EMPLOYMENT TRIBUNALS

Claimant: **Mrs D Czech**

Respondent: **New England Seafood International Ltd**

Heard at: **via CVP** **On: 21/6/2021 to 23/6/2021, in chambers on 1/7/2021**

Before: **Employment Judge Wright**
Ms V Blake
Ms T Williams

Representation:
Claimant: **Ms S Cornakova - representative**

Respondent: **Ms L Carr - solicitor**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claim of unfair dismissal fails and is dismissed. Her claim of unlawful discrimination contrary to the Equality Act 2010 also fails and is dismissed.

REASONS

1. The claimant presented a claim on 16/4/2019 following a period of early conciliation between 31/1/2019 and 5/2/2019. The respondent resists the claim. The claimant's employment commenced on 6/10/2010 and was

terminated by the respondent, by reason of capability on 8/2/2019. The claimant was employed as a Team Leader and there were no issues during her employment. Indeed, it appears she was a valued and conscientious employee.

2. A preliminary hearing was held on 19/8/2019 and that identified the issues as discrimination contrary to the Equality Act 2010 (EQA) and unfair dismissal contrary to s. 94 Employment Rights Act 1996 (ERA). The protected characteristic is disability (s. 6 EQA) in that that claimant has a mobility problem resulting from a fractured shaft of her left femur following an accident on 4/8/2016. The respondent accepted that the claimant was disabled. The claimant also claimed she was disabled due to depression/anxiety (arising from the mobility problem) and the respondent accepted that on 19/1/2021, although it denies it had knowledge of the same prior to the claimant's dismissal.

3. A final hearing was listed on 1/12/2020 and due to the Covid-19 pandemic, that hearing was converted to a preliminary hearing. It was converted on 30/11/2020 and until that point, the parties had understood the final hearing would proceed. As such, they had exchanged witness statements. The result of that was that the parties were aware of what each other's witnesses' evidence would be, from November 2020.

4. The prohibited conduct had been identified at the first preliminary hearing as 'direct discrimination only'. It was recorded that the claimant was not pursuing a race discrimination claim on the basis of her Polish nationality or ethnic origin and was not pursuing an indirect discrimination claim. The Order therefore recorded what claim was being pursued and what was not.

5. Despite having exchanged witness statements and despite there being reference in the claimant's witness statement to allegations of unlawful discrimination contrary to s. 15 EQA (discrimination arising from disability) and s. 20 EQA (failure to make reasonable adjustments); this was not raised by either party at the second preliminary hearing on 1/12/2020. The matter of the claimant's disability by means of depression/anxiety was however raised and further directions were given in that regard.

6. At the start of this hearing, the issues were clarified and Ms Cornakova attempted to assert that the claimant had made allegations under s. 15 and s. 20 EQA all along. The respondent resisted that and relied upon the Order of 19/8/2019.

7. The Tribunal adjourned to consider the position and concluded that there was no s. 15 or s. 20 EQA claim either pleaded or raised by the claimant. The only reference was in the claimant's witness statement. The Tribunal

found that the claimant was not able to 'amend' her claim via her witness statement. The claimant was informed of the ability to apply to amend her claim and she confirmed she wished to make an application to amend. The hearing was therefore adjourned on the first afternoon in order for the claimant to make that application.

8. The claimant duly made the application in accordance with the directions and the respondent responded. The Tribunal considered the application and rejected it. It then transpired the claimant had sent a second email on the morning of the second day, which the Tribunal had not seen. The application was reconsidered in light of the further information and again rejected. Oral reasons were given.

9. The final hearing listed for 1/12/2020 was postponed as the claimant had said she was 'IT illiterate and shielding'. In respect of this hearing, the Tribunal wrote to the parties on 11/6/2021 and stated that this hearing would be heard via CVP, unless a party said in writing why that was not appropriate. There was no such representation from the claimant.

10. In light of the claimant's previous comments and taking into account her medical issues and the fact that a translator was being used, the claimant was asked to confirm at the start of the hearing that the CVP format was suitable. The claimant said that she wished to proceed and that she could hear very well. She was asked whether any other condition would cause a problem and she said she was 'feeling okay and did not see any problem in continuing'. In any event, frequent breaks were taken.

11. The start of the hearing was delayed due to connectivity issues and so the initial plenary hearing was converted to a telephone discussion. Despite the file noting that a translator had been booked, one was not available on the first day. For all of those reasons and the amendment application, the substantive hearing did not start until day two.

12. The Tribunal heard evidence from the claimant; and for the respondent from Ms Dustine Woolfenden (Head of People Operations), Ms Amelia Reid (People Director) and Ms Ginette Ferri (People Manager). It had before it a bundle of 190-pages, to which some documents were added. The page references are to the electronic bundle (the page numbering differed with that on the hard copy). On days two and three the Tribunal was assisted by Ms A Gleb translating Polish/English. When Ms Cornakova was questioning the respondent's witnesses the claimant asked that the translator be withdrawn as she was concerned about the amount of time the translation was taking. The claimant was asked if her English was good enough for her to understand the gist of the answer, without the translation and she said no (this was not a criticism of the claimant, it is understood that when using a second language, more can

be understood than can be spoken, but this was not the case for the claimant). On the basis that Ms Cornakova and the claimant had prepared the questions for the witnesses, translation of the question was dispensed with and the witnesses' answer was translated for the claimant's benefit.

13. The issues which the Tribunal had to decide were narrow: was the claimant's dismissal unfair; and was it directly discriminatory? The other issue was whether or not the respondent treated the claimant less favourably by not 'going through' with a settlement agreement?

Findings of fact

14. The claimant had an accident at work on 4/8/2016 and she did not return to work. She worked at the respondent's Chessington site and the respondent had another site in Grimsby.

15. The claimant was pursing a personal injury (PI) claim against the respondent, via its insurer. The respondent did not have any control over that claim and could not provide any information about it as it was being handled by the insurer's representative. The claimant said the claim was then 'dropped' and it is not clear what happened, other than to say the PI claim was not pursued for whatever reason.

16. The claimant was originally signed off as unfit for work on 15/8/2016 until 26/9/2016 due to a fractured femur (page 184). Initially it had been hoped that that the claimant's leg would heal and she would be able to return to work within about six months, however that proved not to be the case.

17. The claimant was paid occupational sick pay until the 31/12/2016 and then statutory sick pay until 23/7/2017 (page 69). The respondent became aware the claimant had moved from Chessington to Gloucester in March 2017 to be closer to her daughter. During this time, the claimant experienced personal problems.

18. When the claimant's representative was questioning the respondent's witnesses, she sought to criticise them for not asking the claimant such questions as why had the claimant changed address? The respondent quite rightly did not ask these questions of the claimant and it would have been criticised if it had done so. It was open to the claimant to volunteer information about her personal difficulties, but the respondent was correct not to enquire about them.

19. It seems (although it is not clear as the chronology has the report in the bundle after the report dated 6/12/2017 and it is out of chronological order in Ms Woolfenden's witness statement) that the claimant was referred to Dr McKay of Occupational Health (OH) in January 2017 and that resulted

in a report dated 5/1/2017 (page 58). That reports notes that there are two main concerns. Firstly, recovery from the original injury was protracted and secondly, the x-rays showed there had not been a full healing of the fracture. Dr McKay reported that it may be possible that the claimant would return to work in the longer-term, but that she could not at that stage say when that would be, she also suggested that the claimant be reviewed in two months' time.

20. A further OH referral followed and that resulted in a report dated 1/3/2017 (page 60), it said:

> 'She remains unfit to be at work. With the level of recovery, I have seen in the last 2 months, it appears she would be unlikely to return to work in her previous role in the next 3-6 months. It may be possible in the longer term, however, her ability to respond to rehabilitation is yet to be determined. She has not been given an indication of prognosis.'

