



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101078/2023

Held in Glasgow on 22 to 24 August 2023

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Employment Judge L Wiseman

Tribunal Member E Farrell

Tribunal Member K McKenna

Ms M Donnelly

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**Claimant
Represented by:
Mr R Dorrian -
Solicitor**

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South Lanarkshire Council

**Respondent
Represented by:
Mr S O'Neill -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 1. The Tribunal decided to dismiss the claim.

REASONS

1, The claimant presented a claim to the Employment Tribunal on the 23 January 2023 alleging she had been unfairly dismissed and discriminated against because of disability.

30 2. The respondent entered a response in which it accepted the claimant had been dismissed for reasons of capability, but denied the dismissal was unfair and denied the allegations of discrimination.

3. The respondent, prior to the commencement of this hearing, accepted the claimant was a disabled person in terms of section 6 of the Equality Act. The claimant has Anxiety and Depression. The respondent also accepted they had constructive knowledge of the disability at the time of the dismissal.
- 5 4. The issues for the Tribunal to determine were:
- a. was the claimant unfairly dismissed in terms of section 98(4) Employment Rights Act (the claimant having accepted the reason for the dismissal was capability);
 - 10 b. was the claimant treated unfavourably because of something arising from, or in consequence of, the disability in terms of section 15 of the Equality Act (the alleged unfavourable treatment being dismissal); and
 - c. can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- 15 5. We heard evidence from the claimant, Ms Fiona Menzies, Personnel Advisor, who was the claimant's line manager, and Ms Faye Meldrum, Personnel Advisor who took the decision to dismiss.
6. We were also referred to a set of jointly produced documents. We, on the basis of the evidence before us, made the following material findings of fact.

Preliminary issue

- 20 7. The claimant's representative, at the commencement of the hearing, made an application for a postponement on the basis the respondent had not, in its ET3, set out the legitimate aim relied upon. Mr Dorrian considered that if the respondent sought to amend the response to include this, there should be a postponement to allow him to seek further information and instructions. The
- 25 application was opposed by the respondent because Mr O'Neill did not consider an application to amend was necessary in circumstances where the relevant witnesses would be present and could be cross examined regarding this matter.

8. The Tribunal retired to consider the claimant's application. We decided to refuse the application and we further decided no application to amend was necessary. This is a case where dismissal is at the heart of what happened. The reasons for the dismissal are clear and known to the claimant and whilst those reasons may not have been articulated as a legitimate aim, they form the basis of it. Accordingly, the Tribunal did not consider it necessary to postpone the hearing.

Findings of fact

9. The claimant commenced employment with Strathclyde Regional Council in December 1986. The claimant's employment continued with South Lanarkshire Council following local government re-organisation in 1996.
10. The claimant was employed as an Advertising Assistant (this was the role she performed throughout the period of her employment until January 2021).
11. The claimant was advised in January 2021 that her role was going to be displaced because there was no longer a need for the role. The claimant continued in the role for a further six months but was placed on the respondent's Switch2 procedure to seek suitable alternative employment
12. The claimant was advised by letter of the 13 August 2021 (page 70) that following discussion and the meeting on the 13 August, an offer of employment was being made for the post of Personnel Assistant. The respondent considered this role to be suitable alternative employment for the claimant given her transferrable skills.
13. The claimant understood the focus of the role would be dealing with a backlog and uploading information, and that it was for a fixed term of six months. The claimant did not consider this suitable. The claimant approached her trade union for advice, and she raised an appeal against the job offer and a grievance.
14. The claimant attended an appeal hearing and was accompanied by her trade union representative, Ms Jane Aitchison. The outcome of the appeal was sent to the claimant by letter of the 23 September 2021 (page 77). The letter noted

the position offered would involve liaising with managers to agree advert texts for posts, working to deadline, and dealing with the recruitment enquiries. It was considered the post was a match for the claimant because of her skills and experience. The claimant agreed she had a better understanding of the post but was still unhappy it was for a fixed term. The outcome of the appeal was that permission was given for the post to be offered on a permanent basis. Accordingly, the appeal concluded the post of Personnel Assistant was a reasonable offer and that the claimant would be matched to this post with effect from the 27 September 2021 .

10 15. The claimant found the process of her role being displaced and being offered suitable alternative employment very stressful. In addition to this, the claimant was home working because of the COVID pandemic, and she found this isolating, frustrating, and stressful.

15 16. The claimant commenced the new role in late September 2021 . The claimant was working from home and felt she was not provided with sufficient training regarding the new computer system. The claimant's tasks included checking candidate's recruitment documents. The claimant did not feel confident doing this: she felt out of her depth and got very agitated and worried in case she missed something.

20 17. The respondent carried out a review of the personnel function and changed to resource-based teams covering all aspects of personnel. The claimant was contacted by Ms Elaine Lambie, line manager, to advise she would be moving from the recruitment team to another team within Personnel, where Ms Fiona Menzies would be her line manager.

25 18. The claimant commenced a period of sickness absence on the 17 November 2021. The claimant attended her GP and was signed off with stress.

30 19. Ms Menzies contacted the claimant by telephone on the 17 December 2021 as part of the absence management policy. A note of the discussion was produced at page 77. Ms Menzies wanted the opportunity to introduce herself to the claimant, to explain the change in the structure, the change to the claimant's role, and to discuss what supports could be offered. Ms Menzies

understood from the claimant that she had carried out the same role for very many years and had felt “cast adrift” in the new role and had found working from home isolating.

- 5 20. Ms Menzies wanted the phone call to be positive and to ensure the claimant understood this would be a fresh start. The claimant was not the only person starting in the team and her skills and experience meant she was well placed for the role. Ms Menzies sought to reassure the claimant there would be plenty of support and training and the claimant would only take on tasks when she was ready for them.
- 10 21. Ms Menzies referred the claimant to the Early Intervention Officer, Ms Liz Morgan and to the respondent s PAM Assist for access to counselling services.
- 15 22. The Attendance Support Meetings took place every month. The note of the January 2022 discussion was produced at page 81. Ms Menzies noted the claimant had been prescribed antidepressants. She also noted the claimant was not in a position to consider a return to work at that time.
23. The claimant raised a grievance at the end of January 2022 (page 84). The claimant set out what had occurred and the impact on her health and noted she would accept voluntary severance.
- 20 24. The claimant's grievance was heard by Ms Elaine Maxwell, HR Business Manager and an outcome letter was issued on the 15 August 2022 (page 122). The claimant had not wished to attend a grievance hearing and so Ms Maxwell considered the grievance on the papers. Ms Maxwell apologised for the delay in dealing with the grievance. She confirmed the role the claimant had been offered was considered a suitable match to the claimant's skills.
- 25 She also confirmed a no-compulsory redundancy policy had been agreed with the trade unions. Ms Maxwell concluded by confirming the claimant's request for a redundancy package could not be met because of the agreement with the trade unions and because a suitable alternative post had been found for
- 30 the claimant.

25. Ms Menzies referred the claimant to occupational health in February 2022. A report was provided (page 91) which confirmed the claimant was unfit to return to work and recommended the treatment regime being undertaken by the claimant be allowed time to work.
- 5 26. The note of the February attendance support meeting was produced at page 93. The claimant's medication had been increased and she was engaging with Pam Assist. Ms Menzies noted the claimant did not feel there was anything which could be done to facilitate a return to work.
27. The March and April attendance support meetings (pages 95 and 97 to respectively) were similar in content. It was noted in April that the claimant had moved on to half pay. There was also discussion of ill health retirement.
28. Ms Menzies referred the claimant to occupational health again in May, and specifically asked whether ill health retirement could be considered. The occupational health report (page 103) confirmed it was the doctor's opinion 15 that not all treatment options had been explored yet and therefore it was unlikely the claimant would meet the criteria for ill health retirement. The report also noted that until the claimant felt able to engage with further treatment to address her ongoing anxiety, low mood, disturbed sleep and reduced concentration, which were the main barriers to being able to engage with 20 work, it was not possible to give a timeframe for a return to work.
29. Ms Menzies discussed this report with the claimant at the attendance support meeting in May (page 105). Ms Menzies made clear that the decision to apply for ill health retirement rested with the claimant. She also made clear what may happen if ill health retirement was not granted.
- 25 30. The claimant informed Ms Menzies at the June attendance support meeting (page 107) that she wished to apply for ill health retirement and would be obtaining a report from her GP to support this.
31. The claimant was advised by letter of the 24 August (page 125) that her application for ill health retirement had not been successful because, on 30 balance of probabilities, it was more likely that with appropriate optimisation

