EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100146/2017

Held in Glasgow on 24, 25, 26 & 27 October 2017

Employment Judge: Shona MacLean
Members: Mr SF Evans
Mr P O'Donnell

Mrs Eileen Allardice — Claimant
Represented by:
Ms K Osborne
Solicitor

Glasgow City Council — Respondent
Represented by:
Ms G Wilson
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claims of unfair dismissal and disability discrimination are dismissed.

REASONS

Background

1. The claim comprises complaints of unfair dismissal and disability discrimination: discrimination arising from disability - Section 15 of the Equality Act 2010 (the EqA) and failure to make reasonable adjustments - Section 20 of EqA.

2. The respondent accepted that the claimant was disabled in terms of Section 6 of the EqA but only in respect of her osteoarthritis. Otherwise the claim

was denied. In relation to the unfair dismissal complaint the respondent admitted the dismissal but claimed that the reason for dismissal was capability (ill health) and that it was fair.

3. Shortly before the Hearing the claimant made an application to amend the claim form. The application was granted on the understanding that the amendment relating to the verbal warning was to make clear the chronology and not to contend facts which were relevant to the fairness of the dismissal and/or whether there was disability discrimination.

4. At the Hearing, the Tribunal heard evidence from Karen Bell, Principal HR Officer, Gillian Marshall, Senior HR Officer, Linda Cassells, Senior HR Officer and Jane McAskill, HR Officer. The claimant gave evidence on her own behalf. The parties prepared a joint statement of agreed facts and provided a joint inventory of productions to which the Tribunal was referred during the Hearing. The Tribunal found the following material facts to have been established or agreed.

Findings in Fact

5. On 7 August 2000, the respondent employed the claimant as a Social Care Worker in the Children & Family Section of the respondent's Social Work Services. She was based in the North-East Team. Home visits were a significant part of the claimant's job. She carried out two to three home visits per day.

6. The claimant's absence level was high (production 55). She was absence in almost every year since her employment commenced. The claimant had five spells of long absence (20 or more days). In the final two years and eight months of her employment, the claimant was absent for around one year and seven and a half months.

7. The claimant's absence that started on 6 January 2014 was due to osteoarthritis in her knees.

8. At a Long-Term Sickness Meeting on 3 February 2014 with her line manager John Rennie the claimant agreed to the respondent making a referral to Bl) PA. Afterwards Mr Rennie completed a meeting record sheet (productions 60 to 63).

9. A further Long-Term Sickness Meeting between Mr Rennie and the claimant took place on 4 March 2014 following which Mr Rennie completed a meeting record sheet (productions 64 to 67).

10. The claimant's consultation with BUPA took place on 6 March 2014. BUPA provided a report to the respondent dated 10 March 2014 (productions 68 to 70).

11. A Long-Term Sickness Interview took place on 11 April 2014. It was conduct by Mr Rennie. Gillian Marshall, Senior HR officer was also present. The claimant declined representation. Afterwards a letter dated 11 April 2014 was sent from the respondent to the claimant (production 72 to 73). The claimant envisaged undergoing surgery for a knee replacement within the next five to six weeks. The recovery period following the operation was three months minimum. The claimant was concerned about the impact of returning to work, as she would be absent again for her operation thus incurring a further spell of absence. The claimant was advised it would be more beneficial in relation to her sick allowance to return to work and it was expected that she would be at work if she could in the intervening period knowing that the respondent was aware that she would be absent again. There was discussion about support, which the department could offer the claimant to return to work. The claimant was invited to discuss the supports with her General Practitioner.

12. Between 12 and 19 May 2014 the claimant underwent a left knee surgery replacement in the Golden Jubilee Hospital. The anticipated recovery period was three months.

13. Mr Rennie met the claimant on 1 July 2014 for a Long-Term Sickness Meeting. Afterwards Mr Rennie completed a meeting record sheet (productions 75 to 79).

14. Mr Rennie met the claimant on 4 August 2014 for an Absence Management Meeting - Long Term Sickness Interview. The claimant declined representation. Afterwards Mr Rennie completed a meeting record sheet (productions 80 to 85). A letter was also sent to the claimant on 5 August 2014 (productions 86 to 87).

15. The respondent referred the claimant to People Assert Management the respondent's Occupational Health provider. The Occupational Health consultation took place on 12 September 2014 following which People Asset Management provided a report to the respondent dated 12 September 2014 (productions 88 to 89).

16. Mr Rennie met the claimant on 17 September 2014 for an Absence Management Meeting - Long Term Sickness Interview. Ms Marshall was present. Gwydion Apsiencyn, Unison trade union representative accompanied the claimant.

17. The claimant provided an update. She confirmed that following knee surgery she had been attending physiotherapy, which was beneficial. She advised that the similar symptoms affecting her right knee and lower back was a result of referred pain as she was overusing this side. However, this would ease as recovery progressed. There was discussion about relocating the claimant to a ground floor office thus alleviating the difficulty she had with mobility. The claimant advised that she was unable to get assistance from Access to Work. The claimant hoped to have a phased return to work

at the beginning of November 2014. The claimant was advised that it was hoped that she would be able to return sooner and they agreed to meet to discuss this further.

18. The claimant was also advised that consideration would be given to the supplementary information that she had supplied. However, one option which may be explored if she was unable to return to work imminently would be whether it was reasonable to expect a return to work in some capacity with flexible supports in place. If it were deemed reasonable to expect a return to work following that discussion and the claimant remained unwilling to trial the work in some capacity then the consequences of not doing so at that point would mean that she would be in a period of unauthorised absence and there would be no other option to refer the matter to a disciplinary hearing in line with the respondent's disciplinary and appeals policy procedure.

19. The respondent wrote to the claimant on 18 September 2014 summarising the discussion and asking the claimant to consider several supports with her General Practitioner, which included (productions 90 to 92):

a. A phased return with no detriment to salary or annual leave for the first four weeks, thereafter the use of annual eave and flexi could be used to extend the phased return further if this would be useful.

b. A temporary work life balance (WLB) reduction in days/hours, which would be long term.

c. Relocation to a desk on the ground floor allowing her to remain office based and allocating light duties for a period of time. The duties included answering phones, taking referrals, assisting the team to write letters to charitable organisations, gathering information from care and first floor workers, gathering information from care first floor team leaders in relation to them attending internal and external meetings, completion of access to file requests, all to be completed at her desk.

d. No requirement to lift or carry files around.

e. Additional micro breaks to allow her to move around.

f. The department would allow the claimant authorised absence to continue with physio appointments and any other medical treatments that fell within her working day.