21. The respondent wrote to the claimant on 4/4/2017 (page 64) and on 28/4/2017 invited the claimant to a meeting in Chessington (page 65). The claimant was offered the possibility of the meeting going ahead via a video call or at an alternative address, if her condition made travelling difficult. A similar letter was sent on 11/5/2017 (page 67). The letter also recorded that in the circumstances, the claimant may wish to have a family member with her at the meeting and the respondent would also arrange for an interpreter to be present. A response was sent on the claimant's behalf, via email on 21/5/2017 asking for more time (page 70).

22. The respondent again emailed the claimant on the 15/6/2017 (page 72) and there is then a hand written note on the file dated 23/7/2017 which says to leave the position open until December 2017 and that there will be a visit by OH on 4/12/2017.

23. Ms Woolfenden had visited the claimant at home in June or July 2017 and they had agreed she would contact the claimant in six months.

24. The respondent wrote to the claimant on 26/10/2017 (page 75) to confirm a home visit would take place on 4/12/2017, by Ms Woolfenden and Ms Chiweshenga an Occupational Health Advisor. As with the other letters, the respondent enclosed further copies of the previous OH reports and repeated the offer of being accompanied by a family member and said they would provide a translator. The claimant was asked for permission to contact her GP.

25. That resulted in an OH report dated 6/12/2017 (page 56). The report noted that the claimant was due to have an orthopaedic specialist

appointment on 12/1/2018 where the 'specialist will discuss other possible treatment options'. The report noted that the claimant was currently unfit for work, although she was keen to return to work in January 2018. Due to her slow recovery, it was considered that the claimant would not be able to return in the short term (given as in the next two to six months) and that her recovery may well take longer than six months.

26. On 9/3/2018 Ms Chiweshenga confirmed that a GP report was done on 23/11/2017 (page 79). On 23/3/2018 the respondent wrote to the claimant regarding the outstanding GP report (page 80). It seemed the claimant had requested to see the report before it was sent to the respondent and the result was the respondent still had not received the report. The respondent sent more or less the same letter to the claimant on the 2/5/2018 (page 81). The claimant was asked to attend a meeting on 9/5/2018 in Chessington to discuss:

> 'Any adjustments we could make to your role to support you in a return to work
> Any alternative employment which may be available
> Any other information concerning your individual situation which you feel may be of use to us'

The claimant was assured that her employment would not be terminated during the meeting.

27. On 29/5/2018 Ms Chiweshenga wrote to say that she now had a copy of the claimant's GP medical report (page 85). Ms Chiweshenga recorded the last time the claimant had seen her GP was in April 2017. Her recommendation/opinion was:

> 'In my opinion, [the claimant] is unfit at present Her GP has highlighted that she seems to have a substantial impairment that can impact on her ability to undertake her activities of daily living and work duties. She has some ongoing unresolved symptoms and mobility issues that are likely to impact on her return to work.'

28. As a result, the claimant was asked to attend a meeting on 13/6/2018 (page 87). The purpose of the meeting was again to discuss any adjustments which could be made to support the claimant's return to work.

29. The claimant did not attend the meeting and her representative sent an email asking that the meeting take place in Gloucester (page 91). On the 14/6/2018 the respondent wrote to the claimant and proposed the meeting take place on 20/6/2018 at her home address (page 92). There was then a discussion about an interpreter (pages 94-95).

30. Ms Ferri wrote on the 26/6/2018 to confirm the outcome of the meeting, which was that the claimant did not feel able to return to work 'yet' and that she was not in a position to commute from Gloucester to Chessington. She confirmed at the meeting that termination of the contract was discussed and Ms Ferri noted that the claimant had requested that a settlement agreement be proposed. The response had been that as the claimant had an ongoing PI claim, that a settlement agreement was not an option as the claimant would be expected as part of that agreement to waive any PI claim. The claimant pointed out that it was possible to exclude her PI claim from the scope of the settlement agreement. Ms Ferri confirmed that no decision would be taken, but said the respondent would like to refer the claimant to an orthopedic specialist (page 98).

