EMPLOYMENT TRIBUNALS

Claimant: Mrs P Devaney

Respondent: Porthaven Care Homes No 2 Limited

HELD AT: London South ET by Cloud Video Platform **ON:** 18 and 19 May 2022, 15 June 2022 (in chambers)

BEFORE: Employment Judge Barker
Mr S Khan
Ms E Rousou

REPRESENTATION:

Claimant: Mr I Devaney, claimant's son and lay representative
Respondent: Ms J Hale, solicitor

JUDGMENT

The unanimous decision of the Tribunal is that the respondent failed in its duty under the Equality Act 2010 to make reasonable adjustments for the claimant.

REASONS

1. By a claim form dated 16 August 2020, the claimant brings claims of a failure to make reasonable adjustments against the respondent. The respondent operates a number of care homes for the elderly in the south east of England and employs approximately 1,100 staff. The claimant was employed as a carer and team leader in the Lavender Oaks care home and at the time the proceedings were issued, was still employed. She has since left the respondent's employment.

2. The claimant gave evidence on her own account and Ms Hollidge, a former employee of the respondent who worked with the claimant at Lavender Oaks, also gave evidence for the claimant. Ms Astill, the respondent's regional

director, and Ms Hadizad, the respondent's manager of Lavender Oaks, gave evidence on behalf of the respondent.

3. Mr Devaney confirmed to the Tribunal that he was not legally qualified and was acting as a lay representative for his mother. Where necessary the Tribunal afforded Mr Devaney the opportunity to ask questions or clarify the procedure that would be followed during the hearing. In relation to the closing submissions, particularly on the legal issues, the respondent's representative was asked by the Tribunal to provide Mr Devaney with copies of the two case law authorities that Ms Hale had referred to during the hearing so that he may familiarise himself with them, to which Ms Hale consented. This was done in compliance with the overriding objective in rule 2 of the Employment Tribunals Rules of Procedure 2013.

Findings of Fact

4. A number of the facts in these proceedings were not in dispute between the parties and where the Tribunal has made findings on any disputed facts, we have indicated this in the judgment. The parties provided the Tribunal with evidence on some matters that were not directly relevant to the issues we had to decide. Where these reasons are silent on that evidence, it is not that it was not considered, but that it was not sufficiently relevant to be included in the findings of fact.

5. The parties had not agreed a List of Issues for the Tribunal to decide in advance of the hearing. However, the claimant's complaint is relatively straightforward. The respondent accepts that the claimant is disabled within the scope of s6 Equality Act 2010 by reason of her Crohn's disease and was so disabled at the time to which these proceedings relate. She will say that:

    a. the respondent had a "PCP" (that is, a provision, criterion or practice) of only paying care staff their full wages if they attended work in person during the Coronavirus pandemic in 2020, and if they did not, the respondent only paid the equivalent of statutory sick pay.

    b. This PCP put her at a substantial disadvantage compared to someone without her disability, in that she was either required to ignore the NHS shielding advice to stay at home in order to be paid. Alternatively if she followed the advice and was unable to attend work at all she was only paid the equivalent to statutory sick pay (SSP). She was therefore put at a disadvantage.

    c. She will say that the respondent knew or could reasonably have been expected to know that she was likely to be placed at the disadvantage.

    d. The steps that could have been taken to avoid the disadvantage, are suggested by the claimant to be that the respondent should have applied

for financial assistance from the Coronavirus Job Retention Scheme (CJRS or "furlough") for employees who were advised to shield by the NHS and paid her the 80% of her salary available through this scheme.

6. The Tribunal will need to consider whether it was reasonable for the respondent to have to take those steps and when, given that the respondent accepts that it did not take those steps.

7. The Tribunal accepts the respondent's evidence that the period from mid-March 2020 onwards was extremely stressful and distressing to those in their sector and to their residents and the residents' families and friends and that the respondent was under significant operational pressure.

