Case Number: 3321596/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs S Murray	v	Alliance Care (Dales Homes) Limited

Heard at: Watford (via CVP) **On**: 5 and 6 August 2021

Before: Employment Judge Hyams **Members:** Ms G Binks
Mr T Chapman

Appearances:

For the claimant: In person
For the respondent: Mr L Ashwood, solicitor

UNANIMOUS LIABILITY JUDGMENT

1. The claimant was not dismissed unfairly. The claimant's claim of unfair dismissal therefore does not succeed and is dismissed.

2. The claimant was not subjected to direct discrimination because of disability. The claimant's claim of direct disability discrimination therefore does not succeed and is dismissed.

3. The claimant's dismissal was a proportionate means of achieving a legitimate aim. Her claim of discrimination within the meaning of section 15 of the Equality Act 2020, contrary to section 39 of that Act, accordingly does not succeed and is therefore dismissed.

4. The claimant's claim for holiday pay, made as a claim of unpaid wages and/or as a claim for damages for breach of contract, and unpaid notice pay, is well-founded in that she was not paid her full entitlement in those regards. The respondent underpaid the claimant in the sum of £731.24, gross, i.e. before the deduction (if applicable) of income tax and national insurance contributions, and the claimant is accordingly entitled to that sum.

REASONS

The claims

1 In these proceedings, the claimant claimed that she was dismissed unfairly by the respondent within the meaning of section 98(4) of the Employment Rights Act 1996 ("ERA 1996"). She was dismissed on 7 May 2019.

2 In addition the claimant claimed, as recorded in the record of the preliminary hearing conducted by Employment Judge ("EJ") Chudleigh on 12 May 2020 at pages 22-26, i.e. pages 22-26 of the hearing bundle, "direct discrimination because of a disability" and "section 15: discrimination arising from a disability".

3 The claim of "direct discrimination because of a disability" was made under section 13 of the Equality Act 2010 ("EqA 2010"). A claim made under that section is a claim of "less favourable treatment" "because of a protected characteristic" than the claimant would have received if he or she had not had that particular protected characteristic.

4 Section 15 of that Act provides this:

> " (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."

5 In paragraph 3(ix) of the record of the hearing of 12 May 2020 (at page 23), EJ Chudleigh recorded this:

> "The respondent relies on the following as its legitimate aim: foreseeable, regular attendance at work from its care staff at the care home."

6 There was in that record no reference to the proportionality of the means of achieving that aim. Before us, the respondent through Mr Ashwood relied principally on the costs of keeping the claimant as a member of the staff of the respondent, both actual costs in the form of the right of the claimant arising under the Working Time Regulations 1998, SI 1998/1833 ("the WTR 1998") to ongoing holiday pay and potential costs in the form of the amount of (1) notice pay required by the ERA 1996 to be given and (2) any redundancy payment that might need (also by reason of the ERA 1996) to be paid, by reason of the claimant acquiring continuous service from year to year. In addition, the respondent relied on the importance of continuity of care. As against those costs and the desirability of continuity of care, the claimant's case was (we understood) to the effect that it was a major benefit to her to know that she had a job to go back to if and when she was fit to resume work, and it was a major disadvantage to her to suffer the emotional effect of being dismissed.

7 In addition, the claimant claimed that she was owed accrued holiday pay and notice pay. She also stated in paragraph 13 of her witness statement a complaint about what the respondent had paid into her pension pot, but as discussed with the parties on 5 August 2021, a claim of a failure to make a payment into a workplace pension scheme for an employee is not within the jurisdiction of an employment tribunal.

8 The claimant commenced early conciliation by approaching ACAS on 26 June 2019, and the early conciliation certificate was issued by ACAS on 26 July 2019. No time limit issues arose, therefore.

The evidence before us

9 We heard oral evidence from the claimant on her own behalf and, on behalf of the respondent, from

9.1 Mr Michael Daglish, who was at the time of the dismissal of the claimant the respondent's Home Manager of Mill House, where the claimant was employed to work as a carer; and

9.2 Ms Chantal Kirkland, who at that time was employed by the respondent as the Regional Manager for the area in which Mill House was situated.