31. Ms Cornakova (whom the claimant had confirmed in the meeting was now representing her) replied on the claimant's behalf on 11/7/2018 agreeing with the content of Ms Ferri's letter, but took issue with the last paragraph of the letter and set out the claimant's position (page 100).

32. An appointment was then made for the claimant to attend a Dr Roberts in Gloucester and she was informed of this in a letter dated 17/10/2018 (page 109). Dr Roberts' report is dated 30/10/2018 and referred to the claimant's mental health, saying (page 112):

> 'Since the accident occurred and she has had debility and she has had low mood and is currently under mental health care having counselling. She has also had problems with tinnitus and is currently having scans relating to a tonsil problem.'

33. The Tribunal finds this was the extent of the notice which the respondent had in respect of the claimant having any mental health issues.

34. Dr Roberts said the claimant was currently unfit for any type of work and thought it unlikely that the claimant would be fit for any walking, standing or carry role in the next two years. In a separate section of the report, Dr Roberts confirmed the opinion that the claimant would remain unfit for work for the next two years. Regarding an enquiry about ill health retirement, Dr Roberts reported that the claimant did not wish to consider it and preferred the option of a settlement agreement.

35. There was an issue with the claimant making corrections to the report and eventually, it was released to the respondent. On 21/1/2019 Ms Ferri wrote to the claimant to arrange a meeting (page 126):

> 'During this meeting I would like to discuss
>
> The report from Everwell Occupational Health

> Any suitable alternative employment which may be available
>
> Any other information concerning your individual situation which you feel may be of use to us
>
> At the meeting we will agree the next steps and, if it becomes apparent that you are unable to return to work in the foreseeable future we will discuss options which may include ending your employment due to ill health.'

36. The meeting took place on the 29/1/2019 and was minuted (pages 129-134). Ms Cornakova confirmed the details in Dr Robert's report were correct, however there were additional matters which were not included.

37. The claimant disagreed with Dr Roberts' use of the word debility and said that she was suffering from severe depression and anxiety and that she was on medication for the same.

38. The claimant was asked if she agreed with Dr Roberts view that it would be at least two years before she was fit for work and she replied 'probably', she then said that it was difficult to say and for her to look into the future. She did say she felt she was getting worse rather than better.

39. The content of the meeting then returned to the settlement agreement and Ms Ferri said the position was that one would not be offered due to the ongoing PI claim. This resulted in Ms Ferri stepping out to call Ms Reid, after which Ms Ferri confirmed that in the circumstances, it was proposed the claimant's employment would be terminated on the grounds of capability. Clearly, this proposal was unwelcomed from the claimant's point of view. Ms Ferri also said that in light of the new information the claimant had provided, she would review the respondent's position on the settlement agreement. The Tribunal finds the 'new information' to be that provided by the claimant in the meeting, in relation to the amendments/additions she wanted to be made to the report.

40. A follow-up letter from the meeting was sent on the 5/2/2019 (page 147). In that letter, Ms Ferri confirmed that a settlement agreement would not be offered to the claimant. The rationale was that any claim for loss of earnings as a result of the accident, would be the responsibility of the insurance company as part of the PI claim.

41. The Tribunal finds that this is a perfectly rational stance for the respondent to take. It does not want to pay out for insurance cover in the event of a successful PI claim and then pay out again to the claimant for loss of income. The fact the respondent understood there was a live insurance

claim was the reason why the respondent did not want to offer a settlement agreement to the claimant.

42. There was a separate side argument about when the settlement agreement was first proposed or discussed and who first mentioned it.

