EMPLOYMENT TRIBUNALS

Claimant: Miss J Fitzmartin

Respondent: Wrightington Wigan & Leigh NHS Foundation Trust

HELD AT: Manchester **ON:** 3 July 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondent: Mr J Boyd, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed.

2. The determination of remedy to be forwarded to the claimant is adjourned.

3. The remedy hearing has, since the date of hearing, been listed for 22 December 2017.

REASONS

1. By a claim presented to the Tribunal on 2 March 2017 the claimant alleged that she was unfairly dismissed by her employer from her position as a Staff Nurse at the Royal Albert Edward Infirmary in Wigan. The respondent resisted the claim. The case was listed for hearing. The issue in the case was whether the dismissal was fair. Counsel confirmed at the outset of the hearing that it was not disputed that the reason for dismissal was potentially fair, namely capability.

2. I heard evidence for the respondent from Ms Carolyn Dereszkiewicz, Head of Nursing Scheduled Care at the respondent who took the decision to dismiss the claimant. Tthe claimant gave evidence on her own behalf. Both witnesses made written statements which I read. I was provided with a bundle of documents to which I refer where necessary by page number, and at the conclusion I was provided with copies of the decision of the Employment Appeal Tribunal in **DB**

Schenker Rail UK Limited v Doolan UKEATS/0053/09 and **BS v Dundee City Council [2014] IRLR 131 CS** (Court of Session).

3. Findings of Fact

4. The claimant was employed by the respondent as a nurse from March 2000 until her employment was terminated on the grounds of capability on 24 October 2016.

5. Whilst out running in June 2016 the claimant sustained, although she was not aware of it at the time, fractures to both her legs. Her knees became severely painful and she was off work from 16 June 2016 until her dismissal.

6. It appears that the severity of the claimant's condition was not appreciated at the time. She was referred to the Musculoskeletal Clinic and Treatment Service in July 2016 and at that stage one of her legs was x-rayed and at that point it was made apparent that she had been walking around on a broken leg for about ten weeks. It was later discovered that both tibia had sustained stress fractures. It was the claimant's case that her mobility was seriously affected and that she was unable to perform her duties as a nurse from the onset of these injuries.

7. The claimant was invited by the respondent to a formal interview under its sickness absence procedure. This was conducted by Ms Hindley on 2 August 2016. The note (37) shows that the claimant was not currently fit for work or any amended duties.

8. On 7 September 2016 the claimant was seen in clinic by Mr Ben Coupe, Consultant Orthopaedic Surgeon. He was later to report stress fractures of both tibia and that he had asked her to use crutches for weight bearing and to rest the knees consciously for the next six weeks. He indicated that he would review her with further x-rays in six weeks' time.

9. At a meeting that took place by telephone on 8 or 9 September 2016 this was reported to the claimant's manager Ms Hindley (41) at a further formal interview and at that stage there was a suggestion of referral to Occupational Health and the capability case, was to be referred to the Head of Nursing and the note records that termination was a potential outcome at that stage.

10. The respondent wrote to the claimant on 30 September 2016 inviting her to attend a meeting on Thursday 6 October with Ms Dereszkiewicz and the letter indicated to the claimant that, "If it became apparent that a return to work was not foreseeable within a timeframe deemed to be reasonable by the Trust, consideration may be given to the termination of your contract".

11. In the meantime the claimant was referred to Dr Kumar, Consultant Occupational Medicine, who was the respondent's Occupational Health provider. That assessment took place on 4 October 2016 and Dr Kumar wrote a report to Ms Hindley of that date (48). He referred specifically to the fact that the claimant was under the care of Mr Coupe and that he had advised that she should use two crutches for weight bearing and that she had a review assessment with him in two weeks' time. He also reported that the pain had diminished though not resolved, she was awaiting a bone density scan and he said this:

> "At the present moment she is unfit for work. Overall I am confident she will be able to return to her duties. I am making arrangements to see her again in a month's time."

