EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 26 November 2024

Claimant: Ms Jennifer Caswell

Respondent: Maximus UK Services Limited

Before: Employment Judge E Fowell

Ms H Carter

Ms G Mitchell

Representation:

Claimant James Boyd of counsel, instructed by JMW Solicitors LLP

Respondent Nicholas Bidnell-Edwards of counsel, instructed by BDB Pitmans LLP

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was dismissed on grounds of her long-term sickness absence but was assured at her final capability hearing that the respondent would obtain a further Occupational Health report before a final decision was made. This did not happen and so the dismissal was unfair. However, a further report could not have affected the ultimate outcome.

2. As the claimant had exhausted her entitlement to sick pay the award for compensation is confined to (a) a basic award of £2,284 and (b) a compensatory award of £500 for loss of statutory rights.

3. The claim that her dismissal was an act of discrimination arising from her disability is upheld to the same extent. Other complaints of disability discrimination relating to the procedure followed are dismissed.

4. The claim of victimisation, which arose at the appeal stage, also concerns procedural matters, and is also dismissed.

5. The claimant did not suffer an unlawful deduction from wages.

6. The extent of compensation due will be assessed at a further hearing at 10 am on 17 February 2025.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant. As usual, some editing has taken place, mainly to avoid any repetitions, and these written reasons stand as the final version. The final paragraph about panel composition for the remedy hearing has also been added.

2. By way of background, the company, Maximus, provides services to the Department of Work and Pensions. In Ms Caswell's case, this involved carrying out assessments of people claiming long-term sickness benefits.

3. Ms Caswell had a serious car accident in 2019 which resulted in a long absence from work. She was back for about 18 months until, in January 2022, she was signed off sick again, diagnosed with PTSD. She remained off work for the rest of that year until her dismissal, on 21 December. She says that the dismissal was premature and that she was hopeful of making a return to work the following February.

4. There is no dispute that her PTSD amounted to a disability and she also brings a claim of discrimination arising from her disability. She complained about discrimination in her appeal letter and on that basis has added some allegations of victimisation. The final claim is for unlawful deduction from wages.

5. The issues to be decided were agreed and recorded in the case management orders made at the preliminary hearing on 19 September 2023. We will work through them in due course.

Procedure and evidence

6. We heard evidence from Ms Caswell and, on behalf of the company, from:

   (a) Ms Holly Homan (her manager, the Assessment Centre Manager), who took the decision to dismiss Ms Caswell; and

   (b) Ms Melanie Marshall (the Assessment Centre Manager in Plymouth), who heard the appeal.

7. There was also a bundle of about 600 pages plus tribunal documentation. Having considered this evidence and the submissions on each side, we make the following findings of fact. Not every point is dealt with, only those necessary to deal with the issues and support our conclusions.

Findings of Fact

8. Maximus is a national company operating a number of services for the DWP, not just assessing benefit claimants. It has to meet detailed performance targets, particularly in assessing numbers of benefit claimants. DWP exercises a good deal of control over its operations. It sets the salary levels which Maximus can pay its staff, or at least those at Ms Caswell's level. It has oversight of the processes undertaken and the training requirements for each role or task. Even the training modules for Maximus staff are documented and approved by DWP.

9. Needless to say, it has well developed policies, including a Sickness Absence Policy, and it receives HR advice from a separate body called People Manager. As a result, we have records of the various exchanges with them and the advice given. To illustrate the relationship, managers like Ms Homan, who took the decision to dismiss, need to get authorisation from an HR Business Partner in People Manager before any dismissal. The company is therefore held accountable for spending public money and has to operate within fairly tight commercial limits.

10. Ms Caswell is a doctor, qualified as a surgical registrar, and so 'Ms' is the correct form of address. She joined the company in September 2018 and worked at the Hastings Assessment Centre. The role involves reviewing medical evidence, having face to face or telephone consultations with the customer, then producing a report for DWP so that they can decide on eligibility. She had to make four to six decisions a day, or a target of 100 a week.

11. On 24 May 2019 Ms Caswell was involved in the serious road traffic accident, which left her with extensive physical injuries. It also left her with the PTSD that overshadowed the rest of her employment. She was off sick for over a year, until she began a phased return to work in June 2020. By then of course the Covid pandemic had arrived and ways of working had changed. Most of the assessments were by telephone and from then on, given her difficulties, she was allowed to work from home. She also had some adaptive equipment for a hand injury, which sadly proved to be permanent.

12. That was the position for the next 18 months or so, during which she had some absences for treatment and in particular a hip operation in November 2021. In January 2022 she went off sick again with depression. This was in fact a flare up of the PTSD and linked to the accident. She was then off for the rest of 2022 until her dismissal.

13. While she was off sick she had a number of catch-up calls with her manager. These welfare discussions began on a weekly basis, then fortnightly as the absence continued.

