



# EMPLOYMENT TRIBUNALS

## Claimant

MS PINHAO

v

## Respondent

IMPERIAL COLLEGE HEALTHCARE  
NHS TRUST

Heard at: London Central

On: 3 and 4 June 2019

Before: Employment Judge Mason

## Representation

For the Claimant: In person

For the Respondent: Mr. Kennedy, counsel.

## RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The Claimant was dismissed for a fair reason and her dismissal was fair both procedurally and substantively. Her claim for unfair dismissal therefore fails and is dismissed.

## REASONS

### Background and procedure at the Hearing

1. In this case Ms. Pinhao (“the Claimant”) claims that she was unfairly dismissed and claims compensation.
2. The Respondent denies that the Claimant was unfairly dismissed and says:
  - 2.1 The Claimant was fairly dismissed on either grounds of “some other substantial reason” (“SOSR”) (failure to achieve a satisfactory attendance record) or in the alternative that she was dismissed for capability (sickness absence).
  - 2.2 The procedure adopted was fair and reasonable.

- 2.3 Dismissal was within the band of reasonable responses.
3. More than 5 years have passed since the Claimant's dismissal on 21 February 2014. The reason for this is that the Claimant first presented this claim in 2014 but due to the fees regime that applied at that time, her claim was rejected; her claim was then reinstated on 17 May 2018. On 18 September 2018 the full merits hearing was listed for 28 January, 29 January and 30 January 2019 but was postponed to 3, 4 and 5 June 2019.
4. The issues to be determined by the Tribunal are as follows:
  - 4.1 Was the Claimant dismissed for a potentially fair reason in accordance with s98(1) Employment Rights Act ("ERA")? The Respondent relies on capability, alternatively SOSR which are both potentially fair reasons.
  - 4.2 Did the Respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and the merits of the case (s98(4) ERA).
  - 4.3 Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances? The Tribunal must be careful not to substitute its own view.
  - 4.4 If the Claimant's dismissal was unfair, is the Claimant entitled to a basic award and/or compensatory award, and, if so, should there be:
    - (i) any reduction in the compensatory award on the basis the Claimant has failed to take all reasonable steps to mitigate her loss?
    - (ii) any reduction or limit in the award to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome in accordance with **Polkey**?
    - (iii) any adjustment to either award as a consequence of any failure to follow procedure under the ACAS code?
5. I advised the parties that I would hear evidence and determine liability only and a separate Remedy Hearing would be required if the Claimant is successful.
6. The Respondent provided a Chronology and a lever arch file containing the parties' documents; the documents in this file run to 407 pages and I will refer to this bundle as B1. The Claimant provided a witness statement with further documents appended and I will refer to this supplementary bundle as S1
7. Mr. Kennedy on behalf of the Respondent expressed frustration that the Claimant had only provided her witness statement on 14 May 2019 and at that point made late disclosure of additional documents (S1). He pointed out that disclosure had been completed months back in readiness for the previous hearing dates in January. He did not apply for a postponement or seek a strike-out order but applied for an order restricting the evidence so as to exclude the documents in S1 and to limit the Claimant's participation in the proceedings. Having listened to both sides, I refused the application. The Claimant is not legally represented, English is not her first language and she explained her personal difficulties in complying with the procedural

requirements. Whilst the witness statement and appended documents were served late, the Respondent has had sufficient time to read and consider them and cannot show any real prejudice in continuing with the hearing.

8. On the first day, having agreed the documents and the issues, I retired to read the documents and witness statements. Before doing so, I explained the procedure and order of events to the Claimant and suggested that during the break she may wish to prepare her cross-examination of the Respondent's first witness. After the break I heard from Ms. Shah (Reception Manager and the Claimant's Line Manager from January 2013 to the date of termination of the Claimant's employment). Ms. Shah adopted her witness statement as her evidence-in-chief and was briefly cross examined by the Claimant. On the second day, I heard from the Respondent's remaining witnesses: Mrs. Costin-Davis (General Manager for HIV, Sexual Health and Infection Directorate) who made the decision to dismiss; and Ms. Claire Hook (nee Braithwaite) (former Divisional Director of Operations for Medicine) who heard the appeal; again they adopted their witness statements as their evidence-in-chief and were cross-examined by the Claimant. The Claimant gave her evidence on the second day. I then heard oral submissions from the Claimant and Mr. Kennedy. The 3<sup>rd</sup> day was not required. I reserved my decision which I now give with reasons. I have not rehearsed the parties' submissions I but have considered them when reaching my conclusions.

### **Findings of fact**

9. Having considered all the evidence I make the following findings of fact having reminded myself that the standard of proof is the balance of probabilities. Whilst laboriously rehearsing the evidence is generally undesirable, in this case a full detailed exposition of events is merited.
10. The Claimant was employed by the Respondent as an Administrator/Receptionist from 8 February 2008 until her dismissal on 4 April 2014. Until January 2013, her Line Manager was Ms. Agnieszka Tamiola ("AT"); in January 2013 Ms. Shah became her Line Manager.
11. The Claimant was based on Jefferiss Wing, a walk-in sexual health service within the HIV, Sexual and Infection Department at St Mary's Hospital. She was one of 10 receptionists on Jefferiss Wing [Job Description B1 140-144]. It is not in dispute that the department was extremely busy and that in the event of staff absences, the remaining department staff were required to cover.
12. The Respondent has a Sickness Absence Management Policy and Procedure ("the Sickness Absence Policy") [B1 118-139]. This sets out arrangements for managing both long term and short term absences and relevant parts are as follows:
  - 12.1 Policy Statement [B1 120]  
*"Attendance management decisions will be based on overall sickness absence levels, i.e. the combination of both short term and long term absences."*