10 There was a bundle of papers before us, consisting of 85 pages.

11 Having read the pages of that bundle to which we were referred and heard oral evidence from those witnesses, we made the following findings of fact. Before stating those findings, we observe that we found all of the persons who gave evidence before us to be honest witnesses, doing their best to tell us the truth.

The facts

12 The claimant started her employment with the respondent on 8 February 2017. She was employed by the respondent as a part-time Care Assistant. Her contract of employment was at pages 28-31, and it stated on page 28 that her normal working paid hours were 22 per week. On page 29, the contract stated that the claimant was entitled after the successful completion of her probationary period (which we understood had occurred) to four weeks' notice. While the document at page 79, which was the claimant's final pay statement, stated by implication that she worked 21.5 hours per week, Mr Ashwood on behalf of the respondent accepted that that was inaccurate and that the claimant's normal hours per week were in fact 22. The claimant's rate of pay at the time of her dismissal was £8.50 per hour. Thus, her weekly pay was £187.00 gross, i.e. before any deductions for income tax and national insurance.

13 On 29 November 2017, the claimant was diagnosed with breast cancer. As a result of the treatment she received for her cancer, she commenced a period of

absence from work because of sickness on 4 December 2017. That period continued until she was dismissed on 7 May 2019 in the circumstances which we describe below. The claimant was given (we saw from the document at page 79, and as the claimant accepted) what was stated to be pay in lieu of notice in the sum of £688.16 and one week's holiday pay in the sum of £182.75 gross. Thus, she was paid, gross, £870.91 as her final payment of wages. On 6 August 2021 documentary evidence which the claimant expressly did not challenge was put before us showing that the claimant had taken more than four weeks' holiday in the 2017-2018 holiday year. She had, however, not taken any paid holiday after 4 December 2017.

14 The factual background to the claimant's dismissal was described in the following passage of Mr Daglish's witness statement.

> "7. At the start of January 2019, Sarah [i.e. the claimant] was referred to Occupational Health to get more information about how long she might be off work and what, if anything, we could do to help her.
>
> 8. On 8 January 2019, Occupational Health reported that: Sarah was unfit for work; there were no adjustments that we could make that would help her return to work; she would remain unfit for work for the foreseeable future; and a return to work date could not be determined. (The report is on pages 57 - 59.)
>
> 9. After we received the report, I called and HR called Sarah to see if she would come and meet us to discuss the report. Sarah would say that she was too busy to talk.
>
> 10. On 17 April 2019, I wrote to Sarah. I invited her and a companion, if she wanted, to a long term sickness hearing on 7 May 2019 to: discuss the Occupational Health report; have her provide an update on her health and its impact on her ability to work; allow us to talk about any vacant alternative roles for her; and hear her view on when she was likely to return to work. I warned Sarah that a possible outcome of the meeting was her being dismissed with pay in lieu of notice. I asked Sarah to provide an alternative time and date if she could not attend the meeting and I said it would go ahead without her if she did not attend without saying so first. My letter is on pages 64 - 65.
>
> 11. On 7 May 2019, I held the hearing. Sarah did not turn up but, as she had not said that she would not be turning up, I carried on with the hearing. I had Dianne Giles from HR with me to take notes and provide any support I might need. I reviewed the Occupational Health report and went through the information and questions I had prepared. Having done that, I decided that Sarah's employment should be terminated on the grounds of ill health. (The notes of the hearing are on pages 67 - 69.)

12. Later that day (7 May 2019), I wrote to Sarah. I explained all the information that I had taken into consideration, that she had been absent since December 2017 and that I had no evidence that she would be returning to work in the foreseeable future. I told her that her employment was terminated and she would receive a payment in lieu of her notice. I gave her the right of appeal. (My letter is on page 70.)

13. I deny that I dismissed Sarah because she had cancer. I would have dismissed her if she had been absent for 18 months and with no foreseeable return to work because of another health issue.

