



EMPLOYMENT TRIBUNALS

Claimant: Ms Pauline Ayadi

Respondent: South Gloucestershire Council

Heard at: Bristol

On: 27 and 28 November 2023

Before: Employment Judge C H O'Rourke
Dr J Miller
Mrs S Collins

Representation:

Claimant: Mr Rattner and Ms Asif – law student advisors

Respondent: Mr Leach - Counsel

REASONS

(Having been requested subject to Rule 62(3) of the Tribunal's Rules of Procedure 2013)

Background & issues

1. The Claimant was a member of the Respondent's support worker team which works with homeless persons and rough sleepers, to identify and where possible meet their needs, to include housing, access to benefits, etc. Following a period of sick leave for approximately 6 months, from December 2021 to June 2022, she was dismissed for sickness-related capability reasons, with effect 17th of June 2022. As a consequence, the Claimant brings claims of discrimination arising from disability and unfair dismissal. The Respondent concedes that the Claimant was disabled at all relevant times due to depressive episodes and anxiety and that they knew of that condition when making the decision to dismiss. The issues as set out in the Case Management Order and as agreed at the outset are as follows.
2. Discrimination arising from Disability. The following issues were identified:

- a. It is agreed that the Respondent treated the Claimant unfavourably by dismissing her.
- b. It is also agreed that the dismissal arose in consequence of her disability.
- c. However, the Respondent contends that the Claimant's dismissal was a proportionate means of achieving a legitimate aim. The aim being the effective and efficient management of the service, and that it was proportionate as, by the point of dismissing the Claimant, she had been on continuous sickness absence for 6 months, with no scope for redeployment and with no indication as to when, or if ever, she would be fit to return in any role.
- d. The Tribunal will decide in particular whether the treatment was an appropriate and reasonably necessary way to achieve those aims. We record at this point that the Claimant had never challenged the aim, either in her claim, or in the course of cross-examination, or in submissions, and we do not therefore consider that matter further.
- e. Finally, could something less discriminatory have been done instead? How should the needs of the Claimant and the Respondent be balanced?

3. Unfair Dismissal. The issues were as follows:

- a. There was no dispute as to the sickness absence being the genuine reason for dismissal.
- b. The Case Management Order set out the following considerations, upon which we comment as set out below.
 1. Did the Respondent genuinely believe that the Claimant was no longer capable of performing her duties? That was the conclusion of the occupational health report and the unchallenged conclusion of the Respondent.
 2. Did the Respondent adequately consult the Claimant? Again, there's no dispute as to the level of consultation. Indeed, the Claimant complained to some extent as to excessive contact from the Respondent.
 3. Did the Respondent carry out a reasonable investigation, including finding out about the up-to-date medical position? Clearly, yes, they did, basing their decision on the very recent second occupational health report.

4. The issue therefore remains as to whether dismissal was nonetheless within the range of reasonable responses of a reasonable employer.
5. Additionally, the Claimant also asserted unfair procedure, namely, as recorded in the Case Management Order '*claiming system procedures unfair because the Respondent sent her constant emails when she was off sick which caused her distress / exacerbated her illness.*' At this initial point, we find the following, however. There's no real evidence of her being 'bombardeed' (which is the word that was used) with emails. Although we accept, from the Claimant's perspective that any contact, even if minimal, may have been upsetting, conversely a failure by the Respondent to do so would have left them open to criticism. Secondly, we don't consider routine correspondence to constitute a failure in procedure: in fact, the opposite. 'Procedure' means following the ACAS Code, if appropriate, or an employer's own capability procedure. That would include setting out the case in writing, offering meetings and accompaniment at such meetings and providing an appeal procedure, which the Respondent did. Finally, on the procedural point, the Claimant's failure to wholeheartedly engage with the process, despite the range of options open to her, does not mean that the Respondent could in turn opt out of the proceedings, as, if it had, they would have been potentially liable from unfair dismissal. We understand the difficulties for the Claimant caused by her mental health, but an employer must at least attempt to follow the process. We don't therefore consider this issue further.
6. The only remaining issue in the unfair dismissal claim, therefore, is whether dismissal was within the range of responses open to a reasonable employer?

