer be taking any outstanding annual leave. Her holiday form included 10 outstanding days.

21. Mr Nahal spoke to the claimant and offered her standard counselling. She told the claimant that she would be prepared to discuss an early departure. Although she

did not specifically say the claimant would be paid in lieu, she said it was open to negotiation.

22. The claimant's holiday entitlement was for 29 days, three concessionary days and eight public holidays, being a total of 40 days. In accordance with contractual provisions, the respondent paid to her only the outstanding statutory entitlement in respect of untaken leave and not the contractual element. The specific details of the payment are set out below in respect of the claim for holiday pay.

23. We are not satisfied that the claimant was prevented by Ms Nahal or anyone else from taking her outstanding leave during the notice period while she was sick.

The claimant's belief that she could not do so and that the two were mutually exclusive was erroneous. It may be that she was aware of a concept that leave was for rest and relaxation and that, for the purposes of European law, that had a different characterisation to sick leave. That is why the respondent was obliged to treat statutory leave (or at least 20 days of it) differently to contractual leave because it derives from European law.

24. No such distinction arises in domestic law. There was no prohibition on taking the remainder of her leave during sickness absence and no employee of the respondent prevented her from doing so. It is true that Ms Nahal did not draw this to the claimant's attention but there was no obligation on her to do so. She knew the claimant had union representation who communicated with Ms Nahal and she did not know of the claimant's mistaken belief.

25. The claimant's misunderstanding about the right to take annual leave whilst sick undoubtedly led her to miss the opportunity of maximising her income, because from 10 October 2019 she was in receipt of only half sick pay. Nevertheless, that does not amount to her having been unfavourably treated by the respondent which created no impediment to her taking her annual leave in her notice period notwithstanding she was no longer fit to work.

26. The claim for disability discrimination is not established. The comparison of the notice period of her colleague Mr Clarke did not take this allegation any further.

27. It is unnecessary to consider whether there was justification by the respondent for the treatment.

Failure to pay accrued holiday pay on termination

<u>The claimant alleges that the respondent paid her less than what was properly payable to her the under the WTA and/or her contract of employment in relation to accrued holiday pay you on termination of employment.</u>

28. Section 13 (3) of the Employment at Rights Act 1996 (ERA) provides, "where the total amount of wages paid on any occasion by an employer to a worker

employed by him is less than the total amount of wages properly payable by the worker on that occasion (after deductions) the amount of the efficiency be treated but this Part as a deduction made by the employer, worker's wages on that occasion".

29. The contract of employment distinguishes between the right to be paid for statutory untaken leave and contractual leave, see paragraph 16 above. The claimant drew attention to the fact that the contract permitted the parties to carry over a proportion of untaken leave into the next holiday year. Whilst that may appear anomalous, it was open to the parties to make that agreement.

30. We are therefore satisfied that the claimant was not entitled to any remuneration for untaken contractual leave. There was a complexity ascertaining the proper calculation of statutory leave. That is because, upon a proposal suggested by the tribunal, including bank holidays as statutory leave would give a different calculation to excluding them or part of them.

31. The respondent submitted that the contract expressly included bank holidays which had been taken in contrast to bank holidays later in the leave year after the employee had left. This construction is supported by paragraph 9 of the terms and conditions of employment. Any doubt is dispelled in the annual leave guidance at section 11, which provides, "unlike annual leave, statutory leave is not subject the pro rata calculation for employees leaving or joining the authority partway through the leave year. Employees are only entitled to the statutory leave that fall within that period of working".

32. When Parliament chose to amend the WTR by the additional entitlement of 1.6 weeks, it no doubt reflected the eight days bank holiday that would be taken by a worker who undertook a five-day week. However, the amendment in section 13A did not specifically identify this extra period as relating to those specific bank holidays and an employer and employee are free to agree that the employee shall enjoy that period when they choose. For example an employee may agree with his employer that he should always work on the bank holidays but take the eight days on other occasions.