14. I accept that I dismissed Sarah because of her ongoing absence which had no date for ending. Dismissing Sarah was a very hard thing to do. I realised what a battle she had on her hands beating cancer and I wanted to support her. Sarah, sadly though, hadn't been able to turn up to work and carry out her duties and there was no end in sight of that. Continuing to wait for Sarah was outweighed by freeing up a role in Mill House's headcount to recruit someone who would be able to turn up every day and do their work."

15 We accepted that passage in its entirety except in regard to (1) the reason for the claimant's dismissal (which we determined only after a consideration of all of the evidence before us; our conclusion in that regard is stated in paragraph 42 below), and (2) the final sentence. As far as that sentence was concerned, we could not see why the respondent had to dismiss the claimant in order to "[free] up a role in Mill House's headcount". That was because it was open to the respondent to regard the claimant while she was absent from work on account of long-term sickness as not being part of the Mill House "headcount", and Mr Daglish acknowledged that when we put it to him.

16 However, there were costs associated with the claimant's continued employment, which were the result of the application of the respondent's obligations under the WTR 1998 and the ERA 1996, as stated in paragraph 6 above. The ongoing cost to the respondent of retaining the claimant in employment was her right to paid annual holiday. As a result of regulation 16 of the WTR 1998 read with (1) section 223 of the ERA 1996 and (2) the clause headed "Annual leave" in the claimant's contract of employment at page 28, the cost of that right was (while the claimant's hourly rate of pay was £8.50) £8.50 x 22 x 5.6, i.e. £1,047.20, plus pension rights of 3% of that sum, which was £31.42. That was a total of £1,078.62 per year. The claimant's annual pay was £8.50 x 22 x 52, which was £9,724. Her pension rights were 3% of that, i.e. £291.72. Thus the annual cost of employing the claimant (ignoring employer's national insurance contributions) was £10,015.72. There might in addition from time to time have been a need to employ agency staff to cover the claimant's absences, but that would not normally have occurred very often.

17 If the respondent had employed agency staff instead of the clamant while the claimant was absent through sickness, then the agency staff would have cost

more to employ than the claimant. Although the respondent would not have incurred costs in employing a member of staff supplied by an agency over and above the hourly rate of pay for that member of staff (which, we were told by Mr Daglish and we accepted, was in the region of £16 per hour), there was clearly a considerable difference between the costs of employing the claimant and an agency employee. In addition, we accepted Mr Daglish's evidence about the desirability and benefit to residents of there being continuity of care, which would not be easy to ensure with the use of agency staff. However, we did not see there to be a need to employ agency staff to cover the claimant's long-term sickness absence if a member of staff was employed on at least a nominally temporary basis while the claimant was on such absence, and the respondent did not put any evidence before us about the difficulty or otherwise of employing a member of staff on such a temporary basis.

18 The occupational health report on which Mr Daglish relied in deciding that the claimant should be dismissed at pages 57-59, dated 8 January 2019, was written by an occupational health advisor (i.e. and not a doctor). It contained the following statements:

18.1 "Ms Murray continues to be unfit for work at present."

18.2 "I am unable to ascertain a likely return to work date presently as Ms Murray is continuing to present with significant symptoms as discussed above which are preventing her in undertaking her usual day-to-day activities."

18.3 "When Ms Murray indicates she has made further recovery and is ready to consider a return to work date a gradual return to work is likely to be recommended. As she is unfit for work at present it is not possible to provide you with a suitable rehabilitation plan."

18.4 "When Ms Murray indicates she can consider returning to work she is likely to benefit from an initial rehabilitation plan which enables her to undertake lighter duties as she is unlikely to be able to fulfil the full requirements of her role initially. I anticipate over time her symptoms should improve and she should be able to return to her substantive role."

18.5 "I am unable to identify any adjustments that the employer could make to support the employee in facilitating a return to work at this time."

18.6 "I have not made any further plan to routinely review Ms Murray. I would be happy to do so in approximately 4 to 5 weeks when I envisage she will have made some further recovery and it might be possible to provide you with a suitable rehabilitation plan. I therefore recommend management consider a re-referral back to Occupational Health following a discussion with Ms Murray in the first instance."