The Law

4. We refer ourselves to s.15 of the Equality Act 2010 and s.98 of the Employment Rights Act 1996.
5. Mr Leach referred us to a range of authorities as follows:
 - a. **O'Brien v Bolton St. Catherine's Academy [2017] EWCA Civ 145**, which, as recorded in the Case Management Order, said the following. The issue was whether an employee's dismissal following long term sickness absence was objectively justified under s.15. The claimant was employed by the academy as a

teacher and head of department. She was off work with a stress related illness for over 12 months. An employment tribunal found that the academy's aims were legitimate, but that dismissal was disproportionate, because the academy had adduced no satisfactory evidence about the adverse impact of the claimant's continuing absence. In the absence of such evidence, it should reasonably have waited a little longer to see when she would be able to return. The EAT allowed the employer's appeal, but the Court of Appeal held that it had been wrong to do so and restored the employment tribunal's decision. In its view, it was not unreasonable for a tribunal to expect some evidence of the severity of the impact on the employer of an employee's continuing absence, given that this is a significant element in determining the point at which dismissal becomes justified.

- b. The case of **Homer v Chief Constable of Yorkshire Police [2012] UKSC 15**. The guidance in this case is as referred to in our summary of the issues, in respect of the steps to be taken in considering proportionality.
- c. **Grey v The University of Portsmouth [2020] UKEAT0242/20** stated that the employment tribunal was required to demonstrate that it had carried out the necessary critical evaluation, in determining whether the Respondent had shown that the Claimant's dismissal was a proportionate means of achieving a legitimate aim. *'In such cases a critical evaluation is not merely required, it is also necessary that it be demonstrated in the tribunal's reasoning. That is not just a matter of form. It is this requirement that mitigates against the risk of superficiality and against the employment tribunals merely accepting the employer's stated reasons without proper scrutiny. The real issue in this appeal related to the employment tribunal's findings on the claim of dismissal and the decision to uphold the decision to dismiss, on appeal. The employment tribunal stated that it was obvious that continuing to hold the claimant's job open was significantly disruptive for the respondent, but it does not explain why it found that was so. The employment tribunal's findings of fact do not record that the claimant's job was being covered and whether his continued absence was in fact causing disruption to the respondent. No finding is made as to whether there was any additional cost to the respondent as a result. The claimant had ceased to receive any payment from October 2015, or whether there was any difficulty in covering his work.'*
- d. **Harding v Hanson PLC [2005] EWCA Civ 846**, which at paragraph 32 said: *'The purpose of the word 'reasonably' reflects*

the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible; the employer has to show that the proposal in this case for full time appointment is justified objectively, notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business, that it has to make his own judgement on a fair and detailed analysis of working practices and business considerations involved as to whether the proposal is reasonably necessary’.

- d. **City of York Council v Grosset [2018] EWCA Civ 1105** as to the difference between the test in respect of proportionality of conduct leading to discrimination arising and the test of the range of reasonable responses, in a claim of unfair dismissal. At paragraph 44, that judgement said that there is no inconsistency between the employment tribunal’s rejection of a claimant’s claim of unfair dismissal and upholding his claim under s.15 of the Equality Act in respect of his dismissal. This is because the test in relation to unfair dismissal proceeds by reference to whether dismissing was within the range of reasonable responses available to the employer, thereby allowing a significant latitude of judgement for the employer itself. By contrast, the test under s.15 of the Equality Act is an objective one, in respect which the employment tribunal must make its own assessment.

Facts

6. We heard evidence from the Claimant. On behalf of the Respondent, we heard evidence from Mr Chris Benson, the Respondent’s Home Choice service manager, who was the Claimant’s line manager and who took the decision to dismiss her; from Miss Fiona Parfitt, a more senior manager who advised Mr Benson and from Mr Keith Burchell, a Councillor who chaired the panel, hearing the Claimant’s appeal. The Claimant also provided a witness statement from a Miss Angelique da Silva, a psychodynamic counsellor, who provided weekly counselling services to the Claimant. However, Miss da Silva did not attend to give evidence and therefore we gave her statement only limited weight.

