Case Number: 3314602/2020
3315427/2020
3303061/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss K Pitman	**v**	Tesco Stores Limited

Heard at: Norwich – in person **On**: 27, 28,29,30 June 2022
4, 5, 6 July 2022

Before: Employment Judge Postle

Members: Ms S Elizabeth and Mr A Chinn-Shaw

Appearances
For the Claimant: Mr Denman – Lay Advisor
For the Respondent: Mr Mathur - Counsel

JUDGMENT

1. The unanimous decision of the Tribunal was that the claimant

    1.1 Was dismissed by reason of capability and that dismissal was unfair.

    1.2 The claimant's claim under the Equality Act the protected characteristic of disability named discrimination arising from disability, failure to make a reasonable adjustment are not well-found.

    1.3 The claimant's claim for holiday pay is not well-found.

    1.4 The respondents have conceded the claimant is entitled to notice pay.

REASONS

1. The claimant brought three Tribunal claims and these claims have been joined by order of the Tribunal and all three claims are therefore considered together.

2. At the preliminary hearing held on the 4 August 2021 the Tribunal permitted the claimant to add a claim of unfair dismissal to her existing claims. The respondent at the same time was given leave to submit their consolidated response.

3. There is an agreed list of issues. There was a claim for unlawful deduction of wages which was discussed at the outset of the hearing and part of that is the failure to pay notice which the respondents have now conceded. Eventually after discussions with the claimant’s representative it was agreed that the other claim was in respect of holiday pay during the period April 2020 and June 2020. Finally, under this heading there was a vague claim for general unlawful deduction of wages. After discussing that with the claimant’s representative that claim was withdrawn.

4. There are claims under the Equality Act for the protected characteristic of disability. The claimant’s disability is conceded being chronic foot pain, left leg pain, compensatory pain in the right foot, post-traumatic stress disorder, depression and anxiety. Under this hearing there are claims under s.15 discrimination arising for disability and a claim under s.20 of the failure to make reasonable adjustments.

5. Claims under s.20(3) PCPs being:-

   a. Between August 2018 and August 2019 requiring the claimant to work on the self-service checkouts. (The claimant contains that she should have been moved to a regular checkout by way of a reasonable adjustment).

   b. Following the claimant’s return to work in October 2019 requiring the claimant to limit her breaks to 15 minutes. (The claimant contains that she requested 30 minute breaks by way of a reasonable adjustment)

   c. Following the claimant’s return to work in October 2019 requiring the claimant to be at her checkout unless the store was quiet. (The claimant contains that she should have been allowed to walk about the aisles of the supermarket by way of a reasonable adjustment to prevent blood clots).

6. There are also claims under s.20(5) auxiliary aid and these are in respect of provision of a footrest and/or rubber pads or mat to prevent foot rest assistance in assembling any foot rest provide a different chair.

7. There is also a claim for ordinary unfair dismissal under the Employment Rights Act.

8. In this Tribunal there has been a bundle of documents prepared of 819 pages.

9. The Tribunal heard evidence from the claimant through a prepared witness statement. She provided one further witness statement from a support worker, Mrs Brown. She was unable to attend to have her evidence tested in cross-examination.

10. The respondents gave evidence through Mr Balham, Manager at the respondent store; Mr Hubbard, the main Manager at the respondent store and Mr Firth, the Store Director, all giving their evidence through prepared witness statements.

11. The Tribunal also had the benefit of written closing submissions on behalf of the respondents from Mr Mathur to which the Tribunal are most grateful.

12. The claimant was employed by the respondent at its Caister superstore as a checkout operative from 2017 until the 22 June 2021 when she was dismissed for ill health capability. Before that time, she was employed at the respondent's Stalham branch.

