Case No: 2300163/2019
& 2300125/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Shah**

Respondent: **Lewisham & Greenwich NHS Trust**

Heard on: **12th, 13th, 14th, 15th and 16th October 2020 by CVP**

Before: **Employment Judge Pritchard**
Lay members: **Ms N Christofi**
Mr M Cann

Representation
Claimant: In person
Respondent: Mr S Sudra, counsel

REASONS

1. These written reasons for the Tribunal's judgment dated 16 October 2020 are provided at the Claimant's request.

2. The Claimant claims unfair dismissal, disability discrimination and harassment. The Respondent resists the claims. The Claimant is no longer pursuing a claim for notice pay.

3. The Tribunal heard evidence from the Claimant and from the Respondent's witnesses as follows: Helena Segrue (Manager of ward 4/cardiology ward); Sue Brassington (Matron for Acute Medicine at relevant times); Narmathaa Ravichandran (Clinical Coding Manager and Health Social Care Information Centre Auditor); Anne-Marie Coiley (Interim Head of Nursing for Medicine at QEH at relevant times); and Phil Briggs (Head of Nursing at relevant times).

4. The Tribunal was referred to various documents within the hearing bundle. The Claimant put forward further documents for consideration at the commencement of the hearing.

5. At the conclusion of the hearing the parties made oral submissions, Mr Sudra amplifying his written submissions.

Issues

6. The issues had been discussed at a preliminary hearing held on 16 August 2019 and set out in a case management order. Following discussion with the

parties at the commencement of the hearing, and upon further clarification by the parties during the hearing, the issues can be re-stated as follows:

Unfair dismissal

6.1. What was the reason for dismissal? The Respondent asserts that it was for a reason relating to capability which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.

6.2. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

6.3. Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure in the following respects:

6.3.1. The Respondent did not follow its own policy (Section 5.5.2) and did not conduct a final occupational health report;

6.3.2. The Respondent did not give sufficient consideration to alternative employment;

6.3.3. The Respondent did not explore any adjustments to the role; and

6.3.4. The dismissal was generally not reasonable in the circumstances.

6.4. If it did not use a fair procedure, would the Claimant had been fairly dismissed in any event and/or to what extent and when (Polkey)?

6.5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

Harassment

6.6. Did the Respondent engage in unwanted conduct on the 16th May 2018? In particular, did Sue Brassington tell the Claimant:

6.6.1. She could not accommodate the flexible hours the Claimant was given as part of her phased return to work;

6.6.2. It was not fair that the NHS was paying the Claimant full salary as a staff nurse when she was not performing that role;

6.6.3. She would need to find another job or have her employment terminated on the ground of incapability for work?

6.7. The Claimant alleges that she was thereby subjected to a hostile work environment due to the phased return and after the redeployment process (see below).

6.8. If so, was the conduct related to the Claimant's disability?

6.9. If so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Discrimination arising from disability

6.10. The Respondent admits that it treated the Claimant as follows because of her sickness absence and/or assumption that she could not return to work which was something arising in consequence of her disability:

6.10.1. Dismissed her;

6.10.2. Subjected her to the ill health capability procedure; and

6.10.3. Rejected her for the vacancy she applied for.

6.11. The Respondent concedes that by dismissing the Claimant and rejecting her for the vacancy she was thereby treated unfavourably. The Respondent does not admit that subjecting the Claimant to the ill health capability procedure was unfavourable treatment.

6.12. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? It relies upon the following:

6.12.1. The legitimate aim of the Respondent delivering the service it is obliged to provide; and

6.12.2. As to proportionality, the means of managing employees who are unable to perform as required in the role.

6.13. The list of issues set out in the case management order also included the following allegations of unfavourable treatment:

6.13.1. A hostile work environment due to the phased return; and

6.13.2. A hostile work environment after the redeployment process.

6.14. The Claimant explained that these allegations were the same allegations of harassment shown above and agreed that they should therefore be considered under that head of claim.

Reasonable adjustments

6.15. The Respondent concedes that in respect of the coding analyst role it applied provision, criteria and/or practice of requiring the job holder to spend long periods of time sitting at a desk and carrying out physical tasks.

6.16. Did the application of the provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled?

6.17. If so, did the Respondent take such steps as were reasonable to avoid the disadvantage? The Claimant maintains that it would have been reasonable for the Respondent to have allowed the job to be undertaken part time and/or for more time to be allowed for training and/or making adaptions to the role such as desk adaptions and a training chair.