33. In the circumstances, it was open to the parties to agree which of the bank holidays would be earmarked, or attributed, to statutory leave which had been taken when calculating the balance of untaken statutory leave upon termination, provided that did not detract from the entitlement of the employee under the WTR. The attribution of bank holidays, or part of them to the contractual period of leave was permissible, as long as the employee was entitled to no less than 5.6 weeks of statutory leave, pro rata. (Statutory leave is to be distinguished from bank holidays and is a reference to the 5.6 weeks under the WTR. The use of the terms bank holidays and statutory leave are sometimes used interchangeably to refer to the eight days of public holiday, but that is not what is meant in the context of this discussion).

34. We were satisfied that the final approach adopted in closing submissions by the respondent was correct. The claimant had served 10 months of the year when her employment ended. Had she worked a full year she would have been entitled to 5.6 weeks under the WTR. The apportionment to time served of the leave year was 4.67 weeks. The working week was 37 hours. Her entitlement by way of hours rather than weeks was 172.79 (4.67 x 37). The claimant had taken 13 days of holiday and 4 bank holidays. Taken bank holidays were to be included in the computation of outstanding leave on termination, under the contract. Good Friday had not been included because the claimant worked Monday to Thursdays, compressed hours. Her working day comprised 9.25 hours. An employee who worked 5 days worked 7.4 hours a day.

35. In order to introduce parity, the contract provided for entitlement to be converted to hours otherwise an employee who worked the longer working day, as the claimant did, would receive a greater entitlement to holiday than a worker who had shorter hours and worked a five day week. Holiday which had been taken would be calculated by reference to the hours in the employee's actual working day; so for a worker on a five-day week, a day's leave reflected 7.4 hours whereas for a worker on four days, with compressed hours, a day's leave would be 9.25 hours.

36. The 17 days which the claimant had taken, when converted to hours amounted to 157.25 (17 days x 9.25 hours).

37. The balance of the untaken leave was 15.54 hours (172.79 hours -157.25 hours). The payment of accrued but untaken leave was made on 20 November 2019 and was reflected in the payslip of 18 December 2019. Ms Stevenson explained that 14.73 hours had been paid in respect of this entitlement.

38. There was a shortfall in the payment due of 0.81 hours (15.54 – 14.73). That amounts to £17.50 (£21.60 x.81).

39. No payment had been made for the contractual 10% market supplement on any of the statutory untaken leave. The claimant was entitled to an additional payment for that of £33.57 (15.54 hours x £21.60 x 10%).

40. The total outstanding sum is £51.07 (£33.57 + £17.50).

Breach of contract

The claimant alleges that the respondent breached her contractual entitlement to be paid on the 18th of the month when it paid her on 20 November rather than 18 November 2019.

41. Paragraph 5.2 of the terms and conditions of employment stated: "Monthly pay date is usually the 18th of each month unless the date falls at a weekend or bank holiday in which case the date is the previous normal working day".

42. The claimant says that the payment she received on 20 November 2019 in respect of accrued holiday pay for untaken leave, a payment for flexitime she had worked and expenses should have been paid on the 18th of the month, two days earlier, in accordance with the above provision.

43. We do not agree. The term 'monthly pay' reflects her entitlement to remuneration as it accrues from month-to-month. On 18 November 2019, that would be her monthly pay for November 2019. Her employment ended on 5 November 2019. Her monthly pay for November was nil because of a reconciliation which was reflected in the payslip of 18 November 2019.

44. The monies paid on 20 November 2019 related to an agreement she had reached with Ms Nahal in respect of flexitime, whereby she had worked in excess of 15 hours but not been able to take time in lieu, the sum of holiday pay for untaken leave and some other expenses. They were not 'monthly pay', but a computation of sums arising upon termination. There was no breach of contract in paying them after 18 November 2018.

Unauthorised deduction from wages

Two days half pay arising from the attribution of 22nd and 23rd of April 2019 as days when the claimant was off sick.

