



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000048/2022

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Held in Glasgow on 11 and 12 December 2023

10

**Employment Judge J D Young
Tribunal Member Ms K Ramsay
Tribunal Member Mr R Martin**

“JR” (Anonymity Order made)

**Claimant
In Person**

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South Lanarkshire Council

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

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The Judgment of the Employment Tribunal is that the claims presented to it under sections 15, 21 and 26 of the Equality Act 2010 do not succeed and are dismissed.

REASONS

Introduction

25 1. In this case, the claimant raised a claim against the respondent complaining that she had been discriminated against because of the protected characteristic of disability under the Equality Act 2010. In the course of the preliminary hearings to discuss case management and other issues, it was agreed that the complaints made by the claimant could be summarised as:

30 a. harassment under section 26 of the Equality Act 2010 (EA) by the application of the respondent’s sickness absence policy in the period between 9 March and 21 October 2021;

- b. failure to comply with the duty to make reasonable adjustments under section 21 of EA during the claimant's absence in the period between 9 March and 21 October 2021 to enable her to return to work; and
- c. discrimination arising from disability under section 15 of EA with the unfavourable treatment relied upon being the failure to obtain an updated medical report prior to taking the decision on 21 October 2021 to dismiss the claimant.

Disability status

2. The respondent advised at the hearing that they conceded that the claimant was a disabled person as defined in section 6 of EA on the grounds that the claimant had been diagnosed with endometrial cancer in November 2019 discovered following a hysterectomy operation. The claimant had been advised in December 2019 that she was clear of cancer but the respondent accepted that she was in remission at that point with regular checkups through to 21 October 2021.
3. However, the Respondent did not concede that they had actual or constructive knowledge of the claimant's cancer.

Issues for the Tribunal

4. The issue of actual or constructive knowledge of disability and the matters listed at 1a-c above formed the issues for the Tribunal to determine.

The hearing

5. At the hearing, the Tribunal heard evidence from the claimant; her daughter; Mandy King employed by the respondent since 1996 and who from 2020 held the position of Team Leader in the respondent housing repair section; Elizabeth Simpson employed in Local Government since 1985 and who since 2001 held the position of Customer Contact Centre Manager with the respondent; and Fiona Brown personnel assistant with the respondent from 2009 and a personnel officer from 2021.

Documentation

6. The parties had helpfully liaised in providing a joint bundle of documents paginated 1 – 478 (A1-478) A Supplementary joint bundle of documents was also produced paginated 1 – 20 (J1-20). Reference in this judgment to the documents is to the paginated numbers.
- 5 7. From the relevant evidence heard, admissions made and documents produced, the Tribunal were able to make findings in fact on the issues.

Findings in fact

8. The respondent is the local authority for the South Lanarkshire area including Hamilton, East Kilbride, Cambuslang/Rutherglen and Clydesdale. It provides
10 various services to residents in these areas including housing repairs.
9. The claimant had continuous service with the respondent in the period 30 March 2000 to 21 October 2021. She was employed as a clerical assistant by the respondent initially in Land Services until 19 July 2009; then in the Repairs Team at Cambuslang Gate until 7 August 2011; and then relocated with that
15 team to the Repairs customer service centre as from 8 August 2011. She commenced part time working (3 days a week) in 2013. In her post, she was desk based on phone/keyboard receiving calls regarding repairs and emergency repairs required and making necessary arrangements for assistance/resolution.
- 20 10. The claimant had severe estrogen imbalance in 2019 which resulted in blood loss and clots and entailed surgery. Despite listed as an urgent referral in June 2019, when cancer was suspected, a hysterectomy was not conducted until November 2019. Around 11/12 December 2019, the claimant was advised that the hysterectomy had been successful and all cancer removed.
- 25 11. She shared this good news with her colleagues at work in December 2019. She advised Leslie Bowers who was her contact centre manager at the time and who was managing her absence. She advised her that her gynaecologist had confirmed evidence of cancer in the lining of the womb but that there was absolute confidence that all cancer had been removed which after pathology
30 report was confirmed.

12. She also advised Leslie Bowers of issues post surgery at that time. No evidence was given by Leslie Bowers who had left the respondent employment and it was disputed that she had been advised of the claimant's cancer diagnosis and the removal of any cancer. However, the Tribunal accepted the evidence from the claimant on this issue. During the course of her evidence, she was very free with the information on her health concerns during 2019 and thereafter and the Tribunal saw no reason to doubt her evidence that she had told her contact centre manager at the time of her condition.
13. Subsequent to the operation in November 2019, the claimant was advised that she would require to attend six monthly checkups over a period of three years through to November 2022. In those checkups and since the claimant has not had any recurrence of cancer.
14. The claimant made a return to work around 3 February 2020. The repair section made an office move around end March 2020 at which time Mandy King became the team leader for the repairs section and the claimant's line manager. At this time, the claimant suffered from hot flushes due to the medically induced menopause. She gave a description of this by email to Mandy King (A159 – 160). At that time, the claimant requested a fan supplied to her which had not been taken to the new location with her files/folders but the fan was supplied quickly (A161). In the period April – August 2020, the claimant's condition stabilised. At a telephone consultation in April 2020, she expressed herself as being well with occasional discomfort from some physical movements (A162).
15. Around 11 August 2020, the claimant became absent from work through a groin strain as a result of her lifting a household appliance. She remained absent until 14 October 2020. The claimant continued to have hot flushes as a result of the medically induced menopause.
16. Around 9 March 2021, she became absent from work as a consequence of shoulder/neck/arm pain and made no return to work until dismissal on 21 October 2021. The claimant advised that the issue with her shoulder came

about as a result of excessive stretching when engaged in intensive cleaning around her home.

Absence Policy

5 17. Her absence was dealt with in line with the respondent's "Maximising Attendance Policy" (A388 – 420) last updated February 2011 and agreed with the relevant trade unions. The policy advises that a long term absence is "*any period of absence from work because of ill health lasting more than 28 calendar days (four weeks)...*" (A396).

10 18. During absence, contact should be maintained with the relevant procedure stating:

"Maintaining contact

15 *Agreement should be reached on the best way for the employee to maintain regular contact. The employee may phone their manager or agree to accept a call from their manager on a weekly basis. The employee has a responsibility as part of this policy to maintain contact with their line manager. Where possible, this should be done by the employee themselves rather than a representative, however on occasion, it may be appropriate to liaise with the employee's trade union representative on the best method of maintaining contact.*

20 and that during absence managers should ensure that individuals are kept up to date with any policies or procedures and remain "*feeling part of the team...*".

19. Additionally, it advised:

25 *"When a manager becomes aware that the absence may be long term, they should, where possible, arrange to meet the employee either through a home visit, work location or agreed venue. This would be an attendance review meeting with the purpose of this meeting is to discuss the absence, any occupational health reports, agree supports to enable the employee to have*

a successful return to work and rehabilitation plan if appropriate. This meeting should be recorded and actions confirmed to the employee.” (A398 – 399).

20. The policy also indicates that attendance support meetings could be held during a period of long term continuous absence *“at which time reasons for absence and how improvement can be facilitated would be considered together with any relevant support/adjustments and how a successful return to work might be facilitated.” (A397).*
21. Both long-term and short-term absence due to an underlying medical condition, *“will be dealt with via the incapability procedures” (A402).* Those procedures are outlined at paragraphs 9.1 – 9.3.2 of the document with a flow chart at 9.3.4 (A402 – 406)
22. Part of that policy related to the possibility of redeployment. However, redeployment would only be considered if an employee was fit enough to return to a different role.
23. Termination on the grounds of incapability was considered within the procedure at clauses 9.3.1 and 9.3.2 and the process identified that where there was no foreseeable return to work date or no return to work date could be established then the options of either ill health retirement or termination due to capability must be considered. In those circumstances, the employee would be asked to attend an incapability hearing/meeting and in advance all information in relation to the absence with supporting documentation should be passed to an independent manager *“who has not been involved in the ASM process with the employee”* who would review the absence and *“arrange a meeting with the employee and manager”*. At that time, the employee would be advised of the purpose of the meeting and have the right to be accompanied by an accredited trade union representative or a colleague. There would also be an opportunity to appeal any decision of dismissal (A405).

Contact with claimant; physiotherapy reports; occupational health reports.

24. In this period of absence from 9 March 2021 the claimant regularly phoned Mandy King at 08.45am each Monday to report *“how I was and what was happening.”*
25. Ms King arranged for private physiotherapy sessions for a period of 6 weeks from 16 March 2021 in respect of the shoulder/neck injury after which the claimant would receive physiotherapy sessions with the NHS.
26. The first physiotherapy report of 16 March 2021 (A168) advised that there was *“an acute musculoskeletal condition affecting... right neck and shoulder”* and the claimant was not fit for work. A further report of 17 March 2021 (A170) following a *“treatment session”* indicated no estimate on a return to work as the *“symptoms remain too severe at present.”*
27. A further physio report of 23 April 2021 (A176) again advised that there was an inability to estimate a return to work with a *“slower than expected recovery rate”* and that the claimant was awaiting an MRI scan. A report from University Hospital Wishaw of 27 April 2021 advised that *“shoulder seems to be a cuff issue and I am suspicious she may have a rotator cuff tear.”* (A178/179).
28. A further physiotherapy report of 30 April 2021 noted that the claimant was now moving to NHS physiotherapy but again there was no estimate on return to work as the *“symptoms remain too severe at present.”* (A182)
29. On 12 April 2021 and 17 May 2021, the claimant received letters from Mandy King on the outcome of *“attendance review discussion”* (A68 – 69). Those outcome letters advised that medical certificates had been submitted to 7 June 2021 and that pain was still being experienced in the shoulder area and that the claimant was unable to return to work. The letter of 17 May 2021 noted ongoing appointments for a scan on 4 June 2021 with continued physio exercises and that while the respondent *“may be unable to continue to sustain your absence in the longer term as this is now ten weeks from the initial injury and there has been no indication of improvement from physio or if a return to work would be a possibility while physiotherapy is continuing.”*

30. The respondent sought an occupational health report and by report of 20 May 2021(A70/71) it was noted that the claimant remained unfit for work and that physiotherapy had little impact to that point. It was also stated that there were no adjustments/adaptations that would enable an earlier return to work and it was hoped that with adequate treatment and ongoing physiotherapy, a return to work could be made in approximately eight weeks' time.
31. At the beginning of June 2021, the claimant noted a discrete breast lump and was very concerned as her mother had breast cancer and her aunt had passed away from breast cancer. An urgent referral was made and by a report dated 8 July 2021, it was noted that physical examination and ultrasound scans were satisfactory and there were no abnormalities detected and the claimant was discharged (A198).
32. Additionally in June 2021, the claimant had noted that her balance had appeared to be affected and that she, on occasion, "*staggered to the left*". This was noted in a "*nurse's note*" of 9 June 2021 (A191) and the claimant advised that she had told Ms King about these matters in the regular weekly call.
33. The claimant continued to be in touch with Ms King regarding her absence and a letter to the claimant of 8 June 2021, entitled "*attendance review discussion*" advised that the claimant considered there was no improvement to the shoulder injury and exercises continued with a prescription of a muscle relaxant. It was noted that the occupational health report of 19 May 2021 had indicated that it was unlikely that a return to work within 8 weeks would be possible and that the position would be reviewed nearer that time *but "as we are unable to sustain an absence with no foreseeable return date, the council may have to consider terminating your contract on the grounds of capability due to ill health."* (A72)
34. In the notes of weekly telephone conversations with the claimant kept by Ms King it was noted that on 21 June 2021 (A195) the claimant had stated that being advised the respondent may not be able to sustain her absence felt "*like she had a gun to her head if she can't return by a certain date*". In the

telephone conversation of 28 June 2021, it is noted that the claimant felt this
“*very intimidating, felt like she had a gun to her head to give a date. It felt like
bullying, not MK (Ms King) but council.*” With 11 years’ service she felt it was
“*shocking and inappropriate after she worked through COVID*” and the
5 Council policy “*unethical*”. At that time Ms King advised “*we’d spoken about
looking for a RTW plan for a few weeks so it shouldn’t come as a shock. We
can’t continue to sustain her absence indefinitely and need to have some
indication as to whether she will be able to return to work. Returning to work
would mean working at the computer and not sure if that is feasible for*
10 *JR.*”(A195)

35. A letter of 6 July 2021 referred to a further “*attendance review discussion*” on
5 July 2021 and noted that there had been no change or improvement to the
claimant’s injury despite physiotherapy treatment. It was noted that the
claimant’s physio had said that she was not ready to return to work and unable
15 to give any indication of a return date at the present time. A further
appointment for physio was arranged for 23 July 2021. That letter again
contained a statement that while the position would be reviewed “*as we are
unable to sustain an absence for no foreseeable return date, the council may
have to consider terminating your contract on the grounds of capability due to*
20 *ill health*” In the meantime a further occupational health report was being
requested.

36. A further attendance review outcome letter was sent to the claimant on 6
August 2021 after a discussion on 2 August 2021. That outcome letter elicited
that there was no improvement with the claimant’s shoulder injury and she
25 was still unfit to return to work. At that time an occupational health report was
awaited. (A80).

37. The anticipated occupational health report dated 28 July 2021 was then
received which advised the claimant remained unfit for work and there was
“*no clarity of the nature of the underlying condition*”. It was noted that a scan
30 might assist in providing more information but no adjustments were suggested
to prompt a return to work. Occupational health were unable to “*provide
comments in relation to potential recovery timescales*” and it was suggested

that contact between management and the claimant be maintained conform to the absence policy and that a referral to occupational health might be appropriate once there had been a *“substantial improvement on her medical condition”*. In the meantime, no further review was arranged. (A74-75).

5 38. In August 2021, the respondent asked the consultant occupational health specialist whether in light of the previous assessment, the claimant would be eligible for ill health retiral and he advised that there was no *“evidence at the moment that would suggest that the medical problem is permanent”* and so retirement on ill health grounds *“would not be possible until further clarity is obtained, hopefully after the investigations which are due to take place shortly.”*

10 39. In August 2021, the claimant experienced dizzy spells and was referred to a cardiologist by her GP. Additionally, she had suffered a fainting episode towards the end of August 2021 and received certain treatment and advice. She advised the respondent of these issues which were reflected in discussions with the claimant on 16 August and 23 August 2021 (A211).

15 40. These matters were also reflected in an attendance review outcome letter of 3 September 2021. That letter advised that there was still no improvement in the shoulder condition and the claimant continued to be unfit for work. At this time the claimant was advised that given the length of absence a *“fact finding report is being prepared and the Council may have to consider terminating your employment”* (A81).

20 41. Another discussion took place with the claimant on 6 September 2021 when the claimant advised that her shoulders were still painful and she was unable to make any return to work. Also, she advised that she had fainted on her shopping trip and required to attend hospital. Her GP made a referral to Hairmyres Hospital for other tests in relation to these dizzy spells.

25 42. The claimant confirmed in evidence that albeit she had these further issues affecting her through June/August 2021, had the shoulder injury improved, she may have been able to make a return to work but that injury prevented a return.

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Fact finding report and arrangements for incapability hearing

43. A fact finding report was prepared by Mandy King on 7 September 2021 which was submitted to Elizabeth Simpson as the independent manager who had not been involved in attendance support discussions with the claimant. While the claimant questioned the description of Elizabeth Simpson as “*independent*”, that appeared to be on the basis that she was employed by the respondent and so not “*independent*” in that sense. The Tribunal was satisfied that Ms Simpson had not been involved in the ongoing discussions with the claimant up to the point of receipt of the fact finding report and arrangements being made for a hearing and so was “*independent*” for the purpose of the policy.
44. The report (A63 – 67) referred to the physiotherapy reports; occupational health reports and attendance review meeting outcome letters prepared during the absence period. A summary of the shoulder injury and other health health issues reported by the claimant was included and the report advised the case had been reviewed by the “*resource diversity and liaison officer*” who had agreed there were no further supports that could be put in place to facilitate or sustain a return to work.
45. By letter of 16 September 2021 (A236), the claimant was advised that she required to attend a hearing via Microsoft Teams on 30 September 2021 to discuss her current absence from work. She was advised that she would be given the opportunity to explain her views on the reasons for the hearing and be accompanied by a companion. She was to be sent a copy of the incapability procedure and the management submission. She was advised that a decision would be taken at the meeting regarding her continued employment with the respondent and that she was entitled to call witnesses.
46. The claimant contacted the union and advised Mandy King of that approach. The notes of the conversation with Ms King of 28 September 2021 confirmed that there was no improvement to her shoulder condition (A238).
47. The claimant’s union agreed to represent her at the forthcoming hearing but the proposed date was unsuitable. Initially, the respondent indicated that due

to forthcoming annual leave, it would not be possible to alter the proposed date of meeting and suggested that an alternative union representative be found. However, after discussion, the date was altered to suit representation by the chosen representative and the hearing postponed until 21 October 2021. The claimant advised that on a review of the papers with her union representative, she was told that the union could see “*nothing wrong*” with the process that had been adopted by the respondent.

48. The claimant received an appointment for a telephone consultation on Monday 11 October 2021 in relation to the issue with her balance and advised her union representative of that appointment. Also, by letter dated 5 October 2021, the claimant was advised that an appointment had been made for 21 October 2021 with the cardiology department at 13.30 hours. That clashed with the date of the capability hearing which was listed for the same day at 10am (A269 and A264).

49. There was some dispute as to whether the claimant had sought adjournment of the incapability meeting on 21 October 2021. The claimant’s position was that she spoke to Mandy King on 11 October 2021 to advise of the clash of appointments and that Ms King said she would “*see what could be done*”. The claimant suggested that she received word to say that no change could take place to the intended meeting because of leave arrangements. However, the notes of the conversations between the claimant and Ms King on 11 October 2021 (A279) contain no request that the meeting be altered. The evidence from Ms Simpson was that she received no request from anyone to postpone the meeting. If she had been asked to postpone the meeting because of a clash with hospital appointments she would have done so. Also in subsequent messaging/correspondence there was no reference made to any such request either from the claimant or union representative or any complaint made that such a request had been refused.