14. The Sickness Absence Policy sets out a more formal approach for longer-term absences. It applies where there is no indication of a return-to-work date or of the employee returning to work in the "near or foreseeable future". The process begins with advice from Occupational Health. There are then three stages to follow. The first involves a formal meeting to discuss the Occupational Health report and how to help the person return to work. If that cannot be achieved there is a Stage 2 meeting to discuss things further, and then a Stage 3 or Final Review Meeting. If, at that stage, there is still no indication of a return-to-work date, dismissal is an option. Alternatively a plan can be agreed, with dates, to assess the employee's health and progress. No time frames are specified, but even so, the policy says that the process can be modified as appropriate.

15. Ms Homan joined the company in May 2022 and then took over as Ms Caswell's line manager. The last welfare meeting with the previous manager was on 18 May, and Ms Homan also took part.

16. Ms Homan was the Assessment Centre Manager for two locations, Hastings and Lewes, with about 15 to 20 staff reporting to her. In due course, other centres were added and she now has responsibility for five of them. She is not clinically trained, although it seems that many managers in the organisation do have a clinical background, including her own manager.

17. Although all of the meetings to that point had been informal and supportive, Ms Caswell may well have been concerned about what may happen and was covertly recording them, so we have a transcript of what was discussed [494]. She explained, for Ms Homan's benefit, that:

> "I'm off work at the moment with post traumatic stress disorder, anxiety and depression, which has been causing me flashbacks, nightmares, problems with being hypervigilant in my environment and quite extreme anxiety and panic attacks, very low mood, being very fatigued, withdrawn, difficulties concentrating and getting easily overwhelmed."

18. There was then some discussion about her medication; she was on the maximum dose of her antidepressant and her GP had now added medication for anxiety. A further concern was a flare up of Crohn's disease, also due to the anxiety. Matters had been left with her GP on the basis that she would have a review at the end of July and she should contact the surgery in the meantime if things got much better or worse. Surprisingly perhaps, Ms Caswell suggested in that meeting that she might be back at work in four or five weeks time, which would be in late June.

19. They also discussed whether to make an Occupational Health referral. Ms Caswell was happy with the idea but thought that it would be best to have it in mid or late June. In her witness statement, at paragraph 10, Ms Homan states that Ms Caswell withheld consent to this referral but that is clearly not the case.

20. So, at the time Ms Homan took over as her line manager in May 2022, Ms Caswell had serious mental and other health problems and there had been no improvement since her absence began in January. Her contractual sick pay (2 months) had run out and she was on statutory sick pay; that too was due to run out in July.

Welfare Meeting 27 June 2022

21. There was some delay in arranging the next welfare meeting, which took place on 27 June. This time, for some reason, we do not have any minutes, just the records made by Ms Homan on the company's template form [515]. She was still awaiting the review with her GP at the end of July but her view was that she was seeing some slow improvements. She had fewer panic attacks for example. However, all sorts of things like leaving the house or changes in routine would trigger her. She could not see herself returning to work for another month and did not feel that she could look after customers in her current mental state. She was "not ready to take on other people's trauma".

22. There was no real discussion of an Occupational Health review, which is somewhat surprising given the discussion at the previous meeting and the fact that such a report is supposed to be the prelude to a more formal process. However Ms Homan had a misunderstanding about the policy on this point. She thought that an Occupational Health report came at the end of the process, when considering whether or not to dismiss or perhaps how to manage a phased return. So, she simply put "N/A" in the box on the form for Occupational Health, adding "not suitable at present time".

23. After that meeting Ms Homan reported back to her advisor at People Manager, Ms Owen. Ms Homan's note said "no end in sight and no plan for rtw – pls advise." [398]. Ms Owen responded that she needed to get up to date medical information and should tell Ms Caswell verbally that they were going to move to a formal process, rather than simply send her a letter inviting her to a formal meeting [399]. However, Ms Homan did not pick up the phone as suggested.

24. There was some difficulty arranging a further meeting and the next one was in August. There is a dispute over whether it was arranged as a formal or informal meeting. We have in the bundle two rival invitation letters, each dated 28 July, one inviting Ms Caswell to a formal meeting on 10 August and the other to an informal meeting on 11 August.

25. We have the covering email for the “informal” letter [683] but no such email for the formal letter. Neither makes any reference to the other and it would be odd to send out both. The “formal” letter also asked Ms Caswell to confirm her attendance and she did not do so, so the most likely explanation is that only the invitation to the informal meeting was sent.

Meeting on 17 August 2022

26. In the event, there was only one meeting, which was put back to 17 August. Ms Caswell was taken aback by the suggestion that it was formal, with a right to be accompanied, and denied having had any such letter and we accept that her surprise was genuine. However, she agreed to continue with it.

27. We have the original notes taken by Ms Homan, which have then been amended or amplified here and there using the transcript obtained later from Ms Caswell. They show [540] Ms Homan’s view that there was no real possibility of a return to work and that they would need to go through a formal capability process if an action plan could not be agreed in the near future. Ms Caswell felt that some things had got better, although they were clearly still very serious. She referred to improvements in things:

> “like the head nodding, tremor, irritability and suicidal thoughts, but I’m still struggling with anxiety, flashbacks, panic attacks and low mood”.

28. She was also hoping to see a further improvement with new medication. Ms Homan thought there was no point getting an Occupational Health report yet, until there was some real change in Ms Caswell’s condition, nor did she ask Ms Caswell for a report from her GP.