45. The claimant received full pay for these days, but had been recorded as being on sick by her manager. The contractual sick pay scheme entitled an employee to full pay when off work through sickness for a defined period of the year after which the rate was reduced to half. The claimant's entitlement to the full amount of sick pay was exhausted on 9 October 2019, during her last period of sick leave, when she only qualified for half pay.

46. Had the above two dates not been categorised as days when the claimant was off sick, the dates upon which her full pay entitlement would have reduced would have been two days later, on 11 October 2019.

47. 22 April 2019 was a bank holiday, Easter Monday. The claimant had not reported sick then. It was erroneously categorised as a sick day.

48. On 23 April 2019 the claimant contacted her manager to inform her that she was feeling unwell, would not be in the office and would be working from home. The timesheet records that she worked part of that day. Ms Stevenson clarified the policy of the respondent, which was that it did not categorise anything less than one day as sick leave, so that if an employee had worked part of the day that would be regarded

as a working day. The claimant was entitled to work from home and did so for part of 23 April 2019.

49. The respondent produced an email which she had sent to her manager Ms Barnes, on 23 April 2019 in which the claimant had stated that she had been unwell and was to see the doctor later that morning. It did not state that she was reporting sick. The claimant drew attention to some of her commitments which would require cover. She was off sick from 24 April 2019. The email did not undermine the claimant's account that she had worked at home on 23 April 2019.

50. The two days had erroneously been identified as sick days. This had the effect of the reducing the claimant's sick pay entitlement from full to half, two days prematurely.

51. Ms Stevenson has calculated that this would have led to an underpayment of £96.31 gross. We find that was an unauthorised deduction from wages.

10% market supplement for 18.5 hours salary sacrifice payment

52. Pursuant to a collective agreement, employees enjoyed three additional leave days at Christmas subject to the sacrifice of salary which was deducted from wages every month. Because the claimant left her employment on 5 November 2019 she had sacrificed salary in respect of these leave days which she was unable to take later in the year. She sought repayment of the sacrificed salary.

53. The respondent quantified this at 18.5 hours, on the basis that the agreement related to a standard 7.4 hour day. That would have been the equivalent of 22.2 hours for the full three days, but reflected the fact the claimant had worked 83% of the year, this was reduced to 18.5 hours. The respondent reimbursed the claimant for these hours at her hourly rate of £21.60. The claimant states she should have additionally received the 10% market supplement which would have been £39.60. She says that is because had she taken the leave that would have been its value to her.

54. The payslips record a deduction of £39.92 a month of sacrificed salary. This payment reflects the hourly rate. There is no deduction, or sacrifice, of the 10% market supplement. The respondent has refunded the claimant for the sums she has sacrificed. She chose to leave and not enjoy the benefit of the value, as she quantifies it. A refund of the actual monies paid was appropriate. They did not generate any right to the additional value which it would have had to the claimant had she stayed.

10% market supplement for 15 hours of overtime paid in November 2019

55. Although referred to as overtime this concerned a flexitime scheme operated by the respondent which entitled the employee to work up to 15 additional hours within a specified period which could then be taken in lieu. The claimant worked in excess

of the 15 hours and the managers had not recorded and supervised this in accordance with the policy.

56. The respondent says it would have been entitled to refuse to make any payment but that Ms Nahal acceded to a request of the claimant to recognise the fact she had been unable to take time off in lieu. In evidence Ms Nahal recognised there had been some shortfall on the part of the managers. In the circumstances, she sent the claimant an email in which she agreed, "the excess of 15 hours, which is what you could have carried over, will be paid".

57. We agree with the claimant that objectively viewed, the common intention of the parties was that the 15 hours would reflect the rate of remuneration paid to the claimant. That would not only be at her hourly rate of £21.60, but would also carry the 10% market supplement. This was not an ex gratia payment. It was paid in settlement of the claimant's assertion of an entitlement and one which Ms Nahal was prepared to recognise in the terms set out in the email. For these reasons we find the additional sum of £32.40 is due as it was an unauthorised deduction from the claimant's wage.

