EMPLOYMENT TRIBUNALS

Claimant: Ms M Turpin

Respondent: Mr A Shakespeare

Heard at: Leicester Employment Tribunal **On:** 12 to 14 June and in chambers on 15 June 2023

Before: Employment Judge K Welch
Mr K Libetta
Mr K Rose

Representation

Claimant: Mr M Ley, Lay Representative
Respondent: Mr M McPhail, Counsel
and supported by Ms C Hempsall, Personal Assistant

RESERVED JUDGMENT

1) By majority, the claimant's claim for unfair dismissal against the respondent is not well founded, fails and is dismissed. The minority of the Tribunal considered the dismissal procedurally, but not substantively, unfair.

2) Had a fair procedure been followed, the Tribunal unanimously held that the claimant would have been fairly dismissed and that there should be a 100% deduction in any compensation on Polkey principles.

3) The Tribunal unanimously held that the claimant's claim for discrimination arising from disability is not well founded, fails and is dismissed.

REASONS

Background

1. The claimant presented her claims on 7 February 2022. This followed a period of early conciliation from 21 December 2021 until 27 January 2022.
2. The claimant initially brought claims of unfair dismissal, discrimination arising from disability, indirect disability discrimination, failure to make reasonable adjustments and automatic unfair dismissal for having made protected disclosures.
3. At a preliminary hearing for case management on 4 July 2022, Employment Judge Camp agreed the list of issues with the parties, as set out below, which were slightly amended following a discussion at the start of the hearing.
4. After the preliminary hearing, the claimant withdrew her claims for indirect disability discrimination, failure to make reasonable adjustments and automatic unfair dismissal. This meant that the only claims before us were unfair dismissal and discrimination arising from disability.
5. Prior to the hearing, the respondent had conceded that the claimant was disabled at all material times by virtue of three conditions relied upon by the claimant for her section 15 claim, namely bowel cancer, post-stoma hernia, and the side effects of pain-relieving medication (morphine).
6. Following a request from the respondent, the hearing was a hybrid hearing such that the panel, the claimant and her representative attended the hearing, and the respondent, his witnesses and Counsel attended remotely via cloud video platform (CVP). The hearing went ahead within the scheduled listing without any issues. The parties were told that it was an offence to record the proceedings.
7. The parties had agreed a bundle of documents of approximately 250 pages and references to page numbers in this Judgment relate to documents within that bundle. The respondent had sent in additional documents to be added to the bundle and a further document was

provided during the course of the hearing. There was no objection from the claimant to these documents, and as they appeared to be relevant to the issues we were to decide, they were added to the agreed bundle.

8. The claimant sought to include emails attaching fit notes for the claimant for the period 2021. These had not been disclosed previously and so did not appear in the agreed bundle. Unfortunately, these were provided after the claimant had completed her evidence and part way through the respondent's evidence, so that his Counsel could not obtain instructions. However, the parties were pragmatic in agreeing that facts from these documents, could be taken into account as set out below.
9. The Tribunal heard evidence from the following witnesses.
   9.1. On behalf of the claimant:
      9.1.1. The claimant herself.
   9.2. On behalf of the respondent:
      9.2.1. The respondent himself, supported by his carer;
      9.2.2. Ms Vanessa Atkins, Director of PA Support Services Lutterworth Limited; and
      9.2.3. Mr Christian Darling, Director of PA Support Services Lutterworth Limited.
10. The witnesses had provided written witness statements, which had been exchanged prior to the hearing. Both the claimant and respondent had provided updated witness statements, and, with there being no objection from either party, these were allowed to stand as their evidence in chief. We ensured that the witnesses, particularly those attending remotely, had clean copies of their statements and agreed bundle when giving evidence.
11. On 19 May 2023, the respondent had made a request for reasonable adjustments at the hearing itself and attached correspondence from the respondent's doctor in support of his application. The claimant objected to the reasonable adjustments requested and provided her own medical information concerning conditions not relied upon for the purposes of her

discrimination complaint, but which we considered as a request for reasonable adjustments on her behalf. The parties were told that the question of reasonable adjustments would be considered at the start of the hearing.

12. The parties were given the opportunity to address us on the reasonable adjustment applications, and brief reasons were provided during the hearing. The following adjustments were discussed and agreed:

    12.1. The respondent would not be questioned by the claimant herself. Mr Ley, her lay representative would question him;

    12.2. The questions for both the claimant and the respondent were to be clear and concise, to ensure that they were understood;

    12.3. The respondent would be permitted to have his personal assistant, Ms Hempsall, with him during his evidence, who would be afforded some flexibility to rephrase any questions so that the respondent could understand them (with the claimant's representative and the panel ensuring that this was used appropriately). The personal assistant was to be seen and heard on the CVP hearing whilst the respondent was giving his evidence and would not be able to use notes, or write anything down;

    12.4. The claimant would not be visible on the camera save when giving evidence.

13. It was considered that these adjustments were necessary to ensure that the best evidence was obtained from all of the witnesses and was in accordance with the overriding objective. It was agreed that both parties and the panel would keep a watchful eye on the questioning of all witnesses and would raise any concerns promptly.

