



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000466/2023

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Held in Glasgow on 11, 12 and 13 March 2024

**Employment Judge Campbell
Members Mr R McPherson and Mr J Gallacher**

10 **Mr P Phillips**

**Claimant
In Person**

15 **Royal Mail Group Limited**

**Respondent
Represented by:
Mr A Gibson -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous judgment of the tribunal is that:

1. The respondent discriminated against the claimant by reason of something arising from a disability contrary to section 15 of the Equality Act 2010;
2. The respondent is ordered to pay the claimant £4,000 as compensation for injury to feelings, with interest at 8% per annum from 21 August 2023;
- 25 3. The respondent made unlawful deductions from the claimant's wages contrary to section 13 of the Employment Rights Act 1996; and
4. The respondent is ordered to pay the claimant £2,125.18 net of any lawful deductions for income tax and National Insurance contributions.

REASONS

30 **General**

1. This claim relates to the claimant's employment by the respondent which began on 26 October 2021 and at the time of this hearing was continuing. The claimant worked as a mail delivery driver.

2. The claimant alleged that he qualified as disabled under section 6 of the Equality Act 2010 ('EQA') by virtue of a condition characterised as anxiety and depression. He claims that the way he was treated, principally in relation to events connected to a transfer to another depot in August and September 5 2023, amounted to discrimination arising from disability under section 15 of EQA. The respondent did not accept he met the statutory test of disability, and in any event denied that the claimant was unlawfully treated had he been disabled.
3. The claim was heard over three days. The claimant gave evidence himself. 10 On the respondent's behalf evidence was heard from Mr Iain Dunn, the respondent's Customer Operations Manager. The tribunal then deliberated to reach a decision in relation to the claims.
4. The respondent provided an indexed bundle of documents. The claimant provided some additional documents which were added to the end of the respondent's bundle to produce a single volume. Numbers in square brackets 15 below refer to page numbers of the combined bundle. The claimant also provided a schedule of loss and a disability impact statement, as directed at a previous case management hearing.
5. After evidence was heard both parties provided a written note of closing 20 submissions and were given the opportunity to supplement them orally. The submissions are not referred to in detail below, but were considered by the tribunal in reaching its decision.
6. Each witness, including the claimant, was found generally to be credible and reliable. The claim did not involve a large number of disputed facts, but rather 25 focussed more on whether the largely agreed events involved unlawful discrimination or were acceptable practice. Both the claimant and Mr Dunn were found to be candid and open in their answers to questions. Any conflicts in the evidence are discussed in more detail in the findings of fact below.

Applicable law

1. Section 6 of EQA contains the statutory test for disability in the sphere of discrimination law. A person will be disabled in that sense if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. The various components of that definition are discussed in more detail below within the section headed 'Discussion and decision'.
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2. Section 15 of EQA renders discrimination arising from disability unlawful. That will occur when an employer discriminates against its employee by treating them unfavourably because of something that arises as a consequence of their disability. The onus is on a claimant to show that. If the employer treats the employee in that way, they will have acted unlawfully unless they can show that the treatment is a proportionate means of achieving a legitimate aim, or in other words that the discrimination is 'justified'. The onus will be on the employer if they wish to argue that is the case.
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3. By virtue of section 13 of the Employment Rights Act 1996 ('ERA') a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not. A complaint can be made about a series of deductions if the situation is repeated.
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4. Under the Working Time Regulations 1998 and in particular regulation 13, every employee is entitled to a minimum period of annual leave. In many cases employers provide more generous entitlements to their employees. Employees are entitled to be paid when taking annual leave. Where an employee receives regular, fixed pay for their work, they are entitled to a normal week's pay for each week of leave taken.
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Legal issues

The legal issues to be decided by the tribunal were as follows:

Disability status

1. **Did the claimant have a disability in terms of section 6 of EQA at the relevant time?** The relevant time is the period between 21 August and 14 October 2023. The claimant asserts that he was disabled by virtue of anxiety and depression.

Section 15 of EQA – discrimination arising from disability

2. **Did the respondent treat the claimant unfavourably?** The claimant argues that it did so by paying him statutory sick pay between 25 August and 14 October 2023 rather than full pay.
3. **If so, did it do so because of something arising in consequence of the claimant's disability?** The claimant argues the treatment was because he was unable to work between the above dates as a result of his claimed disability. The respondent argues that any treatment was for a different reason related to the claimant's willingness or ability to travel to a new depot.
4. **If so, was such treatment a proportionate means of achieving a legitimate aim?** The respondent argues that it was, because the benefit of full sick pay is a generous one and has to be responsibly managed to ensure it is not over-used or exploited.