50. The Tribunal concluded from this evidence that there was no request from the claimant to postpone the incapability hearing of 21 October 2021. It may be that she was confused with the initial request to change the date of the meeting of 30 September 2023 initially advised not to be possible because of

leave commitments. However, that date was changed and the Tribunal considered her recollection that she had asked that the meeting of 21 October 2021 be changed but refused because of leave arrangements to be an incorrect recollection.

- 5 51. By email of 19 October 2021, the claimant advised both Ms King and Ms Simpson as well as her union representative that:

“Upon reflection, I have decided not to attend the arranged incapability hearing scheduled for Thursday 21 October and I ask you kindly to proceed without me in attendance.”

- 10 52. That was acknowledged by Ms Simpson who asked if *“everything is okay”* and that they would continue with the hearing and be in contact thereafter. The claimant responded to that email indicating:

“Thank you very much for your email. Hope you and your family are well. Actually, I have an appointment on Thursday at 1.30pm with cardiologist at Hairmyres Hospital to get my 24 hour blood pressure and heart monitor
15 *results and to discuss the recent unconscious episodes so this is the reason I have chosen not to attend hearing.*

I will be in touch with Sheena before the hearing and Sheena will very kindly share my messages for everyone.

- 20 *Thank you very much Elizabeth and take care.”* (A280 – 283)

The hearing

53. The hearing proceeded on 21 October 2021 with the claimant’s union representative in attendance. Ms King spoke to her report at that time and the claimant’s representative simply asked to be able to make a statement.
25 The hearing was advised that the claimant was not able to provide a return to work date and wished to concentrate on her recovery and not make any appeal against any decision that was made. While there had been consideration given to requesting a career break for the claimant, she did not feel that was appropriate. It was asked on the claimant’s behalf that once she

had made a recovery could she return to the office to say farewell to her colleagues. No objection was made to the hearing taking place or any request made for a postponement.

54. The hearing considered only the issue of the impairment to the claimant's shoulder. Ms Simpson indicated she was unaware of any cancer diagnosis in the past. While Ms Thompson had taken handwritten notes of the hearing, they had since been destroyed. Ms Thompson advised that the respondent's policy contained no particular period of absence which might trigger an incapability hearing. That was essentially down to the manager of the department/area to decide when it was considered such a hearing should be held in consultation with HR. In this case, Ms Thompson did not consider previous absences but only that which had occurred with the shoulder injury.

55. After a short adjournment, Ms Thompson returned along with Fiona Brown who had been present to advise on any process matters and it was indicated that the outcome of the hearing was dismissal on the grounds of capability by reason of the shoulder injury.

56. By letter of 28 October 2021, the claimant was advised that the contract was to be terminated on the grounds of incapability with effect from 21 October 2021. She received a payment in lieu of notice and advised that she could appeal and the process to be followed in that respect. A copy of the letter was forwarded to the claimant's union representative (A92). The claimant did not appeal the decision.

Events subsequent to termination of employment.

57. The claimant advised that from around January 2022, her shoulder improved. She had an ultrasound scan in February 2022 and the report from the University Hospital of Wishaw (A300) advised that the scan showed an area of calcification within the tendon which would not show up on an x-ray and may "*certainly account for your symptoms*". It was advised that the treatment in the first instance was physiotherapy and an injection which had already been carried out in the clinic. The claimant advised that from that point, things

became “easier”. The claimant advised that after January 2022, she could have returned to work.

58. Both the claimant and her daughter advised that the claimant became depressed after the loss of her job and was referred to clinical health psychology Monklands Hospital and received cognitive behaviour therapy and subsequently was prescribed citalopram. She has not managed to obtain employment since termination of her employment. She requires help for anxiety and has become agoraphobic.

59. At termination of her employment, her net weekly pay ran at the rate of £2175.03. She has been on benefits since the loss of employment obtaining between 21 January 2022 and 23 November 2023 the sum of £15,068.13 per year by way of Universal Credit and from PIP in the period between 11 January 2022 to 4 December 2023 the sum of £9170.04.

60. In her schedule of loss (J1-2), she considered that an appropriate award for injury of feelings would be in the middle of the “*Vento guidelines*”.

Submissions

61. The Tribunal was grateful for the submissions made by the parties and no disrespect is intended in making a summary.

For the claimant

62. The claimant considered that there was injustice in her dismissal and that her disability status had been ignored by insufficient consultation. She considered that more could have been done to assist her rather than having a hearing on incapability.

63. The respondents would not be able to understand the effects on her. They were under a duty to ensure that justice was done. She relied on the evidence which had been given.

For the respondent

64. It was maintained for the respondent that the evidence heard from the respondent's witnesses was credible and their evidence could be relied upon where there was any difference from the claimant in recollection.
- 5 65. The concession by the respondent that the claimant had disability status was down to the diagnosis of early cancer in December 2020 being removed but the claimant continuing to be in remission thereafter. It was submitted that there was no actual or constructive knowledge by the respondent of the condition. None of the witnesses who had dealt with the claimant since March 2021 had knowledge of any oncology intervention or cancer.
- 10 66. The shoulder injury could not be classified as one which fitted the definition of disability as it had not lasted for more than 12 months given that there was improvement from January 2022.
- 15 67. The claim of harassment was one which concerned a Policy. There was no assertion that the claimant's team leader was responsible for any harassment. The claim related to the fact that the Policy required regular communication and reminders that continuing absence through ill health might occasion an incapability hearing and termination of employment.
- 20 68. The Policy was agreed with the relevant trade unions. The policy was not related to the protected characteristic on which the claimant relied and did not have the purpose or effect of creating an adverse environment.
- 25 69. The claim of failure to make reasonable adjustments concerned the issue of redeployment or alternative role being offered. That had been set out in the claimant's Agenda. The practice would not be to redeploy before an individual was fit to return to work. It was only if there was an inability to perform the existing role would redeployment be considered and in this case the claimant was simply unfit to return and so redeployment was not relevant.
- 30 70. The claim of discrimination arising from disability relied on alleged failure by the respondent to obtain an updated medical report. However, the last occupational health support received advised that there would need to be a substantial improvement in the claimant's condition before there was any

further referral and that had not occurred by October 2021. If there had been a recommendation for a further report by the occupational health specialist, then that would have been done.

71. It was clear that had it not been for the shoulder injury, the claimant would have made a return to work by her own admission and that was not related to any cancer diagnosis.

72. At the hearing, the trade union representative made no dispute of the position on the claimant's behalf and at no point was any further report requested.

73. In those circumstances, the claims should be dismissed.

Discussion and conclusions

Disability

74. In her claim form, the claimant relied on *"recovering from cancer and issues from the cancer and medically induced menopause"* as the impairment which caused disability (A13). The *"additional information"* supplied by the claimant in that claim form referred to her hope that coming forward with her claim of discrimination would help others with *"endometrial cancer"* not to be treated in the same way (A12). The email by the claimant of 5 December 2023 in response to the questions set out in the preliminary hearing note of 27 June 2023 advised that she believed the discrimination was because of *"all the issues I was suffering from that had arisen as a consequence of the endometrial cancer"* and then listed various issues stating that she had none of those issues before the *"estrogen imbalance/dominance and endometrial cancer"*.

75. Section 6 of EA defines a person as having a disability if:

"He/she has a physical or mental impairment and the impairment has a substantial and long term adverse effect on that person's ability to carry out normal day to day activities."

76. In this case, the claimant relied on as the impairment her cancer and issues she stated arose as a consequence.

77. The respondent conceded the disability status of the claimant on the grounds that the claimant had cancer and was in remission with continuing checkups on the claimant in the period 9 March 2021 through to 21 October 2021 (being the relevant period on the claimed discrimination).
- 5 78. The evidence was that the claimant had an abnormality detected in an operation in June 2021 and as a result of a hysterectomy operation on 19 November 2021, there was removed what was described as an “*early cancer*”. The claimant was advised that the surgeon was confident that all cancer had been removed and so advised the claimant on 11 December 2021 and then
10 again at the end of December 2021 once a pathology report was available. The claimant celebrated being free of cancer at that point.
79. The significance of identifying the impairment relied upon by the claimant is that she did not identify as an issue arising out of the cancer as the injury to her shoulder sustained in overstretching when engaged in intense domestic
15 cleaning.
80. In relation to the respondent’s knowledge of the disability relied on (cancer and the subsequent issues arising), the Tribunal considered (as narrated in the facts) that the claimant had told her then line manager of the operation in November 2019 and that cancer had been detected and removed at that time
20 and so the respondent had knowledge of the impairment relied upon by the claimant in her discrimination claim.

Discrimination arising from disability

81. Section 15 of EA advises that there is discrimination against a disabled person if he/she is treated unfavourably “*because of something arising in
25 consequence of that person’s disability and it cannot be shown that the treatment is a proportionate means of achieving a legitimate aim.*”
82. The defence that the respondent in this case did not know or could not reasonably have been expected to know that the claimant had the disability is not available to the respondent.

83. The question remains as to whether the claimant was treated “*unfavourably because of something arising in consequence*” of her disability.
84. In this case, the claim by the claimant is that the unfavourable treatment was the failure by the respondent to obtain an updated medical report prior to taking a decision to dismiss on 21 October 2021.
85. The claimant’s position on health issues appeared to be that there were various matters which affected her over the period March/October 2021 and all these issues should have been subject to a medical report prior to any capability hearing. However, the respondent had received Statements of Fitness to Work over the period stating that the claimant was unfit to work because of the injury to her shoulder/neck and that was the only reason why she was unable to attend work. The physiotherapy reports and occupational health reports all concerned the neck/shoulder injury being the reason why the claimant was unfit for work. In the evidence given, the claimant advised that had it not been for the shoulder/neck injury, she would have been able to make a return to work albeit that may have been on a phased basis.
86. As narrated, the early cancer identified had been removed in the operation in November 2019. The claimant had been confirmed as “*cancer free*” by end December 2019. Certainly, the medically induced menopause and hot flushes could be the “*something arising*” as a result of the disability but that did not form the reason for absence. The claimant did attend work after the hysterectomy operation and it would appear that a fan at her desk was sufficient to combat that circumstance and not require her to be absent from work on any sustained basis. While there was an issue in providing a fan in the departmental move that seemed quickly resolved.
87. She detected a lump in her breast and was naturally concerned given the experience of her mother and aunt that she may have breast cancer. That was explored and in terms of the Consultant report of 8 July 2021, the claimant advised that there was no abnormality detected by examination and scan and she was discharged.

88. In August 2021, the claimant was fitted with a heart monitor and *“blood pressure cuff”* to monitor the position. She also experienced a fainting episode and lack of balance and as a consequence a hospital appointment by telephone consultation arranged atand at *“ENT vestibular”* and then a
5 cardiology appointment at Hairmyres Hospital on 21 October 2021. Further appointments were to be made regarding balance issues on 15 and 26 October 2021 (A272/273).
89. There was no evidence that the dizzy spells and balance issues causing fainting and low blood pressure were at all associated with the removal of the
10 early cancer in November 2019.
90. Throughout, the reason given for unfitness to return to work remained as the shoulder/neck injury.
91. The respondent’s position was to rely on the physiotherapy report of 28 July 2021 which indicated that management might *“consider to re-refer their
15 employee once a substantial improvement in her medical condition has taken place if at that point, further advice in relation to potential measures to support a return to work is necessary.”* Accordingly, the advice to the respondent was that it was only if there was a substantial improvement would a further report be necessary and in this case there was no improvement advised by the
20 claimant to her shoulder injury.
92. For the claim of discrimination arising from disability to succeed, it is necessary that the unfavourable treatment is because of *“something arising in consequence of the individual’s disability”* The disability here is in respect of issues arising from the cancer removed in November 2019. The shoulder
25 injury had no connection with the disability so it could not be said that the alleged discrimination (failure to obtain a medical report) was as a consequence of the disability. Such a medical report would not have a connection to issues arising from the detection and removal of cancer and any subsequent issues. Such a medical report would have achieved nothing
30 in relation to the reason for absence which was unconnected with the claimed

and conceded disability of the claimant having had cancer and being in remission.

93. For these reasons this claim does not succeed.

Failure to make reasonable adjustments

5 94. The duty to make reasonable adjustments applies to an employer. Section 20 of EA provides (so far as relevant in this case) that the duty to make an adjustment comprises:

- a requirement, where a provision criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage – s20 (3).

10 95. In determining a reasonable adjustment claim, a Tribunal should consider the nature and extent of the substantial disadvantage relied upon by the claimant, make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage, and assess the reasonableness of the adjustment (i.e. step) that it is asserted could and should have been taken in that context.

15 96. The claimed disadvantage was the failure to make reasonable adjustments to allow the claimant to make a return to work during her absence in the period between 9 March to 21 October 2021. As was pointed out in submission by the respondent, in the agenda lodged by the claimant (A42), it was advised by the claimant that the PCP applied related to redeployment or alternative roles being discussed with the claimant. The claimant associated that with the Policy of the respondent to consider redeployment in cases of sustained absence and particularly where consideration is to be given to termination of employment through incapability (A402 – 405).

