EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms Intisar Issa	**v**	Dnata Limited

Heard at: Reading **On:** 16, 17 and 18 January 2019

Before: Employment Judge Gumbiti-Zimuto
Members: Ms L Farrell and Mr G Edwards

Appearances
For the Claimant: **In person**
(assisted by Mr T Aziz on 16 January 2019; and assisted by Mr T Aziz on 18 January 2019)
For the Respondent: **Mr S Healy** (Counsel)

JUDGMENT having been sent to the parties on **30 January 2019** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form that was presented at the Tribunal on 16 August 2016, the Claimant made complaints of discrimination on the grounds of disability and she also made a complaint about arrears of pay. In this case, which we have considered today and on Wednesday of this week, there has been no reference at all to any arrears of pay and so the decision of the Tribunal is that the complaint about arrears of pay is dismissed. The Tribunal has come to the conclusion that the Claimant's complaint about disability should also be dismissed. Our reasons for coming to this conclusion are as follows.

2. The Claimant has been acting in person in this case and although the claim form makes reference to 'Abby' from an organisation called 'Legal Gate', there has been no professional legal assistance provided to the Claimant during the hearing. This is significant because the Claimant's claim came before the Tribunal on 24 January 2017 for a case management discussion and on that occasion, I made an order requiring the Claimant to provide further particulars of her claim and also other directions for the preparation of the case including disclosure, the preparation of a trial bundle and the exchange of witness statements.

3. The Claimant did not comply with the order relating to the provision of further particulars and at f this hearing, she has failed to produce a witness statement. The problem that has created is that her claim is not clear and the way that the case has proceeded has been on the basis of the Tribunal attempting to understand the nature of the complaints the Claimant has made from the contents of her claim form and from the evidence that she gave during our hearing, which was in the main elicited from her as a result of the cross examination by Mr Healy who appeared on behalf of the Respondent.

4. It is regrettable that this case has taken such a long time to be heard. It was first presented on 16 August 2016 - more than two years ago. Two previous listings of the case have been postponed. The first occasion because one of the Respondent's witnesses was not available. On the second occasion the Claimant was pregnant and expected to be confined around the time the Tribunal hearing was to take place: the Regional Employment Judge took the view that the claim should be postponed and the case relisted. It has been relisted to be heard 16-18 January 2019.

5. The Respondent has relied on the evidence of Debbie Mant and Padraig Delaney and we were also provided with a bundle of documents containing 409 pages and our findings of fact are as follows.

6. On 14 April 2008, the Claimant commenced employment with Servisair as a customer services agent. Her contract of employment included a place of employment clause which said that the place of her employment would be Heathrow Airport. The company reserved the right to alter the duties of the employee and/or transfer the employee commensurate with her experience and ability to another department and/or location within the United Kingdom.

7. The Claimant's employment transferred from Servisair to Dnata in May 2014. The Claimant is epileptic. Unfortunately, in recent times, the Claimant's health has deteriorated in that she has been more susceptible to seizures. This has resulted in the Claimant taking extensive periods of time off work. The fact that she has taken extensive periods of time off work is not her fault it is because of the ill health, principally because of her epilepsy.

8. The Claimant was off sick in the period at the beginning of 2015 from 30 January until 28 February. Following that period of sickness, the Claimant had a sick review meeting with her manager. The Claimant provided her consent for a referral to be made to occupational health. On 27 February, a report was provided by Dr Samir Alvi. Dr Alvi points out that the Claimant's symptoms related to her epilepsy had deteriorated. Dr Alvi pointed out his understanding that the Claimant was a part time worker working four days on and two days off and stated that given her medical history, it would be prudent for her to have a graduated return to work over a two to three-week period, should this be available at management discretion. He stated that the Claimant did not feel that any other specific amendments would be beneficial at present. It was advised that the Claimant should not engage in safety-critical roles at work.

9. The Claimant continued in her role until about August 2015 when the Claimant was again off sick for an extended period of time. She was off sick from 30 August until 29 September. During that period of sick absence, the Claimant had a sickness review meeting with Mr Delaney and Ms Mant on 15 September 2015. During that meeting, Mr Delaney asked the Claimant how she was coping with home and work life. The Claimant stated that she was "*not struggling, just feel tired and need rest*". Mr Delaney asked the Claimant if she thought that she would benefit from dropping her hours, that there appears to be a recurring issue and that it has been ongoing since before the TUPE transfer. The Claimant's response was that *"you guys have been great"*. Mr Delaney pointed out to the Claimant that the most important thing at that time was to take care of the Claimant's health. Mr Delaney indicated that an amended roster may be more conducive to the Claimant's health, he said he would look at the alternative rosters that were available. The Claimant said she would prefer to work later shifts.