Section 13 ERA – unlawful deduction from wages

5. **Did the respondent make a deduction or series of deductions from the claimant's pay?** The claimant argues that the respondent did so by paying less than full pay for his period of absence, 21 August to 14 October 2023.
6. **If so, was/were such deduction(s) authorised by way of a statutory or contractual provision?** The respondent argues it was so authorised under the rules of its sick pay policy, the claimant argues it was not.

Working Time Regulations 1998 – regulation 13 – entitlement to annual leave

7. **Did the respondent deny the claimant the opportunity to take paid annual leave which he had accrued in March 2023?** The claimant argues that he was prevented from taking annual leave he had booked in March 2023 because a disciplinary investigation was ongoing. The respondent argues that it made clear to the claimant he was still entitled to take those days as holidays.

Findings of fact

The following findings were made as they are relevant to the legal issues.

Introduction

1. The respondent is a corporate entity which delivers mail throughout the UK. The claimant is an employee of the respondent. At the time of the relevant events, and this hearing, he was a delivery driver. He delivered mail with the use of a van provided by the respondent. His service with the respondent began on 26 October 2021. He was provided with a number of statements of written terms, the most recent in April 2022 [R63-78]. He was still employed at the time of this hearing.
2. The claimant was originally based at the respondent's Inverclyde delivery office, which is in Greenock. He lived in Greenock, approximately four miles and twelve minutes' drive from the depot. He had the use of the respondent's van to travel to and from work as well as for carrying out his deliveries.
3. On 19 December 2022 the claimant suffered a panic attack at work and was absent from work for a period of approximately two weeks as a result.

Medical position and disability status

4. The claimant suffers from anxiety and depression. He experiences symptoms which vary over time, and are not constantly present. The symptoms include low mood and adverse reaction to stress by way of increased heart rate, shaking, cold sweats and dizziness. The consequences include becoming overwhelmed by everyday situations, becoming debilitated to the point of not

being able to drive or work, and loss of concentration, focus and ability to communicate. He has experienced the symptoms since at least 2013. In more recent years, when becoming especially anxious he would occasionally have a panic attack. Between December 2022 and August 2023 he experienced
5 three or four panic attacks.

5. The claimant provided a disability impact statement as ordered by a judge at a previous case management hearing [115-116]. He also provided extracts from his GP records [117-128]. He attributes the beginning of his condition to events around 12 August 2013 [124] when his GP recorded '*significant low mood, struggling*' after a change in his circumstances which left him as the
10 main carer for his young children.

6. In August 2013 he was prescribed Citalopram (50 to 100 mg per day) but tried to reduce his intake down to zero as he felt they did not work.

7. The claimant continued to experience depression and anxiety to varying
15 degrees, contacting his GP sporadically until October 2015 when he was prescribed fluoxetine, initially 20mg per day increasing to 40mg in March 2016, which he continues to take today. The medication helped stabilise his symptoms and his GP visits became less frequent.

8. The next entry of relevance in his medical records is on 15 July 2021 when
20 he was reported to be again struggling at work. In August 2021 he was prescribed Sertraline, a different type of SSRI medication to fluoxetine, after attempting unsuccessfully to return to work. He tried to stop taking Sertraline in August 2022 but by December of that year he was reporting low mood and stress, and agreed to restart it. This was some two weeks before his first panic
25 attack in employment with the respondent.

9. In December 2022 he was given Propanolol, a beta blocker but experienced unpleasant side effects.

10. He has tried to reduce his intake of prescribed medication but has tended to experience a return of low mood and other symptoms after doing so.

11. The tribunal noted the following entries in the claimant's medical records to be of particular relevance (summarised):

- a. 05/01/2011 – Low mood and stress at work (new baby), not able to go to work;
- 5 b. 06/01/2011 – no evidence of depression, patient agrees with this and will attend counselling and occupational health through work;
- c. 02/05/2012 – recurrence mood issues, partner postnatal depression, discussed options, prefers pharmacological intervention – Sertraline Hydrochloride tablets prescribed;
- 10 d. 12/08/2013 – significant low mood, struggling, change in circumstances, has become the main carer for his toddlers. Tearful, no suicidal ideas, affect flat, mood objectively low; MED3 issued for 3 weeks, stress related;
- e. 29/08/2013 – feels depression symptoms for longtime and keen to consider rx and counselling; try SSRI and review 4/52 (i.e. after 4 weeks), counselling – external agencies discussed; Citalopram Hydrobromide tablets to be taken each day;
- 15 f. 27/09/2013 – review mood, much improved with 4 weeks of Citalopram, feels motivation and back to normal; add SSRI to repeat prescription and advise minimum 1 year review;
- 20 g. 16/10/2013 – Depression interim review, depression medication review;
- h. 15/10/2015 – long discussion regarding mood – has been struggling for many months, mood low, suicidal ideation (no intent), insomnia, EMW (early morning waking), anhedonia, tearful, depressed; Fluoxetine Hydrochloride prescribed, 20mg, 1 cap daily;
- 25 i. 11/11/2015 – Feeling much brighter on fluoxetine, still EMW but anhedonia, tearfulness and suicidal ideation settled;