8. As of 16 March 2020 the UK government issued a mandate that there be no social contact in care homes to reduce the risks associated with Covid 19. On 20 March 2020 the Treasury announced the creation of the CJRS, which at the time applied to employees and workers on their employer's payroll as of 28 February 2020.

9. The claimant was clinically extremely vulnerable to Covid 19 due to her Crohn's Disease and received a letter from the NHS dated 21 March 2020, advising her to not leave the house and avoid all face to face contact for a minimum period of 12 weeks.

10. The letter was very explicit about what the claimant needed to do. It stated:

*"**The NHS has identified you… as someone at risk of severe illness if you catch Coronavirus**….This is because you have an underlying disease or health condition that means if you catch the virus, you are more likely to be admitted to hospital than others.*

***The safest course of action is for you to stay at home at all times and avoid all face-to-face contact for at least twelve weeks from today, except from carers and healthcare workers who you must see as part of your medical care**."* [emphasis in the original document]

11. The letter went on to identify the "*list of diseases and conditions considered to be very high risk*", which included solid organ transplant recipients, people with specific cancers, all cystic fibrosis, severe COPD and severe asthma, and "*people who are pregnant with significant heart disease*".

12. However, a key finding of fact that the Tribunal has made in these proceedings is that the respondent did not pay sufficiently close attention to the claimant's own medical condition and the consequences for her during Covid.

13. In its initial letter to staff on 18 March 2020, entitled "Coronavirus Advice and Guidance", it states:

"This week, the Government introduced new social distancing measures in an attempt to slow down the transmission rate of the disease, as well as identifying three sets of people as "at risk" groups, namely people over 70, those with underlying medical conditions and pregnant women.
[…….]
As soon as [government] guidance is given we will update our guidance and polices, but as an interim measure, if any colleagues who is in an "at risk" group has concerns about working at our homes and is advised by their GP or NHS111 to self-isolate, sick pay will be paid by Porthaven for up to 14 days, irrespective of whether the Government agrees to pay any of this cost."

14. The claimant's letter of 21 March 2020, we find, places her not in an "at risk" category, but a category of "very high risk". This can be seen by the fact that the list of conditions in her letter does not refer to all pregnant women, but specifies "*people who are pregnant with significant heart disease*".

15. We find that, from the start of the pandemic and during these proceedings, and indeed during this hearing, it has been the respondent's assessment of the claimant that she was in a category of employees who were "at risk" along with those over 70 and pregnant women.

16. The evidence from Ms Hadizad under cross-examination was that she herself was "clinically vulnerable" but still chose to come to work and suggested that like her the claimant could have assessed the risks involved but chosen to accept them. Ms Hadizad however acknowledged that she had not had an "at risk" letter from the NHS as the claimant did.

17. However the claimant was not, we find, in the same category as Ms Hadizad, but at a higher risk than Ms Hadizad was. The NHS letter makes clear the degree of risk to which the claimant was subject, and was explicit that she should remain at home for at least 12 weeks and avoid all face to face contact.

18. The claimant received a further letter in April 2020 (at page 70-73 of the bundle) advising that she sign up to the Government's register for "clinically extremely vulnerable people". It reminded her that

"you should not leave your home, including for shopping, GP appointments or other essential services. When arranging food or medication deliveries, these should be left on the door to minimise contact."

19. The letter also states *"This letter is evidence, for your employer, to show that you cannot work outside the home. You do not need a fit note from your GP."*

20. The claimant's evidence was that she took the advice contained in the NHS letter of 21 March 2020 and did not return to work. She was absent from 23 March 2020 to 31 July 2020 and her first shift when she returned to work was

on 3 August 2020. Her initial 12 week shielding period had been extended by subsequent NHS advice and lasted for 19 weeks in total.

