Case: 1807104/2017

EMPLOYMENT TRIBUNALS

Claimant: **Miss L Murray**
Respondent: **Riccall Carers Limited**

AT A HEARING

Heard at: **Leeds** **On: 29th and 30th January 2020**
Before: **Employment Judge Lancaster**
Members: **Ms L Fawcett**
Mr K Lannaman

Representation
Claimant: Not in attendance
Respondent: Mr A Thompson, director

JUDGMENT

1. The Respondent's application to dismiss the claim upon the non-attendance of the Claimant is refused
2. The case will proceed in the absence of the Claimant, pursuant to rule 47of the Employment Tribunals Rules of Procedure 2013.
3. The Claimant was unfairly dismissed.
4. The Respondent is orders to pay compensation for unfair dismissal as follows:
   Basic award (less a 25 per cent deduction for contributory fault) £2692.56
   Compensatory award (gross) £2468.18
5. The complaint of direct disability discrimination is dismissed.
6. The complaint of unfavourable treatment because of something arising in consequence of disability is dismissed.
7. Any application in respect of the wasted cost of the postponed hearing of 20th May 2019 is further reserved. If this is to be pursued the Respondent must make a written application accompanied by a schedule setting out how the costs claimed have been calculated by no later than 13th February 2020. The Claimant will then be given the opportunity to make representations in response and the issue will be decided by the Employment Judge on the papers without a further hearing.

REASONS

1. Because this case has proceeded in the absence of the Claimant written reasons are provided. These have already been handed down to the Respondent at the same time that the judgment was delivered, orally, at the conclusion of the hearing.

Preliminary Issues

2. This is an old case. The complaints all relate to a dismissal on 11th August 2017. The claim was not properly presented until 1st May 2018, but at a hearing on 4th September 2018 the limits were extended to allow it to proceed out-of-time.
3. There have, since 1st May 2018, also been many further delays in the case with the Claimant often citing her health problems or the stressfulness of the tribunal proceedings as the reason why she has not been able to comply with orders in good time.
4. The Claimant has, nevertheless, attended three preliminary hearings in total, on 20th June 2018, 4th September 2018 and on 20th February 2019. The last of those hearings had, however, to be postponed from 2nd November 2018 because, on the day before, the Claimant applied to adjourn on the grounds of ill-health.
5. Since then the Claimant has not, however been able to be present on any of the three occasions when the final hearing has been listed.
6. This case was first scheduled to be tried starting on 20th May 2019, but the Claimant notified the tribunal on the morning of the hearing that she had had a "mental crash" and was unfit to attend. The case was therefore postponed. The Claimant was ordered to provide information, firstly, as to when she would be fit to comply with the outstanding case management directions and, secondly, when she would be well enough to conduct her case at a re-arranged hearing.
7. The Claimant was given further extensions of time within which to comply with the direction timetable, and she did eventually serve her witness statement on 30th July 2019. At this stage the schedule of loss was still outstanding and the Claimant was given yet further time whilst at the same time the case was nonetheless again ordered to be set down for hearing. On 15th August 209 a time slot was allocated for the case to start on 21st October 2019.
8. However, because the Claimant, despite having been reminded on three occasions (the last being on 4th September 2019), had still not provided confirmation of her being fit enough to conduct the hearing it was further postponed, effectively as at 9th September 2019 when the final deadline for providing an update had expired.
9. On 7th November 2019 the hearing was re-listed for 28th January. By this date the Claimant had still not provided any form of "Schedule of Loss" and did not in fact do so until 29th November 2019. The last in a sequence of many applications by the Respondent to strike out the claim on the grounds of non-compliance with Orders, was refused on 31st December 2019. Since that date the case has been ready for trial.
10. On 27th January 2020, the day before the hearing was due to commence the Claimant again notified the tribunal that she had been taken ill and could not attend. The case was therefore stood out of the list until 29th January 2020 and the Claimant, through her mother who was communicating on her behalf, was instructed to provide an update, with relevant medical evidence.
11. On 28th January 2020 it was confirmed that the Claimant "will not be able to attend on the 29th or 30th but is more than happy for it (sc the hearing) to go ahead without her being present, if that is possible, as you have her statement and her evidence which she presented to you earlier."
12. Given the history of this case there is, unfortunately, no guarantee that if a further adjournment were to be granted the Claimant would in fact attend on the next occasion. Without such a guarantee of her participation in the very near future it appears that it may well be that it is no longer possible to conduct a fair hearing in this case – that is a hearing which is fair to all sides. There has already been substantial delay. It is not in the interests of justice that the Respondent, who is ready to go ahead, should have to wait any longer for a conclusion. As the Claimant has expressly said that she is content to have the case determined now in her absence and has already been notified that that is

the Judges' expectation of how matters should proceed, that is what we have decided should happen. The Respondent is of course ready and able to proceed and give evidence

13. It is therefore not proportionate simply to dismiss the claim without hearing any evidence. Although no medical evidence has been produced we are quite satisfied that the Claimant having spent a day in hospital on Monday 27th January 2020, is indeed too unwell to attend a hearing at this time. Had the Claimant not expressly consented to it going ahead in her absence the appropriate course would have been to postpone the case out of the list to consider further whether a fair hearing could now be conducted, and if not strike out at that point.
14. We have therefore heard the case, taking into consideration the agreed bundle of documents, the Claimant's witness statement and enclosures and the evidence of the Respondent's two witnesses, Adam Thompson and Hayley Norris, both in their statements and in answers to questions from the tribunal.

The Issues

15. The issues in this case were clarified at the last preliminary hearing on 20th February 2019 (also before Employment Judge Lancaster). A copy of the relevant parts of that Order are now attached as an endnote to this decision[i].

The Facts

16. The Claimant was employed by the Respondent as a care worker in a residential home from 22nd February 2002 until her dismissal, with one week's pay in lieu of notice on 11th August 2017.
17. The Claimant suffers from a recognised mental disorder, depression with psychotic symptoms, graded at F32.2 under the ICD-10 classification system. She is disabled within the meaning of the Equality Act.
18. There is, however, very limited medical evidence in the case; apart from appointment letters and GP's sick notes it is contained only in a series of review letters from the treating psychiatrist dated February, April July and November 2017. There is no evidence in any of those reviews as to what had in fact triggered the Claimant's psychosis. For the purposes of this hearing we do not have to make any decision on that question, and on the available evidence we would be wholly unable to do so.
19. The Claimant was off sick from 30th October 2016 when she reported an incident at work where she complained of having received unpleasant insect bites whilst tidying a resident's room. She believes that that incident combined with the Respondent's alleged refusal to believe her is what triggered her illness.
20. The Claimant reported the incident to her manager by messages on social media, including photographs of the resident's room apparently showing the bugs, and also her own injuries. It is clear, however, that the Claimant's colleagues on that night shift questioned whether she was imagining it. It is certainly a symptom of her subsequent psychosis that the Claimant unfortunately imagined seeing flies or maggots and became obsessed with cleaning herself and her surroundings. We accept Mr Thomson's evidence that no other member of staff corroborated the Claimant's account and that the room was not in fact, as she asserts, fumigated. We do not, however, have to decide what actually happened on that night.
21. What is significant for our decision is that the Claimant did not, at any time before the ET1 in this case, make any allegation that the Respondent had somehow caused or contributed to her psychosis. Her evidence is in fact only that her line manager stated (though she has not produced any text of this message or of any surrounding messages to put it in context) "although it doesn't look good my honest opinion is that you should

check with another doctor". From this single comment the Claimant concludes, however, that the Respondent did not believe her and attributes her psychosis to that alleged expression of disbelief. It seems to us highly implausible that any such comment was intended to be anything other than supportive of the Claimant in seeking appropriate medical help during her sickness absence. Nor, until the ET1 did the Claimant make any complaint about anything said by her co-workers at the time of the incident on 30th October.

22. After what was presumably an initial period of self-certification the Claimant produced a series of doctor's notes declaring her unfit for work for the entire period between 4th November 2016 and 12th September 2017. These stated that the reason for absence was "stress related" or a "stress related problem". The Claimant did not show her psychiatrist's letters to the Respondent until they were disclosed in the course of these proceedings.
23. The Respondent did not invite the Claimant to a welfare meeting to discuss her absence until a letter was sent by the then home manager, Miss Norris, on 26th May 2017. That was very shortly after the Claimant's entitlement to statutory sick pay had expired.
24. Whatever informal phone conversations or other communications there may have been from the Claimant's line manager before that time (and there was certainly an exchange of supportive messages on 6th November 2016) this delay is a breach of its Absence Management Policy which the Respondent is unable, properly to explain. The policy provides that "hitting trigger points *will* result in you being called to a welfare meeting to discuss your absence and well-being and to determine is disciplinary action should be considered (emphasis added)." One of the trigger points is when it will be known that the absence will be longer than four weeks. That trigger point was reached when the Claimant provided her second sick note dated 16th November 2016 which covered her continuing absence up to 31st November. Similarly, the policy states that the Respondent "*will* treat as "long-term" any period of absence due to serious or significant illness which extends for 20 days or longer, and that "it *will…*discuss with you obtaining a medical report from your GP or consultant as appropriate", and that where the matter is being treated as one of capability or conduct "Riccall Care *will* ….investigate the absence through "Return to Work Interviews" and the obtaining of medical reports*"* (emphases added).
25. Nor did the Respondent ever seek to arrange a home visit or a referral for medical examination, both of which it was entitled to request under the policy.
26. The first letter of invitation to a welfare meeting, from Miss Norris and dated 26th May 2017, does record that when "discussing any support and assistance we may be able to offer" the Respondent may require the Claimant to consent to contact with her GP or to attend an independent medical examiner. It does not say that there will be any consequence of not attending the meeting, nor that there was any threat to the Claimant's employment by reason of her continuing absence.
27. The Claimant failed to attend the scheduled welfare meeting on 9th June 2017 and there is no explanation as to why she did not.
28. A further letter was sent on 12th June, again from Miss Norris, In this letter it is expressly stated that:

    "Your continued absence is impacting on our ability to operate effectively and provide the services required by our clients. As a result your absence may be placing your employment with Riccall Care at risk.", and

    "Please be aware, should you fail to attend for the meeting as indicated above, then we will make decisions with regard to you continued employment with Riccall Care on the basis of the information we have in our possession. This may include your dismissal with notice, from your employment with Riccall Care.

29. The Claimant again did not attend the meeting scheduled for 21st June 2017, which would had it gone ahead have been conducted by the HR consultant alone because Miss Norris was on holiday at that time.
30. On the morning of the day of the meeting the Claimant did, however, email Mike Richards a director of the Respondent to ask him to inform Miss Norris that would not be able to make the meeting because she did not feel strong enough. She also divulged for the first time that "*I had a nervous breakdown and due to that I also suffer with psychosis however we are lot better than I was 6 months ago got my very own shrink."* The email also says *"right now the thought of Riccall terrifies me as all it brings to memory is the bugs in Richard's flat the night I ended up working my last one. I'm hoping it's not going to be much longer before I can start back again even just in little bits but I will keep you informed."* Miss Norris was made aware of this email after her return from holiday.
31. Two further welfare meetings were diarised, firstly for 13th July and again for 28th July 2017. The Respondent now accepts, however, that the invitation letters to those meetings were not in fact sent by the HR consultant so that the Claimant would have had no knowledge of them.
32. Mistakenly believing that the Claimant had failed to attend on a further two occasions without any explanation Miss Norris sent a final invitation letter dated 28th July 2017. That letter has a personalised introduction hoping that the Claimant is well but otherwise it adopts the same formal template as the letter of 12th June (and no doubt also the missing letters that were supposed to have gone out for the meetings on 11th and 28th July). The extracts from the earlier letter which are quoted above at paragraph 28 are repeated verbatim.
33. The Claimant again did not attend on 11th August 2017. Once more on the morning of that same day she emailed Mr Richards and said "*Please could you let Hayley know I can't make the meeting and that it will be another month or two before I'm able to attend a meeting with her."*
34. The Claimant was then dismissed by letter from Miss Norris dated 11th August 2017. The effect of the Claimant's continued absence from 31st October 2016 in the context of the failure to attend meetings to discuss that absence was given as the reason for dismissal. The Claimant did not appeal that decision.
35. The dismissal was stated to take effect as from 11th August 2017 and the Claimant received one week's pay in lieu of notice.
36. Since the termination of employment the Claimant has, sadly, remained unfit for any work. There is, however, no medical evidence to suggest that but for her dismissal she would in fact have recovered sufficiently to return at any time. The psychiatrist's review letter of 5th July 2017, approximately one month before dismissal, gives no indication of any possible improvement that would have allowed the Claimant to return to work within a reasonable timescale. The letter of 20th November 2017 does not suggest that the continued absence of any positive prognosis is in any way attributable to the fact of dismissal. On the contrary the principal change since the previous review is expressly linked to the change of medication which had been first prescribed in July.

Conclusions:

Unfair Dismissal

37. We are satisfied that the Respondent has shown that the reason for dismissal was related to capability. That is a potentially fair reason. The Claimant had been absent for nearly ten months and there was no indication that she would, in fact, be able return to work within the foreseeable future. All the Claimant had said was that she would not meet to discuss her absence at a welfare meting for at least another month and quite probably even longer. There was however, no medical evidence to suggest that the

Claimant was unfit even to attend such a meeting, only her own assertion that she would not yet do so. The Claimant did manage to attend periodic reviews with her psychiatrist.

38. Even where the employer has contributed to the reason for the illness (of which there is no clear evidence in this case that it in fact had) that does not mean that it cannot dismiss in the event of subsequent long-term incapability.
39. Where an employee is dismissed on this ground it would ordinarily be reasonable, however, for the employer to consult with the employee and take steps to discover the true medical position: see for instance East Lindsay District Council v Daubney [1977] ICR 566.
40. In this case the Respondent had never in fact managed to consult with the Claimant and had not therefore discussed the obtaining of any medical evidence. The decision to dismiss was accordingly taken without any medical report whatsoever. It is outside the range of reasonable responses for an employer in those circumstances not to have taken further steps to seek to obtain up-to date information. That is particularly so where the Respondent's own policy dictates that medical reports are to be obtained. Even though the Claimant had failed to cooperate with the investigation by not attending any welfare meetings she had not ever expressly stated that she would not be able to return to work, so as to absolve the Respondent from the obligation to explore the medical position further.
41. This dismissal is therefore, we find, procedurally unfair.
42. However, we also find that it would have made no difference had a fair procedure been followed. There should therefore be no compensation for continuing loss of earnings. Any report that might have been obtained in advance of the dismissal would not, we are satisfied, have provided any reassurance that the Claimant could in fact have returned to work within a reasonable time, even if that is eventually what she would have hoped to do. It would not, as it would have transpired, have been reasonable for the employer to be expected to wait any longer for the Claimant's return. In any event we are quite satisfied that the Claimant would have remained wholly unfit for work, as has been the case, and that she would have certainly been liable to have been dismissed as a result of her continuing absence.
43. Because of her failure to participate in the investigative process through welfare meetings, or to provide -in the absence of her having volunteered any medical evidence - sufficient explanation for not doing so, we consider that it would be just and equitable to reduce the basic award for unfair dismissal by 25 per cent under section 122 (1) of the Employment Rights Act 1996. The Claimant had been explicitly warned of the possible consequences of not attending meetings and of the risk to her employment as a result of her continued absence. The failure to attend, notwithstanding those warnings, was a significant factor in the decision to end her employment and even making all proper allowance for the nature of her illness, it can properly be regarded as conduct before the dismissal such that it would be just and equitable to reduce the amount of the basic award.

Direct Discrimination

44. The dismissal was not because of the Claimant having told Mr Richards on 21st June 2017 that she was suffering from a psychosis. There is no immediate proximity in time. Between 21st June and 11th August the absence review process continued and so far as Miss Norris was concerned the Claimant had failed to attend a further three meetings before she was dismissed.

Disability-Related Discrimination

45. The dismissal for disability-related sickness absence was, we are satisfied, justified. It was a proportionate means of achieving a legitimate aim, namely the securing of adequate staffing to meet the Respondents obligations under its contract with York City Council/Housing association and to ensure appropriate continuity of care for the residents of the home. The substantive decision to dismiss in order to achieve that aim is still proportionate notwithstanding that it was procedurally unfair.
46. In this context we accept the evidence of Mr Thompson. That is that the Respondent had difficulty recruiting staff, and particularly temporary staff. Although the Claimant's duties had been reallocated to other employees taking on more work, or by temporary secondment from other areas of the business, or by the use of bank staff, all of these arrangements left the Respondent vulnerable to an inability to plan for consistent care. After the Claimnt was dismissed the Respondent advertised for and appointed a permanent night shift worker to provide guaranteed cover.

Remedy

47. The Claimant's weekly pay is calculated by reference to the three pay periods for August, September and October 2016. These are the last full months where the Claimant worked normally. The earlier pay reference period of July is artificially low by reason of the Claimant only receiving statutory sick pay for a proportion of that month. The later pay reference period of November runs to the 9th November and is therefore artificially deflated by reason of the fact that the Claimant went off on 31st October. Within that relevant 13 week period from 10th July to 9th October 2016 the Claimant's gross pay was £2916.94. That is £224.38 per week.
48. The basic award is calculated on the basis of 15 years' continuous employment. For the last two years the Claimant was not below the age of 41. So, she is entitled to 1 ½ weeks' pay for those years and not simply 1 week's pay. That is 16 weeks' pay at £224.38 which is a total of £3590.98. Reduced by 25 per cent that leaves £2692.56.
49. Although there is no compensation for future losses of earnings the Claimant was not paid her proper notice pay. That is a loss flowing from the dismissal. She was entitled under her contract and by statute to 12 week's notice. That is at her full rate of pay notwithstanding that she was receiving no sick pay at the time (section 88 Employment Rights Act 1996). She is entitled to the balance of the 11 weeks notice pay that she ought to have been paid in any event, without any reduction. That is the gross sum of £2468.18.

Costs

50. At the postponed hearing on 20th May 2019 Employment H Judge Keevash referred to the wasted costs of that day being reserved. The Respondent has not, however, until now made any actual application for its costs from that occasion. A figure of £2000 is now mentioned but not explained in any schedule. It would be wholly wrong to entertain that application (if it is persisted with) without a proper application in writing to which the Claimant may respond.

EMPLOYMENT JU DGE LANCASTER

DATE 30th January 2020

[i] 4. **Unfair dismissal claim**

4.1. What was the reason for the dismissal? The Respondent asserts that it was a reason related to capability, which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must show that this was the reason (or principal reason) for dismissal.

4.2. The Claimant had admittedly been absent sick continuously for some 10 months and not attended sickness absence meetings (though on the other hand the Claimant says that she was not telephoned to enquire about her well-being) and the Respondent also asserts that on the available information there was no foreseeable prospect of her returning to work within a reasonable time. Did the Respondent act fairly in treating this as sufficient reason to dismiss the Claimant? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

4.2.1. She would in fact have been fit at that time to return (at least part-time) within two months (though in the event the Claimant has now been signed off unfit to work continuously from November 2016 to date

4.2.2. The Respondent did not have sufficient medical evidence.

4.2.3. The dismissal was premature

5. **Section 13: Direct discrimination because of disability**

5.1 Has the Respondent subjected the Claimant to treatment falling within section 39 Equality Act, namely dismissing her.

5.2 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies hypothetical comparators who did not suffer from a psychosis. She says that the "reason why" she was dismissed was because the Respondent was made aware that she suffered from this mental illness.

5.3 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? This will essentially be a question of establishing the relevant chronology of events. When did the Respondent become aware that the Claimant had a psychotic illness? How proximate in time was the subsequent dismissal?

5.4 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

6 **Section 15: Discrimination arising from disability**

6.1 The allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act is the dismissal. No comparator is needed.

6.2 Did the Respondent dismiss the Claimant because of the "something arising" in consequence of the disability, that is her sickness absence?

6.3 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?