EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss R Skalska	**v**	**CS Three Counties**

Heard at: Reading Employment Tribunal (in person)

On: 12,13 and 16 September 2024
Before: Employment Judge Shastri-Hurst
Members: Dr C Whitehouse
Ms A Crosby

Appearances:
For the Claimant: In person
For the Respondent: Mr McCormick, Director

JUDGMENT having been sent to the parties on 25 September 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant brings claims of unfair dismissal and disability discrimination, namely discrimination arising from disability under s.15 of the Equality Act 2010. The claims relate solely to the facts surrounding the respondent's dismissal of the claimant. The claimant was employed as a cleaner by the respondent from 15 July 2016 until her dismissal, the effective date of which was 13 May 2023. The respondent alleges that the reason for her dismissal was capability (ill-health). The claimant alleges that she was, at the time of her dismissal and appeal, disabled by way of depression.

2. In determining the claims we have a bundle that was agreed by the parties, and we have a supplementary bundle from the claimant. We have had witness statements from:

   2.1. The claimant;

   2.2. Mr McCormick, shareholder and Director;

   2.3. Sue Hogg, Commercial Manager;

   2.4. Izora Mendez, Supervisor; and

2.5. Umberto Atunez, Supervisor.

3. Mr Atunez did not attend to give evidence and so we cannot give his evidence the same weight as we gave those statements, the authors of which did attend to be cross examined. We have however read it and taken it into account.

4. We thank both the claimant and Mr McCormick for the way in which they have conducted themselves, in a courteous and professional manner. We were greatly assisted by Mr Rojisky, our Polish interpreter. He has been an excellent asset to the smooth running of this case.

The issues

5. The issues were set out in a previous case management order which is in the bundle. These were discussed on the morning of Day 1 of this hearing. Although that list had included pay claims, by a judgment dated 23 July 2024 those pay claims were dismissed upon withdrawal.

6. We have heard some evidence about pay but we have explained to the parties any issues with pay are not relevant to the claims we are dealing with.

7. The live claims within the list of issues are unfair dismissal and disability discrimination. We also said that, if unfair dismissal succeeded, we would look at the issues of Polkey; in other words, whether any reduction should be made to any compensation in light of the argument that the procedure, if fair, would have led to dismissal in any event. We also said we would deal with the issue of whether the claimant had caused or contributed to her own dismissal.

8. We had initially also said we would consider the remedy issue of an uplift for failure to follow the ACAS Code of Practice: that was our mistake. That matter should not have been included in the list of issues as the ACAS Codes of Practice do not apply to capability dismissals such as this one.

9. The issues for consideration were therefore as follows (paragraph numbers do not match those within the original Case Management Order).

1. Unfair dismissal

Reason

1.1. Has the respondent shown the reason or principal reason for dismissal?

1.2. Was it a potentially fair reason under section 98 of the Employment Rights Act 1996?

Fairness

1.3. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

1.3.1. The respondent genuinely believed the claimant was no longer capable of performing their duties;

1.3.2. The respondent adequately consulted the claimant;

1.3.3. The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

1.3.4. The respondent could reasonably be expected to wait longer before dismissing the claimant;

1.3.5. Dismissal was within the range of reasonable responses.

2. Disability

2.1. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the decision to dismiss? The Tribunal will decide:

2.1.1. Did she have a mental impairment of depression?

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

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

2.1.4. If so 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?

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

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

2.1.5.2. if not, were they likely to recur?

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

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

3.2. If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

3.2.1. Dismissing the claimant;

3.2.2. Confirming the decision to dismiss on appeal.

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

3.3.1. the claimant's sickness absence between October 2022 and May 2023.

3.4 Did the respondent dismiss the claimant and confirm the decision on appeal because of that sickness absence?

3.5 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

3.6 If not, was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

3.6.1 A legitimate business need. The cost of continuing to employ temporary cleaners to cover for the claimant's absence for a further indefinite period of time was excessive.

3.7 The Tribunal will decide in particular:

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

3.7.2 could something less discriminatory have been done instead;

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

4. Remedy

4.1. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

4.2. If so, should the claimant's compensation be reduced? By how much?

4.3. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

4.4. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Findings of fact

10. On 15 July 2016 the claimant started her work with the respondent. She worked as a lone worker at Crosby House, a GP surgery, at which she undertook two and a half hours' cleaning each weekday evening.

11. In terms of the respondent, its structure was as follows. A cohort of cleaners which, at the relevant time, numbered around 130. Predominantly, the respondent supplies cleaners for single cleaner sites, some sites require two cleaners, some three cleaners and one for four cleaners. Any site at which three or more cleaners are used, the respondent has a site-based team leader responsible for weekly checking. For example, if members of staff left, the team leader would do the first meet and greet of any

replacement and would set out any training. For other sites the respondent has mobile team leaders, most of them have a cleaning job too. Then, on occasion, those mobile team leaders go and check other sites. For those hours of checking other sites, they get paid additional sums. If a cleaner leaves and the respondent is in the process of recruiting, a team leader can step in and fulfil the cleaning role.

