



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Machin

Respondent: Oxford University Hospitals NHS Foundation Trust

Heard at: Reading **On: 9, 10 and 11 May 2022**

Before: Employment Judge Gumbiti-Zimuto
Tribunal Members: Mrs C Anderson and Mr F Wright

Appearances
For the Claimant: In person
For the Respondent: Miss R Azib QC

JUDGMENT

The claimant's complaints of unfair dismissal, disability discrimination and unlawful deductions of wages (holiday pay) are not well founded and are dismissed

REASONS

1. In a claim form presented on the 21 October 2019 the claimant made a number of complaints. This hearing has been concerned with the claimant's complaint of unfair dismissal, disability discrimination (failing to make reasonable adjustments), and unlawful deduction of wages. The claimant had also made complaints of unlawful deduction of wages in respect of arrears of pay: this claim was dismissed upon withdrawal by the claimant. The claimant's complaint of direct disability discrimination and any other complaints of disability discrimination other than the failure to make reasonable adjustments were confirmed as dismissed in a letter of 11 May 2021.
2. The issues to be decided in the case summary were set out in the case summary contained in the Record of Preliminary Hearing dated 28 September 2021.
3. The claimant gave evidence in support of her own case. The claimant was not able to produce a conventional witness statement. The claimant provide the following explanation: "*Because of my poor physical and mental health, exacerbated by my unfair dismissal due to injuries to both my shoulders at work on 6th February 2018 and having to rely on family and friends for my*

needs, I wish to inform you that I am unable to prepare my statement in the manner and format I would have wished. In this regard, I am attaching letters from my GP (Doctor) dated back to 2007-2009 and recent letters dated 8th October 2020 and 7th July 2021 which report of my ill health status."

4. The respondent relied on the evidence of Mr James Beale, Mrs Louise Rawlinson and Ms Samantha Foster. The respondent's witnesses produced written statements as their evidence in chief. We were also provided with a trial bundle of documents containing 427 pages of documents.
5. We made the following findings of fact:
 - 5.1 The claimant was employed by the respondent as a Nursing Assistant / Clinical Support Worker from 5 April 1999 until her dismissal with effect from 12 June 2019. The claimant's role involved supporting patients with washing and dressing, providing assistance with eating and drinking, recording the patient care provided and maintaining a clear and tidy environment. The role is both physically and mentally demanding requiring good supportive teamwork.
 - 5.2 In 2017, the claimant had a high level of sick leave the majority of which was due to a septic foot. Mr Beale made a referral to Occupational Health on 16 June 2017. The claimant returned to work on 18 September 2017 on a phased return. On 4 October 2017, a temporary adjustment was agreed whereby the claimant did not have to shower patients. The claimant had withheld her permission for the respondent to have access to her Occupational Health reports.
 - 5.3 On 6 February 2018, an incident with a patient resulted in the claimant suffering an injured shoulder and was off sick thereafter until her employment came to an end on 12 June 2019 (491 days).
 - 5.4 The respondent has a sickness absence management procedure which has several stages. The claimant was requested to attend a Stage 1 Long Term Sickness Absence meeting on 6 March 2018. At the meeting, the claimant said that her shoulder was still painful and that she had an appointment with her GP. An Occupational Health referral was made for the claimant and an appointment was arranged for 12 April 2018. The claimant's absence continued with further GP notes confirming she was not fit for work.
 - 5.5 The claimant was invited to a Stage 2 Long Term Sickness Absence meeting to take place on 31 May 2018. The meeting was postponed at the claimant's request and rescheduled to 21 June 2018. At this meeting there was no information from Occupational Health. However, the claimant indicated that she wished to work in an area like outpatients. Mr Beale stated that he then explained that a formal redeployment process would need to be considered along with any advice from Occupational Health. The claimant in her evidence was unclear about whether she agreed this

was the case. On balance we accept that this was mentioned by Mr Beale to the claimant. The claimant also asked for a jobs list at this meeting.

