Case No: 3305955/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs N Edwards	**v**	**Barnet, Enfield and Haringey Mental Health Trust**

Heard at: Watford **On:** 2 to 5 July 2019

Before: Employment Judge Smail

Appearances:

For the Claimant: In person
For the Respondent: Ms H Patterson (Counsel)

JUDGMENT having been sent to the parties on 2 August 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form presented on 13 April 2018, the claimant claims unfair dismissal. The claimant was employed by the respondent between 11 August 2008 and 5 January 2018. She was a Band 4, Mental Health Act Officer. Her responsibilities were administrative and included administering the processes around mental health tribunals. She was based in The Chase building at Chase Farm Hospital in Enfield. It is a sad feature of the case that the claimant plainly was good at aspects of her job. Her appraisals over the last four years of her actual working were either good or excellent. It was not the technical aspects of her job that gave rise to issues; it was inter-relationships with other colleagues.

2. On 21 June 2017 following a disciplinary investigation into allegations, essentially of bullying, the claimant was found guilty of misconduct and removed from her work setting. She had already been temporarily removed pending the disciplinary process. This was confirmed as of 21 June 2017. She was to be redeployed. The decision was made by Mr Theo Bello, an Assistant Clinical Director. A final written warning was given for the conduct. As to redeployment he wrote:

> "Further, based upon the breakdown of working relationships with your team, I have concluded that in these exceptional circumstances, you should be moved to a suitable alternative role within the trust. The trust will work with you to identify alternative roles over a 12 week period effective from 26 June 2017. The trust will endeavour

to find you suitable alternative roles within the trust and you will also be expected to apply for roles during this period. A member of HR will meet with you on a fortnightly basis to review progress. You will also be referred to Occupational Health during this process."

3. He goes on to say that should no suitable work be found in the timeframe, then she would be re-invited to a disciplinary hearing. By her own admission, and the claimant is frank about this, she did not engage with this process. She objected to being moved. She valued her Mental Health Act knowledge and expertise and wanted to keep using it. The respondent did make a positive offer of a job, a Band 4 Team Administrator in Haringey which was described as an administrator/team leader job. It was suitable alternative employment. The job summary reads as follows:

   "to provide and supervise a high quality administrative clerical and reception service for patients and their carers who access the Trust's services, to take responsibility for all aspects of the smooth running of the service area, to organise both clinical and non-clinical staff, ensuring that all available resources are managed effectively. To manage problem situations as when they arise, this includes technical staffing issues and service user and carer situations to ensure there is adequate administrative and clinical staff covering at all times so that patient care is never compromised."

4. It goes on in the same vein. So this was a serious job and at the same level of pay. The claimant, however, was clearly refusing it by letter dated 20 November 2017. She accepts she did not engage in the redeployment process within the terms of the respondent's own approach to the matter. Then her dismissal followed logically and inevitably. Mr Bello dismissed her, paying her notice. The decision to dismiss was taken just over six months after the decision to redeploy, a process which we know the claimant refused to engage with. Significantly perhaps, she did not claim a constructive unfair dismissal after 21 June 2017. She did not resign, claiming a repudiatory breach of contract or an unfair dismissal at that point. Instead, she refused to engage. She did, however, appeal the final written warning and the decision to redeploy. She appealed by letter dated 28 July 2017.

5. Mr Richard Milner, the Trust Director of Improvement, dealt with the appeal. By letter dated 19 October 2017 he upheld Mr Bello's decision. He found that Mr Bello had reached his decision relevantly based on a cogent body of material.

6. The claimant also appealed the eventual decision to dismiss. She appealed by letter dated 19 January 2018. The appeal was not heard until 18 June 2018. The delay was because so many of the senior managers at the Trust had been involved in the previous history of the matter, including the claimant's grievances. The appeal was eventually heard by David Griffiths, the Chief Finance and Investment Officer. He upheld the decision to dismiss. He found that Mr Bello had reached a decision open to him to take, based on a cogent body of material and the claimant had not engaged with the redeployment process. As I say, within its own terms and within its own approach to the matter, the claimant's dismissal at this point followed inevitably. The fact that it took five to six months to hold the appeal does not make this dismissal unfair. The themes are exactly the same should the appeal have been heard more expeditiously. I accept the explanation for

the delay in the appeals - to find someone who had not had dealings with the claimant previously.

The issue

7. The claimant acknowledges, as I have said repeatedly, that she did not engage in the redeployment process and, bearing in mind she did not resign, claiming a constructive dismissal as of 21 June 2017, her case inevitably is a difficult one to run before this tribunal. Nonetheless, as was agreed at the outset of the hearing, she has to challenge the reasonableness of the original decision to redeploy her. The tribunal does consider whether or not that was a decision which no reasonable employer could have taken and the claimant challenges that decision by saying that the conclusion that she was to blame for the team's dysfunction so that it was her that was moved as opposed to anyone else, was based on inadequate investigation.

8. So, I do look at whether there was a body of evidence to support Mr Bello's conclusions, and to be frank the background facts showing the dysfunction of the team in which the claimant worked, do come across as both disappointing and to some large degree petty, reminiscent perhaps of a school playground, rather than a hospital looking after mental health patients. I put that point to Mr Milner and he corrected me for describing it as a school playground. He emphasised that this was a clinical centre of care for mental health patients and that therefore has to be a proper professional atmosphere. I take that point.

9. Coming back to then to the findings of Mr Bello: the origins of these findings lay in a fallout of the relationship between the claimant and Donna Rees, who brought grievances against each other. A further employee also brought a grievance against the claimant, a Jo Cleasby. Her grievances were investigated by a Mr Colin Chapman who made recommendations. Ms Sexton received those recommendations and decided to commission a disciplinary process against the claimant. Shila Mumin produced a report and those matters eventually came before Mr Bello. The allegations resulting from all of this, put before Mr Bello against the claimant, read as follows:

   9.1 When JC greeted AE on the morning of JC's return from leave, the claimant looked directly at her and ignored her. 16 September 2016. Mr Bello concluded that on examining the facts, the investigating manager had concluded there was no evidence to support the allegation, therefore that allegation was not considered or upheld. So, allegation 1 – no problem.

   9.2 Allegation two it is said that on 26 September 2016, JC was in her office with another member of staff. They were working and the door was closed. Mrs Edwards swept into the office. She did not acknowledge the member of staff. She shoved a post-it note at Jo Cleasby and told Jo Cleasby to phone Lauren. That was said to be corroborated by witnesses and this allegation was upheld.

9.3 Allegation three – it was said that Mrs Edwards spoke to others about Donna Rees in a malicious, bullying and intimidating manner in an attempt to demean Donna Rees' character including making allegations of jealousy. Mr Bello reasoned as follows, and I quote:

> "The panel weighed up the evidence presented by Shila Mumin and the evidence presented in the management statement of case, in particular the panel took into consideration the evidence in the appendices. That was relating to Mr Chapman's grievance investigation which found that there was corroborating evidence from Lauren Barnes that [Mrs Edwards] had spoken to her about Donna Rees in a malicious, bullying and intimidating manner, mentioning details of her private life, including her car and family home. Donna Rees explained that she found this matter to be an invasion of privacy and took it as a personal threat, on the balance of probability. The panel agreed that this was the case. The allegation was upheld."

9.4 Allegation four was upheld - that Donna Rees was threatened as the conversation Mrs Edwards was alleged to have had with others concerned Donna Rees's type of car and house. Donna Rees had not shared that type of personal information with Mrs Edwards, so that allegation was upheld.

10. It was mentioned also that Mr Chapman had investigated the grievance brought by the claimant against Donna Rees. The first allegation arising from that was that on the morning of 12 September 2016 the claimant was subjected to a malicious attack in contravention of the trust, dignity and respect policy by Donna Rees, another member of staff. The finding of that was that whilst Donna Rees's behaviour did not go so far as the allegation suggested, nonetheless, Donna Rees may have slightly exceeded the boundaries of the dignity and respect policy. The second allegation arising from the claimant's allegations against Donna Rees was that Donna had entered the office with Natasha and shouted accusations at her in an intimidating manner. That was said not to be corroborated and so that allegation was not upheld.

11. Initially, the information had been presented to Mr Bello in written and statement form only. That was in a meeting on 8 May 2017. Mr Bello had decided that he would actually hear from some of the witnesses. Some of the witnesses came to speak to their statements and we have heard some of the recordings. He says this in his conclusions:

> "From the pack, there was no evidence that you had any credible witnesses, but we did consider the other points you raised. The witness testimony at the hearing from Donna Rees, Margaret Hanham, Jo Cleasby and Lauren Barnes stated that your actions had caused them to feel threatened and fearful of you and their relationships with you had broken down. There was no evidence to support that the witness evidence provided by Donna Rees and Jo Cleasby had repeatedly changed over the course of the interviews."

12. He concluded that allegations 2, 3 and 4 should be upheld and amount to harassment or bullying behaviour which breaches the trust's dignity at work policy.

13. He explained to the tribunal that whilst the claimant's behaviour per say did not justify dismissal, it did justify removing her from the environment. And to give a bit more flesh on the bone of the sort of allegations being made, I have looked at the original witness evidence submitted to Mr Chapman's investigation. So, for example, Donna Rees said the following in an interview:

> "I find the whole business of Natasha talking bad of me extremely childish, immature and petty. If the bad feeling Natasha has intensified towards me because of her return from sickness, and me not asking her how she was, then this is could've been settled a long time ago by her informing me. I do not understand why Natasha can carry on acting and intimidating in what can only be described as a bullying manner by speaking to my fellow colleagues to try and demean my character in an environment that I have worked in for 16 years without a complaint, grievance or disagreement towards me throughout service here. For a long time, my working environment has felt extremely awkward to work in with Natasha and at times intimidating. However, after this conversation I can only feel that this will not get any better with more accusations from Natasha."

and she concluded at the end of her interview when being asked what do you want to happen now? She said:

> "Mrs Edwards not to be there any more, organisation not to support bullying. I enjoy my job, why should I go. I don't feel I have done anything wrong, making me feel I want to go driving into work is difficult. When Mrs Edwards is not here, a weight is lifted off, it sounds horrible … ".

14. So that's what Donna Rees was saying. Jo Cleasby was saying not dissimilar things. She was asked by Mr Chambers

> "In your statement, you mention an awful atmosphere and low staff morale in the office area. Were you to attribute this to anyone's behaviour what would it take to improve the situation? She replied - "remove her, can't sit down and talk about it like a grown woman over coffee and still ignored, isn't going to get better. I am aware of what's going on because of where it is. Mrs Edwards is devious and tells lies, walks around on mobile talking. When she is away it is bliss. I don't want to go to the print room I go downstairs instead".

She was asked had it always been like that and she said:

> "only been there since February, I noticed something was going on … long standing joke about her attitude and behaviour. I have previously spoken to Catherine about it, I think she wants me to react to say I am picking on her. I think Mrs Edwards has set me up to get me to bite."

15. The claimant was also interviewed in this process and essentially confirmed the difficulties of the situation. So, the claimant's case essentially before the tribunal is to say that the employer was not entitled as it were to take the side of Donna Rees and Jo Cleasby and remove her from the work place based upon the level of investigation that they had undertaken.

16. Mr Bello did, however, take witness evidence. He did not just read the statements that had been submitted in the grievance investigation. He also had a statement from Patricia Morgan. The claimant was hoping that further

questioning of Patricia Morgan would show more support for her side of things.

17. This is a hospital caring for the mentally ill. The picture portrayed by these statements is not one of a functioning professional environment. Mr Bello formed the view that, on balance, Mrs Edwards was more to blame than the others and in any event, it was necessary to move Mrs Edwards out. He portrayed it as though giving her a fresh start but, in any event, he was dealing with the dysfunctionality that those statements so clearly show.

18. There is a contractual support for that approach, express contractual support. So we see from the disciplinary policy that paragraph 21.3 provides as follows:

> "in exceptional circumstances, and as an alternative to dismissal, mitigating circumstances including length of service and previous employment history may be taken into account. Such alternative action may include demotion or transfer to another post and will also carry with it a final written warning. Such demotion and/or transfer will not normally attract any protection of earnings."

19. The respondent points to that. In any event submits the respondent, and I agree, the employer is entitled to make such reasonable steps as are necessary to make the working environment function, and in my judgment, there is no doubt that they were contractually entitled - or in any event a reasonable decision was taken - to invite the claimant to redeploy. I have no doubt that this decision was taken in good faith with the intention and hope that the claimant would remain employed. Significant effort was made to find the claimant a job, as I have already outlined. For her own reasons she decided she was not going to engage with it.

20. So, was there a basis in evidence for the view that Mr Bello took? My conclusion is that there was a basis in evidence. Now, it is a feature of the case that the claimant was signed off with stress since November 2016. She did not attend the disciplinary hearings in front of Mr Bello – all three of them, on the 8 May, 7 June and then 5 January, when she was dismissed. She did not attend the appeal hearings in front of Mr Milner and Mr Griffiths. For the first two hearings in front of Mr Bello, she was offered to attend by a trade union representative or by a conference call. At around that time her position was of not attending meetings was supported by occupational health. That changed on 24 July 2017 when occupational health wrote as follows:

> "the claimant was seen on 24 July 2017 by Dr Yvonne Cooper, who was an occupational health physician …. ".

She says the following, and I quote:

> "I saw Mrs Edwards at your request on 24 July 2017. Held on file is a report dated 12 June 2017 with copies of hospital records and a computer-generated summary of her health. Mrs Edwards spent much of the consultation discussing various grievances she has with her employer. Indeed, she preferred to do so rather than speak about her health. Mrs Edwards is taking no medication at the moment. She had six sessions of CBT but at present is not having any further talking therapy. Mrs Edwards told me that she feels the problems at work cannot be resolved. She told

> me that she can go to an employment tribunal, she told me that she spends much of her day reading legal material to prepare her case against her employer and she has sought help from a solicitor and from ACAS. She told me that she is undertaking all normal activities of daily living with her family. She told me she is happy with home life. She spends time with her children and extended family and goes out with her husband, for example to the cinema or for a meal and she socialises by seeing friends. Mrs Edwards reports some sleep impairment. She told me that there is also some impairment in her concentration. She reports no other medical problems other than feeling that she is not relaxed or at ease."

21. And then the important conclusion:

> "In my opinion, Mrs Edwards' continued absence is a management not a medical issue. She is fit for work. She should be able to return to her full duties. She has told me she is not clear what job she will be returning to and this should be clarified with her if a letter has not already been sent. Although Mrs Edwards has some stress related symptoms I have found no evidence from underlying medical condition. I will not expect these to impact upon her ability to perform her full duties or attend work regularly."

22. So, the respondent submits, with some force, that there was no justification for the claimant not attending the appeal meetings and the meeting with Mr Bello in January 2018 and they submit, again with some force, that in reality the claimant had decided to leave the trust and wanted to make her points before the employment tribunal. That strategy does not always work, of course, because the tribunal reviews the decisions of the employer in unfair dismissal cases rather than substituting its views for that of the employer. That is not the role of the tribunal.

The Law

23. Section 98 of the Employment Rights Act 1996 deals in general with the fairness of a dismissal. So by section 98(1) in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show a) the reason if more than one, the principal reason for the dismissal and b) that it is either a reason falling within sub-section 2, that is capability, conduct or redundancy, or breach of a statutory enactment; or, and this is our case, some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

24. The respondent submits that the reason for the dismissal was some other substantial reason, namely the claimant's refusal to be redeployed in circumstances where it was reasonable to redeploy her. In my judgment that does amount to some other substantial reason. That being the case, we then look at section 98, sub-section 4, which provides where the employer has fulfilled the requirements of sub-section 1, the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, a) 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 it as a sufficient reason for dismissing the employee, and b) shall be determined in accordance with equity and the substantial merits of the case.

25. And as regards the application of that, there is a substantial body of law reminding the tribunal that it is not to substitute its own decision for what it would have done, but rather to review the reasoning of the employer. So, I have reminded myself of the guidance in Sainsburys Supermarkets v Hitt [2003] IRLR 23 Court of Appeal, that at all stages of the enquiry, the tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer bearing in mind there may be a band of reasonable responses. That developed the guidance given in Iceland Frozen Food v Jones [1982] IRLR 439 EAT to the effect that the starting point should always be the words of section 98, sub-section 4 themselves, that in applying this section, an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they, the Employment Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Employment Tribunal must not substitute its' decision as to what was the right course for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view whilst another quite reasonably take another. The function of the Employment Tribunal is to determine whether in the particular circumstances of each case, 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 is outside the band, it is unfair.

26. So much of the claimant's criticism of the respondent relates to failure to investigate grievances as fully as she would like but the relevant grievances were investigated and the directly relevant ones to this case are the grievances brought against her by Donna Rees and Jo Cleasby and the grievance she brought against Donna Rees. There was a considerable body of evidence taken in respect of those matters and a conclusion was made. The fundamental conclusion was that this was a dysfunctional workplace and something had to be done. That was plainly right. The balance of responsibility it seems was laid at the door of the claimant and for that reason she was asked to move. It is that conclusion she particularly finds offensive and takes issue with. That may be so, but there was a body of evidence before the employers to justify the decision that they took that she was more responsible than the others, and once she did not resign, and did not claim constructive dismissal after June 2017, the process almost proves itself once she fails to engage in the redeployment.

Conclusions

27. First, the instruction to redeploy was not so unreasonable that no reasonable employer would have made it, bearing in mind the evidence of the collapse of the relationships at the work place and the belief that she was principally responsible for this. On the contrary, it was entirely reasonable. Secondly, that instruction was contractually permitted, expressly under the conduct code or implied in any event under the discretion of an employer to give reasonable instructions. Lastly, once the claimant refused to engage with the redeployment process, the dismissal was reasonable, indeed inevitable.

28. I find no joy in arriving at this conclusion. I noted the strength of the claimant's appraisals as to her technical performance in the role. However, one does need to have functional relationships at work. There was a real problem with relationships here, and the problem needed to be addressed.

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Employment Judge Smail
5 September 2019
Date: ……………………………….

Judgment sent to the parties on
24 September 2019
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For the Tribunal office