THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

BETWEEN:

Miss M Nicol-Wilson

Claimant

And

South London & Maudsley NHS Foundation Trust

Respondent

ON: **22 – 25 February 2021**

Appearances:

For the Claimant: In Person
For the Respondent: Mr A Ross, Counsel

JUDGMENT

All claims fail and are dismissed.

REASONS

1. By claim forms presented on 27 December 2017 and 7 October 2018, the claimant brought complaints of unfair dismissal, holiday pay and arrears of pay. A claim of race discrimination had previously been struck out and a notice pay claim withdrawn. All claims were resisted by the respondent.

2. I heard evidence from claimant. On behalf of the respondent, I heard from Maria Oakman (MO) Community Business Manager (Lewisham Borough); Sally Dibben (SD) Head of Human Resources; Eamonn Moules (EM) HR Business Partner and Kirstin Dominy (KD) former Chief Operating Officer.

3. The hearing took place virtually by CVP video conference. There were 2 bundles, a main bundle provided by the respondent and a separate claimant bundle, much of which duplicated what was in the main bundle. References in square brackets in the Judgment are to pages within the main bundle unless prefaced with a "C", in which case they refer to the claimant's bundle.

The Issues

4. There was an agreed list of issues and these are more specifically referred to in my conclusions below.

The Law

Unfair Dismissal

5. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed.

6. Section 98(2) ERA sets out the potentially fair reasons for dismissal. One of those reasons is capability. *98(2)(a*).

7. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

8. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Unlawful deduction of wages

9. By section 13 ERA, a worker has the right not to suffer an unauthorised deduction from wages. An unauthorised deduction occurs where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion *s.13(3).*

Credibility

10. Mr Ross, Counsel for the respondent, made a number of submissions about the claimant's credibility and reliability, which I will deal with now. Credibility is about the believability of the evidence, and reliability is about the accuracy of a person's recall. Having considered paragraphs 3 – 11 of Mr Ross's submissions, there is little I disagree with.

11. The claimant's approach to cross examination was to disagree with anything put to her that was detrimental to her case or to feign memory loss if her position was contradicted by other evidence. She was very reluctant to concede anything, even when it would have been sensible for her to do so. An example of this is at paragraph 22 below.

12. A stark example of her credibility being tested was in relation to her evidence on covert recording of meetings. It is common ground that the claimant covertly recorded a number of meetings she had with her employer. It was the respondent's case that she also covertly recorded a meeting with an external mediator brought in to mediate between the claimant and her line manager. However, when it was put to her that she had covertly recorded a mediation meeting, she denied doing so. Her denial was emphatic and repeated several times. When it was put to the claimant that she had sent Capsticks Solicitors an email on 9 April 2020 enclosing an audio file of the mediation meeting, the claimant denied this. As the said email was not in either bundle, Capsticks emailed it to Mr Ross who screen-shared it with the hearing. In response, the claimant asserted that the audio file attached to the email was not a recording of the mediation meeting but one with her employer on 4 September 2017. Due to the claimant's continued denials, I granted Mr Ross' request for the audio file to be admitted into evidence. At this point, the claimant backtracked and said that she could not remember whether or not she recorded the mediation meeting. In my view, this was a cynical change of position. She was fully conscious of the fact that the true position would be clear once the audio tape was played and had clearly calculated that it was better to be judged as forgetful than as a liar. Having heard the audio recording, I am satisfied that it is a recording of the mediation meeting, it is inconceivable that anyone other than the claimant made the recording, and I am satisfied that she did and that she disclosed it to the respondent. Further, I am satisfied that when she said that she had not recorded the meeting, she had not forgotten, she was lying.

13. In light of the above and the other examples highlighted in Mr Ross' submissions, I find that the claimant was not a credible witness. By way of contrast, the respondent's witnesses were straightforward and reliable and much of their evidence was corroborated by documents. For these reasons, where there has been a dispute of evidence which is not independently corroborated, I have preferred the respondent's account and this is reflected in my findings.

Findings and conclusions

Holiday Pay

14. The respondent's holiday year runs from 1 April to 31 March each year. Employees are entitled to 33 days a year leave plus bank holidays The first 28 days of leave are assumed to be statutory [146]. The respondent's Sickness policy provides that only statutory leave accrues during sickness absence and only statutory leave can be carried forward to a new leave year, up to 20 days. [131]

15. There is no claim in relation to holiday accruing in the final holiday year (April 18'- March 19') The claim relates solely to holiday that accrued in the previous year (April 17'- March 18'). The issue between the parties is the number of day's leave that the claimant carried over. The claimant contends that it was 17 days, the respondent says it was 12. The claimant was paid for the 12 days on termination so her claim is for the remaining 5 days.

16. The claimant was on long term sickness absence from the 2nd or 5th October 2017, through to the end of the leave year and beyond. Hence, in accordance with the sickness policy, she would only have accrued her statutory entitlement i.e. 28 days. Both sides agree that the claimant took 16 days' leave in the 2017/18 leave year, leaving her with 12 days. The claimant has been paid for all of her accrued holiday. The claim for holiday pay therefore fails.

Arrears of Pay

17. The claimant claims arrears of pay in respect of 2 periods. The first is a 2-week period between 14/8/17 - 28/8/17 when she was off sick and the second relates to the 22/9/17 in respect of a deduction from pay due to her failure to attend work for a meeting when requested to do so. Take each of those in turn:

<u>14/8/17-28/8/17</u>

18. Paragraph 3.3 of the sickness policy provides that absences lasting 8 or more calendar days must be supported by a Fit Note, which must be received by the respondent within the 8 days or before the current note expires. Thereafter, certificates must cover the whole period of absence up to the return date [109]

19. On 26 July 2017, the claimant rang MO, who she reported to at the time, to say that she was unwell. In accordance with the policy, the claimant provided the respondent with a Fit Note. The Fit Note was dated 27 July 2017 and recorded that the claimant was unfit for work due to work related stress and that she should refrain from all work between 27 July - 13 August 2017 [152-153].

20. At the end of the Fit Note period, the claimant did not return to work, neither did she contact MO or anybody else at the respondent. MO attempted to contact the claimant by phone but could not find a current phone numbers on file. In the end she wrote to the claimant on 29 August 2017, informing her that as she had not been in contact and had not provided a follow on Fit note, her absence would be treated as unauthorised and she would not be paid [166-167]. This was in line with clause 3.4 of the sickness policy which provides: "*If sickness absence is not reported in line with this policy it will result in*

the staff member being considered to be absent from work without authorisation and will result in loss of pay for the period of the unauthorised absence". [110]

21. On 29 August 2019, and without informing the respondent in advance, as she was required to do under the sickness policy, the claimant returned to work. On becoming aware of her presence, MO rang the claimant to invite her to a return to work meeting that afternoon. During the conversation the claimant said that she had sent the respondent a Fit Note by recorded delivery covering the period 14-28 August 2017. At the meeting, the claimant produced a duplicate copy of the Fit Note [154-155] and proof of posting [158]. However, MO told the claimant that this was insufficient to reinstate her pay from the 14 August as it was not proof that the sick note was received by the respondent and the respondent had no record of its receipt. MO therefore advised the claimant to contact the post office and find out who had signed for the letter. Further enquiries by the claimant revealed that the sick note had been returned undelivered to her GP's surgery. This was because the letter was wrongly addressed.

22. A copy of the post office tracking information is in the bundle. This shows that the letter was sent at 14.34 on the 14 August [158]. This means that the earliest time that it could have been received by the respondent was the 15 August. That is a matter of fact and logic which, when put to the claimant she was not prepared to concede stating: "*If that is what you are saying, I don't work for the post office*". Only when pressed did she begrudgingly concede that "*It might have got there the next day*".

23. To succeed in her claim, the claimant must show that the payments that she seeks were properly payable to her. In other words, she had a legal entitlement to be paid for this period of absence. The only statutory entitlement to pay during absence is to statutory sick pay and that is subject to certain conditions being met. That is not what is claimed here. What the claimant seeks to rely on is her entitlement to her normal pay under the sickness absence policy.

24. Paragraph 3.9 of the policy provides:

    "*It is the employees responsibility to comply with sickness notification rules. If sickness certificates are submitted late, without a reason satisfactory to the Trust, pay will be reinstated only from the date the certificate is received by the line manager or other delegated authority*" [110].

25. As the certificate (or duplicate of it) was received after the claimant had returned to work, this did arise. However, what this clause does is introduce an element of discretion on the respondent's part. As pointed out in Mr Ross' submission, the exercise of a discretion is only challengeable on contractual grounds if it is exercised arbitrarily, capriciously or irrationally. In my view that test has not been met here for the following reasons:

    a. The duplicate certificate shows that the original certificate was signed on the 10 August 2017, yet the claimant waited 4 days before sending it to the respondent, which meant that it would not have arrived within the time limit specified in the policy. The claimant did not provide the respondent with an explanation for the delay.

b. The claimant did not check whether or not the respondent had received the certificate even though this could easily have been verified through the post office tracking system or by phoning the respondent.

c. The claimant did not contact the respondent during this period to update it on her absence. This was part of a pattern of lack of engagement with the sickness absence process that continue through to her dismissal.

26. For these reasons, I am satisfied that the respondent was entitled to withhold the claimant's pay for the period 14-28 August 2017. The unlawful deductions claim in relation to this period does not succeed.

22/9/2017

27. On 4 September 2017, SD and MO met with the claimant to discuss her non-compliance with the sickness policy in respect of her absence between 14-28 August 2017. This meeting was recorded covertly by the claimant even though she had been asked whether she was recording it and had said that she was not [188-217]. At the end of that meeting, the view of SD and MO was that the relationship between the claimant and the respondent had become untenable and a decision was taken to look for an alternative place for the claimant within the Trust. In addition to the absence matters, there were concerns about the claimant's relationship and attitude towards colleagues and her relationship with MO against whom she had raised an unsuccessful grievance, which she appeared not to have moved on from. After the meeting the claimant was sent home on paid leave pending further instructions [222-223]

28. On 12 September 2017, SD texted the claimant to ask her to attend a meeting the following day to discuss her potential move from the St Giles team and other behavioural issues that had arisen. [248] However the claimant was unable to attend the meeting because of childcare issues [237]. The meeting was rescheduled for 18 September but the claimant failed to attend. On 18 September SD sent a text to the claimant using the mobile number on which the claimant had previously responded, inviting her to a rescheduled meeting on 22 September 2017. As there was no response, the text was resent on a number of occasion, but was not responded to. Voicemail messages were also left on the same number. The claimant did not attend the meeting.

29. As a result, SD wrote to the claimant on the 22 September informing her that as she had not attended the meeting as requested, her absence would be treated as unauthorised and she would not be paid for that day [258-260]

30. The claimant responded by email on the 24 September 2017, stating that she had not received any text messages or voicemails from SD. [262]. However, when SD eventually met with the claimant on 25 September and showed her the text messages, she said that her mobile phone was broken. That is not an explanation that she gives in her email of 24 September and it was not accepted by SD.

31. At a further meeting on 26 September, confirmed by the claimant's email of the same date, the claimant told SD that the method for communicating with her is usually through her home address by way of letter and that she had not given permission for her phone to be used as a means of communicating with her. [279] This is an example of what has been described as the claimant obstructive manner when it comes to management of her absence.

32. In order to show that she was entitled to be paid for the 22 September, the claimant must show that she was ready, willing and able to work. Work in this context would include attending work related meetings.

33. As the claimant was not off sick, she was clearly able to work. The issue here is whether she was willing to work. Having considered the evidence, I find on balance of probability that she was not.

34. I find that the claimant was being untruthful when she said her phone was broken. She did not raise this in her email of the 24 September, which would have been the logical thing to do. The inference from her email is that she has checked her phone for the text and voice messages and that they are missing. The broken phone was only mentioned to counter the irrefutable fact that the messages were sent. It is clear from the claimant's email of 26 September that she objected to being contacted by the respondent on her personal mobile. It appears to me that she chose to demonstrate her objections by ignoring the messages.

