EMPLOYMENT TRIBUNALS

Claimant: Mrs D Begg

Respondent: Solihull Metropolitan Borough Council

Heard at: Midlands West Employment Tribunal **On:12-16 June 2023**

Before: Employment Judge Routley, Tribunal Member Bannister and Tribunal Member Hicks

Representation
Claimant: Mr Begg (Claimant's husband)
Respondent: Ms S Harty (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The Respondent unfairly dismissed the Claimant. The Respondent must pay the Claimant £14,222. This represents the Claimant's basic award of £13,872 and a sum of £350 in compensation for the Claimant's loss of statutory rights.

2. The Respondent's dismissal of the Claimant amounted to discrimination arising from disability under section 15 of the Equality Act 2010. The Respondent must pay the Claimant £9000 as an award for injury to the Claimant's feelings.

3. The Respondent's decision not to disregard the opinion of the Independent Registered Medical Practitioner did not amount to discrimination arising from disability. The Claimant's claim is not successful in this regard.

4. The Claimant's claims for direct discrimination, indirect discrimination, harassment and failure to make reasonable adjustments do not succeed.

REASONS

Findings of Fact

1. Mrs Begg's period of continuous employment with the Respondent began on either 1 September or 1 October 2004. There was a disagreement between the parties as to the exact date. For the purposes of this claim it is not

essential for the Tribunal to determine an exact date, as it will not impact either on Mrs Begg's ability to bring this claim or on the compensation awarded.

2. There were various periods of employment with the Council before this date. However, Mrs Begg resigned from a role with the Respondent with effect from 19 July 2004. This amounted to a break in her continuous service.

3. Prior to her dismissal, Mrs Begg was employed in the role of Behaviour Lead and Community Liaison at Yorkswood Primary School.

4. Mrs Begg was signed off work due to ill-health with effect from 6 November 2019. Mrs Begg did not return to work.

5. On 11 March 2020, Mrs Begg emailed Mr Tunstall and asked to be referred to Occupational Health.

6. Mrs Begg was assessed by Occupational Health on 30 March 2020. The report indicated that she was psychologically fragile and unfit for work in any capacity. It indicated that Mrs Begg was fit for informal discussions/meetings, but that any formal meeting should be delayed for 6-8 weeks. The report further recommended that Mrs Begg may be able to attend formal meetings after lockdown had ended, if these took place at a neutral venue with the option of bringing someone as a source of support.

7. The report indicated that Mrs Begg's stress was linked to "years of traumatic life events", but also made clear that she found her role stressful and regularly worked alone.

8. The report recommended a further referral to occupational health in three months.

9. On 19 June 2020, Mrs Begg's trade union representative, Mr Williams, emailed Mr Tunstall to inform him that Mrs Begg had not had any sickness meetings and needed an Occupational Health referral. Mr Williams indicated that he would be willing to attend these meetings with her.

10. On 29 September 2020, Mrs Begg's trade union representative again emailed Mr Tunstall to say that Mrs Begg had not had any sickness meetings over the last 12 months and that she needed an Occupational Health referral.

11. The Respondent's sickness absence management procedure ("SAMP") sets out a three-stage process for the management of absent employees. No meetings took place under stages 1 or 2 of this procedure.

12. The Respondent maintained that Mr Tunstall had held Stage 1 meetings during his visits to Mrs Begg's house. The Tribunal finds that these were not in fact Stage 1 meetings, but wellbeing meetings. At page 122 of the bundle, the SAMP explains the purpose of a stage 1 meeting and sets out a list of issues which should be addressed. It also explains that following the meeting, a joint action plan should be developed. Mrs Begg's unchallenged evidence was that work was not discussed during these meetings. No joint

action plan was provided. Clearly these meetings did not meet any of the requirements for a stage 1 meeting and cannot be considered as such.