12. In the meantime an absence management report (50-54) was prepared probably by Ms Hindley. This recounted the claimant's long history of sickness absence, but it is common ground that the respondent did not take that into account in making the decision to dismiss.

13. So far as the claimant's recent condition was concerned, it was reported (52) that amended duties had been discussed with the claimant but at the time that that was done she felt unable to return to work, and that the matter had been referred to Ms Dereszkiewicz because there was no return to work planned for the near future. It was noted that a further fit note had been submitted which covered the claimant's absence to 29 November 2016.

14. Attached to the report was an absence record which so far as the current absence was concerned referred to a phased return to work and amended duties being the support that was offered. It does not appear that any phased return to work was contemplated at that stage.

15. A meeting took place on 12 October 2016 between Ms Dereszkiewicz and the claimant, who was not represented or accompanied, with a member of HR present. It is common ground that the outcome of the meeting could result in termination of contract was informed to the claimant at the outset. It is recorded in the notes that the claimant had been on long-term sick since 16 June; that she had seen an Orthopaedic Consultant; been referred to an Orthopaedic Specialist; that she had been reviewed the day before, and a Dexa scan was awaited. She was currently on crutches. It was said that the condition was unusual in that it involved two bilateral fractures. It was noted that she had had no treatment between 15 June and 7 September and that she was to be seen again four weeks after the consultant visit next week so far as Occupational Health was concerned. The notes record as follows:

> "Decision to review again after consultant visit, hopefully to be able to support a return to work at that time.
>
> If fractures healed, look at rehab, return to work.
>
> Can't currently weight bear, straighten leg, feels like on fire. Could I RTW with limited mobility?
>
> We would need some medical guidance on what capability, our limitations etc. Unfortunately cannot create a role but could look with medical guidance if we had anything we could temporarily redeploy to.
>
> JF – Have considered early retirement, MAS, ill health retirement etc but not sure.
>
> Had MRI of spine, also a few things going on there, I have prolapse disc. Having appointments at RAEI.

CD – need to have direction from your consultant/OH around overall capability to undertaken role [sic] – see again two weeks after consultant appointment."

16. It was Ms Dereszkiewicz's evidence that she did not see at that stage the existing letter of report from Mr Coupe. She does not appear to have asked the claimant for a copy of it. The evidence she had comprised the sick notes and the report of Dr Kumar only.

17. A letter was sent to the claimant on 17 October 2016 appointing the next formal absence review to be 24 October 2016 and again the warning about the potential for termination of contract was stated.

18. On 19 October 2016 the claimant appears to have been seen in clinic by Mr Coupe again and he wrote a report/letter to the GP which was typed on 20 October 2016 (58-59). The claimant received this prior to the formal absence review. He described the claimant now as having what are called "off loading braces and a review in six weeks prior to return to work". He described the claimant as having made gradual progress; that the x-rays seemed to show a gradual healing of the stress fractures. She was recorded as having been carefully weight bearing on crutches for the last six weeks. It was said she was worried about getting back to work in around a month to six weeks' time. He thought that at some stage she would likely need some physiotherapy but it was not essential at that stage. He had prescribed a pair of off-loading braces with a view to them reducing the strain or pressure on her knees, and he said that he would review her in six weeks' time.

19. It is the claimant's case that when she went to the review meeting after that date she had with her and tabled, literally putting them on the table in front of Ms Dereszkiewicz, copies of the two letters from Mr Coupe, but that Ms Dereszkiewicz was dismissive of them, glanced at them without reading them and no reference is made to them in the notes of the meeting. It is common ground that prior to that meeting the claimant had not been back to Mr Kumar.