20. Mr Rennie met the claimant on 24 September 2014 for an Absence Management Meeting - Long Term Sickness Interview. Ms Marshall was present. Mr Apsiencyn accompanied the claimant. Afterwards a letter dated 30 September 2014 was sent from the respondent to the claimant confirming the discussion (productions 93 to 94). It was agreed that the claimant would return to work on Friday 24 October 2014 and the following supports would to be put in place:

a. A phased return to work with no detriment to salary or annual leave for the first week, thereafter the use of annual leave could be used to accommodate the following three weeks phased return.

b. Further annual leave and flexi leave could be agreed if the claimant felt that an extended phased return would be helpful.

c. A temporary reduction in days/hours could be considered should the claimant wish to reduce days/hours long term.

d. Relocation of a desk to ground floor.

e. Office based duties for a period of time.

f. No requirement to lift or carry files around.

g. Additional micro breaks to allow the claimant to move around.

h. The department would allow the claimant authorised absence to continue with any physio appointments or any other medical treatment that fell within the working day.

21. Mr Rennie met the claimant on 10 October 2014 for an Absence Management Meeting - Long Term Sickness Interview. Debbie Irving who was the claimant's new line manager was present. The claimant declined representation. Afterwards a letter dated 14 October 2014 was sent to the

claimant (productions 95 to 96). The letter confirmed the supports that were to be put in place which included the claimant being allocated light duties during the phased return period which could consist of supervising appropriate contacts, completing charity applications for the team, being utilised as a back up duty worker completing tasks that were appropriate at her desk, completing access to files and completing filing tasks for the team, gathering information for JST meetings.

22. The claimant was absent from work from 6 January 2014 to 23 October 2014. She returned to work on 24 October 2014. The claimant attended work on Friday 24 and Monday 27 October 2014. She reported absent from work from 28 October 2014.

23. Ms Irving and Ms Marshall had an Absent Management Meeting with the claimant on 18 November 2014. Mr Apsciecyn accompanied her. Afterwards Ms Irving sent a letter to the claimant dated 28 November 2014 confirming what was discussed (the November 2014 Letter) (production 98 to 99).

24. The November 2014 Letter stated that the claimant was approaching the end of her half pay period of sickness entitlement (6 January 2015) and that she had been advised of the potential outcomes if she was unable to achieve a return to work in the foreseeable future. Various options were explained to the claimant. She was advised that there might come a time when the service would need to consider whether there was no alternative but to terminate her contract on grounds of lack of capability due to ill health. It was also explained to the claimant that should all options be exhausted and she remained unable to return to work the matter would be referred to an Absence Review Meeting. A senior manager within the service who would review the circumstances and determine the next steps would chair this. The potential decision of the Absence Review Meeting would be that her absence could no longer be sustained and the time had

come to terminate her contract on the grounds of lack of capability through ill health.

25. Ms Irving had an Absence Management Meeting with the claimant on 19 December 2014. Ms Marshall was present. Mr Apsciecyn accompanied the claimant. Afterwards Ms Irving wrote to the claimant (productions 101 to 102).

26. Ms Irving advised that consideration had been given to the claimant's previous request to move to a location nearer her home: the Gorbals or Castlemilk area to reduce her travel time to approximately 30 minutes. Ms Marshall said that the department could facilitate this request on a temporary basis and advised the expectation would be that the claimant would trial a return to work in some capacity with supports in place on 5 January 2015.

27. The claimant returned to work on 5 January 2015, the day before she exhausted her occupational sick pay entitlement. In Ms Irving's absence Ms Marshall met with the claimant for an Absence Management Meeting. The claimant, Mr Apsiencyn and Balbir Kaur, Team Leader also attended. Afterwards Ms Marshall sent a letter to the claimant dated 5 January 2015 confirming what was discussed (productions 103 to 104).

28. The return to work in 5 January 2015 was on a phased basis with the claimant next working on the morning of 8 January 2015 and then three mornings per week. From week commencing 12 January 2015 it was agreed that the claimant would use accrued annual leave as part of her phased return. The claimant was to be based in the Twomax building within the Children and Families Team. She was to undertake office based duties for the foreseeable future to be discussed and agreed with Mr Kaur.

29. The claimant was issued with a statement of fitness for work dated 13 January 2015 (production 105). It stated that the claimant would benefit form a phased return to work over the first eight weeks and altered hours.

30. On 15 January 2015 Ms Marshall had an Absence Management Meeting - Formal Interview with the claimant. Mr Kaur and Mr Apsciecyn were present.

31. The claimant requested a return to the Easterhouse Area Office. She said that the relocation had not been as beneficial as she had anticipated; she was experiencing travel difficulties. The claimant also advised that there was a fire evacuation risk associated with the Gorbals office. The respondent agreed to the request with effect from Tuesday 20 January 2015. The claimant also requested to reduce her working mornings from three down to two. The respondent agreed to this request too subject to a further review at the end of January 2015. Afterwards Ms Marshall sent a letter to the claimant dated 15 January 2015 confirming the discussion (productions 108 to 109).

32. On returning to the Easterhouse Area Office the respondent agreed to accommodate the claimant on the ground floor. The claimant subsequently requested a move back to the first floor to which the respondent agreed. In relation to duties these were initially restricted to office-based duties

33. The claimant subsequently agreed to increase her duties to include client contact and to home visits. Mary Rafferty was one of the respondent's employees who carried out these home visits with the claimant as Ms Rafferty could drive the claimant home close to the area when she lived after the visits in Ayrshire. The claimant stopped doing home visits in June 2015. Any contact visits involving the claimant took place in the social work offices (production 180).

34. Debbie Irving held supervision meetings with the claimant on 26 February 2015 (productions 110 to 111); 10 March 2015 (productions 112 to 114), 14 April 2015 (productions 115 to 117); 15 July 2015 (productions 119 to 120); 14 August 2015 (productions 121 to 122); October 2015 (production 123); and 5 February 2016 (productions 124 to 130).

35. Having returned to work in January 2015 the claimant worked for over a year by which time she built up her full entitlement to occupational sick pay.

36. On 23 February 2016, the claimant telephoned Ms Irving to advise that she was not attending work as she had hurt her knee the previous day. The claimant said that it might have happened when walking over to the health centre during the working day but was unsure. The claimant said that she had an appointment with her General Practitioner. Mrs Irving made a note of the telephone conversation on the Attendance Management Activity Record sheet (AMARS) (production 131).

37. Between 23 February and May 2016, the claimant kept in approximate weekly contact with Ms Irving. During these telephone calls the claimant advised of her current health, attendances with her General Practitioner and ongoing treatment. Throughout this period the claimant's position was that she was unfit for work.

38. The claimant was referred to People Asset Management for occupational health advice on managing the claimant's absence. People Asset Management decided that a telephone consultation should take place. This happened on 9 June 2016. The claimant advised Karen O'Mara, Occupational Health Nurse that she had been referred to an Orthopedic Surgeon and had been advised that surgery may be required to treat her condition. Due to current NHS waiting times the claimant had been advised that she might have to wait up to 12 weeks for the consultation.

39. Ms O'Mara's assessment was that the claimant remained unfit for work of any kind at the present due to "the severity of her current musculoskeletal symptoms and the fact that her memory and concentration levels" were reduced because of the strong painkillers. In Ms O'Mara's opinion the claimant's ability to perform normal day-to-day activities remained significantly reduced. Ms O'Mara's advice was that there were no work adjustments that would facilitate the claimant's return to work at present. A return to work was unlikely to be achievable until the specialist had seen the claimant and further treatment options including possible surgery had been explored. Following the telephone consultation Ms O'Mara provided a report (the June OH Report).