- 5.6 It was agreed that a further referral to Occupational Health was made for advice on further treatment and whether reasonable adjustments or redeployment should be considered.
- 5.7 The claimant was invited to a Stage 3 Long Term Absence meeting on 26 July 2018.
- 5.8 On 26 July 2018, the claimant attended the Stage 3 Long Term Absence meeting with Mr Beale and Ms Fiona Styles, HR Consultant for the Trust, also in attendance. The claimant explained that she remained in pain, and she was not able to return to work. The claimant explained that she was awaiting an ultrasound appointment on 3 August 2018 and another Occupational Health appointment had been arranged for 10 August 2018.
- 5.9 The claimant had not given her consent for her Occupational Health report to be released to the respondent. The claimant's return to work options were discussed including a phased return and workplace adjustments which would be recommended by Occupational Health. The claimant said that she would agree to the release of her Occupational Health report. A letter confirming what was discussed was sent to the claimant on 31 August 2018.
- 5.10 Following the claimant's Occupational Health appointment on 10 August 2018, Mr Beale received a letter from Occupational Health on 17 August 2018. The report said that the claimant was not fit for any work involving manual handling but she could possibly work at a computer. The report also said that specialist advice was needed before seeking an alternative post for her. The claimant's fit notes stated that she was continuing to have treatment and investigations into her shoulder pain.
- 5.11 A Long-Term Absence Review meeting scheduled for 13 November 2018 was rearranged for 19 November 2018 at the request of the claimant who could not attend. The claimant did not attend the rearranged absence review meeting and so the meeting was again rearranged for 26 November 2018.
- 5.12 On 15 November 2018, Occupational Health sent limited information to the respondent because the claimant refused to provide consent for Occupational Health to contact her specialist to obtain a report. The report said that the claimant remained unfit to undertake her usual work but that she would be fit to undertake very light duties. The report also stated that the injury sustained by the claimant can cause significant long-term symptoms that may lead to an inability to return to employment with ill health retirement as a possibility but the claimant should have a course of intense physiotherapy and advice from a specialist before an outcome could be determined.

- 5.13 The Long-Term Absence Review meeting took place on 26 November 2018. During this meeting the claimant explained that she had lost confidence in Occupational Health and would not provide her consent to release the report from Occupational Health. Mr Beale explained that if she refused to allow Occupational Health to communicate with the respondent then the respondent would proceed with the Sickness Absence Management process with the limited information that it had, it was important to have up-to-date advice. Work involving very light duties was discussed. The claimant suggested an Outpatient job, Mr Beale pointed out that this was still a clinical role and would require some manual handling; that a ward clerk role could be considered but would also involve some manual handling, as well as computer skills. As the claimant was awaiting results of an MRI appointment and a physiotherapy appointment arranged for 7 December 2018, it was agreed that the claimant would contact Mr Beale after the appointment to discuss light duty roles further. The claimant did not contact Mr Beale as agreed.
- 5.14 On 24 January 2019, Mr Beale informed the claimant that a decision had been taken to move to Stage 4 of the Absence Management Procedure which could result in her dismissal. This was because of the lack of information from Occupational Health and her specialist; her failure to contact Mr Beale regarding her skills and ability for undertaking light duty roles; and the fact that she had been absent since early February 2018 and there was still no indication of a timeframe for a potential return to work.
- 5.15 Mr Beale produced the Management Statement of Case which included a summary of the claimant's absence, details of previous meetings, the claimant's sick pay and the effect of her absence on the ward. A copy was provided to the claimant in a letter dated 7 May 2019 formally inviting her to a meeting scheduled for 23 May 2019.
- 5.16 The claimant asked for the Stage 4 meeting to be postponed because of the effect of her medical condition on her ability to concentrate. This was agreed. A further meeting was arranged for 28 May 2019. The claimant wrote another letter requesting another postponement due to back and shoulder pain. Another postponement was agreed and the meeting was rearranged for 7 June 2019. In a letter dated 28 May 2019 the claimant was informed that it was unlikely that another postponement would be granted and that if she was unable to attend she could submit a written statement to be considered. The claimant sent another fit note which said that she had back and shoulder pain.
- 5.17 Mrs Rawlinson was at the relevant time employed by the respondent as Divisional Head of Nursing and Governance for MRC.
- 5.18 In April 2019 Mrs Rawlinson was asked to chair the claimant's Stage 4 Long-Term Sickness Absence meeting. Prior to this, Mrs Rawlinson did not know anything about the claimant and until now has never met or spoken to her.