20. That meeting took place on 12 October 2016. Ms Woods of HR was present. Again the warning about termination of contract was mentioned. The notes are relatively brief (62). There is no mention at all to the production of Mr Coupe's letters, nor, if they were not produced, is there any reference to Ms Dereszkiewicz asking to see the letters. In evidence ,Ms Dereszkiewicz accepted that she had not waited until the outcome of the second Occupational Health attendance. Although it is recorded that the claimant had had the Dexa scan for bone density at that stage, it was not disputed by the respondent, when the claimant said that she did not have that until some time afterwards. that that was the case.

21. The notes record that Ms Dereszkiewicz asked how long the braces would be on for, and that the claimant said that whilst she did not think the intention was to have them on long-term she may have to. Ms Dereszkiewicz asked about the treatment plan. There was a reference made to taking calcium tablets for bone marrow.

22. Ms Fitzmartin produced a further sick note dated 19 October 2016 for six weeks up until 4 December 2016 and enquired about half pay. It seems probable that the explanation for that is that the Trust permits six months of full pay on sick

leave and then six months of half pay and the claimant was therefore approaching the point at which half pay might come in.

23. It is common ground that the claimant said that she would like to take four weeks' annual leave after the six week fit note expired, which would look to a possible return to work in January 2017. The claimant's evidence was that proposal was dismissed by Ms Dereszkiewicz who was angry that the claimant would not be around to support the work of her unit at around Christmas and New Year. The notes also say this:

> "CD asked about any RTW prior to this. JF was going to discuss this at her consultant visit and with GP. JF advised she does not want to return too early and believes it to be about another three months before a return is realistic. CD advised this would be a seven month absence at that point. Again JF did not want to return too early and then possibly go off again."

Then after the word "adjourned" the notes record the respondent's decision to dismiss the claimant as follows:

> "Considered no imminent RTW, nothing noted on fit note around any amended duties, adjustments to return, JF still on crutches and knee braces, no real assurance around RTW in the future. JF stated realistically another three months. Consider impact on service, staff etc.
>
> Decision termination grounds of capability.
>
> JF asked about applying for ill health retirement."

24. There is no doubt that the claimant's right of appeal against the decision was mentioned in the notes, and in a letter of 26 October 2016 (63-64) Ms Dereszkiewicz referred to a further follow-up after the consultant visit and she said at the end of the first page of the letter with regard to the earlier meeting:

> "Taking the above into account I advised that I would defer my decision until you have had the opportunity to again see your consultant, and after this hopefully we will be in a position to discuss and support a return to work for you."

25. She repeated the earlier note about returning to work with limited mobility and that they would require medical guidance and an understanding of the claimant's capabilities and limitations. She recorded that currently the fit note stated the claimant was not fit for work and as a staff nurse she would be unable to undertake the normal duties in her current condition. Ms Dereszkiewicz recorded that she advised at that earlier stage that she would be happy to explore alternative options in the short-term. Ms Dereszkiewicz then summarised the contents of the meeting that had taken place two days earlier.

26. Following that letter Dr Kumar appears to have seen the claimant again on 1 November 2016. He was clearly aware that she had been informed that her contract was terminated. He described her as still having problems with her knee joint and currently wearing braces and elbow crutches, and he recorded that the claimant had elected to apply for ill health retirement and he informed her he would be happy to assist her with that and he was going to write to Mr Coupe.

27. In my judgment the medical evidence prepared after that day was probably prepared with a view to the claimant possibly seeking ill health retirement from the NHS Pension Trustees. Page 66 is a report of Mr Coupe of 10 November 2016 saying that he is happy to provide information about ill health retirement. There is another one of 12 September 2016 which suggests that the x-rays were showing then good healing. He records the claimant was still using the braces and thought at that stage she should tolerate physiotherapy. He described the ongoing healing of the stress fractures on x-ray as a very positive finding. At that stage he was to review her in two months. There was no question here of at what point the claimant would have been fit to return to work in the minds of Mr Coupe, nor was it in his report of 6 February 2017, because that final report, which is the latest opinion, was either prepared for the purpose of these proceedings or partly for these proceedings and for the ill health retirement application. It is a letter addressed "To whom it may concern" so it may have been prepared for the purpose of these proceedings predominantly. What it does show is that he had not seen the claimant since December. He said this:

> "I felt subjectively at that stage she was making little improvement and x-rays seemed to show healing. Rehab was being hampered with pains elsewhere, particularly in the back and further down the legs, probably as a result of her altered gait. At that stage I referred her for physiotherapy."