12. The respondent then has two supervisors, Ms Mendez and Mr Atunez. Their principal job is to do the inspection audits; to deliver stock; do training; deal with contracts of employment; check identification of workers and sort out information for payroll, as well as responding to customer complaints. They are also the respondent's final backup if a cleaner is off for an emergency and no one else can cover a cleaning shift.

13. We then have Mrs Hogg, Commercial Manager, who is responsible for increasing the respondent's client base, and the day to day operations of delivering the work.

14. "Karen" is a part-time worker who works from home. She is in charge of accounts. She is the administrator, and deals with invoicing and payroll.

15. Mr McCormick's wife also works for the respondent from home and does the accounts and banking.

16. Mr McCormick sits at the top of the organisation chart. His main focus is operations.

17. In terms of communications, everything is done by WhatsApp. There is a WhatsApp group for the Operations Team and a phone number called Stock Line. That line is the employee's line of communication which is always by WhatsApp; that line is manned by Mr McCormick who disseminates information, such as an employee being off on sick leave, to the Operations Team, again via WhatsApp.

18. Mr McCormick told us he was responsible, ultimately, for the contracts of employment. However, he also explained that he did not know entirely the contents of those contracts, particularly the part that we were interested in at clause 11, in which the respondent has the right to pay for its own doctor to examine an employee on sick leave.

19. On 15 February 2021, the claimant was diagnosed with depression and mood disorder; this is noted in the medical records on page 74.

20. On 17 May 2022, the claimant was awarded PIP. The high-level summary of this is that, for certain activities, the claimant was awarded points due to needing prompting to complete those activities. The award period was 7 January 2022 through to 4 May 2025. The cover letter from the Department of Work and Pensions started at page 35, and we asked the claimant to provide the rest of that letter setting out the summary scores. That was duly provided.

21. In August 2022, building work started at Crosby House. We consider that this started to cause the claimant some stress at work. We find she started to feel destabilised because the job was more demanding, and she was a

lone worker. This is supported by the GP notes on 10 October 2022 which state:

> "Surgery is having renovations therefore mess dust plus plus but still expected to clean to previous levels in the same hour".

22. This stress reached its crescendo in October with a site audit and the follow-up letter, which we will explain in more detail shortly.

23. In September 2022, Mrs Hogg had a meeting with the client who was responsible for Crosby House. We know that she was not the one who negotiated this contract originally but she was responsible for maintaining the respondent's contract. We accept that Mrs Hogg had attempted to negotiate more time for the Crosby House job but there was no taking into account the effect the building works would have at this stage, in September, on the cleaner's work.

24. On 3 October 2022, Ms Mendez attended site for an audit with the claimant. The audit rated the site as generally below expectations. The evidence of Ms Mendez around the discussion with the claimant on this day is that she spoke to the claimant about the summary sheets that she filled in and the issues arising from this audit. She gave the claimant two weeks to rectify the problems that she had noted. She did not mention that a reminder letter would be sent. Ms Mendez did ask why performance was low and the claimant said, "because of the building works" to which Ms Mendez responded "It is not all because of the building works". We have no evidence of a response to that statement.

25. The claimant told us that on this day she told Ms Mendez she had depression. Ms Mendez did not remember that. The claimant had been private about her condition until that date and had not shared her condition with her employer. Whether she used the word "depression" or not, we accept that she attempted to convey to Ms Mendez that she was struggling with her mental health.

26. The claimant came back in to work on 4, 5, 6 and 7 October without any problems.

27. On 7 October, the respondent sent a site inspection follow-up letter the claimant. That is at page 44. To the extent that it is relevant, the respondent had updated its procedures, and continuously updates procedures. However, the respondent does not have a mechanism for informing its existing employees of any policy updates. Particularly of relevance here is the follow-up letter that was received in October 2022: this was an update of a previous template version and we find that the respondent did not tell their existing employees that this change had occurred, although it may well have been in an induction for new employees. This meant that, although she would have expected a reminder letter as she had had them in the past, the claimant would not have anticipated the warning about a disciplinary process and potential dismissal that was included in the letter. We find that this particular paragraph of the 7 October letter was strongly worded and heavy handed. This is particularly given that the claimant's score on the audit, in a score of 1 to 5, was, according to Mr McCormick, just below a 3. In other words, the

claimant scored a good 2, rather than a score of 2 that was verging on a 1. The definition of those 5 scores is at page 38 of the bundle.

28. The letter also states:

> "My only conclusion is that either you are not using your time effectively or you are not doing the times that you are being paid to do".

29. This is an underlying assumption that Mr McCormick reiterated in his evidence both orally to us and in his witness statement at paragraph 23, that,

> "Where there are long serving cleaners, the two reasons for a fall in performance are firstly, complacency, and, secondly, not spending the time doing the job for which a cleaner is paid".

30. Although we understand the logic of this analysis, this appears to have been applied to all long-term workers without any consideration being given to individual circumstances.

31. The claimant received the follow-up letter on 7 October. We find that, as a result, the claimant was very upset and suffered an exacerbation of her depression.