- 5.19 Attempts were made to contact the claimant by letter and telephone calls to which there was no response. The Stage 4 Sickness Absence meeting went ahead on 7 June 2019 in the claimant's absence. It was decided by Mrs Rawlinson's reasons for doing so include the fact that there was no evidence that a further postponement would have enabled the claimant to attend within a reasonable timeframe.
- 5.20 Mrs Rawlinson noted that the claimant had not report the incident causing her injury on 6 February 2018. The claimant then did not use the respondent's processes to support her return to work, she did not allow management to liase with Occupational Health to recommend adjustment for a return to work. The claimant did not engage with Mr Beale in seeking out suitable employment opportunities. There was no expected return to work and the claimant remained unfit for work.
- 5.21 Mrs Rawlinson decided that the claimant's employment should be terminated with notice on grounds of capability due to an underlying health condition. Mrs Rawlinson wrote to the claimant on 11 June 2019 to inform her of the decision and the reasons for it (p254). The claimant appealed the decision in a letter dated 19 June 2019.
- 5.22 The claimant's grounds of appeal were that (i) she had previously said she could not attend the Stage 4 meeting due to the effect of her medication on her ability to concentrate; (ii) she is currently awaiting surgery on her shoulder which she hoped would enable her to return to work; and (iii) that she did not give written permission for Occupational Health because she lost confidence in them from previous encounters.
- 5.23 Ms Foster was asked to chair the claimant's dismissal appeal hearing. Before the appeal process, Ms Foster did not know of the claimant and was not aware of her case.
- 5.24 On or around 14 August 2019, the claimant wrote to Ms Foster stating that she would not be accompanied at the appeal because she was not in a trade union and did not have a colleague to accompany her and requested "*the attendance of a person from an external body*" which she said was "*to ensure she receive a fair hearing*" following "*poor experience with this in the past*". The respondent's Appeals Procedure allows employees to be accompanied either by a work colleague or Trade Union representative, it does not say that someone from an external body can attend to accompany the employee or as part of the panel. Ms Foster did not consider it was appropriate or necessary for someone external to attend.
- 5.25 Ms Foster wrote to the claimant on 19 August 2019 to inform her that it was necessary to reschedule the hearing to 9 September 2019. In this letter she confirmed who would be attending and, repeated that the claimant could be accompanied by a trade union representative or

colleague and enclosed a copy of the Management Response to the appeal.

- 5.26 Ms Foster received a letter from the claimant dated 2 September 2019 confirming receipt of the appeal pack and stating that the claimant would attend the hearing only if an “*external body*” was present. The claimant telephoned Ms Foster’s office on 5 September 2019 and spoke an Executive Assistant, saying that she would not be attending the hearing on 9 September 2019 and that it would need to be rescheduled for an external person attend. Ms Foster received a letter from the claimant dated 6 September 2019 saying that she had received advice from the Citizens Advice Bureau that she should get in touch to rearrange a new date for the hearing for an “*external body member panel*” to be present. The appeal hearing was cancelled again.
- 5.27 On 30 October 2019, a letter from the respondent apologised that the appeal hearing had not yet been rescheduled and explained why. On 12 November 2019 Ms Foster wrote to the claimant to confirm the arrangements for the appeal hearing which had been rescheduled to 5 December 2019. The letter again confirmed who was attending, as well as who would be permitted to accompany the claimant.
- 5.28 The claimant replied stating that she could not attend on the 5 December 2019 due to a treatment appointment and requesting an alternative date and again requesting an “*external Body Member be present*”.
- 5.29 Ms Foster decided to go ahead in the claimant’s absence with the appeal hearing on 5 December 2019. This was the second time that the claimant had requested to cancel the meeting and there had already been considerable delay in hearing the appeal. The respondent had tried to contact the claimant by telephone several times to arrange a mutually convenient time for hearing the appeal but had not been able to make any contact. Ms Foster explained her reasons in a letter to the claimant dated 4 December 2019.
- 5.30 The claimant did not attend the appeal hearing. Ms Foster considered that Mrs Rawlinson’s decision to dismiss the claimant on grounds of capability with an underlying health condition was correct based on the information available and the fact that there was no potential return to work date for the claimant, or knowledge of a timeframe for a return to work. There had been a lack of engagement from the claimant despite numerous attempts by various staff to contact her. Ms Foster was aware from the fit note received that the claimant had recently undergone surgery on her shoulder but no further information had been provided. Ms Foster decided that the original decision should be upheld. The outcome of the appeal hearing and the reasons were confirmed to the claimant in a letter dated 12 December 2019.
- 5.31 Ms Helen Joyce, HR Business Partner, had attempted to contact the claimant in order to explore ill health retirement as an option. Preliminary