29. After this meeting Ms Caswell began to take a more proactive approach, writing to Ms Homan on 23 August to reinforce the fact that she was improving [348]:

> ““… I am currently in the transition of the third line antidepressant (and additional anxiety medication) and due to have my dose increased this week. Therefore there is a clear medical plan in place from my GP and it seems unreasonable to consider termination of my employment on the basis that I am unable to return to work in the very near term when there is scope for further therapeutic intervention with the aim of a full recovery and return to my current position. You are aware I am also engaging with weekly psychotherapy and EMDR (having attended all appointments) and have recently attended a phobia course alongside the medical treatment.”

30. However, two days later, she supplied a further medical certificate [550] signing her off work until 2 October.

Meeting on 6 September 2022

31. The next meeting took place on 6 September. This time there was no question that it was formal and Ms Caswell was accompanied by a representative from the BMA, Mr Maguire. But there was a continuing confusion over what stage had been reached. Mr Maguire understood that this was a Stage 1 meeting. Ms Homan confirmed that it was, although her evidence to us was they she thought it was a Stage 2 meeting.

32. Whatever the stage, Ms Homan summed up the position as follows:

> "… as it stands we are at 136 days absent at this point. In the last 4 months there's been no improvement in your situation Jenn, we've looked at some other options, reduced or alternative roles etc. but your last sick note does say unsuitable for any phased return, hours responsibilities etc. So this meeting is to determine where we go from here, support needed and the capacity in which that will happen, that all ok for everyone?

33. Ms Caswell was asked whether she was now able to leave the house and said that she had been able to go out, with her partner, who took her to her treatments in London and for walks.

34. Ms Caswell made the point that she had not had an Occupational Health report yet, and Mr Maguire pointed out that this should have been done before any sort of formal meeting. So, Ms Homan agreed that there should be a report.

35. It is clear from the minutes that no threat of disciplinary action was made in that meeting, as indicated in the list of issues.

36. After the meeting Ms Homan had a discussion with Ms Owen at People Manager, who thought this had been a Stage 2 meeting. Her subsequent advice was:

> "Once the report has come through, if Jennifer is still not returning to work the final capability meeting should be arranged with an outcome of ill health dismissal."

37. The Occupational Health referral was then arranged for 20 October. In the meantime, on 3 October, Ms Caswell submitted a further medical certificate on 2 October 2022, this time for a longer period than before. She was signed off for three months, i.e. until 2 January 2023.

38. Despite this, Ms Caswell wrote to Ms Homan on 11 October to say

> "I had a review with my GP last week in the interim. I have had a little improvement on the new antidepressant since our last meeting. Consequently, my medication dose has been increased to the maximum dose this week and I am hoping this will help further whilst awaiting input from psychiatry."

39. She suggested postponing the Occupational Health report until she had received that input but Ms Homan thought it best to proceed, given that there was an 8-

week delay in arranging such appointments. Ms Caswell disagreed but went along to the appointment anyway. She then explained her view to the Occupational Health advisor, who agreed that it would be better to wait, and so it was put back to 25 November. This was, inaccurately, reported by Ms Homan to People Manager as Ms Caswell refusing to attend her Occupational Health appointment [424].

Occupational Health report

40. The report itself made clear the extent of Ms Caswell's physical and mental health problems. It is necessary to quote from it extensively to give the full picture:

> "Dr Caswell has been absent from work since 17/1/22 due to a significant flare up of her mental health symptoms. She was diagnosed with post-traumatic stress disorder (PTSD) following a road traffic accident in 2019. She has regular reviews from her GP and is on medication for anxiety as well as antidepressant tablets. She has tried multiple antidepressant tablets. These were last increased in October which has helped a bit. She was reviewed by a psychiatrist under the community mental health team on 7/11/22 and was prescribed an additional tablet for depression (which she is waiting to start due to current investigations for cardiac symptoms). She has been referred to the psychiatric multidisciplinary team to advise which trauma-based therapy would be suitable for her. **She will be reviewed in 8 weeks by her psychiatrist**. She is also still having weekly EMDR (Eye Movement Desensitization and Reprocessing) and private therapy. With regards to her symptoms, she states her low mood has eased a bit with the increase of her antidepressant medication. She describes being hypervigilant. She gets anxiety and panic attacks around leaving the house, travelling in a car and spiders. Her sleep is disturbed, and she has nightmares. She gets flashbacks. In addition, she is currently under investigation by her GP for cardiac symptoms as she has been getting persistent chest pain, breathlessness, low grade fevers, general malaise, worsening severe fatigue and other symptoms. She spends most of her time in bed due to fatigue and needs her partner to do chores for her such as cooking and cleaning. She is due to have a 24-hour ECG next week. She is waiting for the results of recent blood tests and x-ray. She may also need an echocardiogram. She has recently been diagnosed with megaloblastic anaemia caused by a folate deficiency and has been started on medication for this. This may be contributing to her symptoms of severe fatigue, breathlessness and can hinder mental health symptoms response to treatment until resolved." [Emphasis added]

41. Even this was not the full extend of her health problems, which included Crohn's disease, Polycystic Ovary Syndrome, and a loss of some function in her right hand. The summary of the report was as follows:

> "Dr Caswell is temporarily unfit for work and unfit to continue in her current role at present. Management may wish to consider a further OH review after 8 weeks, given some new treatments have recently started, or once a return-to-work date is anticipated."

