THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Biljana Stojanoska Claimant

and

The Big Bus Company Limited Respondent

HELD AT: London Central **ON**: 11 -15 March 2019 inclusive and (in chambers) 19 March 2019

EMPLOYMENT JUDGE: Mr Paul Stewart MEMBERS: Dr Steve Jary and Miss Karen Church

Appearances:

For Claimant: in person

For Respondent: Mr Andrew MacPhail of Counsel

JUDGMENT

Unanimously, we dismiss all claims of discrimination. We find the Claimant to have been dismissed for redundancy under a unfair procedure which, had it been altered so as to be a fair procedure, would have resulted in the Claimant's dismissal two weeks later than the date of her actual dismissal. We therefore award the Claimant a compensatory award of two weeks' net wages, being £651.56.

REASONS

1. The Claimant was employed by the Respondent from 9 April 2004 until 11 January 2018 when she was dismissed. She presented an ET1 to the Tribunal on 10 April 2018 claiming she was both unfairly dismissed and discriminated against on the basis of disability.

2. We heard evidence from the Claimant and, for the Respondent, from the following witnesses:

(i) Ms Hazel McQuire, the Head of Marketing, who chaired a grievance meeting with the Claimant on 30 March 2017;

(ii) Ms Catherine McCarthy, Senior Sightseeing Administrator, who took notes at the hearing on 20 April 2017 of the Claimant's appeal from Ms McQuire's decision on her grievance;

(iii) Mrs Veronica Farrar, Payroll & Banking Controller, who was the Claimant's line manager from September 2016 until the Claimant's dismissal in January 2018;

(iv) Mr Tom Redman, the Respondent's Head of Operations, who conducted an absence review meeting with the Claimant on 31 October 2017 and afterwards issued her with a formal warning on 7 November 2017;

(v) Mr Adrian Carter, the Respondent's General Manager with responsibility for London performance and budget delivery. He chaired a meeting hearing the appeal the Claimant made following receipt of the formal warning administered by Mr Redman and he was responsible for implementing the redundancies that the Respondent contends was the reason for the Claimant's dismissal on 11 January 2018.

(vi) Mr Phil Boggon who now is the Chief Operating Officer of the Respondent but was, at the time of his involvement with events herein described, Executive Vice President for Western Europe. He heard the Claimant's appeal against the decision to make her redundant.

Facts

3. The Respondent is a sightseeing company providing bus tours of London to tourists. In peak times, it employs approximately 200 people. In winter months, that figure drops to around 100 people.

4. The Claimant was born on 16 April 1982. She started working for the Respondent on 9 April 2004 as a tour guide on the various routes that the Respondent operates in London. She then moved to the Respondent's information centre before, in September 2014, accepting a position as a Cashier / Banking Clerk in the Respondent's Finance department at their head office.

5. On 3 March 2016, the Claimant emailed Ms Carley Jones, the Group Finance Manager of the Respondent, requesting a salary review. This led to a meeting between the Claimant and Ms Jones who was accompanied by Ms Veronica "Bonny" Farrar, the Claimant's line manager. The Claimant was quite abrupt in her request for a salary review indicating she was struggling for money. She had had to pay £600 towards an AAT (*Association of Accounting Technicians)* course she was starting.

6. It was pointed out to her that salary reviews were usually diarised for 1st May of every year. The Claimant then asked for an advance on her salary but this request was refused on the basis that the new owners of the Respondent had decided the company should no longer give subs. The Claimant then asked to be given more hours to work and it was agreed that this would be investigated.

7. Following the meeting, Ms Farrar reviewed the rota for March and allocated certain days to be covered by the Claimant. However, before they could be worked, the Claimant had an accident. She injured herself when, on Saturday 5 March 2016, she had a fall within the Respondent's premises.

8. The fall occurred when the Claimant was nearing the conclusion that day of her journey to her actual place of work. She saw her GP on 7 March 2016 who recorded that her left leg was bruised due to the fall. Back pain must have been reported because an X-ray was performed to exclude the possibility of her having suffered a bony injury. No bony injury was confirmed. The radiologist reported that vertebral body heights and disc spaces were well preserved and alignment was maintained.