20 97. The Occupational Health reports in this case identified that the claimant was unable to return to work in any capacity by reason of her shoulder injury. In

the report of 28 July 2021 (A74/75) the consultant states “ *I do not believe that (the claimant) is fit for any type of employment at the moment*”

5 98. The PCP relied upon by the claimant was redeployment. In terms of the statutory provision, she required to be substantially disadvantaged by that PCP in comparison with those who were not disabled. Her disability related to the cancer diagnosis, removal of that cancer and issues arising. The shoulder/neck injury was not part of her disability claim and had no connection with the cancer diagnosis removal of that and issues arising. It related to overstretching in the process of domestic cleaning. Therefore, the claimant did not rely on that injury as her disability. But the injury to the shoulder/neck was the reason why she could not make a return to work and not the claimed disability. In that respect, given that she did not claim the shoulder injury as a disability as defined, then she was being treated in the same way as non disabled individuals and there was no protection under this provision.

15 99. In any event, the redeployment provision would relate to those who are unable to conduct their previous role but could redeploy to a different role provided they got appropriate training and support. In this case, an incapability procedure was adopted in respect of the claimant having a shoulder/neck injury and the medical evidence was that injury did not allow her to return to work at all whether in her previous role or in any redeployed role. There was no adjustment around redeployment or alternative role which could be made. And neither did the claimant dispute that she was unfit to return to any role.

100. In those circumstances, this claim does not succeed.

Harassment

25 101. In terms of section 26 of EA harassment a person (A) harasses another (B):-
“if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of (i) violating B’s dignity; or (ii) creating an intimidating hostile degrading humiliating or offensive environment for B”.

102. For a harassment claim to succeed, the unwanted conduct must relate to a “*relevant protected characteristic*” which in this case is disability. There must be a causal connection between disability and the unwanted conduct.
103. In this case, the claimant states that there was harassment not because of any action by her team leader but because of the respondent’s policy under the Maximising Attendance procedures with particular reference to the provision regarding maintaining contact and attendance support meetings.
104. The complaint by the claimant is that in the period between 9 March 2021 and 21 October 2021 she was to maintain regular contact with her team leader and in that contact, there were constant reminders that unless she had a return to work date, then the respondent would require to consider termination of her employment by reason of incapability.
105. The maximising attendance procedure under “*maintaining contact*” (A398 – 399) advises that agreement should be reached in the best way for the employee to maintain regular contact and that the employee may phone their manager or agree to accept a call from their manager on a weekly basis.
106. That was the case here. The claimant phoned her manager each week to advise of her health condition. She would advise her team leader of the difficulties with her shoulder and any progress being made through physiotherapy but there was no improvement.
107. She also told the team leader of other issues that arose namely that she had menopausal symptoms of hot flushes; that a lump had been detected in her breast which concerned her and dizzy spells and lack of balance. However, that information was volunteered by the claimant in these weekly discussions and there was nothing done in respect of those matters which formed “*unwanted conduct*”. It would appear that the claimant freely shared that information with her team leader.
108. The position of the respondent was that contact was necessary because of continued absence which was caused by the shoulder injury and not because the cancer diagnosis and subsequent issues. Those were not the matters

which evidently meant the claimant was unfit to work. Accordingly, any unwanted conduct of the manager requiring regular contact or advising that continued absence from work may lead to an incapacity hearing and termination of employment was not related to the claim of disability and so this claim would not succeed.

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109. In any event, there was no conduct which was outwith the Policy. It did not appear that the claimant's concern was the need to phone her manager each Monday and advise of any improvement in her shoulder condition. What she did complain of was the fact that she was told that if she was unable to provide a return to work date, then the respondent may require to enter the incapability procedure. That was what she felt was like a "*gun to her head*" or "*intimidating*" or "*bullying*".

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110. However, it would not appear that these matters were expressed in anything other than neutral terms in the letters to the claimant. There was an obligation within the policy to maintain contact and for there to be "*attendance support meetings*" and also that actions were confirmed in writing. While the claimant may have perceived the issue of providing a return to work date when she could not do so as unwanted conduct which had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment, the Tribunal would not consider it reasonable that she took that view.

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111. Sustained absence was likely to lead to an incapability hearing and the respondent may have been criticised if no statement on eventual outcome during the absence was not stated. There was no complaint that Ms King was abusing the Policy. The engagement by Ms King appeared helpful in arranging the early physio treatment and thereafter sympathetic. The claimant appeared to recognise that her team leader was operating the respondent's policy.

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112. The claimant in her ET1 expressed on this aspect of matters that "*she could not deal with their constant threats of them sacking me on 3 months notice on grounds of capability*" but the Tribunal considered that was not a fair reflection of the correspondence or discussion with Ms King.

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113. For these reasons this claim does not succeed.

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J.Young

Employment Judge

19 January 2024

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Date

Date sent to parties

22 January 2024

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