EMPLOYMENT TRIBUNALS

Claimant: Mrs T Smith

Respondent: Doncaster Bassetlaw NHS Foundation Trust

HELD AT: Sheffield **ON:** 16 and 17 April 2018

BEFORE: Employment Judge Rogerson
Mr M D Firkin
Mr L Priestley

REPRESENTATION:

Claimant: In person
Respondent: Mr S Proffitt, Solicitor Advocate

JUDGMENT having been sent to the parties on 26 April 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The issues in this case were agreed at the beginning of the case and are the issues previously identified by Employment Judge Rostant at the preliminary hearing on 2 January 2018 (see page 43 of the bundle).
2. There are 2 complaints relating to the claimant's dismissal on 4 September 2017 of unfair dismissal and discrimination arising from disability. The issues the tribunal had to determine for each complaint are:

   Unfair Dismissal

   a. What was the reason for dismissal? The respondent asserts that it was a reason related to capability or some other substantial reason which are both potentially fair reasons for dismissal (section 98(2) of the Employment Rights Act 1996 'ERA 1996'). The claimant accepts her dismissal was for a reason relating to capability which was her ill-health so dismissal was for a potentially fair reason.
   b. The claimant alleges unfairness on the following grounds:

i. Her dismissal was premature because by the time of her dismissal in September 2017 she had a prognosis that she would be fit to return to work on reduced duties in October 2017 and on full duties by January 2018.

ii. She complains that the respondent failed to invite her to the meeting which resulted in her dismissal which was clarified as the second dismissal meeting.

c. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses for a reasonable employer.

d. Does the respondent prove that if it had adopted a fair procedure, the claimant would have been fairly dismissed in any event and/or to what extent and when.

e. Did the claimant cause or contribute to her dismissal by her conduct to any extent and if so by what percentage should any award made be reduced to reflect that conduct.

Discrimination arising from disability section 15 Equality Act 2010

3. The Respondent accepts the claimant was a disabled person by reason of a physical impairment of hypothyroidism (also referred to as an overactive thyroid gland) at the time of her dismissal on 4 September 2017. The Respondent accepts dismissal is 'unfavourable' treatment related to the claimant's disability because the dismissal was related to the claimant's absence from work caused by her hyperthyroidism. What the respondent seeks to do was rely upon the 'justification defence' that is available under section 15(b) of the Equality Act ('EA2010') to argue that the dismissal was a proportionate and necessary step at the time the decision was made, given the information available the length of the absence and the effect of the absence on service provision.

4. We heard evidence for the claimant from the claimant. For the respondent we heard evidence from Kate Carville, Ward Sister and the dismissing officer, Jon Sargeant, the Director of Finance and the first appeals officer, and Karen Barnard the Director of People and Organisational Development and the second appeals officer. We also saw documents from an agreed bundle of documents. This was not a case where the relevant facts were in dispute and we found both parties witnesses were credible witnesses who gave a truthful and honest account to the Tribunal. From the evidence we saw and heard we made the following findings of fact.

Findings of fact

5. The claimant was employed as a Band 3 Healthcare Assistant working in the Accident and Emergency department of the hospital from 4 September 2007 until her dismissal on 6 September 2017.

6. The respondent is a large employer. It has its own in house dedicated human resources department to assist and advise managers with amongst other things ill-health absence management processes and dismissal procedures.

7. The respondent was as the 'Trust' the claimant's employer and also the provider of healthcare services to the claimant as a 'patient'. This was relevant to how the claimant 'viewed' the respondent at the time and at this hearing (see the first paragraph of the claimant's closing submission). She believed she was given an

incorrect treatment plan by the Trust which resulted in her going to another Trust (Sheffield) for a different treatment plan which delayed her operation. She is clearly unhappy as a patient with the health care service she has received for her hypothyroidism. However her issues as a 'patient' of the trust were not the 'employment' issues which the Tribunal has to determine in this case which were set out prior to, and at this hearing.

8. On 25 January 2016, the claimant commenced a period of sick leave absence as a result of her overactive thyroid, which continued until her dismissal and was a disability related absence. She never returned to work in her substantive role prior to her dismissal.

9. On 25 February 2016, the claimant was referred to Occupational Health in order for the respondent to obtain advice and guidance on how to support the claimant with a return to work/ her ill health.

