EMPLOYMENT TRIBUNALS

Claimant: **Mr J Paramu**

Respondent: **Home Office**

Heard at: **Croydon and via CVP** **On: 28/6/2021 – 30/6/2021**

Before: **Employment Judge Wright**
Mr P Adkins
Mr C Wilby

Representation:
Claimant: **In person**

Respondent: **Ms M Tutin - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of unfair dismissal and discrimination contrary to the Equality Act 2010 fail and are dismissed.

REASONS

1. The claimant presented a claim form on 7/11/2017 following a period of early conciliation between 10/10/2017 and 23/10/2017. The claimant's employment commenced on 5/11/2001 and he was dismissed on

16/8/2017. The respondent's reason for dismissal was the claimant's absence from work from 20/11/2015.

2. The Tribunal heard evidence from the claimant and from the respondent from: Ms Isabella Cookey (claimant's line manager); Ms Manisha Kotecha (dismissing manager); and Mr Paul Barrett (appeal manager). There was a witness statement from Ms Caroline Acheson who decide the claimant's grievance in 2016, however the claimant did not have any questions for her.

3. The Tribunal had before it a main bundle of 477-pages and a supplementary bundle. There was a lot of duplication in the main bundle and email strings were unnecessarily included. Both parties had the opportunity to make oral submissions and the respondent provided written submissions.

4. Unfortunately, the final hearing had been postponed for various reasons on various occasions.

5. A case management hearing was held on 6/8/2018 and that identified the issues as:

> *'Unfair dismissal. It is conceded by the Home Office that the Claimant was dismissed. The reason for the dismissal is pleaded in the response as long term absence, which [counsel for the respondent] categorised as either relating to the capability of the Claimant to do the work he was employed to do, or it was some other substantial reason of a kind such as to justify his dismissal. Those reasons fall within sections 98(2)(a) and 98(1)(b) of the Employment Rights Act 1996 respectively, and they are potentially fair reasons. If such reason is established by the Respondent then the Tribunal must decide on all the evidence whether the dismissal was in fact fair in all the circumstances.*
>
> *Direct race discrimination. The Claimant describes himself as being Asian of Indian origin for the purposes of section 9 of the Equality Act 2010. He makes four allegations of discrimination. In each case the comparator for the purposes of establishing less favourable treatment is a hypothetical white British employee who was in the same situation as the Claimant in respect of each of the four incidents in question. The complaints of less favourable treatment are as follows:*

The failure to provide the Claimant more time to consider his position when he requested it on 9 August 2017;
The dismissal of the Claimant;
The dismissal of the Claimant's appeal;
The failure to offer the Claimant an alternative post in October 2017.

Victimisation. The Claimant relies upon his letter of appeal against the dismissal decision and also a complaint of race discrimination at the appeal hearing as protected acts for the purposes of section 27(2) of the 2010 Act. The Respondent does not accept that the Claimant did a protected act.'

Findings of Fact

6. The claimant was employed as an Administrative Officer working for the respondent in Croydon. He was redeployed in September 2015 to the UKVI.

7. There was an incident in October 2015 which was referred to the claimant's Higher Executive Officer (YD). YD spoke to the claimant regarding the matter and the claimant denied the allegation and said it was false.

8. The matter was referred (the Tribunal finds quite rightly) to senior managers. Ultimately, no further action was taken in respect of the allegation, although it took some time for this to be confirmed to the claimant. This led to, on the claimant's part, the relationship with YD breaking down.

9. On the 20/10/2015 the claimant and other employees were asked to work on the 16th floor, rather than the 2nd floor. Following that, the claimant was signed off as unfit for work on 26/11/2015 due to knee pain. He asked to be referred to Occupational Health (OH). Ms Cookey obliged and the claimant then withdrew his consent for the referral. He returned to work. The claimant said the nature of the work aggravated an existing knee injury. The Tribunal finds the respondent was aware of the claimant's difficulties and that YD had told the manager responsible for the claimant on the 16th floor that he needed to be given 'light duties' and that someone would need to bring the files to him (page 151). The email exchange showed the managers being supportive of the claimant and concerned for his well-being.

10. The claimant was then signed off as unfit for work due to stress on 20/11/2015. He never returned to work.

11. By email on 17/12/2015 the claimant raised a grievance against YD accusing him of harassment and bullying, relating to the allegation made in October 2015.

12. Attempts were made to resolve the matter informally, however on 9/2/2016 the claimant confirmed that he would like the matter to proceed formally (page 217). The formal grievance was finally received on 29/3/2016 and Ms Acheson was appointed. A report was produced on 5/5/2016 and a meeting was held on 2/6/2016, at which the grievance was rejected. The claimant did not appeal the grievance outcome. The claimant's Trade Union was involved in the grievance and was advocating for the claimant or for YD to report to different line management chains (page 220).