He concluded by saying:

> "She does seem to be making progress and I'd hope that in the long-term her injuries settle completely and no longer limiting in terms of activity."

28. Subsequently the claimant's ill health retirement application was rejected.

29. It is clear that at least at some point in the process leading to her dismissal the claimant had suggested she could return to work at some point on what was called "amended duties", by which she meant doing the more clerical and sedentary tasks on the wards.

30. The claimant at the time of the injury was deployed to the Medical Assessment Unit and was sometimes acting as Coordinator, sometimes Section Leader, in relation to that, which is essentially a second stage from A & E receiving up to 12 patients in a bed a day and sending them home or on for further treatment or specialist referrals. Some of those patients would have acute needs from time to time. When not deployed to that work she worked on Ince Ward which I understand to be a cardio and respiratory acute ward which also would require all the staff to be fit and active and able to respond to patients' needs.

31. It was Ms Dereszkiewicz's evidence that she did not consider that the claimant with reduced mobility could return to amended duties on either of those wards. That seemed to be a reasonable position for her to adopt.

32. The respondent's evidence also was that there was no role that a Registered Nurse could adopt in the hospital on a temporary basis in which she was effectively doing the more clerical types or administrative types of duties and nothing else.

33. At the conclusion of the evidence both parties made submissions.

34. The relevant legal provisions appear from section 98 of the Employment Rights Act 1996. It seems to me that the relevant test for fairness in these circumstancesy can be encapsulated by reference to four cases: the two referred to by Mr Boyd and the two established authorities in relation to capability dismissals, namely **Spencer v Paragon Wallpapers Limited [1976] IRLR 373** EAT and **East Lindsey District Council v G E Daubney [1977] IRLR 181 EAT**.

The Law

35. In the earlier case of **Spencer v Paragon Wallpapers** the Employment Appeal Tribunal concluded that every case would depend on its own circumstances, and:

> "The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer."

36. In the later case of **Daubney** which concerned questions of consultation and the approach to be taken by the employer the often quoted passage which appears at page 184 of the report is this:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But in every case employers take such steps as are sensible according to the circumstances to consult the employee and discuss the matter with him, and to inform themselves upon the true medical position, it to be found in practice that all that is necessary has been done."

37. Mr Boyd referred me to the case of **BS v Dundee** in the Court of Session. The Court of Session referred to the three important themes from the authorities, and I quote from the headnote:

> "Three important themes emerge from the authorities. First, in a case where an employee has been absent from work for some time owing to sickness, the critical question is whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing the employee. Secondly, there is a need to consult the employee and take their views into account. This is a factor that can operate both for and against dismissal – if the employee states they are anxious to return to work as soon as they can and hope that they will be able to do so in the near future, that operates in their favour; if, on the other hand, they state that they are no better and do not know when they can return to work, that is a significant factor operating against them. Thirdly, there is a need to take steps to discover the employee's medical condition and their 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."

38. My attention was drawn, as I say, also to the case of the EAT in Scotland in the case of **DB Schenker Rail (UK) Limited v Doolan** and in particular at paragraph

36 there is the warning against the Tribunal substituting its own view for that of the reasonable employer, and the guidance given by the Court of Appeal, and in particular by Lord Justice Mummery, in the case of **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** and paragraphs 42 and 43 are there quoted. The EAT referring to that case (which was also a capability dismissal) in paragraph 37 of **Schenker** said:

> "Likewise, a Tribunal requires to guard against being carried along by sympathy for a longstanding employee whose employers have concluded he is not fit to return to his job in circumstances where he was keen to try to return to work and, in all case, to resist the temptation to test matters according to what they would have concluded and decided if they had been in the employer's shoes."