32. On 8 October, the claimant attended the cleaning site at Crosby House. In terms of the conversation on that day, we accept that the claimant's reason for going into the site was to explain that she was going to have to go on sick leave. This we find was a big step for the claimant given that she had been suffering depression and coming into work reliably since February 2021 and had an excellent attendance record, as accepted by the respondent.

33. The respondent's case is that the claimant said "I am going off sick. I'm going to take the respondent to court and I'm going to win". Again, to the extent that it is relevant, we accept that something was said by the claimant to the effect she would take the respondent to court and win. However, if the respondent's inference is that the claimant's sick leave was a sham, we do not accept this. We have been through the medical evidence and the respondent accepted the claimant had depression. Mr McCormick's issue was the length of the sick leave. We accept that the claimant was very agitated on 8 October in such a way that caused her colleagues some concern to see her there.

34. On 10 October, the claimant was signed off sick with depression. She has fit notes for a continuous period up to and including her notice. All the fit notes in the bundle reference depression, some also reference work-related stress.

35. On 20 October, the claimant sent an email to the respondent which we find at page 53. That email we understand to be a grievance which the claimant presented, having taken advice from ACAS. Nothing was done in receipt of this document by the respondent, despite it having a grievance policy.

36. On 25 November, the respondent texted the claimant to ask whether she would be back on the Monday, given her current fit note ended that day.

Throughout the claimant's sickness absence there was no contact with her to support her during her sickness or to deal with her welfare or wellbeing. There were occasional texts, such as this one from 25 November, enquiring whether she would be fit to return to work at the expiry of a fit note. There is no Sickness Absence Policy to deal with welfare meetings for employees on sick leave. Mrs Hogg told us that welfare of employees would fall to supervisors, but no supervisor contacted the claimant throughout her sickness absence regarding her welfare.

37. There was another WhatsApp exchange on 26 December at page 82 of the bundle. The claimant stated that she did not know how long she would stay on a sick note. The respondent had written that it would write to request information from her GP about a return to work. This conversation started by the respondent asking whether the claimant would be returning given her fit note expired on 26 December. The claimant was distressed by this communication: this is set out on a further page, page 84, in a WhatsApp message in which she stated:

> "Please don't stress me over Christmas".

38. The respondent, as we have mentioned, stated that it would be asking permission to contact her GP. In this message, the respondent stated that the ability to contact the claimant's GP was in the claimant's contract of employment. It is not. What is in the contract of employment, at page 4 clause 11, is the provision mentioned earlier that, at the respondent's expense, the respondent may require examination by a doctor of its choice of any employee on sickness absence. Also in this WhatsApp exchange, the respondent told the claimant that there was nothing that could be changed about her job.

39. On 28 December, the respondent sent the claimant a letter asking for permission to contact the GP regarding the nature of her condition and likelihood of her return to work in the foreseeable future. It asked her to send back written permission. That request is at page 85 and 87 and it is a request that was made via a WhatsApp message as well. At this stage, the respondent told the claimant that:

> "We are obviously concerned as nothing in the role can be changed and has remained the same during your employment with us."

40. The Tribunal asked Mr McCormick what view he had formed of the claimant's depression. His evidence was as follows:

> "Other than her being unable to do her work – a cleaner is a physical role not mental but in generality a person goes in to clean. I have known many employees who do it to get away from their house or from the family and have quiet time. If it's a physical injury then its much easier for me to understand how that affects her job. I struggle to understand how someone can suffer from stress and depression, can go from turning up when the diagnosis is earlier than the sick period. I understand how it has an impact. I would have expected a more visible pattern on her."

41. To us, this evidence combined with the letter at page 85, demonstrates a limited understanding based on Mr McCormick's own personal experience which he shared with us regarding someone close to him. He did not

appreciate the broad spectrum of effects that depression can have on any given individual. We find that at this stage Mr McCormick had made the decision that the respondent could do nothing to amend the claimant's role given that the role was physical. This was combined with his limited understanding of how a person's ability to do a physical role can be affected by a mental health issue.

42. On 3 January 2023, the claimant emailed the respondent saying that she would be giving permission for them to contact her GP, and gave her GP's name and contact details. That is at page 87.

43. On the same day, she said (at pages 89/90):

> "I would very much like to meet someone to discuss my possible return to work."

44. On 5 January, the respondent emailed a letter to the claimant stating that they did not feel it appropriate to meet with her until they were in possession of a doctor's report. This was especially given that she was signed off until 29 January. That letter is at page 93.

45. Also on this date, 5 January, the claimant emailed the respondent again stating that she was worried about the whole situation, it was making her more depressed, and she felt discriminated against. This is at page 92. We consider this to be a second grievance that was not acted upon by the respondent.

46. On 5 January again, the respondent sent a letter to the GP of the claimant asking for a report in light of the claimant's authorisation. This is at page 94.

47. The following day on 6 January, the respondent replied to the claimant's longer email of 5 January, again stating that it needed the GP report before having a meeting. This is at page 95. We accept that Mr McCormick's answer here, to not hold a meeting before the GP records were obtained, was genuine. He felt it important to have a current view of the claimant's medical position before opening that discussion.