40. On receipt of the June OH Report Ms Marshall did not consider that it addressed the standard questions raised in the management referral. Ms Marshall emailed People Asset Management and asked Occupational Health's position in relation to the examples of the supports and reasonable adjustments and if there was a timescale for them to be considered. The examples of supports and reasonable adjustments were similar to the flexible support plan produced in July 2016 (production 148).

41. Michael Sharp, the Clinical Operations Manager, Scotland and Northern Ireland emailed a reply on 27 June 2016 (production 144). Mr Sharp said:

"You can offer the employee as much assistance as you can to be able to facilitate a return to work, which is very positive. Therefore, the provision of a taxi can be discussed to allow access to work. I assume that all of your support outlined will be or has been discussed with the employee and she may feel able to take advantage of theses. This means that a phased and supported plan that includes employee input can be discussed and prepared."

42. Ms Irving and Ms Marshall met the claimant on 29 June 2016 to discuss her ongoing absence and the June OH Report. Mr Apsiencyn accompanied the

claimant. The claimant was provided with a copy of the June OH Report she was also told on receipt of the June OH Report clarification was sought about exploring with the claimant the range of supports that the department was able to offer. The supplementary information that had been provided was:

a. Supports offered were very positive.
b. Provision of a taxi could be discussed to allow access to work.
c. All supports outlined could be discussed and the claimant might be able to take advantage of these.

43. There was discussion about the claimant's current health. The following was noted:

a. The claimant had not received an appointment to see the Consultant.
b. The claimant's prescribed medication.
c. The claimant continued to experience pain but she had not discussed nor had her General Practitioner suggested a pain management referral; she preferred to treat the pain with medication.
d. Travel time had an impact on the claimant's pain level.
e. The claimant was continuing to attend physiotherapy three times a week and complete daily exercise.
f. The claimant had been previously advised about weight management by her General Practitioner and although she was not attending a Dietician or a weight management class she had been provided with information which she was trying to incorporate into her daily life.

44. There was discussion around the proposed supports which Ms Irving wished the claimant to discuss with her General Practitioner (production 148). The claimant advised that she felt that with the level of pain she was experiencing she was unable to consider returning to work at this time. She agreed to seek advice from her General Practitioner. The claimant was

advised that the respondent would be happy to consider any reasonable adjustments that she or her General Practitioner could identify within the support plan to assist her achieving a return to work in some capacity.

45. The claimant was advised that Ms Irving believed that it would be reasonable to expect a return at this point based on the support plan. It was the department's main objective but the consequences of a return not being achieved would leave Ms Irving with no option but to view the claimant's continued absence as a period of unauthorised absence and refer the matter to a disciplinary hearing in line with the respondent's disciplinary and appeals procedure.

46. The claimant contacted Ms Irving on 4 July 2016 to advise that neither she or her General Practitioner felt that a return to work could be achieved at that time.

47. Ms Irving sent a letter to the claimant on 7 July 2016 summarising the key points that were discussed on 29 June 2016 (productions 146 to 147). Ms Irving also recorded that she was disappointed that the claimant had chosen not to trial out a return to work. Accordingly, a disciplinary hearing was to be chaired by a Service Manager on 21 July 2016.

48. Around 11 July 2016 the claimant discussed matters with her General Practitioner who wrote a letter (production 149). The claimant's General Practitioner recorded that the claimant did not believe that she was able to return to work at present. He expressed concern that the Nurse Specialist had advised that there could be no phased return and that no further OH input was required and yet a phased return to work plan was proposed a few weeks later. The General Practitioner suggested that a face to face OH review should be provided in order to fully assess the claimant's functions and limitations. He also noted that the claimant was concerned that she was being bullied into returning to work when she does not feel fit to do so.

49. Kevin Miller, Service Manager conducted the disciplinary hearing on 21 July 2016. Ms Marshall was the Presenting Officer. Linda Cassells, Senior HR Officer was also present. Mr Apsiencyn accompanied the claimant. Mr Miller decided that the claimant's entitlement to occupational sick pay was removed with effect from 21 July 2016 for a period of six months and he issued a verbal warning. The claimant was advised of her right of appeal (production 150).

50. The claimant exercised her right of appeal. This was considered by Fiona Brown at a hearing on 2 September 2016. Mr Apsiencyn accompanied the claimant. The claimant's appeal was rejected. The letter advising the claimant of the decision dated 5 September 2016 stated that Ms Brown's expectation was that the claimant would return to work on the supported plan created for her (production 156).

51. On 9 September 2016, the claimant had a consultation with a Consultant Orthopedic Surgeon at which he discussed the various options with the claimant and agreed that a total right knee replacement was appropriate (production 157). The claimant expected that her operation might be scheduled in six weeks. She knew that the timescale were not being met.

52. On 15 September 2016, the claimant was told that she was to attend a pre-assessment on 27 October 2016 (production 158).

53. Around 22 September 2016 Ms Irving spoke to the claimant who provided an update; she had an appointment for a pre-assessment; she continued to attend her General Practitioner and was receiving pain relief; she was attending the physiotherapist (production 137). The claimant was advised that as she had been unable to return to work an Absence Review Meeting had been arranged for 5 October 2016 and that a letter would be sent out confirming the details.

54. A letter dated 21 September 2016 confirmed that the Absence Review Meeting would take place at the City Chambers and the claimant had the right to be accompanied by a trade union representative or a work colleague (the Invite Letter) (production 160). The Invite Letter did not state the possibility that termination of employment was being considered as required by the non-contractual Policy/Arrangement for control of Management of Absence (the Absence Policy) (productions 50 to 54).

55. The Absence Review Meeting took place on 5 October 2016. The claimant was accompanied by her daughter and Mr Apsiencyn. Ms Irving prepared a report in advance (the Presenting Officer's Report) (productions 161 to 162). The claimant was provided with a copy of the Presenting Officer's Report. Karen Bell. Principal HR Office Social Work Services conducted the Absence Review Meeting. Ms Cassells took notes (productions 163 to 166).

56. Ms Bell and Ms Cassells were aware that the Invite Letter omitted to advise the claimant that dismissal was a possible outcome. Ms Bell knew that the claimant had been previously told of potential outcomes at an absence review meeting in the November 2014 Letter and was to be accompanied by her trade union representative who was also familiar with the process. Ms Irving spoke to the Presenting Officer's Report.

57. At the start of the Absence Review Meeting Ms Bell said that dismissal was one of the potential outcomes. Neither the claimant nor Mr Apsiencyn requested an adjournment. The claimant was provided with a copy of the Presenting Officer's Report and was given an opportunity to comment.