9. The GP issued her with a MED3 (2010) fit note on 7 March 2016 declaring her to be unfit for work until 14 March. A further fit note was issued on 11 March which covered her absence from work until 18 March. She had a period of holiday booked from 15 March to 24 March inclusive. She returned to work on Friday 25 March having reverted to her GP on 23 March when a further MED3 (2010) fit note was provided. It asserted that the Claimant "may be fit for work taking account of" amended duties as from 23 March.

10. A return to work interview was conducted on her first day back at work on 25 March 2016 with her line manager, Ms Farrar, and Ms Sandra Ferrari of the HR department. The Claimant described her fall has having occurred whilst she was entering the Respondent's building via the back stairs. The ground was frosty and she lost her balance causing her to fall towards the back door resulting in a bruised leg and open cuts. She had remained at work that Saturday and had returned on Sunday when, she said, her back had started hurting.

11. In the interview, the Claimant asserted that the following "temporary support would be useful", to wit:

    (i) Regular breaks to walk around, to ease her back;

    (ii) Possibly longer time to complete work due to need to take regular breaks, and

    (iii) Support with lifting – specifically coin bags.

12. We note that, in her annual assessment which had been conducted before her injury on 26 February 2015, the Claimant, when asked "What part of your role do you least enjoy and why", had responded "Lifting coin bags, because they are heavy".

13. Ms Ferrari checked the Claimant's chair and ascertained it was possible to move both the height of the chair and the gradient of the back, both of which permitted to the Claimant to move the chair to a position she found most comfortable. It was confirmed that the Claimant was able to manage her own breaks, something recorded as being in keeping with her GP's advice, and it was further recorded that the Claimant was comfortable asking her colleagues for help with her workload, if needed. A male colleague of the Claimant was

spoken to and he confirmed that, if the Claimant needed hep lifting the coin bags, she just needed to ask. This information was transmitted to the Claimant.

14. However, the following day – Saturday 26 March (which that year was Easter Saturday) – the Claimant reported to her line manager that she had found, on 25 March, that taking frequent breaks to move around caused her to work at a slower pace with the result that she had stayed at work beyond 5 p.m., the normal end of her shift. Because Saturday was busy and there was more revenue being taken than had been the case for some time, she was concerned about when she would be able to stop. She sought guidance from her line manager. Ms Farrar (not on duty herself) was unable to make any suggestion apart from the fact that the job had to be done.

15. On 30 March 2016, the Claimant informed Ms Farrar that she was not sleeping at nights mainly because she had witnessed a colleague's gross misconduct in connection with handling cash the previous March. Ms Farrar told her the colleague's misconduct was not the Claimant's fault and she should let the memory go and move on.

16. But on the same day at 0945 hours, Ms Farrar sought advice from Ms Ferrari on how to deal with the Claimant who was noticeably slow in performing her duties. Ms Ferrari responded at 1517 hours offering to have a chat with Ms Farrar but, by that stage, Ms Farrar had taken it upon herself to speak to the Claimant and tell her that her work speed was unacceptable.

17. On 13 April 2016, Ms Ferrari referred the Claimant to Occupational Health for assessment with a full history being provided of the Claimant's injury, her request for temporary support, her reaction to the anniversary of her colleague's misconduct on 28 March 2015 and the slowness with which she discharged her duties which had caused at least one work colleague to feel frustrated. She had also experienced conflict with another colleague who had walked out on her leaving the Claimant upset that her colleagues were not being helpful.

18. Dr John Mason saw the Claimant on 15 April and provided a report on 19 April 2016. His view was that the Claimant was fit for work: he did not think the injury would have a significant impact on her medical capability. He recommended she undertake 75% of her normal shift for the following two weeks. He thought her absence from work was work-related in that the accident had happened on work premises. He did not think the Claimant to be disabled within the meaning of the Equality Act 2010. Neither did he think she required allowances or adaptions in the medium to long term although she would require some support in respect of her pace of work in the medium term.