- j. 08/12/2015 – MED3 issued, not fit for work, diagnosis depression – 4 weeks;
- k. 07/01/2016 – MED3 new statement issued, not fit for work, diagnosis depression – 4 weeks;
- 5 l. 05/02/2016 – as for 07/01/2016;
- m. 02/03/2016 – Doesn't feel has fully improved with fluoxetine yet – degree of detachment perceived but notices irritability reduced, less short tempered. Distractible, EMW and insomnia; discussed online self-help resources, mindfulness and increase fluoxetine to 40mg and review in 6 weeks;
- 10 n. 15/07/2021 – struggling with work, working from home for a call centre, has raised his concerns re his stress levels with management but not really getting any support, MED3 new statement issued for 2 weeks;
- o. 22/07/2021 – further MED3 issued for 2 weeks;
- 15 p. 03/08/2021 – struggling with MH – tried to go back to work yesterday but really struggled and today couldn't face it. Teary and not himself at all. Keen to try medication at this stage, had Citalopram in the past and felt very spaced out, disconnected on it. Agreeable to Sertraline. Feels he can't stay off work long due to money worries, trying desperately to find another job; Sertraline Hydrochloride tablets prescribed, 50mg, one each day; MED3 issued for 1 week;
- 20 q. 02/12/2022 – mood down, started new job and stressful; stopped Sertraline himself in August gradually, would now like to go back on it, agreed re-start Sertraline;
- 25 r. 19/12/2022 – had a panic attack today at work, resolved in 10 mins, never had before; feel very stress at work;
- s. 28/12/2022 – new MED3 issued 19/12/2022 to 02/01/2023.

Disciplinary process

12. The claimant was involved in an altercation with another driver on 24 February 2023 at the depot. He was suspended and the matter was investigated under the respondent's disciplinary policy and procedure. He was interviewed on 27 February and again on 20 March 2023. The investigation concluded in early July 2023 and the claimant attended a disciplinary hearing on 10 July 2023 with Paul Corrigan, Customer Operations Manager and Office Manager. Mr Corrigan made a finding that the claimant had acted aggressively towards his colleague on the day in question, and that his conduct was unacceptable. He ordered that the claimant be given a twelve-month suspended dismissal and transferred to the respondent's Erskine delivery office. The Erskine depot is just under 18 miles from his home, involving a drive of 30 to 35 minutes. The claimant would be performing the same duties there as he had at the Inverclyde depot.
13. The claimant appealed against the transfer element of the sanction, which was considered by another manager named Alan Rankin. The claimant attended an appeal hearing on 30 August 2023. He explained that he accepted his suspended dismissal, but could not travel to work at Erskine as was unable to arrange any feasible way of travelling there. He said that his family had one car which his wife needed for work, and that by using public transport to go to and from Erskine he would be commuting for around four hours each day. He explained that he had already contacted the Erskine depot to ask whether he could be allocated his own van, but had been told that he could not. For operational reasons it was not possible for the Inverclyde depot to continue allowing him to use its van if he moved to another depot.
14. On 15 September 2023 Mr Rankin confirmed to the claimant that his appeal against the transfer of depot was declined. He had explored the public transport options and noted that there was a bus service which travelled between Greenock and Erskine, taking around 30 minutes for the journey and costing £20 for a weekly ticket. He was satisfied that the sanction was appropriate and that the claimant could comply with it.

Periods of illness and annual leave

15. The respondent has a 'Sick Pay and Sick Pay Conditions Policy' [106-111]. For employees recruited on or after 2 June 2002 and who have completed a year of service it provides 'full-rate sick pay' for up to 26 weeks of absence, on certain conditions. One of those conditions is that the respondent is satisfied that the absence *'is necessary and due to a genuine illness'*.
16. Before being suspended on 27 February 2023, the claimant asked to take a period of annual leave in March, and this was approved. On 9 March the claimant asked Mr Dunn by WhatsApp message if his suspension would override the leave he had booked. Mr Dunn replied the following day to say that the annual leave would take precedence as it had already been booked [98]. However, the claimant did not go on holiday anywhere because he believed that the respondent had the power to call him back into the process at any time. He remained at home.
17. On 3 April 2023 the claimant took part in an occupational health counselling session by telephone. The respondent's occupational health providers prepared and sent to the respondent an interim report on the following day [81-83]. Among other matters the report mentioned:
- a. That the claimant had *'been struggling with long term anxiety and depression'*, which was generally well managed by medication, and dealing with difficult issues in his personal life;
 - b. He had been struggling with stress related to work due to an ongoing investigation which he feels has increased his depression and anxiety symptoms;
 - c. He was believed to be unfit to work at that time;
 - d. No clear return date could be suggested at that time;
 - e. Further counselling sessions were offered to the claimant and a further report would be prepared after last of those sessions;
 - f. A stress risk assessment in his workplace was recommended; and

g. It was not possible to predict whether, when or how any further such episodes would occur.