39. Mr Boyd's further submission on the law was that the test to be applied was clearly the **Sainsbury's Stores v Hitt** test of the range of reasonable decisions or processes that a employer would be expected by the Tribunal to satisfy. In other words, some defect in the process would not of itself necessarily render the dismissal unfair unless it was one which would take the process outside the reasonable range.

Conclusions

40. In my judgment there is a difficulty for the respondent in this case based upon a proper application of those principles.

41. It emerges from an analysis of the available medical evidence. Ms Dereszkiewicz accepted that at the time she considered the claimant's case she was aware that the claimant had been seen by a consultant, was to be seen again by a consultant, had been seen by Dr Kumar and was to be seen again by Dr Kumar, in effect very shortly after the point at which she made the decision to dismiss. All she had at the time was Dr Kumar's reports, the claimant's views about her likely return to work and ability to work, and the fit notes, and the more recent fit note indicating that the at the point when the decision to dismiss was taken the claimant was signed off as being unfit for work without any reference to amended duties or phased return or anything of that nature for a period of six weeks.

42. Whether it is to the advantage of disadvantage of an employer in this situation, it is the case that although herself not a practitioner in the orthopaedic discipline Ms Dereszkiewicz as Head of Nursing was entirely aware of the process by which people are referred to and can receive consultants' letters. It was not suggested by her that she considered that those letters were not available at least to the claimant.

43. There was a dispute in the evidence about whether they were put before her. On balance I am minded to resolve that dispute in favour of the claimant, but lest I be wrong in that I proceed now to consider the case on the basis that Ms Dereszkiewicz did not have them in the sense that she was not afforded the opportunity at the meeting of 26 October to read Mr Coupe's letters.

44. The fact remains that Ms Dereszkiewicz was aware of these letters. She was aware that this was an unusual situation medically. She knew that Dr Kumar had said he wanted to see the claimant again. Although she knew both those doctors

were keeping the claimant's case under consideration, she could have but did not even ask to see the available medical evidence.

45. Whether if she had seen that she would have deferred a decision and referred the claimant again and if so what might have occurred is a matter which may be relevant to remedy. In my judgment that is not a relevant question in determining whether the employer acted fairly at this stage.

46. Bearing in mind the provisions of section 98(4) and taking into account all the circumstances of the case, and the guidance on the authorities which I have quoted, it seems to me that the right question to ask is:

> Would any Director of Nursing in a Trust which is responsible for the employment of nursing staff, knowing what she knows about the way in which medical reports can be or are obtained or available, acting reasonably have considered making a decision on dismissal, without even having asked whether medical consultants' letters or reports were available, and if having received an affirmative response, taken the time to read and consider the contents of those reports?

47. Even on that basis, which is based on the assumption that Ms Dereszkiewicz was not afforded the opportunity by the claimant to see those reports on that day, , in my judgment no reasonable person in that position would have made a decision without considering those reports. B

48. If, as I find, the reports were in fact available at the meeting the failure to red and consider them prior to making the decision was even less the action of a reasonable decision maker.

49. Beyond that, it seems to me unlikely that any reasonable employer in that situation, having referred to Occupational Health and knowin Occupational Health were intending to see someone again, would reach a decision without having seen the second Occupational Health opinion that was shortly to be provided.

50. Further to all that, I note in this case that Ms Dereszkiewicz refers to the need to follow medical guidance or consultant or Occupational Health guidance in relation to adjustments, as we might call them, in terms of getting the claimant back into work or into the workplace. It appears to me that she has assumed that that was the obligation of the employee. In other words it was for the claimant to get her consultant or the respondent's Occupational Health physician to state what could be done or should be done. So far as that is a matter for the respondent's Occupational Health physician that task cannot be reasonably laid at the door of the claimant. I was puzzled to see such a suggestion.

