Case Number: 1401297/2015

EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Cowan**

Respondent: **Department for Work and Pensions**

Heard at: **Exeter** **On: 15, 16 and 17 August 2016**

Before: **Employment Judge R Harper**
Members: **Mr P Hemming**
Mr E Beese

Representation:
Claimant: **Mr R Nichol (Trade Union Representative)**
Respondent: **Mr Allsop (of Counsel)**

JUDGMENT having been sent to the parties on **22 August 2016** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was a claim of unfair dismissal and also disability discrimination. In relation to the claim for unfair dismissal the Tribunal have had regard to Section 94 of the Employment Rights Act 1996 ("ERA"), Section 98(2)(a) ERA relating to capability, and Section 98(1)(b) ERA relating to some other substantial reason in relation to which the respondent relies on attendance.

2. The Tribunal has also had regard to the following cases:

   Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 which is authority for the proposition that it is not for the Employment Tribunal to substitute is own decision.

   Spencer v Paragon Wallpapers [1976] IRLR 373

   DB Schenker Rail UK Ltd v Doolan [2011] UKEATS 0053/09

   BS v Dundee City Council [2014] IRLR 931

3. Paragraph 27 of the Dundee decision records as follows:

> "*First in a case where an employee has been absent from work for sometime owing to sickness it is essential to consider the question of whether the employer can be expected to wait longer.*
>
> *Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future that operates in his favour. If on the other hand he states that he is not better and does not know when he can return to work that is a significant factor operating against him.*
>
> *Thirdly there is a need to take steps to discover the employee's medical condition and his likely prognosis but this merely requires the obtaining of proper medical advice. It does not require the employer to pursue detailed medical examination. All that the employer requires to do is to ensure that the correct question is asked and answered".*

4. The tribunal also highlights paragraph 47 of the Taylor decision which states as follows:

> "*The use of the words "rehearing" and "review" albeit only intended by way of illustration, does create a risk that Employment Tribunals will fall into the trap of deciding whether the dismissal procedure was fair or unfair by reference to their view of whether an appeal hearing was a rehearing or a mere review. This error is avoided if Employment Tribunals realise that their task is to apply the statutory test. In doing that they should consider the fairness of the whole of the disciplinary process. If they find that at an early stage the process was defective and unfair in some way they will want to examine any subsequent proceeding with particular care but their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether due to the fairness or unfairness of the procedures adopted the thoroughness or lack of it of the process and the open mindedness or not of the decision maker the overall process was fair notwithstanding any deficiencies at any earlier stage".*

5. Turning to the disability claim this is pleaded under Section 15 of the Equality Act 2010 ("EA"). That sets out as follows:

> "*15.1 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.*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

> *15.2 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".*

6. In relation to this claim the Tribunal have also had regard to the burden of proof requirement in Section 136 EA It has also considered the following cases:

> **Trustees of Swansea University Pension and Assurance Scheme v Williams [2015] IRLR 885 (R)**
>
> **Elias v Secretary of State For Defence [2006] IRLR 934**

7. The Tribunal highlights passages from the Swansea decision. Firstly, paragraph 27 of the Judgment :

> "*The meaning of the word "unfavourably" cannot in my view be equated with the concept of detriment used elsewhere in the Equality Act".*

8. In paragraph 29 it is stated,

> "*the determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by "broad experience of life".*

9. In paragraph 41 of the Judgment it states as follows:

> "*It therefore does not matter whether the alleged discriminator thought that what it was doing was justified it is not a matter for it to judge but for Courts and Tribunals to do so. Nor does it matter that it took every care to avoid making a discriminatory decision. What has to be justified is the outcome, not the process by which it was achieved".*

10. The Tribunal heard evidence on oath or affirmation from the following:

> Kerstie Cowan
>
> Sally Kittle
>
> Karen Hooper

11. Those witnesses gave live evidence before the Tribunal.

12. The Tribunal panel also read the statement of Leanne Greenhalgh. Her evidence was read but she did not attend to give evidence because a medical certificate was provided that she was unable to attend. In the event the respondent decided not to ask for a postponement to enable her to attend to give evidence.