18. The practitioner preparing the report expressed the view that the claimant met the statutory definition of disability, although did not explain why beyond saying that the condition had lasted for more than 12 months.
19. The claimant attended further counselling sessions, the last of which was on 16 May 2023. A further short report was prepared by the occupational health provider on that date. It indicated a slight improvement in his symptoms. He was believed now to be fit to return to work.
20. The claimant asked for, and was granted, four weeks of annual leave in July and August 2023 pending the outcome of his appeal. The leave period ended on Friday 18 August 2023 and Mr Dunn contacted the claimant to notify him that he should report to work at the Erskine depot beginning on Monday 21 August. He said that if the claimant did not do so he would no longer be paid and would risk further disciplinary action.

Discussions with Mr Corrigan and Mr Dunn late August and early September 2023

21. In the evening of Sunday 20 August 2023 the claimant had a panic attack. He was experiencing a level of stress in his personal life and believed it was compounded to by having to go to work in Erskine the next day without a practical way of doing so. By this point he knew that to commute in either direction would involve a bus journey of around 40 minutes and a walk of around 30 minutes at the Erskine end.
22. On the morning of 21 August 2023 the claimant telephoned Mr Dunn, mentioned he had had a panic attack the evening before, and said he was '*not in a good place*' mentally and did not feel fit to go to work in Erskine. He referred to the uncertainty of his disciplinary appeal '*hanging over [him]*'. He indicated that this was a recurrence of poor mental health which he had suffered from in the past. He said it was compounded by the uncertainty

around the appeal process. He had also telephoned the Erskine depot to convey the same message.

23. Mr Dunn understood the claimant to be saying that it was simply the unconcluded appeal which was causing the claimant stress. Later that morning Mr Corrigan sought advice from a Human Resources colleague who said that as the claimant's issue appeared to be related to that process, he could not be treated as medically unfit to work and therefore was not eligible to receive full-rate sick pay for any days not worked. Mr Corrigan telephoned the claimant back to say he was being treated as *'uncooperative'* under the respondent's sickness absence policy. He would not be paid any sick pay. An entry in the respondent's absence record for the claimant reads *'Sick Non Cooperation'* for the period 21 August to 8 October 2023, a total of 49 calendar days [79].

24. In the afternoon of 21 August 2023 the claimant emailed Mr Corrigan to complain about the decision and to intimate that he had contacted his trade union. He said he had no other option and felt that the decision was another additional pressure added to an already fraught and continuing situation. Slightly later that afternoon the claimant's trade union representative, Tam Dewar, emailed Kevin Barclay, Mr Dunn's line manager, to raise the claimant's situation [130]. He said that the claimant suffered from depression and anxiety which may qualify as a disability under the Equality Act, and that he would need to use two forms of transport to travel to Erskine which was also causing him anxiety. He added that the stopping of the claimant's sick pay was causing further anxiety, and asked that this be considered.

25. The claimant was paid weekly each Friday. On Friday 25 August 2023 he received no pay. He emailed Mr Corrigan to complain. At some point Mr Corrigan came back to say that the decision had been reviewed and the claimant would be paid, but only statutory sick pay. It was paid the following Friday, 1 September 2023 as payslips showed [87-88].

26. Also on 25 August, the claimant consulted his GP who certified him as medically unfit to work and issued a fit note, backdated to 14 August 2023.

The reason for absence was given as '*anxiety and depression*' [84]. The claimant gave the note to Mr Dunn in person.

Meeting on 4 September 2023

27. Mr Dunn sought internal HR advice in relation to the claimant's situation on 1
5 September 2023. He was advised to meet the claimant and discuss in more
detail the reason why he was not going to work. HR told Mr Dunn that if the
primary reason for the absence was linked to the penalty of a transfer of office
and the appeal process in relation to that, he should not be treated as absent
through genuine illness, and not be eligible for full-rate sick pay. Alternatively,
10 if the absence was considered not to be linked to the 'conduct case' then it
was appropriate to pay full pay.
28. The claimant agreed to meet Mr Dunn on 4 September 2023. He believed that
this was solely to conduct a stress risk assessment, which had been
recommended in the occupational health report prepared on 4 April 2023. In
15 the meeting Mr Dunn asked the claimant questions about the reason why he
was absent. The claimant explained that the transfer to Erskine and the
absence of a viable means of travelling to and from there were contributing to
his anxiety. When asked whether he would have been able to work at Erskine
if he had been given a van, he said he would. Mr Dunn interpreted this as the
20 claimant saying the reason for his not reporting for work at Erskine, and
remaining on absence, was that he had not been provided with a van. He
believed that it was the first of the two scenarios described by HR which
existed, and thus the claimant did not qualify for full-rate sick pay.
29. The claimant felt aggrieved at how the meeting had been conducted on
25 reflection, as he formed the view Mr Dunn had been seeking responses from
him that could be used to deny him sick pay and not focussing on carrying out
a risk assessment for his benefit.
30. Mr Dunn discussed the position with a colleague and then called the claimant
on 8 September 2023. He said that the respondent would not change its
30 position as conveyed by Mr Corrigan previously, and so only statutory sick
pay would be paid. The claimant became upset during the conversation. He