7. Chronology

1st December 2021 - the Claimant and Mr Benson discuss the Claimant’s mental health. While the Claimant asserted that she had discussed this at some earlier point with Mr Benson, there was no corroborative evidence of such and in any event, the start point of such discussions is not particularly relevant to our considerations. Mr Benson, in his statement and as reflected in his notes of the meeting, said the following ‘*My first*

one-to-one was scheduled in with PA on the 1st December 2021. On the morning of the 1st, PA contacted me to explain that she was struggling with her mental health. My notes of that conversation in the one-to-one meeting with her later that day state that PA explained that she suffers from Post Traumatic Stress Disorder. She is going through the menopause, and she suffers with SAD. She had been trying to deal with the situation on her own, but now needed further support. She explained that she was waiting for callback from her GP to discuss the best solution moving forward. PA went on to explain that she struggles to go out to somewhere she isn't familiar with. This heightens her stress, and she often starts to feel panicky. She could also feel anxious when she is in the office. During lockdown, working from home has been a safe haven for her. She had two visits to do the day before and almost rang in to say she wasn't coming in. She pushed herself to complete them. PA confirmed she has no further client appointments booked in. I also confirmed that PA did not have to work from the office on her next scheduled day and we agreed to review the situation when she had an opportunity to speak to a GP'.

6th December 2021 - the Claimant went on sick leave with depressive disorder, with a fit note dated to the 7th January 2022. She did not return to work thereafter. There are continuing fit notes from that point on until the Claimant's dismissal, six months later.

16th February 2022 - A first Occupational Health report is provided. In summary, it said the following: *'Miss Ayadi is unfit for work at this time. A return to work is likely in six to eight weeks'.* Under 'summary of recommendations on adjustments'. *'Therefore, when she returns to work as planned, I suggested a phased return over 4 weeks. When planning a return to work, I recommend that as well an action plan be completed with Miss Ayadi to provide a structure for conversations around what support would help her in the workplace. To sustain her in work it would help if she was able to do administrative tasks from home if this is practical and not in the office environment, which she finds triggers anxiety. Miss Ayadi is considering redeployment to a role that is less client facing and suggests that the implications for her employment and the options open be discussed with her'.*

Around this time there was an ongoing consultation as to the TUPE-ing in of the Claimant's role from the company with whom she was then employed to the Council, which procedure was completed on 1 April 2022.

23rd of March - Mr Benson, the Claimant and Miss Parfitt met to discuss the Claimant's absence, as summarised in a letter of the 29th of March. Miss Parfitt wrote: *'I confirmed that due to the length of absence and the fact that you were unable to return at this stage, that following your appointment with your GP, a further occupational health review would be*

necessary. I explained we were hoping to support you in return to work shortly, based on the OH report and through a phasing in plan, but as you do not know when you will be fit for return, we need further medical advice. We also have to consider the impact on service delivery and colleagues. And as you will transfer to South Gloucestershire conditions of service shortly, I explained the redeployment process'. She then gives further details of that process below.

16th May - a second occupational health report is provided. I summarise its conclusions as follows: 'Miss Ayadi is unfit for work at this time ... There are no adjustments that I can suggest that would facilitate a return to work in the short to medium term ... She is likely to remain unfit for work for at least the next three months ... Medical redeployment is not advised as she is unfit for any work at present. Job role: I note that her role cannot support her to work from home other than to complete some administration tasks related to the role. She tells me that she is aware that this is the case. The role includes a front facing drop-in service and outreach service for rough sleepers and ongoing housing related support, which includes face to face meetings either in the office or at a client's home. Miss Ayadi has shown no significant improvement. ... There were no adjustments I can recommend at the time to facilitate an earlier return to work. Miss Ayadi is seeking appropriate treatment but has not yet noticed an improvement. It is not likely that she would be able to return in the short to medium term, i.e. not within the next three months.'

27th May - The occupational health report triggers a further review by Mr Benson. He said in respect of that review: 'at this meeting, we discussed the occupational health report and in particular the response to management questions. PA confirmed she agreed with the OH report and that she remained unfit, and she also stated that she was unable to give an indication of when she would be fit to return. I explained the implications of her absence on service delivery and colleagues. I also confirmed, as she remained unfit to work, that a final review was being scheduled and that a decision would be made at the final review meeting regarding her employment'. He said in his notes: 'she has been up and down, but more down. So, Pauline explained that she has been feeling pretty much the same since we last spoke, but she has been up and down but more down recently'.

