EMPLOYMENT TRIBUNALS

Claimant: **Ms M Khasaia**

Respondent: **Mr J O'Dea t/a St Clements Dental Care**

Heard via CVP (London Central) **On:** **7, 8, 9, 10, 11 November 2022**

Before: **Employment Judge Davidson**
Ms M Pilfold
Mr T Cook

Representation
Claimant: Mr A Gannon, husband
Respondent: in person

JUDGMENT

The claimant's claims of unfair dismissal, direct disability discrimination, direct sex discrimination, discrimination arising from disability, breach of contract and unlawful deductions from wages succeed.

Her claim for failure to make reasonable adjustments fails.

The respondent is ordered to pay the claimant the following sums:

Unfair dismissal compensatory award	£14,970.00
Loss of earnings from discrimination	£ 6,697.20
Injury to feelings	£15,000.00
Loss of statutory rights	£ 500.00
Unpaid statutory sick pay	£ 418.60
Notice pay	£ 515.16
Pension	£ 321.84
TOTAL	**£38,191,18**

REASONS

Issues

The issues were set out in the Case Management Order dated 3 March 2022 as follows:

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability (ill-health long term absence).

1.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;
1.2.2 The respondent adequately consulted the claimant;
1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
1.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
1.2.5 Dismissal was within the range of reasonable responses.

1.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

2. Remedy for unfair dismissal

2.1 The claimant does not seek reinstatement or reengagement.

2.2 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.2.1 What financial losses has the dismissal caused the claimant?
2.2.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.2.3 If not, for what period of loss should the claimant be compensated?
2.2.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.2.5 If so, should the claimant's compensation be reduced? By how much?
2.2.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.2.7 Did the respondent or the claimant unreasonably fail to comply with it?
2.2.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.2.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
2.2.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.2.11 Does the statutory cap of fifty-two weeks' pay apply?

2.3 What basic award is payable to the claimant, if any?

2.4 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

4. Disability

[Conceded by the respondent at the start of the hearing.]

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 The claimant says she is disabled with hemianopia.

5.2 Did the respondent do the following things:

5.2.1 Dismiss her.

5.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

5.4 If so, was it because of disability?

6. Direct sex discrimination (Equality Act 2010 section 13)

6.1 The claimant is a woman.

6.2 Did the respondent do the following things:

6.2.1 Mr O'Dea commenting at the claimant's appeal against dismissal hearing on 14 December 2020 that it was not safe for the claimant to look after her baby.

6.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who she says was treated better than she was.

6.4 If so, was it because of sex?

6.5 Did the respondent's treatment amount to a detriment?

7. Discrimination arising from disability (Equality Act 2010 section 15)

7.1 Did the respondent treat the claimant unfavourably by:

7.1.1 Dismissing her

7.2 Did the following things arise in consequence of the claimant's disability:

7.2.1 The claimant's sickness absence between the end of her maternity leave date and her dismissal on 16 October 2020?

7.2.2 The appearance that the claimant was unable to perform her role safely.

7.3 Was the unfavourable treatment (ie. the dismissal) because of any of those things?

7.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.4.1 Ensuring only staff who could work in a way that ensured their own, fellow staff members' and patients' safety should be permitted to work in the clinical environment of the respondent's dental practice

7.5 The Tribunal will decide in particular:

7.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.5.2 could something less discriminatory have been done instead;

7.5.3 how should the needs of the claimant and the respondent be balanced?

7.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

8.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

8.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

8.2.1 Requiring the claimant to work in an inadequately lit environment.

8.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she was less able to see in order to carry out her role?

8.4 Did the lack of an auxiliary aid, namely a large screen for the computer, and a large phone, put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that without these the claimant would only be able to read words and numbers slowly?