investigations by Ms Fiona Styles, HR Consultant, showed that the claimant would not be entitled to ill health retirement.

6. The claimant has the right not to be unfairly dismissed (section 94 Employment Rights Act 1996 (ERA). Section 98(1) ERA provides that in determining whether the dismissal of an employee was fair or unfair, it is the employer to show the reason (or, if there was more than one, the principal reason) for the dismissal. That reason has to be a within subsection (2) of section 98. Capability is a reason that falls within the subsection if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, "capability", in relation to an employee, means her capacity assessed by reference to skill, aptitude, health or any other physical or mental quality.
7. Where an employer has fulfilled the requirements of section 98(1) ERA, the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.
8. The Tribunal must not substitute its views about the employee's capacity for that of the employer. Whenever an employee is dismissed for incapacity it is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable. It is not necessary for the employer to prove that he is in fact incapable.
9. The function of the Tribunal is to decide whether the employer honestly and reasonably held the belief that the employee was not capable and whether there was a reasonable ground for that belief.
10. As relevant in this case, the duty to make reasonable adjustments in sections 20 and 21 Equality Act 2010 comprises a requirement where a provision, criterion or practice of employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
11. The claimant is entitled to holiday pay. The claimant has the evidential burden to show that the respondent has failed to pay holiday pay.
12. The claimant's submissions have not been clearly articulated and do not emerge clearly from the evidence as set out in her witness statement. The claimant's witness statement largely amounts to medical documents illustrating that the claimant continues to suffer as a result of the shoulder injury. An injury which has blighted her life and rendered her incapable of working. In the course of her evidence the claimant repeatedly stated that she was dismissed in circumstances when it was patently clear that she

was unable to work in her role as an assistant nurse / clinical support worker in CMU. The claimant's case appears to be that her dismissal was unfair because (a) the respondent did not provide her with "very light work" that she could do; and (b) the respondent dismissed her on the grounds of capability in circumstances when they should have allowed her to retire on ill-health grounds. The claimant's case about disability discrimination on the grounds that there was a failure to make reasonable adjustments is not clearly set out in her witness statement and her submissions were not helpful in addressing the claim as set out by the Employment Judge in the case management hearing on 10 February 2021. It is important to note that while this case has been concerned with disability arising from a shoulder injury, the claimant has also suffered depression and struggled at times to articulate her argument, something she put down to her general state of health including the effects of her shoulder injury and depression.

13. The claimant accepts that the reason for her dismissal was the fact that she sustained a shoulder injury which resulted in her not being able to work in her role of nurse assistant / clinical support worker. Since 6 February 2018 she has been unfit to work in that role.
14. Alternative employment where a vacancy existed has not been shown to have been available. Mr Beale was clear in his evidence that he was not able to identify any role with "very light work" that the claimant could do. The claimant's evidence did not include the identification of any specific role that was available or might have been available for the claimant to do. The claimant's evidence included a plea that she should have been transferred to the out-patients. Mr Beale said there was no vacancy available. Answering the claimant's complaint that a colleague of hers was given a role in out-patients as a temporary health-based adjustment. Mr Beale pointed out that the difference with the claimant's case was that a specific role had been available which was suitable for the claimant's colleague. In the claimant's case there was no role available, there was a lack of engagement by the claimant with the respondent, and a failure to share Occupational Health reports with managers. All of which meant the respondent could not identify any suitable type of role for the claimant.
15. The claimant also says she should have been allowed to have ill-health retirement. However, this is not something in the gift of the respondent. The claimant's dismissal on grounds of capability would not have been a bar to her getting ill-health retirement pension. The reason the claimant did not have a pension is because she was not in the pension scheme.
16. The Tribunal notes that the procedure followed by the respondent complied with the respondent's procedure / policy. Further the respondent's procedure / policy was reasonable. The claimant specifically questions the respondent's refusal to allow an independent agency to be present at her appeal. The claimant did not impugn the fairness or independence of Ms Foster in dealing with her appeal. Her complaint is that as she was not a member of a union and having no other employee available to attend with her she should have been allowed an independent

agency to be present so as to prevent unfairness in dealing with her appeal.

17. The respondent's policy that only a trade union representative or a fellow employee may attend the internal appeal is in our view reasonable especially where the fairness of the decision maker on the appeal is not in fact being impugned.
18. Taking into account all the circumstances of the case we have concluded that the complaint of unfair dismissal is not well founded and is dismissed.
19. The claimant claims that the respondent discriminated against her on the grounds of her disability by failing to make reasonable adjustment. The claimant's complaint of failure to make reasonable adjustments is not clearly explained. At a case management hearing on 10 February 2021 Employment Judge Anstis said the following of the claimant's case about failure to make reasonable adjustments: *"I interpret the reasonable adjustments claim in the following way: The claimant says that the respondent had a provision, criterion or practice that her work had to include lifting, and that it should have made adjustments to that provision, criterion or practice by transferring her to work which did not involve lifting."*
20. The claimant's evidence has not engaged with the way that the claimant's case was put by Employment Judge Anstis. The claimant in her evidence did say that she asked if she could go and work in the out-patients because the work involved there was not heavy work like the work in CMU. In his oral evidence Mr Beale challenged this stating that the work in the out-patients was still heavy work and that the patients who came in were frail and did not always come in with relatives or support. In any event he also said that there was no role available for a temporary deployment or permanent deployment of the claimant and the claimant's refusal to allow him access to advice from Occupational Health had a limiting effect in respect of finding the claimant alternative work.
21. The question that the Tribunal has to answer is whether the respondent applied a provision, criterion or practice (PCP) of requiring nursing assistants to carry out their normal day to day work which included heavy lifting. The respondent was willing to consider alternative work where it was available but the role of the nursing assistant was one that included heavy lifting whether in out-patients or in the CMU. However, we consider that the evidence clearly shows that the respondent was willing to move any employee who was not able to fulfil the role into another role where it existed and there was the appropriate Occupational Health advice.
22. The PCP if it can be said to exist as alleged by the claimant would put disabled people generally at a substantial disadvantage compared to non-disabled by making them unable to fulfil the requirements of their normal day to day work resulting in absence and the inability to return to their work.

23. In our view however the PCP did not put the claimant to the particular disadvantage. The respondent was willing to move the claimant to a suitable role if one existed and it was supported by Occupational Health advice. It was the claimant's refusal to engage with the respondent by allowing them to get the occupational health advice that was necessary for the respondent to be able to identify the type of role that the claimant could do,
24. The Tribunal is satisfied that the respondent at the relevant time knew that the claimant was a disabled person.
25. There is no evidence that there was work that was available that the claimant could have been transferred to. We have heard no evidence to support the suggestion that the respondent could have created a role where it did not exist. The respondent uses its redeployment process to redeploy employees into available roles.
26. While there is evidence that the claimant made a historic request for reduction in hours there is no evidence that the claimant made such a request at any time after 6 February 2018. There is no evidence that a reduction in hours would have had any effect on the disadvantage arising from the claimant's disability.
27. The effect of the claimant's disability was such that there was no prospect of the claimant ever being able to return to work unless her condition improved. There was no rationale provided to the respondent to enable the respondent to know when that might be. Four years later, the claimant is still unable to work and in her evidence stated that she does not consider that she will ever be able to work in the role of nursing assistant/clinical support worker.
28. The claimant's proposed adjustments in our view were not reasonable adjustments for the reasons set out above.
29. The claimant has not adduced any evidence in support of her claim for holiday pay. The complaint is therefore dismissed.
30. The claimant's claims are not well founded and are dismissed.

Employment Judge Gumbiti-Zimuto

Date: 6 June 2022

Sent to the parties on:

10 June 2022

For the Tribunals Office

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