21. The respondent took a corporate decision in late March 2020 that it would pay those who did not wish to attend work during the Covid 19 pandemic the equivalent of statutory sick pay (as outlined in the letter of 18 March referred to above) but that they would not be accessing the CJRS.

22. The respondent's witnesses Ms Astill, and Ms Hadizad both confirmed that the purpose of this was to encourage staff to attend work. We accept that the situation in care homes was extremely pressured at the time and that the respondent and others in their sector had a need to have staff attend work, having introduced infection control measures to make the home as Covid-safe as possible.

23. We also accept that the main purpose of the CJRS was to support businesses who had to close once the first national lockdown was in force from 23 March 2020. As the respondent was still trading, was not (by its own evidence) experiencing financial difficulties and had an ongoing need for staff to work, it was a reasonable general policy for the respondent not to use the CJRS.

24. However, in the claimant's case, the decision to only pay shielding staff the equivalent of SSP caused her a significant financial loss. She ordinarily received £405 per week net, but was receiving only approximately £95 per week.

25. She made her first request to the respondent that they apply for the CJRS on her behalf on 26 March 2020 to the "Lavender Admin" email address, which belonged to Natalie Thompson, the home administrator. She attached the NHS letter dated 21 March that she had received and said

"I've been told to ask you to put me in as a Furloughed worker so I should receive my wages that will be refunded to Porthaven by HMRC".

26. She did not receive a substantive reply from the respondent until 6 April 2020, when Ms Hadizad told her:

"As we are open and you are a keyworker, we still have work for you to do (which can't be done from home) therefore furloughing doesn't apply.

As the letters I have seen say "suggest" it's really up to you to determine whether you are at risk from being at work and need to self-isolate for 12 weeks. If you do, you need to claim SSP".

27. There is no dispute between the parties that the claimant was unable to work from home, due to the configuration of the respondent's systems at the time, including their IT. The Tribunal accepts that this was the case.

28. However, we find that Ms Hadizad misrepresented the content of the claimant's "at risk" letters and did not accept that the claimant was being very strongly advised to stay at home by the NHS. It was not, we find, appropriate to describe the advice the claimant had received as being a suggestion, or that it was up to the claimant herself to make a decision as to whether to attend work or not.

29. The claimant responded to the email by supplying the respondent with information that, as a shielding worker, she was able to be furloughed. She also forwarded the April 2020 letter (page 70-73 of the bundle) which expressly stated that she could not work outside the home.

30. The claimant received a response from Ms Astill in a letter dated 16 April 2020. It referred to her request to be furloughed, but it described the claimant as being in the category of "at risk workers" identified in the respondent's letter of 18 March, that is, over 70, pregnant, or

    "like you, with a medical condition falling into the extremely vulnerable categorisation, we have asked all home managers to risk assess each employee in order to ensure, where possible, ***the employee is able to continue to work safely in our homes****."* [emphasis added]

31. The letter went on to state

    "Heather advises me that she has had a conversation with you and that her assessment is that you can work safely in the home as you do not need to interact with any resident who is showing symptoms as they would be self isolated in their own room but you are electing not to do so. The vast majority of our at risk colleagues, including Heather, have decided to continue to work".

32. As stated earlier, we do not accept the respondent's assessment of the clamant as being in the same category for clinical vulnerability as Ms Hadizad.

33. Ms Astill's letter went on to explain that they had decided not to furlough workers as they provided an essential service that needed to continue. It also said that they understood that HMRC was about to confirm that care homes could not furlough workers or recover furlough payments. It was accepted by the respondent that this ruling from HMRC did not materialise and that in fact, the claimant could have been furloughed but the respondent chose, as a matter of corporate policy, not to do so.

34. A risk assessment was done for the claimant on 28 April 2020. This suggested further adjustments be done to allow her to come to work, including that she would not be carrying out care work but doing administrative work in an office on her own. We accept the claimant's evidence that this was still an unacceptably high level of risk, given that she would need to pass other people to enter the home and would need to use the home's bathroom. Her evidence, which we accept, was that the room suggested for her use would have

invariably been accessed by other people during her working hours, even if only briefly and even if only by a small number of others.

