



EMPLOYMENT TRIBUNALS

Claimant: M A
Respondent: Secretary of State for Justice
Heard at: Reading **On: 13 and 14 March 2024**
Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: In person
For the Respondent: Mrs Jane Gray, counsel

JUDGMENT

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

REASONS

1. In a claim form presented on the 6 April 2022 the claimant made a complaint of unfair dismissal the respondent denied the claimant's complaint and contended that the claimant was dismissed fairly on the grounds of capability.
2. The claimant gave evidence in support of her own case and they respondent relied on the evidence of Mr David Redhouse. Both witnesses provided written statements which were taken as their evidence in chief I was also provided with a trial bundle of 243 pages of documents running.
3. The issues that I have to decide in this case were set out in a record of preliminary hearing case summary made on 24 March 2023. That document makes clear that the only claim the claimant is bringing is a claim for unfair dismissal. The evidence of the parties has been prepared to present a case about unfair dismissal.
4. The claimant's evidence has not addressed the issue of disability. That is not an issue before me. The claimant is a person who has no experience of Employment Tribunal procedure or particular knowledge of employment law.

5. At what is known as the initial consideration under rule 26 of the Employment Tribunal Rules of Procedure, that is after the respondent has put in a response to the claim, an employment judge will consider the ET1 claim form and the ET3 response form, following which they may give the directions that the judge considers appropriate for the resolution of the case. Coincidentally I saw this case at the rule 26 stage and considered that although only the unfair dismissal box in section 8 of the claim form was ticked, the claim form also potentially included what was intended by the claimant to be a complaint about sex discrimination or sex harassment.
6. At the preliminary hearing that I directed to take place the claimant appeared before an employment judge where she confirmed that her case was solely about unfair dismissal and the judge gave appropriate directions in preparation for the hearing and included an agreed list of issues to be decided at the hearing. The parties were required to exchange witness statements and on 8 August 2023 the claimant signed her witness statement which was exchanged with the respondent, the respondent provided the claimant with a witness statement of David Redhouse dated 3 August 2023.
7. The claimant's witness statement sets out the claimant's case. The claimant blames the respondent for her illness which in turn led to her dismissal. She does not set out in the statement any particular complaints about the procedure followed by the respondent. It also appears to me that while the claimant does not suggest she was a disabled person within the meaning of section 6 Equality Act 2010 that she possibly was disabled at the point of her dismissal. The totality of the evidence before me suggested that the claimant may well have been within the definition of a disabled person. The occupational health reports before me set out the occupational health physician's opinion that the claimant was a disabled person at the point of her dismissal.
8. The claimant has not complained about disability in these proceedings. Disability is not an issue that either party has addressed. The employment tribunal considers cases on an adversarial basis, that is the claimant presents the case that the respondent has to meet. It is for the tribunal to decide the case that has been presented by the parties not the case which the tribunal considers to be a more suitable or appropriate case to the facts.
9. The case presented to me by the claimant was potentially one where an argument that the claimant suffered discrimination on the basis of disability, either discrimination arising from something inconsequence of disability or a failure to make reasonable adjustments, might have been made. Such a claim might have been arguable but was not the case that the Ministry of Justice have to answer, that was not the case before me. It has never been argued by the claimant, the respondent has not prepared to meet such a case, no application to amend the claim to advance such a case has been made. The case before me is as set out in the list of issues.
10. I made the following findings of fact.

