Case No: 2300741/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS:
Ms R Hawley
Mr G Henderson

BETWEEN:

Dr Jawed Ali

Claimant

AND

Drs Torrosian, Lechi, Ebeid & Doshi -T/A Bedford Hill Family Practice

Respondent

ON: **11, 12 & 13 January 2017**

Appearances:

For the Claimant: Mr P Gorasia, Counsel
For the Respondent: Mr A Lord, Consultant

RESERVED JUDGMENT

1. The unfair dismissal claim succeeds. The claimant is entitled to a basic award of £2,850. The tribunal makes no compensatory award.

2. The parties agree that the claimant was entitled to receive employer pension contributions during his notice period in an amount to be agreed between the parties or, in the absence of agreement, determined by the tribunal.

3. The indirect discrimination and holiday pay claims are dismissed upon withdrawal.

4. The disability discrimination claims fail and are dismissed.

REASONS

1. By a claim form presented on 21 April 2016, the claimant claimed unfair dismissal; disability discrimination; unlawful deduction of wages; breach of contract; breach of the working time regulations (holiday pay) and indirect discrimination. The working time, indirect discrimination and unlawful deduction of wages claims were withdrawn and have been dismissed. The breach of contract claim, which related to employer pension contributions during the notice period, was conceded by the respondent though the amount due remains to be agreed or determined.

2. The respondent contends that it dismissed the claimant on grounds of capability, due to his ill health and that the dismissal was in all the circumstances fair. Disability is conceded but the respondent denies discrimination.

3. The claimant gave evidence on his own behalf. The respondent gave evidence through Mr Donavan Sunkur, Practice Manager and Dr Al Lechi, GP. There was an agreed bundle of documents and references in square brackets in the judgment are to pages in that bundle.

The Issues

4. The claimant brings his disability discrimination complaint under sections 13, 15 and 20 of the Equality Act 2010 (EqA). The factual issues are set out in the agreed list of issues, as amended, and shall be referred to more specifically in our conclusions. He contends that his dismissal for capability was unfair.

The Law

5. Section 13 EqA provides that a person (A) discriminates against another (B) if because of a protected characteristic (in this case, disability) A treats B less favourably than A treats or would treat others.

6. Section 20 EqA provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage.

7. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

8. Section 15 EqA provides that a person (A) discriminates against a disabled person (B) if: a) A treats B unfavourably because of something arising in consequence of B's disability, and b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

9. Under the Code of Practice on Employment, the definition of something arising in consequence of employment includes anything which is the result, effect or outcome of a disabled person's disability.

10. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed. Section 98(2) sets out the potentially fair reasons for dismissal. One of those reasons is capability *98(2)(a*).

11. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

12. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Findings of Fact

1. The respondent is a GP practice in South-West London comprising 4 partners. The claimant was employed by the respondent as a GP. He started as a locum and was later appointed as a permanent employee. There was a dispute between the parties as to the date of commencement of the permanent employment. The claimant contended that he was taken on permanently from 1 January 2009. The respondent's case is that he started doing regular locum sessions in January 09 and was not taken on permanently until 1 January 2011.

2. The claimant relies on a contract at pages 48a-f of the bundle, which provides for a commencement date of 5 January 2009. The respondent says that contract was drawn up by the BMA (British Medical Association) after discussion but was not agreed. The contract is unsigned. The respondent relies on a contract, signed by the partners of the practice in January 2011 and by the claimant on 11 February 2011. That contract refers to a commencement date of 1 January 2011. [48G-L] There are other documents that support the 2011 date. For example, the claimant's own CV states that he has been a salaried GP since January 2011 till 9.11.14 (the commencement of his sick leave). [211] Also, his P60 for 2010/11 shows earnings of £20174.99. This figure is consistent with the claimant's earnings for the period Jan-Mar 2011.

3. Taking all the above matters into account, we prefer the respondent's evidence and find that the claimant's employment commenced on 1 January 2011.