19. As a result of receiving Dr Mason's report, Ms Farrar and Ms Ferrari had a meeting with the Claimant whereby it was agreed that the Claimant could undertake 75% of her normal shift for a period of two weeks.

20. The Claimant had a period of illness which lasted approximately 3 to 18 August and which, as it turned out, was morning sickness. She broke the news of her pregnancy to the Respondent on 23 September 2016. By which time, she had applied for a new post within the Respondent organisation, that of Group Finance Assistant.

21. On 7 October 2016, she underwent a Risk Assessment for New and Expectant Mothers but, sadly for her, she miscarried at 20 weeks on 11 October 2016.

22. A second medical referral was made on 31 January 2017 because of continuing concerns being expressed by the Claimant regarding lifting and her back condition. The referral resulted in a report written by Dr Sam Valanejad dated 3 February 2017 after he had seen the Claimant the previous day.

23. The Claimant reported to Dr Valanejad that, because of her back, she could not walk for more than 20 minutes and she struggled to lift any heavy object. Dr Valanejad examined the Claimant and reported that he found her to have a normal gait, a slightly reduced range of movement of the lumbar spine and some tenderness and discomfort in the lower back and also in the midline of the upper back. He did not find her to have any other remarkable findings. He did note that the claimant carried a handbag which she asserted to be the maximum weight that she could comfortably lift. The doctor reported the handbag as being nearly 7 pounds in weight.

24. In answer to specific questions raised with him, Dr Valanejad expressed the opinion that the Claimant was fit to work with adjustments. He did not regard the task of lifting a bag of coins weighing approximately 10 lbs and transferring it to a safe [a task that the Claimant was expected to perform some five or six times in a shift] as a heavy, physical activity per se but he noted that the Claimant expressed concern and an inability to do this task without exacerbating her back condition. On this basis, he suggested that management might wish to explore the option of using a trolley to transport the bags and having the safe on a raised surface. He paid due deference to it being a legal opinion as to whether the Claimant was covered by the Equality Act but opined that, on the basis of his assessment, it was unlikely she was covered.

25. On 23 February 2017, Ms Farrar and Ms Jane Sherratt, an HR manager, conducted a review meeting with the Claimant. Ms Sherratt asked the Claimant whether she could confirm that she already had assistance in lifting the money bags. The Claimant's response was to point out that she had to ask a different person every day and that they often did not have time. At the weekend, she was alone and she needed someone else there. A discussion on this topic followed in the course of which Ms Farrar suggested that the Claimant would assist the Operations staff who worked next door to her by doing some of their waybills in return for them being prepared to assist her with the bag lifting.

26. On 20 March 2017, the Claimant raised a formal grievance concerning certain responses that had been made to her work difficulties. One of these was to do with the Claimant's report of the fury expressed by her personal injury solicitor concerning questions asked of her by Ms Farrar about the progress made to get the Claimant an MRI scan. Another was about the fact that Ms Farrar had, on 22 February 2017, questioned as to why the Claimant had asked the Operations team for help when she could have called Ms Farrar. The Claimant asserted Ms Farrar had said in relation to the request she had made of the operations team that "You have caused chaos". The summons to the review meeting of 23 February had surprised the Claimant in that she was denied the opportunity to bring a representative along because, it was said, the meeting was to be just a normal meeting. But as part of the discussion had dealt with

her accident, the Claimant did not regard it as normal. In addition, she had been shocked that there had been a suggestion that her colleagues should be emailed to let them know that she, the Claimant, needed help at lifting because of her back condition.

27. Ms McGuire chaired a meeting to hear the grievance. She established that the grievance raised three complaints as follows:

    (i) A lack of confidentiality and timeliness in relation to question from Bonnie Farrar as to whether you had received an MRI scan;

    (ii) A lack of confidentiality and appropriateness in relation to a comment from Bonnie Farrar about having caused 'chaos' after requesting help during the weekend of the 18 and 19 February; and

    (iii) The characterisation of a meeting with Jane Sherratt and Bonnie Farrar on 23 February as an informal meeting.