Capability hearing 1 December

42. That report was then considered at a further, formal meeting with Ms Homan on 1 December 2022. Again, there was some confusion about what stage the process had reached.

43. Ms Homan's view was that the report did not give any real grounds for optimism. She made it quite clear that dismissal was the likely outcome, although she couched this (again, incorrectly) as a decision she was required to make by HR.

44. Ms Caswell said that she was showing some improvement on her new medication and that she was hoping to return in February once it had taken effect. She urged Ms Homan to take up the suggestion of a further Occupational Health review after eight weeks but was realistic about how it might end, stating:

> "My thoughts on it are that I think it would be reasonable to allow me the period until February time to have the review for occupational health in in eight weeks. Then we have given the treatment for the folate deficiency, cardiac investigations and the new psych medication and things time to work. I appreciate that if at that point I'm still not in a position to be working then yes at that stage it will have been over a year and I understand your position."

45. Ms Homan agreed to that approach and the conclusion of the meeting was that this would happen. She said:

> "Right. Request for meeting review after 8 weeks OH review. Fine, I will put that through Health Hub today. I imagine probably it would be about 8 weeks until an appointment anyway judging appointments that have already been booked."

46. Ms Caswell raised another concern in the meeting, about her appraisal records. She needed to be able to show a regular series of appraisals, evidencing her clinical work, in order to maintain her registration with the GMC, and was waiting for some data from a Ms Graham about this. Ms Homan promised to look into this. She was due to be away from 5 to 15 December and so they planned to meet again in the week commencing 19 December.

47. However, that is not what happened. We have a record of a further discussion between Ms Homan and Ms Owen on 20 December, which simply records:

> "-As C can't rtw, C will be dismissed on capab grounds"

48. This very brief record of their discussion shows that Ms Homan had decided, on reflection, that there was really no point in delaying matters any longer. She would have preferred to delay the announcement until after Christmas but she had advice from Ms Owen that that was not appropriate; once the decision had been made to dismiss, it should not simply be delayed without good reason. Ms Homan

accepted that advice reluctantly. In accordance with the policy, the decision was referred to a senior HR Business Partner who gave his approval for the decision.

Dismissal meeting on 21 December 2022

49. So it was that Ms Homan met Ms Caswell for the last time on 21 December 2022. Ms Homan explained at the outset [608] that after talking to HR "we" had decided to go ahead today and that the outcome would be dismissal on grounds of capability. (In fact she was at pains to suggest that she was required by People Manager / HR to make the decision.) That was not what Ms Caswell had been expecting at all and she was very much taken by surprise. It was of course a very blunt message to receive just before Christmas.

50. That decision was confirmed by letter that day [617] and Ms Caswell submitted an appeal shortly afterwards [623]. In that letter she alleged that her dismissal had been an act of discrimination but her main complaint was about its fairness, and in particular the failure to wait that further eight weeks. She suggested, as she had at the meeting on 1 December, that there were other roles she could have undertaken, perhaps on a phased return-to-work basis. One of those was file work. She also suggested a trainer role or medical authorship

51. The appeal was dealt with by Ms Marshall, who is the Assessment Centre Manager in Plymouth and had had no previous involvement with any of the participants. She reviewed the very extensive papers and had a meeting with Ms Homan to understand her reasons. She then had an appeal meeting with Ms Caswell on 19 January 2023. Again Ms Caswell was accompanied by Mr Maguire. Unexpectedly, the main issue was the timing of the decision to dismiss and whether a further report should have been obtained.

52. Ms Marshall refused to uphold the appeal and set out her reasons in the outcome letter at page 652. She set out five main reasons and was very open in her evidence to us that some of them were, on reflection, unfounded. For example, she stated there that the occupational health report had concluded that she would be unlikely to improve within 12 months, whereas in fact the only mention of a 12 month was the length of her absence and that this meant she was likely to qualify as a disabled person. There was also an erroneous mention of Ms Caswell changing address, not updating the company and so not engaging in welfare meetings.

Appraisal records

53. There remained the issue of Ms Caswell's appraisal documents, which had still not been provided. An appraisal should have taken place in January 2022 but Ms Caswell was already off sick so it did not take place. But she had assembled her evidence for the appraisal and submitted it to a Ms Schubert [604] and had since

been chasing Ms Graham (Chief Medical Officer) for a copy. Ms Graham ultimately emailed on 15 November 2023 (nearly a year after her dismissal) to say:

> "The bottom line is that we do have the appraisal from Mar 21, with all the supporting documents, and we will arrange to send this across to you. However, the paperwork from early 2022 is not available – because the appraisal was never completed. the documents were not uploaded to our revalidation folders, where we hold the data for 5 years. They would have been in your own F drive and probably Sarah's. However, when a practitioner leaves the business their account is closed down and thereafter we have no way of accessing the content.
>
> We have explored with DWP whether there is any way of retrieving data from the email or F drive from practitioners who have left the business but their response is that both are deleted permanently 30 days after they are documented as a leaver, so unfortunately nothing is retrievable from that 2022 appraisal prep."

54. We take the view that the respondent was keen to help with this issue, and Ms Graham went on to offer to try to help evidence her work from the 2021 appraisal onwards, if Ms Caswell had any records to help. Overall, we accept that the explanation given in this email is correct.

Possible alternative employment

55. Before concluding our findings of fact, we should deal with the alternative types of work that Ms Caswell proposed. Although file work sounds like an administrative task, we heard that it is quite intense. It involves an initial filter of applications on paper, with the doctor making about 70 decisions a day on whether the application should proceed to a face-to-face assessment. It requires an additional period of 6 weeks training in the classroom and is only offered to doctors who are able to show six to 12 months of excellent clinical practice. As it was described to us, it is for those "at the top of their game." Further, these eligibility requirements are strict and are set by DWP so could not simply be dispensed with in Ms Caswell's case. Ms Homan also emphasised that it involved going through evidence of other people's traumatic experiences.

56. Overall therefore, we accept that this would not have been suitable, and we also accept the respondent's evidence that there simply were no alternative vacancies such as in medical authorship or in a training role. We also bear in mind that these alternatives were being put forward at a time when Ms Caswell was unable to leave the house unaccompanied, so the reality at that stage was that a return to work in any capacity was a long way away, if at all.

57. There were some further issues relating to Ms Caswell's final payments on dismissal which we will address as part of our conclusions.

Unfair Dismissal

58. Turning to the applicable law, we will start with the claim of unfair dismissal. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98 the employer has first to show a fair reason for the dismissal, in this case capability. If that is shown, then by s.98(4):

> "… 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."

59. Here, of course, the company relies on Ms Caswell's absence (and hence her capability to perform the role, to use the language of the Act). So, the question becomes whether they acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss her.

60. The essential question in such cases, as made clear by the Employment Appeal Tribunal in **Spencer v Paragon Wallpapers Ltd** 1977 ICR 301, EAT, is whether the employer can be expected to wait any longer for the employee to return.

61. This usually involves a balancing exercise. The Scottish Court of Session in **BS v Dundee CC** [2014] IRLR 131 set out the sort of factors to be taken into account. These include:

    (a) whether other staff are available to carry out the absent employee's work

    (b) the nature of the employee's illness

    (c) the likely length of his or her absence

    (d) the cost of continuing to employ the employee

    (e) the size of the employing organisation; and

    (f) (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.

62. A fair procedure is also essential. This requires, in particular:

    (a) consultation with the employee

(b) a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and

(c) consideration of other options; in particular, alternative employment within the employer's business.

63. **BS v Dundee** also made clear that, although the tribunal has to consider and weigh these factors, it should not simply substitute its view for that of the responsible managers. It also has to ask whether the decision to dismiss within the range of reasonable responses open to an employer in the circumstances.

Compensation

64. If the dismissal is unfair, the next question is often to ask what would have happened if the employer had not taken the decision to dismiss. The Employment Appeal Tribunal (Elias J, President) gave guidance on this is **Software2000 Ltd v Andrews and ors** 2007 ICR 825. He held that:

(a) in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

(b) if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future)

(c) there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal

(d) however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence

(e) a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary

(i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

Discrimination arising from disability

65. The test under section 15 Equality Act is as follows:

> (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.

66. So, this involves unfavourable treatment (principally the dismissal) as a result of something arising in consequence of Ms Caswell's disability, in this case her absence. There is no question that that was the reason for her dismissal and so there is no need to consider the burden of proof provisions in this case. The only remaining question is whether that decision was justified in the circumstances, i.e. whether it was a proportionate means of achieving a legitimate aim?

67. In **O'Brien v Bolton St Catherine's Academy** 2017 ICR 737, the Court of Appeal considered a similar case and held that the test of proportionality under section 15 is essentially the same as the test of reasonableness in unfair dismissal cases. Lord Justice Underhill said at paragraph 53:

> "… it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the 2010 Act. The law is complicated enough without parties and tribunals having routinely to judge the dismissal of such an employee by one standard for the purpose of an unfair dismissal claim and by a different standard for the purpose of discrimination law."

68. For completeness, the decision to dismiss Ms Caswell is not the only alleged act of disability discrimination and she also raises various procedural steps. In fact there are 14 separate complaints which, with some simplification, are as follows:

(a) the delay in obtaining the Occupational Health report;

(b) holding only one substantial capability meeting, on 1 December 2022;

(c) ambushing Ms Caswell with a second capability meeting on 21 December 2022, when she was dismissed;

(d) providing inaccurate meeting notes;

(e) People Manager and / or HR advisors influencing the outcome;

(f) threatening Ms Caswell on 6 September 2022 with disciplinary action;

(g) pre-determining the outcome;

(h) failing to follow advice in the Occupational Health Report to carry out a further review meeting after another eight weeks after her psychiatric review;

(i) alternatively, allowing eight weeks to see if Ms Caswell's new medication and treatment had been effective;

(j) failing to provide meeting notes after the BMA accompanied her to meetings;

(k) dismissing her;

(l) failing to provide any explanation for the deductions to her wages;

(m) failing to pay her accrued annual leave on termination of her employment;

(n) pre-determining the appeal outcome, and include inaccuracies in the record of the disciplinary and appeal transcripts compared to the audio.

69. Setting out each allegation in this way complicates the exercise considerably. However, in each case we need to ask whether the act or failure in question was *because of* Ms Caswell's continued absence, and if so whether that act or failure was justified. With the exception of the dismissal itself the respondent denies the allegation and does not seek to justify it, so the only questions are whether it happened as described and if so whether it was done *because of* her continued absence.

70. In **Pnaiser v NHS England** [2016] IRLR 170, Mrs Justice Simler (President) made clear that there might be more than one reason or cause for the treatment but that the "something" that was one cause of the treatment must have at least a more than trivial influence on the unfavourable treatment which would amount to an effective reason for it, also making the point that motives were irrelevant. She also went on to state that there could be more than one link and a range of causal links, but that, as the causal link was a question of fact, the more links in the chain the harder it would be to show the requisite connection.

71. The Equality Act gives us a structure to follow in carrying out that exercise. Section 136 deals with the burden of proof. It provides that:

(2) If there are facts from which the [tribunal] could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the [tribunal] must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

72. So we first have to decide from all the evidence whether there might have been discrimination involved. If so, it is then for the respondent to satisfy us that there was not. If that happens, cogent evidence is required to show that the treatment in question was 'in no sense whatsoever' tainted by discrimination.

73. A mere difference in treatment is not enough by itself: something more is required. That may be some other feature of the case – the timing of the decision perhaps, or that it was out of the ordinary for some other reason.

Victimisation

74. Victimisation is a term often used to mean being picked on or unfairly treated but it has a narrower meaning in the Equality Act 2010. It applies where someone has made a complaint about discrimination and is singled out as a result. The test under section 27 Equality Act is as follows:

> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.

75. A protected act includes a complaint about discrimination and the company accepts that Ms Caswell's appeal letter was such a protected act. So, the remaining question is whether the respondent subject her to a detriment because she did so. The same test of causation applies, and the alleged detriments are (with some further simplification):

(a) failing to provide any explanation for the deductions to her wages;

(b) failing to pay her accrued annual leave on termination of her employment;

(c) providing an unreasonable and factually inaccurate appeal outcome decision;

(d) refusing to share the recording of the appeal hearing;

(e) failing to disclose all of her personal data;

(f) failing to provide her professional development files and appraisal from 2021 to January 2022.

Unlawful deduction from wages under section 13 Employment Rights Act;

76. The final claim is for unlawful deduction from wages in respect of holiday pay due on dismissal. It does not in fact seem to be disputed that she was credited with her full holiday pay in the pay statement she received in January 2023, but that

statement also contains two substantial deductions: one a 'leaver's adjustment' of £1,483.20 and the other a 'sick pay adjustment' of £3,491.22.

Time Limits

77. The final issue concerns time limits. There are no time limit issues in relation to the dismissal, although some of the allegations of discrimination fall outside the normal time limit. Such claims have to be brought *within* three months of dismissal (i.e. three months less one day) plus any time spent in early conciliation. Here, the relevant dates are as follows:

    (a) The dismissal took place on 21 December 2022

    (b) Early conciliation began on 17 March 2023

    (c) Early conciliation ended on 31 March 2023

    (d) The claim was submitted on 28 April 2023

78. Since ACAS was first contacted on 17 March 2023, any acts or failures which took place before **18 December 2022** are potentially out of time. Some of the allegations of discrimination are earlier, and to pursue these complaints Ms Caswell must either prove that:

    (a) the discrimination was in fact conduct extending over a period of time and ending after this last act, or that

    (b) it would be just and equitable to extend the normal time limit.

Conclusions

Unfair dismissal

79. As already mentioned, the key issue here is whether the respondent could reasonably have been expected to wait any longer for Ms Caswell to return to work. The main dividing line is over the claimant's contention that she ought to have been given a further eight weeks to see whether her medication was working, then an Occupational Health review and a further meeting with Ms Homan to consider matters.

80. There are of course other criticisms of the respondent's process, in particular that Ms Homan ought to have obtained an Occupational Health report at the outset, that she gave conflicting information to People Manager and suggested that Ms Caswell was, for example, refusing such a referral, or refusing to attend welfare meetings, also that Ms Homan was concealing from People Manager the confusion over which stage of the process had been reached, but none of these points feature strongly in Ms Caswell's appeal letter or even in her witness

statement. The main issue is clearly whether Ms Homan should have given her that one last chance.

81. That is of course a decision to which the range of reasonable responses tests applies. Looking at the Occupational Health report, we can certainly understand how Ms Homan reached that view that she did. Ms Caswell had a daunting, almost overwhelming series of physical and mental health problems. It is not necessary to repeat the sections quoted from the Occupational Health report but there had been no discernible improvement during the whole time in which Ms Homan had been involved. The only grounds for optimism was a change in medication, although even that that had been mentioned on previous occasions.