of her treatment and review of her work-related concerns she would be medically fit to re-engage with gainful work in the future.

32. Ms Menzies, at the October attendance support meeting (page 130) advised the claimant that as she could not provide a foreseeable date for a return to work, Ms Menzies intended to produce a capability report which would be the basis of proceeding to a capability hearing.
33. Ms Menzies' Maximising Attendance - Capability Fact Finding Report was produced at page 132. The report set out the applicable policies, the attendance support meetings, the Fit Notes, and the occupational health reports.
34. The capability hearing took place on the 19 October and a note of the meeting was produced at page 145. The claimant attended with her trade union representative Ms Aitchison. Ms Faye Meldrum chaired the hearing and Ms Menzies attended in order to present her report and answer questions.
35. The claimant challenged the redeployment process because she did not consider the post she had been offered was suitable alternative employment. The claimant also challenged that an up-to-date medical (or occupational health) report should be obtained because the earlier report was five months old.
36. Ms Meldrum noted the claimant was still unfit for work and in fact her condition had deteriorated. There was no foreseeable date for a return to work. Ms Meldrum rejected the claimant's argument regarding redeployment and considered it was not necessary to obtain an up-to-date medical report in circumstances where the claimant's condition had not changed and had, in fact, deteriorated. Ms Meldrum understood the claimant wished to be referred to occupational health again so that the application for ill health retirement could be reconsidered, but concluded the claimant had a right to appeal the decision regarding ill health retirement once her employment had ended.
37. Ms Meldrum wrote to the claimant by letter of the 24 October (page 155) to confirm her decision to terminate the claimant's contract of employment on

grounds of capability, with effect from the 24 October 2022. The claimant was paid 12 weeks' pay in lieu of notice. Ms Meldrum noted the claimant had been offered the option of a career break (of up to 4 years) but, having discussed this with her trade union representative, she had rejected the offer.

5 38. The claimant appealed against Ms Meldrum's decision (page 161). The focus of the appeal was on being redeployed to what the claimant considered was an unsuitable post and ill health retirement. The claimant was advised by letter of the 14 December (page 168) that the claimant had already appealed against the redeployment and had had her application for ill health retirement 10 refused. The letter confirmed it was not within the appeal panel's gift to interfere with either of those decisions and accordingly the claimant's appeal was not valid.

39. The claimant has, since the termination of her employment, been in receipt of Universal Credit.

15 **Claimant's submissions**

40. Mr Dorrian submitted, with regards to the issue of unfair dismissal, that the claimant accepted the reason for dismissal was capability. Accordingly, the issue for the Tribunal to determine related to the fairness of the dismissal in the circumstances. Mr Dorrian referred the Tribunal to the cases of *BS v Dundee City Council* [2014] IRLR 131 and *McAdie v Royal Bank of Scotland* 20 [2007] IRLR 895 and submitted the key questions to be asked are whether the employer could be expected to wait any longer before dismissing the employee and, where the employer is responsible for the employee's ill health, whether the respondent could be expected to go the extra mile in terms of tolerating the absence for a further period of time. 25

41. Mr Dorrian submitted that throughout the attendance support meetings no support had been offered to the claimant. The claimant's grievance had not been actioned for seven months and no risk assessment had been done. The issue of redeployment had not been discussed with the claimant and if an up-to-date medical report had been obtained the issue of ill health retirement 30

could have been reconsidered. The dismissal had been unfair in the circumstances of the case.