said it would cost him a third of his pay to travel to and from work. In addition, the extra travelling time and the impact on his childcare responsibilities created difficulty. Mr Dunn by this time had looked at the options involving public transport himself. He had identified a bus service which cost £21 per week. The claimant's home address was close to the bus depot in Greenock. The service took around 40 minutes to get to Erskine, and there would be a walk of around 30 minutes from the drop off point and the Erskine depot. It did not run early enough on Saturdays for the claimant to get to work on time by using it.

31. Mr Dunn also wrote to the claimant on 8 September [104-105]. He referred to the sick pay policy and emphasised the condition that *'The business must be satisfied that an employee's absence is necessary and due to genuine illness.'* He said that condition had to be met for an employee to receive either enhanced sick pay or even Statutory Sick Pay. He went on to say:

'Now that your work-related stress issues [sic] have been fully explored and discussed and it has been explained to you that you are unable to change the outcome of the conduct hearing which will be reviewed as part of the appeal process, then it is my view that your absence is no longer necessary, and you should be looking to return to work by 14/09/23. Unfortunately, if a return to work does not occur by this date, I may not be able to satisfy myself that your absence is necessary and due to genuine illness, a criterion which must be satisfied for Royal Mail sick benefits to be paid.'

Mr Dunn said that he would call the claimant on 11 September 2023 at 12 noon to discuss his return to work, and if the claimant was unable to speak at that time he should let Mr Dunn know beforehand.

32. The claimant emailed Mr Dunn, also on 8 September 2023 [100-102]. He said he wanted to raise a grievance as a result of Mr Dunn's actions. The highlighted three areas of complaint:

a. Withholding of pay because he was off work due to poor mental health;

- b. 'unfair and potentially discriminatory treatment'; and
- c. Withholding holidays.

He expanded on each of those subjects in a number of bullet points.

- 5 33. On 11 September 2023 Mr Dunn telephoned the claimant. The claimant said he was unsure whether he would be well enough to return to work, and would be consulting his GP in the coming days. He again said that the uncertainty caused by his pending appeal was contributing to his stress.
- 10 34. The claimant again consulted his GP on 14 September 2023 and was issued with a further fit note, to run until 28 September. The cause of absence was again 'anxiety/depression' [85].
35. As stated above, the outcome of the claimant's disciplinary appeal was issued on 15 September 2023.
- 15 36. The claimant met with Mr Corrigan on 20 September 2023 to discuss his grievance. Mr Corrigan accepted that it was not correct to treat the claimant's absence as '*unauthorised*', but that it was '*unnecessary*'. He offered the claimant the temporary use of a van to travel to Erskine once his fit note expired, so that he could at least try out working there and explore options in relation to working patterns and travel. This would also allow the claimant to resume being paid.
- 20 37. The claimant received a further and final fit note from his GP on 28 September 2023, running until 12 October 2023. This was not produced, but was referred to in the claimant's GP records [118]. The cause of absence continued to be described as 'anxiety/depression'.
- 25 38. The claimant moved to the Erskine depot on or around 14 October 2023. He is able to commute through a combination of his wife driving him when able, and having temporary use of a van allocated to the Erskine depot. No further issues between the claimant and the respondent were reported.

Discussion and decision

Was the claimant disabled?

39. The first issue for the tribunal to consider was whether the claimant was disabled under section 6 of EQA. That requires that at the relevant time the claimant would have a physical or mental impairment which had a substantial and long-term adverse effect on his ability to carry out normal day to day activities.
40. As is made clear by the Employment Appeal Tribunal in ***Goodwin v Patent Office [1999] IRLR 4***, an employment tribunal should approach the four key questions relating to disability status in order. The questions are:
- a. Does the claimant have a physical or mental impairment;
 - b. Does the impairment have an adverse effect on their ability to carry out normal day-to-day activities;
 - c. Is that effect substantial; and
 - d. Is that effect long-term?
41. It was later added in ***J v DLA Piper UK LLP UKEAT/0263/09*** that it can in some cases be helpful to consider the effect of an alleged impairment before deciding whether there is an impairment. This may be so particularly in cases involving a claimed mental impairment which is disputed by the employer.
42. The onus is on the claimant to establish that each factor was present at the material time, namely August 2023 onwards. He submits that he has met the requirements of the Act since around 2013.
43. As well as the provisions of EQA, the tribunal took into account the Government guidance document on 'matters to be taken into account in determining questions relating to the definition of disability' ('Guidance').