35. I find that the claimant was not willing to attend work on the 22 September 2017 and in those circumstances, she was not entitled to be paid. Her claim for payment for that day therefore fails.

Unfair Dismissal

36. The claimant went on long term sick leave from either the 2nd or the 5th of October 2017 The respondent relies on the earlier date, the claimant the latter but in the scheme of things, it is not material. She remained off until her dismissal. Prior to this there was a period of absence between 26 July and 28 August 2017, which I have already referred to.

37. The respondent referred the claimant to occupational health (OH) on 11 December 2017. The claimant attended the appointment on 12 January 2018 and OH produced a report, received by the respondent on 22 February 2018. The report stated that the claimant had an underlying medical condition caused by work related stress and was deemed unfit for work or to attend any meetings at work [336-339]. The OH report said that the OH doctor had arranged a follow up review of the claimant for 10 weeks later. However, for reasons which are unclear, that review did not take place at that time. It eventually took place on 11 May 2018.

38. The second OH report, dated 11 May 2018, was received by the respondent on 31 May 2018. The report said that although the claimant remained unfit for work, she was fit to attend meetings, subject to being given sufficient notice. It also recommended that the claimant be re-referred to OH 6-8 weeks later. [362-264] That further referral did not take place.

39. A number of sickness review meetings were scheduled, none of which the claimant attended.

40. On 21 February 2018, the respondent wrote to the claimant inviting her to a formal sickness review meeting on 1 March 2018. The claimant was asked to confirm her attendance at the meeting and was provided with a mobile phone contact number for

MO [343]. The claimant failed to attend the meeting and did not make contact with the respondent. On 18 April 2018, the claimant was sent another letter requesting her attendance at a formal sickness review meeting on 1 May 2018. Due to her non-attendance at the previous scheduled meeting, she was advised that if she failed to attend or make contact without an acceptable reason, the meeting would proceed in her absence [357-358] Again, the claimant failed to attend or make contact. As a result, the meeting went ahead in her absence and she was issued with a final written warning on the basis that she had exceeded the trigger points in the sickness policy. It seems from a reading of the policy that trigger points are more relevant to short term absences than long term absence. Nevertheless, the claimant did not appeal the final written warning [359-360].

41. As a result of the claimant's prolonged absence, coupled with her failure to engage in the process, MO recommended that the matter be progressed to a final capability hearing [368-373].

42. The final capability meeting was scheduled 3 times**.** The first time was on 26 July 2018, when the claimant was written to inviting her to a formal capability hearing on 6 August 2018. She was asked to confirm her attendance and told that the meeting would go ahead in her absence if she failed to attend or make contact. The letter also advised that the outcome of the meeting could be dismissal on capability grounds [374-375] On 2 August, the claimant emailed the respondent to say that she was unable to attend the hearing because her union representative was unavailable to accompany her [377]. As a result MO emailed the claimant on 8 August informing her that the hearing was re-scheduled for the following day, 9 August 2018, at 10am [383].

43. Having previously complained that the respondent did not have permission to contact on her on her personal mobile number, the claimant emailed MO on 8 August asking her to cease communicating through her personal email and to send all correspondence by post [383]. Given the respondent's need to contact the claimant quickly in order to schedule the capability review meeting, putting up further barriers to communication, while at the same time refusing to engage in the process was unreasonable and further evidence of the claimant's uncooperative behaviour.

44. In the event, the hearing was again postponed and on 15 August, MO wrote to the claimant rescheduling it for the 24 August 2018 at 10.00am. The claimant was told that she was expected to attend and that if she did not do so, the case would be heard in her absence. She was also told that she could send in written representations if she was to unwell to attend in person [385]

45. On 22 August 2018, the claimant emailed the respondent stating that she was unable to attend the sickness review meeting as she was still unwell. She went on to say that she intended to return to work on 6 October 2018 "*all being well*" [391] In the meantime, the claimant had been signed off by her doctor as unfit for work for a further period; from 6 August to 9 September 2018, with depression and anxiety. The Fit Note stated that the doctor would need to assess the claimant's fitness for work at the end of the period [389]

46. The capability review meeting duly went ahead in the claimant's absence, chaired by Godfried Attafua (GA) Deputy Service Director, who was assisted by EM, HR Business Partner. We did not hear from GA but EM gave evidence about the review meeting and dismissal decision. The claimant did not send in written submissions nor did her union representative attend on her behalf. The outcome of the meeting was the claimant's

dismissal. The reasons for dismissal are set out in the outcome letter dated 4 September 2018 [396-398]

47. On 14 September, the claimant appealed against her dismissal. One of her grounds of appeal was that she was entitled to 6 months full pay and 6 month's half pay while off sick and had not completed a year's sickness absence when she was terminated [405-407].

48. The appeal took place on 17 January 2019, having been rescheduled from the 20 December 20 at the claimant's request [423] The appeal was heard by KD, Chief Operating Officer. The claimant was in attendance [432A-432GG].

49. On 5 February 2019, KD wrote to the claimant confirming that her appeal was unsuccessful and that the dismissal was upheld. [437-440]

50. It is common ground that the claimant was dismissed on grounds of capability due to her sickness absence. That is a potentially fair reason for dismissal pursuant to section 98(2)(a) ERA.

51. In considering whether or not the respondent acted reasonably in dismissing the claimant, I have taken the following matters into account:

    a. As at the 25 July 2018, the claimant had been absent from work, over 2 spells, for a total of 235 working days. By the final capability meeting, this would have risen by a further 22 days or so, to 257 working days. That equates to about year or so of absence.

    b. The respondent took reasonable steps to investigate the true medical position by referring the claimant to OH. The claimant contended that it was unreasonable to dismiss her without referring her back to OH as recommended in the last report. I asked EM, who was present at the dismissal meeting in an advisory capacity, whether an updated report would have been useful and his view and that of the disciplinary chair was that it would not have been. His explanation was that the previous report had indicated that the claimant was fit to attend meetings, but in her subsequent email of 22 August 2018, she stated that she was too unwell to attend the hearing. [319] From this it was inferred that the claimant's condition had deteriorated since the last OH appointment and that there was no return date in the foreseeable future. In the respondent's view a return date of 6 October, "*all being well*" was entirely speculative and could not be relied upon. I find that it was reasonable for the respondent to hold that view and that the decision not to commission a further OH report was one which it was entitled to take.

    c. The respondent used reasonable endeavours to consult with the claimant on her absence as evidenced by the number of absence review meetings arranged and re-arranged. Unfortunately, the respondent was thwarted in its attempts by the claimant's lack of cooperation and refusal to engage. In those circumstances, it was reasonable for the respondent to proceed in the claimant's absence.

    d. It is clear from the claimant's appeal letter that she thought she was entitled to be off sick for a year with 6 months full pay and 6 month half pay before the respondent could dismiss her and this sense of entitlement may have been a factor in her decision not to engage. However, she was incorrect. Entitlement to

sick pay under paragraph 12.12 of the policy cannot be read as an entitlement to be off sick for a year. The claimant's stance was therefore unreasonable.

e. The claimant's absence was having a considerable impact on the needs of the service. Her absence had resulted in the service suffering a significant overspend due to the need to pay for expensive temporary workers to cover the claimant's duties. [368-373]. I am satisfied that the respondent had reached the point where it needed to employ a permanent replacement for the claimant.

52. Taking all of the above matters into account, I am satisfied that the claimant's dismissal for capability was fair. The unfair dismissal claim fails.

Polkey

53. Even if I am wrong and there are procedural issues rendering the dismissal unfair, I am satisfied that the claimant would have been dismissed fairly within a month or so thereafter. By the time of the appeal hearing on 17 January 2019, the claimant had not produced any evidence showing that she would have been fit to return on 6 October 2018, as she had suggested, or indeed that she was fit to return as at the appeal date. Indeed, there was evidence before the tribunal that the claimant was on Employment Support Allowance in February 2019 which strongly suggests that she was still not fit for work at the date of the appeal. Hence, even if an updated OH report had been obtained in advance of the final capability hearing, it would have concluded that the claimant remained unfit for work for the foreseeable future.

Judgment

54. All claims are dismissed.

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Employment Judge Balogun
Date: 12 March 2021