8.5 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

8.6 What steps could have been taken to avoid the disadvantage? The claimant suggests:

8.6.1 Provision of a larger computer screen
8.6.2 Provision of a larger telephone
8.6.3 Providing better lighting.

8.7 Was it reasonable for the respondent to have to take those steps and when?

8.8 Did the respondent fail to take those steps?

9. Remedy for discrimination

9.1 What financial losses has the discrimination caused the claimant?

9.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.3 If not, for what period of loss should the claimant be compensated?

9.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

9.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.8 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

9.9 If so is it just and equitable to increase or decrease any award payable to the claimant?

9.10 By what proportion, up to 25%?

9.11 Should interest be awarded? How much?

10. Unauthorised deductions

10.1 Were the wages paid to the claimant during her maternity leave and sick leave up to 16 October 2020 less than the wages she should have been paid?

10.2 Was any deduction required or authorised by statute?

10.3 Was any deduction required or authorised by a written term of the contract?

10.4 Did the claimant have a copy of the contract or written notice of the contract term before the deduction was made?

10.5 Did the claimant agree in writing to the deduction before it was made?

10.6 How much is the claimant owed?

11. Breach of Contract

11.1 Did this claim arise or was it outstanding when the claimant's employment ended?

11.2 Did the respondent do the following:

11.2.1 Fail to pay the claimant a pay rise after she became GDC registered

11.3 Was that a breach of contract?

11.4 How much should the claimant be awarded as damages?

Evidence

1. The tribunal heard live evidence from the claimant, her husband, Adrian Gannon and her Union representative, Bryan Kennedy on behalf of the claimant and from John O'Dea, owner and Petra Fanoni, Practice Manager, on behalf of the respondent.

2. The tribunal did not have the benefit of a bundle of documents. Despite a case management order requiring him to do so, and correspondence between the parties and the tribunal, the respondent failed to produce a bundle. We acknowledge the claimant's attempts to ensure that the respondent complied with the order and the time she had to spend in chasing this up due to the respondent's failure to comply with the order.

3. On the first morning of the hearing, which had been set aside for reading, there was a discussion with the parties about the lack of documents. The respondent had sent materials to the tribunal but these could not be opened. In the end, the tribunal received 95 emails from the claimant. I managed to distil the emails into eight distinct email chains, which I saved as a single pdf document and we used that as a makeshift bundle. We also had sight of, and took into account, the pleadings, the Case Management Order, the ophthalmology report, the Occupational Health (OH) report and the contract of employment.

Credibility

4. When considering conflicts of evidence, we took into account the consistency of witness statements and witness evidence, the evidence (or lack of) to support assertions made by the witnesses and disregarded parts of evidence which were clearly hearsay. Examples of matters we took into account include:

    4.1. John O'Dea using words such as 'severe' to describe the claimant's condition where there is no medical or other evidence using that word
    4.2. John O'Dea frequently mixed up terms such as OH and Ophthalmology
    4.3. John O'Dea admitted that, despite what was put in the ET3 that he frequently spoke to the claimant during her absence, he only spoke to her once
    4.4. Petra Fanoni admitted that her evidence of what the claimant said on a phone call was entirely based on what John O'Dea told her had been said and was not in her own knowledge.
    4.5. The issue of whether there was overstaffing or understaffing was vague and changeable.
    4.6. John O'Dea told the claimant that 'Everyone says…' about the PPE where, in fact, he meant himself and possibly Petra.
    4.7. John O'Dea said he offered the claimant a trial period – but, after questioning, he says that it was his intention but accepts he never said it to the claimant.
    4.8. We considered that the claimant had not mentioned the September telephone conversation in her witness statement but she did not deny it took place. She was not aware that the respondent would give that

conversation the importance it did in relation to her dismissal as the issue of dismissal was not discussed in that conversation.

On balance, we preferred the evidence of the claimant.

Facts

We find the following facts on the balance of probabilities:

5. The respondent operates two dental practices, St Clements Dental Care in Hammersmith and another practice in the City of London. He is a dentist of 40 years' experience.