82. The report, set against the background of that long absence, seems to us so clear that had Ms Homan said at the meeting on 1 December that she would reflect on matters and that they would meet again on 21 December to give her a decision, we could have taken no issue with a decision to dismiss at that stage. However, the outcome was that there would be a further Occupational Health referral. As a matter of basic fairness, Ms Homan should then have made those arrangements. It is not clear what discussions she had with Ms Owen at People Manager but it seems to us that if she had made clear to Ms Owen that she had given a positive assurance to Ms Caswell that she could have that last opportunity, Ms Owen could hardly have objected. That is therefore what ought to have happened and so on that limited basis we find that the dismissal was unfair.

83. Before leaving this issue however we do need to consider what would have happened next. This involves following the guidance in the **Software2000** case. Normally it is the respondent who suggests that if the employee was not dismissed at this point in time then they would have been dismissed shortly afterwards, for example because of redundancy or because their performance was so unsatisfactory, and in those circumstances the onus is on the employer to provide that evidence. (In that case the employer was arguing that redundancies would have followed shortly). Here, the only uncertainty is over Ms Caswell's health, and evidence of that is entirely in her hands.

84. It is now nearly two years since Ms Caswell was dismissed. According to her witness statement she has not worked since. She states that due to the manner of her dismissal she suffered further unnecessary harm and this has delayed her subsequent recovery, but there is no medical evidence of this. In fact we have nothing to tell us what her current medical condition is. Her witness statement is also silent on such matters as whether she is now able to leave the house unaccompanied, whether her panic attacks have subsided, whether her medication has reduced or ended. She does not claim to have made any applications for employment in that period although she still has a valid GMC licence to practise. She told us that she was not entitled to any benefits because

of her partner's earnings, which suggests that otherwise she would qualify for such benefits on grounds of her health.

85. The lack of any medical records is a surprising feature of this case. These are usually disclosed as part of any disability discrimination case. Disability was not disputed in this case, but are still relevant to the extent of her difficulties at the time and the progress of her recovery. Hence, important relevant documents have not been disclosed. The key issue with which we have been faced is what would have happened if Ms Homan had granted her request and arranged a further occupational health review. The purpose of that extra report was to consider matters in the light of a psychiatric review. That review and any earlier reports should also have been provided. In addition to Ms Caswell's GP records there might have been reports from her psychiatrist and the EMDR practitioner. Clearly, it would have helped her case to have been able to show that she did in fact recover appreciably in early 2023. However, none of this has been forthcoming. In those circumstances we conclude that we have no alternative but to conclude that a further extension of time would have been fruitless.

86. It follows that any compensation for unfair dismissal has to be limited to her basic award, which is unaffected by any such considerations, and an award for loss of statutory rights.

Discrimination arising from disability.

87. The next main claim is of discrimination arising from disability. As already explained, applying the test in **O'Brien v Bolton St Catherine's Academy,** the test of fairness in unfair dismissal is no different to that under s.15 Equality Act. We have given careful thought to whether or not some distinction could be drawn on the basis that this was a mere procedural failing which did not affect the substantive or fundamental fairness of the decision to dismiss, but we conclude that would be mistaken. We have to consider the decision to dismiss at the time it was made. Was it then a proportionate means of achieving the respondent's legitimate aims. That test is often abbreviated, more or less accurately commerce the question of whether or not a less discriminatory measure could have been taken, and in the circumstances it seems to us that the less discriminatory measure was simply to defer matters for that further eight-week period. Any other conclusion would be inconsistent with our finding on unfair dismissal. Hence, to that limited extent, we find that the dismissal was an act of disability discrimination. That means that Ms Caswell is entitled to some compensation for the injury to feelings caused by the timing of the decision, although it is clear that she recognised at the time that dismissal was always the likely outcome.

88. There are of course a significant number of additional allegations of discrimination, set out above. These additional points require a consideration of the burden of

proof provisions. Were these shortcomings in the process *because of* Ms Caswell's absence, in the sense of a substantial influence?

89. Mr Boyd submitted that this question was more nuanced than first appeared. It is that her absence led to a view on Ms Homan's part that her dismissal was inevitable, so she took a more cavalier attitude to the Sickness Absence Policy and in particular to the need to obtain Occupational Health advice.

90. That appears to us to be an argument that has more ingenuity than force. A similar case perhaps is **Pilkington UK Ltd v Jones** 2023 EAT 90, where the claimant was off sick with a shoulder injury. Someone reported that they had seen him wearing work boots. The company got a detective to follow him and film him. He was seen with a friend of his, a farmer, handing over a hose and holding a small bag of potatoes. The company concluded, erroneously, that he was working for someone else. The tribunal found that that is why they dismissed him. But they also concluded that this erroneous belief was "something arising" in consequence of the disability.

91. This decision was upheld on appeal by HHJ Beard who noted that the sickness absence was the reason for the investigation, and hence the observation, and that was the context in which the decision to dismiss was made, relying on the erroneous belief. As already noted from **Pnaiser** (above) there may be more than one link in the chain.

92. So the argument put forward in Ms Caswell's case is that there were several links – the disability caused the absence, the absence was so long that it led Ms Homan to conclude that there was only ever going to be one outcome, and that led in turn to a lack of attention to the sickness absence procedure and the need to obtain an Occupational Health report.