Physical or mental impairment

44. It is the impairment itself which matters in a legal sense rather than the existence of a medical condition by name, or a diagnosis. In other words,

'anxiety and depression' could amount to a mental impairment or not depending on the details and circumstances of the particular case.

45. The Guidance suggests that the term 'impairment' should be given its ordinary meaning (paragraph A3).

5 46. As stated above, it is for the claimant to show that he had a mental impairment at the material time. The respondent denies that he had. The Guidance recognises that impairments can exist in different ways, and specifically gives as an example:

- 10 • 'Mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders, bipolar affective disorders, obsessive compulsive disorders, personality disorders, post traumatic stress disorder, and some self-harming behaviour;' and
- 15 • 'Mental illnesses such as depression and schizophrenia' (paragraph A5).

47. There is sufficient evidence in this case to establish that the claimant had a mental impairment. He had been diagnosed with anxiety and depression by his GP which, although considered initially to be triggered by specific life events, continued and was still present at the time of this hearing, in other words to a greater or lesser extent for some ten years. The effects of the condition constitute an impairment. They detrimentally affect the claimant's day to day life.

48. The claimant experienced mental impairment by way of depression and anxiety since at least 2013 but it is necessary to consider whether and for how long its effects have had a substantial effect on his ability to carry out normal day to day activities. The Guidance (paragraphs B12-17) makes clear that any treatment should be disregarded when making that assessment, unless the treatment results in a permanent improvement. In the claimant's case this means that it is the effect of his condition without medication which should be considered.

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49. According to the claimant's own experience, supported by his medical records, he has gone through a pattern since around May 2012 of being prescribed antidepressant medication in response to low mood, his condition being stabilised, reducing or stopping the medication, then experiencing further episodes resulting in a return to his GP and the prescription of more medication. It took him a period of years to appreciate the need for a balance, which involves taking at least some medication.

Effect on normal day-to-day activities

50. EQA does not define 'normal day to day activities'. The Guidance says that in general they are 'things people do on a regular or daily basis'. Examples given there include having a conversation, preparing and eating food, carrying out household tasks and taking part in social activities. They can also include general (but not necessarily more skilled or specialised) work activities such as interacting with colleagues, following instructions, driving and following a timetable or shift pattern. The claimant's evidence points to each of those activities being adversely affected at various times.

51. The Guidance provides examples rather being prescriptive. The claimant was able to provide evidence of a number of affected activities which are normal day to day activities. They were affected by his anxiety and depression. It is therefore accepted that the claimant was adversely affected in his ability to carry out normal day to day activities by his alleged impairment.

Substantial effect

52. The effect of the alleged impairment must be substantial. Section 212 of EQA confirms that substantial in context means 'more than minor or trivial'.

53. The effects of the claimant's impairment are deemed to be substantial on the evidence in this case. Although the most extreme effects were not continuous, they were substantial when they occurred. Again, the tribunal was mindful of the requirement to discount the alleviative effect of medication, and consider what the position would most likely have been in its absence. The effects

ranged from increased difficulty and taking longer to participate in regular activities to being temporarily debilitated.

54. The tribunal accepted on the basis of the available evidence that the claimant had suffered from a mental impairment and that it had an effect on his ability to carry out normal day to day activities at certain times, but not continuously or to a constant degree. The Guidance clarifies that if such an effect ceases, it is to be treated as continuing if it re-occurs, or is likely to do so – paragraphs C5 and C6. The claimant, being in such a situation, must be treated as having suffered from the relevant impairment in a legal sense since at least as far back as 2013, even if the effects were not the same, or present at all, on every single day since then.

Long term effect

55. Long term in this sense equates to having lasted at least 12 months, or being likely to last 12 months at the time the test is applied, or being likely to recur or to last for the remainder of the individual's life.
56. There is evidence from GP records and the claimant himself that he was affected by his impairment as far back as 2013, although it became more acute in late 2015 and early 2016.
57. Importantly, it is the substantial effect of the impairment which must be shown to be long term, not the underlying condition itself, which may have lasted that long but with a lesser effect. The claimant was substantially affected by his impairment since 2013. Its effect was more than minor or trivial since then, especially when evaluated without the various types of medication he was prescribed.
58. Based on the evidence provided, the tribunal considered that on the balance of probability the claimant's condition had a substantial effect on his normal day to day activities from August 2013. He met the statutory test of disability from that point.
59. It was suggested by the respondent that the lengthy gaps between appointments related to mental health in the claimant's GP history mitigated

against the existence of a condition which could be sufficiently substantial and long-term in its effects to amount to a statutory disability. The claimant put this down to his ability to manage his medication, so that only in the most extreme circumstances did he have to resort to his doctor. The tribunal reached the view that this was the more probable interpretation of the evidence.

