



EMPLOYMENT TRIBUNALS

Claimant: Miss L Fantie
Respondent: Barts Health NHS Trust
Held: East London Hearing Centre (remotely)
On: 15 and 16 November 2022
Before: Tribunal Judge McLeese sitting as an Employment Judge (sitting alone)

Representation

For the Claimant: Mr Jacoub (Fru)
For the Respondent: Miss David (counsel)

JUDGMENT

1. The claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. This is a claim by Miss Fantie against her former employers Barts Health NHS Trust. Miss Fantie was employed from February 2009 until the 28th January 2019. She brings a claim that she was unfairly dismissed.

The Hearing

2. In the course of the hearing, I heard evidence from the Claimant. For the Respondent, I heard from Mr James Lawless, a Theatre Matron and Miss Fantie's line manager and Mr Kevin Walsh, the Divisional Director for Specialist Medicine, who dealt with the Stage 3 hearing and dismissal.
3. In reaching my decision, I had regard to the evidence I was provided with and the evidence I heard during the hearing. I also had regard to the law and briefly set out the relevant parts in respect of these claims.

The Relevant Law

Unfair Dismissal

4. By reason of section 94 of the Employment Rights Act 1996 ('ERA 1996'), an employee has the right not to be unfairly dismissed.
5. Section 98(1) of the ERA 1996 requires that in deciding whether a dismissal was unfair, it is for the employer to show the reason for that dismissal. That reason must either be for "*some other substantial reason of a kind such as to justify the dismissal of any employee*" (per section 98(1)(b)) or fall within a list of potentially fair reasons to be found within section 98(2) of which so far as relevant states:

A reason falls within this subsection if it –

relates to the capability...of the employee for performing work of the kind which he was employed by the employer to do.....

6. Section 98(3) of the ERA 1996 further defines 'capability' as being assessed by reference to an employee's "*skill, aptitude, health or any other mental or physical quality.*"
7. The Tribunal must consider the reasonableness of the employer's decision to dismiss and, in judging the reasonableness of that decision, the Tribunal must not substitute its own decision as to what was the right course to adopt for the employer. Rather, the Tribunal must consider whether there was a band of reasonable responses within which one employer might reasonably take one view whilst another quite reasonably takes a different view. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.
8. Section 98(4) also requires a consideration of whether the procedure by which an employer dismissed an employee is fair. If an unfair procedure has been followed the Tribunal is not allowed to ask itself, in determining whether a dismissal was fair, whether the same outcome (i.e. dismissal) would have resulted anyway even if the procedure adopted had been fair (per Polkey v AE Dayton Services Ltd [1987] IRLR 503HL).

The Issues

11. It was agreed that the Respondent had dismissed the Claimant and that the reason it relied upon for that dismissal was the Claimant's capability. It was left for me to determine whether the decision to dismiss on the grounds of capability was substantively and procedurally fair.
12. The parties agreed at the outset of the hearing that the issues for the Tribunal to determine were set out at page 56 of the bundle in the following terms:

It is agreed that the Claimant was dismissed.

It is for the Respondent to establish a potentially fair reason for dismissal. The Respondent asserts capability as a potentially fair reason for the purposes of s.98(2) (a) of the Employment Rights Act 1996.

If the Respondent establishes a potentially fair reason, did the Respondent act reasonably in treating that as sufficient reason for dismissing the Claimant, taking into account the circumstances of the Respondent (including the size and administrative resources of the Respondent) and the equity and substantive merits of the case?

Did the Respondent follow a fair procedure in taking that decision to dismiss?

If the Claimant was unfairly dismissed, to what basic award is she entitled by virtue of her length of service, age and weekly pay?

What compensatory award would it be just and equitable to award in the circumstances, taking into account:

In the event that the dismissal is deemed procedurally unfair, whether compensation should be reduced to reflect that the Claimant would otherwise have been fairly dismissed had a fair procedure been followed by the Respondent.

Whether the Claimant has failed to take reasonable steps to mitigate her loss.

Findings of Fact

The Dismissal

13. The Claimant was employed by the Respondent from 2nd February 2009 until her dismissal which she was notified of on 30th October 2018. Her effective date of termination was 28th January 2019.
14. In late October or early November 2016 Mr James Lawless, matron, implemented a new rota, for genuine operational reasons that involved a rotation of obstetric and paediatric theatre staff.
15. Knowing of the Claimant's opposition to this change he left her to the end of the process. She was being asked to do the same work as her colleagues.
16. The Claimant's sickness absence began following a meeting between herself and Mr Lawless on the 8th November 2016 regarding the proposed rotation of staff between obstetrics and paediatrics departments. The Claimant was signed off after that meeting with stress at work and did not return to work.