17th June - the final ill health meeting is held, at the conclusion of which the Claimant is dismissed. In that meeting reference is made to her continued absence and the impact on the Service and colleagues, and that continued employment was not sustainable for the Service and 'we cannot continue to cover this work. There is no capacity in the team or service'. Dismissal was confirmed by letter the same day.

27th June - the Claimant appealed the decision.

4th July - the Claimant entered ACAS Early Conciliation.

3rd October - the Claimant's appeal was heard. She did not attend, seeking to rely only on her written correspondence. The appeal was dismissed.

8. We turn therefore now to the claim of disability discrimination. As stated, the Respondent's aim is not in dispute. Accordingly, the only question for us is as to whether the decision to dismiss was proportionate. In doing so we balance the needs of the Claimant and the Respondent and the more severe the effect of the discrimination on the Claimant, the more cogent the Respondent's justification needs to be. Therefore, what was the effect on the Claimant of her dismissal? In our view we don't consider, based on the evidence, the effect to be so severe, for the following reasons:
 - a. The Claimant asserted that her medical condition worsened because of her dismissal. However, there was no persuasive medical evidence to that effect. There is only the comment by Miss da Silva in her statement that '*the repercussions of the lead up to her dismissal and the dismissal itself impeded the progress of our work*'. Even taken at face value, that is somewhat of a vague statement and of course Miss da Silva did not give evidence and nor were any notes from her counselling sessions provided. In contrast, the Claimant's GP wrote, in February 2023 that '*I can confirm that she is suffering from Post Traumatic stress disorder and has significant mental health difficulties which affects her ability to work*', without any reference to whether any such conditions pre-dated her dismissal or were due to or worsened by that dismissal.
 - c. Secondly, on her own evidence, the Claimant continues to be unfit for work, even to the present, almost a year and a half later. Accordingly, the dismissal could not be a major factor in that situation.
 - d. Thirdly, on her own evidence, had the Respondent permitted her to remain in employment for another two months, there would have been no adverse discriminatory effect on her, as she stated that she would have accepted the dismissal at that point and not alleged disability discrimination.
9. As to the allegations made by the Claimant, she said that the Respondent failed to carry out the recommendations of the first OH report, as to a return-to-work plan. We find that, in the context of there being an absence of certainty as to any return and in what form, there was no point in any such planning. And of course, she was not, in fact, able to return at any point. The possibility of working from home was also raised by Miss Asif,

but all the evidence indicated that the Claimant couldn't work at all and indeed complained of receiving communications from her employer. There was also an allegation as to a lack of empathy by the Respondent. We take Mr Leach's point on this issue, namely that by lack of empathy on the Respondent's part the Claimant meant not meeting her request for a two-month extension. That was a management decision the Respondent was entitled to make and there was no evidence from the correspondence, or from the evidence of Mr Benson of any particular lack of empathy.

10. We turn to the effect on the Respondent of the Claimant's continued absence. Mr Benson, in his statement, sets out what he considered the effects to be. *'During PA's absence the work of the support team was carried out by the remaining support workers. As previously mentioned, the team is made-up of 6 full-time equivalents. The allocation of work is carried out by senior officers within the team and a waiting list is held of service users who need support. When a support worker has capacity to take on someone new, the senior officer will allocate the case based on needs of the service user and oversee the situation. In order to remain effective, the number of service users allocated to each team member is generally kept to or around 25, depending on the complexity of the situation and level of interaction required for each person. This means that when there is reduced capacity within the team, the length of time that someone may have to wait for service will increase. We do not have comparative data available as to the evidence in the increase in waiting times in this period. However, we do know that we saw a 5% increase in presentations for housing advice and assistance in 22/23, when compared to 21/22 and a 30% increase in admissions to emergency accommodation during the same period. We've also seen an increase in the level of complexity on presenting issues for service users who require more intensive support to resolve their housing issues. From this information, it is reasonable to assume that the demand for floating support remained high during this period and one of the consequences of the reduced staffing capacity would have been an increase in the waiting time for support work to become available. This meant a delay for some people who were homeless or threatened with homelessness in receiving support to maintain their existing home or search for alternative housing. During this period, support workers also participated in a rota to support the council's housing advice drop-in service. If someone approached the service and it's clear that they would benefit from floating support, the duty support worker will be allocated on the day and will begin to work with the service users straight away. It was not possible to cover PA's absence on this part of the service so on days where PA was scheduled on the rota a duty support worker was not available to provide this immediate support'.*
11. The demand for floating support was also raised in the Housing Options assistance and Officers team meeting. In January 2022, notes of the