Section 15 – was there discrimination by reason of disability?

60. Mr Dunn accepted in cross-examination that that the claimant's inability to travel to work at Erskine could compound his poor mental health and make it worse. He nevertheless saw that as unavoidable, as the sanction had been imposed, it had not (yet) been reversed on appeal, and it was the responsibility of any employee to arrange the necessary travel to and from their place of work.

61. The claimant was candid in relation to a number of events in the relevant timeline. He accepted responsibility for his aggressive conduct towards his colleague in February 2023 and did not seek to attribute this to any medical condition. He agreed that had he been given the continued use of a van in July 2023 when the sanction was imposed, he would most likely have been capable of transferring to Erskine pending his appeal against it. Indeed, he said that had he been allowed the continued use of a van he may not have appealed the disciplinary outcome at all. However, he equally made clear that had he been offered a van on, say, 4 September 2023 he could not have immediately reported to work in Erskine, as his mental health had declined by then, he was waiting to be certified as fit to work again and he was expecting a risk assessment to be carried out.

62. The tribunal accepted the claimant's evidence that he did not feel too unwell to work on 19 July 2023 when the sanction was communicated, or at any time up to his conversation on 18 August 2023 with Mr Dunn, when he hoped to be at work the following Monday. This was consistent with him requesting to use annual leave while he waited for the appeal outcome rather than going off ill and seeking a fit note from his GP. It is also consistent with the conversation he had with Mr Dumm on Friday 19 August 2023, when he still

5 expected to travel to Erskine the following Monday. The tribunal also accepted his evidence that, in the evening of Sunday 20 August 2023, faced with the unresolved problem of getting to work in the new location the following morning, he experienced a panic attack and did not feel well enough to work the next day. His mental health was in a poorer state from this date compared to the days (and weeks) immediately before and he continued to be too unwell to work until his GP certified him fit to return to work after 12 October 2023.

63. The claimant also accepted, as did the tribunal, that Mr Corrigan and later Mr Dunn, acting on advice of HR colleagues, genuinely believed that they were
10 entitled under the respondent's policy to deny the claimant full rate sick pay because in their view he had not shown he was absent for a medical reason. They did however accept that had there been a medical reason, the claimant would have received full pay as the policy dictated. That was the advice of HR. Mr Dunn had not refused a colleague full sick pay in any other case.

15 64. The policy is explicitly described as contractual. Under the section headed 'Entitlement' it states an employee absent on grounds of illness or injury 'will' receive the various payments set out. That includes 26 weeks' full rate pay after a year of service in the claimant's case. There was no discretion on the respondent's part in relation to that aspect.

20 65. The payments described under 'Entitlement' were however made clearly subject to the requirements in the section 'Conditions on which Sick Pay is payable'. There were five of those, and the one which came into play in the claimant's case was the requirement that the business be satisfied that the absence is both necessary and due to genuine illness.

25 66. The tribunal concluded that the respondent, through its managers who dealt with the claimant, ought to have been satisfied that the claimant's absence from work from Monday 21 August 2023 onwards was both necessary and due to genuine illness. As well as being supported by a fit note from the claimant's GP to that effect (albeit obtained on 25 August, but backdated), the
30 claimant's account of his mental health should have led to that conclusion. Most likely, it appears to the tribunal that in the discussion which involved Mr

Dunn, Mr Corrigan and at least one HR advisor in relation to what the claimant's circumstances were, some of the nuance of the situation was lost. That led to an oversimplified view, which essentially was that the claimant was in effect 'holding out' on transferring to Erskine until his disciplinary appeal was resolved, because neither that depot or Inverclyde would provide him with a van in the meantime. Were the position that simple, the respondent may have been justified in withholding the sick pay uplift under its policy (or any payment at all). But the position was that the claimant had experienced a significant downturn in his mental health the day before (Sunday 20 August) culminating in a panic attack, and that he was not well enough to work as a result. The lack of a van was a contributing factor, but it was its effect on the claimant's overall mental health that caused him to report as unable to work.

67. Returning to the terms of section 15 of EQA, the tribunal concluded that 'something' arose in consequence of the claimant's disability, and that was his panic attack and decline in mental health on Sunday 20 August 2023. He became overwhelmed by a number of aspects of his situation at the time, one of those being the requirement to return to work imminently in a location he could not feasibly reach.

68. The claimant was treated unfavourably by reason of that thing arising because, owing to how it was viewed by his managers, it directly led to him being paid less than full rate pay under the sick pay policy. This had the dual effect of causing him financial disadvantage and, in turn, increasing his stress level.

Was any unfavourable treatment justified?