58. The claimant provided a copy of her General Practitioner's letter which she said confirmed that it was not only her but her General Practitioner who considered that she was not fit to work (production 149). The claimant said that June OH Report was following a telephone consultation and she was unwell and not just saying that she was unwell. Although the support plan was comprehensive the claimant said that she was unable to try this out

due to the level of pain that she was experiencing on a day to day basis. The level of pain affected her psychological wellbeing leading to a deterioration in her emotional state. The claimant's General Practitioner had arranged pain management whereby the claimant was seen by a Specialist Physiotherapist who gave a programme consisting of exercises and resistance band initially for both knees. The claimant remained on a high level of pain relief. The claimant said that she saw her consultant on 9 September 2016 and he confirmed that she required a knee replacement on her right knee. The claimant was now on a waiting list to have a date for a pre-op assessment on 27 October 2016 but had been given no indication of timescale as when the knee operation will take place. The claimant remained downstairs at home for the majority of the day only going upstairs to access the toilet.

59. There was general discussion regarding the claimant's absences. Ms Bell noted there were no plans to refer the claimant to a pain management clinic. The claimant declined the use of an option of using a wheelchair while at work as a result of the continued pain and did not see how she would be able to manage a wheelchair. The claimant considered that being at home and being at work were very different. There were no aids or adaptations made in her home but the claimant's husband carried out tasks such as shopping and washing. In relation to psychological wellbeing the claimant declined the offer of accessing workplace options as she did not find it useful in the past. The claimant's General Practitioner had not referred the claimant to any counselling and provided information for Mood Juice the NHS self-help website. The claimant continued to research information on her condition and the medication she was taking, looking at alternatives along with changes to her diet. The timescale for recovery from the planned operation remained unclear. Normal recovery was around 12 weeks. However, the claimant underwent a similar operation to her left knee in 2014 and her recovery took about eight months.

60. Ms Bell adjourned the Absence Review Meeting. Mr Apsiencyn ask how long the adjournment would last. He was told that it was difficult to estimate but up to an hour. He told Ms Cassels that he needed to leave and did so. She informed Ms Bell

61. Ms Bell considered all the information presented. She considered the claimant's overall attendance record and pattern of absence. She referred to the advice from Occupational Health and support that had been offered and the claimant's comments at the Absence Review Meeting. Ms Bell also considered the type of job for which the clamant was employed and the impact on the service. The claimant's work was being covered by existing members of staff. There would have been high cost implications to engaging temporary staff to cover the claimant's absence.

62. Ms Bell noted that that the claimant's overall attendance was of concern as the claimant had a history of absences almost every year since her employment commenced. A large part of the claimant's job involved contact with families. When she was not at work this caused disruption to the families and colleagues. The claimant was unfit to return to work despite the supports that had been offered. She was unable to provide any dates or timescales when the surgery would take place or the proposed recovery time. This continued absence of uncertain duration had an impact on her colleagues and service delivery which could no longer be sustained. As the claimant was not a member of the Strathclyde Pension Fund eligibility for ill health retirement could not be explored. Ms Bell decided that the claimant's employment should be terminated because of lack of capability due to ill health. Arrangements were to be made for the claimant to receive 12 weeks pay in lieu of notice together with payment of any outstanding leave.

63. The Absence Review Meeting reconvened. Ms Bell told the claimant her decision, the reason for it and advised of the right to appeal. The claimant made no further representations.

64. Ms Bell's decision was confirmed in writing on 17 October 2016 (the Dismissal Letter) (production 170 to 172). The right of appeal was confirmed. The claimant appealed her dismissal.

65. The Personnel Appeal Committee comprising of three councillors (the Panel) heard the claimant's appeal on 24 January 2017 (the Appeal Hearing). Alan Thomson of Unison accompanied the claimant. Ms Bell and Ms Cassells were present. The respondent took notes (productions 178 to 185).

66. At the Appeal Hearing Ms Bell presented the management case. The Panel and Mr Thomson asked questions. Ms Bell explained the reason for the claimant's absence in February 2016. It was suggested that she was absent due to injuring her knee during contact with a family. Ms Bell said that she was unaware of any injury while at work. There was a protocol in place if an incident takes place at work. This had not been completed at the time. Ms Cassells confirmed that Occupational Health decided whether consultations would take place in person or over the telephone. It was also confirmed that due to an oversight the claimant was not advised in advance that dismissal was a possible outcome of the Absence Review Meeting. However, the protocol at the Absence Review Meeting was to make clear the purpose of the meeting and possible outcomes.

67. Mr Thomson then presented the claimant's case. The claimant confirmed that since termination of her employment there had been no developments. She was still awaiting surgery. The claimant said that she was not aware her employment was at risk at the Absence Review Meeting until the conclusion. Had she been informed of the possible outcome she would have been able to put some support plan in place but the claimant had no confidence due to previous support plans, and questions of other employment could have been considered. The claimant had had an accident at work and once the operation and recovery had taken place she expected to return.

68. Following *a recess,* the Panel concluded that the decision to dismiss the claimant was reasonable in the circumstances and the claimant's appeal was rejected. The claimant was advised of this decision by letter dated 24 January 2017 (production 186).

69. The claimant was disabled in terms of the Equality Act 2010 by reason of osteoarthritis throughout the period of her absence from 23 February 2016.

70. At the date of termination, the claimant was 60 years of age. She had been continuously employed by the respondent for 16 years. Her gross weekly wage was £504.18 and her net weekly wage was £405.95. Had the claimant remained in employment after 5 October 2016 she would have exhausted her occupational sick pay entitlement by 21 January 2017.

71. The claimant had her operation on right knee in May 2017. The claimant has been in receipt of Employment & Support Allowance since December 2016. The claimant is in a work-related activity group. She continues to receive Employment & Support Allowance and is eligible for this until 7 February 2018.

Observations on Witnesses and Conflict of Evidence

72. The Tribunal considered that the respondent's witnesses were credible and reliable. Their evidence was consistent with the contemporaneous notes.

73. The Tribunal also considered that the claimant believed what she said in evidence and it was based on her recollection of events. The Tribunal was in no doubt about the genuineness of the claimant's absences and did not understand that to be in dispute by the respondent. As explained below in some respects the Tribunal did not find the claimant's evidence to be credible or reliable.

74. There was a dispute about what the claimant said to Ms Irving on 23 February 2016 about the reason for her absence. The claimant's evidence was that she told Ms Irving that she had hurt her knee having to walk at a fast pace over to the health centre. Ms Irving recorded in the AMARS that the claimant hurt her knee and that she advised "this may have happened yesterday when walking over to the health centre during her working day but is unsure."

75. The Tribunal considered there was no reason for Ms Irving to inaccurately record her discussion with the claimant. Had the claimant said that she injured her knee at work it was in the Tribunal's view highly likely that Ms Irving would have recorded that, completed the appropriate paperwork and referred the incident to Health and Safety. From the medical notes the claimant did not mention an accident at work when she consulted with her General Practitioner on 23 February 2016 nor from the June OH Report did she mention that to Occupational Health. There was also no mention of this when the claimant met Ms Irving and Ms Marshall in June 2016 or at the Absence Review Meeting in October 2016. The Tribunal considered that until the Appeal Hearing it was not suggested by the claimant had an industrial injury. The Tribunal considered that the claimant and Mr Apsiencyn must have been aware of that.