14. The Tribunal ensured that regular breaks were given, and asked the parties to request any additional breaks, if required.

15. The support of the respondent's personal assistant during the hearing was extremely helpful, as she was able to repeat or rephrase questions appropriately to assist the respondent in understanding and hearing them. The panel and the claimant's

representative agreed that her assistance helped the hearing to proceed. She was also able to assist him with finding pages within the bundle.

16. We also wish to note that the representatives for both the claimant and the respondent were considerate and ensured that their questioning of the parties, during their evidence, was measured. The claimant was upset at times, particularly towards the end of her evidence, and consequently breaks were offered and sometimes accepted. We consider that each of the parties had a fair opportunity to present their case.

Issues

17. The following list of issues were agreed by the parties following a discussion at the start of the hearing. The only amendment from the earlier agreed list of issues from the preliminary hearing was that the claimant confirmed that she was not seeking reinstatement or reengagement, and the respondent had provided details of the legitimate aims it relied upon in relation to the section 15 EqA complaint by email dated 19 July 2022 [P60].

Unfair dismissal

18. What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence/ incapacity).
19. 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?

Remedy for unfair dismissal

20. If there is a compensatory award, how much should it be? The Tribunal will decide:
    - 20.1. What financial losses has the dismissal caused the claimant?
    - 20.2. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?
    - 20.3. If not, for what period of loss should the claimant be compensated?
    - 20.4. 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?
    - 20.5. If so, should the claimant's compensation be reduced? By how much?

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

20.7. Did the respondent or the claimant unreasonably fail to comply with it?

20.8. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

20.9. Does the statutory cap of fifty-two weeks' pay apply?

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

Discrimination arising from disability (Equality Act 2010 section 15)

21. If and to the extent this is in dispute, did the following things arise in consequence of the claimant's disability:

21.1. the claimant's sickness absence from June 2020 onwards?

21.2. the claimant not being in a position to return to work in December 2021 and not expecting to be in a position to do so until around May 2022 at best?

22. Did the respondent dismiss the claimant because of those things?

23. Was dismissal a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

23.1. Managing adequate care package levels of attendance to the respondent;

23.2. Managing its obligations in respect of health and safety; and

23.3. Ensuring that there were sufficient staffing levels in order to meet the respondent's personal service demands.

24. The Tribunal will decide in particular:

24.1. was dismissal an appropriate and reasonably necessary way to achieve those aims;

24.2. could something less discriminatory have been done instead;

24.3. how should the needs of the claimant and the respondent be balanced?

25. If, and to the extent this is in dispute, did the respondent know, or could it reasonably have been expected to know, that the claimant had the disability? From what date?

Remedy for discrimination

26. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
27. What financial losses has the discrimination caused the claimant?
28. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
29. If not, for what period of loss should the claimant be compensated?
30. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that? Is there a chance that the claimant's employment would have ended in any event? Should her compensation be reduced as a result?
31. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
32. Did the respondent or the claimant unreasonably fail to comply with it?
33. If so is it just and equitable to increase or decrease any award payable to the claimant?
34. By what proportion, up to 25%?
35. Should interest be awarded? How much?

Findings of fact

36. The claimant was employed by the respondent as a personal support worker from 23 November 2018. Initially she was employed for 6 hours a week, but when the claimant's other personal support worker left, she increased her hours to 12 hours per week, working on Tuesdays and Thursdays, which fitted in with her other commitments.
37. The respondent is disabled with multiple conditions. He has depression, epilepsy, hearing loss, essential tremors, irritable bowel syndrome, Barrett's Oesophagus, arthritis, muscle pain, and an upper hernia.
38. The respondent's only income was obtained from benefits. The respondent received some funding from the Local Authority, who I will refer to as Social Services, which was used towards the costs associated with his care. This amounted to half of the total costs of care. The other half was paid from the respondent's benefits.

39. The respondent took out insurance with a company to provide employer liability cover and employment advice and assistance. This was obtained through Social Services and cost £99 a year.
40. The claimant was provided with a written contract of employment [P69-75].
41. The claimant was entitled to 72 hours' holiday per year, as her entitlement under the contract of 36 hours' holiday a year had doubled following her increase in hours in June 2019. This continued to accrue during any absence from work.
42. The contract of employment provided under the heading, Termination:

    "*9.4 Funding to enable the employer to employ their own staff is received from the Local Authority Adult Social Care Services Department and in some circumstances, the Department of Work and Pensions Independent Living Fund. While the employer has a duty to meet their legal responsibilities under this agreement, you need to be aware that your employment is dependent on the above funding and in certain circumstances, the Local Authority may have to suspend or withdraw this funding. In the event that this funding changes or is withdrawn, termination of employment or changes to this agreement will be required*."
43. The claimant's role included collecting the respondent from his home, taking him out for leisure and other activities, including to college, and also helping him with shopping. Sometimes the claimant would be required to carry heavy shopping on behalf of the respondent.
44. It was clear to us that the claimant and respondent had a very good relationship. Both said that they liked each other and the arrangement helped them both.
45. The claimant was unfortunately off work with ill health from 1 June 2020. She had major surgery to remove a cancerous tumour on 8 June 2020, which resulted in her having part of her bowel removed and a stoma bag fitted. After the surgery, the claimant developed a post-stoma hernia which led to intense back pain that would require a further operation in the future.
46. It was accepted that the claimant was too ill to work throughout her absences.