69. The tribunal next considered whether the respondent's treatment of the claimant could be considered a proportionate means of achieving a legitimate aim, and therefore justified in a wider context despite its effect on the claimant. The respondent recognised that paying statutory sick pay as opposed to full rate pay would likely cause the claimant financial difficulty and added stress. It argued that the benefit under the policy is very generous and that it must be monitored and policed responsibly to prevent abuse and ensure its continued

availability. It should only be available in deserving cases, and there were explicit conditions which had to be met.

70. All of the above is accepted to hold true, but the claimant's case did not involve exploitation of the rules, or an undeserving case. The respondent's stated legitimate aim was to ensure only those employees who met the conditions, and therefore deserved full pay during a period of illness, received that pay. The claimant's absence, properly viewed, was genuinely related to illness and necessary. He was eligible under the contractual rules of the policy. It could not be proportionate to disapply the rules of the scheme due to an erroneous understanding of the circumstances of a qualifying candidate.

Injury to feelings

71. In submissions the respondent made the points that any discriminatory act was a one-off decision and not one imposed vindictively. The managers who dealt with the claimant did so with the genuine motive of applying the sick pay policy fairly and not out of malice. The situation caused the claimant initial stress and a drop in earnings, but only for some seven weeks before the situation was resolved, he returned to work, and was restored to full pay.
72. The tribunal largely agreed with this assessment of the seriousness of the respondent's actions. The claimant clearly experienced additional stress at the prospect of having to spend more time commuting to and from work and the knock-on effect that would have on his family life and responsibilities. Together with other stressors, not the responsibility of the respondent, the factors combined to cause a panic attack. This led to the claimant receiving no pay initially, and then reduced pay at statutory level. This financial pressure compounded the initial stress.
73. The situation was, however, brought to an end with the claimant's transfer to Erskine beginning on 14 October 2023. By his own evidence he has settled there and is enjoying his work among colleagues he considers are supportive and understanding. The tribunal also noted the efforts made by Mr Corrigan in the disciplinary appeal meeting to unblock the impasse by offering temporary use of a van to allow the claimant to report to work at Erskine.

74. Taking all matters into account, the tribunal considered that an award for injury to feelings should fall within the lower of the three Vento bands, which at the time ranged from £1,100 to £11,200. It was thought that, given the relatively short-term nature of the detriment and the fact that it and its effects ceased entirely, an award below the midpoint was appropriate. The tribunal settled on the figure of £4,000.
75. Interest is payable on awards of compensation for injury to feelings at the rate of 8% per annum. In this case there was a one-off act, namely the decision not to pay full pay for the claimant's absence. It is appropriate for interest to run from the date of that act, namely 21 August 2023.

Section 13 ERA - Were there unlawful deductions from wages?

76. The claimant's complaint is based on the fact that he received statutory sick pay and not full pay between the dates of 25 August and 14 October 2023. The arithmetical figures are not disputed between the parties and indeed the respondent, fairly, raised that the claimant would have been due a delivery supplement of £155.12 which the claimant had not included in his schedule of loss. The total gross figure is £2,125.18.
77. For essentially the same reasons as the section 15 complaint succeeds, the tribunal found that there had been a series of unlawful deductions, each deduction occurring when the claimant was paid statutory sick pay and not full-rate pay under the policy. The policy was contractual, subject to the conditions explicitly listed. The tribunal did not accept that any of those conditions were unsatisfied. The claimant's absence was necessary and due to genuine illness. The tribunal did not accept that the respondent had established that the absence was due to or aggravated by causes within the claimant's control, or that he neglected the advice of a doctor.
78. There was no question that the deductions were part of a connected series, and that the last was made within three months of the claim being raised. The claimant is therefore awarded the gross sum of £2,125.18 from which normal

lawful deductions for income tax and employee National Insurance contributions should be made.

Working Time Regulations 1998 – was there a failure to provide or pay for annual leave?

5 79. This complaint is unsuccessful. The matter was clearly and succinctly dealt with in evidence, particularly the exchange of messages between the claimant and Mr Dunn on 9 and 10 March 2023.

80. The claimant had booked annual leave in March 2023 and was explicitly told that he would continue to be able to take it even after the disciplinary process started. Whilst he might have genuinely believed that he had to remain available to be called into that process, this would have been a mistaken interpretation of the clear message he had been given. His employer fully expected him to utilise his holidays as normal. He was not denied the ability to take them and in any event he was paid at the time they occurred.

15 **Conclusions**

81. The complaints under section 15 of the Equality Act 2010 and section 13 of the Employment Rights Act 1996 succeed and the respondent is ordered to pay the sums calculated above. The claimant was not however denied any entitlement in relation to annual leave, and that complaint is unsuccessful, and is dismissed.

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Employment Judge: B Campbell
Date of Judgment: 18 June 2024
Entered in register: 19 June 2024
and copied to parties

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