EMPLOYMENT TRIBUNALS

Claimant: Ms S Alexander

Respondent: St George's University Hospitals NHS Foundation Trust

Heard at: **Croydon (via CVP)** **On:** **2 and 3 December 2024**

Before: **Employment Judge Leith**
Ms C Lloyd-Jennings
Mr W Dixon

Representation
Claimant: Mr Neckles (representative), for part of the first and second days; in person for the remainder of the first day and part of the second day; no representation for the remainder of the second day
Respondent: Ms Patterson (Counsel)

JUDGMENT

1. The complaints of unfair dismissal, direct disability discrimination and discrimination arising from disability are not well founded and are dismissed.

REASONS

Claims and issues

1. The claimant claims unfair dismissal, direct disability discrimination, and discrimination arising from disability.

2. Employment Judge Smith conducted a preliminary hearing on 24 November 2023. At that hearing, he clarified the issues with the parties. The agreed list of issues was annexed to his Case Management Orders, as follows:

> "1. Time limits
>
> 1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:
>
> 1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability.

2.2 If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The Tribunal will usually decide, in particular, whether:

2.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties.

2.2.2 The respondent adequately consulted the claimant.

2.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position.

2.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant.

2.2.5 Dismissal was within the range of reasonable responses.

2.3 In addition the claimant relies upon the following, either individually or collectively as factors which rendered the dismissal unfair: –

2.3.1 Proceeding with dismissal proceedings whilst the claimant continued to receive medical treatment.

2.3.2 Issuing warnings under the respondent's Capability Management Procedure whilst failing to provide any right of appeal against such warnings.

2.3.3 Relying on spent warnings in respect of lateness.

2.3.4 A continued failure to apply objective percentage target improvement notices of unsatisfactory attendance for sickness between 2011 and 2013.

2.3.5 Failing to consider prior to dismissal alternative employment, redeployment or reasonable adjustments before dismissing the claimant

2.3.6 Disparity of treatment. The claimant relies upon the treatment by the respondent of Louise Sauerwein, Harriet Owens, Richard Jones and Jacqulyn Totterdell.

2.3.7 Denying the claimant a right of appeal against dismissal.

3. Remedy

3.1 Does the claimant wish to be reinstated to their previous employment or re-engaged?

3.2 Should the Tribunal order reinstatement or re-engagement and if so on what terms?

3.3 What financial award should be made? The Tribunal will decide:

3.3.1 What financial losses has the dismissal, or any proven discriminatory act caused the claimant?

3.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.3.3 If not, for what period of loss should the claimant be compensated?

3.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? (The Polkey point)

3.3.5 Did the claimant cause or contribute to her dismissal? (The contribution point)

3.3.6 If so, should the claimant's compensation be reduced? By how much?

3.4 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

3.5 Should there be any uplift, up to 25% under the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 on the basis the claimant was denied a right of appeal against dismissal?

3.6 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

3.7 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

3.8 Should interest be awarded? How much?

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

4.1.1 Did they have a physical or mental impairments of "SVT and Stoma"?

4.1.2 Did they have a substantial adverse effect on their ability to carry out day-to-day activities?

4.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

4.1.4 Would the impairment have had a substantial adverse effect on their ability to carry out day-to-day activities without the treatment or other measures?

4.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

4.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

4.1.5.2 if not, were they likely to recur?

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 Did the respondent do the following things:

5.1.1 Proceeding with dismissal proceedings whilst the claimant continued to receive medical treatment.

5.1.2 Issuing warnings under the respondent's Capability Management Procedure whilst failing to provide any right of appeal against such warnings.

5.1.3 A continued failure to apply objective percentage target improvement notices of unsatisfactory attendance for sickness between 2011 and 2013.

5.1.4 Failing to consider prior to dismissal alternative employment, redeployment or reasonable adjustments before dismissing the claimant.

5.1.5 Dismissing the claimant.

5.1.6 Denying the claimant a right of appeal against dismissal.

5.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. The claimant relies upon the following actual comparators namely: -

- Louise Sauerwein,
- Harriet Owens,
- Richard Jones and
- Jacqulyn Totterdell.

Further or in the alternative the claimant relies upon a hypothetical comparator.

5.3 If so, was it because of disability?

5.4 Did the respondent's treatment amount to a detriment?

6. Discrimination arising from disability (Equality Act 2010 section 15)

6.1 Did the respondent treat the claimant unfavourably by:

6.1.1 Proceeding with dismissal proceedings whilst the claimant continued to receive medical treatment.

6.1.2 Issuing warnings under the respondents Capability Management Procedure whilst failing to provide any right of appeal against such warnings.

6.1.3 A continued failure to apply objective percentage target improvement notices of unsatisfactory attendance for sickness between 2011 and 2013.

6.1.4 Failing to consider prior to dismissal alternative employment, redeployment or reasonable adjustments before dismissing the claimant.

6.1.5 Dismissing the claimant.

6.1.6 Denying the claimant a right of appeal against dismissal.

6.2 Did the following things arise in consequence of the claimants. disability:

6.2.1 The claimant's sickness absence between 2011 and dismissal together with a tendency to act or behave materially differently both in terms of the way she understood and acted upon instructions or in carrying out her duties coupled with an impact on her power of recollection of information.

6.3 Was the unfavourable treatment because of any of those things?

6.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

6.4.1 To ensure regular attendance to maintain an efficient and reliable service.

6.5 The Tribunal will decide in particular:

6.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims.

6.5.2 could something less discriminatory have been done instead.

6.5.3 how should the needs of the claimant and the respondent be balanced?

6.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?"

<u>The first postponement application</u>

3. The Claimant had, via her representative, made an application for the final hearing to be postponed. That application was made on 29 November 2024, the working day before the hearing was due to commence. REJ Khalil wrote

to the parties explaining that the postponement application would be considered by the Tribunal on the first day of the hearing.

4. Neither the Claimant nor Mr Neckles, her representative, initially attended the hearing. Our clerk contacted both. Mr Neckles explained that he would not be attending. The Claimant did join the hearing; she had apparently been having technical difficulties connecting (in respect of which we of course make no criticism at all).

5. We heard submissions on the postponement application from the Claimant, and from Ms Patterson on behalf of the Respondent. We then adjourned to deliberate. When we returned to deliver our decision, Mr Neckles had joined the hearing. He asked to make further submissions regarding the postponement application, which we allowed him to do. We then adjourned to deliberate further. We returned to the hearing and delivered our decision on the application. Written reasons for that decision having been requested, we set them out here.

6. Our starting point was Rule 30A of the Employment Tribunal Rules of Procedure, which provides as follows:

> "30A.— Postponements
> (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
> (2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—
> (a) all other parties' consent to the postponement and—
> (i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
> (ii) it is otherwise in accordance with the overriding objective.
> (b) the application was necessitated by an act or omission of another party or the Tribunal; or
> (c) there are exceptional circumstances.
> […]
> (4) For the purposes of this rule—
> (a) references to postponement of a hearing include any adjournment which causes the hearing to be held or continued on a later date.
> (b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.

7. We also had regard to the overriding objective of the Tribunal, which is set out in Rule 2:

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing.

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues.

(c) avoiding unnecessary formality and seeking flexibility in the proceedings.

(d) avoiding delay, so far as compatible with proper consideration of the issues.

and

(e) saving expense."

8. The background to the application was as follows. The Claimant issued her claim on 23 May 2023. On the ET1, the name of her representative was Mr John Neckles, and the organisation representing her was named as "PTSC Union". She has remained represented by Mr Neckles, under the auspices of a Union (now apparently Libertas rather than PTSC), throughout these proceedings.

9. At the Preliminary Hearing on 24 November 2023, EJ Smith listed the final hearing for six days starting on 2 December 2024. He made orders to prepare the case for hearing.

10. The Claimant's compliance with those orders could best be described as patchy. The Respondent applied for an unless order on 2 April 2024, in respect of the Claimant's failure to provide a schedule of loss and disclosure of medical records as ordered. The Claimant did belatedly comply with the relevant orders, and the parties agreed an amended timetable for the remaining orders. Unless order application was therefore not pursued

11. The Claimant then failed to confirm that she was ready to exchange witness statement by the date agreed by the parties. On 11 November 2024, the Respondent therefore applied again for an unless order.

12. On 22 November 2024, REJ Khalil made an order that unless the Claimant exchanged her witness statement on or before 27 November 2024, her claims would stand as dismissed without further order.

13. The parties apparently did exchange witness statements on that day. The Claimant's witness statement was dated 27 November 2024.

14. On 29 November 2024, the working day before this six-day hearing was due to commence, the Claimant's representative, Mr Neckles, applied for a postponement of the hearing. The postponement was sought on the basis

that Mr Neckles was unable to attend the hearing because of a medical condition. It was accompanied by a Fit Note in respect of Mr Neckles, with the reason for absence being 4th Nerve Palsy.

15. The fit note said that Mr Neckles would be unfit for work from 19 November 2024 to 18 December 2024. It was dated 28 November 2024 (that is, the day before the application was made).

16. The application explained that the Claimant was unable to represent herself because she lacks legal knowledge and could not afford legal representation. It also took the point that the Respondent had not disclosed any evidence regarding the sickness absence history of the Claimant's comparators.

17. The Respondent objected to the postponement. REJ Khalil ordered that the application would be considered at the start of the hearing. He noted that given the current listing position in the region, if a postponement was granted the next available hearing dates would be September 2026 – that is, nearly some two years hence.

18. At 9:10 on the first morning of the hearing, Mr Neckles sent a further email to the Tribunal. He explained that his condition had been improving but had suffered a significant regression in the early hours of the morning of 29 November 2024, which is when he first became aware that he would be unable to represent the Claimant at this hearing. He reiterated a number of the same points set out in the original application.

19. The Claimant explained in submissions that she was not aware of what, if any, steps the Union had taken to arrange an alternative advocate to represent her at the hearing. She explained that she has anxiety and would therefore be unable to represent herself. There was no medical evidence before us of regarding anxiety. That is not one of the conditions relied upon by the Claimant as a disability within these proceedings. It was not mentioned in either Mr Neckles' original postponement application, not his subsequent email on the morning of the hearing.

20. When Mr Neckles appeared to make further submissions, he explained that the Union is very small, and that he is the only member of staff who is able to provide advocacy on behalf of members. He also explained that the Union does not have the funding to engage external representation for its members. If that is right, it is surprising that it was not mentioned in either the initial application or the subsequent email.

21. We had some concerns about the timing and manner of the application. In particular:

    21.1. The only medical evidence we had regarding Mr Neckles said that he was unfit for work from 19 November 2024. That was some three days before REJ Khalil's Unless order, which the Claimant

complied with. It was ten days before the application was made to postpone the hearing.

21.2. We consider that if it was right that Mr Neckles condition had taken a marked downturn in the early hours of 29 November 2024, he would have said that in terms in the initial application. It was clearly an important detail. He is an experienced representative. So it would be surprising if he had not made that clear.

21.3. It is also surprising that Mr Neckles attended his GP for a fit note the day before his condition apparently rapidly and markedly deteriorated; and consequently also, the day before he said he first became aware he would not be able to represent the Claimant at the final hearing. When Mr Neckles was asked about that in the course of his submissions, his response was that he wanted to have some medical evidence on hand in case his condition worsened, and he needed to make an application. We have some doubts about that explanation. Once again, it is surprising that he would not have mentioned that at an earlier stage. It gave the very strong impression of being an ad hoc attempt to explain away an unhelpful inconsistency in his application. But even if the explanation was right, it would show that he was aware of at least the possibility that he may need to seek a postponement prior to 29 November 2024. So more ought to have been done by the Union to secure alternative representation for the Claimant at an earlier stage, or at the very least to put the Tribunal and the Respondent on notice that a postponement application may need to be made.

22. The Claimant is of course represented by the Union. The relationship between the Claimant and the Union is a matter for them; but it was certainly not the case that Mr Neckles was representing the Claimant on his own account. We considered that it would be surprising if the Union was not able to provide any back-up representation in the event that Mr Neckles was unwell (or, for example, on holiday).

23. We bore in mind the issues with the Claimant's compliance with the Tribunal's orders. It took an unless order to compel her to produce an exchange a witness statement. It was not suggested to us that Mr Neckles' condition was the reason the Claimant had not exchanged her witness statement in a timely fashion. If it had been, we consider that he would have made that point.

24. We considered that the point regarding disclosure of evidence regarding the sickness history of comparators was a red herring. The Respondent's position appeared to be that is that they are not apt comparators. If that was the case, the disclosure of evidence regarding their absence history could not be said to be required. If the Tribunal did find that they were apt comparators, we could of course draw inferences from the failure to disclosure potentially relevant documents.

25. We noted also that no application has been made for specific disclosure of the records in question. Mr Neckles is a professional representative. He

accepted that he had not at any point made a request for the documents in writing, either to the Respondent or by application to the Tribunal. It is beyond surprising that a professionally represented party would sit on an alleged issue of non-disclosure until the working day before trial, before raising it for the first time in an adjournment application. If that was really the Claimant's position, it would fly in the face of the duties owed by parties and their representatives under rule 2 of the Employment Tribunal Rules of Procedure. It would amount to litigation by ambush.

26. In all of the circumstances, we were not satisfied that there were exceptional circumstances within the meaning of Rule 30A. We did not consider that the early hours of 29 November 2023 were the first time that it would have occurred to Mr Neckles that he would be unable to represent the Claimant at the final hearing. That was inconsistent with the sole piece of medical evidence before us (both in terms of what it said and when it was obtained).

27. We consider that the ill health of a particular representative from within a Union, starting nearly two weeks before the hearing and 10 days before the postponement application was made, could not in our judgment be said to be "exceptional" within the meaning of Rule 30A; particularly without any evidence that steps had been taken to source alternative representation.

28. Even if we had considered that there were exceptional circumstances, we would in any event have reached the conclusion that it was not in accordance with the overriding objective to postpone the hearing. That is because:

    28.1. The Tribunal is well versed in supporting litigants in person to present their cases to the Tribunal. It is a jurisdiction that is designed to be user-friendly for lay parties. Litigants in person represent themselves every day in numerous Tribunals up and down the country.

    28.2. Significantly, there was sufficient time within the listed hearing for the Claimant to be given additional breaks, and also for us to adopt a timetable that would allow the Claimant time to prepare her cross-examination of the Respondent's witnesses. The hearing was listed for 6 days, and there were only three witnesses for the Respondent.

    28.3. The allegations in the claim dated back to 2011. The most recent allegation was the Claimant's dismissal, the decision in respect of which was taken in December 2022. If the hearing had been postponed, it would have been nearly two years before a further final hearing could have taken place. That was a significant delay. Therefore, if this hearing had to be postponed, even the most recent allegations would have been almost 4 years old by the time the matter reached trial. That was a powerful factor against postponing.

<u>The second postponement application</u>

29. By the time we delivered our decision on the postponement application, it was nearly 1pm. We explained to the parties that we would spend the rest of the day reading, and we would then deal with any remaining housekeeping matters then hear the Claimant's evidence on the second day of the hearing. Ms Patterson had explained that she anticipated her cross-examination of the Claimant would take around 3 hours. We informed the Claimant that we would not then start the Respondent's evidence until the third day of the hearing to give her additional time to prepare to cross-examine the Respondent's witnesses. We explained that we could even start after lunch on the third day if she required more time. We explained to the Claimant that it was up to her whether she contacted her Union to discuss whether they could provide her with any support to prepare to present her case.

30. Before we were due to start again on the second day of the hearing, Mr Neckles lodged an appeal on behalf of the Claimant against our decision not to postpone the hearing. He connected to the hearing at the start of the second day, and applied orally for the hearing to be postponed on the basis of the pending appeal. He submitted that the Tribunal did not have jurisdiction to continue with the trial while an appeal was pending. We also heard submissions from Ms Patterson on behalf of the Respondent.