4. From 9 November 2014, the claimant was signed off work by his GP after suffering a heart attack. The claimant relies on his heart condition as his qualifying disability. He

remained off work until his dismissal. During this time the respondent received a number of doctor's certificates, all of which signed the claimant off as unfit to carry out any work.

5. On 14 July 2015, the respondent wrote to the claimant's treating physician requesting a medical report and advice on measures that it could reasonably take to facilitate the claimant's return to work. Enclosed with the request was a copy of the claimant's job description. [67-68c] In a report dated 12 August 2015, the claimant's GP, Dr Brice, stated that it was unlikely that the claimant would ever be able to work full time again but he (the claimant) thinks he will be able to work about half his contractual hours in future. It went on to say that on return to work, the claimant would not require any work place adjustments and should be able to carry out the full range of his duties. [69-70]

6. The respondent also received a copy of a report dated 5 August 2015 from the claimant's treating cardiologist. Dr Anderson opined that if the claimant were allowed to return to work part time for the first few months while he returned to physical fitness, he should be able to return to full-time work in the future, which was at odds with the view of Dr Brice. [71-72] In a later letter dated 14 September 2015, Dr Anderson confirmed that the claimant was fit to return to work on a part time basis but with reduced hours, which could be gently increased over time. [74]. It appears that Dr Anderson's view on full time work changed as the claimant told the respondent at the capability meeting that Dr Anderson had strongly advised him not to return to work on a full time basis on medical grounds.

7. On 27 September 2015, the claimant emailed the respondent stating that he was fit for work and asked for the respondent's proposals regarding an occupational health check and return to work date. [75]

8. On 6 October 2015, the respondent wrote to the claimant inviting him to attend a medical capability meeting on the 8 October. The purpose of the meeting was to discuss, amongst other things: the likelihood of the claimant returning to his full-time employment in the near future and, whether there were any reasonable adjustments that could be made to his role. The letter went on to say that if there was little likelihood of a return to full time work within a reasonable timescale and there were no adjustments that could be made or alternative employment available, the claimant would be dismissed. [79]

9. The meeting duly took place on 8 October. The respondent has produced its notes of the meeting, aspects of which the claimant disputed. However, the claimant signed the notes after the meeting as an accurate account of what was discussed and his claim that he only did so because he was told that they were not legally binding is rejected. We therefore accept the notes as an accurate summary of those events. [81-83] At the meeting, the claimant agreed with the medical reports. In particular, he agreed with his GPs view that he would not be able to return to full time employment again. During the meeting the claimant said that he needed to take further sick leave because of a shoulder condition and would be signed off further from 1 October 2015. The Claimant

put forward his proposals for adjustments to his hours and duties and there appears to have been some discussion around these. [81-83]

10. The following day, the claimant was issued with a doctor's certificate signing him off from 1.10.15-15.11.15. The reason for absence was twofold: his shoulder condition and that he was under cardiac review [96]

11. On 16 November 2015, the respondent wrote to the claimant informing him that he was to be dismissed with immediate effect on grounds of capability. Attached to the letter was a document headed: "Reasons for Dismissal." The first reason given was the claimant's inability to return to work full time. The document went on to explain why the adjustments proposed to the claimant's duties were not feasible. [84-86]

12. The dismissal letter informed the claimant that any appeal had to be submitted in writing with full grounds within 5 days of the letter. On 24 November 2015, the claimant wrote to the respondent indicating that he wished to appeal against his dismissal and that grounds of appeal would follow once he had discussed the matter with his union representative. Although outside the time limit, the respondent acknowledged the letter, stating "*we await your letter of appeal*". [87] On 10 December 2015, having heard nothing further from the claimant, the respondent sent the claimant a letter informing him that it would not hear his appeal [90-90a]

Claimant's Submissions

13. The claimant was directly discriminated against because of disability as he was dismissed because of his heart condition. The dismissal also amounted to unfavourable treatment for the purposes of section 15 EqA. The unfavourable treatment was in consequence of the claimant's disability as his heart condition did not allow him to work full time or carry out the full extent of his duties. The respondent accepted that it could have accommodated the claimant working part time on a permanent basis.