6. The claimant joined the respondent on 8 December 2017 as a Trainee Dental Nurse. She was a qualified Dentist in her home country of Georgia and was working up to being an accredited dentist in the UK. She received her GDC accreditation as a Dental Nurse while working for the respondent but was unsure of the date of this.

7. She was employed subject to the terms of a written employment contract which included the following terms:
   7.1. Her salary was £14,970
   7.2. Her salary would increase after she received accreditation
   7.3. The contract contained provisions relating to long-term absence

8. In August 2019, she went on maternity leave. She told the respondent that she intended to take 52 weeks maternity leave, returning in August 2020. Her child was born on 7 October 2019. On 13 October 2019, a few days after delivering her baby, the claimant was readmitted to hospital suffering from a brain haemorrhage. She was discharged in November 2019. The long-term effect of the haemorrhage was that she had hemianopia, which affects the range of vision. It is not necessarily permanent and the claimant's sight has been improving since her discharge from hospital.

9. She remained on maternity leave receiving SMP until her entitlement to SMP was exhausted in May 2020.

10. In July 2020, the claimant spoke to Petra Fanoni about returning to work and this was followed up by email. The claimant said that, due to her hemianopia, she did not feel fit to return to work yet although she was keen to return. She suggested an OH assessment to look at the safety of her returning to work.

11. On 27 July 2020, Petra Fanoni informed the claimant that the respondent was going to put her on Sick leave and asking for evidence of her sickness for payroll purposes so that she could be paid SSP. The claimant sent in a fit note which expired on 12 October 2020.

12. In September 2020 (the exact date is disputed), John O'Dea rang the claimant to discuss returning to work. Petra Fanoni overheard his side of the

conversation as she was in the room with him. John O'Dea was looking forward to her returning to work. John O'Dea's evidence was that he rang to 'offer' the claimant the job of dental nurse, even though that was her current role. She explained that her vision was not fully recovered and that she was due to have an Ophthalmology Assessment on 16 October 2020. She gave him an example of not being able to see her husband in a car park. Although she did not say when that incident had taken place, she told us that it was in June 2020 but John O'Dea understood it to have been more recent than that.

13. In that conversation, she was open that her eyesight was still affected but that she was willing to come back to work, subject to an OH assessment to determine whether she needed adjustments and, if so, what those would be. She did not state that it would not be safe to employ her.

14. John O'Dea then asked if she would be able to do reception work. The claimant told him that she struggled to read on a screen and that this would not be a suitable role.

15. We do not accept the respondent's characterisation of the telephone call with the claimant in September 2020 as an offer of her job back or an offer of alternative employment as a receptionist which was refused by the claimant. We find that the claimant asked for an OH assessment to assist them both in making arrangements for her return. She was willing to return to work but wanted her disability to be accommodated for everyone's sake. We note that the respondent does not reference any refusal by the claimant of a job offer in subsequent email correspondence.

16. Sometime after this conversation, John O'Dea spoke to a friend of his who is an expert specialising in post-natal medicine. Without giving any specific details related to the claimant, he asked her what the likely long-term consequences of a post-natal brain haemorrhage would be. She told him that if normal sight had not returned within a year, it was unlikely ever to return to normal. He also looked up the point online.

17. He spoke to the GDC and told them of his concerns about her eyesight. They told him that severe impairment of sight such as hemianopia would call into question their fitness to practice.

18. For some reason, John O'Dea believed that the claimant's SSP period expired on 16 October 2020. He sent her an email on 15 October 2020 terminating her contract due to 'redundancy' based on her long-term ill-health.

19. The email read as follows

> *Dear Ms Khasaia,*
>
> *It is with great regret that I must give you notice of your redundancy at Hammersmith St Clements with effect from Thursday the 16th October 2020. The long-term injuries that you suffered following the birth of your*

child have meant your staying off work for safety reasons which have also impacted on your ability to safely perform your duties at St Clements. The practice manager and I have discussed the possibility of another role at St Clements for you. However, your long-term disabilities have a direct effect on your safety, the safety of our patients and your ability to safely complete tasks at St Clements.

Should your health improve such that you are able to carry out your normal duties at St Clements and you feel fit to return to work, we would like very much to re-employ you. Everyone at St Clements wishes you a speedy recovery.

Best regards

John O'Dea

Principal, St Clements

20. The claimant did not receive this email and contacted Petra Fanoni at the end of October to discuss returning to work. She had had her Ophthalmology Assessment on 16 October and was ringing to update the respondent. Petra Fanoni told her that she had been made redundant with effect from 16 October 2020. Petra Fanoni forwarded a copy of the dismissal email to the claimant on 30 October 2020.

21. The claimant emailed John O'Dea and Petra Fanoni on 8 November 2020 appealing against the decision to dismiss her. She also challenged the failure to give notice, the failure to consult with her, the need for an OH assessment, the failure to follow the contractual provisions relating to Long Term Absence and requesting to be put on furlough. She also queried the SMP and SSP payments.

22. In response, on 12 November 2020, John O'Dea apologised for not following procedures and promising to do so in future. He agreed to have an appeal meeting. He explained that she had failed to update him on her condition and that he understood from her that she did not feel safe working. He therefore took the decision to terminate on that basis.

23. On 15 November, the claimant replied disputing the allegation that she had failed to keep John O'Dea fully up to date about her condition. She repeated her willingness to undergo an OH assessment and asked him to follow the correct dismissal procedures.

24. Following an exchange of emails dealing with these matters, they agreed to hold an appeal meeting on 14 December 2020. The claimant was accompanied by her trade union adviser, Bryan Kennedy. Although Petra Fanoni, who attended as a witness, told us she had taken notes, these were not before the tribunal and have not been disclosed to the claimant.

25. The respondent asked the claimant to bring her medical evidence to the appeal, even though the appeal was against his decision to dismiss on 15 October 2020.

26. At the meeting, John O'Dea told the claimant that the practice was overstaffed and that she had been selected for redundancy as she was not fit to work and others were. We find that he did mention staffing levels and redundancy as this was expressly confirmed by the respondent in a subsequent email dated 22 December 2020.

27. The claimant alleges that John O'Dea made a comment in the appeal hearing that she could not fulfil her childcare responsibilities towards her baby. Bryan Kennedy recalls this comment but did not include it in his witness statement as his focus was on the outcome of the appeal. Petra Fanoni, who was present, does not recall hearing the comment and John O'Dea denies saying it. Adrian Gannon said that the claimant mentioned it to him when he picked he up from the meeting that day and she referred to it in an email to the respondent dated 8 January 2021 objecting to that comment. John O'Dea did not reply to the email to deny having made the comment.

28. We find that John O'Dea did make a comment. We reach this finding on the evidence of the claimant, Adrian Gannon reporting that she commented that day, Bryan Kennedy and the fact that it was included in email correspondence shortly after the incident and John O'Dea did not deny it. We do not accept his explanation given in evidence that it was so 'left of centre' as not to require comment.

29. At the conclusion of the appeal meeting, it was agreed that the respondent would arrange an OH assessment for the claimant. Bryan Kennedy understood that the respondent would follow the recommendations of the OH report to decide the outcome of the appeal. The claimant's understanding was that John O'Dea would not accept the OH findings whatever they said and would not take her back.

30. Following the meeting Petra Fanoni arranged for an OH appointment by telephone for 4 January 2021. The claimant asked whether there was an outcome of the appeal meeting, in particular whether the dismissal had been withdrawn so that she could be put on furlough pending the OH report.