## 12.2 Referral to Occupational Health: [B1 125]

*“Referral to occupational health is a supportive measure. In addition to providing advice and support to individual staff members, referrals ensure that managers get expert and accurate information on the ability of staff with health problems to perform their roles and attend work.”*

## 12.3 Managing Persistent Short Term Sickness Absence [B1 126-129]:

### (i) Introduction

- a. *“Episodes of up to 27 calendar days are classed as short term. Staff who have repeated short term sickness absence will be given the opportunity to achieve an acceptable level of attendance through the sequential application of the stages of this procedure. Management action will be guided by the following triggers for concern: Five episodes or eight working days/60 hours in a rolling twelve month period for full time staff. Pro rata for part time staff.”*
- b. *“Generally an attendance record will be regarded as unacceptable if the triggers for concern are reached. The triggers are, however, intended for guidance only. The fact that a trigger has been reached does not mean that the stages of the procedure will be automatically invoked. Managers must take into account the reasons for absence ...”*
- c. *“If staff absences relate to an underlying medical reason, managers should seek occupational health advice.... “*

### (ii) Stage 1 Informal Meeting

- a. *“If short term absence becomes a concern, the manager will have a one-to-one meeting with the member of staff to discuss the level of absence and its impact. Meetings are carried out in a positive and supportive manner ...”*
- b. *“The manager will:*
  - *Inform the member of staff that if attendance continues to be unsatisfactory during the next 6 months, the matter may be referred to a stage 2 meeting.*
  - *Set a monitoring period of between six and twelve weeks and agree a date for a review meeting ... to consider attendance during the monitoring period and decide whether a stage 2 meeting should be convened.”*

### (iii) Stage 2 Formal meeting. Potential outcome: attendance improvement notice.

- a. *“If attendance continues to be unsatisfactory within 6 months of a stage 1 meeting, the manager may arrange a stage 2 meeting.”*
- b. *“The manager should set a monitoring period of between six and 12 weeks and agree the date of the review meeting.”*
- c. *“Following consideration of the facts, including underlying health issues and any other mitigating circumstances, the manager may issue an Attendance Advisory Notice which informs the member of staff that:*
  - *If the attendance continues to be unsatisfactory during the next 12 months, the matter may be referred to a stage 3 meeting.*
  - *Failure to achieve satisfactory attendance may ultimately result in dismissal.*
- d. *“Appeals against Attendance Advisory Notices are heard under the appeal procedure.*
- e. *“If attendance improves but still remains a cause for concern in the 12 months following a stage 2 meeting, the manager may decide to hold further stage 2 meetings rather than convene a stage 3 meeting”.*

### (iv) Stage 3 Formal meeting. Potential outcome: dismissal

- a. *“If attendance is unsatisfactory within 12 months of the issue of an Attendance Advisory Notice, a stage 3 sickness absence meeting may be convened. A sufficiently senior manager ... will notify the member of staff that a stage 3 meeting will be convened and that dismissal on the grounds of capability due to ill health is a potential outcome. The notification should include a case summary which will include:*
  - *An accurate and up to date attendance record.*
  - *Impact of absences on the department.*
  - *A record of meetings under the Sickness Absence Procedure.*

- *Advice from occupational health and any other medical practitioner, as appropriate.*
  - *Adjustments and other support, implemented or considered.*
- b. *“The member of staff ... has an opportunity to respond to the case summary. If the manager concludes that the member of staff is unlikely to achieve an acceptable level of attendance within the foreseeable future, the member of staff may be dismissed on the grounds of capability due to ill health.  
Staff have the right of appeal ... under the Appeals Procedure”.*
- 12.4 **Managing Long Term Sickness Absence [B1 129-132]:**  
This sets out the procedure to be followed if an employee is on long term sickness absence. “Long term” is not defined but a stage 2 formal meeting is not triggered unless a return to work date is unclear or the absence is likely to extend beyond three months.
13. **27 April 2010 – 30 April 2010: sickness absence**  
Reason: blood disorder [B1 158].
14. **6 September 2010 – 20 September 2010: sickness absence**  
Reason: respiratory disorder [B1 158].
15. **8 February 2011 – 13 February 2011: sickness absence**  
Reason: cold [B1 145].
16. **31 March 2011**  
The Claimant was asked to attend a Stage 1 meeting on 18 April 2011 [B1 146-147].
17. **11 April 2011- 20 May 2011: sickness absence 40 days**  
Reason: gastrointestinal problems [B1 148-153].
18. **23 May 2011: Return to Work (RTW) meeting**  
The Claimant attended a RTW meeting with her Line Manager. She was advised that her absence level triggered a Stage 1 informal meeting under the Sickness Absence Policy and that a referral would be made to OH [B1 154-155].
19. **25 May 2011: Stage 1 invite letter**  
The Claimant was invited to an informal Stage 1 meeting on 1 June 2011 as her level of absence triggered the policy for long-term absence [B1 156-157].
20. **1 June 2011: Stage 1 meeting**  
This was conducted by AT. The Claimant was placed on a 3 month monitoring period and referred to OH for an assessment [B1 160].
21. **15 June 2011: OH appointment and Report**  
21.1 The Claimant attended an OH appointment.  
21.2 The subsequent OH report [B1 161- 162] stated:  
(i) The Claimant had said that her Line Manager had been supportive and arranged regular shift patterns which she found useful in managing her condition.

- (ii) The Claimant was fit for work; existing adjustments to the rota to be maintained for a further 5 months.
- (iii) There was no imminent indication of the Claimant's condition impacting on her future performance but it was difficult to predict her future health.

**22. 8 September 2011 – 14 September 2011: sickness absence 7 days**

Reason: gastrointestinal issues and a bad reaction to medication.

**23 October 2011**

The Claimant had difficulties at work with a colleague which was resolved by "process of mediation and staff meetings" by her manager [ET3].

**24. 20 October 2011 – 25 October 2011: sickness absence 6 days**

Reason: "cold, post flu jab reaction" [B1 166].

**25. 30 November 2011: Stage 1 review meeting**

25.1 The Claimant's Line Manager (AT) wrote to the Claimant [B1 167] following a Stage 1 review meeting earlier that day.

25.2 The Claimant was advised that since the Stage 1 meeting (1 June 2011), there had been a "significant improvement" in her attendance.

25.3 It was noted that the Claimant had said that her health had improved and her condition was stable. It was therefore agreed that informal monitoring would finish.

25.4 The Claimant was reminded that if she reached a trigger point again within 1 year of 1 September 2011, matters may proceed to a formal attendance review meeting.

**26. 19 December 2011: request to attend Stage 2 meeting**

The Claimant was invited to a Stage 2 meeting in view of her absences in September and October 2011 which post-dated the end of the monitoring period [B1 168-169].

**27. 13 January 2012: 1<sup>st</sup> Stage 2 Meeting**

27.1 AT conducted the meeting and then wrote to the Claimant the same day to confirm the outcome [B1 171-172].

27.2 The Claimant explained "that the last episode was cold related but the previous ones were related to a long-term gastro-intestinal problem"; she said her symptoms were stable but she may need some further procedures/investigations.

27.3 The Claimant confirmed she did not consider a further referral to OH to be necessary; she did not identify any supportive measures she required.

27.4 A 3 month monitoring period was put in place starting (retrospectively) 25 October 2011 and it was explained that if there was not a significant improvement in that period, a Stage 3 sickness meeting would be activated.

**28. 9 February 2012: Stage 2 Meeting**

- 28.1 AT wrote to the Claimant to confirm the outcome of a Stage 2 meeting held that day [B1 173].
- 28.2 There had been a "*significant improvement*" in the Claimant's attendance. The Claimant said her health had improved and her condition was stable. It was agreed that the monitoring would finish.
- 28.3 The Claimant was reminded that should she reach a trigger point again within 1 year from 25 January 2012 the Stage 2 review may be reinstated.

**29. 22 February 2012 – 2 March 2012: 10 days' absence**

Reason: Flu/Upper respiratory tract infection [B1 174-176].

**30. 20 March 2012: Stage 2 meeting invitation letter**

The Claimant was invited to a formal stage 2 meeting on 23 March 2012 [B1 177-178].

**31. 23 March 2012: Stage 2 meeting**

- 31.1 AT wrote to the Claimant to confirm the outcome of a Stage 2 meeting held that day [B1 179-180] which had been triggered by the Claimant's absences within one month of the end of the previous period of monitoring.
- 31.2 The Claimant explained that the last two episodes "*were virus related but the previous ones related to a long-term gastro-intestinal problem*"; she said her symptoms were stable and she was waiting for the results of some tests. She did not require an OH referral.
- 31.3 A three month review period starting 23 March 2012 was set and the Claimant was advised that if there was not a significant improvement in her attendance within this period, a Stage 3 meeting would be held.

**32. 7 August 2012: Stage 2 meeting**

- 32.1 AT wrote to the Claimant to confirm the outcome of a Stage 2 meeting that day [B1 186].
- 32.2 Since the Stage 2 meeting there had been a "*significant improvement*" in the Claimant's attendance. The Claimant said her health had improved and her condition was stable. It was agreed that the Stage 2 monitoring would finish.
- 32.3 The Claimant was reminded that should she reach a trigger point again within 1 year from 22 June 2012 a Stage 3 review meeting may be held.

**33. 6 September 2012- 14 September 2012: 9 days' absence**

Reason: abdominal and gastric pain [B1 188-189].

**34. 2 October 2012 to 3 October 2012: 2 days' absence**

Reason: diarrhoea and vomiting [B1 190].

**35. 19 October 2012: 1 days' absence**

Reason: urinary tract infection.

36. **13 November 2012 to 16 November 2012: 4 days' absence**  
Reason: cold.
37. **30 November 2012: OH referral**  
37.1 AT referred the Claimant again to OH [B1 193-194].  
37.2 AT stated: "*The Claimant's] last absence was virus related but she is undergoing a few investigations into earlier gastric and breast benign growths' diagnosis*"  
37.3 On 4 December 2012, OH advised that the appointment was not necessary and suggested any requirements be discussed internally [B1 194].
38. **28 December 2012: Stage 2 meeting**  
The Claimant attended a Stage 2 meeting.
39. **28 January 2013**  
39.1 The Respondent wrote to the Claimant to confirm the outcome of the Stage 2 meeting on 28 December 2012 [B1 205-206] which was triggered by the Claimant's absences of 14 days over 4 episodes since 7 August 2012.  
39.2 The Claimant explained the last two episodes "*were virus related but the previous ones related to a long-term gastro-intestinal problem*"; she said her symptoms were stable and she was waiting for results of some tests.  
39.3 The Claimant was issued with an Attendance Advisory Notice to remain "live" for a year i.e. until 28 December 2013 and told that if her absence remained a cause for concern during this period, a Stage 3 meeting may ensue which might result in her dismissal on grounds of capability. She was reminded of her right to appeal against this Notice.
40. **16 April 2013 and 17 April 2013: 2 days' absence**  
Reason: urinary infection.
41. **20 May 2013- 4 June 2013: 16 days' absence**  
Reason: abdominal pain/dyspepsia [B1 212-214].
42. **22 July 2013: absence 1 day**  
Reason: headache/migraine [B1 215] .
43. **5 August 2013: Stage 2 meeting**  
43.1 This was conducted by Ms. Shah who wrote to the Claimant on 6 August to confirm the outcome [B1 219-220].  
43.2 The Claimant had confirmed she was feeling well.  
43.3 A monitoring period was set for 6 weeks.  
43.4 The Claimant was to be referred to OH.  
43.5 The Meeting was adjourned until 16 September 2013 pending the OH report.  
43.6 The Claimant was reminded that she had been issued with an Attendance Advisory Notice on 28 December 2012 which would stay "live" until 28 December 2013 and that a stage 3 meeting would be arranged if there was no significant improvement in her attendance.



44. **5 August 2013: OH referral**  
The Claimant was referred to OH by Ms. Shah [B1 217-218].
45. **9 September 2013: OH report**  
OH advised that the Claimant's health condition was not caused by work issues and that her health would be unlikely to impact on her future attendance [B1 221].
46. **30 September 2013: Stage 2 meeting (reconvened from 5 August 2013).**
- 46.1 Ms. Shah conducted this meeting and wrote to the Claimant the same day [B1 227-228] to confirm their discussions and the outcome.
- 46.2 The OH report was discussed.
- 46.3 Ms. Shah asked the Claimant if there was anything else the Respondent could do to help her improve her attendance; the Claimant confirmed she was happy with the adjustments to the rota implemented by Ms. Shah to assist her with the school run and moving house. The Claimant said she did not require further support
- 46.4 It was noted that since the last meeting on 5 August 2013, the Claimant's level of attendance had improved.
- 46.5 It was agreed that a 4 week monitoring period be put in place and a further review meeting take place on 28 October 2013.
- 46.6 The Claimant was advised that if she had any absence prior to 28 October 2013, a stage 3 meeting may be held which could result in her dismissal.
- 46.7 The Claimant was reminded that the Attendance Advisory Notice remained "live" until 27 December 2013 and that any further sickness absence could lead to a Stage 3 formal meeting [B1 228].
47. **18 November 2013 – 22 November 2013: 5 days' absence**  
Reason: headaches/migraine [B1 230].
48. **2 December 2013**
- 48.1 Ms. Shah wrote to the Claimant to invite her to a Stage 2 review meeting on 10 December 2013 (postponed from 28 October 2013) [B1 229].
- 48.2 Ms. Shah also had a "conversation of concern" with the Claimant regarding her level of contact whilst absent [B1 232].
49. **10 December 2013: Stage 2 meeting**
- 49.1 This was conducted by Ms. Shah who wrote to the Claimant on 11 December [233] to confirm their discussions and the outcome.
- 49.2 The Claimant confirmed she did not require any additional support, that she was content with everything at work and that the most recent episode of sickness absence was related to issues at home.
- 49.3 Ms. Shah advised the Claimant that she intended to ask Ms. Costin-Davis to convene a Stage 3 meeting and explained to her that dismissal on grounds of capability was a potential outcome of that meeting.
- 49.4 Ms. Shah gave the Claimant a copy of the Sickness Absence Policy.

50. **8 January 2014: OH referral.**  
Ms. Shah referred the Claimant to OH [B1 238-240] and asked OH to advise on any further adjustments the Claimant may require.
51. **14 January 2014: OH appointment**  
The Claimant did not attend [B1 241].
52. **20 January 2014: OH appointment**  
The Claimant did not attend [B1 241]
53. **21 January 2014: OH appointment**  
The Claimant attended but was 20 minutes late and could not be seen [B1 241].
54. **21 January 2014: referral to OH**  
Ms. Shah made another referral to OH [B1 242-244].
55. **3 February 2014: OH appointment**  
The Claimant attended.
56. **5 February 2014: OH report**  
In the OH report [B1 254-255] Dr Sajid Kjhan (OH Physician) advised that:
- 56.1 Although the Claimant had recurring gastrointestinal problems several years ago, the Claimant had told him that these had now settled and that for the last two years had not been a problem
- 56.2 Whilst the urine infection the previous year may have stemmed from being unable to use the toilet during a busy shift, she was not prone to such infections and he did not expect this to recur.
- 56.3 Her headaches were linked to her personal situation but this was not something that he expected to recur.
- 56.4 On the whole, the Claimant enjoyed excellent health.
- 56.5 There were no underlying medical problems and he did not consider that she was disabled for the purposes of the Equality Act 2010.
- 56.6 The Claimant was fit for work and did not require any adjustments.
57. **11 February 2014: letter to Claimant**  
Ms. Costin-Davis wrote to the Claimant advising her a Stage 3 meeting would be held on 21 February 2014 [B 256]; the letter stated that a potential outcome of the meeting was the Claimant's dismissal and advised her that she had the right to be accompanied.
58. **Management Report**
- 58.1 Ms. Shah prepared a Management Report [B1 257-266] for use at the Stage 3 meeting.

- 58.2 Ms. Shah provided a chronology of events from 11 April 2011 to date which reflects the events the chronology above but also included the various Return to Work Meetings.
- 58.3 Ms. Shah stated that the Trust sickness average was 3.54%, the department 12 month rolling sickness average was 3.7% and the Claimant's sickness average for 2013/2014 was 7.16% having had 103 days of sickness over 12 episodes.
- 58.4 Ms. Shah explained that the Claimant had been referred to OH on four occasions and assessed twice. On advice from OH, a temporary shift pattern had been maintained. OH had not made a recommendation that redeployment would improve her sickness record.
- 58.5 Ms. Shah explained that the potential consequences of the situation had been explained to the Claimant following on from Stage 1 and Stage 2 meetings and she had been given a copy of the Sickness Absence Management policy which had been explained to her.
- 58.6 Ms. Shah explained in some detail why the Claimant's sickness absences had had a detrimental effect on the rest of the reception team and delivery of the service.
- 58.7 Ms Shah concluded:  
*"[The Claimant] has been absent from work on unplanned short term sickness for 103 days on 12 occasions since April 2011 which is disproportionately high in comparison to the departmental average.  
[The Claimant] has been given ample opportunities to have her health situation assessed by occupational health and to discuss any options for a more satisfactory level of attendance.  
[The Claimant's] sickness level is one of the highest in the department at present and these absences have had a serious impact on the staffing and functioning of the reception team at the Jefferiss Wing.  
All reasonable measures have been taken to manage this case in a fair and objective manner.  
It is my concern that [the Claimant's] sickness is having a significant impact on the department's ability to function to the highest standard required.  
Due to the frequency, variety and consistency of [the Claimant's] sickness, it is unlikely that her short term sickness would improve from redeployment into another post.  
It is believed that all other options under the Attendance Management policy and procedure have been exhausted and that consideration should therefore be given to the termination of [the Claimant's] contract on grounds of capability".*
- 58.8 Ms. Shah then appended all relevant documents such as letters to the Claimant and OH referrals and reports.

**59. 21 February 2014: Stage 3 Meeting**

- 59.1 Ms. Nicola Costin-Davis conducted the meeting. Prior to the meeting, she reviewed the Management Report prepared by Ms. Shah and the Respondent's Sickness Absence Policy.
- 59.2 Ms. Costin-Davis was assisted by Ms. Daisy Teal (HR). The Claimant was unaccompanied. Ms. Shah attended to present the Management Report.
- 59.3 The Claimant confirmed at the outset that she had received the Management Report and that she had read it. She also confirmed that she had no documents to submit.
- 59.4 Ms Shah summarised her Management Report as follows:  
(i) Since April 2011 the Claimant had been absent due to short term sickness on 12 occasions totalling 103 days (as set out above).

- (ii) The sickness absence average for the Respondent was 3.54% and department average was 3.71%. The Claimant's sickness average for the past year was 7.16% which Ms Shah said was disproportionately high and over double the average.
- (iii) OH had recommended adjustments which had been implemented, to include allowing the Claimant to maintain a temporary shift pattern for two years.
- (iv) OH had not recommended redeployment. Ill-health retirement had not been explored as it was not the Claimant's case that she was unfit for work.
- (v) The most recent OH report (5 February 2014) confirmed that the Claimant did not have any underlying medical conditions, that she was not disabled and that she was fit for work without adjustments.
- (vi) Ms. Shah explained the departmental difficulties caused by the Claimant's absence. The department had not been able to access short-term agency assignments due to financial pressures. It was not possible to slot someone else into her role given the difference in patient record management in sexual health departments as opposed to other departments in the hospital. Ms. Shah and her team therefore had to work longer hours to cover the Claimant's absences as the walk-in service was extremely busy at all times of day. This had negatively impacted on team morale and on the delivery of patient care.
- (vii) The Claimant said that some of her absences had been, in part, due to stress at work and the result of an unsatisfactory working relationship with a colleague but this was resolved in around 2011 and the Claimant accepted this was not a factor in her later periods of sickness absence. The Claimant said she had been unlucky with her episodes of sickness absence.
- (viii) The Claimant confirmed that adjustments had been made to her working pattern.
- (ix) The Claimant said that her previous sickness record showed she was able to maintain a satisfactory level of attendance. However, Ms. Shah produced the Claimant's sickness records for 2009 – 2011 which showed that her absence during this period was in fact above the Respondent's and the department average.

**60. 28 February 2014: Decision to dismiss**

I accept Ms. Costin-Davis' evidence that she considered the following when she made her decision to dismiss the Claimant:

- 60.1 The Claimant's sickness absence record was extensive, specifically 103 days sickness absence since 11 April 2013 and her absence rate was 7.2%. She took the view that this was extremely high – over double the average – and there was a pattern of poor attendance over many years.
- 60.2 She considered that the Claimant had been managed "generously" under the Sickness Absence Policy. She had had 5 formal Stage 2 meetings despite the Respondent being entitled to proceed to Stage 3 after just one stage 2 sickness review meeting. The Claimant had been given many opportunities to demonstrate an improvement in attendance and failed to do so.
- 60.3 She looked at the Claimant's record in the round and took the view that the reasons for her absence were wide ranging and included frequent and unpredictable absences for various reasons. She accepted all the absences

were genuine but concluded that they were not all related to an underlying health condition.

- 60.4 She considered the Claimant's claim that her earlier periods of sickness absence had been influenced by stress at work and an unsatisfactory relationship with a colleague. However, she was satisfied that the Claimant had not raised this at any of the meetings held under the Sickness Absence Policy or in any Return to Work ("RTW") meetings. Furthermore, the Claimant herself did not consider this to be a factor in her more recent sickness absences and the most recent OH report stated that the majority of her absences were not work related.
- 60.5 The Claimant could not provide any assurance that she would be able to maintain a satisfactory level of attendance in the future.
- 60.6 The Claimant's absence had a detrimental effect on the Respondent's service and covering her shifts had a negative impact on the morale of the rest of the team. Ms. Costin Davies expands on this in para. 23 of her witness statement.
- 60.7 The Claimant was referred to OH on several occasions since 2011 and attended 3 OH appointments. Each report concluded that her absences were not due to an underlying medical condition and that she was fit for work.
- 60.8 Adjustments had been put in place to support the Claimant (changes in her working pattern) and the Claimant did not suggest any further adjustments were required. Her previous work related issues had been resolved.
- 60.9 Redeployment was unlikely to help as there was no suggestion that working at Jefferiss Wing was in itself causing a problem. The Claimant had not suggested this and it was not recommended by OH. There was no reason to assume her attendance would improve if she was moved to another department.

**61. 28 February 2014: outcome of Stage 3 meeting**

- 61.1 Ms. Costin-Davis wrote to the Claimant confirming the outcome of the Stage 3 [B1 267-268].
- (i) She informed the Claimant that of her decision to dismiss her "*on the grounds of capability due to ill health*".
  - (ii) She set out the factors she took into account.
  - (iii) She advised the Claimant of her right of appeal and that she would receive 5 weeks' notice and her last day of service would be 4 April 2014.

**62. 13 March 2014: appeal**

- 62.1 The Claimant appealed the decision to dismiss [B1 269-272].
- 62.2 She challenged the reason given for her dismissal:
- (i) Dismissal for short-term absences should be for SOSR and not capability which suggests that she was unable to do her job satisfactorily and that her standards were below expectation.
  - (ii) Termination for ill-health presumes long term sickness but this was not the basis on which the decision was made and there was insufficient evidence to show that her health impeded her capability or her ability to return to work.
- 62.3 She pointed out that the Sickness Absence Policy:
- (i) classifies short term absences as absence up to 27 days;

- (ii) staff with repeated short term sickness absences would be given the opportunity to achieve an acceptable level of attendance;
- (iii) one of the triggers for concern are 5 episodes of 8 working days in a rolling 12 month period;
- (iv) the triggers are for guidance only and managers must take into account the reasons for absence but for some reason this was ignored in her case.

62.4 She said from 11 April 2011 to 22 May 2011 she was absent 28 days due to a gastro intestinal infection that started in 2008:

- (i) this was a long term absence but was included in the assessment and meant that the figure of 103 days absence was misleading; if this had been distinguished from her short term absences, it could have "*easily influenced the outcome*".
- (ii) it was inaccurate to say that none of her absences were due to an underlying condition;
- (iii) on the other hand, she no longer suffers from this condition and her absence record has improved substantially.

62.5 OH advice:

- (i) She had 4 appointments with OH one of which was a telephone appointment.
- (ii) OH concluded that her absences were all due to a medical condition apart from the last episode which was due to migraines/exhaustion.
- (iii) OH declared that she was in good health and fit for her role and her GP has also declared this.
- (iv) impediments due to her health were unlikely to recur

62.6 She explained the background to some of her absences.

62.7 She said it was "*insincere*" to say her absences affect operational effectiveness; when other colleagues are absent she covers for them.

62.8 There was no evidence that she was not capable of doing her job, or that she was likely to take long periods off work.

62.9 Whilst she accepted her short term absences had "*been on the threshold*" discretion should have been exercised in her favour as there had been a clear improvement and OH had found her to be in good health.

62.10 She believed it was inaccurate that her absence record was the worst in the department.

62.11 She is a single mother of three children, one of whom is registered with a long term disability; she is the sole provider.

### 63. 18 March 2014

Ms. Claire Hook nee Braithwaite (Divisional Director of Operations, Medicine) was appointed to hear the appeal. She was Ms. Costin-Davis' Line Manager. She wrote to the Claimant [B1 273-274] inviting her to an appeal hearing on 27 March 2014.

### 64. 21 March 2014

Ms Hook received and read the Management Report prepared in response to the Claimant's appeal [B1 275-279] by Ms. Tracy Dumbarton (Service Interim Manager) in the absence of Ms. Costin-Davis.

**65. 24 March 2014**

Ms Hook received documents sent by the Claimant [B1 280-301]. These consist of her medical records/letters mainly around the period 2010/2011.

**66. 27 March 2014: appeal hearing**

66.1 Ms. Hook conducted the appeal hearing. She was assisted by Ms. Egghen HR. Ms. Dumbarton also attended. The Claimant was accompanied by a colleague. The notes of the appeal hearing are in the bundle [B1 302-303].

66.2 Ms Hook outlined the process [B1 302].

66.3 The Claimant said she had not received a copy of the Management Report; Ms. Hook provided her with copies of the documents and gave her time to consider them. She also gave the Claimant the option to postpone the hearing, which the Claimant declined.

66.4 The Claimant agreed with Ms. Hook's summary of her grounds of appeal [B1 302].

66.5 The Claimant said she had felt unprepared for the final Stage 3 meeting and was unaware of the potential outcome.

66.6 The Claimant said her sickness absence could be attributed to two underlying issues:

- (i) her gastrointestinal problems; and
- (ii) a difficult relationship with a colleague but conceded that this may have made her feel more exhausted and stressed.

66.7 The Claimant agreed that the list of sickness absences was accurate and that they were for a variety of reasons.

66.8 The Claimant's assertion that she had not received adequate support from her Line Manager was discussed and it was agreed that she had received support such as amendments to the rota and flexibility to attend appointments related to her son's care, and support from OH.

66.9 The Claimant was asked about her failure to attend OH appointments on 3 occasions and she explained.

66.10 The Claimant then responded to the Management Report and summed up her grounds of appeal.

66.11 Following the appeal hearing, Ms Hook checked:

- (i) the absence percentage in the directorate generally, and found that it was around 3.9% whereas the Claimant's was around 7%; however, Ms Hook says this was not central to her decision but background; and
- (ii) the Claimant's lateness record; she established that the signing-in records supported on-going poor time keeping [B1 305]; again, Ms. Hook says this was not central to her decision but background.

**67. 31 March 2014: decision to uphold the dismissal**

67.1 I accept Ms. Hook's evidence that she based her decision on the following:

- (i) She was clear that the Sickness Absence Policy was properly followed and that at all stages it was made clear to the Claimant what was expected of her and the possible consequences of failing to meet those expectations.

- (ii) She did not accept that the Claimant did not realise the seriousness and potential consequences of the Stage 3 meeting.
  - (iii) The Claimant was absent regularly over a prolonged period of time and Ms. Hook was not satisfied that these absences related to any underlying health conditions, as confirmed by OH. Whilst some of the earlier periods of sickness were related to underlying gastrointestinal problems and issues with a co-worker, these had been resolved some time ago.
  - (iv) The Claimant's absence levels were unsustainable in an already busy department given that agency staff could not be brought in.
  - (v) There was no indication that her attendance would improve and therefore Ms. Hook did not consider redeployment which would have simply shifted the problem.
  - (vi) The Claimant had been well supported throughout the sickness management process. She had multiple Stage one and Stage two meetings and been referred to OH on numerous occasions. Despite this, her attendance record did not improve.
- 67.2 Ms. Hook reached her decision to uphold the Claimant's dismissal and wrote to her advising her of this on **31 March 2014** [B1 304]. On **3 April 2014** Ms. Hook wrote to the Claimant recording the details of the appeal meeting and her reasons for her decision in greater detail [B1 308-312].

**68. 4 April 2014**

The Claimant's employment ended.

**The Law**

**69. Section 98 (1) ERA:**

- 69.1 In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:
- (i) the reason (or if more than one the principle reason for the dismissal); and
  - (ii) that it is one of the 5 reasons falling within s98(2) which include capability and some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (SOSR).
- 69.2 Ill health is potentially a fair reason for dismissal as it relates to the employee's capability of performing the work he or she was employed to do. Short-term absences caused by a number of different and unconnected illnesses may not fall under "capability" but dismissal may still potentially be fair for SOSR.
- 69.3 If an employee's absences are due to a combination of an underlying medical condition and also minor unconnected ailments, it is a matter of judgement whether the dismissal is for SOSR or capability depending on what proportion of the absences are based on an underlying condition.
- 69.4 If an employer incorrectly identifies the reason for dismissal, the Tribunal may ignore the "wrong label" if the mistake was genuine and the facts (or beliefs) that led the employer to dismiss were known to the employee at the time of the dismissal and those facts were fully aired in the Tribunal proceedings (Abernothy v Mott, Hay and Anderson [1974] IDR 323).



## 70. Section 98(4) ERA:

70.1 Where the employer has fulfilled the requirements of s98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

- (i) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the s98(2) reason relied on as a sufficient reason for dismissing the employee; and
- (ii) shall be determined in accordance with equity and the substantial merits of the case.

## 70.2 Range of reasonable responses

- (i) In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards.
- (ii) The Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether procedure was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
- (iii) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

70.3 In the case of unconnected ailments and persistent absenteeism, there comes a time when a reasonable employer is entitled to say "*enough is enough*" (International Sports Co Ltd v Thomson [1980] IRLR 340). Dismissal will be justifiable even if the reasons for the absences are genuine. An employer is entitled to look at the whole history and decide whether or not it is prepared to continue to shoulder the burden of an employee's absences (Davis v Tibbett and Britten Group Plc EAT 460/99).

## 71. Compensation

71.1 In addition to a basic award (section 119 ERA), **Section 123(1) ERA** provides for a compensatory award of " ... *such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

## 71.2. Mitigation:

**Section 123(4) ERA** requires a claimant to mitigate their loss and a claimant is expected to explain to the tribunal what actions they have taken by way of

mitigation. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

### 71.3 **Polkey:**

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a tribunal could make:

- (i) In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made.
- (ii) In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out.
- (iii) In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

### **Conclusions**

72. Applying the relevant law to the findings of fact to determine the issues, I have concluded that the Claimant's dismissal was fair.

73. The Respondent has shown that the reason for the Claimant's dismissal was for one of the 5 potentially fair reasons set out in s 98(2) ERA:

73.1 The Respondent has pleaded in the alternative in the ET3 but it is the reason put forward by the Respondent at the time of her dismissal which is relevant and that was ill health capability.

73.2 The Claimant's absences were due to a combination of (i) an underlying medical condition (gastro-intestinal problems) (ii) minor unconnected ailments. The split is roughly 50/50. Ms. Costin-Davis did not distinguish between the two and looked at the Claimant's sickness absence as a whole and in the round but her focus was on the frequency of the short-term absences which were for a variety of reasons. To this extent, I agree with the Claimant that the correct reason for termination of her employment was SOSR, not capability.

73.3 The Respondent therefore incorrectly identified the reason for dismissal but this does not mean the dismissal was unfair. I am satisfied that the mistake was genuine and the facts (or beliefs) that led the Respondent to dismiss were known to the Claimant at the time of the dismissal and those facts were fully aired in the Tribunal proceedings

74. I have then considered the fairness of the Claimant's dismissal (s98(4) ERA). I have reminded myself that I must not substitute my own decision as to what was right or impose my own standards and having considered together all the circumstances of the case (including the size and administrative resources of the Respondent's undertaking), I have concluded that the Respondent acted

reasonably in treating the Claimant's absences as a sufficient reason for dismissing the Claimant in accordance with equity and the substantial merits of the case.

75. I have considered carefully both the procedure and the decision and concluded that both fell within the range of reasonable responses of a reasonable employer for the following reasons.
76. With regard to the procedure, this fell within the range of reasonable responses of a reasonable employer:
- 76.1 Attaching the "wrong label" did not result in any unfairness to the Claimant. I cannot identify any differences between the procedure followed by the Respondent and the procedure required (whether under the policy or otherwise) for (i) short-term absences for a variety of reasons or (ii) absences due to an underlying condition.
- 76.2 The Respondent carried out a fair review of the Claimant's attendance record and the reasons for her absence. The Claimant argues that her absences for an underlying conditional (gastro intestinal) including her long term absence in April/May 2011 should have been disregarded in this review. However, an employer is entitled to take all absences into account and view attendance in the round. This also accords with the Sickness Absence Policy: "*Attendance management decisions will be based on overall sickness absence levels, i.e. the combination of both short term and long term absences*" [B1 120].
- 76.3 The Claimant was given every opportunity to make representations; she attended RTW interviews, Stage 1 meetings, Stage 2 meetings, the Stage 3 meeting and the appeal hearing.
- 76.4 The Claimant was given clear warnings that dismissal was an option if things did not improve. She says she was ill prepared for the Stage 3 meeting but this was not by reason of any fault or default on the Respondent's part.
- 76.5 The Claimant herself does not criticise the procedure followed or suggest any steps that the Respondent should have taken other than perhaps ask to see her medical records and approach her GP. However, in these particular circumstances, the steps taken by the Respondent to establish the medical position were reasonable. The Respondent was entitled to rely on the OH reports in light of:
- (i) The Claimant's repeated assertions to OH and the Respondent that her underlying condition was no longer a problem, that her condition was stable;
  - (ii) She does not challenge the assertion that her other absences were for minor unconnected ailments;
  - (ii) In her appeal letter (para. 62 above) the Claimant said her GP had declared her to be in good health and fit for her role which accords with the OH advice.
- 76.6 The Respondent made adjustments and tried to support her. In August 2011, the Respondent adjusted the Claimant's rota and this continued on the advice of OH. The Claimant was regularly asked if she required any further adjustments or support and always replied in the negative.
- 76.7 Redeployment was given consideration but rejected for the reasons set out above.

77. With regard to the decision to dismiss, this also fell within the range of reasonable responses of a reasonable employer:
- 77.1 In reaching her decision, Ms. Costin Davis took into account all the relevant factors as set out above (para. 60) in reaching her decision
- 77.2 The Respondent accepted that the reasons for the Claimant's absences were genuine and also that her attendance had improved. However, this was a situation where, having looked at the whole history, it was nevertheless within the range of reasonable response for the Respondent to say "*enough is enough*" and conclude that it was not prepared to continue to shoulder the burden of the Claimant's absences. Another employer may have taken a different approach and given the Claimant further time and opportunity to improve her attendance, but dismissal was certainly within the range of reasonable responses.
78. The Claimant's claim therefore fails and is dismissed. Finally, I have some sympathy for the Claimant. She was dismissed as a result of absences which were outside her control and at a time when her attendance had (to some extent) improved. However, I hope she will take some comfort from the fact the Respondent has not criticised in any way her performance or conduct.

Signed by \_\_\_\_\_  
Employment Judge Mason

On: 7 June 2019

Judgment sent to Parties on

11 June 2019