Was the claimant paid the full rate of sick pay for the period from 23 to 30 September 2019 and at the half rate for 1 to 5 November 2019?

58. The claimant is unclear if she received these payments following the corrections made on 18 November 2019, reflected in the payslip of that date. This arose because she had received full pay for the whole of October and the first five days of November, when entitlement should have reduced to half from 10 October (subject to the error we have set out above concerning the 22 and 23 of April).

59. It is not uncommon for such corrections and reconciliations to take place. The claimant is paid on the 18th of the month for the entirety of that month, so it cannot be foreseen if an employee would be absent off sick after the 18th, but the employee would already have received their pay for the balance of that month. That said, one would have expected the claimant's manager to have submitted the information that the claimant was off sick before 5 October 2019 cut-off date, so although the September dates might have needed to be recalculated, pay for the month of October 2019 should have caught up with the new circumstances. Nothing turns on this, however.

60. Ms Stevenson set out a detailed explanation of the reconciliation and how it had been calculated. The claimant did not present any alternative analysis or expose any error in the corrected payment. Sick pay at full rate for the total period of absence from 23 September 2019 to 5 November 2019 was £4,977.85, known as an absence payment. The five days in November were included in this computation initially, again on the premise it was paid at the full rate. The absence payment which was due and should have been paid for the full period was £3,456.11, having regard to the change to half pay from after 9 October 2019. We are satisfied this is an accurate calculation. The differential of £1,521.74 corresponds to the excess of half pay for

26 days period from 10 October 2019 to 5 November 2019. The market supplement reconciliation for the same period was included separately on the 18 November 2019 itemised wage slip.

Itemised pay statement

Did the respondent fail to provide the claimant with an itemised wage statement at or before the time of the wage payment on 20 November 2019?

61. Section 8 of the ERA provides that a worker has the right to be given by his employer, at or before the time which any payment of wages or salaries made to him, an itemised a statement. Section 8 (2) provides that the statement must contain particulars of the gross amount of wages or salary, the amount of any variable and its deductions, the net amount of wages or salary payable, where different parts of the net amount payable in different ways, the amount of method payment and a provision in respect of salary which varies by hours work, which does not arise in this case.

62. The respondent did not provide the claimant with an itemised statement at or before the payment of wages was made on 20 November 2019, as was required. It provided a wage statement on 18 December 2019 in respect of that payment. The respondent states that was because the payment made on 20 November 2019 was early, by fast payment. The claimant had raised a query about why she had not been paid anything on 18 November 2019 and Ms Boyle, of HR, apologised for an administrative error and stated that payment would be made no later than the end of 20 November 2019. This led to the understandable conclusion of the claimant, that wages had not yet been paid.

63. The correct position, as explained by Ms Stevenson, was that no payment was in fact due on 18 November 2019 because of the recoupment of the sums overpaid in respect of sick pay and offsetting other sums which were outstanding from the claimant, together with recalculation of tax and other deductions. The payment which was made on 20 November 2019 relating to the agreement in respect of the flexitime hours, holiday pay outstanding at termination and reimbursement of some other incidental matters and tax calculations was not paid late, as it was not due on 18 November 2019 as monthly pay, for the reasons explained in paragraphs 41 to 44 above.

64. The pay statement of 18 December 2019 should have been provided at or before the time the payment was made on 20 November 2019, but its particulars were sufficient to comply with the provisions of section 8(2) of ERA.

Other unauthorised deduction

65. Ms Stevenson identified an underpayment of £89.54 net, having manually calculated what payments would be due to the claimant and therefore owed by the respondent between September 2019 and December 2019.

66. We have made orders for payments of the unauthorised deductions as gross payments, save for the one identified by Ms Stevenson, in paragraph 65.

67. The claimant is entitled to payment after deductions, provided the respondent accounts to HMRC for any liabilities thereon.

Unanimous decision

68. All members of the Tribunal agreed on the above findings and conclusions.

Employment Judge D N Jones

Date: 30 September 2020