- meeting state that there *'was a long waiting list for floating support at the moment, but cases are being prioritised depending on urgency'*. Similarly, in April 2022, notes state *'we have a long waiting list for floating support, currently around 30 people. This was an issue because service users would contact their allocated Housing Options Assistant or Officer for help where they would otherwise have spoken to their support worker. The pressure of workloads was regularly discussed in team meetings during this period'*.
12. Mr Benson also said that *'when it became clear that PA would be unable to work for an extended period of time, I investigated the possibility of recruiting a temporary member of staff, but we did not have the budget available to continue to pay PA's salary and recruit another member of staff, so this is not possible. The average cost to the support team through an agency is £20-24 per hour, all based on current rates.'*
13. Findings. Our findings in respect of that evidence are as follows. The Claimant's absence out of a team of six reduced the team capacity by approximately 18%, a not-insignificant reduction, particularly if another member of the team at any point was off sick, on holiday, or on a course. It would seem entirely logical that staff absence would increase waiting times for often very vulnerable service users. In the absence of one team member, the other team members workload either increased by approximately 20%, or the waiting lists lengthened. While the Respondent was unable to provide data to that effect the conclusion is, as we said, logical, particularly when the undisputed evidence of Mr Benson was that the demand for the services, in one area at least, increased by 13%. The Team's rota was that each team member would, perhaps once a week, provide immediate or sometimes urgent support to service users on a drop-in basis, or perhaps respond to urgent referrals from another team. It was undisputed evidence that on days when the Claimant would otherwise have been doing this work, it was either not provided, with consequent effects for service users, or other team members were taken away from their routine case work. Also, Mr Benson referred to contemporaneous notes of team meetings to reflect this. The only challenges by the Claimant to this evidence was what she said in her statement *'there was never a kind gesture offered to me at all and Chris mentioned how meeting me out of work was causing disruption to the team. I spoke with a team member who called me a couple of times checking on me saying this was not the case. There was no disruption at all'*.
14. Our view on that evidence is that, firstly, it is silent as to the date and identity of the colleague. Secondly, there is no corroboration of any such discussions and finally even if they did take place as described it is highly unlikely that a supportive colleague is going to burden another very sick

colleague with responsibility for their increased workload. We don't therefore give this evidence any weight.

15. Mr Benson said that he considered recruiting a temporary member of staff to fill in during the Claimant's absence. It is undisputed evidence that an agency worker would have cost the Respondent £3790 approximately a month, based on the Respondent paying £25 per hour, for a full-time replacement, as opposed to the Claimant's basic pay per month of £1574. Also, Mr Benson has stated that to recruit a permanent replacement was a lengthy process. The actual replacement did not start until October and that therefore, in the context of the great uncertainty as to the Claimant's return, there was a degree of urgency in resolving the situation. The Claimant did challenge the asserted length of the recruitment process, but we could see that, in such a relatively sensitive post, dealing with vulnerable persons, more checks than average would be required, explaining the more prolonged process necessary. The overall context in this respect is that there was no indication, either at this point, or even at the point of the appeal that there was any possibility of the Claimant returning to work in the foreseeable future.
16. So, in balancing the discriminatory effects on the Claimant against the adverse effects on the Respondent we consider, for the above reasons that the balance falls in favour of the Respondent and that therefore dismissal was proportionate. There was no less discriminatory action that was possible. The Claimant couldn't return to work, in any capacity, either to her original job, or to another and could not work from home, and therefore the only option open to the Respondent was dismissal. Further delay would have made no difference.
17. Unfair Dismissal. Turning to the Claimant's claim of unfair dismissal, the only issue is as to whether or not dismissal was within the range of reasonable responses. In the context of us finding that it was proportionate to dismiss, despite the Claimant's disability, then applying the case of **City of York v Grosset**, the much less onerous test in cases of unfair dismissal is clearly met.

Judgment

18. Our judgement therefore is that the Claimant's claims of disability discrimination and unfair dismissal fail and are dismissed.

Employment Judge O'Rourke
Dated: 9 February 2024

Reasons sent to the Parties:
12 February 2024

FOR THE TRIBUNAL OFFICE