Time limitation issues

6.18. The Claimant concedes that her claims of harassment and failure to make reasonable adjustments were presented outside the primary statutory time limit.

6.19. Can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period?

6.20. Was any complaint presented within such other period as the Tribunal considers just and equitable?

7. At the outset of the hearing the Tribunal informed the parties that it would consider liability only at this stage, together with any issues relating to Polkey and contribution. If the Claimant were to succeed in all or any of her claims, a further hearing would take place to determine remedy.

Findings of fact

8. The Claimant commenced employment with the Respondent on 3 September 2001. At relevant times she held the position of a Band 5 Staff Nurse within the cardiology unit at the Respondent's Queen Elizabeth Hospital in Woolwich ("QEH"). The Claimant usually worked shifts of 11 hour duration from 7:00 a.m. to 7:30 p.m. three days each week. The evidence before the Tribunal made it clear that the Claimant was respected by her colleagues and highly valued by the Respondent as a trained cardiac nurse.

9. In her role as a cardiac nurse, the Claimant was required to provide a high level of care. She might have to take prompt action in emergency situations requiring a certain level of physical ability, not least to administer CPR from time to time.

10. The Claimant is a disabled person within the meaning of the Equality Act 2010. She suffers from a musculoskeletal condition affecting her lower back and neck.

11. The Respondent's sickness absence policy which was applicable to the Claimant's employment defines long term sickness absence as an absence of four weeks or more. The policy makes provision for sickness absence review meetings ("SAR") and for referrals to be made to occupational health. Paragraph 5.5.2 of the policy provides:

Final Long Term Sickness Review Meeting

If an employee's overall attendance record is not satisfactory or a return to work within a reasonable time scale cannot be established, a hearing will be chaired by an appropriate designated officer with authority to dismiss. All action taken to manage attendance should be collated and presented at a final Long Term Review Meeting. A medical report will be obtained from the Occupational Health Department before the hearing and this will also be discussed.

…

Before deciding on the appropriate course of action the designated officer will discuss with the employee and take into account:

- *The long term prognosis, expected length of sickness absence (likely return to work date)*
- *The wishes of the employee*
- *The opinion of Occupational Health on the fitness of the employee to undertake the work for which he/she is employed; Including consideration of ill-health retirement if appropriate*
- *The needs of the service in terms of the capacity in which the individual is employed, the particular requirements of the department and the impact the absence is having on other members of the department*
- *The length of service, previous health record and attendance record*

Before a decision to terminate contract is made all other options should meaningfully be considered, including:

- *a successful ill health retirement application*
- *rehabilitation phased return*
- *a return to work with or without adjustments*
- *redeployment with or without adjustments*

12. Paragraph 5.8 of the policy provides:

Ill Health Retirement

Ill health retirement is defined as: "early termination of an individual's employment as a result of ill health, giving the individual access to pension benefits before their normal retirement age, as defined by their NHS Pension Scheme membership"

Ill health retirement can only occur when the following criteria have been met:

- *The employee is a member of the NHS Pension Scheme (for at least 2 years)*
- *The Occupational Health have recommended ill health retirement. i.e. confirmed that an employee is no longer fit to carry out the duties for which they were employed and is unable to undertake adjustments to job or alternative employment*
- *The employee agrees to apply for ill health retirement*

- *The NHS Pension Scheme has passed the application as successful*

The Trust will make every effort to support an employee's application for ill health retirement but this will not preclude the Trust from taking other appropriate action such as termination on the grounds of incapability due to ill health, should there be any delay in receiving a response from the Pensions Agency or if the application is not approved.

13. Insofar as relevant to these proceedings, the Claimant commenced sick leave on 6 March 2017. The Respondent referred the Claimant to occupational health who reported on the 21 March 2017 that the Claimant was taking medication for pain relief and now had limited activities due to her health condition. The Claimant was said to be fit for work provided she took care with pulling and lifting. If the Claimant's condition did not improve, it was recommended that she work shorter days or be redeployed to a ward that could accommodate her needs.

14. Although the Claimant had expressed a wish to return to work on the 27 March 2017, in the event she did not do so because her condition was worsening. The Claimant attended an SAR meeting with her line manager Helena Segrue on 24 April 2017. The Claimant explained that she was currently struggling with standing and with everyday activities. The Claimant had been prescribed Amitriptyline, Co-codamol and Ibuprofen and, more recently, the stronger anti-inflammatory Naproxen. She was also having physiotherapy, acupuncture, massage and she was following an exercise programme. She expressed concern that she might not be able to provide safe care to patients.