13. During Mrs Begg's lengthy absence, no conversations took place between her and the Respondent about her medical prognosis, the Occupational Health reports or any steps which might assist with her return to work. Whilst Mr Tunstall did discuss various options with Mrs Begg, these all related to the termination of her employment with the Respondent. Mr Tunstall visited Mrs Begg twice during her lengthy absence, but these were the only conversations he had with her. All other communication was by text or email. Mr Tunstall did not telephone Mrs Begg during her absence.

14. Mr Tunstall stated in evidence that he did not discuss Mrs Begg's occupational health reports with her and that he based his view of her condition on "inferences and deduction".

15. On 29 September 2020, Mr Tunstall emailed Mrs Begg and said that he had "made proposals to the governors."

16. On 7 October 2020, Mr Tunstall emailed Mrs Begg and explained that he had "received proposal back from HR and just need to add timings".

17. On 11 November 2020, Mr Tunstall emailed Mrs Begg and said "we have been asked to present a business case to HR (which isn't too difficult) and then the figures are good to be shared." Mr Tunstall sent an email in similar terms on 18 November 2020.

18. Mr Tunstall sent emails referring to settlement figures on 19, 20 and 26 November, and 9 December 2020.

19. On 4 February 2021, Mr Tunstall sent an email to Mrs Begg in which he referred to a stage 3 meeting as "where there are final discussions about exit plans and monies".

20. Mrs Begg was referred to Occupational Health, and a further assessment took place on 14 December 2020. During this assessment, Mrs Begg referred to the issues which were having an impact on her mental health as a "50:50 mix of both work issues and personal/private/family matters." The report recommended that workplace meetings were arranged in order to explore the work-related issues which Mrs Begg felt were impacting her mental health and wellbeing, and that any practicable progress which could be identified should be implemented sooner rather than later. No such workplace meeting ever took place.

21. The report indicated that the timeframe for Mrs Begg's recovery was "unclear and uncertain". It suggested that her recovery time may "span many months, not simply weeks."

22. On 22 February 2021, Mrs Begg applied for ill-health retirement. This application was rejected in May 2021.

23. Mrs Begg was dismissed with effect from 21 July 2021, following a stage 3 sickness absence meeting. The reason for her dismissal was her sickness absence.

24. This meeting was arranged directly with Mrs Begg's union representative. Mrs Begg was not sent a letter inviting her to this hearing. She was sent a Teams invite by email on the day of the meeting with no accompanying text.

25. On 9 August 2021, the Respondent's Pension Administrator, Esther Malone, sent an email to Andrea Ashley indicating that she understood that Mrs Begg had left due to ill-health retirement, but that no retirement forms had been sent. Mrs Malone stated that she would ask for a letter and forms to be sent out that day so as not to delay payment.

26. On 11 August 2021, Mrs Begg was sent a letter informing her that she had been granted ill-health retirement.

27. Mr Bragg returned from a period of leave on 17 August 2021. At this point, he made Esther Malone aware that there had been an error and that Mrs Begg's application for ill-health retirement had been turned down. Esther Malone stated that she would contact her to apologise.

Judgment

1. Unfair dismissal

1.1. The Tribunal finds that the Respondent had a potentially fair reason for dismissal, namely capability. However, we find that the Claimant's dismissal was unfair.

1.2. The Tribunal wishes to be clear that we understand the motivations behind the decisions taken by the Respondent. We acknowledge that those involved in the process felt that they had Mrs Begg's best interests at heart. However, it is our finding that this resulted in a process that was unfair.

1.3. We also recognise the particular pressures which Mr Tunstall faced at this time given the impact of the Covid-19 pandemic, and we are surprised that he was not provided with additional support with this difficult process by the Respondent.

1.4. In reaching this conclusion, the Tribunal has considered the test for unfair dismissal set out in section 98(4) of the Employment Rights Act 1996.

1.5. The Tribunal has taken into account the size and administrative resources of the employer. The Respondent is a large employer with a dedicated HR function.

1.6. The Tribunal has considered the relevant circumstances, including the equity and substantial merits of the case.

1.7. We accept that the Respondent genuinely believed that the Claimant was incapable of carrying out her role on the grounds of ill-health.

1.8. However, we do not accept that the at the stage the Respondent formed that belief, that they had carried out as much investigation as was reasonable in the circumstances.

1.9. The Tribunal is conscious that the test to be applied here is one of the range of reasonable responses open to a reasonable employer, both in respect of the decision to dismiss and the procedure that was followed.

1.10. Applying the principles of *East Lindsay District Council v Daubney* 977 ICR 566, in order to dismiss fairly on the grounds of ill-health, an employer must consult with the employee, and take steps to discover the true medical position. The Respondent failed on both these counts.

1.11. The Respondent did obtain two occupational health reports. However, as at the date of dismissal, the most recent medical evidence was over six months old. It was outside of the range of reasonable responses to proceed without up to date medical evidence. This would be particularly important given the uncertainty over Mrs Begg's prognosis expressed in the most recent report. It was outside of the range of reasonable responses to proceed without this.

1.12. Whilst there was more recent medical evidence obtained in respect of Mrs Begg's ill-health retirement, this was not presented at the stage 3 meeting on 21 July 2021. The Respondent's evidence was that the only discussion of ill-health retirement was in the context of the fact that it had been refused.

1.13. In addition, the employer made little if any attempt to consult with Mrs Begg over the course of her absence. Mr Tunstall gave evidence that he did not discuss the content of the occupational health reports with Mrs Begg. Mr Tunstall further gave evidence that he reached conclusions regarding Mrs Begg's condition on the basis of "inferences and deduction."

1.14. Further, no stage meetings were held under the Respondent's sickness absence management policy. Mr Tunstall did meet with Mrs Begg, but these meetings were informal and did not cover any of the suggested content set out within the sickness absence management policy ("**SAMP**") at page 122 of the Bundle. We do not accept that these amounted to stage one meetings for the purposes of the SAMP.

1.15. The Respondent's reasons for not holding these stage meetings were twofold. Firstly, the occupational health report had indicated that Mrs Begg was not fit to take part in formal meetings, and secondly, neither Mrs Begg nor her union representative had requested that a meeting take place.

1.16. The panel's view is that it was outside of the range of reasonable responses available to a reasonable employer to disregard the stages of the SAMP entirely. The Respondent could and should have taken steps to follow the spirit of the SAMP, and straightforward adaptations could have been made in order to allow Mrs Begg's interests to be represented despite her health condition. The SAMP clearly states (again at page 122 of the bundle) that consideration should be given to such adjustments.

1.17. By way of example, the stage meetings could have been held informally. Alternatively, Mrs Begg could have been allowed to send representations in writing, or via a union representative. The Respondent has submitted that if it had done so, Mrs Begg's dismissal would have taken place more quickly. The Tribunal does not accept that this was a valid reason for dispensing with these meetings. The purpose of a sickness absence management process is not simply to provide a series of stepping stones to dismissal. It is intended to be a supportive process which provides employees with an opportunity to discuss their situation and put forward ideas and representations as to how to return to work. Mrs Begg was not given this opportunity.

1.18. The panel does not accept that Mrs Begg failed to request sickness review meetings. Mrs Begg's union representative raised the fact that these meetings had not taken place by way of emails sent in both June and September 2020. In any event, the panel's view is that any failure on Mrs Begg's part to request stage meetings is irrelevant to the question of the fairness of her dismissal. It was the employer's policy and the obligation was on them to follow it. They should not have had to rely on prompts from an employee to follow their own policy, particularly not one who was suffering from serious mental health issues at this time.

1.19. In addition, the Tribunal has found that the lack of communication with Mrs Begg directly in respect of the stage 3 meeting was a serious procedural flaw. The employer chose to communicate only with her trade union representative, despite not having Mrs Begg's permission or agreement that she be removed from the chain of communication, or any medical recommendation that this would be appropriate. The Tribunal finds that the Respondent's actions in a) failing to make any direct contact with Mrs Begg regarding the stage 3 meeting; b) failing to formally invite Mrs Begg to attend this meeting; and c) failing to provide any explanation as to what this meeting would involve (either to Mrs Begg or her union representative) were outside of the range of reasonable responses available to a reasonable employer.

1.20. The panel appreciates that the stage 3 meeting was held at the behest of Mrs Begg's union representative. However, the panel believes that it was outside of the range of reasonable responses open to an employer to fail to give its own consideration as to whether this was an appropriate step in the circumstances, particularly where the employee was clearly suffering from a serious mental health condition and where no significant steps had been taken to try and assist Mrs Begg in returning to work.

1.21. Further, the Respondent should have ensured that Mrs Begg was invited to that meeting by letter, and that such letter explained the purpose and potential outcome of that meeting. This is a basic procedural step which would be taken by any reasonable employer, and no such letter was sent. It is clearly outside of the range of reasonable responses to conduct a meeting which could lead to an employee's dismissal without providing them with an invite letter explaining as much. Such communication would be particularly important in the context of the email from Mr Tunstall to the Claimant on 4 February

2021, where Mr Tunstall said that stage 3 would be "where there are final discussions about exit plans and monies".

1.22. Whilst we appreciate that the employer understood that Mrs Begg would be advised by her union, it is not appropriate for an employer to entirely delegate responsibility for explaining its processes to a union representative. The only explanation given by the Respondent regarding the content of the meeting appears to be the email dated 4 February 2021. It was not made clear to the Claimant by the Respondent that the outcome of a stage 3 meeting could be her dismissal in a manner that left her unemployed and without recourse to further funds from the Respondent.

1.23. We appreciate that Mrs Begg's union representative attended the stage 3 meeting and made representations on her behalf. However, this was in circumstances where the Respondent had not provided proper explanation about the nature and purpose of the meeting. This could clearly have influenced the way in which Mrs Begg approached this meeting and the representations she asked Mr Williams to make on her behalf.

1.24. Additionally, even in circumstances where the Respondent had agreed to move to stage 3 at the Claimant's request, the Respondent should still have satisfied itself that it had appropriate information on which to base its decision to dismiss. We find that the Respondent did not, given the out-of-date occupational health report and the lack of consultation with Mrs Begg. It is clearly outside of the range of reasonable responses for an employer to dismiss without any up-to-date medical evidence and without seeking the views of the employee on such evidence.

1.25. Put simply, the Tribunal finds that the Respondent took the decision to dismiss Mrs Begg on the basis of out-of-date medical information, with virtually no consultation with Mrs Begg, and at a meeting the purpose of which was not clearly explained to Mrs Begg and to which she received no formal invite.

1.26. We note that Mrs Begg was suffering from difficulties in her personal life as well as work-related stress, but in light of an occupational health report which indicated that the stressors were "50/50", it was outside of the range of reasonable responses open to an employer to have made no attempt to explore these issues more fully before moving to dismissal. The Tribunal finds that a decision to dismiss without doing so was outside of the range of responses open to a reasonable employer.

1.27. However, clearly Mrs Begg was extremely unwell and had been absent from work for a substantial period of time. Given Mrs Begg's evidence about the current state of her health, we find that Mrs Begg would have remained absent from work due to her ill-health for some considerable time after the date of her dismissal. The Tribunal finds that it would have been possible to dismiss Mrs Begg fairly, had the Respondent obtained up to date medical information on which to base its decision and properly consulted in respect of this information. We

estimate that such a process would have taken around three months. As Mrs Begg would have remained on nil pay during this time, we find that her compensatory award should be reduced by 100%.

2. Direct discrimination (section 13 Equality Act 2010)

2.1. The Claimant has alleged two acts of direct discrimination: 1) her dismissal with immediate effect; and 2) the offering and subsequent withdrawal of ill-health retirement.

2.2. In respect of the Claimant's claims of direct discrimination, the Tribunal finds that the Claimant has failed to demonstrate a prima facie case of discrimination.

2.3. The Claimant has pointed to a difference in treatment and to a protected characteristic, but has not pointed to anything further which would allow the Tribunal to properly conclude, in the absence of further explanation, that a discriminatory act had taken place.

2.4. Even if a prima facie case had been made out, we would find that the Respondent has provided an explanation that was not the protected characteristic.

2.5. In respect of the claimant's dismissal, we find that the reason was because of her lengthy absence, rather than because of her disability.

2.6. In respect of the offering and then withdrawal of ill-health retirement, we find that this was a mistake rather than an act of discrimination, albeit a hugely unfortunate mistake.

3. Indirect disability discrimination (section 19 Equality Act 2010)

3.1. The Claimant has alleged that the Respondent's provision, criterion or practice of always accepting an Independent Medical Practitioner's opinion regarding eligibility for ill-health amounts to indirect discrimination.

3.2. In order to successfully bring a claim for indirect discrimination on the grounds of disability, the Claimant would need to demonstrate a particular disadvantage in comparison with those who are not disabled.

3.3. The Tribunal finds that, given the test applied for ill-health retirement, everyone who would be granted ill-health retirement would be disabled under the definition set out in section 6 of the Equality Act 2010.

3.4. The Claimant is therefore unable to demonstrate a particular disadvantage in comparison with those who are not disabled.

3.5. In any event, the Tribunal would have found that the PCP amounted to a proportionate means of achieving a legitimate aim.

3.6. We find that the fair assessment of ill-health retirement applications is a legitimate aim. We also find that it is proportionate to rely on the evidence of medical practitioners to do so, particularly in circumstances where an employee has the opportunity to appeal and challenge this evidence.

4. Harassment (section 26 Equality Act 2010)

4.1. The Claimant alleged harassment relating to her disability, on the grounds that the Respondent granted and then subsequently withdrew an offer of ill-health retirement.

4.2. The Tribunal has found that whilst this may have been unwanted conduct, this conduct did not relate to the Claimant's protected characteristic, namely her disability.

4.3. The issuing of the letter granting ill-health retirement was clearly a mistake. Once the mistake was discovered, the Respondent had to withdraw this letter.

5. Failure to make reasonable adjustments (section 21 Equality Act 2010)

5.1. The Claimant has alleged that the Respondent's provision, criterion or practice of always accepting an Independent Medical Practitioner's opinion regarding eligibility for ill-health amounted to a failure to make reasonable adjustments.

5.2. In order to successfully bring a claim for failure to make reasonable adjustments, the Claimant would need to demonstrate a particular disadvantage in comparison with those who are not disabled.

5.3. The Tribunal finds that, given the test applied for ill-health retirement, everyone who would be granted ill-health retirement would be disabled under the definition set out in section 6 of the Equality Act 2010.

5.4. The Claimant is therefore unable to demonstrate a particular disadvantage in comparison with those who are not disabled.

5.5. In any event, the Tribunal would have found that the PCP amounted to a proportionate means of achieving a legitimate aim.

5.6. We find that the fair assessment of ill-health retirement applications is a legitimate aim. We also find that it is proportionate to rely on the evidence of medical practitioners to do so, particularly in circumstances where an employee has the opportunity to appeal and challenge this evidence.

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

6.1. The Claimant was dismissed. This amounted to unfavourable treatment.

6.2. The Claimant's dismissal was as a result of her sickness absence. This is "something arising" from her disability.

6.3. The Respondent has pleaded that it had a proportionate means of achieving a legitimate aim which justified its unfavourable treatment. The legitimate aim advanced was "proper management of the workforce". Ms Harty, on behalf of the Respondent, informed the Tribunal that this meant the management of sickness absence.

6.4. The Tribunal accepts that the management of sickness absence could amount to a legitimate aim. However, the Tribunal finds that Mrs Begg's dismissal was not a proportionate way of achieving this aim.

6.5. The burden of establishing proportionality lies with the Respondent. There was no evidence in front of the Tribunal regarding the proportionality of the Respondent's actions. This was not addressed by either of the Respondent's witnesses. No evidence was given, for example, about the adverse impact of Mrs Begg's absence on her colleagues or any similar issue. We had nothing other than a bare assertion by Ms Harty that there was no less intrusive way of managing absence in a member of staff who had been off for 20 months. This has made it difficult to carry out the balancing exercise required when determining such a claim.

6.6. In light of the evidence before us, the Tribunal finds that the dismissal of an employee for sickness absence without applying any of the stages of the SAMP was a disproportionate way of achieving the aim of managing staff absence.

6.7. We have, as far as possible on the evidence before us, carried out a careful balancing act between the needs of the Respondent and the discriminatory impact on Mrs Begg. We accept that an employer has the right to manage the absence of its staff, even where this may have an adverse impact on a disabled employee.

6.8. We have weighed this in the balance against the discriminatory impact on Mrs Begg of being dismissed by her employer.

6.9. When determining whether a measure is proportionate, a Tribunal should consider whether a lesser measure could have achieved a legitimate aim. (*Naeem v Secretary of State for Justice [2017] UKSC 27*). We have considered this question and have determined that there were a number of lesser measures which the Respondent could have implemented in order to achieve its legitimate aim of managing staff absence, rather than simply dismissing without going through the stages of its own SAMP. We have considered the fact that we have found that there were no sickness absence review meetings under stages 1 and 2 of SAMP, that the Respondent did not discuss the content of the occupational health advice received with the Claimant and that no up to date medical evidence was obtained before the Claimant was dismissed.

6.10. The Tribunal has concluded that the Respondent could have achieved its aim of managing staff absence by holding sickness absence review meetings, obtaining up to date occupational health advice and implementing the recommendations of this advice. The procedure leading to dismissal is not irrelevant to the question of proportionality (*Department of Work and Pensions v Boyers [2022] EAT 76*).

6.11. We do not uphold Mrs Begg's claim that the failure to overrule the independent medical advisors in respect of her ill health retirement application amounted to discrimination arising from disability. Putting aside the question of whether this is capable of amounting to unfavourable treatment on the grounds of disability, we find that the fair

assessment of ill-health retirements applications is a legitimate aim. We also find that it is proportionate to rely on the evidence of medical practitioners to do so, particularly in circumstances where an employee has the opportunity to appeal and challenge this evidence.

Remedy

1. Loss of statutory rights

1.1. The Claimant is awarded £350 in respect of her loss of statutory rights.

2. Basic award

2.1. The Claimant had 17 complete years of service with the Respondent. The Claimant was aged over 41 during each of these years of service. We have therefore applied a multiplier of 1.5 to the Claimant's weekly wage.
2.2. The Claimant's weekly wage exceeded the statutory cap. We have therefore applied the statutory cap relevant to a dismissal which took effect in July 2021, namely £544.
2.3. The Claimant is therefore entitled to a basic award of £13,872.

3. Compensatory award

3.1. As set out in the body of the judgment, the Tribunal has applied a deduction of 100% to the compensatory award payable to the Claimant.

4. Injury to feelings

4.1. We have based our award for injury to feelings on the *Vento* guidelines, as updated in the relevant Presidential guidance.

4.2. We find that Mrs Begg's award should fallen within the lower band of Vento, but at the top of that band. In general terms, the reason for this decision is that we have made a positive finding in respect of one act of discrimination. This would generally place an award for injury to feelings into the lower Vento band. However, we felt that the dismissal of an employee was a sufficiently serious act as to justify an award towards the top of that band. Mrs Begg describes the impact of the dismissal had on her in her witness statement where she says that she "gets upset when she thinks about it and probably will for the rest of her life."

4.3. We appreciate Ms Harty's submission that it was failure to follow process that was at issue here, and that Mrs Begg was not aware what the process should have been in any event. However, our finding was that the act of discrimination was Mrs Begg's dismissal. Mrs Begg was aware that she was dismissed and it is clear from her evidence that this had a significant impact on her.

4.4. We have not taken into account the workplace bullying issues reported by Mrs Begg in reaching this decision. It would not be appropriate for us to do so, given that we have not made any finding as to whether or not these actually occurred. We raised these in our judgment simply as a matter that should have been addressed by the Respondent as part of its management of Mrs Begg's absence management.

Employment Judge **Routley**

Date:26/06/2023