43. The respondent did more than it was obliged to do. It did not reject the claimant's request out of hand (as it could have done), it went away and considered the proposal. It may have been, had the claimant's expectations been more modest, that it would have been cost effective for the respondent to settle any potential claims for a small sum and have the certainty that there would not be any litigation. The respondent chose not to make any settlement offer and in these circumstances, it cannot be criticised for the stance which it took.

44. The Tribunal finds that it was the claimant who instigated the settlement agreement discussions and that it was first raised on the 20/6/2018. Even if the claimant's case is correct and that it was Ms Woolfenden suggested a settlement agreement at the meeting on 4/12/2017, that does not assist the claimant's case. It matters not when or who first proposed a settlement agreement. The claimant's allegation is that she was treated less favourably than a non-disabled employee, when the respondent failed to 'follow through' on a settlement agreement. The claimant's comparator would have to be in circumstances that were not materially different from the claimant's. Her comparator therefore would be someone who was pursuing a PI claim against the respondent's insurers. The Tribunal finds that in those circumstances, the respondent would not offer a settlement agreement.

45. In conclusion, Ms Ferri stated that in light of the medical evidence and the claimant's own opinion that there was no prospect of her returning to work, the decision had been taken to terminate the claimant's employment on the grounds of capability. The claimant was paid in lieu of notice and her accrued holiday pay. The claimant was offered the right of appeal, which she exercised. The claimant was asked to explain her grounds of appeal in a letter of 26/2/2019 (page 151).

46. The appeal hearing was held on 4/4/2019 and conducted by Ms Reid (pages 163-171).

47. One of the issues troubling the claimant at the appeal hearing, was her contention that she was dismissed as she had raised the possibility of her employment terminating under the terms of a settlement agreement. The Tribunal does not accept this. It was the claimant's own case that a settlement agreement was first raised, by Ms Woolfenden on 4/12/2017. It is nonsensical to suggest that as a potential settlement agreement was

discussed on the 29/1/2019, the claimant was dismissed as a result of that. The claimant is not prevented from suggesting that her employment end on agreed settlement terms, but equally, the respondent is entitled say 'how much are you looking for?' and then to say 'no', it does not want to take that any further.

48. The claimant also complained that she was not offered light duties and/or other adjustments were not made. This misses the point that the claimant was unfit for any work. The Tribunal finds that the respondent followed its process thoroughly and reasonably. The Tribunal has no doubt in finding that if and when the claimant was well enough to return to work in some capacity, then the respondent would have complied with its obligations. The claimant was not at this point in the proceedings in the position of being well enough to return. The respondent's stance that it would have considered any alternative work or adjustments ***when*** the claimant was well enough to return, was accepted.

49. The claimant also seemed to believe that as she was disabled, she could not be dismissed. The respondent patiently explained that she was dismissed as she was no longer capable of performing her role. Following on from that, there was no prospect of her returning to work for a number of years and she was not fit for any role.

50. The appeal outcome was sent to the claimant on 11/4/2019 (pages 181-183).

51. In respect of proposing a settlement agreement, Ms Reid found that the proposal had come from the claimant and that she had been pursuing this line of enquiry for some time. Ms Reid also found that discussions about a settlement agreement and any potential personal injury claim, had nothing to do with a decision to dismiss for capability in light of the advice (with which the claimant agreed) that she would not be fit for work for two years.

52. On the element of alternative employment or adjustments, Ms Reid referred to the numerous OH reports and the findings of all of them, that the claimant was unfit for work. The Tribunal finds this duty was not therefore, at that particular time, engaged and so there was no failing by the respondent.

53. The claimant also alleged that the Capability Policy had not been followed. Ms Reid did not accept this. The Tribunal agrees and finds that the respondent had been conscientious and accommodating. All the steps the respondent had taken had been reasonable.

54. The claimant's final point was that she had been dismissed for her disability rather than for capability. Ms Reid confirmed the claimant had

been dismissed following medical reports that stated she was unfit for work at the time and was likely to remain so for at least two years. The Tribunal notes that the claimant (despite her case now) agreed with the prognosis at the time, possibly as it assisted her PI claim. As was pointed out, the claimant could not travel to Chessington for an absence attendance meeting and therefore, it was difficult to see how she could travel to work. There was nothing advanced by the claimant (in fact quite the opposite was the case) to give any indication that there was a prospect of her returning to work.

55. The claimant during the hearing sought to rely upon evidence that the respondent had knowledge of her mental health issues, prior to Dr Robert's comments in the report which the respondent first saw in January 2019.

56. The claimant relied upon Ms Chiweshenga's OHA notes and clinical assessment form (additional document number 3) which related to the assessment on 4/12/2017. Under the heading physiological wellbeing, Ms Chiweshenga recorded:

> 'She reports suffering from stress and depression and reports low mood, low energy, not motivated to do anything and low concentration. She reports that she is sometimes feeling suicidal but is not experiencing this for the last few weeks. She had been advised to contact employee assistant programme (EAP) Health Assured on 0800 030 5182 or to contact her GP for counselling referral.'

57. The claimant sees this as evidence that the respondent was on notice of mental health problems from the consultation on 4/12/2017. What that assertion ignores is that although Ms Chiweshenga recorded those matters in her notes, that information did not find its way into her final report made to HR dated 6/12/2017 (page 56). The only reference Ms Chiweshenga made was to:

> 'We have discussed another condition which started due to restricted mobility. She informs me that she saw her GP and was given medication to help manage her stress. I have advised her to contact employee assistance programme (EAP) called Health Assured on 0800 030 5182. She was also advised to contact her GP for counselling referral if required.'

58. For whatever reason, but in all likelihood in her clinical judgement, Ms Chiweshenga did not provide more details of the claimant's mental health issues. In her report to HR she used the word 'stress', rather than 'depression'. She did not detail any medication which the claimant was

on. The Tribunal therefore finds that the respondent only had one mention of 'stress' in the report of 6/12/2017 and in light of the claimant's circumstances, it would be expected that she would be stressed. If nothing more expressly was stated, then that was the only information which HR had available to it.

59. In addition, the report confirmed that a copy of it had been provided to the claimant two working days before it was sent to HR. The claimant could have, as she did in November/December 2018 seek to have the report amended or corrected. She could have informed HR herself that there was further information which she wanted to be considered. Finally, she could have asked her GP to write a report about her mental health issues.

60. The Tribunal therefore finds that the respondent was not on notice of any mental health issues (other than 'stress' which would be expected) until HR received Dr Roberts' report.

61. The claimant also relies upon her own correspondence with the OH provider (where the claimant disagreed with the content of the report following the consultation in November and December 2018). This disclosure should have been provided by the claimant to the respondent as it is not documentation which the respondent knew existed or had control over, in order for it to be included in the bundle.

The Law

62. Section 94(1) of the Employment Rights Act 1996 (ERA) provides that 'an employee has the right not to be unfairly dismissed by her 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.

63. 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)—
>
> a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the case.

64. 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.

65. 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).

66. The prohibited conduct is direct discrimination contrary to s.13 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.

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

68. Comparison by reference to circumstances is dealt with at s.23 EQA, which provides:

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.
>
> (2) The circumstances relating to a case include a person's abilities if—
>
> (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
>
> (b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

69. 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.

70. The authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258. That case makes clear that at the first stage the tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

71. In Shamoon v Chief Constable of the RUC 2003 IRLR 285 it was said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. It is suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as she was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

72. In Madarassy v Nomura International plc 2007 IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase ‘could conclude’

means that ‘a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination’.

