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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr R Singh**

**Respondent:** **Birmingham City Council**

**Heard at:** **Birmingham** **On:** **7 to 11 January 2019**

**Before:** **Employment Judge Butler**
**Members:** **Mr DR Spencer**
**Miss LS Clark**

**Representation**
**Claimant:** **In person**
**Respondent:** **Mr E Beever (Counsel)**

# JUDGMENT

The unanimous judgment of the tribunal is that the claims of unfair dismissal and disability discrimination are not well-founded and are dismissed.

# REASONS

1 By a claim form submitted on 28 December 2017, the claimant brought claims of unfair dismissal and disability discrimination against the respondent. His claims of discrimination were clarified at a Preliminary Hearing on 22 March 2018 as being:

(i) that the respondent dismissed him on 1 August 2017;
(ii) discrimination arising from disability by being subjected to the respondent's absence management policy and then being dismissed; and
(iii) failing to make reasonable adjustments in not adjourning a Full Case Hearing at which he was dismissed; the respondent failing to provide information he had requested; failing to allow him a 4 week phased return following his absence from work in February 2017; failing to carry out risk assessments in June 2016 and July 2017; and failing to discount absences related to his disabilities.

2 The respondent resisted the claims.

The Issues

3 The issues were agreed between the parties at the Preliminary Hearing and no new issues were raised at the substantive Hearing. The issues are summarised as follows:

(i) In relation to unfair dismissal, what was the principal reason for dismissal and was it potentially fair in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? Was it within the range of responses of a reasonable employer?

(ii) In relation to disability, the respondent concedes that the claimant is disabled by virtue of his condition of irritable bowel syndrome. Additionally, the claimant claims he is disabled by virtue of depression and the perceived condition of cancer of the neck and bowel.

(iii) In relation to the alleged disabilities which are not conceded, were the impairments long-standing, having lasted for at least 12 months or being likely to last at least 12 months.

(iv) In relation to direct discrimination on the grounds of the claimant's disability, did the respondent discriminate against him by dismissing him?

(v) In relation to discrimination arising from disability did the respondent discriminate against the claimant by subjecting him to its absence management policy and then dismissing him?

(vi) In relation to reasonable adjustments, did the respondent fail to make such adjustments by not providing him with further information and allowing him to present further medical evidence at the Full Case Hearing and not adjourning that Hearing because he was under the influence of anti-depressants? Did the respondent fail to make reasonable adjustments by not allowing the claimant a 4 weeks' phased return to work in February 2017? Did the respondent put the claimant at risk of further injury to his health by failing to carry out risk assessments in June 2016 and July 2017? Did the respondent wrongly take account of absences due to the claimant's disabilities contrary to its own absence management policy?

The Law

4 Section 13 Equality Act 2010 ("EqA) provides:

> "(I) 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."

5 Section 15 of the ("EqA") provides:

"(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.

6 Section 20(3) EqA provides:

"where a provision, criterion or practice of (A's) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage."

7 Section 21 ("EqA") provides that

"(A) discriminates against the disabled person if (A) fails to comply with that duty in relation to that person."

8 Section 98 ERA provides:

(1) "In determining ….. whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee who are performing work of the kind which he was employed by the employer to do …..

(3) For the purposes of subsection (2)(a) "capability" in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality ……"

<u>The Evidence</u>

9 There was an agreed bundle of documents running to 245 pages and references to page numbers in this judgment are to page numbers in that bundle.

10 We heard oral evidence from the claimant and for the respondent from Mrs D Wagstaff, the claimant's line manager, Mrs C Davies, Chair of the Full Case Hearing, and Mrs C Riley, acting HR Business Partner and Technical Adviser.

11 The claimant was acting in person. He was advised at the commencement of the Hearing that, whilst time would be allowed for him to prepare his cross examination and submissions, the tribunal could otherwise only assist him by explaining and clarifying the procedure to be adopted throughout the Hearing. He was specifically advised that the tribunal was unable to give legal advice. In the event, due to issues surrounding the production of the bundle, he was allowed time on the first day of the Hearing to familiarise himself with the bundle prior to his own cross-examination and time to prepare his submissions once the evidence had been completed.

12 We did not find the claimant's evidence to be reliable, particularly in relation to matters surrounding the Full Case Hearing held under the respondent's capability procedure. This was an important aspect of the claimant's claim. He maintained he had requested information from the respondent prior to that Hearing about staff rotas and ill health absences of other employees without response from the respondent. No evidence of the emails requesting this information was produced.