47. The claimant provided fit notes to cover her absence from work. We were provided with copies of fit notes covering the period 1 June 2020 to 28 December 2020 [P76-84]. These were for diverticular disease, post-operative recovery from bowel surgery, bowel cancer and chemotherapy. In the hearing, it was agreed that the claimant had provided a fit note to the respondent covering the period 28 December 2020 to 11 August 2021 on 22 August 2021 for cancer treatment. Also, the claimant had sent the respondent a fit note on 25 September 2021 covering the period 1 August 2021 to 31 November 2021 on 25 September 2021 for cancer treatment.
48. The claimant was paid her entitlement to statutory sick pay for the first 28 weeks of her absence, although the respondent referred to it as being for 6 months.
49. At the end of the claimant's statutory sick pay period, in January 2021 and March 2021, the claimant was paid her accrued holiday entitlement.
50. The respondent had no support for the first few months of the claimant's absence. Social Services recommended that the respondent obtain support from an agency to cover the claimant's hours, whilst the claimant was too ill to work.
51. The respondent appointed an agency to cover the claimant's work, namely T&J Lutterworth (referred to as T&J). This agency was recommended by Social Services and was engaged on a temporary basis to provide his care during the claimant's absence.
52. The respondent was assessed by Social Services approximately every 6 to 12 months. This assessment was to consider the ongoing support required for his care needs. This assessment would set the amount of funding provided by Social Services. A copy of the claimant's assessment from August 2021 appeared at pages 85-95.
53. There was clearly a discussion between the claimant and Social Services over the care support that the respondent was being provided with. At this time, the agency, T&J, was undertaking this for him. The assessment provided:

    "*[The respondent] has appeared very anxious about ending the employment of his previous PA, [the claimant], although he is aware that this is now necessary. [The respondent] has been supported by his insurance company to draft a letter to send to [the*

claimant] to dismiss her on medical grounds as she has been unable to return to work for many months and is no longer entitled to sick pay. This has been difficult for [the respondent] as he had developed a positive relationship with [the claimant]."

54. It went on to say,

"[The respondent] is to write a letter of dismissal on health grounds to his previous PA, [the claimant], who has been unable to work for may (sic) months. He has sought advice from his insurance company who have supported him to draft the letter. [The respondent] will also consult ACAS should he need any further guidance."

55. During the claimant's absence, the claimant completed two medical assessment forms, which we assume were provided by the respondent's insurers. Due to the claimant's conditions, she was extremely clinically vulnerable, and, as this was during the Covid-19 pandemic, the parties could not meet face to face to discuss her ongoing absence. The respondent therefore posted these forms through the claimant's door, which were completed by the claimant and returned on her behalf to the respondent who then forwarded them on to his insurers.

56. We were not provided with copies of these medical assessment forms because neither party had retained copies. We accept that the forms were designed to be completed in a face-to-face meeting, but due to Covid-19 and the claimant's vulnerability we accept that no meetings took place.

57. The claimant indicated that she envisaged a return to work in May 2021. This was discussed with the respondent, who wanted her to return to work for him. Unfortunately, she was unable to do this following advice from her oncologist. She had, by this time, developed a post-stoma hernia as a result of her cancer treatment, and the respondent was fully aware of this, as this prevented her return to work at this time. The respondent told the claimant at this point that he was happy to keep her on until she recovered as he was keen to retain her as an employee.

58. In anticipation of the claimant's return, the respondent had given notice to the agency, T&J, to end their care support, so that the claimant could return to her job. As the claimant was unable to return, the agency continued to provide support.
59. The respondent was taking advice from his insurers, and we believe had been advised to obtain medical evidence about the claimant's conditions and likelihood of her return to work. We did not see any evidence of how this was requested by the respondent. It would have been helpful if the insurers had provided letters to be given to the claimant to help him to obtain this.
60. Our belief is that there was a misunderstanding between the parties about what this medical evidence should contain. The claimant believed that the respondent wanted her complete medical records, including things irrelevant to her current ill health. She also gave evidence that she understood a medical report would also have contained this information. The respondent requested a letter from the claimant's consultant, which the claimant refused to provide on the basis that she had already provided fit notes from her GP confirming her conditions. In evidence, the respondent was unable to explain what the consultant's letter was to be used for, although we understand that this would have been forwarded to his insurers for them to provide further advice to the respondent on what to do.
61. On balance, we accept that the respondent did make requests for further medical information and that this was not provided by the claimant.
62. The respondent had a further meeting with Jane Simpson of Social Services in November 2021. Ms Atkins from T&J attended this meeting, which was to discuss the respondent's support package and funding. At this meeting, the respondent was told by Social Services that they did not want the claimant back, that her statutory sick pay had expired, that her absence had gone on too long and there was no known date when (or if) the claimant could return to work.

63. The respondent took further advice on this, and his insurers provided him with a letter inviting the claimant to a capability meeting. This was sent to the claimant on 9 November 2021 [P96-97].

64. The letter confirmed that the meeting would discuss the claimant's ongoing absence and the possibility of her return to work in the near future. It referred to the claimant's refusal to consent to a report from her medical practitioner. It also stated, "….*if there is no reasonable prospect of your return to work in the near future, then you may face termination of your employment.*" It went on to provide the right for the claimant to be accompanied by a colleague or union official.

65. The meeting was postponed at the claimant's request and rearranged for 1 December 2021 [P98]. This letter again referred to the claimant's refusal to provide authority for a medical report and confirmed that "*a decision may be taken to terminate [the claimant's] employment* ". The meeting went ahead on 2 December 2021, as the claimant was not available for personal reasons on 1 December. This was agreed via messages between the parties.

66. The meeting on 2 December 2021 was held by telephone between the claimant and the respondent with Ms Atkins of T&J in attendance to take notes of the meeting.

67. The respondent initially read out a short statement, which included that he would be assessing whether she had the capability to return to work and, if not, "*whether [her] contract of employment must come to an end*." It confirmed that no outcome would be given in the meeting. The respondent went on to start to read out the questions on the medical capability meeting form provided by his insurers, although as he got muddled in his questioning, Ms Atkins took over asking the questions for him. Despite this, we consider that the respondent had conduct over the meeting, despite the claimant's view that this was not the case.

68. The claimant was attending the meeting by telephone from her bed and, as was accepted by both parties, was too ill to return at that time. She stated in the meeting that she had a good chance of returning to work in May 2022 and needed a further six months to recover.

She stated that she would offer to resign if she was not fit enough to return to work in May 2022, something she later referred to in a message to the respondent.

69. Ms Atkins completed the medical capability meeting form, which she believed was taking proper notes of the meeting [P101 – 111]. The parties accepted that these notes were not a word for word account of what had been discussed. We considered that Ms Atkins only recorded the answers to the specific questions as asked on the form and did not make any general notes of other discussions. We therefore do not consider these to be a complete record of what was discussed. For example, there is no record of what the respondent said during the meeting, other than the printed part he read out at the start.
70. We are, however, satisfied that the answers, whilst not word for word, are a true reflection of what was said by the claimant and that Ms Atkins read this back to the claimant during the meeting. The answers were not as detailed as the claimant said, but attempted to catch the important parts of what was said.
71. Following the meeting, on 8 December 2021 Ms Atkins sent photographs of the handwritten medical capability meeting form, which she considered to be the notes of the meeting, to the claimant, the respondent and the respondent's insurers.
72. The claimant understood that she was to be provided with the minutes to approve before they were sent to the respondent's insurer, but this did not happen.
73. The claimant complained to Ms Atkins, T&J, by email on 8 December 2021 [P112] about the notes from the meeting. She disagreed with the way that some of the answers had been worded, considered it was Ms Atkins' interpretation of what the claimant had said, and that it was not word for word.
74. Just after this email was sent to T&J, the claimant messaged the respondent [P187] to say that she was unhappy with the wording of the notes sent through, and that Ms Atkins had "*twisted [her] answers to suit [Ms Atkins'] own gains*". A number of the claimant's complaints about what was said in the meeting proved to be incorrect, for example the claimant believed that the notes did not say that the claimant had bowel cancer, or that

she was intending to return to work in May 2022, both of which were contained within the notes.

75. There was a long exchange of messages between the claimant and the respondent on 8 December 2021 [P187 to 232]. In two of the messages, sent consecutively, the respondent stated, *"I will look at the old notes and including what other treatments too before you you (sic) have the go a head about you will have an operation about hernia which you will have in the coming months. At this time you are not well to return to work and will need recovery time before you move to the next level."*

    "But i (sic) will talk to them both as I did say in the interview this is not about you get (sic) the sack. This was about your welfare and how can I help you and where we go from there".

76. The claimant sent a further email later on 8 December 2021 to T&J complaining that her data protection rights had been breached by Ms Atkins actions with the notes [P112].

77. There were further communications between the claimant and T & J regarding the claimant's concerns over data protection, that we do not need to concern ourselves with.

78. On 9 December 2021, the claimant called Mr Darling of T&J. He was not expecting the call. The claimant's evidence was that Mr Darling "*blurted out that [the respondent] was actually going to sack me*". Mr Darling could not recall saying this. We think that he did say something along these lines, as the claimant messaged the respondent before the dismissal letter was received, complaining that he had not told her himself about her dismissal, but had arranged for the care company to do so [P240].

79. Mr Darling sent an email to the claimant on 9 December 2021 [P117], which requested that the claimant contact T&J and not the respondent about her employment or appeal.

