



EMPLOYMENT TRIBUNALS

Claimant: Mrs N Ingram
Respondents: The Haven Residential Home (Metheringham) Limited
Heard at: Nottingham **On:** 23 & 25 April 2018
Before: Employment Judge Clark
Mr R Loynes
Mr P Jackson

Representatives

Claimant: In Person (supported by her husband)
Respondents: Mr Shah, Solicitor

JUDGMENT

1. The claim for unfair dismissal is **dismissed upon withdrawal**
2. The claim of disability discrimination under s.13 of the Equality Act 2010 is **dismissed upon withdrawal**
3. The claim of disability discrimination s.15 of the Equality Act 2010 fails and is **dismissed**.
4. The claim of holiday pay is **dismissed upon withdrawal**.

REASONS

1. **Introduction**

1.1. This claim arises out of the circumstances of the termination of a period of the claimant's employment with the respondent, effective on 24 February 2017. The claim originally included a claim for unfair dismissal but as the claimant did not have sufficient qualifying service, that has been withdrawn. At the hearing, the claims for direct discrimination and accrued holiday pay were similarly withdrawn. The remaining claim is a claim of disability discrimination because of something arising from her alleged disability under s.15 of the Equality Act 2010.

1.2. The "something arising" relied on is sick leave, either the actual sick leave

that the claimant was taking at the relevant time, or the possibility of an extended period of sick leave in the future to undergo surgery. There is no dispute that those matters arise in consequence of the alleged disability, namely a lately discovered congenital heart defect

1.3. For its part, the respondent says the claimant is not disabled and that the employment was terminated simply due to the fact that the claimant was engaged to cover a temporary shortfall in cleaners and, on the return of one of the cleaners, she became surplus to requirements.

2. Issues

2.1. Issues were discussed at the preliminary hearing in August 2017. At the outset of the hearing and with the agreement of the parties, the tribunal expanded on those issues slightly as follows:-

- a. Whether the claimant was a disabled person at the material time. The impairment is conceded but not the remaining elements of the test of disability.
- b. Whether the respondent knew or could reasonably be expected to know the claimant had the disability at the material time.
- c. Whether the reason for the employment being terminated was because of taking time off sick/the need to take further time off sick.

2.2. The case is defended on the facts of the reason why. Consequently, there is no issue that the claimant's particular employment came to an end and no alternative case of justification.

3. Evidence

3.1. For the claimant, we heard from Mrs Ingram herself who adopted two statements. One on liability and her earlier disability impact statement. We also heard from an ex colleague (who happens also to be her Aunt), Mrs Tracey Lawler.

3.2. For the respondent, we heard from Miss Nicola Shotton, who at the relevant time was the registered manager. We received short statement in letter form from Mrs Dobbs, the home proprietor. It is unsigned and she is not here to give evidence. It is dated 20 April, that is last Friday. The reasons advanced for her not being in attendance are not consistent with her failure to file a statement in accordance with the directions ordered for exchange of witness statements. Consequently, we have read it but we only give it such weight as we deem appropriate. In the event, much of it is either not contentious or is otherwise found in evidence we have heard.

4. FACTS

4.1. It is not the tribunal's function to resolve each and every last dispute of fact between the parties, but instead to make such findings of fact as are necessary to resolve the issues and to put them in their proper context. On that basis and on the balance of probabilities we make the following findings of fact.

4.2. The respondent is a care home business caring for up to 29 residents. It employs 26 staff. It has a limited management structure. Mrs Dobbs, the owner

of the business is involved in decision making with the registered manager, at the time Miss Shotton. There is a role of deputy manager (now, if not at the relevant time) and various care and cleaning staff of various levels of seniority. It has written policies and procedures available to staff. We have not seen any examples and it is not clear whether they include employment procedures. We have not seen evidence of written contracts of employment. We find informal communication is the norm including the use of Facebook, text and other messenger apps.

4.3. The respondent has an unusual payroll process. Wages are paid in respect of a Saturday to Friday week. The rotas and payroll instructions for the following week are prepared the Thursday or Friday before. Wages are paid on the Thursday during the Saturday to Friday week to which they relate. In other words, there is no week in hand. That means unexpected events during the working week often mean the payroll is wrong and adjustments have to be made the following week.

4.4. The claimant applied for work on 1 April 2016. A number of her family were already employees of the respondent. Her application process included a health questionnaire [32]. In that the claimant disclosed "hole in the heart / CHD". In response to the question asking whether there were any physical or mental impairments which had a substantial and long lasting adverse effect on her ability to carry out day to day activities she replied "No".

4.5. She was successful in her application and commenced work as a carer on 19 April 2016. She initially worked waking nights 10pm – 8 am, Friday and Saturday with an evening shift on Sunday nights. This totalled 24 hours per week. She did not need any adjustments to carry out her duties nor did she seek any. She was good at her job and was regarded as so by her employer.

4.6. In or around July 2016, after about 3 months, her shifts changed to remove night work.

4.7. The claimant took next to no time off work sick.

4.8. The claimant resigned from her employment with effect from 24 November 2016. There is no dispute that the reason for this was entirely down to the fact that the claimant's husband's work circumstances had changed and he was no longer able to provide the child care support to release her to work at the care home. Although the employment relationship appeared to come to an end, the parties remained on good terms and the claimant volunteered to cover the holiday shift she had committed to at Christmas and she continued to attend the care home to spend time with the residents on a social basis. The various close family connections with this employer meant it was always known that she was someone that the respondent could call on, they also knew she was a good worker and had a valid DBS certificate.

4.9. The respondent had two housekeepers, Angela and Pat. It has only ever had two housekeepers each of whom worked for around 16 hours per week. The care staff themselves would also undertake some cleaning as part of their duties, particularly related to care activities and otherwise at weekends when the cleaners were not at work. The employer's need for housekeeping was loosely measured in terms of needing two people, the exact number of hours being flexible.

4.10. On 16 December 2016, Pat had to take compassionate leave. The respondent was faced with covering her work in the short term. It approached its care staff and an agreement was reached with Tracey Lawler to undertake some additional cleaning hours over and above her care shifts. The hours varied but were around 6 to 8 hours per week.

4.11. Matters were then compounded for the employer in early January 2017 when the other housekeeper, Angela, resigned. During a night shift some time around 9 to 13 January, Miss Shotton was discussing the cleaning situation with colleagues. Other's present in this discussion included the claimant's Mother-in-law who was also employed as a carer. She suggested to Miss Shotton that the claimant might be willing to do some cleaning. The familiar relationship between all concerned is seen in the fact that Ms Shotton felt able to call the claimant there and then, despite it being after 11 pm. We find Miss Shotton asked if the claimant would be interested in helping out. The claimant agreed and the two met subsequently to discuss matters further. There is a dispute about this conversation and the terms of what was offered and accepted. The claimant says she was permanently offered the post as replacement to Angela. Miss Shotton says it was clear this was temporary, it was made clear that it was to help out while she advertised for a replacement and because of that it was offered on flexible terms meaning the claimant could do as many or as few hours as she could manage and the start and finish times could fit around her child care commitments. We did not hear from the other Mrs Ingram in evidence who may have been able to speak to the initial discussion with Miss Shotton on the need for housekeeping cover.

4.12. We prefer respondent's account. What was offered was casual and the nature of the commitment was simply to help out with as much or as little as she could manage. The intention to advertise for new housekeeper in due course was mentioned.

4.13. The claimant started cleaning on 16 January 2017 and did so for about 5 weeks working around 14 hours per week. During that time, she also helped out to cover some evening care shifts during sickness absence of other staff. The working relationship remained flexible. Sometimes the claimant could do extra sometimes she couldn't.

4.14. The respondent, through Miss Shotton, together with many of the other staff were aware of the claimant's congenital heart defect. Miss Shotton was also aware that the fatigue and tiredness experienced by the claimant was as a consequence of it. We reject Miss Shotton's evidence that she did not know of the possibility that the claimant would require surgery. We found it unlikely that these two individuals who got on well wouldn't have had wider social discussion. That is so especially in 2016 as Miss Shotton was herself facing surgery around the same time although we take the view that this level of knowledge about the claimant's condition was learned early on in the relationship. There were many members of the claimant's extended family working in the care home all of whom did know, leading to a general level of awareness and we have seen examples of the claimant cropping up in discussions between family members and Miss Shotton when the need for cleaners arose. We therefore find that is more likely than not that Miss Shotton was aware.

4.15. We find the replacement housekeeper was advertised on 15 February 2017. The claimant was not told about the advert. We reject the contention that this was because of an adverse view of her and her continued employment. In our view, the fact she wasn't told was down to Miss Shotton's understanding that the claimant was doing no more than helping out temporarily and this understanding was reinforced by the fact of her resignation from a substantive post only a few months earlier. Miss Shotton's understanding was that the claimant was doing them a favour. Whilst it may well have been better practice to ask the claimant about her interest longer term, we do not find there is anything sinister behind the failure. What would become the period of sickness absence had not yet happened and we find Miss Shotton was already aware of the possibility of surgery from before the claimant started in the role. Those factors do not, therefore, explain the failure.