13. The respondents have a very detailed procedure and policies for long-term sickness absences (126-152).

14. The claimant has a history of short and long-term absence going back to 2016. On the 21 December 2016 the claimant had a telephone assessment with an occupational health adviser prior to her move to the Caister store (704-709). In the course of that it was noted that:

> "She had been off work since the 17 April 2016 (8 months)
> - She had PTSD and was worried about her ex-partner.
> - Karen's health condition is long-standing, and it is not possible to predict duration as it will depend on Karen's response to current and planned treatment.
> - She wanted to stay of self-checkouts when she moved to the Caister.
> - She had a fit note that would last for 2 months from the 14 December 2016."

15. The claimant ultimately returned to work on the 15 March 2017.

16. A return to work plan was agreed on the 23 March 2017 (180) which all of the claimant's requests for adjustments were accommodated to include starting shift later on Tuesdays and Wednesdays following counselling, altering her hours. The return to work plan was extended until the week commencing the 19 June 2017 which is a length of time well beyond the 8 weeks envisaged under the respondent's policy and in circumstances where 12 weeks was considered to be exceptional.

17. From the 8 June 2017 the claimant was again absent. The long-term sickness process was started on the 28 June 2017 and reached the stage of second formal meeting and agreed a return to work date for the 2 October 2017.

18. Around late 2017 and early 2018 the claimant (at this point remained contracted to self-service checkout) would choose to work on the main checkouts on an ad-hoc swap with other colleagues. This is apparently a

relatively common practice amongst staff. The claimant wanted to do this in order to take herself out of her comfort zone as a method of rebuilding her confidence. In the meantime, the claimant was having regular let's talk meetings with Mrs Balham in which the claimant's progress would be discussed.

19. In May 2018 an issue arose regarding the timing of the claimant's hours, she overlapped with another colleague known as Emma. The claimant did not want to change her hours and requested that Emma would be asked to change hers (229).

20. It is clear from the email correspondence that the respondents closely engaged with the claimant to understand her preference.

21. In June 2018 in the course of one of the claimant's ad hoc swaps to the checkout when she was working on the main checkouts the claimant apparently bumped her knee. The claimant states that as a result of this she hurt her shin. When she was questioned about this at a meeting with Mrs Balham on the 28 August 2018, "Did you not think to log it"", she replied in words to the effect, "no just one of those things". Further, when asked, "is there anything you need from us" she replied, "no".

22. The claimant was constantly absent from work between the 25 June 2018 and the 4 October 2018, returning to work with a returning to work plan in place. This contained numerous adjustments including altered hours, altered duties and through allocating the claimant to the main checkouts.

23. Although this was intended to be a temporary change (255) the claimant was in fact never moved back to the self-service checkouts from the main checkout.

24. In an occupational health report dated the 31 January 2019 (710-714) it is quoted that the adjustments already in place were enabling her to return to work. It is clear that any discussion with management about return to self-service checkouts was contingent on 1. Physio being effective and 2. There not being any vacancies on the main checkouts.

25. On the 14 July 2019 when the claimant was working at the checkouts her footrest apparently broke. She did not report the incident to the Duty Manager or otherwise log it as an accident at work. The claimant says that she informed Daniela Philips whose account of the events of that day is at 314. Surprisingly in the days following the incident the claimant continued to work as normal.

26. At a meeting on the 25 July 2019 with Mrs Balham at which the claimant signed the form where the question was, "was the absence due to an accident at work", the form records "no" having been signed by the claimant as an accurate record of the meeting.

27. From the 1 September 2019 until ultimately 30 December 2019 the claimant was absent from work. During this period from 1 September until the 24 September a 20 day period (which excludes 3 days whilst the claimant was in hospital) in which the claimant failed to provide fit notes. Furthermore, the claimant did not attend a wellness meeting which she was invited to on the 4 October 2019 without good reason.

28. On the 28 November 2019 the claimant returned to work for 2 days and was provided with a sturdier standard issue footrest. The claimant believed this was inadequate and rejected it.

29. On the 2 December 2019 the claimant was invited to an absence review meeting but failed to attend.

30. On the 30 December 2019 a return to work occurred at which it was expressly noted that for the claimant a brand new footrest for her sole and exclusive use was to be ordered. Furthermore, the claimant would be offered the exclusive use of till 11 as that would assist in not being frequently asked to turn round and authorise alcohol sales to members of staff under the age of 18. The claimant also notified a Manager that the incident on the 14 July should now be noted as an accident albeit retrospectively.