93. The point may be academic here, since we concluded that the dismissal itself was an act of discrimination, and this argument only applies to the surrounding procedural points, but we cannot take this chain of reasoning so far. Unlike in **Pilkington**, there was no erroneous belief. Ms Homan's belief that there was only ever going to be (or perhaps likely to be) one outcome was entirely rational. That is an important point. We are all very good at coming up with reasons for things we want to do anyway. The more suspect the reasoning, the easier it is to discern some taint of prejudice at work, but we could see no basis for suspect reasoning here.

94. More generally, the main consideration from Ms Homan's point of view was always the likelihood of Ms Caswell being able to return to work, not the length of time she had been off, although of course that length of time and the lack of any real improvement were a further indication that dismissal seemed unavoidable. Although the process was confused, we can see no evidence that it was rushed,

and overall Ms Caswell was off for a considerable period before the final decision was taken. There *was* her misunderstanding about the sickness absence procedure, and about when an Occupational Health should be obtained, but it still seems to us too fanciful to put that in the category of an erroneous belief which arose in some way from annoyance at Ms Caswell's absence.

95. Applying those considerations, we do not see that the failure to obtain an Occupational Health report earlier calls for any further explanation from the respondent, nor the confusion over the stages of the process. The arrangements for the meeting on 21 December were unsatisfactory and Ms Caswell should have been told that she might be dismissed at that stage, but that is not something that can be separated from our existing finding that the decision to go ahead with the dismissal at that stage was unfair and unjustified. The same applies to the alleged failure to follow Occupational Health advice over the need for a further review, although in fact that overstates the terms of the report. The support from People Manager also appears to us appropriate at each stage, given the information they had from Ms Homan.

96. We do have concerns over the accuracy of the notes taken by Ms Homan, and the lack of notes provided to the BMA. It also seems likely that the outcome was determined some way in advance of the final meeting, in the sense that Ms Homan never saw any realistic alternative in the absence of a marked improvement in Ms Caswell's health. However, and again, ultimately we do not find anything in those circumstances to suggest that the fact that this was unfavourable treatment tainted by the fact of her absence from work, or the length of that absence. That is the context in which the procedure was being handled but nothing more than that.

97. Anticipating our conclusions on the wages claim, we have come to the view that there was no unlawful deduction here, or any detriment, and so those issues cannot therefore be an act of discrimination or victimisation.

Victimisation

98. Turning to the main victimisation claim, very much the same considerations apply. It does seem that Ms Marshall paid less attention than she should to the appeal exercise, and that her reasons for upholding the decision were not all correct. That may well reflect what she regarded as the obvious nature of the decision. Apart from the wages issue, the complaints concern the failure by the respondent to explain her final pay statements, the inaccuracies in the appeal letter, a refusal to share with her the recording of the appeal hearing (about which we heard no evidence), the handling of her Data Subject Access Request and failing to disclose all of the personal data, particularly that relating to her appraisals.

99. We cannot see any connection between these data issues and the appeal, and there is no evidence, for example, to show that those like Ms Graham, who were

dealing with the data issues, were aware of the protected act. Overall, there is nothing sinister or out of place her that would call for any further explanation by the respondent and we felt overall that they have been trying to assist her since her dismissal. As a result, none of the complaints of victimisation can succeed.

Unlawful deduction from wages

100. As to the wages issue, we were concerned on seeing the pay slip for January 2023 and noting the large and unexplained deductions on it. No evidence was provided from anyone in payroll or HR to explain it and in those circumstances we might have taken the view that the respondent had failed to discharge the burden of proof on this issue. However, on reflection, we concluded that that ran the risk of some clear unfairness given that pay statements are factual documents which it should be possible to reconcile and we were provided with the full pay statements going back to November 2021.

101. The system operated by the respondent is confusing. When someone is off sick their salary is shown in full together with a corresponding sickness payment adjustment, which is often a negative figure for the same amount. Each pay slip is prepared on the basis of information known on the 10th of the month and so the adjustment usually relates to the previous month. Without extending this decision any further we are satisfied that there was a slight overpayment, as noted in the final pay statement, and that Ms Caswell did indeed receive contractual sick pay for two full months, overlapping with six months of statutory sick pay and so there was no underpayment. We note that she was paid a bonus of nearly £2,872 in June 2022, which does not form part of that calculation, but there was a further payment of £2,036 in February 2023, after the disputed pay statement. Accordingly, the wages claim is also dismissed.

102. It follows that the claim succeeds to a limited extent. We can see no basis for any award for loss of earnings but I will hear submissions regarding other potential heads of compensation at the remedy hearing if the parties are not able to resolve matters by then.

103. In accordance with the recent presidential guidance, at each hearing a decision has to be made about whether the hearing should involve a full panel or a judge sitting alone. The test is whether the case involves questions of reasonableness to which non-legal members would be able to add significant value. Given the limited nature of the remaining assessment, which is mainly about injury to feelings, I concluded that that test is not met here. If either party disagrees, they may make written submissions on the point within 14 days of these reasons.

Employment Judge Fowell

Date 19 December 2024

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