4.16. On Monday 20 February 2017, the claimant commenced a period of sickness absence. This was due to her being unwell with a chest infection but also broadly coincided with attending consultations with her doctors about her heart condition.

4.17. On 3rd and 13th February the claimant attended hospital appointments in respect of her heart condition. She was being advised to undergo surgery to repair the CHD. We find the prospect of this surgery was something the claimant was extremely anxious about. She had been diagnosed with the CHD only in the previous 4 years or so, when she suffered some form of heart attack during pregnancy. After initial investigations, she had then disengaged from the hospital appointments which we find was directly as a result of the anxiety and fear about the process it involved. She had resumed contact with the hospital around the turn of 2016/17.

4.18. During this week of sickness absence, two other significant events occurred. The first is that Miss Shotton was also off sick in order to undergo surgery of her own. She attended the workplace briefly on Thursday and Friday of that week only to prepare the rota's and payroll for the following week. She knew the claimant was off sick that week. She sent a text message to her on the afternoon of Thursday 23 Feb. It stated.

"Hi jade. Just wondered if you were in tomorrow, I'm doing the wages today and you've been paid 20 hours this week but you owe me 13 back so ill have to rearrange them next week if your cleaning next week but if you're not cleaning next week then I'm going to need the cash back, can you let me know as soon as please mate.x"

4.19. The paying back of overpayments is not unusual with a "current week" payroll system and the prospect of it raised no concerns. The claimant replied later that night stating.

"Hi nic I'm back at the doctor in the morning so won't be in tomorrow, but hopefully if my chest sounds better I should be back Sunday, will keep you informed after my appointment. If I'm not able to come in will just give you the cashxx"

4.20. Miss Shotton replied

"Ok mate, no problem, hope it goes ok at the docs xx"

4.21. It can be seen that the claimant's sickness absence appears to cause no apparent annoyance or inconvenience to Miss Shotton. The tone of the exchange continues in the friendly manner that all were used to.

4.22. We find the work the claimant was scheduled to do that Friday was her morning cleaning shift. There was also a possibility of covering an evening care shift as an extra. We find therefore, that the claimant would not have been at work that Friday afternoon even if she had not been off sick.

4.23. The second significant event to occur that week was that Pat returned from compassionate leave. Miss Shotton did not know this until a discussion with the owner on the Friday. The respondent's records and recollection of the exact date of Pat's return to work is not clear. It was either Monday 20th, whilst Miss Shotton was herself away from the workplace, or her return was intimated that week to be the following Monday, 27th. Due to the unusual payroll system in place, if it was the earlier date, Pat did not get paid for that week, something we still find unlikely. It seems to us more likely that there had been some intimation, probably to the home proprietor that Pat was returning the following week. That is the week payroll records show she was paid. However, in the circumstances of this case it doesn't make any difference which date it was. The fact of the matter is that Miss Shotton did not know about pat's return until Friday 24th. It was the fact of Pat's return (that week or the next) which causes the respondent to review its need for cleaners.

4.24. On Friday afternoon Miss Shotton was involved in three discussions. The first was with Mrs Dobbs. It was during this conversation that the fact of Pat returning to work was discussed. This led to the review of the need for cleaning hours generally. Mrs Dobbs enquired if Tracey was at work then and whether she was prepared to continue with the additional cleaning hours for the time being.

4.25. This led to her second conversation with Tracey Lawler herself. The purpose of that was to follow up the first discussion and see if she still wanted to continue with the cleaning hours which Mrs Lawler indicated she did. The two also discussed Mrs Lawler's own pay situation which prompted Miss Shotton to share that she didn't know how much to put through for the claimant the following week. That much is consistent with the text exchanges referred to already. Miss Lawler then says that she told Miss Shotton that she was under the impression that the claimant might be getting a sick note as she was visiting the Doctor that day. There is nothing in the conversation between Mrs Lawler and Miss Shotton that added to Miss Shotton's existing state of knowledge about the claimant's circumstances. To the extent that Mrs Lawler indicated to the claimant that she might be to blame for what then happened is her own erroneous supposition and we find was not at all instrumental.

4.26. The third conversation that afternoon was again between Miss Shotton and Mrs Dobbs. Miss Shotton confirmed Tracey was willing to continue cleaning. As a result of which the decision was taken by Dobbs that the respondent no longer needed the claimant to cover the cleaning role. In a further text message at 4:01 Miss Shotton wrote

"Hi Jade, me and Mel have spoken today and would like to thank you for helping out whilst pat was away, it's been much appreciated but pat is back now and we no longer require the extra help, I hope you understand and thank you again for your help.xx"

4.27. The essence of the conversations between Miss Shotton and Mrs Dobbs was confirmed by Mrs Lawler who innocently overheard parts of it.

4.28. We were concerned to understand why it was when there were two people temporarily covering to support the work of the absent housekeepers, one was chosen over the other. The reason given was that it made sense to speak to Tracey there and then simply as she was in the building.

4.29. The claimant wrote a grievance letter on Monday 27 February [52]. She complained about the unfairness of the decision to terminate her role, that it was unprofessional to be done through Facebook messenger; she stated that she took over the vacant cleaning role and was never told it was temporary, that in any event it was unjust as she was not covering for Pat, but for Angela who had left. She asserted that she believed the dismissal was directly related to the fact of her upcoming surgery which she had kept her employer fully aware of. She set out the chronology of the previous week's absence and her concern that her dismissal related to the possibility of being entitled to SSP. She set out her concerns in terms of s.15 of the 2010 Act.

4.30. The Respondent did not reply. It received advice to the effect that the internal grievance procedure was not appropriate where the subject was no longer an employee.

5. The Disability Issue

5.1. The issue in this case is on the effect the accepted impairment has on the claimant's ability to carry out normal day to day activities. We need to make some specific findings of fact on this issue as there is a stark conflict of evidence on this between what the claimant has told us and what she has been telling her doctors.

5.2. In evidence, the claimant says she suffers from numerous issues in her day to day living, that she tires easily and quicker than others, that she had to stop doing the night shifts because of this, that she is unable to walk her children to school regularly and requires additional family support. All this is draining and adds to her fragile mental state arising because her concern about her condition and undergoing surgery. She describes fatigue and an over bearing sense that simply everything she tries to do is much harder. In particular, she describes having to sit down and rest on long walks or when she takes them out shopping and the distress of feeling palpitations.

5.3. In her account to her consultant, a different picture is painted. Her consultant Dr Bolger reported in early February 2017 that she had not only told him, but *insisted*, that the condition did not limit her in any way and she did not feel unwell and she did not have palpitations. She said there was no other significant medical history.

5.4. There was, however, consistency in one area. That is the claimant's increased susceptibility to infections due to her immune system being deficient. We are satisfied this is itself a consequence of the CHD. She is often on courses of antibiotics. She explained how she would often suffer from infections in her throat, airways, chest or lungs particularly, and especially in the colder months of the year. She has had double pneumonia in the past. These are matters which

lead to her having to rest up and take time out of her daily routine, sometimes for days at a time. She has an inhaler to help with breathlessness which is of limited assistance.

5.5. Dr Bolger reports how the claimant was fearful in coming forward for cardiac surgery and was tearful during the consultation. We accept she was anxious about the implications of major surgery and had a tendency to down play it, indeed it seems she was positively trying to ignore the prospect of surgery.

5.6. We have to try to reconcile the evidence given to us and the effects as described to the medics. In that conflict, we observe that it is understandable why the respondent has taken issue with the legal test of disability status. However, we find the claimant was seeking to minimise the effects in a naive attempt to persuade the doctors not to operate.

5.7. The meaning of Disability for the purpose of the Equality Act 2010 is defined in section 6 together with schedule 1. There is further guidance to be taken into account both in previous relevant discussions, such as Goodwin v Patent Office [1999] ICR 302, and the 2011 Guidance on the Definition of Disability. In simple terms, the claimant must establish a mental or physical impairment which has a long term adverse effect on her ability to carry our normal day to day activities.

5.8. There is no dispute about the impairment. The Atrial Septal Defect (commonly a hole in the heart or CHD) was diagnosed around 2013 during pregnancy. Whatever its effects, they have been constantly present for more than 12 months at the relevant time and were permanent, at least until any surgical rectification which may not have removed all the adverse effects and may have introduced its own. It thus satisfies the long-term element of the test. The real issue is what day to day activities are adversely affected by that impairment and whether they are substantial.

5.9. Substantial means simply more than minor or trivial. The adverse effects must be considered in terms not only of activities which are prevented but how they might become more difficult or take longer or cause their own secondary issues. They must also be considered as they would be without the benefit of clinical intervention such as medication. A cumulative view of a number of effects may pass a threshold where each individual effect, viewed in isolation, might not.

5.10. The claimant identifies difficult day to day activities in respect of walking her children to school regularly, going to the shops, undertaking all but basic housework and tidying up for short periods, making lunch, taking her children on longer walks or playing with them in the park as well as the effect on her general home life when she is frequently unwell due to infections and laid up for a number of days of rest and recuperation at a time when all of the day to day activities have to stop.

5.11. We conclude that there are elements of those effects on day to day activities which are close to the line of whether they are substantial or not. Some of them, such as walking her children to school seems to be at odds with the evidence that this happened daily and that she undertook this task for other members of her family living nearby. Were it only the case that we were dealing with the inability to go on long walks or playing in the park, it is possible we may not have found the necessary substantial element present. However, we need to

look at the effects both overall and cumulatively and consider them in the context of how much more difficult they were to perform for the claimant in view of her tiring so easily and the occasions when she was suffering with infections. There are clearly good days and bad days. There are clearly times when her susceptibility to infection means all of those day to day activities are prevented entirely. There is an overlay of her secondary issues of anxiety and mental health arising from the fear of the surgery that she knows she will at some point have to undergo.

5.12. In our judgment, the cumulative effect of all these effects is that there is a substantial adverse effect on the ability to carry out those normal day to day activities. The claimant is, therefore, disabled for the purpose of the Act.

6. The Knowledge Issue

6.1. We identify in our findings of fact that the existence of the condition was known to the employer at the time of the claimant's recruitment. The effects were masked by the part time working, such that much of the recovery period from tiredness took place between weekend shifts. However, we have also found that the employer, through its registered manager at the time was aware of the claimant's condition and, significantly that it had consequences to her in terms of fatigue and tiring. Taken together, we are satisfied that the respondent had sufficient information before it to know of the claimant's disability.

7. The Liability Issue

7.1. This issue is answered by reference to our findings of fact of the reason why the employment was terminated either by way of an explicit conclusion, one way or the other, or by application of the shifting burden under s.136 Equality Act 2010. In the context of a claim under s.15 of the Act, that is to determine whether the facts show a prima facie case that the reason was the claimant's current or potential sickness absence. If so, we must conclude the claimant was treated unfavourably for that reason unless the respondent can show it was in no way connected to that reason.

7.2. There is no doubt that termination of employment amounts to unfavourable treatment. We have not been able to come to a conclusion that the reason why the employment was terminated was the current sickness absence or threat of future absence. Nor are we able to conclude the claimant has made out a prima facie case from which we could conclude the reason why is that sickness absence.

7.3. Our findings on the reason why lead to two significant conclusions. They are firstly that the claimant's sickness absence that week, or the prospect of it in the future, were inherently unlikely to prompt any adverse response from the respondent. Secondly, that the evidence shows there was clearly a non-discriminatory reason why there was a need to review housekeeping that week which was unrelated to the claimant's absence. In this employer's business, the housekeeping need is flexible and variable, save to the extent that it views its need as simply having two people doing it. In other words, it does not schedule its cleaning with the sort of precise staffing ratios used for its care staff. The return of Pat from compassionate leave around the time of the dismissal was a legitimate reason for the employer to review its need for the temporary cleaning arrangements it had put in place over the previous few months. We are satisfied

that the return of Pat was a reason unrelated to the claimant's sickness absence and was the reason why the respondent reviewed its temporary cleaning, leading to the claimant's termination.

7.4. However, that in itself does not give a full answer as both the claimant and Tracey Lawler were in broadly similar circumstances insofar as both were undertaking some temporary cleaning hours for the respondent. We have therefore had to consider the reason for the decision to choose to keep Tracey but end the claimant's employment, as opposed to keeping the claimant and ending Tracey's additional hours. The reason for this was one of pragmatism, or perhaps laziness, in the thought process undertaken as it boiled down to the coincidence of timing that Tracey was at work in the building when the discussion took place between Miss Shotton and Mrs Dobbs. It is not a particularly clever approach but this is a small employer and from what else we have seen of its employment systems, it is in line with its approach to management. It is, therefore, one we are satisfied was genuine. Tracey was simply there to be asked. Our instinctive response to that state of affairs was that, if the claimant had not been off sick, she may not have suffered that disadvantage. Whilst we accept there was no conscious decision to disadvantage the claimant due to her sickness absence, that did not prevent there being inadvertent unfavourable treatment because of the sickness absence. However, the shift patterns were such that we have found on balance that she would not have been present at the time even if she had not been off sick that day. To that extent, therefore, the claimant's sickness absence, played no part whatsoever in the choice between her and Tracey. In those circumstances, asking the person who coincidentally was at work is not a discriminatory act. For those reasons, we have to dismiss the claim.

Employment Judge Clark
Date 3 June 2018

JUDGMENT SENT TO THE PARTIES ON
8 June 2018

FOR THE TRIBUNAL OFFICE