28. She expressed her conclusions on each of these complaints in a letter dated 3 April 2017. On the first complaint, she found there to be a conflict of evidence. While Ms Farrar had accepted her question regarding the MRI scan had been put to the Claimant within earshot of colleagues, she asserted that the Claimant had mentioned to her colleagues she was awaiting this procedure. Ms McGuire accepted that the standard should be that medical procedures should not be discussed in an open environment but leeway had to be made "if the enquiry is made as a colleague and in relation to your general wellbeing".

29. In relation to the second complaint, Ms McGuire decided on the evidence the comment had been made in respect of performance but indicated she did not believe it should have been made in an open environment. She indicated the defects would be addressed through coaching and training.

30. The third complaint she dismissed as she considered the Claimant was being invited to a normal meeting and not one at which she was entitled to be represented.

31. The Claimant's absence record through sickness became a cause for concern. From 3 August to 7 December 2016, she had had 19 days off sick. From 2 March to 15 October 2017, she had a further 31 days off. Ms Farrar wrote to her on 17 October 2017 inviting her to a formal review meeting under the Respondent's capability procedure. Mr Redman conducted the review and the result was that he issued the Claimant with a formal warning. His understanding was that the Claimant had passed trigger points warranting such a meeting earlier but no action had been taken because of her pregnancy. In his letter. Mr Redman investigated after the meeting the support which the Respondent had provided for the Claimant because of her back pain and set them out in his letter imposing the warning. The support comprised:

    - *New office chair*
    - *As to return to work following an absence in March 2017*
    - *Desk support– mouse, keyboard*

- *Support to lift heavy bags from the safe*
- *Regular breaks away from your desk*
- *Occupational health assessment on 2 February 2017*

32. Mr Redman delivered his decision with the following words:

> *This letter therefore constitutes a formal warning under stage 1 of the organisation's sickness absence management procedure as I believe that your attendance level is unsatisfactory and must improve. In order to improve, I am putting in place an action plan as follows:*
>
> - ***No further absences from work due to sickness*** *– in the next six months*
> - ***Permission to contact your GP*** *– to obtain a further assessment on your fitness to perform your role and any advice on any further reasonable adjustments. For clarity I have copied below page 51 of the employee handbook which states –*
>
> **Medical evidence**
>
> Where we wish to contact your doctor, we will indicate this in writing. We will secure your written consent. You have the right to withhold consent that we always prefer to take account of your doctor's medical opinion. Otherwise, we must rely solely on the information currently available to us and/or an occupational health advisor's view. In those circumstances we may conclude we have no alternative other than dismissal.

33. The Claimant appealed the decision to issue her with a formal warning. Mr Adrian Carter heard, and dismissed, the appeal giving reasons although he modified the requirement that there be no sickness absences in the next six months to a requirement that there be a "considerable improvement in your attendance record over the next 6 months". Ms Sherratt, the HR Manager, was present throughout the course of the hearing. In the course of the discussion, the Claimant challenged the relevance of looking at the number of absences incurred over a 15 month period when, if a 12 month period was concentrated upon, then the number of absences only totalled 39. She pointed out that her contract provided for sick pay up to 8 weeks, that is, 40 days and she had only had 39 days off in the preceding 12 months.

34. Ms Sherratt responded by pointing to the fact that they were looking at 15 months because the Claimant had had 50 days off in that time because of her back injury. But, in any event, 39 days in 12 months was the highest of any level of absence in the company. And the fact that the contract provided for 8 weeks' sick pay did not mean that 8 weeks' absence was allowed.

35. Mr Carter, when giving evidence that supplemented his witness statement, mentioned that, at a staff party held in 2017 pre-season (by which we understood him to mean late spring / early summer) he had observed the Claimant "moving swiftly".

36. In the latter part of 2017, there was a downturn in passenger numbers - 30% year on year. The Respondent considered that terrorist incidents (22 March Westminster, 22 May Manchester, 3 June London Bridge, 19 June Finsbury Park and 15 September Parsons Green) were a major factor causing this downturn. Mr Carter, being the General Manager, was charged with responding

to this. It was determined that the company needed to make cost savings as part of "continuous efficiency improvement". As Mr Carter explained:

> *15. This resulted in the finance team being affected. As the revenue is declining, there was a reduction in the amount of cash that was collected on a daily basis. This together with a significant reduction in associated paperwork and admin tasks, led to review the role of cashier. We concluded that the reduction in cash meant there was a need for only one cashier position.*
>
> *16. There were two employees in the position of cashier: the claimant and PP. The positions were standalone and clearly defined. We therefore viewed these two employees as the 'pool' for redundancy.*
>
> *17. The criteria that we propose to use to select for redundancy were knowledge of the job, skills (accuracy), skills (mistakes made), versatility, job performance, attendance, timekeeping and disciplinary record.*

37. An announcement was made on 4 January 2018 to the two people in the pool, the Claimant and PP. They were told that a decision had been made to reduce the number of cashiers from two to one and that the selection criteria were as set out above. They were invited to provide ideas as to how otherwise the required savings envisage by the reduction in the number of cashiers might be achieved. Individual meetings were held with PP and the Claimant but neither of them had any questions or comments on the proposed process. The Claimant asked for, but was not provided with, a copy of the script that was used in the first meeting on 4 January, a fact which Ms Sherratt at the appeal meeting appeared to acknowledge.

38. The assessment as to how the two candidates measured up against the selection criteria was conducted by Ms Farrar, the line manager for both cashiers, and Ms Carley Jones, the head of London Finance. Marks were given out of 10 against each criterion and there was a weighting given as a multiplier (1 – 5) to each reflecting the perceived relative importance of the particular criterion. The Claimant scored 49 on the criteria without any weighting and 182 when the weighting was applied. In contrast, PP scored 68 and 240 when weighting was applied.

39. As a result of this exercise, Mr Carter wrote to the Claimant on 11 January 2018 confirming the outcome of the redundancy and terminating her employment as from the date of the letter. There was no alternative work for the Claimant. That was the assertion which was made on behalf of the Respondent but we were not presented with evidence of a thorough examination having been made for alternative work. The Claimant asserted that another person was doing her job 3 weeks later but Mr Carter explained that as being the need to train up someone to cover for the one cashier when she required time off, either for holiday or sickness.

40. Elsewhere in the organisation, a senior engineer and two electricians were made redundant as part of the same business review that led to the Claimant's dismissal. In addition, the Head of Sales resigned and was not replaced. A further restructuring of the Engineering team resulted in one Leading Hand position being made redundant, a reduction in Leading Hands from 3 to 2. Indeed, a further cost-cutting exercise has resulted in the head of London Finance being made redundant,

41. The Claimant appealed the decision to make her redundant. Mr Boggon heard the appeal on 25 January 2018. The Claimant was accompanied at the appeal by a representative from her Trade Union. Her representative made the point that the Claimant had been marked down twice over for criteria that related to her disability, those criteria being attendance and for having received a warning. Mr Boggon accepted that there had been a low score duplicated in each of those categories and therefore he excluded both of the categories and recalculated the scores. However, the Claimant still scored lower than PP. Certain criticisms the Claimant made of the procedure adopted were accepted by Mr Boggon as being matters on which improvement could be made but he dismissed the appeal.

The Issues

42. The Claimant had provided a list of issues for a preliminary hearing on 22 October 2018 and we propose to deal with those issues in the order they are set out.

Unfair Dismissal

43. We were satisfied that the Respondent dismissed the Claimant on the ground of redundancy. We considered the Claimant's contention that the real reason for her dismissal was capability but we did not accept that was the case. We noted that the scoring on the selection criteria were still showing the Claimant to be the employee to be dismissed even when attendance and the fact she had received a capability warning were taken into account.

44. We were not satisfied that, in treating that reason as being a sufficient reason for dismissal, the Respondent acted reasonably and, in so determining, we had regard to all the circumstances (including the size and administrative resources of the Respondent's undertaking). We also had regard equity and the substantial merits of the case. Our reason for adopting this view was that we regarded the period from announcement on 4 January to dismissal on 11 January was only one week and that period covered the whole consultation process. Additionally, the Claimant had asked for, but not been provided, with the script which Mr Carter had used on 4 January.

45. However, we considered that, had a fair procedure been adopted, the result would still have been that the Claimant was dismissed for redundancy. Thus we accept the Respondent's arguement in favour of a Polkey reduction, that being a deduction made from a compensatory award in an unfair dismissal case to reflect the chance that although a dismissal was procedurally unfair it would have happened in any case, see Polkey v AE Dayton Services Ltd [1988] 1 AC 344. We considered a fair procedure would have added two weeks to the Claimant's employment.

Disability

46. The onus was on the Claimant to establish that she was disabled. This she did not do to our satisfaction. We had regard to the following matters;

    (i) The two Occupational Health physicians who examined the Claimant each ventured the opinion that she was not covered by the Equality Act 2010.

(ii) The first OH physician, Dr Mason, suggested the Claimant might need some additional support in terms of her pace of work for "the next two or three months", the implication being that he expected her condition to improve.

(iii) The second OH physician, Dr Valanejad, observed her as having voluntarily chosen to carry a handbag weighing nearly 7 lbs.

(iv) The Claimant had reported

(v) The Claimant reported to Dr Valanejad and ability to walk for 20 minutes.

(vi) Mr Carter had observed the Claimant "moving swiftly" at a pre-season party in 2017.

(vii) The reliance the Claimant placed on a walking stick appeared inconsistent. Although the Claimant mentioned in her oral evidence that "Without the stick I feel I struggle with my posture and have to hold to objects to keep my balance", we noted that she had not mentioned to either OH physician her need for a stick and neither physician observed her to be using a stick. Ms Farrar reported the Claimant as having come into work with a stick because, she said, her GP had recommended it but Mr Carter reported seeing her use a stick if she went out to lunch but not in and around the office. In addition, while Ms McCarthy reported seeing the Claimant with a stick, it was "only sometimes not every time".

Reasonable Adjustments

47. We do not accept that the Respondent was seized of knowledge that the Claimant was disabled. Two occupational health physicians had been asked whether her condition was such as to be covered by the Equality Act 2010 and both had said "No". The Claimant herself did not provide any medical evidence to the Respondent other than the so-called fit notes from her GP. The Respondent did provide support to the Claimant as outlined in paragraph 31 above but we do not regard such support as being made in response to a perceived statutory duty based upon the Claimant being disabled and the Respondent knowing that to be the case.

48. In the circumstances, therefore, we do not consider that the Respondent failed to make reasonable adjustments pursuant to section 20 of the Equality Act 2010. Nor do we consider the Respondent subjected the Claimant to discrimination because of something arising in consequence of her disability per section 15 of the Equality Act.

49. However, lest we be wrong about the Claimant not establishing that she is and was disabled and about the Respondent not having knowledge of the same, we set out the following findings.

50. On the allegation of failure to make reasonable adjustments, we do not accept that there was a provision, criterion or practice [PCP] requiring a cashier to fulfil all duties of the role and, in particular, the lifting of bags of coins. We accept the submission of counsel for the Respondent that the Claimant was not required to lift such bags. She was encouraged to seek assistance for the same and, if

no assistance was immediately available, she could leave that task for when someone was able to assist her.

51. We accept that there was a practice for a cashier to be placed on the rota working alone but we do not accept that this meant the Claimant was required to lift bags. The reasonable adjustment contended for by the Claimant was that the task should have been allocated to a co-worker. However, there were people working next door to her in the Operations team who were available to be asked to lift the bags with the Claimant briefed to offer to do some of their paperwork should the bag lifting take a disproportionate amount of their time.