76. While the evidence was not conflicting as such there was some confusion about the issue of a disciplinary sanction. The claimant said that she was disciplined for not attending work when she had a genuine illness. The respondent's evidence was that this procedure was in relation to reducing the claimant's occupational sick pay entitlement because she was deemed not to have made reasonable attempts to have returned to work because she refused to trial a supported return to work. The Tribunal accepted the respondent's evidence as it was consistent with the approached taken in November 2014.

77. There was also conflicting evidence about the claimant's understanding of the potential outcome of the Absence Review Meeting. The claimant's evidence was that Ms Irving asked her to come in on 5 October 2016 for a catch up with her and Ms Marshall. The claimant said this was what she told Mr Apsciecyn. He arrived late for the Absence Review Meeting. There were a lot of people there and when he was handed the paperwork he said that he was not aware of the type of meeting otherwise he would have met the claimant earlier. The claimant said that she did not know that dismissal was a potential outcome.

78. Ms Bell and Ms Cassells said that they realised before the Absence Review Meeting that the Invite Letter did not state that a possible outcome was dismissal. The point was made at the beginning of the Absence Review Meeting. They both believed that the claimant and Ms Apsiencyn already knew the potential outcome of an absence review meeting. Neither sought to adjourn or postpone it. Ms Cassells was surprised that Mr Apsiencyn did not wait until the decision was issued.

79. The Tribunal understood that Mr Apsiencyn is an experience trade union representative. He would or ought to have been familiar with the respondent's procedures. Mr Apsiencyn accompanied the claimant at several absence management meetings, the disciplinary hearing and disciplinary appeal hearing. In the Tribunal's view, it was incredible that he would not have known that an absence review meeting would be conducted by a senior manager and that dismissal would be a possible outcome where an employee remains unfit to return to work in any capacity and the absence could no longer be sustained. The Tribunal also found it surprising that the claimant who over the years has been involved in the absence procedure and in November 2014 had been informed of potential outcomes if the absence could not be sustained did not know that dismissal was a potential outcome.

80. The Tribunal considered that it was highly likely that at the start of meetings HR advisors would recommend that the chairperson made introductions, explained the process and potential outcomes. This would be particularly so when the chairperson had an HR background and knew that the Invite Letter omitted that information.

81. The Tribunal thought it highly unlikely that Ms Irving would have referred to the Absence Review Meeting as a catch-up. While she might have said that she and Ms Marshall would be present, Ms Irving would know that she was not going to conduct the Absence Review Meeting. Even if the claimant misunderstood, which the Tribunal considered doubtful, the Tribunal considered that Mr Apsiencyn's attitude was cavalier. He appeared to have attended the meeting unprepared. If he was unclear about the nature of the meeting before he arrived he was in the Tribunal's view under no delusions about the nature of the meeting when he attended. The Tribunal considered it astounding if he and the claimant truly had not known the nature of the meeting beforehand that he did not seek an adjournment. The Tribunal noted that Mr Apsiencyn left during the adjournment because he had another meeting to attend. The Tribunal did not consider that he left in protest when he learned that dismissal was in contemplation. If he wanted to protest the Tribunal considered that the time to do so was at the start of the meeting and therefore it was more likely that he had another engagement.

82. The Tribunal also considered that it was highly likely that had either the claimant or Mr Apsiencyn requested an adjournment or postponement it would have been granted. The Tribunal's impression was that Ms Bell and Ms Cassells were aware of the omission in the Invite Letter (which was not of their doing) but thought that the claimant and Mr Apsiencyn were aware of the potential outcome. They were not disabused of that perception at the Absence Review Meeting. To the contrary when it was mentioned at the outset no comment was made by the claimant or Mr Apsiencyn.

Submissions

The Respondent

83. The Tribunal was referred to the agreed statements of facts. The evidence of the claimant which was not put to the respondent's witnesses in cross-examination ought to be disregarded. Further where there was conflicting evidence from the witnesses of the respondent and the claimant the Tribunal was invited to accept the respondent's witnesses as being honest, credible and reliable.

84. The Tribunal was invited to find that the reason for the dismissal was the claimant's incapacity or alternatively her conduct due to her unwillingness to return to work.

85. In relation to the fairness of the dismissal the Tribunal must consider whether the respondent acted reasonably in dismissing the claimant on those grounds in accordance with Section 98(4) of the Employment Rights Act 1996.

86. Ms Bell's belief was that the claimant was incapable of carrying out her job and that dismissal was a reasonable decision. At the stage Ms Bell's belief was formed on those grounds the respondent had taken reasonable steps to ascertain key facts including the claimant's capability and prognosis, the business needs and the reasonable adjustments made to date and whether any such adjustments would be reasonable. Ms Bell acted reasonably in the circumstances. The respondent did not need to have conclusive proof of the claimant's incapability.

87. In assessing the reasonableness of the decision, the Tribunal had to bear in mind that the verbal warning issued to the claimant was part of a procedure the main aim of which was to reduce the claimant's occupational sick pay

entitlement because she was deemed not to have made reasonable attempts to return to work was irrelevant.

88. The respondent's position was that the procedure it adopted contained a regrettable error in that the claimant was not informed in writing ahead of the Absence Review Meeting that her employment could be terminated but in all the circumstances it was fair.

89. In essence, the procedure was such that the claimant and her experienced trade union representative were aware that she could be dismissed following the Absence Review Meeting. Had a postponement been requested on 5 October 2016 by the claimant or her representative it would have been granted.

90. The Tribunal was referred to *Stoker v Lanarkshire County Council [1992] IRLR 75.* It was submitted that this case which related to a failure to fallow a disciplinary policy could be distinguished because the Absence

91. The statutory ACAS Code of Practice does not apply to ill health or sickness absence dismissals neither is it expressly dis-applied (see *Homes v Qinetiq Ltd UK/EAT/0206/15/BA).* The respondent's position was that it acted reasonably throughout the process including at the appeal stage. In any event if there were any procedural breaches following the usual proper procedure would have been utterly useless or futile and thus does not render the dismissal unfair.

92. The Tribunal must not substitute its own opinion as to what the reasonable and adequate process must be. It must consider applying the objective standard of a reasonable employer (see *Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23).*

93. The Tribunal was also referred to *Iceland Frozen Foods Ltd v Jones [1982] IRLR 439* for correct approach to adopt. The Tribunal was reminded that the

band of reasonable responses approach is that the Tribunal should determine whether a decision to dismiss an employee fell within the band of reasonable responses *"which a reasonable employer might have adopted".*

94. That process must be conducted by reference to the objective standards of the hypothetical reasonable employer which are imported by statutory references to *"reasonable or unreasonably"* not by reference to the Tribunal's own view of what it would in fact have done as an employer in the same circumstances.

95. In capability dismissals, the issue is whether the employer acted reasonably in treating the ill health of that particular employee in the particular circumstances as sufficient grounds for the dismissal.

96. This can depend on a number of factors: the nature of the illness, the length of the illness, the effect of the illness, if the illness has been caused by the employer, the length of service, the importance of the job, the effect on other employees, the size of the employer, the nature of employment and the provisions or otherwise of sick pay.

97. Case law indicates that employers should comply with the following three requirements for there to a be a fair dismissal in capability (ill health case):

a. Consultation with the employee.
b. Thorough medical investigation.
c. Consideration of other options.

98. The respondent's position was that its decision to dismiss the claimant fell within the band of reasonable responses. There was always an area of discretion within which management may decide on a range of responses all of which might be considered reasonable. It is not for the Tribunal to ask whether a different approach would have been reasonable but whether or not the dismissal was reasonable.

99. Turning to the disability discrimination claim the Tribunal was referred to the claimant's claim form in relation to the claim of reasonable adjustments. The Tribunal was then referred to the statutory provision under Section 20 of EqA.

100. The Tribunal was referred to the case of *Environment Agency v Rowan [2008] ICR 218* which stated that when considering a claim that an employer has discriminated against an employee by failing to comply with the duty to make reasonable adjustments, the Tribunal must identify:

a. The provision, criterion or practice applied by or on behalf of the employer.
b. The physical feature of premises occupied by the employer.
c. The identity of a non-disabled comparator (where appropriate).
d. The nature and extent of the substantial disadvantage suffered by the claimant.

101. Reference was also made to *Griffiths v Secretary of State for Work & Pensions [2015] EWCA Civ 1265.* This case underlined the necessity of identifying whether the disabled employee has been placed at a *"substantial disadvantage"* by the policy otherwise the employer is not reasonably expected to make any adjustment. Without identifying the disadvantage, it is not possible to determine what steps could have been taken to eliminate it. It demonstrated that there is an arrangement causing substantial disadvantage envisages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. That is not to say in every case the claimant would have to provide the detailed adjustments that would need to be made before the burden would shift. It would, however, be necessary for the respondent to understand the broad nature of the adjustment proposed and be given sufficient detail to

enable him to engage with the question of whether it could reasonably be achieved or not.

102. What is reasonable depended on many things including cost, the resources available to the employer, the disruption it would cause and the effect of it having to remove or preventing any disadvantage.

103. There is no issue of justification being available to the employer in relation to reasonable adjustments. What is reasonable, is what is reasonable in order to remove the substantial disadvantage - nothing more.

104. The Tribunal was also referred to *Romec Ltd v Mr H S Rudham UK/EAT/0069/07/DA* and *P Lancaster v TBWA Manchester UK/EAT/0460/10/DA.*

105. To be reasonable an adjustment should take such steps as are reasonable to avoid that substantial disadvantage with the emphasis being on getting the employee back to the duties on a sustained basis.

106. Given the claimant's absence history there was insufficient evidence that the reasonable adjustments would have removed the disadvantage. Even if it would have removed the disadvantage it is contended that the adjustment would have gone beyond what is reasonable.

107. Turning to the claim of discrimination arising from disability the Tribunal was again referred to the claimant's claim form and the legal test set out in Section 15 of EqA.

108. The respondent conceded that the claimant had been unfavourably treated by being dismissed because of her absence in 2016 which related to her disability. The respondent's position was that It had a legitimate aim which was to deliver a sufficient and dependable human resource able to deliver regular and effective social care to children and families under its

jurisdiction pursuant to its regulatory obligation. This was in the context of budget cuts. The respondent contended there was no less discriminatory way of achieving that legitimate aim. There was no evidence before the Tribunal of a less discriminatory way in which the respondent could have achieved that aim.

109. The Tribunal was referred to the guidance set out by the EAT in *Pnaiser v-NHS England [2016] and Jones v Post Office Court of Appeal [2001] EWCA 558.*

110. The respondent's position was that the decision was proportionate in achieving its legitimate aim because of the lack of certainty; the absence could a long time (the earliest March 2017 and the latest August 2017) and the cost of having the claimant absence covered even if that was possible and the business needs of the service it being a regulatory function. The decision was proportionate having regard to the claimant's previous disciplinary record.

111. The respondent's primary position was that there was no valid claim and no compensation is due. The Tribunal was referred to the respondent's schedule of loss which it was to prefer over that of the laimant which failed to take account of the claimant's continued ill health and lack of full earnings post termination.

112. The respondent did not accept that any sums were due to the claimant and if it was minded to award any injury for feelings then it was important to note that the new *Vento* bands only applied to claims presented on or after 11 September 2017. Accordingly, the old *Vento* bands would apply and this would be in the lower band £660 to £6,600 to around £5,000.

113. In terms of the just and equitable reduction of *Polkey* the Tribunal was entitled to consider this and reduce the compensatory award to take account of the general considerations of fairness. It was recognised that the

Tribunal may regard it as just and equitable to reduce the award of compensation because the claimant could have been fairly dismissed notwithstanding any procedural failing by the employer. If the Tribunal found that there was no procedural unfairness the claimant would have been dismissed in any event. Importantly the claimant presented no evidence that there was likely to have been a different outcome had particular procedural steps been fully and properly implemented. The respondent submitted the claimant suffered no prejudice in being dismissed as this would have happened anyway if a fair procedure had been followed.

The Claimant

114. In relation to the unfair dismissal claim the respondent submitted that the claimant was dismissed due to capability and the burden of proof falls on the respondent.

115. The Tribunal must assess whether the respondent honestly believed that the claimant was incompetent due to her health. It was submitted that they did not because during her evidence Ms Bell made reference to the claimant not helping herself. The respondent did not request further evidence but formed the view that the claimant had not made sufficient efforts and was of the view that the claimant was able to return in some capacity. It appears to be inconsistent with the respondent's position that the claimant was incapable of doing her job. Within one month of the claimant being told that she was unfit to return to work she was then disciplined for unreasonably refusing to return on the plan. The real reason for the dismissal was the claimant refusing to return under the support plan that was suggested. The respondent was now suggesting an alternative reason was conduct. However, they had no reasonable grounds for forming that belief as the June OH Report supported the position the claimant was not fit to return and this was also supported by the claimant's General Practitioner.

116. The June OH Report suggested that the clamant was not able to return to work. The supplementary report seemed to suggest that the information could be discussed. There was no clear medical input to the support plan. There was no reason why the respondent should depart from the medical advice. There was no reason for the respondent to disagree with the original advice that had been given. Accordingly, the respondent had not formed a reasonable belief if any dismissal based on conduct was not fair.

117. As regards investigation there was no direct evidence from the Investigating Officer. There was no explanation as to the treatment of an injury at work and why it was not deemed to be relevant. There was no explanation why Ms Bell thought that a face to face meeting was not required. There was a lack of investigation into whether the claimant would become fit for work and when.

118. Ms Bell's position was that the claimant's submission was *"poof.* It was for Ms Bell to investigate and consider all the relevant factors.

119. The claimant was due to attend an outpatient appointment to progress her right knee operation. There was no investigation as to how this would take and while no date had been given for an operation there was an estimated timescale and recovery.

120. Ms Bell was dismissive of the claimant's timescale and focused on the length of time it took for the left knee operation without taking medical advice as to why the right knee operation may be different. This was not the correct approach.

121. The respondent said that it could not sustain the claimant's absence but there was no evidence of this in the investigation. There was no real consideration of the ability to sustain the claimant's absence for a further period. The focused on the high level of absence rather than how long they could sustain it.

122. Ms Bell's evidence was that it was for the claimant to raise issues which suggests that her decision was predetermined.

123. There were also procedural failings as the respondent was aware that it had not informed the claimant of the potential outcome of the absence Review Meeting but took no steps to rectify this in advance nor was it suggested at the outset of the Absence Review Meeting that it could be postponed. A short adjournment would have allowed the claimant to prepare for the case and would have given her an opportunity to see and consider all the papers which were not given to her in advance. She could have challenged the accuracy of the paperwork.

124. No reasonable employer would have taken the decision taken by the respondent. The respondent had not considered enough medical information, and it had no idea as to the type of operation or the recovery time. The respondent required to go the extra mile because of the injury sustained at work.

125. The respondent formed the view that the claimant was not doing everything possible to return. Any reasonable employer would have waited longer. It was not costing the respondent for the claimant to remain in employment as she was no longer receiving occupational sick pay and she was not on an occupational pension scheme.

126. There were procedural errors in the appeal as there was no discussion as to whether dismissal was proportionate or consideration about the accident and whether the claimant should have been treated differently.

127. Turning to the claim of discrimination arising from disability it was not proportionate for the respondent to dismiss in regard to the respondent's size and it would have been reasonable to have work covered. The respondent was a large employer and could sustain temporary cover but

there were budget cuts but there was no evidence that this was to this specific department.

128. Turning to reasonable adjustments the claimant was at a substantial disadvantage because of the respondent's policy. Adjustment would have been to allow her more time to improve her performance. There was no financial prejudice to cover her absence temporarily and this would be reasonable for a large local authority.

129. The claimant was seeking reinstatement failing which compensation as set out in the schedule. She was also seeking a statutory uplift as there was an element of culpability as the reason for dismissal was for conduct.

130. The claimant has limited capacity for work. She maintains that she was fit to return to work around August 2017.

Deliberations

Unfair Dismissal

131. The Tribunal started its deliberations by referred to Section 98(1) of the ERA. It provides that the respondent must show the reason for the dismissal and that it was for one of the potentially fair reasons set out in Section 98(2).

132. At this stage, the Tribunal was not considering the question of reasonableness. It asked whether the respondent had shown the reason for the claimant's dismissal. The respondent admitted that the reason for dismissal was the claimant's lack of capability due to ill health. This was confirmed by Ms Bell in her evidence. While the claimant said that it was for the respondent to assert the reason for her dismissal she stated in the claim form that she was dismissed due to capability and the respondent said that it could not sustain her absence. In the claimant's submissions, it was said

that that the real reason was that the claimant was refusing to return to work under the supported plan.

133. The Tribunal considered that at the Absence Review Meeting Ms Bell knew that the claimant had been absent from work since 23 February 2016 due to an injury to her right knee. Ms Bell also knew that the claimant had had a similar injury to her left knee during which the claimant had been able to return to work in some capacity with support and adjustments in place. Ms Bell knew that similar discussions with the claimant about a supported return to work in some capacity had taken place in June 2016. While the respondent considered that these might facilitate the claimant's return to work in some capacity the claimant did not agree. Ms Bell had not been involved in these discussions and in the Tribunal's view it was entirely reasonable, particularly as there was a possibility that the claimant's employment might be terminated, that Ms Bell explored with the claimant why she considered that the supports and adjustments offered would not allow her to return to work.

134. The Tribunal's impression was that Ms Bell believed that the claimant could have done more to try to help a supported return to work by for example attending weight management classes; seeking a referral to a pain management clinic; utilising the range of support offered by the respondent; or having a trial return to work. However, the Tribunal did not consider that this belief was why the claimant was dismissed.

135. The reason the claimant was dismissed was in the Tribunal's view Ms Bell's belief that claimant was not able to return to work in any role in the near future. The claimant's General Practitioner had given a medical certificate that she was unfit to return to work. There were no other supports or adjustments that could ease the claimant's return to work in any role. The claimant said that she was awaiting surgery but had no date for her operation and the recovery period was a minimum of three months. The claimant was no longer receiving occupational sick pay. The Tribunal was

satisfied that the respondent dismissed the claimant for a long-term illness involving a long-term absence from work. This was a potentially fair reason for dismissal.

136. The Tribunal then considered whether the respondent acted reasonably in dismissing the claimant on the grounds of capability in accordance with Section 98(4) of the ERA.

137. The Tribunal had to consider whether the respondent could be expected to wait longer for the claimant to return to work; and the procedure it adopted.

138. The Tribunal was satisfied that throughout the claimant's absence the respondent kept in personal contact with her keeping abreast of the claimant's progress and telling her of the respondent's proposals to assist the claimant in returning to work in some capacity. The Tribunal considered that during this contact the respondent obtained the claimant's view of her medical condition and discussed what could be done to get her back to work and her view on those proposal. In many although not all (because the claimant declined the offer) the claimant was accompanied.

139. The Tribunal was also satisfied that the respondent had established the nature of the claimant's illness and its prognosis.

140. The Tribunal considered that the involvement of Occupational Health in June 2016 was for medical advice on what capacity if any the claimant might be able to return to work. The June OH Report mentioned that surgery may be required and the claimant was on a waiting list to see a consultant. The appointment was unlikely to take place before 9 September 2016. The June OH Report stated that no work adjustments would facilitate the claimant's return at present and a return to work was unlikely until after the claimant was seen by the consultant.

141. Given that the respondent was being informed that the claimant's absence was likely to last for at least a further 12 weeks, the Tribunal considered that it was reasonable for the respondent to seek clarification from Occupational Health about discussing with the claimant whether any supports or adjustments could facilitate the claimant return in any capacity. The supplementary Occupational Health advice was that discussion should take place with the claimant as she might feel able to take advantage of these. The claimant had done so when on long term absence in relation to her left knee. The Tribunal considered that it was reasonable to have such a discussion with the claimant in relation to a long-term absence because of injury to the right knee.

142. In the Tribunal's view by 5 October 2016 the medical position was not in doubt. The claimant needed an operation on her right knee. She had a pre-assessment appointment on 27 October 2016. She did not have a date for the operation although it was scheduled for six weeks afterwards although timescales were not being met. After the operation, the expected minimum recovery was three months. This was the information provided by the claimant. It was accepted by Ms Bell at the Absence Review Meeting and had not changed by the Appeal Hearing.

143. The Tribunal was satisfied that other options had been considered. The respondent had suggested supports and adjustments that might facilitate the claimant's return to work in any capacity. The claimant was not eligible for ill health retirement.