13. The Tribunal has considered all the documentation to which its attention has been drawn, making the point that if its attention has not been drawn to

a document then it has not considered it. The Tribunal has also considered the oral and written evidence of the witnesses and also the oral and written submissions provided by the representatives.

14. The case was originally listed for five days to hear evidence and submissions together with one chambers day. However, the case was competed within three days and the Tribunal panel are grateful to both representatives for their respective professional and efficient conduct in relation to the presentation of their respective cases.

15. On 12 December 2005 the claimant commenced employment as a Financial Assessor which work she undertook with one other member of staff. The applicable procedure is the Attendance Management Procedure - Long-Term Absence to be found at page 321.

16. The Tribunal has also had regard to paragraph 7.24 of the policy and paragraph 7.2.

17. The claimant's role was a key business role. The claimant was dismissed on 23 February 2015. The ET1 was filed on 17 June 2015.

18. At a telephone Preliminary Hearing before Employment Judge Castairs it was recorded that "*the respondent accepts that the claimant was disabled at the relevant time by virtue of her Gynaecological condition with associated abdominal pain bleeding and hormone related migraines".*

19. As a result of these gynaecological problems the claimant was recommended to have a hysterectomy. Her name was added to the NHS surgery list in May 2013. As a matter of record she in fact had the surgery on 30 March 2015. The claimant accepted in cross examination that in relation to her witness statement her evidence of alleged facts in that statement ended at paragraph 25 as paragraphs 26 onwards are effectively more like submissions than evidence. She also agreed with the summary of the final paragraph on page 148 which is the OH Assist report dated 22 November 2014.

Occupational Health Reports

20. The first one to turn to is to be found at page 86 of the bundle and this is dated 18 September 2014.

21. Under the heading "Capability For Work" it is stated, "*in my opinion Ms Cowan is likely to return to her normal hours and duties on 22 September. I recommend she is referred to Occupational Health after surgical treatment following which management will be advised accordingly".*

22. The next one to note is to be found at page 99 of the bundle dated 24 October 2014. Under the heading "Capability For Work" it is stated "*in my clinical opinion given Ms Cowan's acute symptoms she is unfit for any return to work in any capacity at present and is unlikely to return until after her surgery. She informed me that at a recent meeting it had been suggested she could return to work and work on admin tasks in a darkened office. In my opinion this would only add to her symptoms as she would need to struggle to read things as well as making her feel socially isolated.*

I ask that you consider further referrals three to four weeks post her surgery in which we can offer advice on progress outlook and future work capabilities".

23. The next Occupational Health report to highlight is to be found on page 148 dated 22 November 2014 which records as follows, "*Following the assessment today in my clinical opinion Ms Cowan remain unfit for work in any capacity and is likely to remain unfit until such time as surgery and recovery has taken place the timescale for this is currently unknown. As a result of the length of absence already incurred and as yet no timescale as to when a return will be possible I have progressed the case for an opinion by an Occupational Health Physician a further report will follow. I have discussed the content of this report with Ms Cowan and have verbal consent to release this information to you".*

24. The next Occupational Health report to highlight is to be found at page 212. This is dated 16 February 2015 and the relevant part of that report to highlight is under the heading "*Outlook*" which records as follows, *"The impact of the surgery on the prognosis for the migraines/headaches is likely to take several weeks or even months to become clear. It is not likely to cure them. This may improve the symptoms and to allow these to return to the previous pattern so less frequent and less severe. Some level of recurrent headache/migraine is likely but better control is anticipated".*

25. The next medical reference to highlight is to be found at page 162 which is from an email from Leanne Greenhalgh to Sally Kittle dated 3 December 2014 and states as follows, "*I have spoken to Dr Alam who produced the most recent OH Assist report request GP medical report. Dr Alam is concerned that there maybe underlying conditions that Kerstie has not been clear about that maybe the cause of these migraines. He finds it difficult to confirm that these migraines are necessarily attributed to the gynaecological condition alone. Kerstie has mentioned that she has had an accident in the past which affected her neck and he wishes to confirm that the current spells of migraines are not linked. He explained that it was difficult to make a decision on ill-health retirement until GP report received".*

26. The medical notes provided by the GP did not indicate any return to work date. The claimant's case was referred to the decision maker after 43 days of absence. Absences up to twelve months maybe supported but there is no twelve month grace period. A line manager is entitled to refer to a decision maker after 28 days absence. The local policy was not used. The line manager relied on the national policy.

27. In paragraph 6 of Ms Kittle's statement it is recorded as follows, "*On 18 November 2014 Leanne emailed me in response to my email above addressing each of the points in turn. I asked whether the business could support the continued absence or not and why Leanne explained that the claimant was in a business critical role the work in undertaken by the claimant and another member of staff and the claimant's absence had doubled the workload and caused increase stress on her colleagues".*

VES (Voluntary Exit Scheme)

28. This ran concurrently with the Absence Management process.

29. On 23 February 2015 the claimant indicated a provisional interest in VES prior to her receiving the dismissal letter on 25 February 2015. VES availability ceased at that point.

30. The terms of the VES policy was subordinate to the attendance management process. If VES had applied, the release date would have been 30 June 2015 and the respondent submits that it could not sustain the claimant's absence until that date.

31. On the facts of this case therefore the issue of VES is something of a red herring.

IHR

32. As set out in paragraph 27 of Ms Kittle's statement Leanne emailed her on 17 February to update her on the latest OH report which referred to IHR. It stated that "*whilst the possibility of IHR is not a medical question*" it was premature to consider this as the claimant was likely to be well enough to return after the operation and thus was not permanently unfit to return to work. It seemed therefore that IHR was not a possibility. As far as the claimant's line manager is concerned Leanne Greenhalgh was a relatively inexperienced manager. It is apparent from page 215 that she did not receive attendance management training until 18 November 2014 long after the claimant was dismissed. However, this aspect of the case does not make the dismissal unfair or the alleged conduct discriminatory.

Investigation

33. There was an informal review with the claimant after fourteen calendar days absence on 30 September 2014. As is recorded at the bottom of page 137 "*Kerstie is still unable to attend work due to migraines and has got sick notes from her GP she has been prescribed additional medication to try to control headaches. KC confirmed unable to return to work at this time".*

34. There was then a formal keeping in touch meeting on 14 October 2014. It could also be described as a twenty-eight day review meeting. As described by Leanne Greenhalgh at paragraph 8 of her statement, "*At that meeting the claimant said that she had been told verbally the operation had provisionally stated as mid November although no firm date had been given and she told me before the meeting that she had been on the waiting list for the operation for twelve months and had dropped off the list. The claimant said she could not return to work at that time and there as no clear return date. I asked if she could undertake non screen facing activity and she said that she would check with her GP".*

35. A further reference to this meeting is in the document at pages 93 and 94 and at the top of page 94 it is recorded as follows, "*If you do not return to work then a further meeting will be arranged to discuss your long-term prognosis this maybe followed by a decision maker interview arranged by and conducted by a senior manager outside of the office structure who will review your circumstances and potential for return to work to establish if the*

department can or cannot continue to support your absence".

36. Under the heading "Addendum" it is recorded, "*I am please to hear that you have said that you will return to work on Monday 28 October".*

37. There was a further twenty-eight day review meeting on 7 November 2014. The minutes of that meeting start on page 119. At the bottom of page 119 Leanne Greenhalgh is recorded as saying "*lets discuss what could be done to support you returning to work. Last time we discussed a number of options you were going to discuss with your GP but I understand he doesn't believe a return to work will help*".