31. After deliberating, we returned and informed the parties of our decision. Having reminded ourselves of the same principles we had already considered when dealing with the first postponement application, we decided not to postpone the hearing, because:

    31.1. There was no basis for Mr Neckles' suggestion that this Tribunal no longer had jurisdiction to consider the matter simply because an appeal had been lodged. The fact that an appeal had been lodged was simply one relevant factor to consider in terms of whether to continue or to stay the proceedings.

    31.2. A significant factor in our decision on the previous application was the significant delay to the proceedings if the listed final did not go ahead. We were mindful that the appeal being considered by the Employment Appeal Tribunal would (unavoidably) build in yet further delay.

    31.3. It was not a case where the Tribunal had already heard evidence and made findings of fact on, for example, liability. All of the primary fact-finding still had to be done. A further delay would necessarily impact on the memories of all of the witnesses (including the Claimant). We noted that the Claimant's witness statement was relatively brief and contained very little primary evidence relevant to any of the allegations. In the circumstances, a delay may very well have impacted more heavily on her than on the Respondent's witnesses (who had all prepared detailed witness statements).

    31.4. For those reasons, as well as those we had articulated in respect of the first postponement application, we considered that it was not in the interests of justice for the matter to be further delayed.

32. After we had delivered our decision on the second postponement application, Mr Neckles immediately left the hearing. The Claimant then explained that she would not be able to, as she put it, "defend herself", and she could not answer any questions. We explained to the Claimant that, while we could not force her to participate in the hearing, there were three matters she should bear in mind:
    32.1. She was not defending herself. It was her claim, which she had initiated against the Respondent.
    32.2. Whether or not she had been represented by Mr Neckles, she would always have had be cross-examined, which would mean being required to answer questions from the Respondent's counsel. That would necessarily have taken up a significant part of one of the hearing days.
    32.3. Litigants in person represent themselves every day in front of the Tribunal. They do so without having either knowledge of the law or previous experience in presenting cases at Tribunal. So she should not think that either of those things would be necessary for her to be able to advance her claim.

33. We then took a break gave the Claimant some time to think about what she wanted to do next. When we returned, the Claimant explained that she could not continue with the hearing.

34. The Claimant then left the hearing. We proceeded in her absence.

35. We heard evidence on behalf of the Respondent from:

    35.1. Catherine Leak, General Manager in Facilities (Hotel Services);
    35.2. Phillip Robinson, Facilities Manager; and
    35.3. Caroline Knox, Deputy General Manager for Corporate Outpatient Services.

36. Each of the witnesses gave their evidence by way of a pre-prepared witness statement, regarding which they were asked questions by the Tribunal.

37. We had before us a bundle of 442 pages, together with a chronology and cast list prepared by the Respondent. At the end of the evidence, we heard submissions from Ms Patterson. We reserved our decision.

Fact findings

38. We make the following findings on balance of probabilities. We have not dealt with every area canvassed before us; rather, we have focused on those necessary to reach a conclusion on the issues in the claim. There was, in reality, very little factual dispute between the parties. The various internal processes carried out were contemporaneously documented. The Claimant did not, either in her pleaded claim or in her witness statement,

suggest that she took any issue with the factual accuracy of those contemporaneous documents.

39. The Respondent is an NHS Trust. It operates St George's Hospital in Tooting (as well as other sites). It employs over 9,000 staff.

40. The Claimant was employed by the Respondent as a Receptionist. There is some dispute around exactly when her employment started, which we do not need to resolve. The Claimant started working as a receptionist in 2011.

41. At the relevant times, the Respondent had in force a sickness absence management policy [375]. The policy in evidence before us came into force in November 2018. That policy provided a framework for dealing with persistent short-term absence [390]:

    41.1. The level of absence regarded as unacceptable would depend on the employee's general attendance record, but that as a guideline, two absences on separate occasions during a three month period; three absences on separate occasions during a six month period or five absences during a period of twelve months would normally be regarded as unacceptable.

    41.2. Where the absence record became unacceptable, the employee would be invited to a meeting under Stage 1. An employee had a right to be accompanied at a Stage 1 meeting, and to be invited on 7 days' notice. At a Stage 1 meeting, a monitoring period would be set. At the end of the monitoring period, a further meeting would take place at which the manager could decide:

        41.2.1. Satisfactory improvement had been achieved and the case would not proceed to Stage 2 (although in that case, if the absence deteriorated again within 3 months the procedure would be reinstated at Stage 2)

        41.2.2. Some improvement had been made but the overall attendance remained unsatisfactory, in which case the Stage 1 monitoring period could be extended: or

        41.2.3. The attendance was unsatisfactory, in which case the procedure would move to Stage 2.

    41.3. At Stage 2, a meeting would be arranged. The employee would again have the right to be accompanied. A further 6 months monitoring period would be set, although if attendance deteriorated the process could proceed to Stage 3 at any time. The employee would be warned that continuation of unacceptable attendance may result in termination of employment. At the end of the Stage 2 monitoring period a further meeting would take place at which the manager could decide:

        41.3.1. Satisfactory improvement had been achieved and the case would not proceed to Stage 3 (although in that case, if the absence deteriorated again within 3 months the procedure would be reinstated at Stage 2)

41.3.2. Some improvement had been made but the overall attendance remained unsatisfactory, in which case the Stage 2 monitoring period could be extended: or

41.3.3. The attendance was unsatisfactory, in which case the procedure would move to Stage 3.

41.4. If a case progressed to Stage 3, an Occupational Health assessment would take place prior to the Stage 3 meeting. The manager would prepare a sickness management report which would be submitted to the Designated Officer to decide whether to proceed to a formal Sickness Absence hearing. If it was decided to proceed to a Sickness Absence Hearing, the employee would have the right to be accompanied. The Designated Officer conducting the hearing may decide:

41.4.1. To establish a further monitoring period.

41.4.2. To redeploy the employee; or

41.4.3. To dismiss the employee on notice (in which case the employee would have a right to appeal).

42. The policy also noted that where an employee had a disability, any reasonable adjustments needed to be implemented prior to applying the triggers.

43. From 14 May 2012, the Claimant was monitored under Stage 1 of the Sickness Absence policy, initially for a period of 3 months. That was subsequently extended to 5 November 2012, and then to 7 January 2013. The Claimant's absence then improved, and she was removed from Stage 1 on 7 January 2013.

44. The Claimant had lengthy absence following an operation on 22 April 2013. Following her return work, she had two further episodes of sickness in September 2013, so she was placed back on Stage 1 of the Sickness Absence policy. On 12 Sept 2014 the Claimant attended a sickness meeting. She was placed on Stage 2 [93]. She was told that she would remain on a monitoring period for 9 months, until 11 May 2015.

45. The Claimant only had one day's absence during the monitoring period, so she was informed that the monitoring period had ended [94]. She was also informed that if her absence deteriorated again within 9 months, the procedure would be reinstated at Stage 2.

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46. Over that 9-month period, the Claimant had 6 absences. She was therefore placed back on Stage 2 from 27 April 2016, for a further 9-month monitoring period (lasting until 28 January 2017). Mrs Leak met the Claimant on 23 February 2017 to review the Stage 2 monitoring period. Mrs Leak decided to progress the Claimant's absence to Stage 3 [95]. The Claimant was informed that one possible outcome may be the termination of her employment.

47. The Claimant was not subsequently invited to a Stage 3 hearing. This appeared to be an oversight on the Respondent's part. She attended a

further Stage 2 review on 30 November 2017. As her absence record had improved, Mrs Leak decided instead to place the Claimant on a Stage 2 monitoring period for 3 months [109].

48. In the interim, the Claimant was invited to a disciplinary hearing in respect of persistent lateness. That hearing took place on 18 July 2018. Out of a possible 97 shifts, the Claimant had been late for work on 39 occasions (and there were a further 15 occasions where there was no record of whether she had arrived on time). The Claimant was issued with a first formal warning [102].

49. The Claimant attended a further Stage 2 review meeting with Mrs Leak on 23 April 2018. Mrs Leak decided to extend the monitoring period for a further 3 months [116].

50. The Claimant attended a further Stage 2 review meeting on 13 August 2018. The Claimant had had a further period of sickness absence during the monitoring period, and a further period just after the monitoring period had finished. Mrs Leak therefore decided to progress to Stage 3 of the policy [119].

51. The Claimant was referred to Occupational Health "(OH"). The Occupational Health advice was that the Claimant was fit to work with no restrictions and did not meet the Trust criteria for medical redeployment or ill health retirement [121 – 123].

52. On 3 October 2018, Mrs Leak met with the Claimant to discuss the OH report (and a stress questionnaire which the Claimant had completed) [125].

53. The Claimant was seen by Occupational Health again on 27 February 2019. The OH advice referred to diabetes medication and abdominal pain but noted that the Claimant was otherwise in good health. The advice remained that the Claimant was fit for work with no restrictions. [129]

54. The Claimant was then absent from work 1 March 2019 with cardiac issues.

55. The Claimant was seen by OH again on 29 April 2019. The OH advice referred to "recent intermittent symptoms of light-headedness" which became severe on 1 March 2019. It noted that the Claimant had been referred for investigation with cardiology. The advice was that the Clamant was unfit to work, but that redeployment was not medically indicated as when she was fit to work again it was likely that she could return to her job role [131].

56. Mrs Leak met the Claimant on 24 May 2019 to discuss her ongoing absence. It was noted that the Claimant had an appointment with her cardiologist on 29 May 2019, and that she would update Mrs Leak after that appointment [133].

57. The Claimant was then diagnosed with Supraventricular Tachycardia ("SVT")

58. The Claimant saw OH again on 5 June 2019 [134]. OH advised that the Claimant had been diagnosed with fast cardiac rhythm disturbance. The Claimant had adopted "watchful waiting" as an approach (rather than opting immediately for either medication or surgery), because she had not had any further severe episodes of symptoms. Occupational Health advised that if the Claimant remained symptom-free for two to three weeks, she could return not work, so it was planned she would return from the week commencing 24 June 2019. OH advised a phased return to work plan [134]. They also advised that the Claimant should be rostered with a colleague alongside when doing her front desk duties, for at least 6 months.

59. Mrs Leak wrote to Occupational Health to explain that working alongside a colleague could not always be accommodated. Occupational Health then advised that the Claimant still wished to return to work as planned, and that if her symptoms returned, she would see her doctor and consider starting medication.

60. Phillip Robinson took over from Mrs Leak as the Claimant's manager during that period.

61. On 16 July 2019 the Claimant attended a meeting regarding her long-term sickness absence [143]. It was noted then that the Sickness Absence Hearing would take place on her return.

62. On 30 August 2019, Stuart Reeves, Divisional Director of Operations, wrote to the Claimant to invite her to a Long-Term Sickness Absence Hearing. The letter noted that one outcome of the hearing may be the termination of the Claimant's employment. The Claimant had returned to work but was the absent again. The hearing had to be rearranged on a number of occasions.

63. In the interim, the Claimant was seen again by Occupational Health on 22 October 2019 [155]. The report from that appointment noted that the Claimant had been referred back to cardiology. It further noted that the Claimant had recently been diagnosed with diverticular disease. The report advised that the Claimant should be able to return to work from 29 October 2019, on a phased basis. It advised that redeployment on medical grounds was unlikely to be beneficial. The report also advised that the Claimant was medical fit to attend formal meetings.

64. The Claimant did then return to work on 30 October 2019. The Sickness Absence Hearing took place on 22 November 2019 [159]. Mr Reeves concluded that neither redeployment nor ill health retirement would be appropriate. He summarised his conclusion as follows:

> "You must be aware that I strongly considered terminating your contract of employment as your overall level of sickness is unacceptably high and this level of sickness can no longer be

> sustained. This would have been a reasonable outcome of the Hearing. However, I decided to give you a final chance to improve your attendance at work."

65. He then went on to say this:

> "However, should at any point during the next 12 months your level of attendance fall below the required level, a further Hearing will be convened, and this would usually result in your termination of your contract of employment with the Trust."

66. The Claimant was then absent from work from 29 January 2020. She was admitted as an in-patient at St George's Hospital. In March 2020 she was fitted with a stoma.

67. The Claimant attended a Long-Term Sickness Meeting with Mr Robinson on 21 May 2020. The meeting was conducted by telephone. It was noted that the Claimant was unlikely to return to work in the near future [171].

68. The Claimant attended an Occupational Health appointment on 27 May 2020. Occupational Health advised that the Claimant was recovering from the surgery that had been undertaken while she was an inpatient. The report also noted that the Claimant was going to have surgery for her SVT, which had been postponed due to COVID. It was advised that the Claimant would be reviewed in six to eight weeks [173].

69. Another Occupational Health appointment took place on 16 July 2020. The report noted that the Claimant was making steady recovery from her abdominal surgery, and that she would contact Occupational Health for a review when she had made further functional improvement over the coming weeks [175].

70. The Claimant attended a further Long Term Sickness meeting with Mr Robinson on the same day [176]. The Claimant explained that she hoped that her current sicknote, which ran until 7 July 2020, would be her last one.

71. The Claimant attended a further Long Term Sickness meeting with Mr Robinson on 17 August 2020. The Claimant explained that she would be returning to work on1 September 2020. Mr Robinson explained that, in line with the outcome of the previous Stage 3 hearing, he would be compiling a sickness report which would be sent to a Designated Officer to decide whether to progress to a further hearing. He explained that one outcome might be the termination of the Claimant's employment [180].

72. The Claimant attended a further Occupational Health appointment on 2 September 2020 [181]. Occupational Health advised that the Claimant was medically fit for work, and to carry out her full range of duties (on a phased return basis over four weeks) [182].

73. Mr Robinsons produced a Sickness Absence Report [183]. The decision was taken by the Respondent not to proceed to a formal hearing, and essentially to wipe the slate clean. [SUMMARY ON 194]

74. The Claimant attended a further Occupational Health review on 3 November 2020. The advice remained that the Claimant was medically fit for work [195]. She attended a further review on 25 January 2021, and once again the advice was that she remained fit for work [196].

75. The Claimant had four periods of sickness absence totalling 11 days between December 2020 and April 2021:

    75.1. 1 December 2020 (1 day), by reason of stomach-ache.
    75.2. 25 January 2021 (1 day), by reason of headache.
    75.3. 11 March 2021 (1 day), by reason of stomach-ache.
    75.4. 7 April 2021 (1 day), by reason of stomach-ache.
    75.5. 13 April 2021 to 20 April 2021 (8 days), by reason of stomach complaint.

76. On 16 April 2021, Mr Robinson emailed the Respondent's HR team as follows [197]:

> "I have again attached the report prepared in September 2020 for your perusal in case you have not seen the background to my email in the thread previously.
>
> This is not a typical case of stage 1 sickness as you will see from the sickness report prepared for the aforementioned hearing, I am very concerned that there is seemingly nothing that can be done to support me as her line manager in this situation.
>
> I will set aside some time this afternoon if a call can be arranged, it needs saying that I am starting to face a rebellion from others who have sickness attendance issues (that are far less serious than the individual in question) who have triggered stages, There is one case who I am about to write to for a stage 2 meeting who's record is not good but in comparison to SA's record….I am being told that 'I am not being fair and looked what Sonia is getting away with etc'
>
> The team in question is the front of house team, they have 6 people working side by side, day by day and the tension and frustration this situation is causing is palpable, there is only so much I can do to placate."

77. The Claimant was then invited to a sickness absence meeting. The meeting took place on 7 May 2021. Mr Robinson decided to place the Claimant on Stage 1 of the Sickness Absence policy, with her absence being monitored for three months [208].

78. The Claimant was seen by Occupational Health on 18 May 2021. They advised that the Claimant was fit for work, although she could from time to time experience "mishaps" with her stoma [210].

79. The Claimant was then absent from work from 25 June 2021. She had been scheduled for a hernia repair and reversal of her Stoma. The hernia repair was successful, but the Stoma reversal could not be completed.

80. She attended a long-term sickness meeting with Mr Robinson on 8 September 2021. The Claimant explained that she anticipated being able to return when her current sick noted expired, on 15 October 2021 [213].

81. Mr Robinson arranged a further long term sickness meeting to take place with the Claimant on 13 October 2021. The Claimant did not attend. Mr Robinson telephoned the Claimant separately. She confirmed that she would be returning to work on 18 October 2021 [217].

82. The Claimant did return to work on 20 October 2021. She had further absences as follows:
    82.1. 25 and 26 October 2021 (1 day), by reason of D&V;
    82.2. 29 October 2021 (for a half day), by reason of stoma issues.
    82.3. 5 – 8 November 2021 (4 days), by reason of D&V.
    82.4. 30 November to 1 December 2021 (2 days), by reason of cough/sneezing.

83. Mr Robinson therefore invited the Claimant to a Sickness Absence Meeting to take place on 17 December 2021 [219]. We note that the Claimant would therefore have met the relevant trigger even excluding the absence that was recorded as being by reason of stoma issues. In the interim, she had a further absence on 15 December 2021 by reason of a migraine.

84. At the meeting on 17 December 2021, Mr Robinson decided to move the Claimant to Stage 2 of the Sickness Absence Policy. He explained that the Claimant would be monitored for 6 months [221].

85. The Claimant attended a further Occupational Health assessment on 1 June 2022. Occupational Health advised that the Claimant was fit for work. The report noted that the Claimant's had explained that a number of her absences had been related to her stoma, and the underlying condition that had led to her needing a stoma. The report noted that the Occupational Health Physician had discussed with the Claimant the importance of improving her attendance record and also her timekeeping [227].

86. The Claimant attended a further Sickness Absence Meeting on 11 August 2022. The Claimant had by that stage had had 7 absences during the six-month Stage monitoring period. She had had a further 5 absences since the monitoring period had ended, as follows:

    86.1. 19 January 2022 (one day), headache.

86.2. 28 February 2022 to 1 March 2022 (two days), D&V & headache.
86.3. 29 March 2022 (one day), headache.
86.4. 25 April 2022 (one day), stoma issue and upset stomach.
86.5. 10 May 2022 to 11 May 2022 (two days), headache.
86.6. 27 May 2022 (one day), muscle soreness.
86.7. 23 June 2022 (one day), upset stomach.
86.8. 7 July 2022 to 11 July 2022 (five days), vomiting.
86.9. 20 July 2022 (one day), vomiting/cold/cough.
86.10. 25 July 2022 to 26 July 2022 (2 days), cold/cough.
86.11. 8 August 2022 (1 day), headache.

87. Only one of those was recorded as being related to the Claimant's stoma [230]. We note that, even excluding the absence related to the Claimant's stoma, she had significantly exceeded the relevant trigger. Mr Robinson decided to move the Claimant to Stage 3 of the Sickness Absence policy.

88. The Claimant was seen by Occupational Health on 21 September 2022 [232]. The advice from Occupational Health was that the Claimant was fit for work. The report noted that her stoma was due to be reversed in February 2023. The report also advised that there was no medical reason to suggest that the Claimant should be redeployed, as she was fit to do her role, and there was no indication that she would need to apply for ill health early retirement.

89. Mr Robinson produced the Long-Term Sickness Absence report on 28 November 2022 [235]. The report was accompanied by 37 appendices. It was sent to the Claimant in advance of the hearing. The report noted that since the Mr Robinson had made the decision to progress to Stage 3 of the policy, the Claimant had had 11 further periods of sickness absence, totalling 30 days. Three of those absences (totalling 8 days) were recorded as being due to issues with the Claimant's Stoma.

90. The report also referred to persistent absence on the Claimant's part, which had increase dramatically since the beginning of April 2022, and which she attributed to her stoma. The report referred to the previous formal warning. It noted that the Claimant had had 57 episodes of lateness across the 108 shifts she had worked since 1 April 2022, and that in terms of time this totalled 35 hours of missed working time – almost an additional week of absence.

91. The report noted that the effect of the Claimant's absence was that the reception often had to close early and open late, leaving patients and visitors with no assistance. The report also noted that the Claimant worked as part of a team of 6 people, and that her colleagues were under pressure to work unsupported for extended periods because of the Claimant's absence and lateness.

92. The report concluded by noting that since commencing work as a receptionist on 21 September 2021, the Claimant had had 82 separate sickness absences totally 894 days of absence.

93. The Stage 3 meeting took place on 14 December 2022. It was conducted by Caroline Knox, Deputy General Manager for Corporate Outpatients Services. The Claimant was accompanied at the hearing by Kim Jordan, Divisional Personal Assistant SNCT. Mr Robinson attended to present the management case.

94. Ms Knox decided to dismiss the Claimant with notice (although the Claimant was not required to attend work during her notice period). She wrote to the Claimant on 16 December 2022 to confirm her decision [257]. In that letter, she expressed her reasoning as follows:

> "On reconvening, I made the following findings:
>
> • You have had a significant level of Sickness Absence as follows:
> o 21st September 2011 - 31st August 2020 - 47 episodes totalling 702 days
> o 1st September 2020 - 25th November 2022 - 35 episodes totalling 192 days
>
> • During your employment within the Front of House Team you have had 82 separate episodes totalling 894 days of absence
> • Since 1st April 2022 to 25th November 2022, you have been a total 2097 minutes late which amounts to 35 hours which is almost a week of additional absence
> • Adjustments have been made to accommodate you having a 9:00 am to 5:00 pm shift where possible, also accommodating increased toilet breaks and both GP and hospital appointments
> • In the past 2 weeks you have had further sickness absence and episode of lateness
> • Occupational Health have confirmed that you are fit for work, that redeployment is not required and that you do not fit into ill health retirement.
> • Since 2018 your absence has been due to symptoms related to your diagnosis in 2020 of diverticulitis resulting in surgery and stoma which has impacted both your physical and mental health.
> • Following your surgery, you have developed OCD and anxiety and in the last 12 months you have been receiving support from Staff Support and Talk Wandsworth
> • It's planned for you to have surgery in February 2023 to reverse your stoma and you intend to be better and do better following this.
>
> Taking all of the above into consideration, even though you say that you intend to do better I am not assured that your sickness absence and lateness will improve, and I'm also not assured that you fully appreciate the impact of your sickness absence and lateness on your colleagues, the team and our patients.

As your standard of attendance has not improved my decision as per the Sickness Absence Policy is to terminate your employment on the grounds of Capability (Health) with notice. Due to your number of years' service your period of notice will be 12 weeks, which will be paid. During this time, you are not required to attend work, however you will continue to have full access to Support Services."

95. Ms Knox's outcome letter informed the Claimant that if she wished to appeal, she should do so within 21 calendar days of the dismissal letter.

96. On 16 February 2023, Mr Neckles wrote to the Respondent attaching a notice of appeal on behalf of the Claimant [262]. The Respondent did not progress the Claimant's appeal. As it had been brought outside the time limit for appealing.

97. The claimant notified ACAS under the early conciliation process of a potential claim on 13 March 2023 and the ACAS Early Conciliation Certificate was issued on 24 April 2023. The claim was presented on 23 May 2023.

Law
Disability

98. The definition of disability is set out in section 6 of the Equality Act 2010:

"(1) A person (P) has a disability if—
a. P has a physical or mental impairment, and
b. the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability –

a. A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
b. A reference to persons who share a protected characteristic is a reference to persons who have the same disability

(4) This Act …applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly …
a. a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability…
b. a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability

> (5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

99. The Government has issued guidance under section 6(5) of the EqA 2010, entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ("the Guidance"). The Guidance does not impose any legal obligations in and of itself, but the tribunal must take account of it where it is considered to be relevant.

100. The Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment (2015) ("the Code"). The Code provides guidance on the meaning of 'disability' for the purposes of the EqA 2010. It does not impose legal obligations but must be taken into account where it appears relevant to any questions arising in proceedings.

101. In considering the question of whether a Claimant is disabled, the Tribunal must apply the four-stage approach approved by the Court of Appeal in *Sullivan v Bury Street Capital Limited* [2021] EWCA Civ 1694 (while remaining mindful of the need to look at the overall picture):

> a) Was there an impairment? (the 'impairment condition');
>
> b) What were its adverse effects [on normal day-to-day activities]? (the 'adverse effect condition');
>
> c) Were they more than minor or trivial? (the 'substantial condition');
>
> d) Was there a real possibility that they would continue for more than 12 months? (the 'long-term condition').

102. It is usually not necessary to consider the "impairment" condition in detail (*J v DLA Piper UK LLP*).

103. Section 212 of the EqA 2010 defines "substantial" as being more than minor or trivial.

104. Paragraph 5 of Schedule 1 provides as follows:

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:
>
> (a) measures are being taken to correct it, and
>
> (b) but for that, it would be likely to have that effect.
>
> (2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid."

105. In considering whether an impairment has a substantial adverse effect on the ability to carry out normal day-to-day activities, it is necessary to take account not only evidence that person is performing a particular activity less

well, but also of evidence that a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation (Appendix 1 to the Code).

106. Schedule 1, para. 2 of the EqA 2010 defines "long-term" as follows:

> (1) The effect of an impairment is long-term if -
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

107. In that context, "likely" has been held to mean it is a "real possibility" and "could well happen" rather than something that is probable or more likely than not (*SCA Packaging Ltd v Boyle* [2009] ICR 1056).

108. The question of how long an impairment is likely to last must be determined at the date of the alleged discriminatory act, not at the date of the Tribunal hearing (*McDougall v Richmond Adult Community College* [2008] ICR 431).

109. The burden of showing that she is disabled within the meaning of the Act rests on the Claimant.

Direct discrimination

110. The definition of direct discrimination is contained in section 13(1) of the Equality Act 2010:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

111. The comparison may be to an actual or a hypothetical comparator. In either case, there must be no material difference between the circumstances relating to each case (s.23(1)). That is, the comparator must be in the same position in all material respects save only that he or she is not a member of the protected class *(Shamoon v Chief Constable of the RUC* [2003] ICR 337).

112. Where considering the treatment of a claimant compared to that of a hypothetical comparator, the Tribunal may draw inferences from the treatment of other people whose circumstances are not sufficiently similar for them to be treated as an actual comparator (*Chief Constable of West Yorkshire Police v Vento* [2001] IRLR 124).

113. In considering whether a claimant was treated less favourably because of a protected characteristic, the tribunal generally have to look at the "mental processes" of the alleged discriminator (*Nagarajan v London Regional Transport* [1999] IRLR 572). The protected characteristic need not be the only reason for the less favourable treatment. However, the decision in question must be significantly (that is, more than trivially) influence by the protected characteristic.

Discrimination arising from disability.

114. The definition of discrimination arising from disability is set out in s.15 of the Equality Act 2010:

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

115. "Unfavourable" is not defined in the statute. The EHRC Statutory Code of Practice provides that it means that the disabled person "must have been put at a disadvantage".

116. Guidance for Tribunals on how to approach the test in s.15 was set out by the EAT in *Pnaiser v NHS England* [2016] IRLR 170. The Respondent does not need to have knowledge that the "something" leading to the unfavourable treatment was a consequence of the claimant's disability (*City of York Council v Grosset* [2018] ICR 1492).

117. The burden of establishing objective justification rests on the Respondent. There is a two-stage test:

117.1. First, the respondent must be pursuing a legitimate aim.

117.2. Secondly, the unfavourable treatment must be a proportionate means of achieving that legitimate aim.

118. The proportionality limb involves assessing whether the treatment was "reasonably necessary" (*Homer v Chief Constable of West Yorkshire Police* [2012] ICR 704)

Burden of proof

119. Section 136 of the Equality Act deals with the burden of proof:

> "(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene that provision"

120. The section prescribes a two-stage process. At the first stage, there must be primary facts from which the tribunal could decide, in the absence of any other explanation, the discrimination took place. All that is required to shift the burden of proof is at primary facts from which "a reasonable tribunal could properly conclude" on balance of probabilities that there was discrimination. It must, however, be something more than merely a difference in protected characteristic and the difference in treatment (*Madarassy v Nomura International PLC* [2007] EWCA Civ 33.

121. The burden of proof at that stage is on the Claimant (*Royal Mail Group v Efobi* [2021] UKSC 22). The employer's explanation is disregarded.

122. If the claimant satisfies that initial burden, the burden shifts to the employer at stage 2 to prove one balance of probabilities that the treatment was not for the prescribed reason.

Unfair dismissal

123. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95.

124. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

125. Section 98(2) provides that capability is a potentially fair reason for dismissal.

126. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

127. Guidance regarding dismissal for short-term intermittent absence was given by the EAT in the case of *Lynock v Cereal Packaging Limited* [1988] IRLR 510. In that case, Mr Justice Wood said this:

> "There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Second, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following: the nature of the illness; the likelihood of it recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching."

128. Where absences are related to an underlying disability, there is no absolute rule that it is unreasonable for an employer to treat those absences as part of the reason for dismissal on grounds of repeated short-term absence (*Royal Liverpool Children's NHS Trust v Dunsby* [2006] IRLR 351).

129. In considering dismissal for long term ill health, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return (*BS v Dundee City Council* [2014] IRLR 131). The employer must consult with the employee about the proposed dismissal and discover the true medical position (*East Lindsey District Council v Daubney* [1977] ICR 566).

130. It is not for the Tribunal to substitute its own view on whether to dismiss; rather, the question for the Tribunal is whether dismissal was in the range of responses open to a reasonable employer.

Conclusions

Disability

131. It is common ground that the Claimant was disabled at all relevant times by reason of her Stoma. We must decide whether the Claimant's SVT also constituted a disability. We deal with the four questions set out in the *Bury Street Capital* case.

Impairment

132. The Claimant was diagnosed with the SVT. That is sufficient to meet the impairment criteria.

Functioning

133. The Claimant's impact statement was not very detailed. And we can give it little weight given that she did not attend the hearing to be cross-examined. But the Claimant was absent from work for around 6 months, medically certified, by reason of her SVT. Her job was not a particularly arduous one, so we consider that the tasks she would carry out as a receptionist would all fall within the rubric of "everyday activities".

134. During all of the time that the Claimant was medically certified as unfit to work, the fit notes therefore evidence that she was unable to undertake ordinary day-to-day activities – namely, the activities she would carry out at work when she was fit to do so. So, we are satisfied that the functional criteria is made out.

Substantial

135. We are satisfied also that the effect of the SVT was more than minor or trivial – at least for the time that the Claimant was signed off work. Something which prevented her from undertaking her role must, by definition, have been more than minor or trivial. If the effect had been trivial, it would not have prevented her from working.

Long-term

136. On the medical evidence before us, at the time of her diagnosis, there were three options being presented to the Claimant – surgery, medication (which on her evidence would be ongoing for the rest of her life) or "watchful waiting" – that is, waiting to see if she had more acute attacks. That leads us inevitably to the conclusion that at the point of diagnosis, the effect must have been long-term, because the medical evidence suggested that the condition would fluctuate, and that there was a real possibility that it would continue to recur and having a substantial effect for more than twelve months.

137. We therefore conclude that the Claimant was disabled by reason of SVT from her diagnosis in May 2019.

<u>Direct discrimination</u>

138. The Claimant relied upon four comparators:

138.1. Louise Sauerwine – Mrs Leak's evidence, which we accept, is that Mr Sauerwine works on a reception desk in a different area of the hospital.

138.2. Harriet Owens – Mrs Leaks' evidence, which we accept, is that she was unable to locate anyone called Harriet Owen in the Respondent's email address book.

138.3. Richard Jones – Mrs Leak's evidence, which again we accept, is that there were a few people named Richard Jones in the Respondent's email address book, but she did not know who any of them were and none of them worked in the area she managed.

138.4. Jacqulyn Totterdell – Mrs Leak's evidence, which again we accept, is that Ms Totterdell is the Chief Executive Officer of the Respondent.

139. The Claimant gave no evidence about any of her named comparators her witness statement. None of the names of her comparators were even mentioned. She produced no evidence at all to explain why she considered that they were relevant comparators for the purposes of her claim, or why she compared herself to them.

140. We take the allegations of direct discrimination in the order set out in the list of issues.

5.1.1 Proceeding with dismissal proceedings whilst the claimant continued to receive medical treatment.

141. It is common ground that the Respondent proceeded to dismiss the Claimant while she was still awaiting the stoma reversal and ablation surgery for the SVT.

142. Even on the Claimant's own evidence, she did not suggest that any of her four named comparators were due to undergo either stoma reversal or ablation, or indeed any other significant medical procedure. In the circumstances, there is no evidential basis on which we could find that they were in a comparable position to the Claimant. It follows that the claim relying on them as comparators must fail.

143. In the alternative, the Claimant relies on a hypothetical comparator. Once again, the Claimant has adduced no primary evidence to suggest that a hypothetical comparator would have been treated any differently.

144. Mrs Knox did appear to accept within the dismissal letter that the Claimant's more recent absences were related to her stoma and the underlying diverticulitis. Some of the Claimant's absences were explicitly recorded as being by reason of her stoma. Others were for gastric symptoms. Some appeared, on the face of it, to be unrelated to the stoma. Occupational Health did not appear to suggest that the Claimant would necessarily have a higher level of absence (beyond the reference to occasional stoma malfunctions). And importantly, the Claimant had made it to Stage 3 of the policy on two occasions previously, prior to the point where she was disabled within the meaning of the Equality Act 2010. She also had her sickness slate wiped clean in August 2020 (at a time when she would otherwise have reached Stage 3 for a third time). The Respondent's policy expressly required it to take into account the Claimant's entire sickness history in coming to a decision. That suggests that Claimant was being treated in according with the policy, which suggests consistency of treatment.

145. It is also, we consider, relevant that other staff had complained that the Claimant appeared to have been treated particularly leniently. We accept that Mr Robinson's email to HR was reporting genuine feedback he

had received from team members about the perception that they were being treated much less leniently than the Claimant was. Once again, that does not suggest that a hypothetical non-disabled comparator with the Claimant's sickness record would have been treated any more favourably than the Claimant. It suggests, rather, that such a comparator would have been treated considerably less favourable than the Claimant was.

146. We can see nothing to suggest that hypothetical comparator with the same absence history as the Claimant but who was not disabled would have been treated any differently.

147. It follows that this allegation fails.

5.1.2 Issuing warnings under the respondent's Capability Management Procedure whilst failing to provide any right of appeal against such warnings

148. The Respondent's policy did not allow for a right of appeal against warnings under the procedure. The Respondent followed its own policy. There was no evidence at all before us to suggest that the Respondent, in contravention of its own policy, offered a right of appeal against warnings to non-disabled employees.

149. It follows that this allegation fails.

5.1.3 A continued failure to apply objective percentage target improvement notices of unsatisfactory attendance for sickness between 2011 and 2013.

150. The Respondent took the point in submissions that it did not really understand what this allegation meant. We see the force in that. There was no evidence in the Claimant's witness statement that addressed the allegation or explained what it meant.

151. The evidence before us showed that the Respondent followed its own policy between 2011 and 2013. There was no evidence to suggest that a non-disabled employee in the Claimant's position would have been rerated any differently during that period.

152. In any event, even on the Claimant's own case she was not disabled within the meaning of the Equality Act prior to 2019. So this allegation simply cannot succeed.

153. It follows that this allegation fails.

5.1.4 Failing to consider prior to dismissal alternative employment, redeployment or reasonable adjustments before dismissing the claimant

154. There was no explanation in either the claim form or the Claimant's witness statement regarding what adjustment she said the Respondent should have made. Nor was there any reasonable adjustments claim before the Tribunal.

155. On the evidence before us, the Respondent did make adjustments for the Claimant. As referred to in the dismissal letter (and also in the evidence of Mr Robinson), she was allowed to leave the reception desk whenever she needed to attend to her health and personal care needs, and for medical appointments. She was also offered the opportunity to change her shifts where possible.

156. Furthermore, Occupational Health specifically advised on the possibility of redeployment or alternative employment on several occasions. The consistent advice from Occupational Health was that it was not appropriate, since the Claimant was medically fit to carry out her substantive job. So it could not be said that the Respondent failed to consider it – they took professional Occupational Health advice on it, and acted on that advice. There was nothing in the evidence before us to suggest that the Claimant asked for redeployment.

157. We therefore find that the allegation is not made out on the facts. It follows that it fails.

5.1.5 Dismissing the claimant.

158. It is common ground that the Respondent dismissed the Claimant.

159. We have had no evidence before us to suggest that any of the Claimant's named comparators were in a similar position to the Claimant. The Claimant again gave no primary evidence regarding the position that her comparators were in.

160. Nor was there anything before us to suggest that the Respondent would have treated an employee with Claimant's absence history but who was not disabled any less favourably than they would have treated the Claimant. Once again, the evidence in fact suggested that the Claimant was treated more favourably.

161. We conclude that, in being dismissed, the Claimant was not treated less favourably than a comparable employee was or would have been.

162. It follows that this allegation fails.

5.1.6 Denying the claimant a right of appeal against dismissal.

163. The Claimant was offered a right of appeal. The reason her appeal was not heard was because she did not lodge her appeal until two months after her dismissal, when It was supposed to be lodged within 21 days. It was not merely a day or two late – it was late by over a month.

164. It was not suggested either in the Claimant's evidence or elsewhere that any her four named comparators had been dismissed by the Respondent.

165. Nor was there anything on the evidence before us to suggest that a non-disabled employee who lodged an appeal over a month late would have had their appeal heard.

166. It follows that this allegation fails.

Discrimination arising from disability.

167. The "something arising" relied upon by the Claimant is her sickness absence between 2011 her dismissal, together with a "tendency to act or behave materially differently both in terms of the way she understood and acted upon instructions or in carrying out her duties coupled with an impact on her power of recollection of information".

168. Taking those two points in turn:

168.1. The Claimant's sickness absence from 2011 to May 2019 cannot possibly have arisen in consequence of her disability, because she was not disabled within the meaning of the Equality Act 2010 prior to May 2019.

168.2. Some of the Claimant's sickness absence from 2019 onwards was related to her disability.

168.3. We do not understand what the second limb means. It was not elucidated in the Claimant's witness statement, or her disability impact statement. Nor was it referenced in the Occupational Health advice. Therefore, even if we had understood what it means, we can see no evidence to suggest that it was something which arose in the consequence of the Claimant's disabilities (of SVT and Stoma).

169. We turn then to look at the factual allegations (which are the same factual allegations as relied upon for the complaint of direct discrimination).

6.1.1 Proceeding with dismissal proceedings whilst the claimant continued to receive medical treatment.

170. The Respondent did proceed to the Stage 3 hearing, and subsequently dismissed the Claimant, while she was still receiving medical treatment, in that she was awaiting a stoma reversal and an ablation procedure in respect of the SVT.

171. The Claimant was dismissed because of her entire absence history. That necessarily included the periods of disability related absences. And Mrs Leak appeared to accept, in her outcome letter, that at least some of the Claimant's recent absences were related to her stoma. The Claimant's disability-related absence therefore had a significant (that is, a more than trivial) effect on the overall decision.

