



EMPLOYMENT TRIBUNALS

Claimant: Ms Steadman

Respondent: University Hospitals Birmingham NHS Foundation Trust

Heard at: Midlands West Employment Tribunal

On: 27 – 29 November 2023

Before: EJ Murdin, sitting with Ms M Gola and Mr M Pitt

Representation

Claimant: In person

Respondent: Mr Mellis (Counsel)

JUDGMENT

1. The Claimant's claim for unfair dismissal is dismissed.
2. The Claimant's claim for discrimination arising from disability is dismissed.
3. The Claimant's claim for a failure to make reasonable adjustments is dismissed.

The Background

Save where otherwise stated, page numbers referred to are the page numbers of the Joint Bundle used by the Tribunal at trial.

5. Early conciliation started on 7 November 2022 and ended on 12 December 2022. The Claim form was presented on 30 December 2022, in which the Claimant brought claims for unfair dismissal, discrimination arising from a disability, and a failure to make reasonable adjustments.
6. The Claimant was employed by the Respondent, an NHS Trust, as a healthcare assistant (HCA Band 2) , from 10 October 2016 until her dismissal on 2 November 2022.
7. The Claim is about the claimant's dismissal. She says that this is both unfair and amounts to disability discrimination. She says that the Respondent should have given her more time to improve her attendance and that she had insufficient time to prepare for the final capability hearing where she was dismissed.
8. The Respondent's defence is dated 28 January 2023. The Respondent denies all claims and says that the Claimant's dismissal was because of her persistent short term absences from work and that this was a fair reason for dismissal. They say they followed a fair procedure throughout, gave the claimant sufficient warnings and offered her a right of appeal.
9. The Claimant's disability for the purposes of this claim is a herniated disc. The Respondent accepts that the Claimant is a disabled person under the Equality Act 2010 in relation to this disability. Within the disability discrimination claims, the Claimant brought claims for discrimination arising from disability and a failure to make reasonable adjustments. The Respondent denies that they dismissed the Claimant for a reason(s) connected to her disability, and they aver that they had made all reasonable adjustments that they realistically could.
10. The issues to be determined are set out at page 42:

The Evidence

11. The Claimant relies upon the documentation contained within the trial bundle, her witness statement, and that of Ms Sheedy. They also gave oral evidence.
12. The Claimant's oral evidence was largely consistent with her witness statement. Despite clearly being upset and finding the legal proceedings stressful, the Tribunal were grateful to the Claimant for the way that she dealt well with challenging circumstances, and clearly had had to cope with a difficult family background . The Tribunal felt that she clearly took great pride in her job, and were sympathetic to her health problems. We had no doubt that the difficulties with her health were entirely genuine.
13. The Respondent relies upon the documentation contained within the trial bundle and the supplementary trial bundle, together with the witness

statements of Hannah Johnston dated 10th November 2023, and Alison Money dated 12th November 2023, both of whom also gave oral evidence, which was consistent with their witness statements.

14. The Tribunal found they were both impressive, credible witnesses. They had an excellent recollection of the various procedures, and had dealt with the difficult situation in a pragmatic and understanding manner. Where there were differences of recollection, we preferred the evidence of the Respondent's witnesses.

Findings of Fact Unfair Dismissal

15. It is agreed that the Claimant was dismissed on 2nd November 2022.
16. Pursuant to section 98(1) of the Employment Rights Act 1996, it is for the Respondent to prove the reason(s) for the dismissal, and thereafter, to prove that reason was potentially fair.
17. The Respondent avers that the reason for dismissal was capability and/or some other substantial reason, which are potentially fair reasons pursuant to the Employment Rights Act 1996.
18. The Tribunal will need to decide whether the respondent genuinely believed the claimant was incapable of performing her duties and whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?
19. The Tribunal will decide, in particular, whether:
 - (i) The Respondent adequately consulted the Claimant;
 - (ii) The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
 - (iii) Whether the Respondent could reasonably be expected to wait longer before dismissing the Claimant;
 - (iv) Dismissal was within the range of reasonable responses.
20. The Tribunal has determined that the ground for dismissal was capability, which is a potentially fair reason, pursuant to section 98(2)(a) of the Employment Rights Act 1996.
21. Furthermore, we have concluded that the Respondent genuinely believed that the Claimant was no longer capable of performing her duties.
22. In reaching these determinations, we rely in particular upon the evidence of Hannah Johnston, whose evidence we accept in its entirety. Ms Johnston was a careful, measured witness who explained the steps that the Respondent had taken to ensure that the Claimant was treated fairly. Ms Johnston took into account the Claimant's entire absence history since the commencement of the absence procedure. She was concerned by the number and frequency of absences for differing problems, and further by the fact that despite the Respondent's reticence in moving to Stage 3, the Claimant's absence level was not significantly improving.

23. We are entirely satisfied that Ms Johnston did not take into account absences related to the Claimant's back, her disability for the purposes of this claim. Neither did she take into account Covid-related absences.
24. Throughout the process, the Claimant was consulted on a regular basis. We find that to have been more than adequate. The chronology of those meetings and informal discussions is agreed.
25. Equally, we are satisfied that the investigation was reasonable. It is summarised both in the detailed Management Report beginning at page 121, and in Ms Johnston's evidence.
26. In those circumstances, we have concluded that the Respondent's sanction of dismissal was within the range of reasonable responses. We are content that the documentation was provided to the Claimant in sufficient time via email, and was also available to her as a physical copy. It is unfortunate that the Claimant did not receive a copy until shortly before the hearing, but had she brought that to the attention of Ms Johnston, no doubt an extension of time could have been agreed.
27. We are also satisfied that the Claimant attempted to appeal, both via email, and through the leaving of voicemails. We also accept the evidence of Ms Money, that she received neither those emails, nor the voicemails. In the circumstances, an appeal did not take place. We consider it extremely unlikely, given the diligent approach to the capability hearing taken by Ms Johnston, that any appeal would have been successful.
28. The claim for unfair dismissal therefore fails, and is hereby dismissed.

Discrimination

29. Given the fact that we have already concluded that Ms Johnston did not take into account the Claimant's absences in relation to her disability, namely her back, that claim also fails.
30. It is finally alleged by the Claimant that the Respondent failed to make reasonable adjustments. However, we rely on the evidence of Ms Johnston that adjustments including, an ergonomics assessment, provision of a modified/high-back chair, a reduction in working hours, amended duties and a change of work area, had already been made. Furthermore, when redeployment was offered to the Claimant, she declined that option. We note that it would have been open to the Respondent to offer a more formal process of redeployment, although we conclude that it would have been unlikely to alter the overall outcome.
31. The Claimant avers that a further period of time should have been offered to her, to allow her absence record to improve. However, having already extended the procedure on a number of occasions, the Tribunal finds that there was no obligation upon the Respondent to extend it again.
32. For the above reasons, the claims for discrimination fail.

33. Whilst this outcome will no doubt be difficult for the Claimant, the Tribunal wish to extend its thanks to her for her assistance in calmly and professionally managing these proceedings. We wish her the best, and would invite the Respondent to assist the Claimant wherever possible in her search for employment. We are grateful to Ms Johnston for her undertaking to provide the Claimant with her professional certificates, and we wonder whether a short factual reference could also be proffered, setting out the Claimant's skills and achievements. That will of course, be a matter for the Respondent, but it may assist the Claimant moving forward.

Conclusion

34. The claim for unfair dismissal fails, and is dismissed.
35. The claims for discrimination fail, and are dismissed.

**Employment Judge Murdin
29 November 2023**

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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