48. On 9 January, the claimant's GP emailed the respondent asking for signed consent. Page 97.

49. On 12 January, the respondent emailed the claimant sending her an authorisation form for her to sign. That is at page 100.

50. A week later, on 19 January, the respondent emailed the claimant to chase signed authorisation suggesting that it was possible that she had already taken it to her GP.

51. On 30 January, the respondent WhatsApp messaged the claimant again, stating that it had not received signed authority and asking for it to be sent that evening – page 104. The claimant responded with a sick note – page 105.

52. On 15 February 2023, the respondent emailed the GP with signed authorisation from the claimant. So, evidently, at some point the claimant

did send this second authorisation to the respondent. The respondent's email is at page 108.

53. The following day, 16 February, the GP emailed the respondent again stating it needed clarity on what was being authorized – page 110.

54. On the same day, the respondent emailed the claimant sending a new authorisation letter for her signature – page 111.

55. The claimant never did sign a third authorisation letter. Her evidence was that she had signed two, did not understand why they were not adequate, and had no guarantee she would not be asked for a fourth different authorisation. This lack of authorisation and indeed lack of GP information, we find would not have prevented the respondent from arranging an informal face to face conversation to have some human contact with the claimant, to discuss her welfare and her view on her health and prognosis. Such a meeting could also have allowed for the respondent to attempt to get the claimant to sign the authorisation requested. We find that it is possible that a face-to-face meeting may have eased the situation.

56. On 22 February, the respondent texted the claimant asking (page 113):

> "Are you looking to return next week or are you looking to continue sick leave? We are struggling to get information from your GP and due to difficulties arranging cover for such a long time we may have to begin the process of bringing this matter to a resolution. Please advise.

57. The claimant's almost immediate response was that she would be continuing on sick leave.

58. On 27 February, the respondent emailed the claimant again stating that no authorisation had been received in relation to the GP's third request. If no response with authorisation was received within seven days, the respondent said that it would assume the claimant no longer wished to give authorization – page 114.

59. On 13 March, the respondent sent a letter to the claimant. There was still no signed authorisation and it asked her again to provide the same within seven days. This letter included an invitation to an investigation meeting on 23 March. It then referred to this meeting as a "resolution meeting" which may result in dismissal. The respondent explained that it had incurred significant costs of getting short term cover. It also confirmed that they could not alter the claimant's role. We find that this content demonstrates a closed-mindedness to the resolution meeting and that dismissal by this point was inevitable.

60. Also on 13 March, the respondent sent a letter to Donna Murphy confirming temporary variation of her contract to cover the claimant's shifts at Crosby House. Ms Murphy was a current worker on their books, and they agreed to pay her an additional £4 an hour given the temporary nature of the work – page 117.

61. On 19 March, the claimant emailed the respondent confirming she would attend the resolution meeting – page 118. We find therefore that the

claimant was engaging in this process at this stage.

62. On 22 March, the claimant received a Universal Credit letter stating she had limited capability for work and work-related activity – page 120. This was not disclosed to the respondent until the Tribunal process.

63. The resolution meeting took place between Mr McCormick and the claimant on 23 March. The notes are at page 125 and are incredibly short. Mr McCormick asked a series of prepared questions and obtained answers to them. The respondent did not explore details about the claimant's illness or enquire as to how she was or what it was that was preventing her coming back to work. The respondent did not ask for the claimant's view on when she may have been fit to work or what steps they could take to help her with returning. The claimant in turn did not explain why she had not signed the latest authorisation letter to her GP when asked.

64. The respondent sent a decision letter on 3 April dismissing the claimant with notice. That letter is at page 126.

65. The claimant appealed on 6 April, her appeal letter being at page 129. The claimant was sent an invitation to an appeal on 11 April at page 132.

66. On 13 April, an appeal meeting was held, again between Mr McCormick and the claimant. Still Mr McCormick did not ask questions about the claimant's health, her view on her ability to return to work, or whether there was anything the respondent could do to assist in getting the claimant back to work. The notes of this meeting are at page 133 and 136.

67. In our view, Mr McCormick was not the best placed person to undertake both the resolution and appeal hearings. We accept that Mr McCormick took the steps he understood to be procedurally correct but that it was, in reality, a tick box exercise where dismissal was inevitable. We find this, given that he asked only pre-prepared questions that did not attempt to explore any way of facilitating the claimant returning to work.

68. The Tribunal asked the claimant what she would have said if the respondent had asked whether there was anything that could be done to assist her getting back to work in April 2023. The claimant's answer was that, if she had help at Crosby House to complete the cleaning, she would have been able to come back to work.

69. On 17 April, the appeal decision was sent to the claimant – page 134.

70. The claimant started the ACAS early conciliation process on 1 May, her termination date being 13 May. The ACAS early conciliation process ended on 12 June. The claimant presented her claim form to us on 18 June.

The law

Unfair dismissal

71. The relevant legislation for the Claimant's unfair dismissal claim is found at s98(1), (2) and (4) ERA.

Reason for dismissal

72. The Respondent relies upon capability (ill-health), as being the potentially fair reason for dismissal. The burden of proof is on the respondent to show that the reason for dismissal was ill-health, on the balance of probabilities.

Fairness - generally

73. Ultimately, the question for the Tribunal is whether the process, and the decision to dismiss, fell within the band of reasonable responses available to a reasonable employer. The test for fairness is that set out in British Home Stores v Burchell 1980 ICR 303:

73.1. Genuine belief in its stated reason for dismissal;

73.2. Based on reasonable grounds;

73.3. Having conducted a reasonable investigation

74. The framework is set out in Monmouthshire County Council v Harris EAT 0332/14. The Tribunal's reasoning needed to demonstrate that it had considered first whether the respondent could have been expected to wait longer before dismissing the claimant, and second whether any consultation with the claimant was adequate. Another factor to weigh in was what had been done by the respondent to obtain proper medical evidence.

75. In cases where there is an attendance policy, the respondent will be expected to follow that policy in order that the procedure is fair – Sakharkar v Northern Foods Grocery Group Ltd (t/a Fox's Biscuits) EAT 0442/10.

76. In the case of East Lindsey District Council v Daubney 1977 ICR 566, Phillips J emphasised the importance of consulting the employee on long term absence, as well as taking steps to "to discover the true medical position". The EAT held:

> "Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, and injustice may be done".

77. In order for a consultation to be fair, the following should be included:

77.1. Regular discussions with the employee in question, and an update/warning when the employer considers that there is a risk of dismissal for due to ill-health;

77.2. One to one contact between employer and employee;

77.3. Obtaining of up to date medical evidence and giving that evidence due weight;

77.4. Understanding the employee's view of his/her condition and prognosis – S v Dundee City Council 2014 IRLR 131;

77.5. Discussion of steps that could be taken to get the claimant back to work – S v Dundee City Council 2014 IRLR 131;

77.6. Discussion around redeployment.

Fairness – true medical position

78. In terms of obtaining the true medical position, the duty is on the employer not the employee to take reasonable steps to obtain up-to-date medical advice about the claimant – Mitchell v Arkwood Plastics (Engineering) Ltd 1993 ICR 471 EAT. The Employment Appeal Tribunal held that the Tribunal had erred in finding it was fair to dismiss someone who had failed to volunteer details of his medical prognosis. The respondent's duty (in Dundee) is simply to take reasonable steps to obtain proper medical advice.

79. If an employee refuses to cooperate in providing medical evidence the employer is entitled to base its decision on the relevant facts available, even if those facts are insufficient to give the full medical position. Dismissal may then be fair – for example O'Donoghue v Elmbridge Housing Trust 2004 EWCA Civ 939 CA.

80. However, a dismissal may be unfair even when the employee has been obstructive, if there were other reasonable means by which the respondent could have obtained an up to date medical picture and failed to do so.

81. In a case in which the employee has been obstructive regarding medical evidence, but the dismissal is in any event found to be unfair, the appropriate way of recognising this failure to co-operate is in a reduction for contributory conduct – Slaughter v C Brewer and Sons Ltd 1990 ICR 730, EAT.

Limited remedy issues

Polkey reduction

82. In cases where the claimant has been unfairly dismissed on procedural grounds, it is open to the Tribunal to reduce the claimant's compensation to reflect the fact that the employee would have been fairly dismissed in any event, regardless of procedural unfairness – Polkey v AE Dayton Services Ltd [1987] UKHL 8.

83. This rule stems from the case of W Devis and Sons Ltd v Atkins 1977 ICR 662, HL, in which it was held that:

> "it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed".

84. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

85. The Tribunal must consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is

always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the Tribunal should not be reluctant to undertake the exercise just because it requires speculation - Software 2000 Ltd v Andrews [2007] ICR 825, EAT.

86. What about the case in which a dismissal is found to be substantively unfair? The tribunals have held that it is not as straight forward as saying that Polkey reductions can only apply in cases of solely procedural unfairness. However, in King and ors v Eaton Ltd (No2) 1998 IRLR 686, Ct Sess (Inner House), it was held that the distinction between procedural and substantive failings may, in fact, be an important one. It is easier to say with some certainty that, had a procedural step been rectified, the outcome would have been unaltered. Conversely, in cases of substantive unfairness, it may well be harder to hypothesize about what would have happened but for that unfairness. In the latter scenario, the Court of Session found that the tribunal cannot be required to "embark on a sea of speculation".

87. Appellate courts have moved away from distinguishing between substantive and procedural unfairness, and instead focus on the need to consider a Polkey reduction when there is evidence that a claimant may have been fairly dismissed in any event.

Contributory fault

88. Under s123(6) ERA, it is provided that:

> "(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regarding to that finding."

89. The test as set out by the Court of Appeal in Nelson v BBC (No.2) 1980 ICR 110, CA is as follows:

89.1. The conduct must be culpable or blameworthy;

89.2. The conduct must have actually caused or contributed to the dismissal; and,

89.3. It must be just and equitable to reduce the award by the percentage determined.

90. This requires the Tribunal to look at what the Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of the claimant's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56, EAT.

91. The EAT in Steen summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

91.1. Identify the conduct which is said to give rise to possible contributory fault;

91.2. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;

91.3. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,

91.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

92. Steen also indicated that a reduction of the basic award to nil would be a rare finding.

Discrimination arising from disability – s15 EqA

93. S15 EqA provides:

> "(1) A person (A) discriminates against a disabled person (B) if —
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

Respondent's knowledge

94. Under s15, the sole requirement of knowledge on the part of the respondent is knowledge of the claimant's disability. It is not necessary for the respondent to know that the "something" arose from that disability.

Unfavourable treatment

95. Under this section, no comparator is required. The question is simply whether unfavourable treatment was suffered by the claimant. In this context, unfavourable treatment requires the Tribunal to consider whether a claimant has been disadvantaged. This requires an assessment against "an objective sense of that which is adverse as compared to that which is beneficial" - T-System Ltd v Lewis UKEAT/0042/15.

Because of something arising in consequence

96. First, it is necessary for the Tribunal to identify the "something" that is said to be the cause of the alleged unfavourable treatment. Second, it is necessary for that "something" to have arisen in consequence of the claimant's disability. These are the two causal steps that are required by s15 EqA.

97. In Pnaiser v NHS England [2016] IRLR 170, the EAT held that:

> "…more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of the disability…the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact".

98. The Tribunal must determine what, consciously or unconsciously, acted on the mind of the alleged perpetrator. The relevant test is whether the "something" had a significant influence, or was an effective cause, of the unfavourable treatment – Pnaiser. Motive is irrelevant under s15. Further, the "but for" test is not sufficient to prove the necessary causative link – Robinson v Department of Work and Pensions [2020] IRLR 884.

Justification

99. If discrimination is established, then a respondent can still defend a s15 claim on the basis that the unfavourable treatment was a proportionate means of achieving a legitimate aim.

100. In Hensman v Ministry of Defence UKEAT/0067/14, Singh J held that:

> "the Employment Tribunal must reach its own judgment upon a fair and detailed analysis of the working practices and business considerations involved. In particular, it must have regard to the business needs of the employer."

101. The relevant test is an objective one, set out by the ECJ in Bilka-Kaufhaus GmbH v Weber von Hartz 1987 ICR 110, namely whether the PC is "necessary" to achieve the legitimate aim. "Necessary" here means "reasonably necessary" – Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704 SC. The Tribunal should give weight and respect to the respondent's view as to what is reasonably necessary to meet a legitimate aim – Birtenshaw v Oldfield [2019] IRLR 946.

102. Costs alone will not be a sufficient legitimate aim. However, the reduction of costs can amount to a legitimate aim if coupled with other factors – Heskett v Secretary of State for Justice [2021] ICR 110.

Conclusions

Unfair dismissal – reason for dismissal

103. We accept that the reason for dismissal was capability by way of ill health. That is clear from Mr McCormick's evidence. He made it clear to us that this was not about performance or disciplinary and that the claimant had, until this particular absence, been a reliable and effective employee. There has been no suggestion that there was any other underhand reason for the dismissal.

Fairness

104. Mr McCormick genuinely did believe that the claimant could not do the job because of her ill health or because of the period of time she was having off for her ill health. Mr McCormick's evidence was that there was never any indication from the GP on any fit note that he received, that there was anything the respondent could do to get her back to work.

Consultation with the claimant

105. As we have said, no questions were asked in either the resolution or appeal meeting regarding returning to work or the state of the claimant's health. Further, no contact was made with the claimant during her absence

regarding her welfare and wellbeing.

106. The respondent's evidence as to why he, Mr McCormick, did not ask questions about the claimant's health and possible return to work was that he was aware from personal experience that asking those questions can be taken as putting pressure on an individual. We accept this explanation as genuine and that Mr McCormick was seeking to avoid causing additional distress to the claimant. However, the respondent's answer instead was not to ask those questions, but then dismiss the claimant, which would inevitably cause the claimant additional distress. Given the detrimental result of the decision to dismiss, we consider it was unreasonable and unfair not to ask those questions. This we find was unreasonable as one of the key pieces of information that an employer needs to take reasonable steps to obtain is to understand the claimant's health and the prospect of returning to work.

Carrying out a reasonable investigation including finding out about the medical position

107. We accept the claimant did not ultimately provide authorisation that was acceptable to her GP when asked for a third time. However, the respondent did not follow its own contract of employment in that it did not pay for the claimant to see its own doctor. This reflects the case of Sakharkar v Northern Foods Grocery Group Ltd. We consider that this was a failure to make reasonable attempts to obtain necessary medical evidence by other means other than just reliance on the claimant. It was unreasonable for the respondent not to take this step particularly given it is set out in the claimant's contract of employment. We also consider that failing to ask the claimant's own view of her own medical position and prognosis was unreasonable too.

Consideration of what can be done to get the claimant back to work

108. There was no discussion or consideration as to what steps, if any, the respondent could take to get the claimant back to work. It was clear from early on in the process that the respondent was unwilling to consider any adjustments to the role. As we have stated already, when the claimant was asked by the Tribunal whether there was anything that could be done to get her back to work, she said she could have come back if there had been help for her shift at Crosby House, specifically, tidying up before she started to clean.

109. The concept of giving help to the claimant was discussed with the respondent in the Tribunal. Mr McCormick took this to mean he would split the claimant's shift in half and have her do one half and someone else do the other. We find again that this shows a closemindedness to thinking flexibly about solutions to get the claimant back to work.

Alternatives to dismissal

110. The respondent did not ask the question of himself whether there were any alternatives and he accepted that he did not consider any alternatives to dismissal at the time of making his decision. This we find was unreasonable. The respondent should have considered and discussed

redeployment to another cleaning role or a change of hours, but we have found that his mind was focused on dismissal by this point.

111. We therefore find that the claimant's dismissal was unfair. The investigation was not within the band of reasonable responses available to a reasonable employer. Therefore, although we accept Mr McCormick genuinely believed in his reasons, he did not have reasonable grounds for concluding that dismissal by capability was a fair reason for dismissing the claimant. In other words, we conclude that no reasonable employer would have dismissed the claimant in these circumstances.

Procedural fairness

112. We have found that the process put in place by the respondent was simply a tick box exercise. We also find that Mr McCormick should not have chaired both the resolution and appeal meetings. Although we accept that the respondent is a relatively small business, it is not so small that there was no-one else available to undertake the resolution meeting. Mr McCormick should have been left to do the appeal and we consider Mrs Hogg was well placed to do the resolution meeting given the level of her seniority. We therefore conclude that the claimant's dismissal was procedurally unfair as well as substantively unfair.

113. Therefore, the unfair dismissal claim succeeds.

Polkey reduction

114. We turn to consider whether any reduction is appropriate, on the basis of the argument that, if a fair procedure had been followed, dismissal would have occurred in any event. We make no reduction here. Where a dismissal is both substantively and procedurally unfair, the Tribunal is not required to use a crystal ball to consider what would have taken place had the procedure been fair.

Contributory fault

115. We accept that the claimant was part of the blockage in the progress of the case internally. Although we understand her explanation of not signing the third authorisation letter, we find it difficult to see why, when faced with dismissal, she still did not give her signature. This is particularly given that her previous authorisation was not rejected by the respondent but by her GP. We accept that this was blameworthy behaviour by the claimant, and we impose a reduction of 15% on any compensatory award.

Disability status – substantial adverse effects

116. In relation to the issue as to whether the claimant's impairment of depression had the requisite substantive adverse effect, we have looked at this case in two distinct periods of time. Firstly, February 2021 to October 2022 when the claimant was at work but suffering with depression. And then the second period October 2022 to May 2023 when she was off sick with depression.

117. We take first the period from February 2021 to October 2022 and consider

what the effects of that depression were. We have evidence that a PIP award was made going back to January 2022 and, as mentioned already, the claimant scored two points on various activities due to DWP's decisions that she needed prompting. We have a statement of entitlement of PIP dated 17 May 2022. The claimant told us that she submitted that application in December 2021. The claimant's evidence to us was that, between February 2021 and October 2022, she had difficulty shopping, cooking, tidying up the house and taking her daughter to school. She told us that these effects continue today. Her GP records align with this. The first diagnosis of depression is February 2021 when she diagnosed herself but then rung her GP during which call it is reported that the claimant had "read online and feels she has depression". In the medical records it is marked as a few months of low mood, and broken sleep.

118. On 12 March 2021, the claimant reported some improvement in mood to her GP as well as her sleep being less broken.

119. On 7 May 2021, the GP recorded that she asked to come off the antidepressants and her mood was good.

120. We have some evidence from Talking Therapies and we have various scores for the PHQ9 test and the GAD 7 test from 8 March 2021. Those scores are 17 and 21. They go down by 15 June 2021 to 9 and 7 respectively.

121. As I have mentioned, the claimant applied for PIP in December 2021 and that was successful from January 2022. We find therefore that, despite her not having medical appointments, she satisfied the DWP that she was suffering, as set out in the PIP letter, functional effects because of depression.

122. Looking at the whole of this period, we find that the claimant's evidence to us is supported by the PIP report in which the DWP would have had to have been satisfied that those effects were genuine. We also have the Talking Therapies notes as we have mentioned.

123. We are satisfied that there were substantial adverse effects arising from the claimant's depression between February 2021 and October 2022, that being over a 12-month period.

124. We then look at the second period, October 2022 to her termination date.

125. The claimant's evidence to us was that her condition and her effects got worse. The trigger for this increase or exacerbation we have found to be the follow-up letter sent on 7 October in which dismissal and disciplinary were mentioned.

126. Coming back to the time period from October 2022, we are satisfied on the evidence we have heard and seen that the claimant was suffering substantial adverse effects on her ability to undertake normal day to day activities. Her evidence was that she was having more bad days than previously, and she was having more bad days than good. More than half of her days were bad days and those days meant she would be in bed not wanting to do anything and wanting to disappear. A good day was that she

could cook dinner and walk the dog. We therefore accept that the claimant had substantial adverse effects from her depression in that second period of October 2022 onwards.

Disability status – long term effects

127. We have found a constant period from February 2021 to May 2023 when the claimant suffered substantial adverse effects due to her depression. We therefore accept that those effects were long-term at the time of the claimant's dismissal.

128. As a result, and in conclusion, the claimant was disabled at the relevant time which is the time of the decision to dismiss and the decision at appeal.

Discrimination arising from disability – respondent's knowledge

129. The respondent was first notified in writing that the claimant suffered depression in her email of 20 October. The respondent then received continual fit notes stating that depression was the reason for her being off sick. Initially, Mr McCormick's evidence was that he thought she would be back after a couple of days because that is the usual pattern of his employees with such fit notes. Mr McCormick used a person close to him as a frame of reference as to the effects of depression, but he was not open to understanding that that person's experience is not the sole way in which depression manifests itself. His evidence to us was that he accepted the claimant was suffering form depression but did not believe that she should have been signed off for seven months.

130. We accept that the respondent did not have actual knowledge that the claimant was disabled because she did not tell them of the effects of her depression nor did the respondent ask. However, we find that by the time of the dismissal and appeal the respondent should have known of the facts that would demonstrate she had a disability; that she was suffering a mental impairment that had substantial and long-term adverse effects on her ability to carry out normal day to day activities. One flag was that she was not able to attend work for seven months because of depression We note that there was no financial benefit to her remaining off on sick leave as she did not get sick pay; we conclude therefore that this sickness absence was genuine.

131. The respondent had not obtained any medical evidence or asked her about the effects of her mental health. If it had asked her about her health and the effects and had paid for their own doctor's report, we conclude that it would have had the facts available to it to have the requisite knowledge required by s.15 of the Equality Act. In other words, we find the respondent could reasonably have been expected to know about the claimant's disability at the time of dismissal and appeal.

Discrimination arising from disability – unfavourable treatment because of something arising from disability

132. It is accepted generally that dismissal is unfavourable treatment.

133. Was dismissal because of long-term absence? In short, the answer to that question is "yes". We have already found that that was the reason for the

respondent's decision to dismiss.

134. The next question is, "did the long-term absence arise as a consequence of the claimant's disability?". We conclude that it was because of her depression that the claimant had long-term absence. There was a trigger that took the claimant from a position of being able to manage her depression and attend work to not being able to manage any further. That trigger we have found was the 7 October letter. This letter exacerbated the pre-existing effects of depression and pushed the claimant to a position where she was not fit to work. The dismissal is therefore discriminatory, and we turn to look at the respondent's defence of justification.

Discrimination arising from disability – justification

135. The first issue is to consider the respondent's alleged legitimate aim. The respondent has cited legitimate business need as their legitimate aim. In evidence, Mr McCormick expanded on this point to say that it was not just the cost of temporary staff but the risk of the potential loss of a contract as the client becomes intolerant of variable cleaning standards with temporary staff. We accept that this is a legitimate aim. This is what is referred to in law as a costs plus argument from the case of Heskett v the Secretary of State for Justice [2020] Court of Appeal. That means that there is an element of costs to the respondent's legitimate aim which, without more, is not enough to be a legitimate aim justifying discrimination. However, if the justification is costs plus another matter, that can be enough to be a legitimate aim. This is the case here: not only was the respondent worried about costs, but also of losing the contract. We therefore conclude that the aim of the respondent was legitimate.

136. We therefore consider whether dismissal was a proportionate means of meeting that legitimate aim. Considering proportionate means, it is necessary for a respondent to show that the dismissal corresponds to a real need on the respondent's part and was necessary to meet the legitimate aim. "Necessary" here means "reasonably necessary" and that test is a more stringent one than the range of reasonable responses test for an unfair dismissal claim. The respondent needs to show that dismissal was an appropriate means of achieving its legitimate aim, it need not show that dismissal was the only means.

137. We find that there were less discriminatory options that could have been implemented instead of dismissal: one example being redeployment. Just exploring that further, we find that the respondent had the capacity to redeploy: for example, Ms Murphy was an existing employee who responded to a "shout out" put out to the workforce. That was an extension of her role rather than redeployment, but it does demonstrate the flexibility around shifts and the willingness of the respondent to put "shout outs" to the workforce. With 130 employees on its books at the time, we find that some movement of employees would have been reasonably feasible to avoid dismissing the claimant.

138. The respondent already had Ms Murphy working on the contract at Crosby House at the time of the claimant's dismissal. We accept that this did cost the respondent additional wages, but it did ameliorate the risk or variable cleaning standards and the risk of the client being unhappy. We accept that

this would have cost the respondent more. However, that (costs) would have been the only problem that then faced the respondent in terms of sickness absence of the claimant.

139. We find that in weighing the discriminatory effect on the claimant against the business needs of the respondent, the balance favours rejecting the respondent's justification argument, therefore, the claimant's discrimination arising from disability succeeds.

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Employment Judge Shastri-Hurst

Date: 12 November 2024

Judgment sent to the parties on

12 November 2024

For the Tribunal office

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