19 The claimant appealed against her dismissal, without giving any reasons for her appeal. The appeal letter was dated 10 May 2019 and was at page 71. In it, the claimant merely said: "I am Appealing against the decision to terminate my Employment." On 14 May 2019, in the letter at page 72, the claimant was invited to attend an appeal hearing on 28 May 2019, to be chaired by Ms Kirkland. The claimant did attend that hearing. Ms Kirkland's evidence was that notes of that hearing were made but that they had been lost. What was still in existence, as one would expect, was the outcome letter. It was dated 30 May 2019 and was at pages 73-74. On page 73, this was said by Ms Kirkland:

> "You stated that you were invited to attend a meeting on 7th May 2019 but failed to attend and therefore the hearing took place in your absence. You said that the reason you could not attend was that you were at the hospital having an MRI scan. I informed you that you did not make any contact with us to let us know that you could not attend the hearing and the home tried to contact you on the day however you didn't respond via the telephone therefore the hearing took place with the information provided by Occupational Health regarding your ill health and the factual information was used to make a decision.
>
> You showed me your appointments from the hospital which showed that you had hospital appointments on the 1st and 17th May but nothing on the 7th May. You said that you had 'become confused and that your head was everywhere' You said that you have trouble remembering as you are prescribed medication for depression."

20 On page 74, Ms Kirkland had written this:

> "The purpose of the hearing was to consider if you as an individual was able to return to work in a reasonable timescale and able to perform the duties of the required role as you had been absent from work since the 4th December 2017 which was considered long term. The company used the medical information which was provided to them along with any conversations which had taken place during your period of absence. It was considered based on the information received that you were continuing to be unfit for your role and therefore the decision was made to terminate on the grounds of ill health.
>
> During the appeal meeting you appeared confused and contradicted many of the points that you initially raised. I have therefore not upheld your grounds for appeal."

21 Ms Kirkland's evidence was that those passages in the letter at pages 73-74 were accurate, and we accepted that they were. Ms Kirkland's witness statement contained the following paragraphs, which we also accepted:

> "7. Whilst I have not been able to check the notes, I am confident that Sarah [i.e. the claimant] said that she remained unfit to return to work because she was still poorly and she did not say she would be able to come back

> to work soon. I am confident about this because if Sarah had said she was fit to return to work or would be soon, I would have overturned the decision to terminate her employment.
>
> 8. I remember Sarah seemed confused at times and she contradicted herself many times during the meeting."

22 The claimant alleged that as from 6 March 2020, she was fit to return to work. In saying that, she relied on the letter of that date at page 75 which, as she put it, discharged her from the oncology service which had been treating her. However, there was in the bundle also, at page 76, a letter from the claimant's General Practitioner dated 1 June 2020, which referred to the claimant as having "in February 2019 ... clear depression symptoms" for which she was "commenced ... on mirtazipine" and as having in "March 2020" "[scored] 15/30 on a PHQ depression questionnaire", for which she was then "commenced on Sertraline".

23 In addition, on 12 May 2020, this was recorded (at the end of order 1.4 on page 24) by EJ Chudleigh:

> "It was noted that the claimant has not worked since her dismissal, she says by reason of ill health."

24 Also, in the claimant's schedule of loss at page 27, dated 8 July 2020, this was said:

> "The client is still unfit for work, and is in receipt of the following benefits: Universal Credit, Personal Independence Payment, and Council Tax Support."

25 The claimant said that the schedule of loss had been prepared for her by someone at a Citizens Advice Bureau and that they had asked her whether she had a job and when she said that she did not, they said that it was because she was not fit to work. We found that difficult to accept, but in any event the claimant told us that she had not looked for work at all since her dismissal because she had been awaiting the outcome of this case as the case was very stressful for her.

The relevant legal principles

<u>The law of unfair dismissal</u>

26 In paragraph DI[1206]-[1207] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"), this is said about dismissals for (in)capability arising from ill-health:

> 'The starting point for analysing the duty of the tribunal in deciding whether or not an ill health capability dismissal is fair is the EAT [i.e. the Employment Appeal Tribunal] decision in *Spencer v Paragon Wallpapers Ltd* [1976] IRLR

373, [1977] ICR 301. In that case Phillips J emphasised the importance of scrutinising all the relevant factors.

> "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?"

And he added that the relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'."

27 In order to act fairly when dismissing an employee for incapability through ill-health, an employer has to consult the employee and have obtained some reliable medical evidence on which to base the decision to dismiss. That is clear from the following passage from the judgment of the EAT in *East Lindsey District Council v Daubney* [1977] IRLR 181, [1977] ICR 566:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."

28 We read that passage as a statement to the effect that if an employer acted in a way which was inconsistent with the principles stated in the passage, then the employer would have acted outside the range of reasonable responses of a reasonable employer.

29 We read the following passage in paragraph DI[1264] of *Harvey* in the same way:

> "As the dictum of Phillips J in *Spencer v Paragon Wallpapers Ltd* (para [1206]–[1207] above) indicates, there are a variety of factors to be weighed up in considering whether the decision to dismiss is reasonable under ERA 1996 s 98(4). These include:

— the nature of the illness and the job;

— the applicability and clarity of an employer ill health policy;

— the needs and resources of the employer;

— the effect on other employees;

— the likely duration of the illness;

— how the illness was caused;

— the effect of sick-pay and permanent health insurance schemes;

— alternative employment; and

— length of service."

Direct disability discrimination

30 In the course of determining a claim of direct discrimination within the meaning of section 13 of the EqA 2010, section 136 of that Act applies. The latter provides:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

31 When applying that section it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the

evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:

> ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
>
> 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.
>
> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable?

> There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''
>
> In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

32 Nevertheless, in some cases, the best way to approach the question whether or not there has been direct discrimination within the meaning of section 13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred. That is the effect of the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

Section 15 of the EqA 2010

33 We found the passage in paragraphs L[377]-[377.02] of *Harvey* to be of considerable assistance to us in analysing the question whether or not the claimant's dismissal was in the circumstances a proportionate means of achieving a legitimate aim. At the end of that passage, this was said:

> "[I]n *Ruiz Conejero v Ferroser Servicios Auxiliares SA* C-270/16, [2018] IRLR 372 the ECJ [i.e. the European Court of Justice] dealt with a case [where the] claimant was a hospital cleaner who had a degenerative joint disease aggravated by obesity; he was dismissed after a series of absences, the cumulative duration of which exceeded the limits set out in the Spanish provision in question. There was no exemption for disability-related absences. The ECJ held that the policy was likely to place disabled employees at a substantial disadvantage as compared to non-disabled employees and had placed the claimant at a disadvantage. They were satisfied that the policy pursued the legitimate aim of combating absenteeism at work. The question of proportionality was for the referring court, but it would be necessary, the court held, to consider the direct and indirect costs that had to be borne by companies as a result of absenteeism, whether the measures went beyond what was necessary to achieve the aim pursued and the adverse effects it was liable to cause for the persons concerned."

Holiday pay payable on the termination of employment where annual leave has not been taken during a period of sickness absence

34 On 5 August 2021, we caused an extract from *Harvey* concerning the issue of the right to accrued holiday pay when an employee has been absent on account of sickness and not taken holiday during the period of that absence to be sent to

the parties by our clerk. The extract was paragraphs CI[169]-[190]. We found paragraphs [188]-[188.05] to be of particular assistance. Their nub is that the best approach to take to a situation such as the one in issue in this case is that which was taken by Lewis J (as he then was) sitting in the EAT in *Plumb v Duncan Print Group Ltd* [2015] IRLR 711, [2016] ICR 125, which is that

> 'that the modification of WTR SI 1998/1833 reg 13 proposed by Mummery LJ in *Larner* [i.e. *NHS Leeds v Larner* [2012] EWCA Civ 1034, [2012] IRLR 825, [2012] ICR 1389] should be qualified so as to read:
>
> > "(9)Leave to which a worker is entitled under this regulation may be taken in instalments but, (a) it may only be taken in the leave year in respect of which it is due, *save* that it may be taken within 18 months of the end of that year *where the worker was unable or unwilling to take it because he was on sick leave and, as a consequence did not exercise his right to annual leave*.' (The words in italics are those added by Mummery LJ; the underlined words are those further added by Lewis J.)'

The issues for determination by us

35 In addition to the question whether or not the claimant was entitled to any additional accrued holiday and notice pay on 7 May 2019, the issues were accordingly these.

(1) The claim of unfair dismissal

36 What was the reason for the claimant's dismissal?

37 If, as it is the respondent's case, it was the claimant's capability:

37.1 Was the claimant consulted sufficiently about the possibility that her employment might be terminated because of her long-term absence on account of sickness, i.e. was the consultation with the claimant herself that occurred less than it was within the range of reasonable responses of a reasonable employer to conduct?

37.2 Did the respondent fail to take such steps as it was within the range of reasonable responses of a reasonable employer to take to obtain objectively reliable evidence concerning the claimant's health and likely ability to return to work as at 7 May 2019?

37.3 Was the claimant's dismissal for (in)capability in the circumstances as we found them to be within the range of reasonable responses of a reasonable employer?

(2) The claim of direct disability discrimination

38 Had the claimant put before us "facts from which [we] could decide, in the absence of any other explanation," that the respondent in dismissing her treated her less favourably to any material extent because she had cancer?

39 If so, had the respondent satisfied us on the balance of probabilities that the respondent had not so treated the claimant?

40 Alternatively, what was the reason why the claimant was dismissed?

(3) The claim of a breach of section 15 of the EqA 2010

41 It being clear that the claimant was dismissed because of something (namely her absence from work) arising from her disability of cancer, the question for us was whether that dismissal was a proportionate means of achieving a legitimate aim.

Our conclusions on the claims

Unfair dismissal

42 The claimant's dismissal was, we concluded, for capability. We came to that conclusion because we accepted Mr Daglish's evidence in this regard, in paragraph 11 of his witness statement, which we have set out in paragraph 14 above, in the circumstance that the claimant had, by the time of her dismissal, been absent from work continuously for 18 months by reason of sickness.

43 The claimant was, we concluded, given ample and sufficiently clear notice of the meeting of 7 May 2019 which Mr Daglish intended to hold with her, as he stated in the part of his witness statement set out in paragraph 14 above which, as we say in paragraph 15 above, so far as relevant we accepted. The fact that the claimant did not attend that meeting did not mean that she was not sufficiently consulted about the proposal that she be dismissed. She had the opportunity to participate in a proper consultation process, but for no objectively good reason declined to do so.

44 In any event, the claimant had the right to appeal against the decision to dismiss her, which she exercised, and in the course of the appeal she had (in the circumstances to which we refer in paragraphs 19-21 above) a full opportunity to state her response to the (now actual rather than proposed) decision to dismiss her. We accepted Ms Kirkland's evidence (which we have set out and stated that we accepted in paragraphs 19-21 above) that she listened carefully to what the claimant said to her and was willing to overturn the decision that the claimant be dismissed if she thought it right to do so.

45 In those circumstances, we came to the clear conclusion that the claimant was consulted sufficiently about the proposal to dismiss her for capability.

46 Given the occupational health report the material parts of which we have set out in paragraph 18 above, we concluded that there was objectively good medical

evidence before the respondent to justify the conclusions that (1) the claimant was not fit to work at the time of her dismissal and (2) it was not possible to foresee when she would be fit to return to work.

47 In those circumstances, we concluded that it was within the range of reasonable responses of a reasonable employer to dismiss the claimant because of her (in)capability through ill-health.