31. In response, John O'Dea wrote the following email to the claimant:

> *Dear Medea,*
>
> *I thought I had made it very clear at the meeting that you were made redundant due to the overstaffing and lack of work available at Hammersmith St Clements.*
>
> *It surprises me that you still insist on trying to use a system which was put in place for the purpose of retaining essential staff in these difficult times. I*

have said very clearly at the meeting that I do not want to put you on furlough. There is no position for you at St Clements. Your stroke and the consequences of your stroke have made you unsafe for work of the type which is required for a dental nurse. You are unsafe to yourself, to your work colleagues and to the public in general; your impaired eyesight renders you unsafe for the level of accuracy required for your position at St Clements. I back this up with 40 years of experience as a dentist. You may not wish to face the fact but it is so. Your GP has signed you off as not fit to work, the ophthalmologic report says the same.

We are now expected from January 2021 to complete 45% of all the NHS work which we are budgeted to complete each month. This will need to be carried out wearing a "stealth" mask (type FFP3), a full face visor and full PPE. Donning and doffing of these PPE items will need to be done many times per day over the next unlimited period so as to attend and treat NHS patients in safe but "rapid" succession. You are not capable of doing this. Everyone is saying this very clearly, to your face. Your health has very sadly been impaired by your stroke and we all have to face up to the reality of this.

Yours sincerely

John O'Dea

32. The OH report was sent to the claimant and the respondent on 25 March 2021. The report concluded that the claimant was fit to work with adjustments. The OH assessor referred to the telephone assessment and waited for the March report from her Ophthalmology consultant, which he took into account. The current position was summarised as the claimant feeling well with some visual impairment and struggling with reading. The recommendation was for a workplace assessment with Access to Work to determine what adjustments would be required. The OH report concludes that consideration of reasonable adjustments required is a management decision and the implementation of such adjustments should be undertaken in accordance with what management believe to be appropriate at the time for service delivery.

33. We did not see any correspondence from the respondent after the receipt of the OH report but it is not in dispute that the respondent took no further action. The respondent relied on the part of the report which gave management responsibility to implementation of adjustments as justification for not taking further action. We disagree with this interpretation of the report which, in our view, states that reasonable adjustments must be considered and their implementation, once decided, is for management to undertake.

34. The claimant submitted her ET1 on 24 March 2021.

35. Following the termination of her employment, the claimant repeatedly requested clarification of her money payments but did not receive a comprehensive or adequate response. This correspondence was continuing until July 2022. Even at the hearing, the respondent's witnesses were unable to answer queries relating to the claimant's financial entitlements.

The Law

Unfair dismissal

36. Section 98 of the Employment Rights Act 1996 provides,

> *(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls under this subsection if it –*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he employed by the employer to do …*
>
> *(3) In subsection 2(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …*
> *(4) Where the employer has fulfilled the requirements of subsection 98(1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

Direct discrimination

37. Direct discrimination means less favourable treatment in comparison to a comparator because of a protected characteristic. S. 13 EA 2010 defines direct discrimination as:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Discrimination arising from disability

38. Under s. 15 EA 2010 (A) discriminates against (B) if:

> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*

Duty to make reasonable adjustments

39. Section 20 EA 2010 sets out the general scope of the duty to make adjustments:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A'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*
>
> *(4) The second requirement is a requirement, where a physical feature 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.*
>
> *(5) the third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid…*

Determination of the Issues

40. The respondent conceded disability at the beginning of the hearing.

Unfair dismissal

41. We find that the reason for dismissal was capability in that the respondent took the view that the claimant's hemianopia meant that she could no longer work as a dental nurse. Unfortunately, the reason for dismissal has been confused by the respondent's incorrect usage of the word 'redundancy' in the dismissal email and the payment of a statutory redundancy payment. It was further confused at the 'redundancy appeal' meeting on 14 December 2020 by John O'Dea referring to overstaffing, which he then confirmed as a reason in a subsequent email.

42. However, we find that the reason that the claimant is no longer employed by the respondent is her medical condition. This is supported by the contemporaneous documents and the witness evidence before us.

43. We find that the respondent did not act reasonably in treating that as a sufficient reason to dismiss the claimant. In particular the respondent failed to consult with the claimant prior to finalising any decision. He did not give her the opportunity of making representations.

44. He also failed to ascertain her current condition or to investigate her prognosis of recovery from those treating the claimant. He made no enquiry of the up-to-date medical position and appeared to rely on a general conversation with a friend who had expertise in post-natal medicine but who knew nothing of the claimant's particular circumstances and did not examine the claimant.

45. On his own case, he relies on what the claimant told him in the conversation in September 2020. He accepts that this was not a conversation about dismissal. He then used the content of this conversation to justify his dismissal a month later.

46. The respondent failed to explain why the decision to dismiss needed to be taken in October 2020. He mentioned that the SSP period had come to an end. We do not understand this. The claimant was on maternity leave until August 2020. She appears to have been paid SSP from the end of her SMP period in May although no payment was actually made until November, after her employment had terminated. In our view, the SSP period should not have started until August and would run for 28 weeks. Even if the SSP period started in May 2020 at the end of SMP, the 28 week period had not expired on 15 October.

47. We therefore find that the respondent has failed to give a reason why the decision had to be taken at that point. The respondent was aware that the claimant had an upcoming ophthalmology appointment and did not wait to the outcome of that assessment.

48. We also note that John O'Dea relied on his belief that the claimant would not be able to 'don and doff' PPE equipment required as part of the COVID protocols. He never asked her about this or made any enquiry of a medical practitioner to determine whether his belief had any foundation.

49. He failed to follow the procedure set out in the contract of employment he issued to the claimant by the following (among others):

    a. he failed to discuss any required modifications after a period of illness
    b. he failed to obtain a medical report from her doctor on her long term prognosis and any adjustments.

50. The respondent did not specify that the claimant had the right of appeal but agreed to hold an appeal when she asked. The appeal hearing dealt with overstaffing issues and, by doing so, confused matters. The conclusion of the meeting was that the respondent would arrange for an OH assessment of the claimant. However, after that assessment was made and the finding was that the claimant was fit to return with adjustments, the respondent did not act on this and, in fact, never gave the claimant an appeal outcome. Rather than remedying an originally defective dismissal, we find that the appeal process compounded the unfairness. We find that the appeal was a sham and that John O'Dea had no intention of revisiting his decision.

51. John O'Dea told us that he did not believe the OH report had credibility as it was just based on a telephone conversation with the claimant (although we note that the report included reference to her medical reports) but he did give weight to the opinion of his friend who had never even met the claimant.

52. In conclusion we find that the dismissal was unfair, both procedurally and substantively. The defects were so fundamental that we reject the respondent's argument that this is a Polkey situation and that the claimant's employment would have terminated if he had followed a better procedure. We find that if the respondent had knowledge of the improvement to the claimant's sight, the prognosis of further improvement and the obligation to make reasonable adjustments, the claimant's employment could well have continued. It is accepted by the respondent that she was a diligent and hard-working employee whom he wanted to retain.

Direct disability discrimination

53. It is accepted that the respondent dismissed the claimant because she was disabled with hemianopia. We find that this was less favourable treatment. We find that the method of dismissal (by email out of the blue) would not have been used if the claimant did not have a disability. It was conceded by Petra Fanoni that this was not how they would normally carry out a dismissal.

54. We find that the dismissal was because of her disability in that the respondent labelled her as a person with hemianopia and did not take account of her actual abilities or investigate the precise extent of the effect of her condition on her ability to do the job.

55. For example, he relied on his view that she was a risk to the patients and staff (and herself) as she might 'bump into' a colleague who was operating equipment. There is nothing in the medical evidence to suggest that there was a greater risk of the claimant bumping into anything than anyone else – the limitations of her condition were primarily with struggling to read.

56. Further, he made an assumption that she would not be able to 'don and doff' PPE without any basis other than her disability. There is no evidence, medical or otherwise, that she would have any greater problem than anyone else. We also note that John O'Dea had not seen the claimant since she went on maternity leave in August 2019.

57. We therefore find that the dismissal was discriminatory.

Direct sex discrimination

58. We have found that the comment relied on was said. We find that John O'Dea would not have made the same comment to a man in the same circumstances as the claimant.

59. We find that it amounted to a detriment and that the claimant felt demeaned by the comment. The respondent accepted that such a comment would be offensive (although he denied making it himself).

60. We therefore find that the claimant was discriminated against on the grounds of her sex.

Discrimination arising from disability

61. The respondent treated the claimant unfavourably by dismissing her.

62. We find that the claimant was absent from August 2020 until her dismissal on 16 October 2020 and that her absence arose in consequence of her disability.

63. We find that the appearance that the claimant was unable to perform her role safely arose in consequence of her disability.

64. We find that the dismissal was not because of her absence.

65. We find that the dismissal was because John O'Dea genuinely believed that the claimant was unable to perform her role safely. We accept the legitimate aim of ensuring only staff who could work in a way that ensured their own, fellow staff members' and patients' safety should be permitted to work in the clinical environment of the respondent's dental practice.

66. However, we do not find that dismissing the claimant was an appropriate and reasonably necessary way to achieve that aim and that something less discriminatory could have been done instead. In particular, the respondent could have met with the claimant, made enquiries of the claimant and her medical team to ascertain the actual implications of the disability on the workplace, he could have asked for an OH assessment before dismissal and he could have offered a trial day.

67. Despite his criticism of the OH report for not meeting the claimant in person, he himself made a decision on the basis of a telephone call and did not invite her to meet with him. He could have then made an assessment of whether she was likely to bump into people etc.

68. We find that the OH report dated March 2021 summarises how the needs of the claimant and the respondent should be balanced. The report concluded that the claimant was fit to work with adjustments. The recommendation was for a workplace assessment with Access to Work to determine what adjustments would be required. The OH report concludes that consideration of reasonable adjustments required is a management decision and the implementation of such adjustments should be undertaken in accordance with what management believe to be appropriate at the time for service delivery.

69. We find that the respondent discriminated against the claimant on the basis of something arising from her disability, namely his perception of the dangers she might pose in the workplace.

Reasonable adjustments

70. We find the claimant has not shown that there was a PCP to require staff to work in an inadequately lit environment. There was insufficient evidence before the tribunal regarding the adequacy of the lighting.

71. We therefore find that this claim fails.

Unauthorised deductions from wages/breach of contract

72. We are not able to determine the amount of the pay increase that the claimant says she was entitled to. The parties had not agreed what the pay rate should be and there is insufficient evidence before us to determine this amount or the date on which any entitlement began.

73. We find that the claimant received her SMP until the end of her SMP period and no further SMP is payable.

74. Although the claimant was not entitled to move to sick pay until the end of her maternity leave period in August 2020, the respondent unilaterally changed her leave status from maternity leave to sick leave with effect from 5 May 2020. That being the case, she should have received Occupational Sick pay in accordance with the terms of her contract at the rate of 2 weeks @ full pay and 2 week @ half pay. Thereafter she would be on SSP.

75. Her entitlement to SSP had not been exhausted at the time of her dismissal on 16 October. It had only been paid to 12 October 2020. The respondent accepts that SSP is owing for the period from 12 to 16 October.

76. In addition, although the claimant was dismissed on 16 October, she did not become aware of it until 30 October. We find that the dismissal only became effective on 30 October and she is therefore entitled to SSP until 30 October.

77. We also award the claimant two weeks' notice pay. The respondent admits that it failed to pay her notice entitlement.

Employment Judge Davidson
Date 14 December 2022

JUDGMENT WITH REASONS SENT TO THE PARTIES ON

14/12/2022

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing