



EMPLOYMENT TRIBUNALS

Claimant

Mrs N Rice

Heard at: Leeds

Before: Employment Judge James
Mr K Smith
Ms H Brown

Respondent

v Calderdale and Huddersfield NHS Trust

On: 17 to 21 incl., 24 and 25 June 2024

Representation

For the Claimant: In person, supported by her husband Mr I L Rice

For the Respondent: Mr C Breen, counsel

JUDGMENT

- (1) The claim for constructive unfair dismissal (s.94 Employment Rights Act 1996) is not upheld and is dismissed.
- (2) The claims for whistle-blowing detriments (s.47B Employment Rights Act 1996) are not upheld and are dismissed.
- (3) The claims for disability discrimination (ss15, 20 and 21 Equality Act 2010) are not upheld and are dismissed.
- (4) The claim for holiday pay (s.13 Employment Rights Act 1996) is not upheld and is dismissed.
- (5) The claim for wrongful dismissal (notice pay) has been withdrawn and is dismissed.

Employment Judge James

Employment Judge James
North East Region

Dated 25 June 2024

Sent to the parties on:

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For the Tribunals Office

Notes

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

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Recording and Transcription

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<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

Annex A – Agreed List of Issues

The claimant is making the following complaints:

- (1) Unfair dismissal (constructive);
- (2) Failure to make reasonable adjustments;
- (3) Discrimination arising from disability;
- (4) Public interest disclosure (detriment);
- (5) Unlawful deductions (holiday pay)

The issues the Tribunal will decide in relation to those complaints are set out below.

1. Time limits

1.1 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Unfair dismissal

2.1 Was the claimant dismissed? In particular, did the respondent do the following things:

2.1.1 On 7 September 2021 Karen Lord disclosed the claimant's cancer diagnosis to employees at another site without the claimant's permission.

2.1.2 In February 2022 Karen Lord pressured the claimant to return to work before her fit note expired and without a risk assessment or ongoing support from Karen Lord or Sarah Wallwork.

2.1.3 On 17 May 2022, Karen Lord wrongly accessed the claimant's medical records. Karen Lord was critical of the claimant's GP and made the following comments "I don't know why there doing that, you need to stop all this you'll end up killing yourself",... "NO I'm not joking you will end up killing yourself if you don't stop think you have cancer again".

2.1.4 From 15 August 2022 the claimant's work was monitored by Karen Lord (whether through other people or directly), and the adjustments agreed in the meeting with Sarah Wallwork and Donne Watson in July

2022 were not implemented. The claimant says it was Karen Lord's responsibility to implement the adjustments.

2.1.5 Throughout September 2022, Karen Lord influenced the claimant's colleagues' behaviour towards her by spreading rumours about the claimant and making negative implications about the claimant. The claimant will provide more detail about this in her witness statement.

2.1.6 On 14 September 2022 Karen Lord sent other members of staff to observe the claimant in the stable macular clinic in the guise of offering support and then wrongly criticised the claimant for the way she was dealing with a patient.

2.1.7 On 15 September 2022 in the morning huddle Karen Lord was unreasonably critical by her body language, of the claimant's contribution to the meeting about district nurse referrals.

2.1.8 On 15 September 2022 the claimant was called into an ad hoc meeting with Diane Lee and Corrina Hampshire where she was wrongly accused of bullying a colleague and adding incorrect information to an appraisal and being unprofessional/unkind in the meeting that morning.

2.1.9 On 16 September 2022 Corrina Hampshire handed the claimant a letter about disciplinary allegations in public in front of a patient, and refused to tell the claimant what it was about or assist her to understand it. The claimant was upset/concerned about the letter and Corrina Hampshire laughed or smiled at the claimant's reaction.

2.1.10 The claimant understands that statements were taken from members of staff about the claimant before 16 September 2022. On and from 17 September 2022, Alicia Webster and the respondent generally, has failed to provide the claimant with copies of those statements.

2.1.11 On 23 September 2022, Corrina Hampshire cancelled a charity event the claimant had arranged.

2.1.12 On 28 September 2022 the claimant was required to attend a disciplinary, or quasi-disciplinary meeting. The claimant says that the allegations made against her were untrue, the hearing was unfair, the claimant's account was not listened to or recorded, and the minutes of the meeting were inaccurate. The claimant says that she was wrongly accused of being aggressive at the meeting on 15 September 2022.

2.1.13 On 3 October 2022 the claimant returned to work and the agreed adjustments (from the meeting in July 2022) were not implemented by Karen Lord. This included an effective buddy system, mediation, occupational health referral and a chair.

2.1.14 On 27 October 2022 Corrina Hampshire sent the claimant a letter with the outcome of the meeting on 28 September 2022. The claimant says that the outcome was wrong, there was no evidence to support the allegations and did not take account of what the claimant said at the meeting. The recommendations, including mediation, in the letter were not implemented.

2.1.15 On 20 December 2022 the claimant received a response from the Speaking Up helpline that her complaints had been passed to HR to

address. The claimant's complaints were not and have not been addressed.

2.1.16 Throughout the period from August 2022 to January/February 2023 the claimant's annual leave was not corrected so that she could not use leave instead of sick days which made her sickness record look worse.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. Remedy for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?

3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.1.3 If not, for what period of loss should the claimant be compensated?

3.1.4 Does the statutory cap apply?

3.2 What basic award is payable to the claimant, if any?

4. Protected disclosure

4.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

4.1.1 What did the claimant say or write? When? To whom? The claimant says she made a disclosures on this occasion:

4.1.1.1 On 23 May 2022 by email to Sarah Wallwork the claimant stated that Karen Lord had accessed her medical records without direct care reasons or consent from the claimant.

4.1.1.2 On 23 September 2022 by email to Andrea Gillespie (Freedom to Speak up) stated that she had been mistreated, her reasonable adjustments had not been implemented and that the allegations against her had not been dealt with fairly or impartially.

4.1.2 Did she disclose information?

4.1.3 Did she believe the disclosure of information was made in the public interest?

4.1.4 Was that belief reasonable?

4.1.5 Did she believe it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation?

The claimant asserts that this was a breach of the Nursing and Midwifery Council Regulations, with which Karen Lord was obliged to comply.

4.1.6 Was that belief reasonable?

4.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

5. Detriment (Employment Rights Act 1996 section 48)

5.1 Did the respondent do the following things:

5.1.1 The allegations set out above under constructive unfair dismissal.

5.1.2 From August 2022, Karen Lord allocated the claimant to work on her own (in the Fields room) a lot of the time, and the claimant was not booked into clinics leading to the claimant being or feeling isolated;

5.1.3 From August 2022, the claimant had her duties taken off her and allocated to other members of staff. Removed duties included ordering weekly stock for clinics, registration of CVI and the clinic for stable macular;

5.1.4 The claimant's alleged protected disclosures were not investigated and the claimant did not receive an outcome.

5.1.5 Diane Lee and Corrina Hampshire gave information about the claimant's sickness absence to the manger in the new job the claimant had been offered, resulting in the job offer being withdrawn. Diane Lee and Corrina Hampshire were not given by the claimant as referees.

5.2 By doing so, did it subject the claimant to detriment?

5.3 If so, was it done on the ground that she made a protected disclosure?

6. Remedy for Protected Disclosure Detriment

6.1 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

6.2 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

6.3 Is it just and equitable to award the claimant other compensation?

7. Disability

7.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

7.1.1 Did she have a physical or mental impairment?

7.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

7.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

7.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

7.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

7.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?

7.1.5.2 if not, were they likely to recur?

8. Discrimination arising from disability (Equality Act 2010 section 15)

8.1 Did the respondent treat the claimant unfavourably by:

8.1.1 Withdrawing a job offer (trainee plaster technician) on 20 February 2023.

8.2 Did the following things arise in consequence of the claimant's disability:

8.2.1 the claimant's high level of sickness absence?

8.3 Was the unfavourable treatment because of any of those things?

8.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

8.4.1 The recruitment of a candidate who was going to be able to fulfil the requirements of the Trainee Plaster Technician role, assist in maintaining the efficiency of the services provided to the population served by the Respondent.

8.5 The Tribunal will decide in particular:

8.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

8.5.2 could something less discriminatory have been done instead;

8.5.3 how should the needs of the claimant and the respondent be balanced?

8.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

9.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

9.2.1 A practice that an ophthalmology technician would work some weeks in excess of the normal contracted hours (in the claimant's case the normal contracted hours were 37.5 hours and in practice she would work up to 45+ hours in a week);

9.2.2 A requirement for someone in the claimant's role of ophthalmology technician to work a minimum of their contractual hours (in the claimant's case 37.5 hours per week);

9.2.3 A requirement for someone in the claimant's role to take no more than one half hour unpaid break a day at lunch time;

9.2.4 That an employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions under the absence management policy;

9.2.5 That an ophthalmology technician should carry out the normal duties of that role;

9.2.6 A practice that the work allocated to a band 3 ophthalmology technician often involved standing up doing heavy work on a machine all morning or all afternoon or sitting down doing heavy work on a machine all morning or all afternoon;

9.2.7 A requirement to have the equivalent of a C in GCSE English and Maths assessed by way of an NHS online functional skills assessment in order to get on to the Trainee Nurse Associate course?

9.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that:

9.3.1 Because of the claimant's anxiety and depression she worried about situations at work, about patient care and about making mistakes. The longer the hours she worked, the more stressful work became for her;

9.3.2 Because of the claimant's anxiety and depression and menopause symptoms she suffered from fatigue. The longer the hours she worked, the worse her fatigue was at work and at home. Increased fatigue led to increased anxiety and worry;

9.3.3 The longer the hours the claimant worked, the worse pain she suffered in her coccyx and back;

9.3.4 If the claimant worked in one position (sitting or standing) doing heavy work for a whole morning or afternoon she suffered increased pain in her coccyx;

9.3.5 The claimant's menopause symptoms led her to suffer about 20-30 hot flushes and sweating a day from November 2021 until about April 2021. As a result, at home she would change her clothes about 4 times a day. She would need to change her clothes in a working day about twice a day. If she was only able to take one break, she could only change her clothes once;

9.3.6 The claimant's hot flushes and sweating meant that she needed to drink more frequently. It was difficult for her to get a drink outside break times because she was not allowed to leave her work station unless someone relieved her and she spent a lot of time isolated in one room;

9.3.7 As a result of her cancer and her depression and anxiety she would suffer overwhelming fears about the cancer coming back which would prevent her from focusing on her work and impact on her ability to carry out her normal duties;

9.3.8 As a result of her anxiety and depression she would sometimes be 'in crisis' suffering overwhelming anxiety and stress at work which would prevent her focussing on her work and impact on her ability to carry out her normal duties;

9.3.9 Because of her disabilities (save for dyslexia) she had and was more likely to have sickness absences, for example because of fatigue or pain;

9.3.10 Because of her dyslexia her grammar and spelling are very poor (the claimant had a 'scribe' for her GCSEs who wrote down her dictated answers)?

9.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

9.5.1 Alternating tasks so that the claimant could carry out some lighter work in a different position during the morning or afternoon rather than working in the same position (sitting or standing) on heavy work for the whole morning or afternoon;

9.5.2 Facilitating the claimant to work a more flexible working pattern, by for example, facilitating her using her annual leave to reduce the number of shifts she was working in a week when she was suffering from particular fatigue. The claimant says that she could not do this from August 2022 because her relationship with her band 6 sister (Karen Lord) had broken down;

9.5.3 Allowing the claimant to just work her contracted 37.5 hours per week rather than up to 45+ hours per week;

9.5.4 Not counting the claimant's disability related absences for the purposes of her sickness record or for triggering the absence management process;

9.5.5 Allowing the claimant to use annual leave to take days off to cope with fatigue so that her sickness absence record was unaffected and she was less likely to trigger the absence management process;

9.5.6 Allowing the claimant to take 'carer's leave' days so that her sickness absence record was unaffected she was less likely to trigger the absence management process. The claimant says that this was done for another employee;

9.5.7 Providing an effective 'buddy system' so that she had someone to talk to if she had fears or anxieties. The claimant says that the system was ineffective once her relationship had broken down with Karen Lord;

9.5.8 Providing ongoing weekly health and wellbeing update meetings to identify if reasonable adjustments were being made and if the claimant was being supported;

9.5.9 Allowing the claimant to take additional breaks;

9.5.10 Providing the claimant with one to one tuition from an ACP for the online test;

9.5.11 Giving the claimant in clinic time to prepare for the online test?

9.6 Was it reasonable for the respondent to have to take those steps and when? The claimant asserts that the respondent should have taken those steps between August 2022 and March 2023.

9.7 Did the respondent fail to take those steps?

10. Remedy for discrimination

10.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

10.2 What financial losses has the discrimination caused the claimant?

10.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

10.4 If not, for what period of loss should the claimant be compensated?

10.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

10.6 Should interest be awarded? How much?

11. Unauthorised deductions/Holiday Pay (Working Time Regulations 1998)

11.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? This dispute relates to 31 days holiday carried over from 2021 to 2022.