35. Ms Hadizad gave evidence that during the time when the claimant was shielding, 25% of the respondent's staff tested positive for Covid and there was an outbreak in the home in April 2020. We accept the respondent's evidence that they had strict Covid safety protocols and made the home as Covid safe as possible.

36. The clamant forwarded further government guidance on the CJRS to Ms Hadizad on 21 April 2020, which we find was issued as a result of the Treasury Direction on the CJRS of 15 April 2020. The claimant (correctly) identified that "shielding employees can be furloughed". Ms Hadizad replied on 27 April confirming that furlough was still not available as

    "*Porthaven remains open and providing a service to our residents… I am happy to undertake a risk assessment for you so that we can arrange a date for you to return to work".*

37. We note that the claimant was still, at this point, within the initial 12 week compulsory shielding period identified in the NHS letter of 21 March 2020.

38. On 29 April, the claimant reminded Ms Hadizad by email that she was instructed to avoid all face to face contact and could not leave her home. She asked for medical suspension to be considered and told Ms Hadizad that she was considering issuing a Tribunal claim for discrimination.

39. The claimant was contacted by Ms Hadizad on 5 May 2020 to ask her to "*come in and see me so that we can complete the risk assessment and you are able to return to work*". The claimant replied by return confirming that she was not able to attend in person for a risk assessment.

40. Ms Hadizad responded again on 13 May rejecting a request for suspension on full pay, repeating that furlough was not available and said "*we have had staff test positive, but no-one is displaying symptoms at Lavender Oaks and all staff have now returned to work*".

41. The claimant raised a grievance by return, noting "*it seems much of what I say is barely taken notice of."*

42. By 8 June, three weeks later, the claimant complained that she had not been contacted about a grievance meeting. A video call was held on 15 May to hear the grievance, but this not the subject of the claimant's complaints to this Tribunal, save that in the respondent's letter of 15 June, the clamant notes that Ms Astill states that the claimant "*failed to attend a meeting to complete a risk assessment*." The claimant draws the Tribunal's attention to the fact that she is being criticised for not attending the home in person. Her grievance was not

upheld. The claimant continued only to receive SSP until her return to work on 3 August 2020.

43. The claimant accepts that she requested and was paid for holiday for 84 hours at her full rate of pay of £924 gross during the period in which she was shielding.

The Law

44. Duty to make reasonable adjustments: Provision, criterion or practice (s20(3) Equality Act 2010). Did the respondent have a provision, criterion or practice (PCP) that put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time? If so, did the respondent know or could it reasonably have been expected to know, that the claimant was likely to be placed at any such disadvantage? If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

45. Substantial disadvantage (section 212(1) Equality Act 2010): "Substantial" means more than minor or trivial but it is for the Tribunal has to identify the nature and extent of the disadvantage.

46. The claimant is to identify or assist the Tribunal in identifying what steps should have been taken and the respondent may assert either that this would not have reduced the disadvantage or that the step itself was not reasonable. The Tribunal needs to assess what the effectiveness of any step would be.

47. Schedules 8 and 21 Equality Act 2010, and the Equality and Human Rights Commission Code of Practice on Employment provide guidance to Tribunals in determining complaints of a failure to make reasonable adjustments.

48. The case of *O'Hanlon v Commissioners for Revenue and Customs 2007 EWCA Civ 283* considered the application of the then Disability Discrimination Act 1995 (since replaced by the Equality Act 2010) to the requirement to adjust an employer's sick pay rules to continue to pay disabled employees when off sick. The Court of Appeal held that payment for long-term absence would provide a disincentive for employees to return to work and as the purpose of the disability discrimination provisions have the purpose of facilitating the attendance of disabled employees at work, the requested adjustments were not reasonable.

Application of the law to the facts found

49. Taking each of the issues for the Tribunal to decide in turn, we conclude as follows:

50. The respondent did have a "PCP" (that is, a provision, criterion or practice) of only paying care staff their full wages if they attended work in person during the

Coronavirus pandemic in 2020, and if they did not, the respondent only paid the equivalent of statutory sick pay (£95 per week). This operated from the date of the respondent's letter of 18 March 2020.

51. This PCP put the claimant at a substantial disadvantage compared to someone without her disability, in that she was either required to ignore the NHS shielding advice to stay at home and attend work (with the accompanying risk of very serious illness in her case), or that if she did follow the advice she was unable to attend work at all and was only paid the equivalent to statutory sick pay (SSP). She was therefore put at a disadvantage.

52. The respondent compares the claimant to others in the "at risk category" and states that it was safe for the claimant to attend work with adjustments, but we find that this is not appropriate. The claimant was not simply "at risk" but was assessed by the NHS as being at "very high risk" and was clinically extremely vulnerable ("CEV"). It is not appropriate to categorise her with pregnant people or those over 70. She is to be categorised along with others who were CEV.

53. She was therefore at a substantial disadvantage when compared with those who were not clinically extremely vulnerable who did not receive the explicit "stay at home" advice from the NHS, in that she had no alternative but to stay at home and was not therefore paid any more than SSP.

54. The respondent knew or could reasonably have been expected to know that she was likely to be placed at the disadvantage. We find that the respondent either deliberately or through an oversight failed to acknowledge the difference between workers who were CEV and those who were merely "vulnerable". As a care provider, they could reasonably have been expected to know this difference, and we note that the claimant provided this information to them on a number of different occasions, including supplying them with the formal NHS letters she received. They ought to have known that she was being faced with a choice as a result of their policy of either to ignore the NHS advice and risk the consequences for her of catching Covid, or to be financially disadvantaged by remaining at home.

55. The steps that could have been taken to avoid the disadvantage are suggested by the claimant to be that the respondent should have applied for financial assistance from the CJRS for employees who were advised to shield by the NHS and they could have paid her the 80% of her salary available through this scheme.

56. We do not accept that the respondent's proposed adjustments, which required her to attend work in person, were reasonable in the circumstances, given the levels of risk to the claimant's health involved in them.

57. What was it reasonable for the respondent to do, given that working from home was not an option? A respondent is expected to take such steps as is

reasonable to have to take in the circumstances of the case in order to make adjustments. Considerations listed in the Equality and Human Rights Commission Statutory Code of Practice include the cost of the adjustment, any disruption, the effectiveness of measures and the size and resources of the respondent.

58. The respondent is not a small employer. It has 1100 staff and a dedicated head office function. The claimant is a care worker and does not earn a high salary – she earned £405 per week net, which would have been £324 net a week at 80%. The respondent was already paying the equivalent of SSP, which was £95. The payment would have been for a fixed and limited period of time. The respondent could have chosen to recover those sums from the CJRS. This would not, we accept, have caused any financial losses to the respondent.

59. We find that this would have been a reasonable step for the respondent to take. The administrative work in applying for furlough would not have been excessive, and the respondent would have suffered no financial losses from paying 80% of the claimant's salary as this would be reimbursed. The adjustment would be very effective at reducing the disadvantage suffered by the claimant. Any concerns about incentivising the claimant to return to work would be eliminated by the fact that she was not being paid a full salary while shielding, only 80%.

60. In terms of when it would have been reasonable for the respondent to pay the claimant at CJRS levels, we find that this would have been reasonable from the date the claimant notified the respondent that she would be shielding at home, so from 23 March 2020, until her return to work on 3 August 2020. The respondent noted on 18 March that it would pay SSP for the first 14 days and keep the matter under review to those who did not wish to attend work. We find that the respondent could equally have paid the claimant 80% of her salary from the CJRS for an initial period and then reviewed the situation periodically, if there were concerns about the duration of the absence or about the respondent's ability to recover sums from the CJRS. The claimant provided the respondent with evidence that she was eligible to be paid under the CJRS from 26 March 2020. It was absolutely clear, by the time of the Treasury direction on 15 April 2020, if not earlier, that the CJRS was not just available for business struggling financially who had been forced to close, but could have been used by the respondent.

61. In closing, the respondent made submissions about the purpose of the disability-related provisions of the Equality Act (EQA). We will address these in turn. The respondent draws an analogy with the *O'Hanlon* case, where a disabled employee on long-term sickness absence was denied further sick pay as a reasonable adjustment. The respondent notes that the purpose of the EQA is to facilitate the full participation in employment of disabled people, and that the *O'Hanlon* case noted that extensive paid sickness absence can be a

disincentive to a full return to work. Similarly, the respondent argues that the CJRS would also have had a disincentivising effect on the claimant and others in her position, and the CJRS was not properly aligned with the purpose of the EQA in doing so.

62. We do not accept the respondent's position in this regard. We agree with the claimant, who in closing submissions noted that *O'Hanlon* was in an entirely different context. The claimant in these proceedings was not off on long-term sickness absence. Her entire period of absence was 19 weeks and was always intended to be time-limited, until the worst period of risk had passed. She did return to work when this was the case. The coronavirus pandemic was an unique situation, and the CJRS was a unique scheme. We accept this.

63. The claimant also notes that any incentivising effect of only being paid SSP was irrelevant here. We accept that any incentivising effect of financial losses was irrelevant to the claimant – however low her income, she quite reasonably was unwilling to attend work. All that the actions of the respondent achieved was to make her period of shielding one that was additionally difficult because of her financial losses and the lengthy correspondence with the respondent over her wages, including making a grievance.

64. We also note that, by analogy, the CJRS has similarities to the Access to Work scheme. In the Access to Work scheme, employers and disabled employees may apply for financial assistance in purchasing aids or making adjustments that would assist an employee at work. An employer is not obliged to use Access to Work and could fund such adjustments themselves. However, failing to facilitate applications to Access to Work for a disabled employee (due to an objection to accessing public funds, for example) can be a failure on the employer's part to make reasonable adjustments.

65. Finally, there are instances envisaged in the EHRC Code of Practice where it may be a reasonable adjustment, for example, to allow a worker to take paid time off as disability leave. Equally, it was not unreasonable for the respondent in this case to access the CJRS to allow the claimant as a CEV disabled member of staff to complete her period of shielding on 80% pay, even if other members of staff were having to come into work during that time, however stressful and difficult we accept it would have been for them. The respondent treated the claimant like any other member of staff and did not make reasonable adjustments for her, to allow her to stay at home. This resulted in her being placed at a substantial disadvantage when compared with others not so disabled. She was not "choosing" not to attend work, but was expressly told not to attend work.

66. The respondent has therefore failed to make reasonable adjustments by failing to pay the claimant wages at the CJRS level during her period of shielding.

Remedy

67. The parties are encouraged to resolve the issue of the claimant's financial compensation (remedy) via alternative dispute resolution if at all possible. The respondent is assisted in doing so by the claimant's Schedule of Loss, which, it is noted, is not an unreasonable or excessive sum when what the claimant may reasonably be awarded by a Tribunal at a remedy hearing is taken into account. It is however to be subject to a deduction for paid holiday for 84 hours at her full rate of pay of £924 gross.

68. The parties are to contact the Tribunal within 28 days of the date this judgment and reasons is sent to the parties to notify the Tribunal whether or not a hearing is needed to fix the amount of the claimant's compensation. If a hearing is required, it will be by video and have a time estimate of 3 hours on a date to be notified to the parties.

_____
Employment Judge Barker

Date_____15 June 2022_____