80. Five minutes later, Mr Darling sent an email enclosing the claimant's dismissal letter [P118-120]. This stated that the claimant was "*asked to provide your consent for [the respondent] to approach your GP in order to get a report on [the claimant's] medical welfare, prognosis for recovery and likely return to work. Regretfully [the claimant has] refused [her] consent…."*

81. The letter went on to recite some of what had been discussed in the meeting, including that the bowel cancer was no longer the primary reason for the claimant's absence, but that the hernia made it difficult for her to walk long distances or to drive, and that the claimant was in bed during the meeting. It also referred to the operation to remove the hernia, although that no date had been given. It referred to the claimant having a good chance of being able to return in May 2022, but would need a shopping trolley due to an inability to carry heavy items, such as shopping bags. The letter confirmed the claimant's dismissal and gave the right of appeal.
82. The claimant appealed the decision by email to the respondent [P242]. This complained about Ms Atkins' involvement in the meeting, inaccuracies with the information recorded at the meeting and discrimination.
83. The claimant was invited to attend an appeal hearing by letter dated 15 December 2021 [P150]. It confirmed that the appeal would be heard via telephone on 18 December. It went on to say that the respondent would conduct the meeting and that either Ms Atkins or Mr Darling of T&J would attend to take minutes.
84. The claimant could not attend the scheduled meeting and requested an alternative date [P151]. Ms Atkins replied on 16 December [P154-155] to say that they would look to re-arrange the hearing. Following this, the claimant emailed [P152] to say that she refused to be contacted by T&J and that she had, "*no other alternative than to escalate this entire matter to ACAS*." This was taken by the respondent as her withdrawing her appeal.
85. The claimant was paid her notice and holiday pay in January 2021 as evidenced by her payslip [P181].
86. Should the claimant not have been dismissed, whilst no salary would have been payable, the respondent would have continued to have been responsible for holiday pay accruing whilst off sick and the cost of insurance.

Submissions

87. We summarise below the oral submissions made by the parties during the hearing.

The respondent's submissions

88. Dealing with unfair dismissal first, the reason for the claimant's dismissal was capability, and was potentially fair. It was clear that the claimant had been off sick for a considerable amount of time and that her health had been considered before her dismissal. The claimant had attempted to return to work in May 2021, but this was unfortunately unsuccessful. The Council had given a view that things had gone on for long enough. The respondent had sought medical evidence, which the claimant refused consent to provide. The claimant hoped to be better in May 2022, but the respondent was not obliged to work with that estimate. The process followed was fair and made clear that termination was a possibility. Even if the respondent had made a comment that it was not about sacking the claimant, he was doing what he could to help the claimant and this meeting was to assess the position. The claimant was given the right to appeal, which she chose to withdraw. A fair process had been followed, in that there had been consultation, an investigation and the claimant had been warned about possible dismissal following her lengthy absence. For section 98(4) ERA, this was as small an employer as you could get. One factor to weigh in the balance was that the claimant had stated in messages that she was content with the dismissal, although this does not make it fair, it remains a factor to be considered.

89. Turning to the section 15 discrimination arising from disability claim, disability was conceded but knowledge was not, other than for the condition of cancer. Therefore, when looking at the reason for the dismissal this was for the later absences of the claimant and likely future time off, which were not related to cancer, which the respondent contended was the only disability the respondent knew of.

90. Justification needs to have an objective assessment carried out. The claimant required his care needs to be met, he could not afford to keep both the claimant and the agency, and his funding was dependent on the Council. The respondent was not wealthy and was reliant on benefits. Whist to continue with the claimant's employment would not cost a

fortune, he would be responsible for holiday pay and insurance, which were noted to be small sums, but that the respondent was not a man who could afford small sums.

91. Finally on Polkey, the claimant's own words were that the relationship had broken down at the point of dismissal. Also, it was clear that the claimant remained unable to work for well over 6 months after the date of the meeting. The consultant's letter from April 2022 confirms this and she had not worked since then. The claimant's failure to engage with the respondent over providing medical evidence was contributory conduct.

The claimant's submissions

92. The claimant firmly believes that this was an "absolute case" of unfair dismissal and discrimination. In August 2021, the decision had been taken to dismiss the claimant by the Local Authority. The respondent had then followed a sham process in dismissing the claimant.
93. The minutes of the meeting are not a true reflection of what was said. It was not clear that it was the respondent's decision to dismiss.
94. The respondent was the claimant's employer, not Social Services, although they put him under pressure to dismiss the claimant and made the decision. It was clear that the respondent had asked for the whole of the claimant's medical records. The respondent had not asked for a letter or report from the claimant's consultant.
95. The claimant could not expect a fair appeal, with T&J's involvement. She had a grievance against them and their involvement, and they were benefiting from the hours that the claimant had formerly done.
96. There was a lot of discussion about medical evidence. Firstly, there was nothing in law that gives an employer a right to see medical evidence. The claimant would quite probably have provided a medical report from her consultant, but this is not what the respondent asked for.
97. The claimant had been fair with the respondent and said that should not be able to return in May 2022 she would offer her resignation. This was not costing the respondent any money at that point. There was no sick pay as he was not paying her. The only reason

she got a sum of money in 2022 was because the respondent dismissed her. The argument about the finances therefore did not stack up.

98. The respondent has looked at his own needs and not the claimant's needs or disabilities.

99. The claimant will work again and it is not the case, as implied by the respondent, that she will not.

100. The Tribunal will have to decide how reliable a witness the respondent was, and Ms Atkins had changed her evidence.

101. The only reason for the claimant's dismissal was her medical conditions and is therefore unfair dismissal and discrimination.

Law

Unfair dismissal

102. The respondent has to prove the reason for the dismissal and that it was one of the potentially fair reasons provided by section 98(1) and (2) of the Employment Rights Act 1996 ('ERA').

103. Under section 98(2)(a) of the ERA a reason for dismissal is a potentially fair reason if it "*relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*". Section 98(3)(a) defines capability as "*in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality*".

104. Once an employer has shown a potentially fair reason for dismissal, section 98(4) ERA provides that "*the determination of the question whether* the *dismissal is fair or unfair ... (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*."

105. It is necessary for the Tribunal to be satisfied that dismissal was, in all the circumstances, within the range of reasonable responses of a reasonable employer and that a fair procedure had been followed by the employer (Iceland Frozen Foods Ltd v Jones

[1983] ICR 17), as subsequently approved by the Court of Appeal in other cases. This is authority for the well-known proposition that a Tribunal must not substitute its own decision on the reasonableness of a dismissal for that of the employer; rather, the Tribunal must decide, objectively, whether the decision to dismiss was within the range of reasonable responses of a reasonable employer.

106. Where an employee has been off work on long term sickness absence, the Tribunal must consider whether the employer can be expected to wait any longer for the employee to return. In S v Dundee City Council [2014] IRLR 131 the Inner House of the Court of Session suggested that when deciding this question the Tribunal must balance relevant factors, including:

106.1. The likely length of the absence;

106.2. The nature of the illness causing the absence;

106.3. The size of the employer;

106.4. Whether other employees can cover for the absent employee; and

106.5. The cost of continuing to employ the employee.

107. Consultation with an employee on long term sickness absence should be carried out with a view to finding out the medical position and likelihood of return to work. Warnings are often not appropriate in cases of long term absence. In East Lindsey District Council v Daubney [1977] ICR 566 Mr Justice Phillips stated that "*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position*."

108. Consultation with the employee should ideally start at the beginning of the employee's sickness absence and continue periodically throughout that absence.

109. In order for an employer to fairly dismiss an employee on long term sickness absence, the employer must also follow a fair procedure. The Tribunal must consider

whether the procedure followed by the respondent was reasonable, including whether it complied with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

110. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that a compensatory award may also be increased by a maximum of 25% for failure to comply with the ACAS Code of Practice.

111. In Polkey v AE Dayton Services Ltd 1988 ICR 142 the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (i.e. the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

Discrimination

Burden of Proof and discrimination claims

112. The Tribunal had regard to the burden of proof in discrimination claims. This lies with the claimant. However, if there are facts from which a Tribunal could decide in the absence of another explanation that the employer contravened the provisions of the EqA, the Tribunal must hold that the contravention occurred by virtue of section 136 (2) EqA.

Discrimination arising from disability Section 15 EqA

113. The claimant complained that she had been treated unfavourably because of something arising as a consequence of her disability. The protection is laid out in Section 15 which states:

"(1) a person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability and,

(b) A cannot show the treatment is a proportionate means of achieving a legitimate aim.

(2) sub-section (1) does not apply if A shows that A did not know and could not reasonably have been expected to know that B had a disability."

114. No comparator is required for this assessment. In order for this to apply, the employer must have treated the claimant unfavourably. The EHRC employment code explains at paragraph 5.6 that it is sufficient to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability. There must therefore be a link between the unfavourable treatment and the claimant's disability.

115. The knowledge required for a discrimination arising from a disability claim is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability.

116. The Employer may seek to rely upon an objective justification for the unfavourable treatment where it is a proportionate means of achieving a legitimate aim. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so.

117. It is for the Tribunal to balance the reasonable needs of the employer against the discriminatory effect of the employer's actions on the employee (Land Registry v Houghton and others UKEAT/0149/14). When determining whether or not a measure is proportionate, it is relevant for the Tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim. The Tribunal should consider whether the measure taken was proportionate at the time the unfavourable treatment was applied.

Conclusion

118. Applying the relevant law to the evidence we have heard and the documentation considered, we have reached the following conclusions. The conclusions were unanimous, save where indicated:

Unfair dismissal

119. The employer had a potentially fair reason for dismissal, namely capability. It was clear that the claimant was dismissed for this, as she was unable to perform her role and was not in a position to return to work for some time due to her ill health.

120. We therefore must consider whether the employer acted reasonably or unreasonably in dismissing the claimant for that reason, in accordance with section 98(4) ERA.

121. The dismissal was substantively fair for the following reasons:

121.1. It was clear to us all that the respondent wanted the claimant to return to work for him once she was fit enough to do so. However, she had been off sick for 18 months by the time of the claimant's dismissal and was not at that point able to envisage a likely return before, at best, May 2022, which would have meant that she had been absent for almost 2 years. Further, as the claimant had failed to return in May 2021, when she clearly wanted to, but was unable to due to her continued ill health, there was no guarantee that the claimant would be in a position to return to work at that point.

121.2. We are satisfied that the decision to dismiss the claimant was made by the respondent himself. We note that there were pressures placed on him by Social Services, who clearly considered that the claimant's employment should be ended in light of her lengthy absence. We also note that he took advice from his insurers, but his evidence was clear that he made the decision himself, as the claimant was too unwell to return to work. We also note that, despite Mr Darling informing the claimant of the decision to dismiss in a telephone conversation before the letter was sent out by Mr Darling on behalf of the claimant, that this did not mean that Mr Darling was involved in the decision to dismiss.

121.3. The respondent had tried to seek further medical information from the claimant about her condition as requested by his insurer. We acknowledge that there was a difference in understanding about what the claimant was required to provide, as discussed above, however the letters inviting her to the capability meeting referred to her refusal to provide a report from her medical practitioner, and this was repeated to her in the meeting. Her response in the meeting was that she did not want to disclose her full medical history as she didn't feel it necessary, as she had provided sick notes. The claimant did not say that she had not refused this information, and even in evidence, confirmed that she believed a medical report would contain her full medical history. We consider on balance, therefore, that the respondent did attempt to get further information about the claimant's condition from her doctor or consultant, but that this was refused.

121.4. The respondent had obtained information from the claimant about her conditions and likelihood of return on two earlier occasions, when she was requested to complete the medical assessment forms, although accept that no meeting was held with her to discuss these. We accept that this was not consultation in the true sense, but note that this was during the pandemic, which, when considering the vulnerability of the claimant due to her conditions and treatments, prevented them from meeting face to face.

121.5. When considering the size and administrative resources of the employer in this case, we consider that he was justified in not keeping the claimant's role open at the point of dismissal, in the hope that she could return in May 2022. There were no alternative employees who could take over the claimant's duties, but we accept that the respondent was receiving support from T&J. Whilst we accept that the costs of keeping the claimant in employment were low, since her salary had been exhausted, there were some ongoing costs, notably the accrual of her holiday pay, which could be taken during her absence, on her return or later termination and the insurance premium paid by the respondent. The respondent is of very limited

means such that even these relatively small costs would be difficult to meet from the funding provided from Social Services, and which was being used for the care provided by T&J, or from his benefits.

121.6. The respondent is a disabled man, who, whilst fully able to make decisions for himself, is clearly in need of support, as recognised by Social Services and provided the reason for the claimant's employment. The claimant was the respondent's only employee, and they had a close and personal relationship, which worked well for both of them whilst the claimant was able to perform her role.

122. The majority decision was that the respondent had followed a reasonable procedure, which, whilst flawed, was within the range of reasonable procedures, particularly when considering the size and administrative resources of the respondent in these unusual circumstances. The reasons for this are:

122.1. The respondent had carried out some investigation into the claimant's conditions and likelihood of return to work before making the decision to dismiss. The claimant had completed medical assessment forms prior to the one which was completed during the meeting. The claimant had refused to provide her medical records or a letter from her consultant, and whilst we understand her reasoning for doing so, was told in the invitation letter for the meeting [P96-7] that the respondent would "*have to proceed without the benefit of medical information*." The claimant was also asked during the meeting about seeking advice from her GP to gain a better understanding of her condition, and the claimant responded, that she did not want to disclose her full medical history as she didn't feel it necessary as she had provided sick notes.

122.2. The claimant was invited in writing to a meeting to discuss her continued absence, The letters inviting the claimant to the meeting, and the adjourned meeting, made clear that a possible outcome of the meeting could be the claimant's dismissal. We note that the respondent appeared to have said contradictory statements in

the meeting and in a message following the meeting [P207], in saying this was not about the claimant's dismissal, when the written invitation made clear that this was to be considered. However, we consider that this did not affect the overall fairness of the decision to dismiss.

122.3. The claimant was offered the right to be accompanied by a colleague of her choice or a union official in the invitation letter, in accordance with legal requirements. We accept that the claimant had no colleagues, and was not a member of a Trade Union, but she did not ask to be accompanied by anyone else and confirmed in the meeting that she was happy to continue without being accompanied.

122.4. The minutes of the meeting were not minutes in the true sense, but rather a note of the claimant's answers to questions asked by the respondent or Ms Atkins. However, this did not affect the overall fairness of the meeting or the dismissal itself.

122.5. We also did not consider that T&J's involvement (namely Ms Atkins works for T&J who are the agency who continued to provide the claimant's care work following the claimant's dismissal) affected the fairness overall.

122.6. We were concerned that the claimant had been informed by the respondent that the meeting was not about "sacking" her and had this repeated in a message sent after the meeting but before the dismissal. However, we consider that the respondent was anxious around the time of the claimant's dismissal and did not want to upset or hurt her. We do not consider that this affected the overall fairness of the process, although accept that this may have misled the claimant. We take into account that the decision to dismiss the claimant was taken after the meeting, and the meeting notes state that no decision will be made during the meeting. The decision was made once he had received the benefit of advice from his insurers.

122.7. We carefully considered whether Mr Darling's confirmation that the claimant was being dismissed, prior to the dismissal letter being sent, albeit on the same day, rendered the dismissal procedurally unfair, particularly when considered with the

other failings in the process outlined above. However, we did not consider that this affected the procedure followed and was said at the time that the decision had been made by the respondent and was about to be provided to the claimant.

122.8. The claimant was offered a right of appeal with the respondent. We do not accept that T&J's involvement affected the fairness of this. We do not consider that there was anyone else who could have supported the claimant.

123. Despite our concerns about the influences on the respondent to dismiss the claimant from Social Services and the advice from his insurers, the majority of the Tribunal accepted that the respondent in deciding to dismiss the claimant followed a fair procedure and the dismissal was, therefore, procedurally fair.

124. The minority of the Tribunal considered that the dismissal was procedurally unfair for the following reasons:

124.1. A further meeting should have been held with the claimant to discuss her possible dismissal, in light of her concerns raised over the contents of the minutes of the meeting and T&J's involvement in the process.

124.2. The respondent had informed the claimant that it was not about her being dismissed, and it was not sufficiently clear that dismissal was a distinct possibility. Whilst the letter inviting her stated this, it was undermined by the respondent's comments to the contrary.

124.3. The method of communicating the decision to the claimant, namely her being told by Mr Darling that she was to be dismissed prior to the letter being sent to her.

125. However, the Tribunal unanimously agreed that, had a fair procedure been followed and the failures outlined above remedied, then the dismissal of the claimant would have been inevitable in the circumstances. Therefore, had there been a procedurally unfair dismissal, then there would be a reduction in compensation of 100% on Polkey principles.

Discrimination arising from Disability

126. It had been conceded that the claimant was disabled for 3 conditions, which I will refer to as cancer, post-stoma hernia and side effects of medication. Whilst the respondent also conceded knowledge of the first condition, cancer, it denied knowledge of the other conditions.

127. We are satisfied that the respondent had knowledge of the claimant's disability related to her post-stoma hernia. She had suffered with this following the operation to remove part of her bowel in June 2020 and was certainly suffering from this in May 2021 when she unable to return to work. We do not accept the respondent's assertions that he knew only of the existence of the hernia and not the substantial effect it was having on the claimant's normal day to day activities. It was clear to us that the claimant had been transparent about her hernia and its effect on her life. She was unable to drive, and was even in bed throughout the capability review meeting on 2 December 2021. We therefore have no hesitation in finding that the respondent had knowledge of this condition.

128. We accept that the respondent did not have knowledge of the side effects of her medication. There was no evidence before us to assist us, and the claimant's representative only referred to her cancer and hernia in his summing up in support of the claimant's claim for discrimination arising from disability. However, it is sufficient for us to find that there was knowledge of her first two conditions relied upon, namely cancer and post-stoma hernia.

129. The claimant's absence from work and her inability to return to work in December 2021, and not expecting to be able to return to work until around May 2022 at best, were all things arising from the claimant's disabilities of both cancer and post-stoma hernia.

130. We have found that the claimant was dismissed because of her absence and/or her inability to return to work until at least May 2022. This means that unless the respondent can objectively justify her dismissal, it would be discriminatory under section 15 EqA.

131. We therefore need to consider whether the dismissal of the claimant was a proportionate means of achieving a legitimate aim.

132. The respondent relies upon three legitimate aims. We accept that managing care package levels of attendance and ensuring sufficient staffing levels in order to meet the respondent's personal service demands were legitimate aims.

133. We were provided with no evidence concerning the second legitimate aim relied upon by the respondent, namely to manage his obligations in respect of health & safety. We therefore do not accept that this was a legitimate aim.

134. We have to consider whether dismissal was a proportionate means of achieving the legitimate aims we have found and whether there were less discriminatory ways of achieving those aims. We find as follows:

134.1. The dismissal was an appropriate and reasonably necessary way to achieve those aims, given the length of time the claimant had been off and the possibility of a potential return date being May 2022, a number of months away;

134.2. There were no reasonable adjustments, which could have assisted an earlier return. The claimant had suggested a trolley to assist with carrying heavy shopping, but this would have been at the point she was fit enough to return;

134.3. There was no less discriminatory way of achieving the legitimate aims. The respondent had used agency workers to cover the claimant's absence, which could have continued, but there were ongoing costs associated with doing so, namely the claimant's holiday accrual and insurance. Whilst the sums involved were relatively small, given the respondent's very limited resources, these were not insubstantial to him; and

134.4. Balancing the needs of the claimant and the respondent, dismissal was a proportionate means in the circumstances.

135. Therefore, the unanimous decision of the Tribunal is that the claim for discrimination arising from disability fails and is dismissed.

136. The remedy hearing listed for 10 August 2023 has therefore been vacated.

Employment Judge Welch
Date: 23 June 2023

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