14. The PCP applied by the respondent was the requirement for doctors to work full time i.e. 8 sessions a day. A reasonable adjustment would have been to offer the claimant part time work i.e. 4 sessions, which the respondent did not do. If part time work had been offered, the claimant would have returned to work. The claimant does not rely on any other matters as PCPs.

15. There was inadequate discussion and consultation with the claimant prior to the dismissal. The claimant had 24 hours' notice of the capability hearing and no opportunity afterwards to consider the consequences of the Partner's meeting, at which the decision to dismiss was taken. Although the respondent agrees that it could have offered the claimant part time work, its whole focus was on the likelihood of his full-time return.

16. Having acknowledged the claimant's intention to appeal, it was unreasonable to refuse him an appeal without informing him of any revised timescales.

Respondent's Submissions

17. The claimant was dismissed because of his continuing ill health. Notwithstanding the claimant's wish to return, he was unfit to do so in any capacity. He continued to receive sick notes signing him off continuously until February 2016 and all of the notes, apart from one referring to stress, referred to his heart condition. The tribunal is invited to ignore the subsequent letter from his GP declaring him retrospectively fit as this is inconsistent with the position taken contemporaneously. The claimant accepted that he had made an insurance claim on the basis that he was unfit for work. The claimant is working at his wife's practice on terms similar to those he sought from the claimant but closer to home, which is what he had always wanted. He had no intention of returning to the respondent.

18. The invitation to the capability meeting was sent by post and email. If the Claimant needed more time to arrange representation, he could have asked for it. The dismissal letter explained the right of appeal. A substantial amount of time had passed between him indicating his intention to appeal and the respondent not receiving any grounds. This is because he had no intention of returning. Any discussion that he claims to have had with the BMA about the appeal were most likely discussions about bringing this claim.

19. The respondent is a small practice and the claimant's absence had already cost it £132,000. Given its size and administrative sources, and the financial impact of the absence, dismissal was a reasonable response.

20. If the dismissal is found to be unfair, the respondent could have dismissed fairly within 2 months of the dismissal as the claimant remained signed off post dismissal and no adjustments were recommended that would have enabled him to return.

21. In relation to direct discrimination, the claim is not made out as the claimant has not shown that he was less favourably treated than a non disabled employee with a similar period of absence.

22. It is accepted that the dismissal arises in consequence of disability. The respondent's legitimate aim was to ensure the best possible care to patients. Dr Lechi gave evidence about the need for continuity of care and how this could not be maintained with locum doctors. There was also a financial impact on the practice arising from the claimant's absence. Although partly funded by NHS England, the practice had to absorb over £90,000 itself. Dismissal was a proportionate response in the circumstances.

23. The duty to make reasonable adjustments did not arise as the claimant was unfit to return to work as evident from the sick notes and the fact of the insurance claim. None of the adjustments proposed by him would have been effective at the material time. Alternatively, the claimant did not suffer any substantial disadvantage.

Conclusions

24. Having considered our findings of fact, the submissions and the relevant law, we have reached the following conclusions on the issues:

Direct discrimination

25. The claimant's case is that he was dismissed because of his disability i.e. his heart condition. The respondent says that he was dismissed because of the consequences of that condition i.e. that he was unfit to resume his role. We accept the respondent's case, not least because Dr Lechi had also previously suffered a heart attack but had not been dismissed. The claimant has not shown that he was treated less favourably than a non disabled person with a comparable amount of absence. He has therefore not discharged the burden upon him to establish a prima facie case of discrimination. The direct discrimination claim is therefore dismissed.

Failure to make reasonable adjustments

26. The claimant now relies only on the requirement to work full time as a PCP, having abandoned those matters listed as PCPs at paragraphs 30.1 - 30.6 of the particulars of claim. We are satisfied that this was a PCP applied by the respondent. It was clear from the reasons attached to the dismissal letter that full time working was the respondent's business model and a departure from this was considered detrimental. Also, the reason given for dismissal was that there was no prospect of the claimant returning to full time (my emphasis) work within the foreseeable future. [84-85]

27. The claimant has the burden of showing that the PCP put him at a substantial disadvantage. It is clear from the body of medical evidence and the claimant's own testimony that he was unlikely to be able to work full time for the respondent again. Nevertheless, we do not consider that he was at a substantial disadvantage because it was not the inability to work full time that was preventing him from carrying out his profession with the respondent but his unfitness to undertake any work due to his ill health. That was the position at the date of dismissal and beyond as evidenced by the doctor's certificates. Had the claimant been fit to return to part time work at any point prior to dismissal, the doctor's certificates would have given that indication in the section of the certificate dealing with adjustments. In a letter dated 28 July 2016, Dr Brice wrote that, despite the claimant's difficulties, he was in fact fit to return to work between 16.11.15 and 15.2.16 [180]. We place little if any weight on this letter. It is contrary to the certificates that he signed and they are likely to be more reliable as they are contemporaneous with events, as opposed to a letter written retrospectively in the context of litigation.

28. In the absence of a substantial disadvantage, the duty to make adjustments does not arise. In those circumstances, arguments about whether the respondent was willing for the claimant to return part time or not are irrelevant as he was unfit to do so.

29. If we are wrong and the claimant did suffer a substantial disadvantage because of the requirement to work full time, any adjustments to the claimant's hours/sessions at the point of dismissal would have been ineffective as he would not have been fit to work the reduced hours. An adjustment that is ineffective in removing a substantial disadvantage is not a reasonable one.

30. The tribunal is not limited to considering the adjustments put forward by the parties and we have therefore considered whether it would have been a reasonable adjustment to allow the claimant more time off. At the time of dismissal, the claimant had been absent for 12 months – 6 on full pay and 6 on half. There was no indication as to when he would be fit to return, on any basis, and as we know, he remained unfit for some time thereafter. In those circumstances, we do not consider allowing more time off a reasonable adjustment. The section 20 claim is not made out and is dismissed.

Discrimination arising in consequence of disability – section 15

31. It is accepted that dismissal is unfavourable treatment for the purposes of this section. We are satisfied that the dismissal arose in consequence of disability as the claimant's continued absence was caused by his heart condition. We also accept that the respondent's need to ensure that the best possible care was provided to patients was a legitimate aim.

32. In considering the issue of proportionality, we have asked ourselves whether the claimant's dismissal was reasonably necessary to achieve the stated aim. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do the respondent's aims outweigh the discriminatory impact of the dismissal. Deciding that issue involves a balancing of the reasonable needs of the business against the effects of the respondent's actions on the claimant.

33. Dr Lechi set out in his witness statement the impact of the claimant's continued absence on the practice, financially and operationally and we accept that evidence. The respondent is a small practice that receives all its funding from NHS England. It has had to bear some of the financial cost of the claimant's absence and, notwithstanding the use of locums, the other members of the practice have had to shoulder the burden of extra work caused by the absence. There has also been an impact on continuity of care, which, we were told, is very difficult to maintain with locum doctors. The respondent was not in a position to recruit a permanent replacement for the claimant while he remained employed and there was no indication as to when he would return. All of this impacted on patient care and we are satisfied that the need to provide the best possible care for patients outweighed the claimant's need to remain employed. In those circumstances, we find that dismissal was proportionate. The section 15 claim is not made out and is dismissed.

Unfair Dismissal

34. We are satisfied that the reason for dismissal was capability based on the claimant's continued unfitness to carry out his full time role of GP. We are also satisfied that there was sufficient medical evidence available to the respondent at the time for it to form that belief.