38. The claimant's Trade Union representative stated "*this is also confirmed by OHS who have written in their report that a return to work isn't appropriate*". The claimant is recorded as "*yes I'd like nothing better than to return to work but I am not well enough"*. It was also suggested that the claimant might be able to access the Civil Service Learning From Home Scheme. In further discussions the claimant indicated that she was not able to use computers well at the moment and that she could only use her iPad for about ten minutes at a time before it became difficult. There was a discussion at that meeting about whether any physical adjustments could be beneficial. However the claimant's Trade Union representative requested that this be left until after the claimant's operation as once that was done then a much better idea of what reasonable adjustments would support a return to work. The claimant was asked do you have a date yet for your operation? Her reply was, "*the last I was told was mid to late November."* The claimant was told (top of page 121) that there was support from different areas including employee assistance, the physio advice line and Benenden.

39. The claimant's Trade Union representative is recorded as having stated as follows, "*The DWP Attendance Management Policy on referral to a DM and believes a referral would be inappropriate in these circumstances"*. She clarified that "*the policy allows a member of staff to be absent for up to a year as KC's absence was for forty-three days or the case could technically be referred it would not be appropriate at this time as surgery is due and there is evidence of a full and effective return to work after she has recovered".*

40. On 9 January 2016 there was a three month "keep in touch" meeting (page 189). The claimant was asked if there was any prospect of any return to work prior to the operation, to which the claimant replied "*no, not possible. Having found the previous attendance to a team meeting overwhelming I can't say what day I will or will not be feeling good on. I cannot consider doing any form of PTMG".*

41. There was then a twenty-eight day review meeting on 10 February 2015. The claimant was asked by Leanne Greenhalgh "*so things have go worse and deteriorated in the last week yes" to which the claimant replied "yes both physically and mentally*". Leanne Greenhalgh then retorts "*so obviously a return to work prior to the operation of any form is not appropriate".*

Decision Maker

42. The claimant was referred to the decision maker in November 2014 with the DM meeting taking place on 8 December. The outcome of the decision was delayed pending receiving information from Dr Alam. Eventually after several cancellations of surgery the claimant was dismissed on 23 February 2015. At that time surgery was scheduled to take place on 27 February 2015. The Tribunal have to decide the case on the basis as to the position on 23 February. There was much concern by the respondent as to whether or not the operation would take place at the time of dismissal and whether the claimant might be in a position to return within a reasonable period. As it happens the operation WAS further cancelled but that is not a relevant factor for the Tribunal to consider. The Tribunal again reminds itself that it must not impose its own view as to what it would have done.

43. The Tribunal find that there is no evidence at all that the line manager had taken a predetermined course of action which was inconsistent with the Attendance Management Procedure. The referral to the DM, subsequent to twenty-eight day Attendance Review Meeting, was in accordance with policy and was not outside the range of reasonable response and neither was it punitive. In fact, in her evidence, the claimant accepted that she was referred to a DM at forty three days, not twenty-eight days, and this was in line with national policy. The evidence did not support the contention that "*the DM's ongoing delay in disposing of the case one way or another is inconsistent with procedural fairness"*. The delay was to try to be as fair as possible and to await evidence from Dr Alam.

44. Following the decision to dismiss paragraph 7.24 of the procedure at page 333 sets out various requirements all of which were complied with. There was also compliance with paragraph 7.17 of the procedure. At the stage of dismissal there were no procedural steps taken by the respondent which were either outside the procedure or outside the range of reasonable response.

45. In the decision, on page 223, it is recorded "*Kerstie has worked for the Organisation since 12 December 2005 and has far exceeded the trigger points during this period.*" The dismissal letter is found at page 225 and dated 23 February 2015.

46. The claimant appealed this decision on the form between pages 233 – 235. It is clear from page 234 that under the heading "*what do you hope will happen as a result of making this appeal*"? The claimant has stated "*that the decision to dismiss is rescinded so that I can take advantage of the VES offer which predated it*".

47. The appeal hearing was before Karen Hooper on 9 March 2015. Before reaching a decision Mrs Hooper called the complex case HR Worker Michelle Field on 9 March 2015 to get guidance in relation to VES. The recorded advice, in paragraph 13 of Mrs Hoper's statement, is "*as the business has decided it can no longer support the absence the VES application should not necessarily have prevented the dismissa*l".

48. As is recorded in Mrs Hooper's statement paragraph 16 *"the view I took*

having considered the guidance that I had received from CSHR and from the relevant guidance on VES is that the delay in receipt of the VES offer had no material effect on the AM process. My decision was made using the rationale that it was clearly stated in all DWP's guidance on VES that at any stage of the process up to 30 June 2015 normal DWP HR policies and procedures should apply. There is nothing within DWP policies that require us to wait for the outcome of any VES applications".

49. Mrs Hooper recites some general background in paragraph 21 of her statement that the situation had been continuing since the Spring of 2013 and there was still, at that time, no guarantee that the operation would go ahead on 27 February. Mrs Hooper recorded in paragraph 22 of her statement "*it was clear that the business had supported the absence longer than it originally felt it could and I believe that the DM's decision to dismiss was consistent with guidance and other similar cases because of a significant delay in the operation taking place and the uncertainty in relation to the claimant's health prognosis*".

50. The appeal was conducted, and the outcome notified, in accordance with a reasonable range of response and in accordance with procedure.

51. The Tribunal's finding therefore, in relation to unfair dismissal is that the evidence supported the respondent's contention that this was a capability dismissal or indeed in the alternative that it was an attendance dismissal - SOSR. There were no procedural failings. Therefore both substantively and procedurally the dismissal was fair.

52. The Tribunal now turns to the discrimination claim under Section 15 EA. This is brought on the basis that the referral to the decision maker and also the decision to dismiss were discriminatory. The Tribunal agree with the respondent's assertion in paragraph 30 of their skeleton argument that it cannot be unfavourable treatment to refer an employee who has been continuously absent for two months to a decision maker, especially one that has additional allowance in respect of her trigger points under the Attendance Management Procedure. The respondent highlighted that at the time the decision was taken to dismiss, the claimant had been away from the workplace for a considerable period of time.

53. The Tribunal's prime finding in relation to discrimination is that there is no evidence of unfavourable treatment. However in the alternative if there was unfavourable treatment then the tribunal would have had to consider whether the respondent's argument in relation to justification had any merit.

54. In relation to the referral to the decision maker there was a legitimate aim in referring the matter to a decision maker, and it was a proportionate response. The objective was sufficiently related to justify limiting a fundamental right. It was connected to the objective and was no more than was necessary to accomplish the objective.

55. In relation to the issue of the dismissal and whether that was discriminatory, the Tribunal adopt the assertions in paragraph 35 of the respondent's skeleton argument. The objective was sufficiently important to justify limiting a fundamental right and was rationally connected to the objective. The Tribunal agree that the claimant's colleagues could no longer sustain the

claimant's absence from work at that time and it was unclear to the respondent as to whether the claimant would return to work and be able to sustain attendance in the future.

56. In the final paragraph of the claimant's skeleton argument, it is asserted "*the decision arose from a predetermined referral to the decision maker in accordance with a local policy which in the absence of any evidence to the contrary was imposed with no regard for its impact on disabled employees including the claimant".*

57. As set out earlier in this Judgment the Tribunal reject any allegation of predetermination and find that this dismissal was handled under a national policy and not the local one.

58. To be clear, the prime finding in relation to the discrimination claim is that no unfavourable treatment is found. In the alternative if the Tribunal was wrong in that and had to determine justification arguments, then it would have found that justification arguments succeeded in relation to both the allegations made under the discrimination head and therefore the discrimination claim is dismissed.

_____

Employment Judge R Harper

_____

Date: 2nd September 2016

REASONS SENT TO THE PARTIES BY E-MAIL ONLY
ON 6 SEPTEMBER 2016

FOR THE TRIBUNAL OFFICE