15. The Claimant attended a further occupational health consultation on 4 May 2017. Occupational health reported that the Claimant was under the care of her GP and was taking regular pain-relieving medication, her symptoms increasing with daily activities. She was able to walk for only 15 minutes and stand for 15 minutes. In the view of the occupational health advisor, the Claimant was unfit for any work duties due to her significant pain. A return to work date could not be predicted. If her symptoms were to improve over the next four to six weeks then it was recommended that the Claimant be allowed a phased returned to work, initially working 50% of contractual hours increasing gradually over a four week period. It was thought that on completion of a phased return to work the Claimant would be capable of resuming her full contracted hours. Occupational health did not recommend redeployment at this point or that the Claimant should be supported in an ill health retirement application.

16. A further SAR meeting took place on 8 June 2017. The Claimant explained that she was still experiencing numbness in her right arm and would be consulting her GP with a view to increasing her pain relief medication; this medication caused tiredness.

17. Unfortunately, despite the Claimant's wish to do so, she remained unable to return to work. She was again referred to occupational health who reported on 18 July 2017 that the Claimant was currently experiencing significant pain to her neck and back which disturbed her sleep with occasional numbness to her hands. She was taking regular pain-relieving medication and her symptoms

increased with daily activities. Occupational health advised that the Claimant was fit for limited work duties due to her significant pain. She should bend, squat, pull and push gently. It was hoped that she would be able to return to work on 7 August 2017. A phased return to work was again recommended to commence with approximately 50% of contractual hours increasing gradually over a four week period. It was thought that the Claimant would be able to return to her full contracted hours upon completion all the phased return to work plan.

18. The Claimant returned to work on 14 August 2017 on the phased basis recommended by occupational health. However, at the Claimant was unable to resume her full contracted hours by the end of the fourth week. She found early morning shifts difficult and was unable to start work until 9:00 a.m. Her phased return was interspersed with annual leave and on occasions she left work early because she was in significant pain or feeling tired. Nevertheless, the Claimant managed to increase her hours such that she could work from 9.00 a.m. to 5.00 p.m.

19. Although back at work, the Claimant did not carry out the clinical elements of her staff nurse role. Instead, she mainly carried out clerical and administrative tasks such as completing audits, referrals, friends and family questionnaires and assessments. Nevertheless, she occasionally carried out light duties such as assisting with making beds - but she was otherwise unable to carry out the essential manual handling elements of her role.

20. The Respondent again referred the Claimant to occupational health who reported on 3 October 2017 that the Claimant was fit for only limited / adjusted work duties due to her significant pain. Although the Claimant's condition was generally controlled with medication, the condition was ongoing. There was a potential for her to experience problems in the future with likelihood of her condition flaring up from time to time. Occupational health was unable to predict the frequency severity and duration of these flare ups and any associated sickness absence. Occupational health advised that the Claimant remained unable to work her full shift but would be able to work 7 1/2 hours. It was advised that the Claimant should be allocated to a role with more clerical duties rather than clinical so that she could manage her symptoms more effectively. It was reported that the Claimant was not considering ill health retirement but was interested in exploring the possibility of redeployment.

21. The Respondent held a further SAR meeting with the Claimant on 26 October 2017. Among other things discussed at this meeting, it was agreed that seeking redeployment on health grounds was the most sensible way to try and support the Claimant as had been recommended by occupational health.

22. In November 2017 the Claimant completed an expression of interest form for a Cardiac Arrhythmia Nurse vacancy. She was unsuccessful in her application. The Claimant, who did not feel confident that she could fulfil the role, told the Tribunal that she was not critical of the Respondent in this regard.

23. Ms Segrue held a further SAR meeting with the Claimant on 7 December 2017. The Claimant was provided with an up to date list of vacancies and job descriptions were subsequently forwarded to her as she had requested.

24. The Claimant attended a further SAR meeting on 9 January 2018. The Claimant was still working reduced hours: 9.00 a.m. to 5.00 p.m. She explained that because her medical team had identified her health issues as neurological, surgery had not been offered. It was noted that the Claimant had been informed of over 30 vacancies but that she had not been successful in securing alternative employment. In particular, it was noted that the Claimant had expressed an interest in a vacancy within the outpatients Department but after an informal a visit she decided that it would not be suitable because it involved a lot of standing. It was explained to the Claimant that the search for redeployment could not continue indefinitely nor could the amended roster pattern be supported indefinitely, not least, as the Claimant herself recognised, because it was not supporting her longer term health. The Respondent decided therefore to refer the Claimant to occupational health and asked for further reconsideration as to whether she would be supported in an ill health retirement application and whether any further adjustments or redeployment should be considered.