35. In the case of long term ill health dismissals, as well as the general requirement to adopt a fair and proper procedure, there are 3 matters which go to the issue of fairness: i) consultation; ii) medical investigation and iii) consideration of other options. The claimant makes a number of complaints about the procedure.

36. The claimant contends that he was given insufficient notice of the capability meeting. The invite letter was dated 6 October 2015. The respondent had contacted the claimant on the 5 October by email asking if he could attend a meeting with the partners on 8 October and he confirmed that he could. In his witness statement, he said that the email was all that he received by way of invite and that he thought the meeting was a general catch up regarding his health. However in cross examination, he accepted that the invite letter was sent to him by email on 7 October though he contends that he did not open the attachment so did not see its contents before the meeting. If the claimant was unaware of the purpose of the meeting because he failed to read the invite letter, that is his fault, not the respondent's.

37. The claimant says that he was not given the right to be accompanied. However, the invite letter expressly refers to that right, which he would have seen had he opened it. Also, contrary to another of the claimant's assertions, he did receive warning that dismissal was a potential outcome of the meeting as the invite letter said so in terms.

38. During the capability meeting, the claimant expressed his wish to return to work on a part time basis, starting on a phased basis of one session per week, gradually rising to 4 sessions. Dr Lechi told us that he offered the claimant part time working of 4 sessions a week at the meeting. The claimant denies this. We prefer the claimant's account. There is no reference to such an offer in the meeting notes. Also, at the start of the meeting, the claimant was told that no decisions would be made that day so an offer of part time work would have been inconsistent with that statement. Dr Lechi told us that he met with the other partners mid-end of October and collectively, they decided to dismiss the claimant based on his inability to work full time.

39. Although the partners had concluded that the claimant was unlikely to return to full time employment in the foreseeable future, there had been no meaningful consideration or consultation on alternatives to dismissal, in particular, the possibility of a return to work part time. Dr Lechi told us that it would have been possible for the claimant to work 4 sessions on a permanent basis, upon his return, albeit not on the terms he had proposed. When asked why he did not invite the claimant to a further meeting to discuss the terms on which the respondent could offer part time work, Dr Lechi said that he did not think that such a meeting would be productive because the claimant had given the impression that he was not flexible. In our view, that was an unreasonable stance to

take given that this was potentially an alternative to dismissal. Whilst we now know that the claimant continued to be signed off post dismissal, we have to judge the respondent's actions based on what it knew, or ought to have known, at the time the decision was taken. At that time, the most up to date medical report was that of Dr Anderson, of 18 September 2015, confirming that the claimant was fit to return to work on a part time phased basis. By the time of the capability meeting, the claimant had developed a right shoulder problem that required him to be signed off for a further period until 15 November 2015. In those circumstances, a reasonable employer in the respondent's position would have obtained an updated medical report in order to establish the extent to which the shoulder injury would impact on the prospect of the claimant's return on a part time basis. The respondent did not do that but instead, decided, before the certificate had expired, that the claimant should be dismissed.

40. Taking all of these matters into account, we find that the claimant's dismissal was procedurally unfair.

41. Having found the dismissal unfair, we have gone on to consider whether the claimant could have been dismissed fairly at a later date or if a proper procedure had been followed. Polkey v AE Dayton Services Ltd 1988 ICR 142, HL (*Polkey*).

42. We know from the evidence that after the dismissal, the claimant was signed off for continuously until 14 February 2016, at least, and that all of the 4 certificates within that period declared him unfit for any work. Had the claimant not been dismissed when he was, it would have become apparent to the respondent very quickly that his return to work, on any basis, was not imminent. Given the length of time the claimant had been off the absence of an imminent date of return and the consequences of that to the practice, we have concluded that the respondent could have dismissed the claimant fairly at the end of December 2015. As the claimant was already on nil pay, he would not have been entitled to any salary during the the additional weeks of employment. His remedy is therefore limited to a basic award for unfair dismissal of £2,850.

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Employment Judge Balogun
Date: 14 March 2017