52. The Claimant herself resisted the suggestion that members of the Operations team be informed she had a bad back hence the suggestion that she could barter for such assistance by offering the Operations team assistance with their paperwork.

53. The Respondent submits this claim was out of time. However, this allegation of the Respondent having failed to make a reasonable adjustment must be an allegation of a continuing act. It must have come to an end on 11 January 2018. That being the case, the claim was presented in time.

54. As regards the allegation that there was a PCP that a cashier was scheduled on a rota to work alone, we do not accept that there was such a PCP. Although the cashier might have been the only cashier working the particular shift, there were people in the Operations team working next door.

55. The substantial disadvantage to which this alleged PCP is alleged to have caused was the Claimant finding it harder to get all the work done in time. There was no evidence – certainly no medical evidence – that the slowness of her work, a worry to Ms Farrar, was down to her back condition, especially when the availability of help with lifting is taken into account. There was no evidence that the Respondent had knowledge that the Claimant was suffering a substantial disadvantage through her back condition.

56. Counsel for the Respondent has submitted that the claim in respect of the cashier being scheduled on a rota to work alone is out of time. We do not see this to be the case. In our view, if we are wrong and there was, indeed, a PCP of a cashier being scheduled to work alone, then that was a continuing practice and this a continuing act.

57. The final PCP contended for by the Claimant is that there was a requirement for an employee to maintain an acceptable level of attendance in order not to be subject to the risk of disciplinary sanction. Counsel for the Respondent has accepted that the Respondent did have such a PCP. Further, he accepts that such a PCP put the Claimant at a substantial disadvantage in respect of the alleged disability. However, he says that two of the absences which the Claimant had did not result from the alleged disability. The number of absences recorded by the Claimant was the highest in the company, so it was legitimate for the Respondent to take action to reduce the level of absence and a warning was justified.

58. The issue of jurisdiction for this disciplinary action was raised. The outcome of the appeal hearing was communicated to the Claimant by letter dated

Wednesday 29 November 2017 which we assume, for these purposes, arrived with her the following day. The ET1 was presented on 10 April 2018. Contact with ACAS for the purposes of early conciliation was made on 12 March 2018. By that stage, the claim was out of time by some 10 days. In the circumstances, the claim was out of time. The Claimant has not provided evidence as to any reasons why it might be just and equitable for the claim to proceed and, thus, we would dismiss this claim on the basis we lack jurisdiction.

59. The Claimant claims that an auxiliary aid – to wit, an L-shaped desk – should have been provided to her because she asserts that, because of her alleged disability, she found it difficult to reach some areas of her desk from her chair whereas an L-shaped desk would have made it easier for her to pick up those objects on her desk that she needed for her duties.

60. We agree with the submission of counsel for the Respondent that there is no medical evidence in support of the Claimant's contention that an L-shaped desk would have avoided an identified substantial disadvantage and nor has the Claimant established that the Respondent had knowledge she had some substantial disadvantage.

61. The issue of the Claimant having a larger desk was raised in the capability meeting with Mr Redman and was left to be discussed with Ms Farrar after the meeting. Ms Farrar's view was that there was not the space available in the office for an L-shaped desk, Ms Farrar advised the Claimant on how to make better use of surfaces which existed in the office and the mouse and keyboard provided to the Claimant were changed for smaller ones thereby increasing the amount of desk space available.

62. Part of the reason for Mr Redman highlighting in his warning letter the need for permission to contact the Claimant's GP was to obtain any advice on any other reasonable adjustments. Mr Redman's final piece of evidence in re-examination was to say that, prior to the appeal from his warning, he believed he had not been given permission to contact the Claimant's GP.

63. In all the circumstances, we do not consider there to have been any failure on the part of the Respondent to make a reasonable adjustment in respect of an L-shaped desk.

64. Given that the subject was raised for the first time in the capability meeting conducted by Mr Redman and it was not addressed in the appeal meeting whose outcome was notified to the Claimant by letter dated 19 November 2017, it would appear that the Claimant had the right to complain about the failure to supply the required desk as at 20 November 2017. In the circumstances, the eventual presentation of a complaint relating to the lack of provision of this auxiliary aid was out of time and, as commented before, the Claimant provided no evidence as to why it would be just and equitable to permit this claim to proceed. In the circumstances, we would dismiss this claim on the basis we lack jurisdiction.

Discrimination arising from disability

65. We have already said we do not consider the Respondent subjected the Claimant to discrimination because of something arising in consequence of her disability per section 15 of the Equality Act by reason of her failure to establish disability. However, we seek to continue to provide the determinations we would have made if we had not identified such a failure.

66. The claimant alleges she was subjected to unfavourable treatment as follows:

    (i) The formal warning from the Respondent on or about 7 November 2017 and / or the decision in the appeal letter of 29 November 2017 to uphold that warning;

    (ii) The reliance on the Claimants sickness absence record and / or written warnings for sickness absences in the Respondent's scoring of the Claimant's "Attendance' and 'Disciplinary record" in the redundancy selection matrix in its final decision to dismiss her on 11 January 2018;

    (iii) The Respondent's assessment of any of her other scores in the redundancy selection matrix, to the extent that any of her scores and therefore her subsequent dismissal because of those scores were impacted by something arising in consequence of her disability.

67. Dealing with the receipt of the warning for absences, we do not agree that this was unfavourable treatment. The level of absence justified the triggering of the capability procedure – particularly when some of the absences did not related to the alleged disability - and receiving a warning (as was established on appeal) to make considerable improvement in her attendance record over the next 6 months appears to us to be the only way in which the Respondent could provoke an improvement in the Claimant's attendance record.

68. We regard the issuing of a warning as a proportionate means of achieving a legitimate aim, that being, better attendance. The Respondent's counsel has set out at paragraph 70 of his submission six reasons as to why issuing a warning at that time was proportionate. We think that 39 days absence in 12 months for any employee holding a responsible money-handling position creates difficulties for an employer making the giving of a warning to improve as being a proportionate response.

69. As for the reliance on the Claimant's absence record and the disciplinary record, we consider the point made at the appeal to be significant: disregarding the scores on the matrices relating to the absences and disciplinary record did not alter the fact that the Claimant had the lower score vis à vis PP. In the circumstances, we do not consider there to have been any discrimination which arose from the Claimant's disability.

70. It perhaps is helpful when considering the allegation in respect of the reliance on the other criteria in the matrix for each candidate to repeat all the criteria which appear in paragraph 36. They were

    (i) knowledge of the job,

    (ii) skills (accuracy),

(iii) skills (mistakes made),

(iv) versatility,

(v) job performance,

(vi) attendance,

(vii) timekeeping and

(viii) disciplinary record.

71. If we eliminate (vi) attendance and (viii) disciplinary record, we do not see there to be any discrimination in reliance on the remaining criteria which arises from the Claimant's disability. The criteria appear reasonable. Indeed, we did not understand the Claimant to criticise their use. The scores turn very much on the assessment which the Claimant's line manager, Ms Farrar, made. She was best placed to make such an assessment and, having heard her give her evidence, we did not think she had assessed both the Claimant and PP anything other than honestly.

Conclusion

72. For all the above reasons, unanimously we dismiss all the claims save the claim for unfair dismissal which we find in favour of the Claimant. However, applying Polkey, we find that, had the factors which we determined made the procedure unfair been eradicated, the dismissal would have occurred in any event only two weeks later than it actually did. The result of this is that the Claimant is entitled to a compensatory award of two weeks' net wages which is £651.56. Her entitlement to a basic award is off-set by the redundancy payment she received.

Employment Judge Stewart
3 September 2019

Sent to the parties on:

05/09/2019

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For the Tribunal:

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