48 The claim of unfair dismissal therefore did not succeed, and was dismissed.

The claim of direct discrimination because of disability

49 There was nothing in the circumstances from which we could draw the inference that the claimant's dismissal was to any extent because of her disability, i.e. using the word "because" in the sense in which it is used in section 13 of the EqA 2010. In any event, we were satisfied at least on the balance of probabilities that the claimant's dismissal was in no material way "because of" her disability of cancer. While it is true that the claimant had cancer and would not have been absent from work if she had not had it, she was not in our judgment dismissed to any extent "because" she had cancer. Accordingly, the claim of direct discrimination within the meaning of section 13 of the EqA 2010 because of the protected characteristic of disability did not succeed and was dismissed.

The claim that the claimant's dismissal was in breach of section 15 of the EqA 2010

50 There was in our view no doubt about the legitimacy of the aim on which the respondent relied, namely "foreseeable, regular attendance at work from its care staff at the care home." Whether it was a proportionate means of achieving that legitimate aim to dismiss the claimant was a more difficult question. On the one hand, it might have helped the claimant to recover from her cancer and its effect on her mentally as described in paragraph 22 above. On the other hand, if the claimant was dismissed for ill-health and she recovered from it, then she would be able (without her dismissal for ill-health being in any way a discredit to her) to apply again to the respondent, and any other care home, for work of the same or a similar sort to that which she did for the respondent. Moreover, and this was in our view the key factor here, if the claimant continued in the respondent's employment then the respondent would, even without the claimant doing any work in a leave year, accrue the right to paid holiday costing (see paragraphs 16 and 17 above) £1,078.62 per year. Given (1) that cost, (2) the fact that the claimant's annual pay gross pay and pension rights were at the time of her dismissal a total of £10,015.72, and (3) the fact that the claimant could reasonably be expected to approach the respondent (or any comparable employer) as soon as she was able to return to work, it was in our view not a disproportionate means of achieving the legitimate aim in question to dismiss the claimant, i.e. using precisely the language of section 15, it was a proportionate means of achieving that legitimate aim to dismiss the claimant.

51 For the avoidance of doubt, we did not regard as being relevant the fact that the respondent had a particular "headcount" for the care home in which the claimant worked. However, we did take into account the facts that (as we indicate in paragraph 17 and the final sentence of paragraph 16 above we accepted) (1) ideally there would be continuity of care for residents, and (2) if a permanent employee were employed in place of the claimant, then in addition to maximising the chance of there being such continuity, it would be far less likely that agency staff would need to be engaged from time to time. Those factors fortified our view that dismissing the claimant was in the circumstances a proportionate means of achieving a legitimate aim.

52 For those reasons, the claim of a breach of section 15 of the EqA 2010 did not succeed and was dismissed.

The claim of unpaid holiday pay and notice pay

53 The claimant's holiday year ran from 1 April to 31 March. The claimant was paid on the termination of her employment by way of accrued holiday pay only (see paragraph 13 above) one week's pay in the sum of £182.75 gross and by way of notice pay only £688.16. She was entitled for the then-current holiday year to 37/365 x (see paragraph 16 above) £1,047.20, which is £106.15. Also as stated in paragraph 13 above, (1) the claimant was not paid anything in respect of the 2018-2019 holiday year, (2) she did not take any holiday during that year, but (3) she did, however, take more than four weeks' paid holiday in the year before that. She was (as we say in paragraph 13 above) absent from 4 December 2017 onwards, and she was dismissed 18 months later, so she was entitled in our view to four weeks' accrued pay for her untaken holiday entitlement in the 2018-2019 leave year. She was also entitled to four weeks' notice pay. Thus the claimant was entitled to 8 x 22 x £8.50 = £1496.00 gross by way of notice pay and accrued holiday pay. The grand total to which she was therefore entitled on her dismissal was that sum plus £106.15, which is £1602.15. The claimant was actually paid by way of accrued holiday pay and notice pay £870.91 gross. Thus, she was underpaid in those regards by £731.24 gross.

<u>In conclusion</u>

54 In conclusion, only the claimant's claim for accrued holiday pay succeeds, and it succeeds to the extent stated in the preceding paragraph above.

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Employment Judge Hyams

Date: 9 August 2021

Case Number: 3321596/2019

JUDGMENT SENT TO THE PARTIES ON

.1/9/2021

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FOR THE TRIBUNAL OFFICE