42. The claimant also brought a complaint of discrimination because of disability in terms of section 15 of the Equality Act. There was no dispute regarding the fact the claimant was a disabled person at the relevant time and the respondent had knowledge of this. The dismissal of the claimant was unfavourable treatment because the reason for the dismissal was absence which was related to the claimant's disability.

43. Mr Dorrian understood the respondent's legitimate aim was finality of proceedings and strain on the service. Mr Dorrian acknowledged Ms Menzies had spoken to there being two Personnel Assistants in the team and with the claimant being absent the workload had fallen on one person. The claimant's post had been filled following her dismissal. Mr Dorrian submitted that if the claimant had been given a career break, it would have achieved the same aim and accordingly dismissal was not proportionate.

44. Mr Dorrian invited the tribunal to uphold the claims and have regard to the Schedule of Loss which had been included in the documents.

Respondent's submissions

45. Mr O'Neill referred the tribunal to the case of *Pnaisner v NHS England* [2016] IRLR 174 and in particular to paragraph 15 of the judgment where the EAT had set out the proper approach to claims brought under section 15 of the Equality Act. Mr O'Neill submitted "unfavourable treatment" meant disadvantaging the person. He invited the Tribunal to ask whether, in broad terms, dismissal had disadvantaged the claimant in circumstances where there was no evidence of disadvantage, the claimant had been on nil pay, internal proceedings were making her more stressed and she was unfit to return to work in any capacity. The claimant, having been dismissed, was in receipt of benefits and able to appeal the decision in respect of ill health retirement. The claimant had wanted voluntary severance or ill health retirement. Mr O'Neill invited the Tribunal to find the act of dismissal had not been unfavourable treatment in the circumstances of this case.

46. Mr O'Neill submitted that should the Tribunal find the dismissal amounted to unfavourable treatment then the respondent had to show its legitimate aim, which was to deal with/manage the claimant's absence to get her back to work. Mr O'Neill referred to the respondent's policy of Maximising Attendance at Work and the fact the claimant had been offered (and made use of) PAM Assist, Early Intervention, Occupational Health, and an application for ill health retirement. Mr O'Neill submitted this was a proportionate means of addressing the claimant's absence and a proportionate means of achieving the legitimate aim of addressing the absence given the effect her absence had on the service.
47. The claimant had acknowledged the impact of her absence on the service and Ms Menzies had spoken of the fact there were two Personnel Assistants in the team and with the claimant's absence it had left one Personnel Assistant to deal with the workload. In addition to this the claimant's post had been filled on her dismissal.
48. It was submitted the respondent's fair policy had been applied thoroughly. The respondent had tried to discuss support for a return to work with the claimant, or a return to alternative duties, but the claimant had closed down those discussions. In all the circumstances Mr O'Neill invited the tribunal to dismiss the section 15 Equality Act complaint.
49. Mr O'Neill referred to the cases of *BS v Dundee City Council* [2013]; *McAdie v Royal Bank of Scotland* [2007]; *Spencer v Paragon Wallpaper* [1976], and *East Lindsay District Council v Daubney* [1977]. He submitted it was not necessary to obtain a detailed medical report, but the respondent had, in any event, done this and it confirmed what the claimant told the respondent, that she could not say when she might be fit to return to work. The claimant had carried out the new role for 5 weeks before her absence.
50. The claimant was not capable of returning to work and, in the circumstances, it had been reasonable for the respondent to follow its policy. The claimant could not, because of her health, consider any reasonable adjustments, training, or support to facilitate a return to work.

51. Mr O'Neill submitted that in the circumstances the decision to dismiss had been fair and reasonable and the respondent could not have been expected to wait any longer before dismissing. The claimant and her representative had requested the respondent obtain an up-to-date occupational health report but it was submitted this had not been necessary because the claimant's situation had not changed, in fact it had deteriorated.
52. The claimant had appealed against the decision to dismiss. The appeal focussed on redeployment and ill health retirement, but these matters had already been determined and it was not within the power of the appeal panel to make any decision regarding these matters. The claimant was accordingly advised that her appeal was not valid.
53. Mr O'Neill invited the Tribunal to dismiss the claim of unfair dismissal in the circumstances.