51. Even as far as the consultant was concerned, there was absolutely nothing to stop the Trust, with the claimant's consent, asking Mr Coupe for an opinion on those matters: what duties the claimant might be able to discharge at that time; at what time he thought the claimant might reasonably be able to return to her full duties, or at least sufficient of them to enable them to return to the workplace.

52. I make those findings and draw those conclusions conscious that ultimately it might not have made any difference and that the claimant could still have been fairly dismissed if these steps had been taken. But considering the position as at

the date of termination, which must be the focus of the Tribunal's attention at this point, I am satisfied that on the balance of probabilities no reasonable employer could have reasonably dismissed this claimant on these facts at that stage.

53. By way of completion, I should say this. It was submitted on behalf of the claimant by Mr Mensah that in some way Ms Dereszkiewicz was unreasonable in not taking sympathetically into account the fact that the claimant's first 2½ months of absence were when she was walking around on fractured tibias without being aware of the severity of the injury. Whilst I recognise the difficulty that the claimant faced, it has to be recognised as well that the regrettable situation also puts the respondent in a position. It is not their fault as employers that the injuries went undiagnosed or inadequately diagnosed for such a lengthy period. It is clearly a factor in the case that the absence was lengthy. I am very much aware that I do not know what would have been the course of the claimant's treatment and recovery if the diagnosis had been made earlier. It might have been that it would have been a shorter period of absence, but it is not clear to me on the material currently before the Tribunal to what extent I could make that finding.

54. Therefore whilst I can see that some employers might, in a situation such as this, have in some way discounted the significance of the earlier part of the claimant's absence, it does not seem to me that I can say that Ms Dereszkiewicz was acting unreasonably in not doing so. She treated the claimant as having been absent from 16 June when considering the application of the policy. Although some employers might not have done so, it does not seem to me that that was a position that Ms Dereszkiewicz was not entitled to take, and so in terms of making my judgment as to the fairness of dismissal I do not place any weight upon that argument for the claimant.

55. Having indicated the result of my deliberations to the parties I invited them to consider how they wished to proceed in relation to remedy. I asked them if they wished me to indicate at that stage if I had any preliminary views formed without hearing such further evidence as either party might wish to call on the issue, or hearing further submissions in relation to the doctrine in **Polkey v A E Dayton Services**. Both parties indicated they wished me to give an indication and at the point at which we decided to adjourn the remedy hearing I asked them if they wished me to record the preliminary indication in these written reasons, and they both said that they wished me to do so.

56. I stress again, this is at this stage a preliminary view and is not one from which I am unable to be shifted because I have not necessarily heard all the evidence in relation to remedy, nor indeed have I heard submissions of the parties on the **Polkey** issue.

57. With those warnings or bookmarks in place my provisional view is this.

58. If the Trust had properly considered the evidence of Mr Coupe at the point at which they were considering the dismissal at the end of October 2016 it is highly probable, almost a certainty, that they would have put the matter back to Mr Coupe. Had they done so he would likely have suggested that at the expiry point of the next sick note i.e. by early December, he would be able to provide a prognosis.

59. It is not clear to me what at that stage his prognosis would have been, and therefore my preliminary conclusion is that at that point in time there is a 50% chance that the claimant could have been fairly dismissed on the basis that the Trust could say, "Well after this length of time we cannot be expected to wait any longer for a more definitive answer".

60. I repeat that these are preliminary indications only, given in an attempt to assist the parties and given with their consent. If the remedy hearing is required the issue of remedy is entirely at large and neither the parties nor the Tribunal are to consider themselves bound by them in any way.

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Employment Judge Ryan

Date 3 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
4 October 2017

FOR THE TRIBUNAL OFFICE