73. In Hewage v Grampian Health Board 2012 IRLR 870 the Supreme Court endorsed the approach of the Court of Appeal in Igen Ltd v Wong and Madarassy v Nomura International plc. Which said that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

74. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in Igen v Wong approved the principles set out by the EAT in Barton v Investec Securities Ltd 2003 IRLR 332 and that approach was further endorsed by the Supreme Court in Hewage. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

75. The Court of Appeal in Ayodele v Citylink Ltd 2017 EWCA Civ 1913 confirmed that the line of authorities including Igen and Hewage remain good law and that the interpretation of the burden of proof by the EAT in Efobi v Royal Mail Group Ltd EAT/0203/16 was wrong and should not be followed.

76. In Dresdner Kleinwort Wasserstein Ltd v Adebayo 2005 IRLR 514 the EAT said that the shifting of the burden to employers meant that tribunals are entitled to expect employers to call evidence which is sufficient to discharge the burden of proof. The EAT said that one of the factors to be taken into account, in an appropriate case, could be the respondent’s failure to call witnesses who were involved in the events and decisions about which the complaint is made, in cases where the burden is found to have passed to the employer.

77. The respondent has conceded the claimant was disabled by reason of her mobility issue for the purposes of s. 6 EQA. The claimant also relies upon her mental health issue as a disability. The respondent concedes that it is a disability, but denies that it had knowledge of the condition at the relevant time. Irrespective of that, the Tribunal fails to understand what is added by pleading a mental health issue in the alternative. There is no allegation where the disability is only the mental health issue. In the two allegations made, the mobility disability is relied upon as the protected characteristic and the respondent has conceded that.

Conclusions

78. In respect of the fairness of the dismissal, the potentially fair reason was the claimant's incapability of attending work – she was unfit for work and the medical opinion was that she would remain so for at least two years. At the time of dismissal, February 2019, the claimant had been absent since August 2016. The claimant agreed with the medical opinion.

79. The respondent followed a fair and reasonable process. It referred the claimant to OH and it provided translators. It gave her notice of meetings and allowed her to be accompanied. It met her in her own home as she was unable to travel to its premises in Chessington. There was nothing to criticise about the process.

80. The decision to dismiss in these circumstances fell within a band or range of responses which an employer could take. Many employers would have been less tolerant and 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 (her labour). That was not a situation which could be allowed to continue indefinitely. The respondent also had a legitimate business need to replace the claimant as Team Leader. It was looking to develop its business and moving into new areas. It needed continuity in leadership and it was entitled to take a decision, in the light of all of the evidence it had, that it needed to terminate the claimant and to replace her. It was also open to the claimant, had her health dramatically improved much sooner than was expected, to apply to re-join the respondent. As has been observed, the Tribunal was not told of any issue with the claimant's performance prior to her accident and there is nothing to suggest that when she was fit enough, the respondent would not have welcomed her back.

81. 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. In the circumstances, the claimant's absence with no prospect of her returning to work, merited dismissal.

82. The claimant's dismissal was therefore fair.

83. Turning to the allegations of direct discrimination, was the claimant treated less favourably (dismissed) because of her disability? Would someone who did not have the protected characteristic of disability in circumstances that were not materially different to those of the claimant had also been dismissed?

84. The reason why the claimant's employment was terminated was because of her extended absence, the medical reports and the fact that there was no prospect of her returning to work, for at least two years. The claimant was not dismissed because she had a disability. If the claimant had recovered and was able to work in some capacity, she would have done so, even if she remained disabled. There was therefore no direct discrimination in respect of the claimant's dismissal.

85. The respondent did not 'go through' with a settlement agreement. The reason it did not do so was the fact that there was a 'live' PI claim and the claimant could potentially recover loss of earnings/etc via that litigation. That was the reason the respondent declined to enter into a settlement agreement and it had nothing whatsoever to do with the claimant's disability. There was a connection in that if the accident had not happened, the claimant would not be pursuing a PI claim, but that is the extent of it. The claimant was not treated less favourably than a non-disabled employee in not being offered a settlement agreement because of her disability.

86. A remedy hearing listed for 3/12/2021 will not be used for that purpose.

1/7/2021

Employment Judge Wright