17. In or around 2015 Mr Lawless was the investigating officer in relation to an allegation of bullying by the Claimant. He found that she was not involved in the behaviour alleged.
18. The difficulties during the meeting of November 2016 related to the Claimant's dissatisfaction with the proposed rotation. During that meeting the Claimant made clear her dissatisfaction and accused Mr Lawless of bullying her, that she would take the matter to her Union. Mr Lawless, inappropriately he accepts, may have suggested she "bring it on", or words to that effect. That was, on balance of probability, in direct response to the manner in which the Claimant spoke to him but nonetheless should not have been said.
19. The Claimant went to the Accident and Emergency department and then remained off sick with stress.
20. The Claimant had a number of longstanding health issues prior to the meeting with Mr Lawless, including difficulties with stress at work.
21. Mr Lawless wrote to the Claimant on the 21st December 2016 requesting sick notes to cover her absence from the 15th November 2016.
22. On the 7th February 2017 the Claimant attended an occupational health (OH) assessment and on the 3rd March 2017 a stage 1 sickness meeting took place in the absence of the Claimant.
23. At the 7th February OH meeting the assessing professional noted that the Claimant indicated as follows, *"Lovida tells me there have been some incidents at work which have caused her high levels of stress. She tells me she is regularly asked to work elsewhere in the department which has been challenging for her as she would only like to work in the post she had originally applied for"*.
24. The OH assessor concluded, *"I do anticipate that Lovida may return to work if she received a reassurance that she would be working in her original role"*.
25. The delay in that first meeting taking place, which was not in line with trust policy, was due to a number of factors including the Claimant having to be asked to supply doctors notes, the need for OH and human resources input and the intervening Christmas break.
26. The Claimant attended a further OH assessment on the 10th May 2017.
27. Between May and June 2017, the Respondent's systems were affected by a cyber-attack. This was clearly out of the control of any of the parties involved in this appeal.
28. During 2017 Mr Lawless also had a family issue which effected his availability for work.

29. On the 30th June the Claimant raised a grievance with the Respondent relating to Mr Lawless and on the 15th August 2017 a meeting was held to discuss that grievance.
30. On the 30th August the Claimant was invited to a reconvened stage 1 sickness absence review meeting on the 13th September 2017 which she could not attend due to unavailability of representation.
31. On the 12th September the Claimant was invited to a reconvened meeting on the 29th September 2017.
32. On the 23rd October the Claimant attended a third OH assessment.
33. In December 2017 the Claimant was admitted to hospital and underwent several operations, remaining in hospital for four weeks, being discharged on 9th January 2018.
34. On 9th February 2018 an administrative error caused the Claimant to be written to regarding salary and indicated an invoice would be sent from her former employer. Where this is regrettable it was not linked to, nor is it of any bearing on the dismissal or the process.
35. On the 27th February 2018 a rescheduled round table meeting took place.
36. On the same date the Claimant's grievance was not upheld.
37. On the 13th March 2018 the Claimant attended a further sickness absence review meeting.
38. In that meeting a return to work proposal was shown to and sent to the Claimant both explaining why the rotation of staff was required and providing adjustments for the Claimant as regards the types of work she would be asked to do. This can be found at page 346 of the bundle.
39. The Claimant did not want to do any paediatrics and was not willing to undertake this work, citing health concerns.
40. A further meeting on the 28th March 2018 was postponed due to the Claimant being unable to obtain a GP appointment and so a further meeting took place on the 24th April 2018.
41. On the 3rd April the Claimant was written to and it was conceded by the Respondent that Mr Lawless accepted he had failed to fully adopt the sickness management policy in a timely manner but the Respondent found there was no evidence it had impacted on the Claimant adversely and had provided her with greater time to return to work.
42. On the 12th June 2018 the Claimant was written to regarding the outcome of her grievance appeal hearing.

43. On the 4th July the Claimant was written to to be invited to a further sickness absence review meeting and in response indicated she should see OH beforehand.
44. She attended OH on the 16th July 2018 and the sickness absence meeting took place in her absence on the 17th July 2018.
45. A management report on the Claimant's sickness absence was produced on the 21st August 2018.
46. On the 11th September 2018 the Claimant attended her GP and during the consultation requested a letter in support of ill health retirement.
47. On the 18th September 2018 a final absence sickness review meeting took place involving Kevin Walsh the Divisional Director for Specialist Medicine.
48. In that meeting the Claimant asked for ill health retirement to be considered and was referred to OH for that purpose. Following a report recommending the same the Claimant was dismissed with an effective date of termination of the 30th October 2018.

Submissions

49. The submissions on behalf of the parties may be summarised as follows.
50. The Claimant says that the Respondent should have ensured that she was working only in obstetrics and she should not have been placed in the new rotation and that the discussion with Mr Lawless in November 2016 caused her to have to go to A and E and go home because of raised blood pressure.
51. On her behalf it was submitted that the behaviour of her employer caused her ill health, that the sickness management process was deliberately delayed in an attempt to have her removed from the hospital. She says that Mr Lawless was motivated by a dislike of her and that the delays worsened her health further and contributed to her being eligible for ill health retirement.
52. It is submitted that her employer did not pay heed to recommendations made by occupation health and that they did not seek further advice regarding suggestions that were made.
53. She submits that she could and should have been allowed to work in obstetrics.
54. It is also advanced on her behalf that she would have been fit to return to work in obstetrics at the time of the Stage 3 meeting and that the decision to dismiss her was unfair.

55. The Respondent's counsel submits that the procedure used in dealing with the Claimant's sickness absence was fair and thorough. She submits that the Claimant was no longer capable of carrying out her role and that she did not when offered, engage with proposals to allow her to return to work.
56. The Respondent submits that Mr Walsh was faced with a position where the Claimant accepted she was not fit for work, requested ill health retirement be considered and that they had little or no option but to dismiss the Claimant and that that dismissal was fair.

Conclusion

57. It is not in dispute that the Claimant was an employee, that she had been an employee for the requisite period and that she was dismissed.
58. I find the primary reason for her dismissal was capability.
59. As regards the live evidence Mr Walsh was a straightforward and accurate witness whose evidence I accepted.
60. Mr Lawless made appropriate concessions and accepted, as reflected in the documentation and in this judgment that there were things he would have done differently, although as indicated elsewhere I do not find them to have a material effect on the fairness of this dismissal.
61. I was satisfied that in terms of the core elements of the matter before me that Mr Lawless had sought to find ways to assist the Claimant with a return to work and that his changes to the working rotation were operationally sound and certainly not a means to bully or cause distress to the Claimant.
62. I acknowledge that subjectively the Claimant harbors grievances against her former employer and that she will be disappointed with the outcome of her appeal.
63. However, on balance, I find that the way in which she put her case, specifically relating to Mr Lawless being actively driven by his dislike of her and the whole process being delayed to facilitate her removal from post is not reflected in the evidence.
64. In particular the Claimant's assertion in evidence that she was fit to and should have been returned to her old post in September 2018 was not borne out by the evidence of her professed position at the time as reflected in the documentary evidence of her doctors' notes, the Stage 3 hearing and the OH report of October 2018.
65. It is suggested that the meeting with Mr Lawless in November 2016 precipitated a significant deterioration in the Claimant's ill health. On the evidence before me I am not satisfied that was the case. In coming to this conclusion, I bear in mind the letter from of the Claimant's doctor at

page 479 of the bundle which indicate that she had been attending the surgery since 2012 with work related stress.

66. The Claimant's case was put on the basis that the Respondent was actively trying to remove her from her post. On the evidence before me I reject those contentions and in fact it appears that the Respondent's delayed the process moving to Stage 3 to try and resolve the issues concerning the Claimant's ill health.
67. Page 420 reflects that a further Stage 2 meeting was reconvened in July 2018 as an alternative to moving to Stage 3 of the sickness management process.
68. The Respondent commissioned a number of OH reports and explored various ways in which the Claimant could return to work.
69. It is the case that in the early part of the Claimant's sickness absence certain actions took longer to place in train that they ideally should. It is suggested that this was a significant factor in the deterioration of the Claimant's health. I do not find this to be the case, nor do I find that the failure to comply with the letter of the Trust's policies to have had a material effect upon the fairness of the dismissal or the manner in which it came to be.
70. Even if the Claimant's ill health was contributed to by her employer I have been referred to and rely upon the case of *McAdie v. Royal Bank of Scotland* (UKEAT/0268/06/ZT).
71. Where some delays were caused by matters relating to the employer, especially initially, some were caused by inaction or circumstances relating to the Claimant, her representatives, her ill health or her GP.
72. As stated, I accept that there were delays in relation to dealing with the Claimant's sickness absence, particularly initially, but do not find that they rendered the process or ultimate outcome to be unfair.
73. The Respondent obtained a number of OH reports during the course of the Claimant's sickness absence to explore how she could return to work. By July of 2018 the Claimant was indicating that redeployment was not an option for her.
74. On the balance of probabilities, I am satisfied that the reality of the position was that the Claimant only wanted to work in obstetrics and that for legitimate and proper operational reasons, wholly unconnected to dislike of or bullying of the Claimant, the Respondent wished to implement a rotation of duties.
75. Further to that the Respondent did seek to suggest a number of ways in which the Claimant's duties could be amended to help in dealing with her health concerns and which in response the Claimant indicated she was not able to carry these out.

76. On balance of probabilities the Claimant's position was that unless she could just work in obstetrics she would not return to work.
77. As such, firstly the Respondent was faced with a position where despite having commissioned a number of OH reports and having suggested adjustments to the Claimant's employment, she was not able to do as they were suggesting or countenance the same.
78. That then progressed to a position where the Claimant was indicating that redeployment was not an option and ultimately that she wished to be considered for ill health retirement.
79. When it comes to the Stage 3 sickness absence review meeting involving Mr Walsh on the 18th September 2018, I particularly bear in mind the following:
 - The Claimant indicated in an OH meeting on the 16th July 2018 that "redeployment was not an option for her";
 - The Claimant had sought a letter from her doctor in support of ill health retirement prior to the meeting with Mr Walsh;
 - The Claimant raised in the meeting of the 18th September 2018 that ill health retirement had not been offered at any previous meeting;
 - Both she and her union representative asked for ill health retirement to be considered at that meeting;
 - In the subsequent OH meeting which was requested by Mr Walsh to ensure that ill health retirement was appropriate the Claimant indicated again that redeployment was not an option for her;
 - The conclusion of the OH report was that ill health retirement should be initiated as soon as possible;
 - Contrary to her evidence to the Tribunal I am satisfied the Claimant did not indicate in the meeting with Mr Walsh or in the OH meeting that she was fit to return to her previous role;
 - The Claimant did not seek to appeal her dismissal.
80. Mr Walsh on behalf of the Respondent was faced with the situation where there was no viable alternative to dismissal being suggested by OH or the Claimant who was actively seeking ill health retirement.
81. It was suggested on behalf of the Claimant that McAdie establishes that where an employer causes or materially contributes to an employee's incapability that they should "go the extra mile" in finding alternative employment or put up with a longer period of sickness absence.
82. In this appeal that argument cannot succeed given the position the Claimant was espousing at the time of the dismissal, namely that she wished ill health retirement to be considered, supported by her obtaining a letter of support from her doctor and that she made clear redeployment was not an option.

83. Mr Walsh, in all the circumstances with which he was presented, had little choice or option than to take the course he did.
84. It should be noted that on the evidence before me I reject the Claimant's assertion that she considered herself fit to return to her role in obstetrics at the time of the Stage 3 meeting, nor do I accept that she proposed that course of action in that meeting. I am supported in that view by the fact that the OH assessment of 23rd October 2018 contains no indication that the Claimant suggested such a course.
85. If that was the Claimant's position I would have expected that she would have been making very clear to her doctor, the Stage 3 meeting and to OH that she was fit to return to work in obstetrics but that is not reflected in the documentation.
86. The Respondent sought OH assessments to try and assist the Claimant in returning to work. The Respondent considered and proposed amendments to the Claimant's work to try and assist with a return to work. Their conduct and behaviour was reasonable in the circumstances and was within the range of reasonable responses open to an employer.
87. Having explored those avenues and options they were left with a position where the Claimant was still unwell after almost two years, OH was indicating a return to work was not possible and the Claimant was asking for ill health retirement to be considered.
88. Further time would not have made any difference and the course the Respondent's took of dismissing the Claimant on the grounds of capability was not unfair and it was carried out in a fair manner. In fact, one might argue given the situation in September 2018 at the Stage 3 meeting that had they not taken that course they may equally have been criticised for not doing so.
89. As such, the claim of unfair dismissal is not well founded and is dismissed.

**Tribunal Judge DS McLeese Sitting as an
Employment Judge
Dated: 15 December 2022**