



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms S Mahabir

**Respondent:** Kent Community Health NHS Foundation Trust

**Heard at:** Croydon                      **On:** 4 April 2019

**Before:** Employment Judge Cheetham QC  
Ms Y Walsh  
Mr E Walker

## Representation

**Claimant:** in person

**Respondent:** Mr S Keen (Counsel)

## REASONS

1. By a Judgment dated 9 April 2019, the Tribunal dismissed the Claimant's claims for unfair dismissal and discrimination arising from disability. Reasons were given orally at the hearing on 4 June, but the Claimant has now requested those reasons in writing. The Judgment was signed on 9 April and sent out to the parties on 27 April.
2. This was a claim for unfair dismissal, where the Respondent contended that the reason for dismissal was capability. There was also a claim under the Equality Act 2010 s.15 for discrimination arising from disability, the unfavourable treatment being the Claimant's dismissal. The Respondent accepted that the dismissal amounted to unfavourable treatment, but contended that it was justified. It was accepted that the Claimant was disabled.
3. At the start of the hearing, the Tribunal discussed the issues and explained them to the Claimant, who was representing herself.
4. Capability is one of the potentially fair reasons for dismissal and the burden is on the Respondent employer to prove that is the reason. In this case, the particular matters that were relevant to the fairness of the decision to dismiss included the following:

- (i) whether there was a realistic chance that the Claimant's health would improve, so that she could return to work;
  - (ii) whether any decision should be delayed in order to see if further medical evidence would indicate any improvement;
  - (iii) whether there could be a phased return to work, including with any adjustments;
  - (iv) whether the Claimant's absence could continue to be managed by the Respondent, given the importance of her role and the difficulty of filling the role on an interim basis.
5. The Tribunal explained to the Claimant that it was restricted to judging the reasonableness of that decision and that this was not a re-hearing of the capability hearing.
  6. With regard to the discrimination claim, the Respondent's case was that it was a legitimate aim to maintain a workforce that was able to provide the required services in an efficient and cost-effective way. The Claimant's dismissal was a proportionate way of achieving that aim, when one weighed up the relevant factors, which included those set out in the previous paragraph.
  7. The Tribunal heard evidence from the Claimant and, for the Respondent, from Nicola Rutter (HR), Charlotte Smyth (manager), Mark Cummings (Head of Service and dismissing officer).

### **Findings of fact**

8. The Claimant commenced employment on 2.6.14 as a health trainer and she remained in employment in that role until her dismissal on 16.8.17. She was very good at her job and, although her dismissal was by reason of capability, this related to her health and not her abilities as a health trainer. At this hearing, both Mr Cummings and Mr Smyth were full of praise for her abilities and, clearly, she was a very valued member of her team. Her role was an important one and also a very visible one, in the sense that her absence was both noticed and keenly felt by the service and service users.
9. Unfortunately, the Claimant developed fibromyalgia. This is a debilitating and serious condition that can have a very significant impact on an individual, as it did on the Claimant. She suffered from a varying range of unpleasant symptoms, which meant that, by the start of November 2016, she had been signed off by her GP as not fit to work. She remained signed off until her dismissal some 10 months later.
10. There were two initial informal catch-up meetings with the Claimant's manager Ms Broome on 10.1.17 and 17.2.17. These confirmed the Claimant's ill health and that she was not able to return to work at that stage.
11. The first occupational health report was dated 23.3.17 and it confirmed that the Claimant was unable to work, but also said that there were no suitable adjustments available to allow her to return. The Claimant's condition was also described in a letter dated 10.4.17 from the Department of Rheumatology at Queen Mary's Hospital.

12. The first formal sickness absence meeting was with Ms Smyth on 11.4.17. This confirmed that the Claimant remained unfit to work and, at this meeting, the first OH report was considered. By this stage, the Claimant was on half pay; her contractual entitlement was to full pay for four months and half pay for four months.
13. The second OH report was dated 6.6.17. This report contained rather mixed messages. It listed a series of very significant and debilitating symptoms, which it described as severe. It confirmed that the Claimant was currently unfit to work and that she was highly unlikely to return to her duties. It then went on to say that she was unlikely to return before the next 4 to 6 weeks, which seemed an arbitrary time-frame that did not accord with the description of the Claimant's condition. However, what it meant was that the OH clinician would review matters after that time, following the Claimant's appointments with a specialist and a physiotherapist, rather than that there was likely to be an improvement after 4 to 6 weeks.
14. On 4.7.17, the Claimant attended a second formal sickness absence meeting. The purpose of this meeting was in part to discuss the second OH report, although the Claimant says this did not happen. The Tribunal found that surprising and considered that the Claimant's recollection may well be mistaken. The most recent OH report had to be considered, just as the previous OH report had been in the first meeting. In any event, at this meeting, it was confirmed that the Claimant remained unfit to work and that there was no indication of any apparent improvement.
15. Following this, the Claimant was invited to a formal capability hearing on 30.7.17. An investigation report had been prepared. The Claimant was also sent a copy of the sickness absence policy. She says that she had not received it before within this process, but that she had seen it previously.
16. The capability hearing took place on 16.8.17 and was chaired by Mr Cummings, a senior manager. The Claimant had prepared a statement which covered potential adjustments, redeployment and return to work. Understandably, the Claimant was keen to continue work and therefore made a number of suggestions. The meeting lasted over two hours. It covered the Claimant's written statement in detail, including therefore potential adjustments and redeployment, as well as the Claimant's perception of her fitness to work. There was also discussion of the OH report.
17. The Tribunal accepted Mr Cummings evidence that, had the Claimant suggested to him that her health had improved, he would have adjourned the hearing and asked for an updated medical report. However, unfortunately, there had been no improvement in her condition and no date for a return to work could be identified. Equally, no suitable adjustments could be identified either.
18. Mr Cummings then reached his decision which was that the Claimant would be dismissed by reason of capability. He took into account that the Claimant's role was an important and very visible one, which could not be filled on an interim basis, and that her absence was having a very clear impact on the service.
19. The outcome letter was dated 21.8.17 and allowed 14 days for an appeal. The

Claimant had said that would be on holiday for the following 3 weeks, but the letter still referred to a 14 day window for an appeal. The Claimant said that she did not receive the letter and it was re-sent on 25.9.17. Two weeks after that, on 10.10.17, during a discussion about loss of data, the Claimant was told that she had lost her right of appeal, because she would now be out of time. However, even if the Respondent was being rather inflexible if it was referring to the original outcome letter, the Claimant had not brought an appeal within 14 days of the further copy.

## **Submissions**

20. The Tribunal heard oral submissions from both parties; Mr Keen provided helpful written submissions, which referred the Tribunal to ***East Lindsey DC v Daubney [1977] ICR 566***, ***Dundee CC v Sharp UKEATS/0009/11*** and ***Taylor v OCS Group Ltd [2006] ICR 1602***.

## **Conclusions**

21. Dealing first with the claim for unfair dismissal, the question for the Tribunal was – in terms – whether the decision to dismiss the Claimant by reason of capability was one that was reasonably open to Mr Cummings, taking into account all of the relevant circumstances.

22. On the hand, there was no evidence before him of a foreseeable return to work and, by the time of the capability hearing, the Claimant had been signed off work for 10 months. There was also no evidence to suggest that adjustments could be made to assist in a return to work. Further, Mr Cummings took into account the importance of the Claimant's role, which was a very visible one for the Respondent. It could not be filled on an interim basis and the Claimant's absence was having a clear and continuing impact on the service provided by the Respondent.

23. On the other hand, the second OH report had indicated that the OH clinician could review matters after the Claimant had seen a specialist and physiotherapist, so there was an argument (and this, essentially, was the Claimant's case) that Mr Cummings should have delayed any decision. The Claimant was also a good and experienced employee.

24. The Tribunal concluded that Mr Cummings had considered all of these relevant matters and had balanced the competing factors. It also accepted that he was best placed to understand the needs of the service provided by the Respondent and the impact of the Claimant's absence. On balance, the conclusion he reached was a reasonable one on all the evidence before him, namely that he should terminate the Claimant's employment.

25. Turning to the parallel claim that the dismissal amounted to discrimination because of something arising from the Claimant's disability, the question was whether the dismissal was justified, because the Respondent accepted that the dismissal was unfavourable treatment. The Tribunal agreed with the Respondent that it was a legitimate aim to maintain a workforce that was able to provide the required services in an efficient and cost-effective way. The Claimant's dismissal was a proportionate way of achieving that aim, when one carries out the same balancing act as above.

26. It follows that the claims for unfair dismissal and discrimination arising from disability are dismissed.

27. Although this will be of little comfort to the Claimant, the Tribunal wanted to record its sympathy for the Claimant, who represented herself at this hearing very effectively and gave her evidence clearly and persuasively. None of what has happened is her fault and the impact of her illness has not only been severe, but has led to her losing her job. The Tribunal very much hopes that in due course her health improves and she is able return to work.

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Employment Judge Cheetham QC

Date: 10 June 2019