13. Under the respondent's Attendance Management Policy, a review meeting was held by Ms Cookey on 15/6/2016. The claimant was accompanied by his Trade Union representative. At this point, the claimant had been absent for 239 days. The claimant gave consent for a referral to OH.

14. The OH report was dated 22/7/2016 (page 404). It confirmed that the claimant indicated that he never saw himself returning to his current team and that the only way he could return to work for the respondent would be in a different team. The report noted that there was 'no medical barrier' preventing the claimant from returning to work.

15. On 16/8/2016 there was a further absence review meeting (page 408) at which the claimant was accompanied by his Trade Union representative. A phased return to work based on working twice a week was discussed, as was the option of working on the 2nd or 16th floors. The claimant enquired about YD and was told that he had been off for three to four months. Ms Cookey did tell the claimant that he would need to return to work at some point.

16. The next attendance review meeting took place on 28/9/2016 as the claimant had enquired on 1/9/2016 about a managed move (page 411). The Tribunal was told that managed moves[1] were rare and were designed to make reasonable adjustments for disabled employees. The claimant indicated that he wished to move to KH's team, where there were vacancies. KH confirmed that unless the claimant was to transfer to her team under a managed move (if he met the criteria) then he should apply

[1] A managed move is only considered when an employee's disability is inhibiting their ability to provide full and effective service in their role.

to transfer under the 'appropriate process' (page 412). Ms Cookey confirmed the same to the claimant in an email of 23/9/2016 (page 413). At the meeting, the claimant informed Ms Cookey that he had applied for a vacancy in KH's team.

17. Although the Tribunal was not expressly told the outcome of the claimant's application, it must follow that it was unsuccessful (whether or not he withdrew, the vacancy was withdrawn or he was not offered a role is not clear).

18. A further referral to OH was made and a report dated 27/2/2017 was received (page 427). The report stated the claimant was keen to return to work, but that 'he finds it impossible to see himself now working back in the same team environment given a loss in trust and confidence'.

19. A further absence review meeting took place on 17/5/2017 which noted the claimant had been absent for 537 days (page 376). The claimant was no longer represented by the Trade Union, although the claimant asked for his representative to be copied into the minutes. The claimant was asked if there was anything which the respondent could do to enable him to return to work and the claimant said he had applied for other roles and again, requested a managed move. At this meeting, Ms Cookey reminded the claimant that he could potentially be dismissed from the respondent's employ.

20. That followed another referral to OH and a report dated 13/7/2017 was produced (page 430). The report stated there was no change in the overall position, the claimant was medically fit to return to work, however the barriers which prevented him from doing so were non-medical and related to work issues.

21. Ms Cookey attempted to arrange a further attendance review meeting, which eventually took place on 1/8/2017 (page 444). That meeting was chaired by Ms Kotecha. Ms Kotecha informed the claimant there were vacancies in UKVI and that he could return to work the following week. The claimant repeated that he was unable to work on the 2nd and 16th floors and said he had been applying for other roles. He said he had two interviews coming up and that it was not the case that he did not want to return to work, but that he could not work in UKVI (or in the alternative on the 2nd and 16th floors). A phased return to work was discussed, as was the claimant returning to work (to UKVI) and then looking to transfer elsewhere. Ms Kotecha did say that if the claimant did not return to work, she did not see any other option than his dismissal. It was also pointed out to the claimant that as so much time had passed since he had last worked in UKVI, the whole management team had changed and he would not know the majority of the staff. The Tribunal notes that the claimant

had only worked in UKVI for approximately one month following his redeployment before his sickness absence.

22. Ms Kotecha was quite blunt and told the claimant that if he did not return to work, that she would consider dismissing him. She did however agree to give the claimant more time to consider his position further to the meeting, as he wanted to focus on the job interview he had the following Tuesday.

23. On the 9/8/2017 the claimant asked for more time, he requested 2-3 weeks and said that he wished to seek legal advice, due to the possibility of dismissal (page 448). Ms Cookey passed that request onto Ms Kotecha, but the Tribunal was not taken to any response from her, or to any communication sent to the claimant.

24. In the background to that request, the claimant had a fitness for work note dated 7/8/2017 which said he was unfit for work until 4/9/2017 (page 447). Although the claimant said and the respondent accepted that his absence was fully certified by his GP, there was no sign of any immediate improvement in his fitness for work.

25. What Ms Kotecha then did was to send the claimant a letter of dismissal dated 16/8/2017 and in the covering email she said she was unable to grant any additional time to the claimant (page 449). The claimant was told that he was not required to work his notice period and it is not clear whether or not a payment in lieu of notice was made to him. The claimant was also told that he was not entitled to compensation under the civil service scheme. The claimant was informed of his right of appeal.

26. The claimant took issue in the hearing that Ms Kotecha had not considered other options than dismissal, for example a demotion to a lower grade. That is an argument the claimant has advanced with the benefit of hindsight and it fails to recognise or acknowledge what the stance the claimant had taken and was taking in the meetings. When he was told there had been a complete change in the management of UKVI, he replied that it was not about individuals, but that he could not return to UKVI and in particular, to the 2nd and 16th floors. In light of that, there would have been no point in considering a demotion.

27. The claimant never attempted to return to work. A reasonable employee would be expected to have at least attempted to return to work. A phased return was offered and the claimant should have taken advantage of that and at least have made an attempt to return to work. As he did not do so, his fitness for work remained untested.

28. The claimant did appeal the decision to terminate his employment (outside of the prescribed time limit) on 24/8/2017 (page 453). The claimant did refer to his outstanding job application and said that he had been given the impression that he would be successful.

29. The appeal hearing took place on 18/9/2017 and was chaired by Mr Barrett (page 458). Mr Barrett asked the claimant if there were any circumstances under which the claimant would return to his former section and he replied he 'just can't see how it's going to work'.

30. Mr Barrett asked the claimant about the role he had applied for and the claimant confirmed that it was in his old department (the Customer Direct Team in Lunar House). He went onto say:

> 'I last worked there before I was redeployed. Basically they had a redeployment exercise and I didn't get the job. Some people had to be moved on, I was one of the unfortunate ones that had to be moved on. We had to reapply for our jobs and I didn't get the job to stay in that section and was placed in the redeployment pool.'

31. The Tribunal was taken to Mr Barrett's email following up this point (supplemental bundle pages 7-13). The Tribunal finds that although the claimant was informed that he had the third highest score and there were three vacancies, that upon enquiry with his current line manager (and noting Mr Barrett's concerns that the claimant had not been entirely candid about his situation and had given the impression KH was his line manager, not Ms Cookey) the extent of his absence had been revealed and that led to a decision not to make an offer to the claimant.

32. The Tribunal was concerned that it appeared that the respondent had dismissed the claimant in order to thwart his attempt to secure a role in KH's team. Whether or not the claimant was dismissed on the 16/8/2017 or a month later, say on the 16/9/2017, due to the extremely long period he had been absent and despite the fact he had performed satisfactorily in the interview, the Tribunal finds that an offer would not have been forthcoming in any event. Irrespective therefore of the dismissal, the Tribunal finds that he would not have been offered a role in the Customer Direct Team.

33. Mr Barrett's conduct of the appeal was thorough and he considered all of the claimant's grounds of appeal, even though ultimately he upheld the decision to dismiss.

34. The Tribunal also accepts Mr Barrett's point that if the fact that an application was ongoing prevented a manager from taking a decision to dismiss; then dismissal could in theory never happen. The reasons being

that the claimant could continue to make job applications and as a result of the 'live' application, could then prevent any decision taken to dismiss.

The Law

35. Section 94(1) of the Employment Rights Act 1996 (ERA) provides that 'an employee has the right not to be unfairly dismissed by his employer'. Dismissal is defined by Section 95(1) ERA. Once a dismissal has been established it is for the employer to show the reason or principal reason for the dismissal and that it is either a reason falling within subsection (2), or some other substantial reason of a kind such as to justify the dismissal of the employee holding the position which the employee held.

36. Section 98(2) sets out five potentially fair reasons, one of which is capability (section 98(2)(a)). Once the reason for the dismissal has been shown by the employer the Tribunal applies Section 98(4) to the facts it has found in order to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides:

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)— depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> shall be determined in accordance with equity and the substantial merits of the case.

37. In considering Section 98(4), the Tribunal asks itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in the case. The case of Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT, established that the correct approach for a Tribunal to adopt in answering the questions posed by Section 98(4) is as follows:

> The starting point should always be the words of section 98(4); in applying the section, a tribunal must consider the reasonableness of the employer's conduct, not whether the tribunal considers the dismissal to be fair;
>
> in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what the right course to adopt should have been;

> in many (although not all) cases, there is a band of reasonable responses in which one employer might reasonably take one view, whilst another might reasonably take another; and
>
> the function of the tribunal is to determine 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. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band, it is unfair.

38. In Polkey v AE Dayton Services Ltd [1988] ICR 142 the House of Lords made it clear that procedural fairness is an integral part of the reasonableness test. The House of Lords decided that the failure to follow the correct procedures was likely to make a dismissal unfair, unless in exceptional circumstances, the employer could reasonably have concluded that doing so would have been futile. The question: 'would it have made any difference to the outcome if the appropriate procedural steps had been taken?' is relevant only to the assessment of the compensatory award and not to the question of reasonableness under section 98(4).

39. The prohibited conduct is direct discrimination contrary to s.13 Equality Act 2010 (EQA):

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

40. It appears the claimant relies upon both detriment and dismissal as the complaint under s. 39(2)(c) and (d) EQA.

41. The burden of proof in s. 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.

42. The claimant claims he was victimised contrary to s. 27 EQA, which provides:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

43. Clearly, there has to be a protected act for an allegation of victimisation to follow.

Conclusions

44. The Tribunal dismisses the claimant's claims of discrimination contrary to the EQA. It accepts the respondent's submission that the claimant has done no more than to make an allegation against the respondent and to refer to a protected characteristic (race). Furthermore, although the claimant has made the allegation of direct discrimination, he has not led any evidence in respect of it. The Tribunal also accepts the respondent's non-discriminatory explanation.

45. The reason why the respondent did not allow the claimant more time to consider his position following the meeting on 1/8/2017 was that his employment could have been terminated from November 2016, once his absence had exceeded one year (under the terms of its Policy). The claimant was adamant that he would not return to UKVI in any circumstances. His complaint had moved on from the grievance he raised about YD to the claimant saying it was the fact an allegation had been

raised in the first place, which led to his loss of trust and confidence. Giving the claimant more time would not have made any difference in the circumstances.

46. The reason for the claimant's dismissal was his prolonged absence and his refusal to return to work. Ms Kotecha gave him the option of returning the following week and said that if he did not, she did not see there being any alternative to dismissal. The decision to dismiss was unconnected to any protected characteristic.

47. Mr Barrett upheld the decision to dismiss and the Tribunal found that his conduct of the appeal was thorough. He went through all of the claimant's grounds of appeal and conducted further investigations. He explored with the relevant managers what had happened in respect of the interview and he concluded that once the true facts had been established, that no job offer would have been forthcoming to the claimant, irrespective of whether or not Ms Kotecha had taken the decision to dismiss him if he failed to return to work. The decision to uphold the decision to dismiss had nothing whatsoever to do with the claimant's race.

48. The claimant's final allegation of direct race discrimination related to a failure to offer the claimant a post in October 2017. This in fact related to the vacancy for which the claimant was interviewed on 8/8/2017. The reason the claimant was not offered a role was due to the circumstances which included his absence from work since November 2015.

49. In respect of a claim of victimisation, the Tribunal agrees with the respondent that the matter upon which the claimant relies (his appeal email) did not amount to a protected act. The email makes no reference to the EQA as required by s. 27(2). As there was no protected act, there can be no victimisation. There was also no reference to the EQA in the appeal hearing.

50. Finally, the Tribunal concludes the claimant's dismissal was fair. He was dismissed as he was incapable of attending work, was refusing to attend work and he made it clear that he would never return to UKVI. In the alternative, it was fair to dismiss the claimant for some other substantial reason per s. 98(1)(b) ERA, the reason being his refusal to return to work.

51. There was no medical reason preventing the claimant from returning to work. Once the allegation was raised with the respondent in October 2015, YD was obliged to inform the claimant and then to refer the matter on. In the end, the matter was not taken any further, however, the respondent cannot be criticised the action which it took. Of course the claimant would be upset and possibly even be offended that an allegation had been made, that does not remove the obligation to investigate the

matter. Indeed, it was in the claimant's own interest that the matter was investigated as that would provide him with the opportunity to clear his name.

52. The respondent followed its own process, which was fair and reasonable. In fact, the respondent could have fairly terminated the claimant's employment much sooner. There were five attendance review meetings and three referrals to OH. The claimant was on notice that his continued failure to attend work could result in his dismissal. The respondent cannot be expected to support the claimant's long-term absence indefinitely.

53. The claimant did not qualify for a managed move and the question of him transferring to another department was first raised by his Trade Union representative in February 2016 and so the claimant had had time to explore that possibility. The Tribunal does not accept there was any 'blocking' of the claimant transferring to another department. It was also relevant that the claimant had applied for numerous vacancies between August 2016 and his dismissal and had been unsuccessful in respect of all of them.

54. The decision to dismiss in these circumstances fell within a band or range of responses which an employer could take. Many, many employers would have terminated the claimant's employment much sooner. The claimant was a drain on resources and the respondent was not getting anything in return from the claimant (his labour). That was not a situation which could be allowed to continue indefinitely; it was open to the respondent to bring it to an end at some point.

55. Taking into account the respondent's size and administrative resources, the process followed and the decision to dismiss was reasonable and therefore fair. There was no suggestion that the respondent had treated other employees differently and indeed there was a comment in the final attendance management meeting from HR that this was the longest period of absence that particular HR manager had seen. In the circumstances, the claimant's absence with no prospect of him returning to work, merited dismissal.

56. A provisional remedy hearing listed for 28/1/2022 will no longer be needed for that purpose.

30/6/2021

Employment Judge Wright