



EMPLOYMENT TRIBUNALS

Claimant: Ms R. Phullar

Respondent: OFSTED

Heard at: Midlands West Employment Tribunal

On: 11 – 15 December 2023

Before: Employment Judge Murdin, sitting with Mr D Faulconbridge & T Stanley.

Representation

Claimant: Mr Gittins (Counsel)

Respondent: My Bayne (Counsel).

JUDGMENT

1. In relation to the complaints, the conclusion of the Tribunal is as follows:
 - (i) The claim for unfair dismissal fails, and is dismissed;
 - (ii) The Claimant's claim for discrimination arising from her disability fails, and is dismissed;
 - (iii) The Claimant's claim for failure to make reasonable adjustments, brought under section 20(3) Equality Act 2010 succeeds in respect of allegations (ii) and (iii).

- (iv) The claim for a failure to make reasonable adjustments under section 20 (5) Equality Act 2010 fails, and is dismissed.

- 2. The claim be listed for a two-day remedy hearing in respect of the 2 successful claims set out at 1(iii) above. This hearing is to be listed via CVP.

- 3. The parties have permission to file and serve any additional documentation in respect of remedy by no later than 4pm on 4th March 2024.

- 4. The parties have permission to file and serve any additional witness evidence in respect of remedy by no later than 4pm on 18th March 2024.

The Complaints

5. The Claimant is making the following complaints:
 - (i) Unfair dismissal;
 - (ii) Disability discrimination contrary to s.15 of the Equality Act 2010 about the following: her dismissal;
 - (iii) a failure to make reasonable adjustments to accommodate disability pursuant to s. 20 of the Equality Act 2010.

The Background

6. The Claimant was employed by the Respondent, a non-ministerial department of the UK Government. The Claimant was an Early Years Regulatory Inspector. She TUPE'd into the Respondent's organisation on 1st April 2017, but had just over 8 complete years of continuous service at the time of her dismissal on 3rd May 2022. The ET1 Claim Form was received by the Tribunal on 16th June 2022.
7. The Claimant claims unfair dismissal and disability discrimination (discrimination arising from failure to make reasonable adjustments and failure to provide auxiliary aids). There is no dispute that firstly, the Claimant was disabled, having been diagnosed with skin cancer and having received a skin graft and secondly, that the Respondent had knowledge of this at all material times.
8. The Claimant returned to work in October 2021. She had a phased return, and was advised by occupational health that desk-based work was fine but not to carry out physical inspections.
9. The Claimant says that no workstation assessment was provided following her return and was instead told to seek her own advice on what equipment

would help with desk-based duties. She says she used her own pillows to support her posture and a box file to ensure her screen was lifted to a suitable height.

10. The Claimant says the Respondent did not provide a number of reasonable adjustments and auxiliary aids and that the only adjustment made was a reduced workload.
11. An occupational report received on 26th January 2022 suggested the Claimant was not fit to return to full duties and that capability might return once adjustments were made. The Claimant says the absence of number of adjustments meant she could not take on full amounts of work.
12. Following a meeting on 8th March 2022, the Respondent informed the Claimant that she would be dismissed. An emphasis is said to have been placed on her inability to undertake inspections, the role for which the Claimant was being employed. The Claimant says no alternative roles were proposed.
13. The Claimant says the dismissal was substantively and procedurally unfair and that her dismissal was less favourable treatment arising by reason of disability. The Respondent denies that the dismissal was unfair and relies upon capability as the potentially fair reason. Additionally, the Claimant says that she was entitled to reasonable adjustments and provision of auxiliary aids and these were not addressed or provided.
14. The matter came before EJ Kelly on 13th May 2023 for a TCMH.

The Issues

Unfair Dismissal

15. What does the Respondent assert was the potentially fair reason or principal potentially fair reason for dismissal? The Respondent contends that the reason was capability.
16. Was the reason or principal reason a potentially fair one within the meaning of section 98(2) Employment Rights Act 1996?
17. Did the Respondent follow a fair procedure?
18. Did the Respondent act reasonably and within the range of reasonable responses in treating the reason as a sufficient reason for the dismissal?

Disability

19. The Respondent concedes disability and knowledge with regard to the Claimant's cancer and skin graft as defined within s.61(1) of the Equality Act 2010.

Discrimination arising from disability – section 15 Equality Act 2010

20. The Claimant relies on the following alleged acts as incidents of discrimination arising from disability:
 - (i) the Claimant's dismissal;
21. Did the alleged unfavourable treatment occur in the manner alleged?
22. If so, did it arise in consequence of the Claimant's disability?
23. If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent alleges that the Claimant's dismissal was a

proportionate means of achieving a legitimate aim, namely that the Respondent required the Claimant to be able to fulfil her duties as an Early Years Regulatory Inspector and she was unable to do so, and there was no timescale afforded as to when she would be able to do so.

Failure to make reasonable adjustments – section 20 (3) Equality Act 2010

24. What are the provision, criterion or practice (PCPs) relied on by the Claimant?

- (i) Requiring an EYRI to carry out on-site inspections;
- (ii) Carrying out desk - based duties.

25. In respect of each PCP relied upon, did that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? Did the Claimant suffer an increased level of pain, cramps and stiffness due to sitting for a long period of time and suffer pain in the neck and shoulder area due to leaning over when typing; and

26. Did the above amount to a substantial disadvantage for the purposes of the s.20(3)?

27. Did the Respondent know or ought it to have known that the Claimant was likely to be put at a substantial disadvantage by that PCP?

28. Did the Respondent take such steps as were reasonable to avoid that disadvantage? (EqA 2010, s 20(3)). The Claimant argues that the following steps which would have been reasonable but were not taken by the Respondent:

- (i) provide the Claimant with the those adjustments outlined in the Access to Work report dated 19 January 2022;
- (ii) provide the Claimant with opportunities to shadow colleagues during on-site inspections;

- (iii) provide the Claimant with a phased-return to conducting on-site inspections;
- (iv) consider alternative roles or duties that the Claimant could perform prior to dismissing her on 8 March 2022.

Failure to make reasonable adjustments – section 20 (5) Equality Act 2010

29. Would a disabled person in the Claimant's role, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with a persons who are not disabled?

The Claimant argues that the follow auxiliary aids would have been reasonable but were not provided by the Respondent:

- (i) Adapt 620 Ergonomic Chair;
 - (ii) Coccyx Cut Out Wedge with Memory Foam;
 - (iii) Portable Inflatable Lumbar Support;
 - (iv) Adjustable Tilting Footrest;
 - (v) Electric Sit Stand Desk with 1000mm x 600mm desktop;
 - (vi) Monitor Arm;
 - (vii) Olympus DS 9500 Voice Recorder.
30. Was the Claimant in fact put at a substantial disadvantage in comparison with persons who are not disabled by the failure to provide the said auxiliary aids?
31. Did the Respondent know or ought it to have known that the Claimant was likely to be put at a substantial disadvantage?
32. Did the Respondent take such steps as were reasonable to provide the auxiliary aid? (EqA 2010, s 20(5))
33. Did the claimant suffer an increased level of pain, cramps and stiffness due to sitting for a long period of time and suffer pain in the neck and shoulder

area due to leaning over when typing; and did the above amount to a substantial disadvantage for the purposes of s.20(5)?

The Evidence

34. For the purposes of determination of the above issues, the Claimant relies on the documentation contained within the bundle, together with her oral evidence, and that of Melissa Cox, an Early Years Regulatory Inspector, and the Claimant's Trade Union Representative.
35. The Claimant gave evidence in a calm manner, which was consistent with her documentation. We found her to be a straightforward and credible witness. To the extent that Ms Cox was able to assist, she was equally straightforward, although of course, she did not have the equivalent insight into the Claimant's position, although she was helpful in providing useful context.
36. The Respondent relied on the documentation contained within the bundle, together with the oral evidence of Mr James Norman, Matthew Hedges and Andrew Cook.
37. Mr Norman is an Early Years Senior Officer for West Midlands region, and was the Claimant's line manager. Mr Hedges is a Senior His Majesty's Inspector, and was the line manager of Mr Norman. Mr Cook is the Regional Director for West Midlands and Northwest regions, and for the purposes of this litigation, was the line manager of Matthew Hedges.
38. The Respondent's witnesses were at times defensive and the Tribunal formed the view that they were overly concerned with the protection of their respective positions. This undermined the value of their evidence, and detrimentally affected their credibility.
39. We have carefully read and considered all of the above documentation.

Submissions

40. The parties made helpful oral and written submissions following the conclusion of the evidence, which the Tribunal has read and carefully considered.

Conclusion

41. In relation to the respective issues, our conclusions are as follows:

Unfair Dismissal

42. What does the Respondent assert was the potentially fair reason or principal potentially fair reason for dismissal?

The Respondent contends that the reason was capability.

43. Was the reason or principal reason a potentially fair one within the meaning of section 98(2) Employment Rights Act 1996?

The Tribunal is satisfied that the given reason does constitute a potentially fair reason within section 98(2) Employment Rights Act 1996, notably s98(2)(a).

44. Did the Respondent follow a fair procedure?

The Tribunal was concerned with the procedure that had been followed. In particular, that procedure was not consistent, and whilst we were not unduly concerned with the time taken, there could have been a greater consultation than was undertaken.

However, both parties were content with the extent of contact that took place – the Claimant was properly informed of the process and the outcome, whilst

the Respondent was genuinely concerned that it should not unduly trouble the Claimant.

Furthermore, and whilst there was no meaningful medical investigation (the Respondent could have obtained the Claimant's medical records and/or spoken to her Consultant), it was certainly reasonable to rely upon the OH report. The rationale for dismissal was clearly conveyed, and whilst there was no meaningful consideration of alternative redeployment, it was clear that the Claimant only wished to return to her position.

In the circumstances, and whilst improvements could have been made to the procedure that was adopted, it is clear to the Tribunal that a reasonable procedure was adopted.

45. Did the Respondent act reasonably and within the range of reasonable responses in treating the reason as a sufficient reason for the dismissal?

The Tribunal is content that the Respondent acted within the reasonable range. Whilst the Tribunal did have some concerns in relation to the areas set out above, it is not for the Tribunal to stand in the shoes of the Respondent, and the Tribunal has therefore concluded that the Respondent acted within the range of reasonable responses in treating the reason as a sufficient reason for the dismissal.

46. The claim for unfair dismissal therefore fails, and is dismissed.

Disability

47. The Respondent conceded disability and knowledge with regard to the Claimant's cancer and skin graft as defined within s.61(1) of the Equality Act 2010.

Discrimination arising from disability – section 15 Equality Act 2010

48. The Claimant relies on the following alleged acts as incidents of discrimination arising from disability:

(i) the Claimant's dismissal;

49. Did the alleged unfavourable treatment occur in the manner alleged?

It is accepted that the Claimant was indeed dismissed as alleged.

50. If so, did it arise in consequence of the Claimant's disability?

The Tribunal has concluded that the Claimant was not dismissed in consequence of her disability. We have considered what the operative factors were in the mind of the dismissing officer, and whilst we accept that there may be more than one operative reason, the Claimant's disability did not, in our minds, have any significant influence on the decision-making of the Respondent.

51. If so, was the treatment a proportionate means of achieving a legitimate aim? The Respondent alleges that the Claimant's dismissal was a proportionate means of achieving a legitimate aim, namely that the Respondent required the Claimant to be able to fulfil her duties as an Early Years Regulatory Inspector and she was unable to do so, and there was no timescale afforded as to when she would be able to do so.

We have not therefore been required to address our minds to this final issue.

52. The Claimant's claim for discrimination arising from her disability therefore fails, and is dismissed.

Failure to make reasonable adjustments – section 20 (3) Equality Act 2010

53. What are the provision, criterion or practice (PCPs) relied on by the Claimant?

- (i) Requiring an EYRI to carry out on-site inspections;
- (ii) Carrying out desk - based duties.

The Tribunal is content that both of the above identified PCPs do amount to appropriate PCPs for the purposes of s20(1) EqA 2010.

54. In respect of each PCP relied upon, did that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled? Did the Claimant suffer an increased level of pain, cramps and stiffness due to sitting for a long period of time, and suffer pain in the neck and shoulder area due to leaning over when typing?

The Tribunal has concluded that each of the aforesaid PCPs put the Claimant at a substantial disadvantage in comparison with persons who are not disabled. We remind ourselves that this threshold is deliberately set low, and further that there is no requirement to identify a specific comparator.

However, the particular disability suffered by this Claimant, and the consequences and symptoms of that disability, did indeed lead to the Claimant being placed at a substantial disadvantage in comparison with persons who are not disabled.

55. Did the above amount to a substantial disadvantage for the purposes of the s.20(3)?

Furthermore, that did indeed amount to a substantial disadvantage for the purposes of s20(3). Substantial is defined at s 212(1) EqA 2010 to mean “more than minor or trivial” and given the particular circumstances of the Claimant’s disability, the Tribunal is content that the consequences that she set out in her evidence amounted to a substantial disadvantage.

56. Did the Respondent know or ought it to have known that the Claimant was likely to be put at a substantial disadvantage by that PCP?

The Respondent has accepted that it was, at all material times, aware of the Claimant's disability. Furthermore, and whilst it is, in our view, overwhelmingly likely that the Respondent knew that the Claimant was likely to be put at a substantial disadvantage by the PCP, there can be no doubt that, in the unlikely event that they did not in fact know, they certainly ought to have known.

57. Did the Respondent take such steps as were reasonable to avoid that disadvantage? (EqA 2010, s 20(3)). The Claimant argues that the following steps which would have been reasonable but were not taken by the Respondent:

- (i) provide the Claimant with the those adjustments outlined in the Access to Work report dated 19 January 2022;
- (ii) provide the Claimant with opportunities to shadow colleagues during on-site inspections;
- (iii) provide the Claimant with a phased-return to conducting on-site inspections;
- (iv) consider alternative roles or duties that the Claimant could perform prior to dismissing her on 8 March 2022.

In respect of each allegedly reasonable step which would have been reasonable to take, the Tribunal has concluded as followed:

- (i) whilst it would have been desirable for the Respondent to provide these adjustments, given the particular PCPs, and the nature of the substantial disadvantage suffered by the Claimant, provision of the adjustments outlined in the Access to Work report dated 19 January 2022 would not have avoided that disadvantage;
- (ii) the Tribunal agrees with the Claimant that this adjustment would have been reasonable to provide. It is an adjustment that goes to the heart of the Claimant's role, and would have allowed her to see how a Dictaphone was used, and to assess whether it would have

assisted her. The Tribunal was impressed with Ms Cox's evidence in this regard, given her particular experience of the Claimant's precise job. Furthermore, it is an adjustment that would have been straightforward to provide, and consequently, would have been reasonable to provide, in order to avoid the Claimant's substantial disadvantage.

- (iii) the Tribunal also accepts that this adjustment would have been reasonable. Again, the Tribunal found that Ms Cox's evidence as to the mechanism and usefulness of phased returns was insightful, and furthermore, the Tribunal considered that the adoption of a phased return for the Claimant would have placed only a modest burden on an employer of the size and resources of the Respondent. It is an adjustment that had the potential to greatly ameliorate the Claimant's substantial disadvantage, and in the circumstances, we concluded that the provision of such an adjustment would have been reasonable.
- (iv) the Tribunal accepts the Respondent's evidence in respect of this adjustment. It was evidence that was not particularly challenged, and consequently, we conclude that the Respondent did consider alternative roles and/or duties for the Claimant.

58. The Claimant's claim for failure to make reasonable adjustments, brought under section 20(3) Equality Act 2010 succeeds in respect of allegations (ii) and (iii).

Failure to make reasonable adjustments – section 20 (5) Equality Act 2010

59. Would a disabled person in the Claimant's role, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with a persons who are not disabled?

The Claimant argues that the follow auxiliary aids would have been reasonable but were not provided by the Respondent:

- (i) Adapt 620 Ergonomic Chair;
- (ii) Coccyx Cut Out Wedge with Memory Foam;
- (iii) Portable Inflatable Lumbar Support;
- (iv) Adjustable Tilting Footrest;
- (v) Electric Sit Stand Desk with 1000mm x 600mm desktop;
- (vi) Monitor Arm;
- (vii) Olympus DS 9500 Voice Recorder.

60. Was the Claimant in fact put at a substantial disadvantage in comparison with persons who are not disabled by the failure to provide the said auxiliary aids?

The Tribunal has concluded that the Claimant was not put at any substantial disadvantage by the Respondents' failure to provide the above items.

61. In the circumstances, this claim for a failure to make reasonable adjustments under section 20 (5) Equality Act 2010 fails, and is dismissed.

Employment Judge Murdin

5th February 2024