10. On 19 April 2016, the claimant attended an Occupational Health appointment as a result of which Occupational Health confirmed that the claimant was unfit to return to work in any capacity because of her overactive thyroid. They could not predict a likely date of return to work.

11. On 7 June 2016, the claimant had a meeting with her line manager. Also in attendance were her Union Representative and a HR representative. The claimant explained that she was expecting to undergo surgery when her consultant was happy with her thyroid levels. The respondent wrote to the claimant after this meeting to confirm the discussions that had taken place

12. On 11 August 2016 the claimant's entitlement to sick pay came to an end.

13. In September 2016, a second referral was made to Occupational Health which still confirmed the claimant was too unwell to return to work in the foreseeable future. Occupational Health also advised that after surgery took place a further two to three months absence would be required for the claimant to achieve 'reasonable stability' in her condition post surgery.

14. On 7 November 2016 at another meeting with the claimant's line manager the claimant's position had still not improved and there was still no foreseeable return to work date. As a consequence the claimant was invited to a meeting on 10 February 2017 to consider her continued employment with the respondent in light of her ongoing sickness absence.

15. It is accepted that in error the invitation letter referred to the meeting as a 'Stage 3 Sickness Management Meeting' rather than a 'Formal Review of Long-Term Sickness Absence'. The incorrect label attached to the meeting did not alter the fact that the claimant clearly understood that the purpose of the meeting was to consider her continued employment in light of her ongoing sickness absence. The labelling error was also explained to the claimant/ her union representative at the beginning of the meeting. She confirmed she was happy to continue with the meeting rather than have another letter issued to her with another date.

16. The claimant now complains that this was a breach of procedure and by this mislabelling the process that was followed was unfair. We do not agree. The claimant understood the purpose of the meeting and the likely consequences of that meeting. She was represented at the hearing and raised no objection when she was asked if she was happy to continue at the time. At this hearing she did

not challenge the evidence of the dismissing officer in that regard and the outcome letter confirms the choice she made. We have no doubt that if the claimant had asked for the meeting to be rearranged that is what would have happened.

17. In fact in cross-examination no questions were asked at all of Ms Carville in relation to her decision to dismiss or the process that she followed to suggest any unfairness. The outcome of the meeting was the claimant's dismissal. The dismissal letter clearly sets out the rationale for the decision made which we accepted. Miss Carville makes it clear that "*From what you have told me …your health condition means that you are unable to attend work for the foreseeable future and that further investigations and treatment are required. This clearly means that there is no foreseeable return to work date for you in the near future"* The letter sets out the information that was available and had been considered at that date. It assures the claimant that there were no questions regarding the claimant's conduct or performance in her role and that her dismissal was only about her incapability due to ill-health. It records that the claimant's accepted position was that there was no likely return to work in the foreseeable future. There was no date for any operation. The claimant recognised that was the position which was why she asked about the possibility of having a career break.

18. Ms Carville dealt with the career break request in her outcome letter and explained that a career break could not be used in this way to deal with/manage an individual's sickness absence. The 'career break' policy serves a completely different purpose which is to enable staff to "*leave their employment on a long term but temporary basis to care for children and or dependents, to undertake an individual research project, to work abroad, to take sabbaticals and to take further educational qualifications not relevant to the particular post*" (see page 59). The career breaks policy was not used to manage an employee's ill-health absence. In cross-examination the claimant accepted the evidence the respondent had provided demonstrates that the policy has not been used to manage an employee's sickness absence in the way she wanted to use it. None of the individuals the claimant had identified had taken career breaks to manage their sickness absences.

19. Looking at the list of issues we have to consider whether Ms Carville acted reasonably in treating it as a sufficient reason to dismiss and whether she followed a fair procedure. She considered all the available information the respondent had from Occupational Health and from the claimant. There was no dispute that there was no likely return to work in the foreseeable future and no date for any operation. We were satisfied that based on the information she had Ms Carville genuinely believed the claimant was incapable for the foreseeable future of returning to work because of her ill-health given the agreed prognosis. She had reasonable grounds for that belief having carried out a reasonable investigation having the claimant's agreement that the medical evidence that the respondent was relying upon at that time was accurate and up to date.

20. The claimant appealed against the dismissal by letter dated 22 February 2017. In her letter she refers to her illness being "fixable" provided she is given 'reasonable space and time to recover'. The appeal hearing took place on 10 April 2017 before a panel of three which included Jon Sargeant. Mr Sargeant connected the 'fixable' comment the claimant was making to the Occupational Health report dated 26 October 2016 in which Occupational Health had predicted

that the claimant should achieve reasonable stability, that could lead to a phased return two to three months after surgical intervention.

21. At the appeal hearing, the claimant and her trade union representative agreed with the occupational health assessment and the time frame given of two to three months after the operation, for recovery. They requested that the claimant was reinstated and any decision about her ongoing employment was deferred until the operation, which they now expected would take place in four or five week's time. Although a date for the operation was not provided at the appeal hearing it was subsequently provided by the claimant's brother as 4 May 2017 at the Sheffield Hospital. The claimant's brother also confirmed that from the claimant's perspective she expected the recovery period after the operation to be two to three months which would be the end of August 2017.

22. By letter dated 3 May 2017 the Appeal Panel reinstated the claimant and overturned the dismissal decision but with three very clear conditions attached to that reinstatement so the claimant was in no doubt about what was expected to happen going forward. The panel also recognised that since the dismissal, the new development was the operation and a date for it of 4 May 2017 which Ms Carville had not known when she made her decision. The 3 conditions attached to the reinstatement offer were first that the claimant had the operation as planned on 4 May 2017. The second was that there would be a six week review meeting with occupational health after the operation had taken place. The third was that following a two to three month recovery period after the operation "*you will be able to undertake a sustained return to work and establish an acceptable level of attendance"* in the claimant's substantive role. With the operation date of 4 May 2017 the two to three month period meant by 4 August 2017. The letter confirms that "*should you be unable to meet any of the stipulations a decision will be taken in relation to the continuation of your contract of employment*". It was reasonable for the respondent to reinstate the claimant with those 3 conditions in place which was in accordance with the claimant's request for more time. Although a phased return to work was not specifically mentioned in the letter it is clear that further Occupation Health Advice would have been sought before any return to work plan was finalised.

23. The claimant had the operation on 4 May 2017 which was successful. The claimant was referred to Occupational Health and a report dated 30 June 2017 was provided (at page 396). The relevant parts of that report state as follows.

> *"providing further improvement, she might be able to resume her duties in a predominantly* ***sedentary capacity*** *by the beginning of October 2017. On her resumption a predominantly office base sedentary job should be ideal. A phased return over three to four weeks may be considered as well. Hopefully by* ***early next year she will be able to return to her own employment***".

24. It is clear from the language used in the Occupational Health report that there was no certainty of a return to work to the claimant's substantive post until possibly/hopefully early 2018 which would mean a total period of absence from work period of two years.

25. In light of this advice, Mr Sargeant sought further information from the claimant as to her views on the report. There were email communications sent to the claimant on 2 and 3 August 2017 asking the claimant to provide any additional information she wanted the appeal panel to consider before any decision was

made. The claimant's response of 3 August is to blame the respondent for the delay in her having the operation but not to offer any information about her ability to return to work.

26. On 18 August 2017, Mr Sargeant wrote to the claimant terminating her contract of employment with effect from 31 August 2016 (referred to as the second dismissal). His letter sets out the reasons for his decision which we accepted were the reasons which were not challenged in cross-examination. The claimant's complaint of unfairness identified in the list of issues is that she should have had another meeting before the 'second' dismissal. It is not clear what difference she says that would have made in circumstances where she was given the opportunity to provide further written information to Mr Sargeant for the panel to consider before a decision was made. She did not suggest in her evidence or to Mr Sargeant what it is she would have said that she did not/could not have said in writing which would have influenced or changed the outcome. What she tells us at this hearing is that she would have said she was able to return to work in October 2017 but she has not said that to the respondent at the time and does not say that now in her witness statement. In answer to questions from Mr Proffitt she indicated that she has not been looking for any work until recently because she is unfit to work and her GP continues to certify her as unfit to work. The view the respondent took at the time about any likely return to work is supported by the evidence they saw at the time and by the evidence that we saw and heard at this hearing.

27. The claimant then appealed the decision of the appeal panel. The respondents did not have to provide a second appeal process but did so which demonstrates an open minded approach. This second appeal also allows the claimant a further hearing where she can put her case in person. The respondent was willing to listen and willing to be persuaded by the claimant to change its mind if there were reasons/evidence to support a different decision. The claimant was asked to provide any evidence she wanted the appeal to consider.

28. The second appeal was heard by Kathrine Bernard on 10 January 2018. She attempted to get some up to date medical information from Occupational Health and from the claimant or from the claimant's GP in December 2016. On 6 December the purpose of her request is made crystal clear to the claimant. It is *"to obtain occupational health and further advice to assist the appeal panel in making its decision" (page 555)*. She makes it clear to the claimant that some time has elapsed since the last Occupational Health Advice was obtained and as a result it would be '*helpful'* to have an update in preparation for the appeal.

29. At the end of those communications the claimant's response is also crystal clear. She is uncooperative unhelpful and unwilling to provide any further information or to enable the respondent to obtain further information. All she wants is a date for the appeal.

30. On 22 December 2017 a final attempt is made by letter explaining the importance of providing up to date information whether that was from the claimant or her GP in the absence of the Occupational Health referral. In cross examination it was suggested to the claimant that by her approach she was being 'stubborn' and she agreed she was. The claimant was deliberately deciding not to provide information which was being sought to help the respondent in the decision making process. At this hearing she suggested to the Tribunal that she didn't

know what to do. She hadn't been able to get a doctor's appointment. If that was the case, why not inform the respondent that was her difficulty rather than simply demanding a date for the Appeal. If she had explained the problem the respondent could have dealt with it in the appropriate way by allowing her more time to obtain a doctor's appointment or she could have agreed to them getting the Occupation Health advice as an alternative.

31. At every opportunity the claimant was given she adopted a stubborn difficult and unhelpful approach to providing information, in circumstances where the respondent has made it clear why the information was being sought. That stubborn approach was a choice made by the claimant but she now seeks to blame the respondent for the consequences of that choice.

32. The respondent had every intention of obtaining further advice and had at the time drafted a detailed referral for further occupational health advice in readiness for this being obtained before the appeal hearing. They did this because they genuinely wanted to consider any further relevant information before a decision was made. Unfortunately they could not proceed with this request because the claimant did not co-operate or provide consent which denied the respondent access to this further information before the second appeal.

33. Mrs Barnard heard the appeal in January 2018. The claimant was allowed to be represented by a friend. The notes demonstrate how the claimant was given every opportunity to put forward any representations that she wanted to make. The claimant was asked why she refused to attend the Occupational Health appointment. Her response was that she had not attended because she was no longer a Trust employee. Her response demonstrating a stubborn and deliberately unhelpful approach. Mrs Barnard also recalls that the claimant was expressing reservations about coming back to work. When she asked her whether she wanted to come back to work the claimant said that she '*wanted to speak to her family*'. She would have known in advance of the appeal hearing that the respondent was going to explore the possibility of a return to work and she chose not to give any positive response to the question. When she says at this hearing that she was ready to return to work by January 2018 it is surprising she didn't say that at the time when the outcome could have been affected by that answer. Instead her responses and actions at the time were consistent with someone who did not want to return to work.

34. By January 2018, the claimant is not telling the Respondent she is capable of returning to work and she is not providing information or access to information to persuade them that she can. Oddly, she complained at this hearing that there was no line manager meeting that took place in the intervening period but it is difficult to see what purpose such a meeting would have served when the missing information the respondent was seeking needed to be provided by the claimant her GP or occupational health if the claimant wanted to provide it.

35. The outcome of the appeal was that Mrs Barnard confirmed the dismissal decision. The detailed written decision was at page 573G and sets out the rationale that was adopted which we accepted. The relevant paragraphs of that decision are as follows:

> *"I am aware that you were seen by Occupational Health in June 2017 and that their advice dated 30 June 2017 was that you would not be able to return to work in any capacity until October 2017. Further occupational health also*

stated that you would require a sedentary administrative role upon your return as well as a phased return. Occupational health did not believe that you would be able to return to your full role until early 2018. In light of the advice received from Occupational Health it was clear that your recovery progression was not as successful as previously expected and as you and the Trust had hoped it would be and that you did not meet the reinstatement criteria that had been clearly set out for you.

In light of this the Trust informed you that it would need to make a decision in relation to your continued employment. Prior to taking this decision you were asked if there was any information you wished to submit to the Trust to assist in the decision making. This could have included further medical evidence from your GP or other information about how you are feeling. The email sent by you did not add any pertinent information about your employment with the Trust and instead referred to your treatment as a patient of the Trust. The decision about your employment was remitted to the previous appeal panel, those individuals who decided to conditionally reinstate you. The original appeal panel reviewed whether you had met the conditions that they had clearly set out for you in their letter dated 4 May and as they had not been the decision was taken to terminate your employment. The panel has found that a further hearing was not necessary in the circumstances. In any event you were given an opportunity to provide any comments or any additional evidence that you wished to in advance of the decision being made. Having considered all the evidence presented it is clear that you did not meet the reinstatement criteria that had clearly been explained to you in writing. As such the decision to terminate your employment is upheld."

36. That was a reasonable decision for Mrs Barnard to make in all the circumstances and falls within the band of reasonable responses open to a reasonable employer. The circumstances were that the Trust had an absent healthcare assistant from the Accident and Emergency Department for two years by this point. Mr Sargeant explained how long term sickness absence during this period had to be covered by agency/bank or by overtime, which are expensive and disruptive options which made it difficult to provide an effective and consistent service to the patients. See in particular paragraph 40 of his witness statement. He identifies the legitimate aim is the ability to provide care for patients in an effective consistent cost efficient way. The claimant was an employed health care assistant and the alternative ways of providing the service for her long term absence lacked consistency (because patients would not see the same member of staff), lacked the same knowledge base and experience (temporary staff cover could not be guarantee in the same way and they were not as familiar with other staff/working environment as employees in the substantive post would be and was a more expensive option. A 'replacement' health care assistant could not be recruited while an employee was absent which is why the absence has to be covered by the other temporary options. After two years it was disproportionate to continue with the claimant's employment for any longer without any evidence to support a return to work in a reasonable time.

37. We agreed that by this time in January 2018 it was proportionate and necessary for the respondent to dismiss. The Tribunal has to balance the discriminatory effect of the dismissal with the effect of continuing to employ someone who has no reasonable prospect of returning to their role in a reasonable period of time.

The respondent had waited 2 years by the final appeal which was a reasonable period of time to wait and the claimant was not providing any information to support a return to work. The claimant may feel it is not proportionate when she blames the Trust as a service provider for failing to provide her with an operation date earlier than it did but that is not the issue. One consultant may take one view about a treatment plan that is different to another and the tribunal is not in a position to comment on that or blame the employer for those decisions. It is the respondent's actions as an employer in that period which we have to consider.

38. Section 98(4) of the Employment Rights Act 1996 requires the tribunal to consider whether the dismissal for ill health capability (a potentially fair reason) was fair having regard to that reason and considering whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably in treating it as a sufficient reason for dismissing the claimant and determine fairness in accordance with equity and the substantial merits of the case. This is a large employer with a dedicated HR team that has demonstrated in the procedure it has followed up to and including the second appeal a thorough fair and open minded approach which has allowed the claimant numerous opportunities to provide information to influence the outcome which in the end the claimant chose not to do. We are satisfied the dismissal was procedurally and substantively fair and a sanction that falls within the band of reasonable responses open to a reasonable employer in these circumstances.

39. We also find the unfavourable treatment was justified in accordance with section 15(1)(b) of 'EA 2010' because it was a proportionate means of achieving a legitimate aim. In those circumstances therefore we find that the dismissal was fair and although discriminatory was justified as a proportionate means of achieving a legitimate aim. Therefore the complaints of unfair dismissal and discrimination arising from dismissal fail and are dismissed.

40. In view of our findings on the unfair dismissal we did not need to deal with contributory conduct. However given our findings as to the claimant's conduct up to her dismissal and her deliberate stubborn and unhelpful approach in failing to provide relevant information we agree with Mr Proffitt submission that any award we would have made would be reduced substantially by 100% to reflect that conduct given it's effect in contributing towards the decision to dismiss that was made and upheld at the second appeal.

Employment Judge Rogerson

Date: 20 June 2018