31. On or around late 2019 early 2020 the claimant made some requests for other mats or pads for the footrest to aid its stability. Mr Hubbard went so far to buy them but ultimately was advised against making any homemade adjustments to standard issue equipment by health and safety experts. That is the sole reason those adjustments were not ultimately made.

32. From the 15 February 2020 to the 22 February 2020 the claimant was granted two weeks absence to attend to her ill step-father.

33. On the 15 March 2020 the claimant commenced a period of absence due to an infection. That was then the first wave of Covid and the claimant advised the respondent that she was vulnerable and did not attend work. The claimant received statutory sick pay topped up by the respondent so she would receive full pay. During that period the claimant was to have 2 weeks coded as holiday (345).

34. Following the relaxation of restrictions in the Summer of 2020 the claimant expressed some concern about returning to work. In the circumstances the claimant received a further assessment by occupational health and was given a risk classification of B. That meant she could return to work with additional controls in place for her. The claimant, on the 22 August emailed Mr Hubbard to say she would not be returning on the 24 August as the adjustments and equipment she had requested had not been in place.

35. Then on the 24 August Mr Hubbard emailed the claimant regarding return to work confirming that the claimant's requested adjustment for the return had now been met (377). Mr Hubbard further pointed out that any further

absence would be unpaid advising her that she could take either annual leave or health reasons that would have to be supported by a sick certificate from a doctor. Mr Hubbard requested the claimant contact him as to how she wished to deal with that absence and when she was planning to return to work.

36. The claimant failed to keep in contact with the respondent and is sent a letter on the 1 September reminding her the need to keep in contact during periods of absence requesting that she contact Mrs Balham.

37. In the meantime, Mr Hubbard was in touch on the 14 September 2020 with Virosafe the manufacturer of specialist equipment particularly a footrest and their Mr Keough who confirmed a footrest could be provided which was load bearing and therefore one was ordered.

38. On the 12 October 2020 the claimant returned to work and was allowed 30 minute breaks envisaged in the return to work plan (414). Following on from an occupational health assessment on the 3 September the claimant was allowed to continue with the 30 minute breaks throughout her employment.

39. The new footrest was provided on the claimant's return to work on the 12 October. There was initially some difficulties with the adjustment to the footrest nevertheless the claimant was able to continue to work in the meantime. The return to work being supported by a new support plan for the claimant.

40. The claimant was then absent in the second lockdown from early November to early December 2020 which the claimant took as unpaid leave and holiday. During that period the respondents arranged for Virosafe to visit the store with the claimant in attendance to show how the foot stool worked or was adjusted. A date was set for the 12 November but the claimant was not available and the visit had to be rearranged. On the 30 November the claimant emailed the respondents to enquire if a new date had been fixed for the visit by Virosafe. Mr Hubbard responded to say a new day would be arranged upon her return to work. He also suggested a video call from the manufacturers could be arranged in respect of the foot stool.

41. From the 3 December 2020 to the claimant's dismissal on the 21 June 2021 the claimant was absent from work on the grounds of ill-health.

42. The claimant had been granted and took exceptional leave over the respondent's busiest period of the year, Christmas, to visit her father.

43. On the 15 January 2021 the claimant was invited to a wellness meeting with the Manager under the long-term sickness absence policy. The claimant did not want to meet in person and the respondents agreed such meetings would take place via an exchange of email. Originally the meeting was arranged to accommodate the claimant's NHS support worker Miss Brown and was then further rearranged to the original date again to accommodate Miss Brown. In the meantime, the claimant also indicated to Mrs Balham

that she could not attend the store as she was unable to drive and this appears to be occurring from the 1 February 2021 to the 1 April 2021.

44. Notwithstanding the claimant's insistence that she could not drive she was sighted at Lidl supermarket on the 1 February 2021 on her own, having clearly driven there, pushing a shopping trolley.