172. We must therefore consider the question of objective justification.

173. The aim being pursued by the Respondent is "To ensure regular attendance to maintain and efficient and reliable service". The Respondent

is publicly funded body, charged with providing healthcare services within its area. Self-evidently, it requires staff to provide the service it needs to provide. So it can only provide an efficient and reliable service when its staff attend work regularly. We therefore have no difficulty concluding that the aim of ensuring regular attendance was therefore self-evidently a legitimate one for them to pursue.

174. We therefore turn to consider the question of proportionality. In that respect:

174.1. The Claimant had had 894 days absence (across 82 separate episodes) in the 11 years when she had worked on reception for the Respondent. That averaged out as over 7 periods of absence per year, and over 80 days absence per year.

174.2. A significant number of the Claimant's absences predated the time the Claimant had been disabled within the meaning of the Equality Act 2010. The Claimant had twice reached Stage 3 of the Respondent's absence policy before she was, in February 2017 and August 2018.

174.3. When the Claimant was absence, it caused the Respondent difficulty in covering her work. On occasions it would mean that the front reception desk was unstaffed.

174.4. Mrs Knox concluded that even once the Claimant had had her stoma reversal procedure, she had no real confidence that her attendance would be acceptable. Given the Claimant's history prior to both the SVT and the stoma being fitted, we consider that that was self-evidently a legitimate and reasonable conclusion for Mrs Knox to have reached.

174.5. The Claimant had been warned repeatedly that she was getting close to the point where her continued employment would have to be considered.

174.6. The Respondent had taken medical advice and had considered the possibility of alternatives such as redeployment. But Claimant's absence was not related to a functional incapability in respect of her role. On the days she was absent, she was unable to do any work.

175. In all of the circumstances, we are satisfied that dismissal was proportionate.

176. It follows that that allegation fails.

6.1.2 Issuing warnings under the respondent's Capability Management Procedure whilst failing to provide any right of appeal against such warnings.

177. The reason the Claimant was not allowed to appeal the warnings she was given under the Sickness Absence Management Policy was not because of her disability-related absence. It was nothing to do with her disability. It was simply the Respondent's policy.

178. It follows that the allegation fails.

6.1.3 A continued failure to apply objective percentage target improvement notices of unsatisfactory attendance for sickness between 2011 and 2013.

179. As set out above, this allegation predates the Claimant's disability by many years. It is therefore entirely misconceived even on the Claimant's own case. It follows that it fails.

6.1.4 Failing to consider prior to dismissal alternative employment, redeployment or reasonable adjustments before dismissing the claimant.

180. For the reasons set out above, we have found that this allegation is not made out on the facts. It follows that it fails.

6.1.5 Dismissing the claimant.

181. We have already considered this allegation in substance, as 6.1.1. For the same reasons we have already expressed, it fails.

6.1.6 Denying the claimant a right of appeal against dismissal.

182. The Claimant was not denied a right of appeal. She was offered a right of appeal, with a time-limit attached to it. The reason her appeal was not heard was not because some of her absences were related to disability. Rather, it was because she submitted the appeal over a month after the time-limit for doing so had expired.

183. It follows that the allegation fails.

Unfair dismissal

184. We are satisfied that the reason for dismissal was capability. We find that the reason Mrs Knox reached the decision to dismiss the Claimant was because she considered that the Claimant was not capable of providing an acceptable level of attendance, given her absence history across the over 10 years she had worked on reception.

185. Turning then to consider the questions set out in the list of issues:

185.1. We are satisfied that Mrs Knox genuinely believed that the Claimant was not capable of rendering an acceptable level of attendance. That was the clear conclusion she reached and articulated in the dismissal letter.

185.2. We are satisfied also that the Respondent consulted adequately with the Claimant. The Claimant had regular meetings throughout the absence management process. She was made aware on numerous occasions what the possible consequences of further absence could be. The Claimant was given the right to be accompanied at all of the meetings she attended.

185.3. The Respondent sought Occupational Health advice on numerous occasions. The report produced for the Stage 3 hearing was very thorough. Essentially, Mrs Knox's conclusion was based not on medical evidence that Claimant lacked the capability to carry out her role due to some underlying condition or inherent factor, but rather on the Claimant's extensive attendance history which provided evidence that she was unable to improve her attendance to an acceptable degree.

185.4. It is relevant that the Respondent had reached Stage 3 of the process on two previous occasions and had also wiped the Claimant's absence slate clean in upon her return to work in September 2020.

186. In respect of the specific factors identified by the Claimant, we have largely dealt with them within our conclusions on disability. In particular:

186.1. We consider that it was not unreasonable for the Respondent to proceed to dismissal while the Claimant continued to receive medical treatment (and while the stoma reversal had not yet been undertaken). For the reasons we have already explained, the conclusion reached by Mrs Knox that she was not satisfied that it would lead to an improvement in the Claimant's attendance was not an unreasonable one, bearing in mind the Claimant's lengthy absence history.

186.2. It was not unreasonable for the Respondent's policy not to provide for a separate right of appeal every time the Claimant reached a stage within the policy. Different employers draft sickness management policies in different ways. Some employers' policies are more or less generous than others in different respects. We do not consider that the policy adopted by the Respondent was outside the range of reasonable responses open to a reasonable employer. Importantly, there was a right of appeal against dismissal within the policy.

186.3. The Respondent did not rely on spent warnings regarding lateness. While the previous warning was referred to in Mr Johnson's report as part of the background, there was no suggestion that the Respondent built on that warning; nor was the Claimant dismissed for misconduct. Ultimately, the Claimant's lateness formed only a relatively small part of the overall picture regarding the Claimant's attendance. The Respondent's policy entitled it to take into account the entirety of Claimants' non-attendance at work.

186.4. In respect of the period from 2011 to 2013, as we have already explained, we did not really understand the point that the Claimant was making. But in any event, we have also already concluded that the Respondent followed its own policy during that period.

186.5. We have concluded that there was no direct discrimination against the Claimant. The Claimant named four comparators, one of whom is the Respondents' Chief Executive. She did not provide any evidence at all about why she had named those comparators, or why she considers them comparable, or why she felt she had been treated differently. The Respondent had not even been able to

identify two of the named comparators. So, there was simply no basis on which to find in her favour on this point.

186.6. We have also dealt with the point regarding the Claimant's appeal. The Claimant had a right of appeal. She failed to exercise it within the time limit she had been given.

187. Stepping back, we conclude that the decision to dismiss the Claimant was within the range of reasonable responses open to a reasonable employer. So too was the process followed by the Respondent.

188. It follows that we conclude that the dismissal was a fair one, and the complaint of unfair dismissal fails. On the evidence before us, the Clamant had had a consistently significant level of absence over a period of 10 years. She was given many opportunities to show she could improve her attendance. Unfortunately, she was unable to do so.

Postscript

189. The Claimant chose not to attend the final hearing after we explained our decision not to postpone. That was her choice.

190. The Claimant was, of course, professionally represented up to the start of the hearing. She was represented when her claim form was drafted, at the Preliminary Hearing when the list of issues was agreed, when the contents of the bundle was agreed, and when her witness statement was (belatedly) produced and exchanged.

191. There was no primary evidence from the Claimant in her witness statement that ran contrary to Respondent's evidence. So even on the points where we have found that allegations in the list of issues were not made out on the facts, that was not because we did not accept the Claimant's evidence. It was not a question of us giving limited weight to her evidence because she did not attend to be cross-examined. Rather, in respect of the allegations that would have required us to make factual findings which ran contrary to the Respondent's evidence, it was because the Claimant adduced no primary evidence to support the allegations.

192. Even had the Claimant felt able to attend and present her case, or even if the Union had acquired an alternative advocate to present her case at the hearing before us, it is therefore difficult to see that it would have resulted in a different outcome bearing in mind the evidence as a whole.

Employment Judge Leith

20 December 2024

Date

Case No: 2302219/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

31 December 2024

FOR THE TRIBUNAL OFFICE

P Wing

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