13 At the time of the Full Case Hearing on 1 August 2017, the claimant claims to have been suffering from depression and on a high dose of anti-depressants. In his Claim Form (page 7) he said:

> "At the full case Hearing, I was on a high dose of anti-depressants and although my union rep pointed this out and said I was not fit to take part, this was disregarded and I was told that the Hearing would go ahead."

Under cross-examination, the claimant gave two different accounts of what was actually said. Firstly, he said Mrs Davies did ask him if he was fit to carry on but he could not remember what his response was. When pressed by the tribunal, however, he accepted that Mrs Davies had asked him if he was fit to carry on and he "probably said yes." Accordingly, we do not accept his evidence that he asked for any adjournment or postponement of the Full Case Hearing.

14 There was also some inconsistency over the claimant's evidence that he was not allowed to present medical evidence from his GP regarding his depression and, presumably, his other medical conditions. That evidence was also inconsistent with the documents in the bundle. In his evidence, the claimant said he was given a very short period of time between being invited to the Full Case Hearing on 17 July 2017 (page 165) and to the hearing itself on 1 August 2017. He said this did not give him enough time to obtain a letter from his GP. Whilst he gave evidence that he applied for a letter from his GP in good time, this is not borne out by his GP's notes at page 221. These show that he first raised the request or a letter from his GP on 27 July 2017 by telephone. His notes show that he was told there would be a charge for this letter. On 31 July 2017, the notes show that he telephoned the surgery again requesting a letter

and was told that he needed to make payment first and the letter would take 5 working days to produce. In the event, the letter from his GP produced in the bundle is dated 29 September 2017 stating he was no longer taking anti-depressants and was fit for work. His notes at page 219 show that this particular letter appears to have been changed from its original form to one that was acceptable to the claimant. It seems to us that his evidence regarding this letter is unreliable as he had ample time during the invitation to the Full Case Hearing and the hearing itself to obtain the letter but simply left it too late to do so. The notes of the Full Case Hearing, although not verbatim, make no reference to the claimant's alleged request to be able to produce further medical evidence.

15 For the above reasons, we did not consider the claimant to have given clear and reliable evidence.

16 We found the evidence of the respondent's witnesses to be more reliable. We did detect some animosity between the claimant and Mrs Wagstaff who at times treated the claimant's questions in cross-examination with some distain and this was further illustrated by her general demeanour during the claimant's own cross-examination as witnessed by the tribunal members. Having said that, Mrs Wagstaff answered questions spontaneously and concisely and we had no reason to doubt the reliability of that evidence. We did find the evidence of Mrs Davies to be reliable. She had a sound recollection of the Full Case Hearing and of what was said in it and was steadfast in her account of the claimant's participation in the hearing.

17 Mrs Riley's evidence clarified that in the Full Case Hearing both she and Mrs Davies were satisfied the claimant had been supported at work during and in between his medical absences.

18 For the above reasons, where there was a dispute on the facts in relation to the relevant issues, we preferred the evidence of the respondent's witnesses.

<u>The Facts</u>

19. We find the following facts as they are relevant to the issues before us:

(i) The claimant commenced employment with the respondent on 19 March 2002 as a full-time referral and advice officer within the Children's Advice and Support Service. At the relevant times, the claimant was married with 5 children under the age of 7 years, including triplets.

(ii) From 28 July 2014, the claimant began to accumulate a number of days' sickness absence. These are scheduled at page 164. In the period from 28 July 2014 to 30 December 2014 he accumulated 26 days sick leave including 5 days for psoriasis and 9 for toothache. From 10 November 2015 to 17 June 2016 he took 45 days' leave including 19 for a sprained ankle and 26 for gastro enteritis. From 6 December 2016 to the date of his dismissal he took over 70 days' leave for acute stress reaction, "investigations for neck", colorectal problems and depression.

(iii) As a result of these absences, the claimant, in accordance with the respondent's sickness absence policy, was put on two absence improvement

plans on 12 December 2014 (page 87) and 27 June 2016 (page 110). The claimant accepts that he breached both of the plans each of which set a target of no more than 10 days' sickness absence for the following 12 months.

(iv) The respondent's sickness absence policy is at page 47 and the absence improvement plans record that absences related to disability are not taken into account when setting numerical targets in those plans.

(v) After the second absence improvement plan was put in place, the claimant had sickness absences on 6 December 2016 for 2 days with gastroenteritis, on 3 January 2017, 13 February 2017 and 22 February 2017 to 27 March 2017 for 54 days expressed to be at page 164 as "under investigation for neck and colorectal problems." From 6 July 2017 until his dismissal he was absent with "depression, adverse effect from anti- depressants". In fact, the absence which began on 3 January 2017 is supported by a fit note issued on 10 January 2017 (the first week presumably having been self-certified) stating the claimant was not fit for work for 2 weeks until 24 January 2017 due to "acute stress reaction". Accordingly, 15 days of the absence commencing on 3 January 2017 was due to acute stress reaction and not, as stated on page 164, due to investigations for neck and colorectal problems.

(vi) The claimant was advised by letter dated 17 July 2017 from Mrs Wagstaff that he was required to attend a Full Case Hearing either on 1 or 2 August 2017. He was given with that letter a copy of the respondent's report, advice he could be accompanied and that "you are required to submit any written documentation you wish to use at the hearing to me no later than 5 working days prior to the date of the hearing. Failure to meet this deadline will mean that the Chair of the Panel may refuse you permission to use any written documentation at the hearing".

(vii) The claimant did not request a letter from his doctor in timely fashion and, at the Full Case Hearing itself, did not apply for an adjournment or postponement of the hearing due to his depression or the effects of taking anti-depressants. He was asked by Mrs Davies, when it was pointed out to her that he was taking anti-depressants, whether he was fit to carry on and he replied that he was. The outcome of the hearing, bearing in mind the claimant's absences, was that he was dismissed on notice (page 194).

(viii) The claimant appealed the outcome of the Full Case Hearing, the appeal being heard on 20 March 2018 at which he was not accompanied (page 213) but his appeal was dismissed (page 215).

(ix) During the course of the claimant's absences, and as a result thereof, he was referred to Occupational Health and the reports on 10 February 2017 and 14 July 2017 (pages 124 and 147 respectively) both make reference to risk assessments to be carried out and phased returns to work. In relation to the phased return to work recommended in the first Occupational Health Report, we find that, although it suggested a 4 week phased return to work, the claimant in fact agreed to a 2 week phased return to work then changed his mind and requested 4 weeks which was denied by the respondent after consultation with

its HR team. In response to this denial, the claimant, as he had previously indicated he would, went off sick again.

(x) During the claimant's various absences we find he did on several occasions fail to follow the respondent's reporting sickness absence procedure. Following his absences, he attended return to work interviews afforded to him by way of support by the respondent.

Submissions

20 The claimant submitted that, at the Full Case Hearing, he had mentioned the fact that he wanted to present a letter from his GP and that he had communicated with his GP about it. Anything to do with his medical conditions was related to his irritable bowel syndrome ("IBS"). He had been tested for crohns disease and stress made his condition worse. Risk assessments recommended by Occupational Health were never carried out. His relationship with his line manager had broken down and this added to his stress. He submitted that if his IBS had been discounted, he had hit his targets for sickness absence. There had been concerns over possible cancer diagnoses, but tests had proved normal. He had done everything in his power to get better but had no support. His long service had been ignored.

21 For the respondent, Mr Beever confirmed that the respondent had only conceded the claimant was disabled as a result of IBS. His depression and perceived possibility of cancer were not conceded. He submitted there had been inadequate evidence produced, particularly regarding the claimant's mental health issues. Only the GP's notes from April to July 2017 referred to depression and thus it was not a long-term impairment. The diagnosis had arisen in the context of a domestic incident in early July when the claimant had been arrested at home. A perceived risk of cancer could not amount to a disability. In relation to section 13 EqA, the claim was misconceived. The claimant had not been treated less favourably because of his disability but because of his absence. The alleged problems with his line manager were not live issues under section 13. Regarding section 15, Mr Beever submitted that the claimant had failed to establish any element of unfair treatment up to his dismissal. The claimant's claim that his sickness absence was connected to his IBS could not be sustained because the respondent considered each absence in isolation. The absence in January 2017 was due to acute stress reaction and not linked to IBS.

22 He further submitted that the section 20 EqA claim was flawed as it arose out of the claim that the claimant was depressed. The fact of the matter was the claimant's depression was not longstanding, did not amount to a disability and no reasonable adjustments were required in relation to it. The reference to the stress risk assessment should be considered by asking what would have been done and what would have happened if risk assessment proposals had been followed.

23 In relation to unfair dismissal, the dismissal was fair pursuant to section 98 ERA although it might be appropriate to label it as a dismissal for some other substantial reason.

Conclusions

24 We first addressed the issue of disability. The respondent conceded that the claimant's condition of IBS was a disability for the purposes of the EqA. In relation to this condition, we first address whether, or as claimed, the respondent directly discriminated against the claimant by dismissing him on 1 August 2017. The claimant's case seems to be absences for this particular medical condition should not have been taken into account under the respondent's sickness absence policy. In fact, addressing the schedule of absences at page 164, we note that the claimant from 2014 onwards had no absences connected to IBS until mid-January 2017 when he was under investigation for neck and colorectal problems. Between 13 May 2016 and 17 June 2016 he had 26 days' sickness absence due to gastroenteritis but the entries in his GP notes at page 228 (show that he was treated for viral gastroenteritis) which would not have been connected with his IBS. Accordingly, we find that the respondent was entitled to take into account the 26 days' absence for gastroenteritis and also the 2 further days' absence for the same condition commencing on 6 December 2016.

25 In relation to the breach of the 2016 absence improvement plan, discounting the 15 days' absence for acute stress reaction, but for which no treatment seems to have been given, the claimant seems to have had over 20 days' absence, not including the investigations for neck and colorectal problems but including the depression. In these circumstances, we cannot find that the claimant's dismissal amounted to direct discrimination as a result of his disability for IBS as this is simply not borne out by the medical facts.

26 In relation to section 15 EqA, it is equally the case that the claimant was not subject to discrimination arising from that disability because, when discounting the absence for the investigations in January and February 2017, the claimant still fell within the scope of the respondent's sickness absence policy and there is no evidence that he was dismissed because of his IBS. But if this was not the case, following the decision in Royal Liverpool Children's NHS Trust v Dunsby [2006] IRLR 351 EAT, there is no absolute obligation on an employer to refrain from dismissing an employee who is absent wholly or in part on grounds of ill health due to a disability and the question of justification should be considered.

27 As for reasonable adjustments, the recommendations by Occupational Health for risk assessments are not related to his IBS condition but to other medical conditions for which he was absent from work. Accordingly, it cannot be said that the respondent failed to make reasonable adjustments in relation to the IBS condition. Consequently, the reasoning in RBS v Ashton [2011] ICR 632 EAT relating to the identification of the provision, criterion or practice applied to him or the nature and extent of the substantial disadvantage suffered by him is not relevant.

28 For completeness sake, we note that the condition of psoriasis was actually not mentioned at all during the Hearing and was certainly not conceded by the respondent. There was no impact statement from the claimant but only a few references to the condition in his GP's notes. Accordingly, there is insufficient evidence before us to find that the condition of psoriasis amounted to a disability.

29 We turn to the alleged disability claimed by the claimant, namely, depression and, further, the perception of the possibility he had cancer. Dealing with the latter, there is nothing within the EqA or its schedules or accompanying guidance which refers to a

perception of a disability, but not actually having that disability, as being capable of amounting to a disability. Indeed, it cannot be said to be long-standing in this regard since it arose in around January 2017and it was apparently gone within a few months when all the test results showed there was no cancer present.

30 It is clear that depression can amount to a mental impairment coming within the scope of the EqA. In this case, we note from the GP's medical notes that the first prescription of Amitriptyline was given on 3 April 2017 (page 223). This is an anti-depressant prescribed for depression and poor sleep. Even if we were to accept that this prescription followed a diagnosis of depression, which we do not since it is not confirmed by the notes, the condition as it applied to the claimant could not amount to a disability because it was not long-standing. This seems to be confirmed at page 231 by the letter from the claimant's GP dated 29 September 2017 which states:

> "After a number of appointments with the GP, Mr Singh is also no longer taking anti-depressants and is deemed fit for work."

Since we find, therefore, that the claimant's alleged depression is not a disability for the purposes of the EqA, the respondent was not required to make reasonable adjustments by not applying the sickness absence policy and proceeding to a Full Case Hearing as a reasonable adjustment. Further, it cannot be said to be a reasonable adjustment to have delayed or adjourned the Full Case Hearing and, indeed, it was not since we have already found that the claimant was asked whether he was fit to continue with the hearing and confirmed he was.

31 The claimant has also complained that it was a reasonable adjustment for the respondent to have undertaken risk assessments after his various absences as referred to above. We do not find that the respondent's failure to do so amounted to discrimination or a failure to make reasonable adjustments as the recommendations to carry out those assessments did not relate to his IBS which is the only disability he had. We note also that the claimant underwent investigations for neck pain but these were returned normal so cannot amount to a disability.

32 The claimant also complained that on his return to work in February 2017, he was discriminated against because he was not allowed a 4 week phased return to work and this amounted also to a failure to make reasonable adjustments. We find, as admitted by the claimant in his evidence, that, despite the recommendation from Occupational Health, he fully agreed to return on a 2- week phased return and only changed his mind subsequently. In the circumstances, we find this inconsistency on his part does not endorse the view of discrimination or failure to make reasonable adjustments by the respondent.

33 Considering whether the claimant was unfairly dismissed, we first of all addressed the reason for his dismissal. The dismissal letter is at page 194 and merely records that, after 165 days absence for a variety of reasons over a 3 year period, the claimant was being dismissed as his absences were not sustainable to the business need (page 195). Mrs Davies in her outcome letter notes that the current advice from Occupational Health was that they were unable to give a reasoned prognosis regarding the question of the claimant's reliable and consistent attendance in the future and that further sporadic absences would be inevitable. At page 32k, in its response to the

Claim, the respondent states the claimant was dismissed for capability. In these circumstances, we cannot accept Mr Beever's submission that it is open to us to find he was dismissed for some other substantial reason. We contrast this case with the conclusion of the Court of Appeal in Wilson v the Post Office 2000 IRLR 834, CA where the nature of the absences leading to a finding of dismissal for some other substantial reason were entirely different.

34 As already noted, for the purposes of the ERA capability is assessed by reference to, inter alia, health or any other physical or mental quality.

35 The claimant states that his long service was not taken into account but reviewing this in terms of the reasonable employer we must ask whether 165 days absence in a 3-year period, the vast majority of which absences are not related to any disability, would effectively override long service. He also claims that his absences were in part due to the failure of the respondent to continue his flexible working arrangements but we do not find that to be the case since his absences reached a very significant level whilst still working to those flexible arrangements. In relation to his length of service, we find that a reasonable employer would have taken issue with his absences regardless of his length of service especially since the absences were dealt with under the respondent's sickness absence policy over a 3 year period during which time he was subject to to two absence improvement plans and on each occasion he breached the plans by exceeding the prescribed limit of 10 days' absence in the following 12 month period for reasons not related to any disability. In reaching this conclusion, we bear in mind the decision in S v Dundee City Council 2014 IRLR 131, Ct Sess (Inner House) where the court held that long service was not automatically relevant to a decision to dismiss for ill-health. Reference was made in that case to evidence which might show an employee to be "a good and willing worker with a good attendance record, someone who would do his utmost to get back to work as soon as he could". In this case, the claimant had a very poor attendance record for a variety of ailments, indicated that he would go off sick if he did not get a 4 week phased return (having agreed a 2 week phased return) and there was no guarantee he would have no further sporadic absences in the future.

36 At the time of the claimant's dismissal, he had been on sickness absence since 6 July 2017, with no return to work in sight. The respondent's sickness absence policy makes clear that sickness absence will be managed according to the policy and the claimant acknowledged that he was familiar with the policy and understood the concept and effect of absence improvement plans. He accepted that his continued absences in 2017 amounted to a breach of his latest absence improvement plan and that a Full Case Hearing was merited.

37 In the circumstances, we find that the claimant's dismissal was by reason of incapacity and that the respondent acted reasonably in treating it as a sufficient reason for dismissing him.

38 In reaching this conclusion, we note that the claimant alleged he had a lack of support from the respondent in managing his absence and his various medical conditions. We do not find that to be the case. He did not dispute the respondent's evidence that he was still at times allowed to work flexibly, was allowed to attend a diabetes course in case he was to contract diabetes (of which there is no evidence) and was allowed to use his holidays as requested in order to attend appointments with his

children. We accept the claimant's evidence that relations with Mrs Wagstaff had broken down and this was agreed by Mrs Wagstaff in a social context, but there is clear evidence in the bundle in the form of letters and other communications from her to the claimant that in relation to his absences she did all that was expected of a line manager.

39 For the above reasons the claims are dismissed.

**Employment Judge Butler**

**18/02/19**