45. There was then a second wellness meeting on the 12 February 2021 again conducted by email, there was a further occupational health referral by telephone, the appointment being the 26 February. Mrs Balham confirmed that information had now been sent to the claimant from the manufacturers regarding the footrest, confirming it was a simple and easy piece of equipment and was available on her return to work.

46. On the 3 April 2021 there was a third wellness meeting (570) conducted by email. The occupational health referral had taken place on the 8 March and they noted,

> "If she were to attempt to return to work in her current situation, I would recommend that she be deemed unfit prolonged standing, unfit lifting, moving, handling, unfit bending, unfit stretching, unfit repetitive motions of the lower limb and torso. In my opinion she would also require workplace adjustments due to her disability. In using a chair provided in her current contracted role due to her inability to sufficiently weight bear through her ankle and feet to safely position herself upon one."

47. By now the new foot stools weight bearing had been provided.

48. In the meantime, the claimant was reminded by email of the necessity of keeping in touch with Mrs Balham at the respondents and the need to provide up to date fit notes as they were not being provided from when they expired.

49. It was clear from the occupational health recent assessment the claimant was unfit for work and in the wellness meeting exchange of emails Mrs Balham was asking if there was a timeline for returning to work albeit on a phased basis. Mrs Balham offered to change her hours, days, workplace adjustments, assessments would be arranged for her return.

50. The claimant was chased for a response on the 1 April and replied on the 6 April questioning holiday pay, access to on-line payslips, frequency of checking the new footrest. However, the claimant does not give a timeline for her return to work.

51. On the 13 April the first formal absence review meeting was conducted. Again, at the claimant's request by email (571). As the claimant had now been absent for some time. The claimant was asked what was preventing her return to work given most of the recent fit notes were suggesting she may be fit to return with adjustments. The claimant was asked if she thought or saw a return to work in the near future if so roughly what was the date.

52. The claimant responds on the 16 April providing medical appointment dates indicating she was unable to offer any further information about return to work.

53. As a result of the above a second formal absence review meeting took place on the 3 May, again by email (574). The claimant was asked in the fit note the doctor said you may be fit for work with regular breaks for mobilisational and pastural support with phased return for stress. The claimant was then asked why she cannot return as of yet with support that the respondents could provide.

54. On the 9 May the claimant responds (578) providing further fit notes updates of hospital appointments, questions about what pastural support can be given and from whom. She was unable to put pressure on her foot or leg to get on the checkout chairs and offered no date of return.

55. On the 11 May Mrs Balham writes to the claimant and explains,

> "If all options have been exhausted and a return to work remains unlikely then the outcome of the process could be dismissal on the grounds of incapability return to work."

56. There is a third formal absence meeting and Mrs Balham emails on the 20 May she confirms everything OH have recommended has now been done, namely, footrest at checkout sufficient weight load, shift changes, amended breaks and work patterns. She advises that a workplace assessment will be done on the claimants return. The health and safety policy as requested was sent to the claimant.

57. The claimant responds on the 22 May (584) she provides no return to date timeline, she only questions her payslip and access to them, and she wants them posted rather than on-line.

58. On the 27 May there is a fourth formal absence review meeting, this takes place again by email at the claimant's request. Given there is still no date or timeline for return. Mr Hubbard writes to the claimant advising that following the fourth formal absence review the respondents would then be moving to a final formal review and it was agreed that also could continue by email. Mr Hubbard pointed out that Covid shielding would be excluded (597-598).

59. The claimant was then asked to respond to a number of questions posed in an email of the 7 June particularly about the return to work timeline whether the respondents could do anything to support a return. The fact being pointed out the claimant had now been absent since December 2020.

60. The claimant responds by the 13 June (595-596). The key point was the claimant was unable to give any date for return to work.

61. During the period of absence and the lack of any return date Mr Hubbard took the decision to dismiss the claimant on the grounds of capability given both the history of the sickness absence and the fact that the health

condition meant that there was no reasonable foreseeable return to work date for her (594-595).

62. At this stage the claimant was not eligible for ill-health retirement as not all her treatment had been exhausted.

63. On the 25 June the claimant appealed her dismissal (603-605) on the grounds of her appeal in summary were,

    - Another OH assessment should have been carried out.
    - Accident at work (footrest incident) should be excluded from the absences.
    - Why she is not eligible for ill-health retirement.
    - Admin roles and other options.
    - She felt she was being discriminated against.

64. The appeal was heard by a Mr Firth, a Store Director. The claimant was encouraged to attend personally and engage in the process. However, the claimant was insistent she did not wish to attend and wanted to continue the process via an exchange of emails. The claimant was invited to the first appeal meeting on the 2 July. That is ultimately rescheduled as Mr Firth decided to request a further occupational health assessment. That report dated the 21 July noted no material change from the previous report to the claimant's conditions and concluded "in my opinion Mrs Pitman remains unfit for any form of work for reasons given above (721)."

65. The appeal hearing took place on the 29 July and the 4 August. The claimant did not engage personally in the appeal hearing relying on an email exchange instead. Mr Firth did uphold the decision to dismiss and set out clearly his reasoning for that decision dealing with each of the claimant's ground for appeal (628-629).

The Law

66. S.15 discrimination arising from disability, the law.

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

67. The factual matrix of discrimination arising from disability can be broken down as follows:

    a. Unfavourable treatment causing a detriment.
    b. Because of something arising.
    c. Which arises in consequence of the claimant's disability.

68. The respondent will have a defence if it can show

    a. The unfavourable treatment is a proportionate means of achieving a legitimate aim (objective justification) or
    b. It did not know or could not reasonably have been expected to have known that the claimant had a disability "the knowledge defence".

69. In the context of objective justification in the EATs words in *Bray v The London Borough of Camden UK EAT-1162-01* are relevant in this type of case

> "The logical consequences of the argument that the employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. In our view the Tribunal was correct as a matter of good sense to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill feeling and be a potential for unauthorised absenteeism. In any event, it would as the Tribunal recognised be a practical step for an employer to take. It would severely undermine the scope and range of the sickness procedures and would have a financial impact on the employer and disrupt its activity in particular its ability to perform statutory functions."

Conclusion on discrimination arising from disability

70. The claim here is advanced purely on the claimant's dismissal in consequence of the claimant's disability. So, was such treatment unfavourable. So, was the treatment a proportionate means of achieving the legitimate aim.

71. It is clear that the respondent had legitimate aim and the dismissal was clearly connected to that. Particularly at the time of the claimant's dismissal there was no realistic or alternative, there medically was no return date, the claimant could not give a date, there was no timeline in June. The claimant had been absent at that stage since December 2020. To that the plain facts were that the claimant had been absent for something in the region of 24 months of the preceding 4 years.

72. It was clear she was not eligible for ill-health retirement or lifestyle break which the respondents offered in certain circumstances but not where the claimant is continually absent. In the case of ill-health retirement, the claimant's treatment had not been exhausted.

73. The respondent did not offer an alternative role and in any event at the most recent occupational health assessment on the 21 July it deemed the claimant unfit for work.

74. The claimant had been supported over a period of 4 years. The policies particularly return to work and the time in which the policy allowed for a phased return, had been extended by the respondent. The claimant had a

number of wellness meetings and formal long-term absence review extensions of time for support.

75. Clearly this claim is not well-founded.

The law ordinary unfair dismissal under the Employment Rights Act

76. Capability is a potential fair reason to dismiss under s.98.

77. The Tribunal then has to go on to consider s.98(4) which deals with fairness of a process. Much depends on the procedure the employer followed particularly consultation with the employee and medical evidence are important components as to the question of reasonableness.

78. In this case the Tribunal are unanimously of the view that the claimant was given ample opportunity over a long period of time. She was given everything asked for or was recommended by occupational health and the most recent occupational health report said she was unfit for work. Consideration of other alternatives, there were no other alternatives for the claimant to perform in the respondent's organisation.

79. Ill-health retirement was not a feasible possibility given the fact that the claimant's treatment had not been exhausted. As for the lifestyle break these are expressly not intended to cover employees who are on long-term sick.

80. In those circumstances, the claimant's dismissal was not unfair.

The Law s.20 Reasonable Adjustments

81. The duty arises under three discrete requirements any of one of which will trigger an obligation on the employer to make an adjustment that would be reasonable.

82. The first applies where a provision criteria practice has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to relevant matters in comparison with persons who are not disabled.

83. The second kicks in where a physical feature puts a disabled person at a substantial disadvantage in relation to relevant matters.

84. The third is the lack of provision of auxiliary aid which again puts a disabled person at a substantial disadvantage.

85. The claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments as arisen. There are facts from which it could reasonably in the absence an explanation that the duty has been breached.

86. In considering the reasonable adjustment EHRC Employment Code list factors a Tribunal might take into account when assessing reasonableness, the focus is on the practicable result of the measures that can be taken.

87. Reasonable adjustments are limited to those that prevent a provision criterion or practice placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. The primary concern enabling the disabled person to remain in or return to work with the employer. The proposed reasonable adjustment must be judged against the criteria that it must prevent the PCP from placing the disabled person at the relevant substantial disadvantage. If the adjustment does not alleviate the disabled persons substantial disadvantage it is not a reasonable adjustment within the meaning of the legislation.

88. Referring to the three PCPs above in this judgment advanced by the Claimant: the first being that between August 2018 and 2019 requiring the claimant to work on the self-service checkouts.

89. What is clear is the claimant was moved to regular checkout on her return to work in October 2018 that never changed and continued right up until her dismissal. Therefore, the PCP simply not made out.

90. The second regarding the 30 minute breaks as soon as she requested them. They were granted and that never changed, they continued until dismissal. That PCP is simply not made out.

91. Thirdly, the claimant alleges that on or around Autumn 2020 Mrs Balham told her that she could not walk around the store unless it was quiet, there is simply no documented evidence that, that ever was said. It is clearly inconsistent with Mrs Balham and the respondents supporting every other adjustment the claimant sought, there was consequently no PCP preventing the Claimant from walking around the store. .

92. As regards to the footrest as is claimed under s.20(5) auxiliary aids:

93. It is blatantly clear from the facts the claimant was provided with a footrest. On the 28 November 2019 when she returned to work she was offered a new footrest for her sole use. She said it was inadequate and therefore another footrest had to be provided. Such a footrest was sought but the claimant was absent from work for almost all of the period. In any event, shortly before the claimant returned to work in 2020 a tailor made load bearing footrest was provided by Virosafe.

94. In relation to the pads and mat it is clear that Mr Humphry, as the claimant accepts, went out and purchased these as home made adjustments. However, they were not allowed to be used after advice from health and safety since they were DIY adjustments and could be a further source of risk. Therefore, it is simply unreasonable to suggest that the respondents failed in this respect.

95. In relation to the assistance in the assembling of the footrest provided that is inconsistent with a claim that she never requested a visit from the manufacturer or help with assembly, she clearly did, she asked when was the visit from Virosafe being rearranged. The only reason it was cancelled in the first place was because the claimant was absent due to leave. Furthermore, the respondent sought to obtain information and instructions from the manufacturer. That claim is simply not made out.

96. Finally, it is not entirely clear how this advanced in relation to a different chair at the checkout and how this would have avoided the claimant being placed at a substantial disadvantage given that she could use the load bearing footrest solely for her use to get on to her chair. In any event, it appears that the first occasion this was sought was in May 2021. She had already been on long-term sick and no timeline for a return. Had it been clear what was wrong with the chair, if anything, and the claimant was planning to return then no doubt the chair issue would have been looked at, if indeed there was anything wrong and appropriate adjustments made. The Tribunal have no doubt an appropriate chair, if needed, would have been sought. This claim is not made out.

____

Employment Judge Postle

Date: 22 August 2022

Sent to the parties on: 18.9.2022

GDJ
For the Tribunal Office