144. In relation to the procedure, the Tribunal considered that it was unfortunate the Invite Letter did not state the potential outcomes of the Absence Review Meeting. In the Tribunal's view, some employers might on realising the omission have postponed the Absence Review Meeting. However, depending when the omission was noticed the Tribunal considered that having arranged the meeting and knowing the familiarity that the claimant and Mr Apsiencyn had with the Absence Policy it was not unreasonable for

it to have proceeded on the basis that if the claimant and Mr Apsiencyn said at the meeting that an adjournment or postponement was necessary it would be granted.

145. In any event even if the Absent Review Meeting had been postponed the Tribunal did not consider that it would have made any difference as the claimant's situation remained unchanged even at the Appeal Hearing in January 2017. If as the claimant suggested she did not know her employment was to be terminated at the Absence Review Meeting the claimant's position was that she could not return to work. That was her position in September 2016 knowing that her occupational sick pay was being withdrawn.

146. The Tribunal did not accept the claimant's submission that Ms Bell's decision was predetermined. The Tribunal's impression was that Ms Bell was searching for reasons not to terminate the claimant's employment and was therefore looking to the claimant to provide information that would assist her doing so.

147. It is usual when considering ill health to have regard to an employee's overall sick absence record because past attendance is often an indicator of future attendance. The claimant's absence was not an injury at work and frmo the information before Ms Bell she had no reason to believe it was. The claimant had been absent from February 2016 and the minimum time before she expected to return was mid-March 2017. While the claimant was not in receipt of occupational sick pay she continued to be employed and accruing rights. The claimant's absence disrupted the service provided to clients as it was covered by colleagues. The respondent did not have the resources of placing people into post where there were absences or recruiting temporary staff. The Tribunal concluded that Ms Bell's decision to dismiss the claimant fell within the band of reasonable responses.

148. At the Appeal Hearing the claimant still had no date for her operation. The original anticipated return date of mid-March 2017 was highly unlikely. The Panel considered all the points raised on the claimant's behalf. The Tribunal considered that the procedure and decision at the Appeal Hearing was within the band of reasonable responses.

149. The Tribunal concluded that the dismissal was a fair and the unfair dismissal claim was dismissed.

Disability Discrimination - Reasonable Adjustments

150. The Tribunal then turned to the discrimination claims. It referred to the claim form which stated that the respondent applied to her a provision, criterion or practice (PCP) which place her at a substantial disadvantage compared with person who were not disabled as she was dismissed due to ill health absences. The claimant said that the reasonable adjustment was to have allowed a longer period to return to work than would have been applied under the Absence Procedure.

151. The Tribunal referred to Section 20 of the EqA. The Tribunal asked what was the PCP applied by the respondent. It was the Absence Policy. The Tribunal did not agree with the claimant that it required the claimant to be fit for work. From the evidence, the Tribunal considered that the respondent was willing for the claimant to return to work and undertake desk duties. She was not asked or expected to do the work for which she was contracted. In the Tribunal's view the Absence Policy required the claimant to maintain a level of attendance in some capacity not to be subject the termination of her contract.

152. The Tribunal considered that owing to the claimant's disability she was more likely not to be able to attend work at all and therefore suffered a substantial disadvantage by the application of the Absence Policy. The reasonable adjustment suggested by the claimant was that she should have

been allowed a longer period to return to work than would be applied under Absence Policy.

153. What is reasonable depends on several factors but a material consideration is the extent to which the proposed adjustment would prevent the disadvantage caused by the PCP. While it was not put to the respondent's witnesses the Tribunal agreed that the inference was that the claimant would be able to maintain a level of attendance in some capacity and even return to her full duties after recovery from her second knee operation.

154. The Tribunal considered that there was while there was an estimated period for the operation and recovery of approximately six months (October to mid-March) it was only an estimate; the claimant had not been given a date for her operation. That remained the position at the Appeal Hearing. It was not reasonable in the Tribunal's view to expect the respondent to give the claimant an indefinite period to return and the claimant's absence history was not such that the evidence before the respondent was that it was unlikely that to do so would remove the disadvantage.

155. The Tribunal concluded that there had been no breach of the obligation to make reasonable adjustments as the adjustment suggested by the claimant was not one that the respondent could reasonably have taken.

Disability Discrimination - Discrimination arising from Disability

156. The Tribunal next referred to the claim form in which the claimant asserts that her dismissal amounted to discrimination contrary to Section 15 of the EqA as she was dismissed due to ill health which arose from the effects of her disability.

157. The respondent accepted that the claimant had establish that she suffered unfavourable treatment and that treatment was because of something arising from her disability.

158. The issue for the Tribunal was therefore the respondent was liable unless it showed that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

159. The legitimate aim relied upon in the response form was securing the consistent attendance of its workforce and or to consider termination of employment when an absence could no longer be reasonably supported.

160. The Tribunal considered that Mr Bell's evidence established the respondent had a regulatory obligation to deliver regular and effective social care to children and families under its jurisdiction. This requires a sufficient and dependence workforce and the need to control and manage absence. The claimant was aware of the importance that the respondent place on managing absence. The claimant had been involved various meetings with her managers throughout her employment at which the number of and length of her absences were discussed; the range of supports available to assist with a return to work and the potential outcomes if the claimant was unable to achieve a return to work in the foreseeable future.

161. The Tribunal's view was that there was a legitimate aim of securing the attendance of its workforce to meet its regulatory obligations so it moved onto the question of proportionality. This involved the Tribunal carrying out a balancing exercise.

162. The Tribunal had no doubt that the respondent was reluctant to terminate the claimant's employment. The Tribunal's impression, particularly from the respondent's approach when the claimant returned after her first knee operation, was that the respondent would be willing to agree to any support that would allow the claimant to return to work in any capacity. The claimant would be aware of that when the respondent offered to support her return to work in some capacity from June 2016 onwards. At this stage while the

claimant had had a substantial absence from work the respondent was taking steps to secure her return in some capacity.

163. From July 2016, the claimant's position which the respondent accepted was that she was not able to return in any capacity until she had her second knee operation followed a period of recovery. The best estimate was that in six months, mid-March 2017 the claimant might be able to return to work in some capacity.

164. The Tribunal considered whether it would have been more proportionate for the respondent to have continued to employ the claimant. The respondent was not paying the claimant any occupational sick pay but she continued to accrue her statutory rights. There was a lack of certainty about when the claimant could return not only in relation to the date of her operation but also from her absence record the time for recovery. The Tribunal acknowledged that the respondent was a large employer which was no doubt why the respondent could sustain an absence that was already of six months duration. However even public-sector employers do not have infinite resources and funding to place people into posts where there is absence or recruit temporary staff rather than manage existing resource.

165. The Tribunal concluded that dismissing the claimant was a proportionate means of achieving legitimate aim.

166. The Tribunal therefore dismissed the claimant discrimination claims. Having reached this conclusion, it was not necessary for the Tribunal to consider this issue of remedy.

Employment Judge: Shona MacLean
Date of Judgment: 24 January 2018
Entered in register: 26 January 2018
and copied to parties