11. The claimant's employment with the respondent commenced on the 17th July 2017 in the catering department as a catering assistant at HMP Huntercombe. The claimant joined the team which consisted of 2 supervisors, JH and JB, and also a manager DE.
12. The claimant experienced behaviour from JH that she found to be uncomfortable, inappropriate and sexual harassment. The behaviour grew worse as time went on with the claimant being subjected, daily, to unwanted physical and verbal attention from JH. This behaviour towards the claimant was noted by colleagues including the manager DE who had to tell JH to stop his behaviour on occasions.
13. The claimant speaks of continual verbal sexual harassment from JH which would include him making comments about the claimant's body and appearance. Throughout the summer of 2017 and into 2018 the claimant reported the sexual harassment by JH to her line manager. The line manager was dismissive of her claims saying things like "*that's just how JH is*" and did nothing to support her other than say that he would "*have a word with JH*". There are no notes of meetings made of any of the claimant's complaints by the manager DE. There was a complete failure to deal with these incidents of sexual harassment that the claimant was experiencing. The claimant suffered bullying and sexual harassment for two years culminating in a sexual assault upon her by JH.
14. Sexual assault took place on the 17 May 2019. In July 2021 JH was found guilty of sexual assault at the Crown Court. The ongoing sexual harassment from JH caused the claimant to suffer periods of poor health which resulted in her taking time off work for a variety of ailments.
15. The claimant found the year leading up to the Criminal Court difficult and she continued to suffer with mental health issues of anxiety depression and stress.
16. In about March 2020 the claimant was promoted to the role of Band 4 Specialist Production Instructor. In her new department the claimant complains that she was singled out by NG, who was a supporter of JH, and continued to suffer harassment. As the means of managing her levels of stress and anxiety, the claimant reduced her hours of work to part time working hours in early 2021. The purpose of doing that was to reduce the number of hours she spent in the working environment.
17. At the time that the claimant made her witness statement, 8 August 2023, the claimant continued to suffer with anxiety and depression, and other physical ailments. She was prescribed various medications by her GP. At the time that the claimant made her witness statement the claimant had still not been able to return to work since prior to her dismissal due to her mental health, with her condition at that time being seen as anxiety, depression and PTSD.
18. On 3 July 2019 David Redhouse received a report about the behaviour of

JH towards claimant this included an allegation that JH had touched the claimant in a sexually inappropriate way and had made inappropriate comments to her. Given the nature of the allegations made against JH David Redhouse took steps so that an investigation was carried out and JH was suspended.

19. A senior manager independent of HMP Huntercombe was appointed to conduct the investigation into the allegations against JH. The claimant was interviewed during the investigation process. An investigation report was produced on 16 August 2019. The investigation report made several recommendations including that the allegations against JH be tested at a formal disciplinary hearing.
20. David Redhouse can carried out the disciplinary hearing relating to JH. David Redhouse concluded that the appropriate sanction was JH's summary dismissal. The dismissal was confirmed in a letter on 18 September 2019. The claimant was informed shortly afterwards of this action.
21. David Redhouse points out that the claimant had not taken any sickness absence related to the incident with JH, the claimant was attending work throughout the investigation period. David Redhouse was aware that the claimant was receiving counselling around this time some support from the care team within HMP Huntercombe. David Redhouse was also aware that at this time the police case was ongoing and the process of JH's prosecution was causing the claimant "*a lot of stress*". David Redhouse states that

“although I knew the process of JHS prosecution was ongoing, I was not aware that Michelle was having any issues within the workplace. She did not raise any formal complaints about ‘ongoing harassment’ as now alleged in these proceedings until she raised two specific incidents with me on 23rd September 2021...”

What the claimant says about matters is as follows

“I feel that the whole situation in the kitchens was mismanaged by the management of HMP Huntercombe right from the beginning of my employment and failed to support me properly to avoid the sexual assault from occurring in the first place. I feel that had the situation being managed properly at that time then I would still be employed at HMP Huntercombe and would never have been left in a position to be sexually assaulted by a colleague... It is unfair that I have had a job that I loved taken away from me and destroyed my career opportunities in the Prison Service in the future. As a woman I should not have had to be exposed to such behaviour in the workplace.”

22. The circumstances leading to the claimant's dismissal are explained by David Redhouse. David Redhouse points out that in 2018 the claimant had taken a total of 22 days sick leave across 2 periods. The claimant took 36 days of sick leave starting on the 26 August 2019. The claimant had a period of leave due to COVID in May 2020. Between 15 October and 5 November 2020, the claimant was absent due to sick leave for 22 days. In

respect of these periods there are various causes for the claimant's absence, these included respiratory illness, back pain and digestive illnesses.

23. On 28 October 2020 the claimant was referred to the respondent's employee assistance programme. The referral stated that the claimant *"is also struggling mental health wise with a work related issue with a colleague last year which has not been completely resolved although the colleague was dismissed Michelle has spoken to Victim Support but she's very emotional and needs further support"*. The 'unresolved issue' referred to was the ongoing criminal case of JH.
24. An occupational health report dated 13 November 2020 stated that the claimant had back pain which was affecting her ability to carry out her duties. The report also stated that the sexual assault *"is causing her stress"* and suggests this was because the case was progressing through the Crown Court. It was stated that the claimant had reported *"the stress can affect her ability to carry out her duties"* it was recommended that the claimant contact her GP if her stress symptoms deteriorated.
25. Between the 23 November and 6 December 2020, the claimant was absent from work due to COVID.
26. On the 12 May 2021 the claimant was very upset at work due to the requirement for her to attend court. The claimant called in sick and said that she was nervous and stressed about the upcoming trial. The claimant said that she *"feels unable to cope with work while preparing for the court case"*. The claimant did not return to work after this point.
27. A further occupational health referral was made for the claimant on 18 June 2021. A report dated 27 July 2021 was produced. The report stated that the claimant was seeking advice from her GP and that the claimant was displaying symptoms of severe depression and anxiety. The occupational health practitioner anticipated *"a potential return to work at some point after 4 weeks"*.
28. On 21 July 2021 the claimant met with a manager for an informal attendance review meeting during which the claimant stated that she didn't feel ready to return to work due to feeling anxious. The claimant was offered a return to work on restricted duties, but she declined.
29. A further occupational health report was prepared on 23 August 2021, the report stated that the occupational health practitioner was *"unable to say how soon [the claimant] will return to work"*.
30. A stress risk management assessment was carried out on the recommendation of occupational health on the 24 August 2021.
31. A further occupational health report was produced on 15 September 2021. The report stated that the claimant *"is not fit to return to work at present"*

and that there are no adjustments I can suggest facilitating this". The report also stated "I cannot advise if and when she may be able to return to work... it seems unlikely that she will return to work within the prison service in the foreseeable future."

32. The claimant had now been absent for over three months David Redhouse decided that it was time to consider whether the claimant's absence could continue to be supported in accordance with the respondent's policy. A formal absence review meeting (FARM) with the claimant was arranged for 23 September 2023. The purpose of the meeting was to discuss the claimant's absence and consider whether the claimant could be supported to return to work in the near future. The claimant attended the meeting on 23 September and during that meeting she raised allegations against several members of staff about two specific incidents. David
33. Redhouse informed the claimant that the allegations needed to be investigated.
34. The claimant told David Redhouse that she didn't know if she can "*ever work again*" and that "*she can't even think about it*". The claimant was very upset and tearful during the FARM. David Redhouse suggested that ill health retirement was an option that could be looked at for the claimant. The claimant was undergoing a course of EMDR treatment and David Redhouse suggested that course of treatment was completed before a further FARM was held in two months. The purpose was to give the claimant more time to undergo treatment before an assessment was made as to whether it was likely that the claimant would be able to return to work within a reasonable timeframe.
35. A further referral to occupational health was made for the claimant and a report produced on 3 November 2021. The report stated that the claimant was not fit to return to any work, that she's not considering a return to her work and that there is little to indicate that this might change in the foreseeable future. There was a recommendation that her case is referred to the pension provider to consider an option about medical retirement.
36. On 23 November 2021 a second FARM took place. During this meeting the claimant confirmed that she couldn't return to work at all. David Redhouse formed the view that the claimant wasn't capable of continuing to fulfil her role. During the course of the meeting, in the course of discussions, the claimant offered to resign. For reasons to do with her eligibility for compensation David Redhouse explained that she should not do so as she would be ineligible for compensation under the Civil Service Compensation Scheme if she did. During this meeting, it David Redhouse understood that the claimant had made an application for ill health retirement. However, having heard evidence from the parties it is not clear whether in fact the claimant ever did or did not make an application for ill health retirement.
37. During the meeting the claimant was asked if there was any job within the

prison that she would like to do. David Redhouse explained that he did not mention any specific position but merely asked the claimant whether she would consider working in a different part of the respondent prison. It is agreed between the parties that the claimant said, "definitely not".

38. David Redhouse concluded that it was reasonable to dismiss the claimant because occupational health practitioner and the claimant agreed that she would likely never returned to work in the prison service, the opportunity of a move to a different role had been offered and declined by the claimant, and in his view the claimant met the criteria under the policy for dismissal.
39. David Redhouse considered whether the fact that the claimant's absence arose because of the assault by JH should influence the outcome. David Redhouse's view was that the claimant had already remained employed for longer than she would otherwise would have been, once it became clear that she was unlikely to return to work within a reasonable. David Redhouse did not consider that it was reasonable even in circumstances where there were new harassment allegations still being investigated, for the claimant's sickness absence to continue to be supported when occupational health, and the claimant herself, were saying that she would never be returning to work.
40. David Redhouse also took into account the fact that the claimant had offered to resign and considered that this meant that the claimant didn't want to remain employed by the respondent. David Redhouse's understanding was that dismissal of the claimant would not have any impact on any application for ill health retirement that the claimant may have made.
41. David Redhouse states that he did consider whether an outcome short of dismissal was appropriate including a potential re grade or alternative post but because the claimant had refused to consider alternative employment he didn't consider that this would facilitate the claimant's return to work either in the short or the long term.
42. It was pointed out by the respondent that its policy was to verify return to work is not likely within a reasonable timescale and that the absence cannot continue to be supported, a decision then needs to be made whether to refer the individual for ill health retirement, or whether downgrade/regrade or dismissal is appropriate. David Redhouse considered that the claimant fitted these criteria and therefore was eligible for dismissal under the policy.
43. An employee has the right not to be unfairly dismissed (section 94 Employment Rights Act 1996 ERA).
44. Capability is a potentially fair reason for dismissal under section 98(2) ERA. Where there is a potentially fair reason for dismissal, section 98(4) ERA provides that 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.

45. Where there is long term sickness absence the first critical question is whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing the employee. Secondly there is a need to consult the employee and take their views into account. If the employee states that they are anxious to return to work as soon as they can and hope that they will be able to do so in the near future that is a reason not to dismiss, however if the employee states that they are no better and do not know when they can return to work that's a significant factor operating against them. Thirdly, there is a need to take steps to discover the employee's medical condition and their likely prognosis.
46. How the claimant sustained her injury which resulted in her inability to work is a relevant consideration. If the employer was responsible this may mean that the employer should take greater steps to avoid dismissal than would otherwise be the case, for example by finding alternative employment for the employee or putting up with a longer period of illness than would otherwise be reasonable.
47. Whether the employer failed comply with its obligations to make reasonable adjustments that might have resulted in the injury being avoided is a relevant consideration.
48. The wishes and views of the employee are a material consideration.
49. The tribunal must not substitute its views about the employee's capacity for that of the employer. When an employee is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent.
50. The function of the tribunal is to decide whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.
51. I have concluded that the dismissal in this case was not unfair.
52. The claimant at the time of the first and second FARM was clear that she couldn't return to work and that she didn't have an anticipated date to return.
53. At the second FARM the claimant offered to resign. It is in dispute between the claimant and the respondent how this came about but in my view that doesn't make a lot of difference what the claimant was saying

clearly to David Redhouse was that she didn't want to return to work for the respondent.

54. I accept that the claimant was confused about the process- either specifically about compensation or generally about the FARM process as a whole- but in my view this makes no difference. What is important is what the claimant said and what was said to her and what it was reasonable for David Redhouse to conclude on the basis of the information before him at the time of making the decision of dismissal.
55. The claimant knew what she thought she wanted at the time. That was not to return to work. The claimant now says that it was due to trauma that she said this. I accept that is true it seems to me obvious that someone who has been through what the claimant went through is likely to say what she did.
56. What a reasonable employer would do, in my view, is not to attach undue significance to an offer to resign made in circumstances such as those in which the claimant made her offer to resign but to consider, having regard to all the circumstances, whether dismissal was appropriate. I am satisfied that David Redhouse did not attach undue weight or significance to what the claimant said but I recognise that he did attach significance to it and did take it into account when making his decision to dismiss.
57. David Redhouse had the occupational health report and the claimant's comments which aligned about the claimant's inability to return to work. It was not unreasonable for David Redhouse to have regard to what the claimant herself was saying at the time.
58. I am satisfied that David Redhouse had independently formed the view that the claimant had no prospect of coming back to work and that he told her that was his view. It is likely that at that point the claimant made the offer to resign. I take into account that the claimant had been consulted about alternative roles although no specific role was mentioned. The claimant made it clear that she wasn't ready to return to work in any capacity at that time. While the claimant did not specifically say that "I will never be able to work for the respondent ever again", however, the claimant was not suggesting that there was a prospect of returning to work in the near future, her statement at the time was clear that she "*couldn't come back*".
59. David Redhouse took into account that the claimant had been absent to five months, this was longer than would otherwise have been tolerated by the respondent. At the point of the decision to dismiss there was no foreseeable prospect of the claimant returning to work. There were no adjustments suggested there was no alternative role that the claimant was willing to consider.
60. While David Redhouse might have waited longer the fact that he did not in all the circumstances was not unreasonable and was within the range of

responses of a reasonable employer. David Redhouse was entitled to take into account that the real-world consequences of the claimant's absence for the respondent were that it presented genuine operational difficulties for the prison.

61. In all the circumstances the claimant's dismissal was not unfair.

Employment Judge Gumbiti-Zimuto

Date: 9 April 2024

Sent to the parties on: 14/05/2024

For the Tribunals Office

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