Discussion and decision

15 *Unfair dismissal*

54. The Tribunal firstly had regard to the terms of section 98 Employment Rights Act which provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason, or principal reason, for the dismissal and that it is either a reason falling within section 98(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. We noted in this case that the respondent accepted it had dismissed the claimant for reasons of capability (a reason falling within section 98(2)(a) Employment Rights Act) and the claimant accepted this had been the reason for her dismissal.
- 25 55. The issue, accordingly, for the tribunal is to determine whether dismissal for that reason was fair or unfair in terms of section 98(4) Employment Rights Act.
56. We next had regard to the cases to which we were referred. In the case of *Spencer v Paragon Wallpapers Ltd* [1977] ICR 301 the EAT held that where an employee has been absent from work for some time, it is essential to

consider whether the employer can be expected to wait longer for the employee to return. The Inner House of the Court of Session, in the case of *SS v Dundee City Council* [2014] IRLR 131 said the Tribunal must address this question and balance the relevant factors in all the circumstances of the case. Such factors include whether other staff are available to cover the absent employee's work; the nature of the employee's illness; the likely length of the absence; the cost of continuing to employ the employee; the size of the employing organisation; and the unsatisfactory situation of having an employee on very lengthy sick leave.

57. We were also referred to the case of *East Lindsay District Council v Daubney* [1977] ICR 566 where the EAT stressed the need for a fair procedure to be followed, which included consultation with the employee, a thorough medical investigation and consideration of alternative employment.

58. We next turned to the circumstances of this case and noted there was no real dispute regarding the facts. The claimant was an employee with very lengthy service who had been employed in the same job (Advertising Assistant) for most of that period of service. The business needs of the service changed and the claimant's post was "displaced" (that is, it was deleted from the structure). The claimant was first advised her post was going to be displaced in January 2021, although that did not take effect until some months later. The claimant was placed on the Switch2 programme which exists to find alternative employment for employees in her position. The claimant's skills and experience were matched to a Personnel Assistant post and she was formally offered that post in August 2021 (page 70). The claimant carried out this role for a period of 5 weeks before going off on sickness absence in November 2021. The claimant did not return to work.

59. There was no doubt the claimant found the whole process of being displaced and being found alternative employment and adapting to a new post very difficult. These difficulties were compounded by the fact home-working was still in place due to the pandemic and so the claimant was having to take on a new role and adapt to different systems and duties whilst feeling isolated at home. These difficulties were exacerbated by the fact the role was only

offered on a permanent basis after the claimant appealed the matching to that post; and the duties of the role changed between August and January 2022.

- 5 60. The claimant's period of sickness absence started in November 2021. Ms Menzies became the claimant's line manager in January 2022 following a restructure which meant the claimant became a member of her team rather than the recruitment team. Ms Menzies was responsible for making contact with the claimant on a monthly basis in terms of the Maximising Attendance policy. The Tribunal accepted Ms Menzies' evidence that she had first made contact with the claimant in January 2022 to introduce herself, explain the change to the structure, to understand how the claimant was and what supports could be offered. Ms Menzies understood the claimant had been in her previous role for a long time and had felt "cast adrift" in the new role and found home-working isolating. Ms Menzies wanted to re-assure the claimant this would be a fresh start where support would be offered and the claimant would only take on new tasks when she felt ready.
- 10 61. Ms Menzies offered the claimant the supports which were available in terms of PAM Assist (for counselling) and Early Intervention. The claimant took up these supports but did not progress towards being able to consider a return to work. Ms Menzies described the claimant as not wanting to consider a return to work but looking instead to voluntary severance or ill health retirement.
- 15 62. Ms Menzies referred the claimant to occupational health. The report from occupational health advised allowing the claimant time to feel the benefit of the medication and other supports which had been put in place. Ms Menzies accepted that advice and continued to have monthly contact with the claimant.
- 20 63. The respondent, in terms of its Maximising Attendance policy must inform the employee of ill health retirement. Ms Menzies did this and confirmed to the claimant that she would ask occupational health to comment on this in their next report. The report (page 103) confirmed the opinion of the occupational health doctor that ill health retirement would not be granted because it could not be said the claimant was permanently incapable of work.
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64. The Tribunal was satisfied that Ms Menzies, through her monthly contact with the claimant and through the occupational health reports, understood the reason for the claimant's absence was stress. The claimant's condition did not appear to be improving and the claimant was "closed" to discussing a return to work or what supports could be put in place to facilitate a return to work.
65. The claimant decided to proceed with an application for ill health retirement. The application was ultimately unsuccessful.
66. The respondent proceeded to a capability hearing on the 19 October 2022. The claimant had, by that time, been absent for 11 months and there was no indication when she may be fit to return to work.
67. The Tribunal considered that in terms of consultation with the claimant, there had been monthly contact meetings with Ms Menzies. The meetings provided an opportunity for Ms Menzies to be updated regarding the claimant's condition and to offer support. We accepted that initially there had been discussion and focus upon a return to work with adjustments and supports offered, but the claimant closed down those discussions and accordingly the contact became more focussed on updating Ms Menzies regarding how the claimant was feeling.
68. The Tribunal accepted the respondent obtained medical evidence regarding the claimant's condition. The respondent was in receipt of Fit Notes from the claimant's GP and the respondent also obtained two reports from occupational health. The Tribunal noted that at the capability hearing the claimant and her trade union representative had argued that an up-to-date report should be obtained. This was not for the purposes of showing any improvement in the claimant: in fact, it was for the opposite purpose of showing the claimant had deteriorated. The claimant wanted the up-to-date report so that the decision regarding ill health retirement could be reconsidered. There was no evidence before the tribunal to inform us whether the decision regarding ill health retirement could be "reconsidered". The

evidence was that the decision regarding ill health retirement could be appealed once the claimant's employment had terminated.

- 5 69. The Tribunal concluded, in the circumstances, that the respondent's decision not to obtain an up-to-date medical report was reasonable because the current medical position had not changed (insofar as any improvement, which may impact on the decision at the capability hearing). There was no dispute regarding the fact the claimant was not fit for work and would remain so for the foreseeable future. An up-to-date medical report would not have changed that position.
- 10 70. The claimant was also critical of the respondent for not having carried out a stress risk assessment. The claimant did not go on to suggest what benefit such an assessment would have been in her circumstances. The tribunal accepted Ms Menzies' explanation that such an assessment is usually carried out when an employee is at work or about to return to work. There was no purpose to be served or benefit to be gained from doing it when the employee was absent, unfit for work and unable to answer questions regarding work and its impact.
- 15 71. The respondent did not consider offering alternative employment because the claimant was not in a position to return to work in any capacity. The claimant did ask the respondent for voluntary severance or redundancy. The respondent explained to the claimant that it had agreed a "no compulsory redundancy" policy with the trade unions. Furthermore, the claimant was not in a redundancy position because suitable alternative employment had been found for her.
- 20 72. We next asked whether the respondent could have been expected to wait any longer. We, in considering this point, had regard to the fact the claimant had been absent for 11 months, was unfit for work in any capacity and there was no indication when the claimant may be fit to return to work. There were no adjustments or supports which could be put in place to support a return to work. In addition to this we had regard to the fact the claimant was about to go on to nil pay and was in the position of finding the internal processes added
- 25 30

to her stress. The absence was also causing a strain on the service in circumstances where a team with two Personnel Assistants was having to operate with only one. We concluded that in the circumstances of this case there was no reason for the respondent to wait any longer before dismissing the claimant: there was no benefit to be gained from delaying the decision.

73. The Tribunal decided, having had regard to all of the points set out above, that the respondent had followed a fair procedure when dealing with the claimant's absence and the decision to dismiss. We say that because the respondent had consulted with the claimant; informed itself of the nature of the illness and the prognosis and had considered other options. This was not a situation where the respondent could be expected to wait any longer. We say that because there was no indication when the claimant may be fit to return to work, and her continued absence was causing a strain on the service. The Tribunal decided the respondent's decision to dismiss was fair.

15 *Section 15 Equality Act*

74. This section of the Equality Act provides that a person discriminates against a disabled person if s/he treats the disabled person unfavourably because of something arising in consequence of the disabled person's disability and s/he cannot show that the treatment is a proportionate means of achieving a legitimate aim.

75. The claimant is a disabled person in terms of section 6 of the Equality Act. The claimant has anxiety and depression. The respondent conceded the claimant was a disabled person at the relevant time and that they had constructive knowledge of this.

25 76. The claimant, in order to succeed with her claim, must show:-

- a. there must be unfavourable treatment;
- b. there must be something that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be because of the something that arises in consequence of the disability; and

d. the respondent cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

5 77. The Tribunal considered whether the claimant had been treated unfavourably when she was dismissed. Mr O'Neill invited the Tribunal to find there was no unfavourable treatment in the circumstances of this case because the claimant was on nil pay and could access benefits after her dismissal; the claimant could appeal the decision regarding ill health retirement after her
10 dismissal; the internal proceedings were adding to the claimant's stress and the claimant had wanted to leave (albeit via voluntary severance or ill health retirement). The Tribunal, whilst acknowledging these factors were all accurate, could not accept that translated into a finding that dismissal was not unfavourable treatment. The claimant was an employee with very long service
15 who had not been expecting to leave the employment of the respondent before retirement. The claimant was not in a position she either expected to be or wanted to be. There is a psychological impact in being dismissed and a financial impact if the claimant has to access her pension early. We concluded, therefore, that dismissal amounted to unfavourable treatment.

20 78. The Tribunal next has to ask whether there was something that arises in consequence of the claimant's disability. The "something" in this case was absence. We next asked whether the unfavourable treatment (dismissal) was because of absence: it was. The claimant's employment was terminated because of the length of her absence and because there was no indication of
25 when she may be able to return to work.

79. The Tribunal next asked whether the respondent could show the unfavourable treatment was a proportionate means of achieving a legitimate aim. The respondent's legitimate aim was addressing long term absence. This was the purpose of the respondent's Maximising Attendance policy. We considered
30 this was a legitimate aim because the primary purpose of the Policy is to support employees to return to work.

80. We next asked whether dismissal was a proportionate means of achieving the legitimate aim. We noted above that the primary purpose of the respondent's Policy is to support employees to return to work. The respondent did this through its Attendance Support meetings; PAM Assist, Early Intervention; Occupational Health and Ill Health Retirement. Unfortunately, the respondent's support did not have an impact on the claimant such as to enable her to return to work, or even to discuss doing so.
81. The claimant was unfit for work in any capacity and unable to contemplate when she may be able to return to work. The claimant was in a nil pay situation, her health was deteriorating, and she was stressed by the internal proceedings. The options the claimant discussed with the respondent focussed on her leaving their employment through voluntary severance or ill health retirement. Voluntary severance was not an option available to the claimant and ill health retirement had already been refused and this was not a decision with which the respondent could interfere.
82. The claimant's absence was also putting a strain on the service. The claimant was part of a team which included two Personnel Assistants. The team was having to function with only one Personnel Assistant. The team needed to have the post filled either by the claimant returning to work or by someone else. The team could not be expected to continue to carry the burden of a vacant post.
83. Mr Dorrian submitted the respondent could have offered the claimant a lengthy career break. This would have kept the claimant in employment but allowed the team to recruit to fill the Personnel Assistant post. There may have been merit in this argument if the claimant had wanted to accept a career break. Ms Meldrum, at the capability hearing, noted the issue of a career break had not been discussed with the claimant, and so she raised it and offered the claimant time to consider it. The claimant, having discussed it with her trade union representative, refused it. This was, accordingly, not a viable (or proportionate) option as an alternative to dismissal.

84. The Tribunal decided, having had regard to the circumstances of the claimant and the strain on the service, that dismissal was a proportionate means of achieving a legitimate aim in the circumstances. We decided to dismiss this complaint.
- 5 85. The Tribunal, in conclusion, decided to dismiss the claim in its entirety.

Employment Judge: L Wiseman
Date of Judgment: 30 August 2023
Entered in register: 05 September 2023
and copied to parties

