



# EMPLOYMENT TRIBUNALS

**Claimant:** Charmaine Angela Cunningham

**Respondent:** Asda Stores Ltd

**Heard at:** **On:** 12-13 March 2024

**Before:** Employment Judge Rakhim (sitting alone)

## Appearances

**For the claimant:** Represented by Mr J Cunningham

**For the respondent:** Represented by Ms R Levene (Counsel)

## JUDGMENT

The claimant's complaint for unfair dismissal is not well founded and is dismissed.

## REASONS

### Background

1. The Claimant was employed by the Respondent from 12 June 2015 to 10 March 2023 and at the time of her dismissal she was a Shop Floor Assistant. It is not in dispute that she was dismissed by the Respondent.
2. The Claimant started the ACAS early conciliation process on 1 April 2023 and the ACAS certificate was issued on 3 April 2023. The claim was presented, in time, on 28 April 2023.

### The Claim

3. The Claimant has claimed unfair dismissal pursuant to the Employment Right Act 1996, Section 98 ("ERA"). The Claimant was then dismissed on capability grounds as she had been on long term sickness absence since 19 May 2022. The Respondent disputes she was unfairly dismissed.

4. The Claimant's case is that she was not appropriately trained for the bakery section when she transferred to the Pontefract store in May 2022, she went on sickness absence and the lack of appropriate training was never resolved in the mediation process, grievance hearing and appeal hearing. She says she remained on sickness absence and then was unfairly dismissed by the Respondent.
5. The Respondent case is the Claimant was referred to Occupational Health on 25 May 2022, she was review on 21 June 2022 and then after several failed attempts the Claimant was again assessed on 2 November 2022, where reasonable adjustments were suggested. The Respondent also say that at the meeting on 29 November 2022 the Claimant expressed an unwillingness to return to work, a Capability Meeting was held on 20 January 2023 where it was determined that the Claimant was unable to move past the grievance and its appeal, the reasonable adjustments offered were not agreed by the Claimant, she had been absent for 8 months, there were no prospects of return to work and she was thus terminated on the grounds of an ill health. This decision was upheld at the Appeal Hearing of 10 March 2023.

### **Issues in dispute**

6. On 18 August 2023, when granting the parties further time to exchange statements, Employment Judge Lancaster reminded the parties to concentrate *"only on the issues as to whether the dismissal on grounds of capability (assuming that the Respondent can establish that as the reason) was, on the information reasonably known to the employer at the time, fair or unfair. Matters that do not relate to that capability dismissal, including any dispute with Mr Cunningham which may or may not involve the police, would appear to be wholly irrelevant"*.
7. At the outset of the hearing, I was assisted by the list of issues that had been drafted. The parties agreed these were the only issues in dispute for my consideration. These were as follows:

#### **a) Unfair Dismissal**

- i. Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(a) of the Employment Rights Act 1996 (ERA), namely capability?
- ii. Did the Respondent act reasonably in treating the Claimant's lack of capability as a sufficient reason for dismissing her?
- iii. Was the dismissal of the Claimant fair in all the circumstances? In particular, was the dismissal within the band of reasonable responses available to the Respondent?
- iv. Did the Respondent follow a fair procedure when dismissing the Claimant?
- v. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss?

#### **b) Remedy**

- i. What financial loss, if any, has the Claimant suffered as a result of any unfair dismissal?
- ii. If the Claimant has suffered financial loss, what financial compensation is appropriate in all of the circumstances? In assessing this: has the Claimant mitigated her loss? Should any compensation awarded be reduced on the grounds that the Claimant has failed to mitigate her losses and, if so, what reduction is appropriate?