10. As a result of the Claimant's cumulative absences, she had triggered the need to attend an absence hearing. One was scheduled to take place on 6 October 2015. However, by 6 October, the Claimant was again off sick and no meeting took place with the Claimant until 3 November 2015, when another sickness absence review meeting took place again with Mr Delaney and Ms Mant.

11. During that meeting, Mr Delaney told the Claimant that he was very concerned about her and he told her that with effect from 1 November 2015, she would have exhausted her company sick pay. He asked if the Claimant had any specific triggers for her epilepsy: The Claimant indicated that she just had headaches. Mr Delaney asked if the role aggravated epilepsy the Claimant's response was *"I love my job but that doesn't affect it"*.

12. The Claimant's sick certificate lasted until the end of the year and there was some discussion about whether the Claimant would be able to return to work before it ended. Ms Mant pointed out that if the Claimant was well enough to return to work before it ended then the Claimant would need to get a certificate from her GP stating that.

13. Following the meeting on 3 November 2015, the Respondent wrote to the Claimant informing her that the Respondent would be commencing the process of reviewing her capability to undertake her contracted role. Part of the letter sent on 3 November reads as follows:

    "We are now at the stage where we need to move forward and ultimately bring this situation to a conclusion, as there appears to be no end date in sight in terms of your recovery or return to work. A possible outcome of this process could be the termination of your contract of employment with notice, however, if you are unable to return to your current role we are keen to consider reasonable adjustments and explore alternative roles within the company."

14. It went on to state that the letter *"constitutes the first stage of our capability policy"* and the Claimant was provided with a copy of the policy and

procedure for her information.

15. A further referral was made to occupational health and following receipt of the report from occupational health, a further capability review meeting took place on 18 December 2015. At that stage, it was anticipated that the Claimant would be returning to work in the near future and there was discussion about a phased return to work. This was subsequently confirmed by Mr Delaney to the Claimant showing that the Claimant would be working two shifts on, four shifts off, for a period of two weeks and then three shifts on, three shifts off, for a period of two weeks.

16. The Claimant returned to work in early January. Before she returned to work, the Claimant drafted a grievance letter. Her letter is dated 30 December and was received by the Respondent on 4 January. The letter reads as follows:

"My name is Intisar Issa, I work for the Qatar team, the reason I am writing to you this letter is because of the capability stages that I have been put through because of my disability which I suffer from epilepsy. I am compelled to feel that I am being discriminated on the grounds of my medical disability.
Since 2008, with Servisair where I worked in similar responsibility and had the same medical condition no better or worse and without not facing any capability meeting with Servisair, I am now having to face capability meetings and stage 2, with Dnata. My intention is to offer the best services to Dnata as always.
My medical condition occurs unintentionally and without forewarning. To ensure that my medical condition is kept under control, I regularly consult with my Neurology. Dnata seems to have highlighted that they may Discriminate against me on my medical disability. Although I have always provided with the GP letters which is sick note, and as well been to several appointments with the companies medical doctor but yet again I feel that I am not been treated fair because of my disability."

17. The Claimant's grievance was treated as an appeal against the capability procedure. The Claimant was at work from 2 January until 9 January 2016 and then from 9 January, the Claimant was off sick and would remain off sick until July 2016. On 22 February 2016, the Claimant's appeal against the capability stage 1 was heard by Mr Catterall and he dismissed her appeal. In dismissing the Claimant's appeal, he stated a number of things and I just read a couple of passages from his letter:

"During the meeting we took note of your comments, however, it is evident that your absence levels have significantly increased in the last year and in 2015 you had been absent from work for a total of 6 months. Whilst I appreciate you have been unwell and have been trialling new medication, this level of sickness absence is excessive and higher than any previous levels of sickness. In view of this, we as a business need to review your capability in order for you to fulfil your contractual obligations."

18. Mr Catterall told the Claimant that he had decided to uphold the decision to place her on a stage 1 capability ill health.

19. There was a meeting with Mr Delaney and Ms Mant on 24 February 2016. On that occasion, there was a discussion about a phased return to work for the Claimant. The Claimant's GP had indicated that the Claimant should work two days on and five days off but the two days were not be Saturday and Sunday. There was a discussion as to why that was necessary and also further discussion about whether the number of hours that the Claimant worked would be sufficient bearing in mind that the Respondent employed people to work 18.75 hours which is half a full time rate. It was pointed out that the Claimant's request to work what would in effect be 8 hours would not meet the business needs. There was a mention at this meeting of the possibility of the Claimant carrying out work for alternative airlines.

20. Following the 24 February meeting there were discussions between the Claimant and the respondent the was an intervention from ACAS. It became clear during the course of these discussions that the Claimant's requirements were capable of some movement. There was a suggestion that the Claimant work two days on and five days off and at another stage there was a suggestion that the Claimant work three days on and five days off. That offer was made by the Respondent as a way to get the Claimant back to work and then to review that after a period of time.

21. The Claimant returned to work in about July 2016 and a meeting took place again with Mr Delaney and Ms Mant during which a discussion was had about her pattern of work. It was agreed that the Claimant would return to work from 9 July, working 4.5 hours per shift with a three on and five off rotational pattern that was to be the subject of review at the end of July. The Claimant was told that during this phased return period there would be no adjustment to her salary. If the work pattern that was to continue beyond the phased return period, there would have to be some discussion about reviewing the Claimant's salary. The Claimant was also informed that her health was going to be closely monitored by the Respondent and that she would remain on the capability process for a further 12 months.

22. On 27 July, there was a meeting to review the end of the phased return to work. The meeting between the Claimant, Ms Mant and Bindu Malhari. On that occasion that the Claimant stated that she can work four days on, but she would need five days off. The Claimant indicated that the epilepsy medication was affecting her. She said, *"it's because I am standing and checking"*. The Claimant made it clear that she could not do the normal work rota. The Claimant was told by Ms Mant that the Respondent could not accommodate the Claimant's request for four days on and five days off. Shortly after that, the Claimant was again signed off sick and was to remain off sick from the end of July until the beginning of January 2017.

23. On 16 August, the Claimant presented her complaint to the Employment Tribunal.

24. From those facts, we have to consider whether the Claimant has been discriminated against on the grounds of her disability.

25. In the Claimant's claim form, it appears to the Tribunal that there could be

three things that the Claimant complains about as acts of discrimination. The first one is a reference to *"Dnata managers disregarding my disabilities and seizures rather than showing empathy I was unduly placed on warning"*. There appears to be a suggestion that the Claimant was disciplined or warned as a result of her disability. It is certainly the case that the Claimant's disability resulted in absences. The reason that the Claimant was given warnings arises from the operation of the Respondent's capability policy and procedure. The Claimant has not adduced evidence from which we are able to conclude that there was any discrimination in relation to the operation of the capability procedure.

26. A capability procedure which is triggered by illness is going to require examination i where the illness is a disability. In this case, the absence of any evidence from the Claimant explaining why there was any particular disadvantage or what type of discrimination arises as a result of the actions which have taken place in this case makes it difficult for the Tribunal to be able to conclude what type of discrimination has been complained of.

27. However, attempting to analyse sections 13, 15 and 20 which appear to be the relevant provisions of the Equality Act 2010 that might apply, we are not satisfied that the evidence that has been given in this case really allows us to draw any conclusions that suggest that there was discrimination. The evidence about the operation of the capability procedures has come from Ms Mant and Mr Delaney. There is nothing in the evidence that they have given which indicates anything which offends or breaches the statutory provisions referred to.

28. The Claimant has indicated that she requested from Dnata reduced number of working hours. This has been the area which has been the principal area of examination from the evidence that has been adduced and the only area in which the Claimant has really engaged with in this case. By trying to fit the complaint that is made about the reduction of hours into the scheme of the Equality Act 2010 it is the view of the Tribunal that there is a potential claim under section 15 and section 20.

29. The first part of section 20 requires us to consider whether there is a provision, criterion or practice that puts the Claimant at a substantial disadvantage in relation to the number of hours she worked in comparison with persons who are not disabled. The Claimant has only really expressed a wish or a desire for a reduction in hours. She has not presented evidence of substantial disadvantage. An analysis of her evidence can lead to the conclusion that there was no substantial disadvantage from number of hours that the Claimant worked.

30. There are a number of features about the Claimant's circumstances which suggest that the problem with the hours was not actually a problem about her disability but a problem concerning her need to provide the sort of childcare and parental support for her children that she wishes to do provide. The Claimant's desire to only work two days on and five days off was because of child care not disability. The Claimant indicated that her reason for asking for two days on and five days off was so that she could take care of her children. We are satisfied that the Claimant also stated

that she wished to rest. The wish to rest is a matter which arose from her health or disability issue. The Claimant has not adduced any evidence beyond her statement asserting that.

31. Even if we were satisfied that the Claimant had been able to show, in respect of the failure to reduce her hours, that there was a substantial disadvantage in comparison with persons who are not disabled, when we consider all the circumstances of this case, we are satisfied that the Respondent has acted in a way which was appropriate and reasonable. There was no failure to take reasonable steps. On the contrary, the Respondent gave the Claimant a phased return to work in order to ease her back into work; the Respondent agreed to accommodate the Claimant's specific working pattern and it was the Claimant that refused it because it would have resulted in the Claimant working on an airline other than Qatar Airlines. The Claimant does not have any contractual right to to work on any particular Airline. As a matter of practice, the Respondent seeks to satisfy the Claimant's desires to work on Qatar Airlines but what the Respondent has done is offer the Claimant an opportunity to work on another airline working the hours that she requested. There was nothing connected with her disability in refusing that offer. It was her desire to work on prestige Airline that prevented her from accepting the offer by the Respondent.

32. The reason that the Respondent is unable to offer the Claimant her desired work pattern on Qatar Airlines is explained in the witness statements of Mr Delaney and Ms Mant. It arises from the nature of the service level agreement that the Respondent has with Qatar Airlines. The working hours of customer service agents on this Airline are organised in such a way in order to meet the requirements of the service level agreement. Mr Delaney explained how the rota system works and how accommodating the Claimant's request for hours would create an imbalance in the rota that would require additional employees to be taken on to cover or alternatively overtime to be worked in order to provide the cover that the rota would necessitate.

33. We are satisfied that those were all reasonable business matters for the Respondent to consider. They are matters which are real criterion considered, the Respondent is entitled to take them into account. On another Airline where the same criterion or restriction did not apply it is the Claimant who turned down the request.

34. Were the same circumstances analysed under the provisions contained in section 15 of the Equality Act, 2010 and if it were established that there was unfavourable treatment arising from something in consequence of disability. The conclusion of the Tribunal would be that the Respondent has shown that the refusal of the reduction in hours in Qatar Airlines contract was a proportionate means of achieving a legitimate aim in that the legitimate aim. It was in order to properly service the Qatar Airlines contract in accordance with the service level agreement. It was the reasonable business requirement of the Respondent. We would therefore conclude that it was a proportionate means of achieving a legitimate aim.

35. The final matter which may give rise to a complaint in this case is that in

section 8.2 of her claim form. The Claimant makes a complaint that her letter of grievance was responded to in a way that had no empathy and resulted in a worsening of her health. This complaint has not been substantiated in the evidence which the Claimant has given. To the extent that evidence has been presented to the Tribunal, on this issue, the Tribunal is satisfied that the matter of the Claimant's grievance was dealt with appropriately by considering it as an appeal against the capability procedure. There is nothing in the evidence which has been given that leads us to be able to conclude that there was anything inappropriate in that conduct. We are not satisfied that there any facts from which we could conclude that there was discrimination in respect of that matter.

36. Our conclusion in this case is that the Claimant, through no fault of her own, suffers from a serious medical condition and that serious medical condition results in her suffering periods of ill health which mean that she takes significant periods of time off work. We are satisfied that in the way that the Respondent has dealt with the Claimant in this case they have been alive to the Claimant's ill health and have attempted to accommodate her. We are also satisfied that in the actions that they have taken thus far in dealing with the matter under the capability procedures that they have acted reasonably and appropriately and, in the circumstances, we do not consider that the Claimant's claims are well founded and the complaints are therefore dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 27 February 2019

Reasons sent to the parties on

6 March 2019

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For the Tribunal office