25. Occupational health reported on 20 February 2018 that the Claimant continued to experience neck and back pain which disturbed her sleep and increased with activity, as well as numbness and weakness in her hands. She remained on medication. Occupational health recommended that the Claimant was fit for adjusted work duties: no more than 6 to 7.5 hours per day; flexible working hours and a reduction in hours i.e. less than 30 hours per week; refrain from activities involving fine finger movements/phlebotomy; refrain from tasks requiring high levels of concentration such as medication rounds because the Claimant felt a lack of concentration due to current medications. It was recommended that redeployment to a non-clinical role on a permanent basis would be suitable. It was not considered that the Claimant would be considered for ill health retirement because she was fit for some work.

26. Following the Claimant having expressed an interest, on 21 February 2018 she was interviewed for the role of Trainee Coding Analyst. During the interview the Claimant explained that she was unable to work a full day and was unable to work full time. She also stated that she could not sit down at the desk for any long period of time or walk any significant distance. Although the Respondent offered the Claimant the opportunity to try the job on a trial basis, she did not accept the offer.

27. The Respondent had regard to the NHS Digital National Clinical Coding Training Handbook which sets out prescribed rules and timeframes for completing the Clinical Coding Standards Course ("CCSC") and concluded that the Trainee Coding Analyst post could not be done on a part-time basis. The Respondent did not offer the job of trainee coding analyst to the Claimant.

28. On 21 March 2018 the Claimant again went on sickness absence. The Respondent continued to inform the Claimant of vacancies.

29. On16 May 2018 the Claimant went to see Sue Brassington at QEH to submit her fit note.

30. The GP's fit note recorded that the Claimant had intervertebral disc disorders and was undergoing physiotherapy. It noted that the Claimant's back pain and leg had improved and that she would like to return to work on 16 May 2018.

The Tribunal's finding as to what was said at this meeting is set out in its conclusion below.

31. The Respondent again referred the Claimant to occupational health who reported on 31 May 2018 that she had ongoing musculoskeletal problems affecting her back and neck. Although she was doing non-clinical work, she had gone off sick again because this too was causing her pain. She had reduced concentration and dizzy spells associated with medication. She had difficulty in doing daily activities such as washing, dressing and cooking because of the pain. She was able to sit for just 20 minutes and walk for 25 minutes before she started to experience pain. A mental health assessment showed low mood. The Claimant was not fit for work. Occupational health now reported that it was most likely that the Claimant would be considered for ill health retirement. Occupational health discussed the content of the report with the Claimant and sought further information from her GP.

32. On 30 July 2018 Mrs Coiley invited the claimant to attend a final long term sickness review meeting in accordance with the Respondent's policy. It was proposed that the meeting would take place on 10 August 2018. The statement of management case was enclosed with the letter. The Claimant told the Tribunal that she had not received the occupational health report of 31 May 2018 but she confirmed that she had received it in advance of the meeting which took place, after her union representative had asked for it to be rescheduled for 31 August 2018.

33. Having been prompted by her union representative to do so, the Claimant completed her application for ill-health retirement pension ("IHR") on 18 August 2018. Instead of sending her application to the pensions officer, the Claimant sent the form to the Respondent's HR Department. The HR officer informed the Claimant where to send her application.

34. The Tribunal accepts that it is an employee's obligation to make the application for IHR. The Tribunal also accepts that consideration of IHR is not a matter for the Respondent.

35. The final review meeting took place on 31 August 2018. For a variety of reasons there was no one present at the meeting to present the management case but neither the Claimant nor her representative objected. The management statement of case was read out at the meeting. Mrs Coiley noted that the Claimant appeared to be in poor physical health: she was in visible discomfort, walked incredibly slowly and found it difficult to sit. During the hearing the lengthy redeployment process was discussed. Between 10 November 2017 and 24 April 2018, the Claimant had been notified of over 94 vacancies.

36. The Claimant's state of health was discussed. The Claimant confirmed that she was unfit to return to work and made it clear that she wished to pursue IHR. Following an adjournment Mrs Coiley informed the Claimant of her decision that the Claimant should be dismissed, with notice, on grounds of ill health. Due to miscommunication between Mrs Coiley and the HR Department, the written outcome confirming the decision was not sent to the Claimant until 29 October 2018.

37. Upon receipt of the written confirmation, the Claimant appealed against her dismissal by letter dated 5 November 2018. The Claimant was invited to attend an appeal meeting on 26 March 2019.

38. The Claimant contacted ACAS by way of early conciliation notification on 14 November 2018. ACAS issued an early conciliation certificate on 14 December 2018. The Claimant presented her claim to the Tribunal on 11 January 2019.

39. At the appeal meeting, chaired by Phil Briggs, Mrs Coiley presented the management case in response to the Claimant's grounds for appeal. By letter dated 25 April 2019, Mr Briggs provided the Claimant with his decision. Mr Briggs concluded that the overall process had been fair. He did not uphold the Claimant's appeal. He recognised that the Claimant could have been provided with more support in respect of her wishes to be granted IHR and also noted that corrections had been made to her last day of service such that there would be no detrimental impact on any benefits she would receive should she be successful in her IHR application.

Relevant law

Time limits

40. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of:

    (a) the period of 3 months starting with the date of the act to which the complaint relates, or

    (b) such other period as the Tribunal thinks just and equitable.

41. Under section 123(3)

    (a) conduct extending over a period is to be treated as done at the end of the period;

    (b) failure to do something is to be treated as occurring when the person in question decided on it.

42. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:

    (a) when P does an act inconsistent with doing it; or

    (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

43. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether

the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA. At a preliminary hearing when a Claimant, otherwise out of time, seeks to show an act extending over period, she must show a prima facie case; see Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548 CA.

44. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.

45. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA. It was said in Aberawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 CA that factors which are almost always relevant are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing it or inhibiting it from investigating the claim while matters were fresh).

46. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

47. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

48. In Apelogun-Gabriels v Lambeth London Borough Council [2001] EWCA Civ 1853 it was said that that the fact that a Claimant deferred commencing proceedings in the Tribunal while awaiting the outcome of internal proceedings is only one factor to be taken into account when considering an application to extend time.

49. In disability cases, the disability itself might be a relevant factor. See for example: Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA.

Harassment

50. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:

    (a) A engages in unwanted conduct related to a protected characteristic (race in this case); and

    (b) the conduct has the purpose or effect of:

    (i) violating B's dignity, or

    (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

51. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

    (a) the perception of B;

    (b) the other circumstances of the case;

    (c) whether it is reasonable for the conduct to have that effect.

52. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.

53. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?

54. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 held that alleged discriminatory words must be considered in context. The Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

Reasonable adjustments

55. Sections 20, 21 and 39(5) read with Schedule 8 of the Equality Act 2010 provide, amongst other things, that when an employer applies a provision, criterion or practice ("PCP") which puts a disabled employee at a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

56. In the case of the Environment Agency v Rowan [2008] IRLR 20, the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:

    (a) the provision, criterion or practice applied by the employer;

    (b) the identity of non-disabled comparators where appropriate; and

    (c) the nature and extent of the substantial disadvantage suffered by the Claimant.

Discrimination arising from disability

57. Section 39 of the Equality Act 2010 provides, among other things, that an employer must not discriminate against an employee by dismissing the employee or subjecting her to any other detriment.

58. Section 15 provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

The burden of proof

59. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

Unfair dismissal

60. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held. In this case the reason relied upon by the Respondent is capability which is a reason falling within subsection (2). That is defined as including ill health.

61. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider 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 that question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)).

62. In S v Dundee City Council [2014] IRLR 131 the Court of Session stated that in a case where an employee has been absent from work for some time owing to sickness, the following issues would need to be specifically addressed:

    62.1. Whether the employer could be expected to wait any longer and, if so, for how much longer. This is the critical question to be decided in dismissals of grounds of ill-health. Relevant factors could include whether the employee has exhausted his sick pay, whether the

employer was able to call on temporary staff, and the size of the organisation.

62.2. Whether the employee had been consulted with, whether his views had been taken into account, and whether such views had been properly balanced against the medical professional's opinion.

62.3. Whether reasonable steps had been taken to discover the employee's medical condition and likely prognosis. It would not be necessary for the employer to pursue a detailed medical examination as the decision to dismiss is not a medical question but a question to be answered in the light of the available medical evidence.

63. The Court also pointed out that length of service is not automatically relevant. The important question is whether the length of service, and the manner in which service was rendered during that period, yields inferences that indicate that the employee is likely to return to work as soon as he can.

64. It is clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they, the Tribunal, consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances.

65. The Polkey principle established by the House of Lords is that if a dismissal is found to have been unfair then the fact that the employer would or might have dismissed the employee anyway had the employer acted fairly goes to the question of remedy and compensation reduced to reflect that fact.

Conclusion

66. The Claimant contacted ACAS by way of early conciliation notification on 14 November 2018. ACAS Issued an early conciliation certificate on 14 December 2018. The Claimant presented her claim to the Tribunal on 11 January 2019. Having regard to the time limits set out in section 123 of the Equality Act 2010, it follows that any act or omission taking place before 15 August 2018 falls outside the primary three-month time limit.

Harassment

67. The Claimant accepts that she presented her harassment claim outside the primary time limit. The allegations of harassment related to disability are

discrete in the sense that they were isolated acts. There is no direct link between the allegations and the later alleged disability discrimination. In particular, the allegations are made against Sue Brassington who had left the Respondent's employment by the time the Claimant was dismissed. The Tribunal concludes that the allegations of harassment cannot be considered as conduct extending over a period and time is thereby not extended.

68. The Tribunal next considered whether it would be just and equitable for time to be extended in relation to the allegations of harassment. Although the Claimant knew on 16 May 2018 what had been said to her and had the benefit of advice from her union representative, her evidence in cross examination was that she made a conscious decision not to make a complaint because she did not wish to cause herself additional stress. The claim was presented three months outside the time limit; given the short limitation periods in employment claims, three months is a significant delay. Although the Respondent has suffered no forensic prejudice in that Sue Brassington has been available to give evidence, if the claim were to be permitted to proceed, the Respondent would nevertheless suffer the prejudice of losing a limitation defence. In the Tribunal's view, the balance of prejudice falls in the Respondent's favour. Time is not extended under the just and equitable principle.

69. Even if the Tribunal is wrong in concluding that time should not be extended, having heard the evidence the Tribunal would not in any event uphold the Claimant's harassment claim. Sue Brassington was a credible witness and gave a full explanation as to what she told the Claimant on 16 May 2018. The Claimant told the Tribunal that Sue Brassington did not speak to her angrily and the Claimant did not feel the need to make a complaint at the time. While giving evidence, and again in submissions, the Claimant candidly told the Tribunal that she might have misunderstood what Sue Brassington told her. The Tribunal would prefer Sue Brassington's evidence as to what was actually said and that did not amount to harassment as defined under section 26 of the Equality Act 2010. The Claimant was not subjected to a hostile work environment due to the phased return and after the redeployment process.

<u>Reasonable adjustments</u>

70. The Claimant made it clear that her allegation that the Respondent failed to make reasonable adjustments related solely to the role of Trainee Coding Analyst for which she applied.

71. The Claimant presented this claim about five months outside the primary time limit, the Respondent having decided in about February or March 2018 that reasonable adjustments could not be made and that the Claimant should not be considered for the role. The alleged failure was not a continuing act or omission and time is not thereby extended.

72. As to whether time should be extended under the just and equitable principle, the Tribunal has had regard to the Claimant's statement included at pages 67 to 71 of the bundle of documents in which she states she was unable to cope at the time, was emotionally and physically vulnerable and suffering the effects of her medication. This was at a time when occupational health reported that the Claimant could work on restricted duties. The Tribunal accepts that the Claimant was suffering as set out in the occupational health report of 20

February 2018. However, there is no medical evidence to suggest that the Claimant was emotionally and physically vulnerable as she now asserts. Although the Respondent has suffered no forensic prejudice, it would suffer the prejudice of losing a limitation defence if the time limit were to be extended. As with the Tribunal's determination of time limits in respect of the harassment claim, the Tribunal does not exercise its discretion to extend time under the just and equitable principle.

73. Even if the Tribunal's conclusion is wrong with regard to the time limit, having heard the evidence the Tribunal would not in any event find in the Claimant's favour. The Tribunal would reach the following conclusion:

    73.1. The provision, criterion or practice ("PCP") applied by the Respondent was that the role of Trainee Coding Analyst had to be carried out on a full-time basis (this is not the same as the PCP set out in the list of issues);

    73.2. The comparators are those non-disabled employees who could work full-time; and

    73.3. The substantial disadvantage suffered by the Claimant was that she was unable to undertake the role because she could only work part-time.

    73.4. There were no reasonable steps the Respondent could have taken to avoid the disadvantage. The training requirements of the NHS Digital National Clinical Coding Training Handbook are highly prescriptive. The Claimant accepted in evidence that the requirements in the Handbook are inflexible and that the training role could only be undertaken on a full-time basis.

    73.5. For the first time when giving evidence the Claimant said that she could have undertaken the full-time training role and that her claim for reasonable adjustments related to work after her training period when she had qualified as coding analyst. The Tribunal prefers the clear and unequivocal evidence of Mrs Ravichandran that the Claimant made it clear at interview that she could only work part time in the training role. The occupational health report of February 2018 tends to support that finding. If the Claimant was unable to undertake the training role of perhaps 18 to 24 months duration, her claim for reasonable adjustments to be made after she had been trained does not fall for consideration. The Tribunal notes for completeness the evidence of Mrs Ravichandran that adjustments could have been made after training, the problem was that adjustments could not be made in relation to the training itself, a necessary precursor to a qualified role.

<u>Discrimination arising</u>

74. The Respondent argues the Claimant was not treated unfavourably by subjecting her to the ill health capability procedure because all employees who take sick leave, whether or not disabled, are subject to the same procedure. No comparative exercise is required under section 15 of the Equality Act 2010; the word "unfavourable" makes this clear, as does chapter 5 of the Code of Practice on Employment (2011) to which the Tribunal has had regard. In the Tribunal's

view, the application of the ill health capability procedure to the Claimant treated her unfavourably, not least because she was ultimately dismissed by virtue of its application.

75. The Respondent concedes that the Claimant was subjected to the ill health capability procedure, rejected for the vacancy she applied for and dismissed because of something arising in consequence of her disability. The question for the Tribunal is whether the Respondent was justified in subjecting the Claimant to such treatment in the sense that it was a proportionate means of achieving a legitimate aim.

76. The Tribunal is satisfied that the Respondent has shown a legitimate aim, namely its requirement to deliver the service it is obliged to provide and that means ensuring it is properly staffed. The ill health capability procedure is not primarily designed to justify the dismissal of employees. The thrust of its provisions is to provide support for employees throughout their sickness period. Termination of employment is a last resort. The Claimant herself conceded that the policy applied to her. The Tribunal, having regard to the detrimental effect on the Claimant and having carried out a balancing exercise, is satisfied that the Respondent has shown the treatment was a proportionate means of achieving those aims.

77. With regard to the Trainee Coding Analyst role, the Respondent clearly had a legitimate aim in requiring employees in that role to undergo training in accordance with the requirements of the NHS Handbook in order to become competent and attain sufficient expertise. It was proportionate to reject the Claimant for the vacant position given that it would not have been reasonable to make adjustments. As discussed above, the Claimant was not in a position to take up full-time employment as the trainee role required.

78. With regard to dismissal, the Respondent has the legitimate aim of delivering the service it is obliged to provide, and that means ensuring that it employs sufficient staff within its budget in order to do so. The Claimant had significant periods of sick leave. The outlook, as reported by occupational health, was not optimistic and there was no prospect of an early, or any, return to work. The Claimant's absence put pressure on other staff working on the cardiology ward. Bank nurses available for cover may not have been as well qualified as the Claimant and extra staff were required to mitigate any risk to patients. This incurred additional expenditure. A permanent replacement could not be recruited while the Claimant remained on the payroll. Having balanced the impact on the Claimant and the legitimate aim of the Respondent, the Tribunal concludes that dismissal was proportionate in the circumstances.

79. The Tribunal concludes that the Respondent has shown, in each case, that its treatment of the Claimant was a proportionate means of achieving a legitimate aim.

<u>Unfair dismissal</u>

80. The Respondent has shown the reason for the dismissal related to the Claimant's capability, namely her ill health. There was no evidence to suggest that the Respondent had any ulterior motive to dismiss the Claimant, nor did the Claimant suggest there was.

81. As to the fairness of the dismissal, the Claimant's allegations of unfairness are considered as follows:

    (1) That the Respondent failed to follow its own policy (section 5.5.2) and did not conduct a final occupational health report.

82. The policy requires that a medical report is obtained before the final long-term sickness review meeting. There are no time limits in the policy as to how recent any medical report should be. In this case, the last of six occupational health reports was dated 31 May 2018 and the final long-term sickness review meeting took place, after it had been re-scheduled, on 31 August 2018. Clearly, a literal interpretation of the policy indicates that it had been adhered to. Nevertheless, the Tribunal has considered whether the occupational health report was adequate so as to inform the Respondent of the Claimant's condition as at 31 August 2018. In the Tribunal's view, it was in this case. The report had stated that it was most likely that the Claimant would be considered for ill health retirement. That would suggest permanent incapacity. In the Tribunal's view, in the circumstances of this case, the Respondent did not act unreasonably by failing to obtain a yet further medical report. In any event, it is clear that Ms Coiley not only considered the occupational health report but also took into account the Claimant's visible condition at the final long-term sickness review meeting before reaching her decision that the Claimant's employment should be terminated. The Tribunal accepts that the request made by occupational health for a GP's report related to the Claimant's wish to be considered for IHR and was not intended to inform the Respondent further with regard to any decision relating to possible termination of employment. The Tribunal notes that in many cases a failure to obtain a recent and up to date medical report will adversely affect the fairness of a dismissal, but it did not do so on the facts of this case.

83. The Tribunal is also satisfied that the most recent occupational health report was discussed with the Claimant at the final review meeting, not least because it formed part of the management case.

    (2) That the Respondent did not give sufficient consideration to alternative employment.

84. The Claimant told the Tribunal that apart from the role of Trainee Coding Analyst she was not critical of the Respondent's efforts to redeploy her. The Tribunal has already dealt with this aspect of the claim when considering reasonable adjustments and there is no need to say more. The Tribunal is satisfied that the Claimant was notified of all vacancies, that details were sent to her when she expressed interest, and that the Respondent gave sufficient consideration to alternative employment.

    (3) That the Respondent did not explore any adjustments to the role.

85. The Respondent followed the advice of occupational health. The Claimant returned to work on a phased basis. Instead of reduced hours lasting four weeks as had been recommended, the period of reduced hours working lasted several months. The Claimant duties were adjusted so that she carried out mainly administrative tasks. The Respondent held a number of SAR meetings

with the Claimant when her ability and well-being were discussed. The Tribunal is unable to accept the Claimant's allegation that the Respondent did not explore adjustments to the role.

(4) The Respondent failed to support and guide her in respect of a prospective application for IHR in the period 31 May 2018 (when occupational health first thought the Claimant might be eligible) to about 18 August 2018 (when the Claimant first completed the application form).

86. This aspect of the claim had not been identified at the preliminary hearing. However, it was raised by the Claimant at the hearing and the Tribunal took the view that it should be considered as part of its deliberation when considering the fairness of the dismissal.

87. The Tribunal has had careful regard to this aspect of the case. Although the details were never made entirely clear, it is the Tribunal's understanding that an application for IHR made after termination of employment, assuming it is granted, provides for reduced retirement benefits. Mr Briggs was critical of the Respondent's lack of support which now forms this part of the Claimant's complaint against the Respondent. Nevertheless, the Tribunal accepts that it is the employee's obligation to apply for IHR and the Claimant herself delayed doing so despite the easily accessible advice that was available to her. In any event, any procedural error on the Respondent's part and any detriment the Claimant might have suffered was remedied on appeal such that she would not be disadvantaged should her claim for IHR be successful. The Tribunal concludes that any failure to provide advice and guidance as identified by Mr Briggs did not lead to unfairness in this case.

(5) That the dismissal was generally not reasonable in the circumstances.

88. The Tribunal is satisfied that the dismissal was reasonable in the circumstances. The Respondent had waited a considerable time for the Claimant to recover and could not be expected to wait any longer given the difficulties the Claimant's absence caused as the Tribunal has identified above: although the Respondent is a large employer, the Claimant's absence had a reasonably significant impact, on the cardiac ward in particular. She was consulted throughout and her views sought. Reasonable steps had been taken to discover her medical condition. The procedure followed was fair.

89. The decision to dismiss in the circumstances fell within the band of responses open to a reasonable employer.

90. For these reasons, the Claimant's claims do not succeed.

91. Even if the Claimant's dismissal had been unfair by reason of any procedural defect, in the Tribunal's view the Respondent would have dismissed her anyway had a fair procedure been followed given her extensive sickness absence and the fact that she remained unfit for work.

Employment Judge Pritchard

Date: 5 November 2020