8. It was agreed that the issue of liability will be dealt with first.

### **Preliminary issues**

9. The Claimant applied to rely on a covert recording of the grievance meeting. It was submitted that the recording supports there being no job for her, it evidences bullying and harassment by a colleague which had led to the depression, which had in turn led to the absence and capability proceedings. It was submitted that this was a 20 minute recording, of which 7 minutes are deemed to be relevant and show the Claimant's distress. It was submitted that this had been played to the Respondent in the grievance meeting but was considered to be irrelevant by the Respondent.
10. Ms Levene submitted the relevant grievance documents are not within the bundle, the Respondent is not equipped to deal with the grievance issue, the grievance had been finalised in November 2022, she understands the events upon transferring to the Pontefract store in May 2022 had led to the absence, but the recording from 18 May 2022 does not deal with the reasons for the dismissal, the grievance was a separate procedure and is not a relevant issue. She submitted the claim before me concerns the capability meeting in January 2023 due to the Claimant having been on sickness absence and the recording did not form part of the consideration by either the dismissing manager or the manager dealing with the appeal. She submitted the Tribunal is to decide whether a fair procedure had been followed in respect of the Capability Meeting and its subsequent Appeal Hearing. She submitted that the covert recording should only be permitted if it was relevant and that it did not go to the issues before the Tribunal.
11. I adjourned the matter to carefully consider the application and upon return I provided my decision to the parties. I refused the Claimant's application to rely on the covert recording. The recording must be relevant for it to be admitted into evidence, as otherwise there would be little merit in considering this additional evidence. The draft list of issues had already been agreed between the parties (see above) and I am tasked in dealing with the capability proceedings and whether the correct procedure had been followed for this. The parties had been reminded on 18 by Employment Judge Lancaster to focus on the issues in dispute.
12. In my judgment, the covert recording, and the matter that it relates to, does not form part of the issues that I have to decide. The Capability Meeting took place on 20 January 2023 and the Appeal Hearing on 10 March 2023. The managers involved in both meetings had attended this hearing to give evidence on them meetings. It was agreed between the parties that the recording related to the events in May 2022, which had been subject to the grievance hearing that had concluded in November 2022. Neither of the Respondent witnesses at this hearing had heard the recording and it did not relate to the issue to be considered with respect to the capability proceedings. I accept the Claimant is still upset at what happened in May 2022 and does not agree with the grievance outcome, but I must focus on the capability proceedings. Accordingly I refused permission for the covert recording to be admitted into evidence as I did not consider it to be relevant.

### **The hearing**

13. The hearing took place at Leeds Employment Tribunal with all parties attending in-person. The Claimant was represented by Mr J Cunningham, who was her husband. The Respondent was represented by Ms R Levene, counsel.

14. The bundles were provide on the morning of the first day. I was provided a 300 pp. Hearing Bundle ('HB1') containing the claim form, response form, grounds of resistance, policies, training and contractual documents, correspondence, occupational health related documents, notes of the meetings, pay documents and the schedule of loss. I was also provided a 31 pp. Supplementary Hearing Bundle ('HB2'), which contained the Claimant's disclosure. On the final day, the Respondent provided a 80 pp. Authorities Hearing Bundle ('HB3').
15. With respect to witness evidence, the Claimant relied on a 2 pp. email dated 5 September 2023 and Mr Cunningham also relied on a on a 2 pp. email dated 6 September 2023. Both of these emails were sent to the Respondent on 6 September 2023. The Claimant and Mr Cunningham adopted these emails as their witness evidence. The Respondent relied upon the 8 pp. witness statement the General Store Manager ('KB'), dated 31 August 2023, and the 12 pp. witness statement by the Senior Director for East Yorkshire Manager ('LG'), dated 4 September 2023.
16. The parties confirmed there were no additional documents. The parties agreed that they would refer me to the relevant documents that they wanted me to consider within the bundle.
17. All witnesses affirmed, adopted their statements and had no requirements for any adjustments. On the afternoon of the first day, I heard oral evidence from the Respondent first, namely KB followed by LG, and each was cross examined by Mr Cunningham. On the second day, I hear oral evidence from the Claimant, followed by Mr Cunningham, and each was cross examined by Ms Levene.
18. After the end of the evidence, the Respondent provided written submissions, which I read and I allowed the Claimant time to consider these. Upon resuming the hearing, I heard closing submissions from Ms Levene and then finally from Mr Cunningham.
19. At the end of the hearing, I reserved my determination as the submissions finished at the end of the second day of the two-day listed hearing.
20. Throughout the hearing, I allowed the Claimant and Mr Cunningham to liaise and consult with each other. I was mindful that Mr Cunningham was a lay representative. I also adopted a flexible approach in allowing both of them to participate in asking questions of the Respondent's witnesses and I allowed them both to provide the submissions at the end.
21. In reaching my decision, I have carefully considered the oral and documentary evidence, the closing submissions, and my record of proceedings. The fact that I have not referred to every document in the evidence bundle should not be taken to mean that I have not considered it.
22. Where it has been necessary to make a finding of fact in respect of contested matters, I have done so by deciding which version of events is more likely, taking the evidence in the round.

## **The Facts**

### *Background*

#### *Transfer to Pontefract*

23. The Claimant was employed by the Respondent from 12 June 2015 to 10 March 2023. She was employed as a Shop Floor Assistant in team Fresh at the Respondent's Beeston Store. It was not disputed that the Claimant had an impeccable record and there had been no prior issues of concern. On 20 March 2022 an altercation took place between the Claimant and another colleague and the Claimant reported this to the Beeston Store Manager ('JS') on 8 April 2022. The Claimant requested a transfer from the Beeston store to another store in her area as it would make it easier for travelling. The Beeston Store Manager informed her on 12 April 2022 that the Respondent's Pontefract Store was recruiting. On 13 April 2022 the Claimant formally requested the store transfer. She left the Beeston store on 20 April 2022.
24. The Claimant started at the Pontefract store. On or around 9 May 2022, the Pontefract Store Manager ('JA') asked the Claimant if she would like to be trained to work in the Bakery section. All team Fresh colleagues were trained in the Bakery section and the Claimant was noted to be enjoying her learning. The Claimant was paired with a Bakery colleague for on-the-job training on 12-13 May 2022 in the Bakery section and the Pontefract Store Manager considered this training was sufficient.
25. On 12 May 2022, the Claimant sent an email to the Beeston Store Manager requesting a transfer back to the Beeston store. Her reasons, amongst others, were that she did not believe there had actually been a vacancy in team Fresh at the Pontefract store and she was uncomfortable about the prospect of working alone in the Bakery that Saturday (14 May 2022).
26. On 13 May 2022, half-way through her second day of Bakery training, the Claimant notified the Pontefract Store Manager that she was feeling nervous about working alone in the Bakery the following day. The Pontefract Store Manager provided positive assurances to her and arranged for the Section lead to remain in the production area on 14 May 2022 in order to provide the Claimant with additional support.
27. The Claimant was scheduled to work in the Bakery on 19 May 2022, and on the day prior she asked to leave work early, but she was asked to work her full shift so she could receive further bakery training. However, on 19 May 2022 the Claimant commenced a period of sickness absence, noting "stress" as the reason for this.

#### *Grievance Process*

28. On 24 June 2022, as per the Grievance policy, mediation took place between the Claimant, the Beeston Store Manager and the Pontefract Store Manager. This was mediated by the Yorkshire Senior Manager ('AW') but a resolution could not be reached.
29. A formal investigation was then undertaken by the Wakefield Store Manager ('DH') and four of the nine grounds of the Claimant's grievance were upheld; the Claimant's original complaint following the incident on 8 April 2022 was not resolved by the leadership team in a timely manner and the transfer request could have been investigated in further detail, a formal induction did not take place following the transfer to the Pontefract store with no store tour provided, the training provided to the Claimant was deemed satisfactory but she could have been provided with more coaching to support her, and there had several pay issues throughout the Claimant's absence (albeit these were resolved, with no sums owed to the Claimant).
30. In his outcome letter, the mediator provided the Claimant with the following suggestions for how the matter could be resolved: return to the Beeston store after further mediation with the Beeston Store Manager to resolve the matters between them, return to the Pontefract store which was now under a new Pontefract Store Manager ('VW'), or return to work in an alternative store.

31. The Claimant appealed on 20 September 2022 and her grounds of appeal were that a colleague had not been interviewed as part of the investigation, the Claimant's husband had not been allowed to attend the hearing, the hearing notes were deemed inaccurate, the notes did not acknowledge the Claimant's covert recording of a section leader which had been played at the hearing, and that the note taker had also been asking questions.
32. An appeal hearing for the grievance was held on 17 October 2022 by the Central Yorkshire Senior Director ('TF') and he upheld the original grievance decision. TF had interviewed the colleague, it was not deemed to be a necessary reasonable adjustments to allow the Claimant's husband to attend, the Claimant had reviewed and signed the notes from the meeting to confirm their accuracy, the recording had been acknowledged in the adjournment notes previously but were not included in the investigation notes as there was no consent from the section leader and DH had stated that the recording did not impact on the outcome of the grievance, and the note taker had interjected on a few occasions for purposes of perspective or clarity.
33. The Claimant was notified of the outcome of her appeal on 4 November 2022. As part of the appeal outcome, TF confirmed that he had thoroughly investigated the Bakery training that the Claimant had received at the Pontefract Store. TF stated that there are 17 'training missions' to complete on Bakery but there is no hot plate in the Pontefract store and some of these missions are not applicable here, and as such, the 11 hours of training given to the Claimant was deemed to have been adequate for colleagues, especially given the simplification of the bakery process within the last 12-18 months.

*Health & Wellbeing/Capability Process*

34. The Claimant remained absent on sick leave and in May 2022 the Respondent referred the Claimant to Occupational Health (OH) in accordance with the Respondent's Sickness and Absence Policy. Numerous attempts for an OH assessment, as well as attempts at Health and Wellbeing meetings between August-October 2022 were made, but did not materialise as the Claimant informed she was not well enough to attend.
35. An OH assessment took place on 21 June 2022 and on 2 November 2022. In its later report, OH confirmed that the Claimant was *"unlikely to be fit for work until the alleged workplace stressors are resolved"* and that further OH intervention *"is unlikely to be helpful until any real or perceived employee workplace stressors or issues are addressed"*. OH suggested that a reasonable adjustment would be for the Claimant to return to Respondent store which does not impact on her mental wellbeing, such as an ASDA Living store. No other restrictions or adjustments were identified as being required, but the report commented that supportive management would be helpful.
36. A Health and Wellbeing meeting took place on 29 November 2022 to discuss reasonable adjustments to facilitate the Claimant's return to work. The Claimant attended with her husband, and the meeting was conducted by the new Pontefract Store Manager (VW). The Claimant states she could not return to either the Beeston or Pontefract stores. She also indicated concerns about working in at the ASDA Living store in Leeds due to a lack of familiarity and training. The Claimant said that *"everything about ASDA makes me feel ill"* and questioned how she was expected to return to work.

*The Capability Meeting*

37. The Claimant continued to remain absent from the business and a Capability Meeting took place on 20 January 2023. The Claimant attended with her husband and the meeting was conducted by the General Store Manager (KB).

38. KB noted the eight month absence and after considering representations determined that there had been no change in the Claimant's condition, the Claimant was unable to move forward from her grievance and appeal, and the Claimant was unable to agree to any of the reasonable adjustments offered by the Respondent. He concluded there was no prospect of a return to work and determined to terminate the Claimant's employment on the grounds of ill health.
39. This was confirmed in writing in the outcome letter dated 25 January 2023.

*The Appeal*

40. The Claimant appealed this termination decision by way of a letter dated 31 January 2023.
41. An appeal hearing took place on 10 March 2023 and was conducted by the Senior Director for East Yorkshire Manager (LG). After considering representations, the decision to terminate was upheld.
42. LG determined that the Claimant had not agreed to any of the reasonable adjustments proposed by the Respondent to facilitate a return to work and there had been no changes in the Claimant's health. She also concluded that the Claimant was unwilling to engage with the Respondent's attempts to resolve the workplace stressors or issues referred to within the OH report. She noted the Claimant's concerns on the grievance, but stated that the grievance process had been concluded with the appeal before TF. She also determined that the Respondent had followed the relevant procedures, the Claimant had admitted that her relationship with Respondent had broken and that she would not be returning to the Respondent.

**The Law**

43. Potentially fair reasons for dismissal are set out at section 98 of the Employments Rights Act 1996 as follows:

*"(1) in determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

*(a) the reason (or, if more than one, the principal reason) for the dismissal, and*

*(b) that it is either a reason falling within subsection (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.*

*(2) A reason falls within this subsection if it –*

*(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*

*...*

*(3) In subsection (2)(a) –*

*(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*

*...*

*(4) Where the employer has fulfilled the requirement of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and  
(b) shall be determined in accordance with equity and the substantial merits of the case."*

44. The employer is required to follow a fair procedure. In **East Lindsey District Council v Daubney [1977] ICR 566**, the EAT stated:

*"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."*

45. The employer must show it had a genuine belief that ill-health was the reason for dismissal, it had reasonable grounds for its belief, and it carried out a reasonable investigation; **DB Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09**.

46. In **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** the EAT held that the function of the Employment Tribunal was to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair.

47. In **McAdie v Royal Bank of Scotland [2007] EWCA Civ 806**, the Court of Appeal stated that an employer could fairly dismiss an employee for ill-health capability despite the fact that the employee's stress-related illness was attributed to the conduct of the employer. The key issue is whether the employer acted reasonably in all the circumstances, which include the fact that the employer was responsible for the ill-health.

## Conclusions

### *Potentially Fair Reason*

48. I find that the Respondent dismissed the Claimant for a potentially fair reason, namely, her capability. The Claimant has not asserted any alternative reason for her dismissal.
49. Whilst I note the Claimant's concerns about the grievance, I find that the only true reason for the dismissal was the capability. There was a wealth of evidence in support of this:
- a) The OH report of 21 June 2022 talked about the health issues and that the Claimant feels unable to return to work as a result.
  - b) The further OH report of 2 November 2022 talked about the ongoing health issues and the associated symptoms. It was noted that the Claimant was unable to go into any Respondent store and seeing the Respondent delivery van set off her symptoms.



- c) I had sight of the notes from the capability meeting of 20 January 2023 and I accept the focus of this meeting was very much on the Claimant's capability. This was also stated by KB in the hearing during cross examination. KB stated *"just to remind ourselves as to the purpose of why we are here it's first to review your absence since February"*. He was corrected by the Claimant that the absence was from 15 May 2022. KB then stated *"Ok the second is to review all the adjustments and have they been considered. Thirdly to consider options which may assist in your return to work and fourthly to make a decision regarding continued employment which may result unfortunately in your employment with Asda being ended. That summarises the purpose of this ill health capability meeting"*.
- d) The outcome letter dated 25 January 2023 shows that only capability was considered.
- e) I had sight of the Claimant's payslips between March 2022 and January 2023. I note she was paid sick pay for many months. The Claimant's payslip of 31 December 2022 showed sickness pay, but this does not appear on the payslip of January 2023, as the sick pay had now been depleted due to the long term sickness absence.
- f) The sick note for work-related stress, covering the period 12 February 2023 to 14 May 2023, supported the view that capability continued to be an ongoing issue post termination.

*Reasonableness of treating the capability as sufficient reason for dismissal*

- 50. It was common ground that the Claimant had been off work on sickness absence since 15 May 2022 and had never returned. In line with the Health and Wellbeing policy, the Claimant was referred to OH.
- 51. The 21 June 2022 concluded that the barrier to returning was the Claimant's perception of work-related issues rather than a medical condition or symptoms. It clearly stated at the end that *"no further OH review is required"*. Despite this, the Respondent continued trying to obtain further OH input. There had been a failed attempt to secure an OH report in September 2022. The Respondent then obtained a report in November 2022.
- 52. The 2 November 2022 OH report stated as follows:  
  
*"From my assessment, Charmaine is unlikely to be fit for work until the alleged workplace stressors are resolved. Please note, further OH intervention is unlikely to be helpful until any real or perceived employee workplace stressors or issues are addressed. Charmaine is likely to be able to complete all her duties she has been trained to complete or be given new training when she does return to work...No other restrictions or adjustments have been identified as being required...Once the workplace issues are addressed, I can see no reason why Charmaine cannot provide effective and sufficient service in the future."*
- 53. I find that the continued attempts to secure OH input was a genuine effort by the Respondent to support the Claimant and to try and understand her condition in order to facilitate a return to work.
- 54. I conclude that the Respondent had supported the Claimant and consulted with her as far as reasonably possible. The Claimant was invited in July and September 2022 to Health and Wellbeing meetings with the new Pontefract Store Manager (VW). Despite the efforts, the Claimant declined to attend.

55. A Health and Wellbeing meeting took place on 29 November 2022 to discuss the Claimant's health and reasonable adjustments to return to work. The Claimant became distressed and Mr Cunningham requested an end to the meeting. I accept the Claimant was unable to return to work for the Respondent. Within this meeting, she said "*I cannot come back to your store or to Beeston...everything about Asda makes me feel ill...*" The Respondent's note of the hearing stated that the Claimant will not be returning to work and that she still remained unhappy with the appeal outcome of the grievance. In the closing submissions, the Claimant stated she has realised that retail is not a place for her anymore and then Mr Cunningham stated that the relationship had broken down.
56. This meeting was summarised in the letter dated 9 December 2022 to the Claimant. This letter also addressed the alternative employment options that had been considered. The Claimant was not prepared to work in any Respondent supermarket store. The Respondent sought clarity if the Claimant was open to working at an Asda Living store, as suggested by OH. I find this is evidence of the Respondent exploring potential options. In response to this, Mr Cunningham emailed stating they saw no point in any future meeting that the Respondent may want and suggested the possibility of a settlement. In light of all the evidence to this point, I find it was a safe conclusion to reach that the Claimant would not be returning to work. I accept the Respondent had made reasonable efforts to explore alternate work, including at the Asda Living stores.
57. On 22 December 2022, the Respondent invited the Claimant to a meeting with an independent manager. By this time the Respondent had the updated OH report from November, had met the Claimant to discuss the situation and explored alternative employment options. I do not consider there was anything more that the Respondent could reasonably have done to assist the Claimant's return to work. This letter stated that, in line with the Health & Wellbeing Policy, an independent manager could invite the Claimant to an Ill Health Capability meeting to decide on the appropriate action.
58. KB sent the letter to the Claimant on 7 January 2023, inviting the Claimant to a meeting on 17 January 2023, and this stated that one possible outcome of that meeting could be the termination of the Claimant's employment.
59. At the Capability Meeting, the Claimant stated she could not return to a Respondent store. I do conclude that given the period of absence, the efforts made by the Respondent and the Claimant's expressed views, there was nothing that the Respondent could offer to facilitate the Claimant's return to work in the foreseeable future or at all.
60. I find that the KB, as the decision maker, held a genuine belief in the matters listed within the outcome letter. KB had regard to the 2 November 2022 OH report and its conclusions. In coming to a decision, he explicitly stated that he had considered:
- *"The length of your absence*
  - *Occupational Health's opinion regarding your absence, medical condition and likelihood of a return to work in the foreseeable future*
  - *Our offers of any alternative duties, vacancies, reasonable adjustments and why these were not able to be implemented including the workplace stressors, your inability to move forward following the grievance and appeal process and for us to work together to facilitate a return to work*
  - *The impact of the continued absence on the business"*
61. The outcome letter reflects that capability was the genuine reason and that a thorough and considerate process had taken place before KB made the decision to terminate the

Claimant's employment. I find the Respondent had acted reasonably in concluding the capability as a sufficient reason for dismissal.

*Procedurally fair disciplinary process*

62. The process followed by the Respondent was fair. The Claimant had been kept informed throughout. She was invited to a meeting where she was able to engage.
63. The Claimant was provided with sufficient notice of both hearings and had elected to change the dates on the first meeting. In the 7 January 2023 invite to the Capability Meeting, reasonable adjustments were offered including offering to have the meeting at Asda Living in Leeds or at a hotel in Pontefract. On 10 January 2023 Mr Cunningham emailed requesting a change of date and the Respondent duly rearranged the meeting to 20 January 2023. I note the locations on offer were not the Respondent's supermarkets, they were not sites the Claimant had worked at, and they included a location that was not linked to the Respondent, namely an independent hotel.
64. The Claimant is not required to allow Mr Cunningham to attend but had facilitated this at both the Capability Meeting of 20 January 2023 with KB, and the Appeal Hearing on 10 March 2023 with LG. The Claimant accepted in cross examination that the Respondent had gone 'above and beyond' in allowing her husband to attend.
65. At the Capability Meeting, the Claimant had highlighted that she would like her supporting advocate to attend, and in the letter of 19 February 2023 inviting her to an Appeal Hearing the Respondent sought further details to consider this request. There was no attendance at the Appeal Hearing by the advocate. At the hearing, the Claimant stated the advocate did not attend because he could not make the appointment that day. However, she had never previously mentioned this so had never given the Respondent an opportunity to make any further adjustments for her. Accordingly the Respondent's conduct cannot be criticised.
66. Both hearings were undertaken by different independent managers. Neither had been involved with the Claimant prior to this.
67. The Ill Health Capability meeting was from 12:07 to 13:55, thus lasting almost two hours. In Cross examination, KB stated that he was aware of the Health & Wellbeing policy and had followed this. At the Capability Meeting, Mr Cunningham praised KB for the manner in which the meeting was conducted and repeatedly said KB was a credit to himself and to the Respondent. Each handwritten page of the Capability Meeting was signed by the Claimant indicating the record was accurate.
68. The Appeal hearing was from 10:01 to 14:00, thus approximately four hours. This is indicative of care being taken and the Appeal Hearing not being rushed. I accept LG had approached the matter with an open mind, which is reflected in the Appeal Hearing notes, outcome letter, LG's witness statement and her oral evidence. I considered she had given careful consideration to each ground of appeal raised and her outcome letter was detailed. In oral evidence, the Claimant stated that LG had offered the Claimant any job she wants and that she would be trained up for that. However, the Claimant stated that the trust was no longer there. I considered this offer by LG as indicative of exploring every possible option to facilitate a return to work.
69. I find the Claimant had a fair hearing in relation to both the Capability Meeting and the Appeal Hearing.

*Range of Reasonable Responses*

70. The dismissal was within the band of reasonable responses available to the Respondent. The Respondent's Health & Safety policy (last updated August 2021) stated as follows:

*"If there's no prospect of improvement or return to work in the foreseeable future. [sic] The colleague should be made aware that due to their continued absence from work and/or the continued impact on their ability to carry out their role, options will now need to be explored in relation to the colleague's employment... The Independent Manager should invite the colleague to an Ill Health Capability meeting where a decision will be made to determine the appropriate action, including about their continued employment."*

71. It was reasonable to conclude that the Claimant would not be returning to work. She had stated in meetings that she could not return to the Respondent stores. The OH reports stated that the Claimant could not return until the stressors were resolved, but the Claimant was unable to move past the grievance process. The stressors appeared linked to the grievance, that grievance process had been concluded in November 2022 and the appeal had also been completed. The Respondent was entitled to conclude that there was no realistic prospect of improvement of the stressors.
72. I do not consider the Respondent had rushed any of the approach. The Health & Wellbeing policy, in reference to the termination of employment on the grounds of ill health, stated that *"This decision would usually be made at six months"*. The Claimant's termination was confirmed in the letter dated 25 January 2023, which was over eight months after the sickness absence started.
73. The outcome letter states that the Claimant had attended the capability meeting with a pre-prepared resignation letter. On balance, I do not consider this indicated she had no intention of returning to work. I accept the Claimant's oral evidence that she used this letter to try and force the Respondent to disclose training records. There was no dispute that the Claimant had offered her resignation on the proviso that the training documents could be provided and when KB stated he did not have the training documents then Mr Cunningham tore up the resignation letter. It was clear that the Claimant had sought a copy of these training documents for many months and had gone through a grievance process related to the training. Given the Respondent had been unable to produce the documents at any early stage, it is likely that the training documents do not exist. In cross examination, KB confirmed that it was his understanding that the training documents did not exist.
74. That does not mean that they did not exist at some point or that the training was inadequate; in the mediation that took place on 24 June 2022, AW had concluded the training provided to the Claimant was deemed satisfactory. At the grievance appeal hearing of 4 November 2022, TF had concluded that training given to the Claimant was deemed to have been adequate for colleagues. As indicated earlier, I am not tasked with resolving the grievance process and its outcome, thus I do not consider this issue further. Whether the Claimant had been appropriately trained when at Pontefract in May 2022 was irrelevant to the fairness of the dismissal.
75. Irrespective of the resignation letter, there was a lot of other factors that pointed towards it being unlikely that the Claimant would return to work for the Respondent (see above). There was also the consistent medical evidence that indicated a return to work was not going to be likely.

76. It appeared to have been a broken relationship as far as the Claimant was concerned and she was unable to move past the grievance process. I have had regard to the long period of sickness absence, the OH reports, the various meetings, the exploration of alternate locations, the continued engagement by the Respondent and the Claimant's responses. In light of all of this, I considered that KB was entitled to conclude that dismissal was appropriate. In cross examination, KB stated that the termination did not have to be a measure of last resort and that termination was simply one of the options available for his consideration.
77. There was nothing to indicate that the Claimant would have ever returned. In oral evidence she stated that the matter was still not resolved in her head and she questioned how she could be expected to return. Ms Levene had put to the Claimant that the Claimant had said she cannot move forward, and that this is a clear statement that the Claimant would not return to work no matter what the Respondent did; the Claimant responded to confirm that is correct. Her ongoing sick note post termination is further support that the Claimant would not have returned to work.
78. The Claimant accepted in cross examination that there was no foreseeable return to work, that she was unable to move forward and no matter what she would not return. In re-examination, she stated that she would never work for the Respondent again or work in retail again. I find that this was due to the relationship having broken down with the Respondent. I accept that the offer to settle proposed by Mr Cunningham was his desire to bring the matter to an end due to the effect that this dispute continues to have on the Claimant. I did not accept that this reflected on the Claimant's credibility as it was her husband who had brought it up. I accept the Claimant seeks an apology and for her grievance to be resolved, albeit that process has long concluded in November 2022.
79. The written policy was clear that dismissal was an option that was open to KB. In light of the above, I accept the Respondent acted reasonably. It was reasonably open KB to conclude that the employment should be terminated. As it was clear that the Claimant would not return to work (and the medical evidence supported this), then in reality there was no alternative to dismissal.
80. I find the Respondent's decision to dismiss the Claimant is within the band of reasonable responses.
81. For the above reasons, the Claimant's complaint for unfair dismissal is not well founded and is dismissed.

---

Employment Judge Rakhim

(signed electronically)

19 April 2024

Sent to the parties on:

29 April 2024

For the Tribunal Office: