



EMPLOYMENT TRIBUNALS

Claimant: Ms H McKenley-Jones

Respondent: The Secretary of State for Business Energy and Industrial Strategy

Heard at: Cardiff **On:** 25 to 27 February 2019

Before: Employment Judge A Frazer
Members:
Ms W Morgan
Ms P Palmer

Representation:
Claimant:
In person

Respondent:
Ms J Williams
(Counsel)

JUDGMENT

1. The unanimous decision of the tribunal is that the claimant's claims for unfair dismissal under s.98 of the Employment Rights Act 1996 and for disability discrimination under ss.15 and 21 of the Equality Act 2010 are not well-founded and do stand dismissed.

REASONS

1. The claimant in this case is Ms Hermione McKenley Jones. She was employed by the Secretary of State for Business, Energy and Industrial

Strategy from 16th January 1995 until her dismissal on 18th August 2016. By way of her ET1 dated 23rd November 2016 she brings claims for disability discrimination and unfair dismissal. At a telephone preliminary hearing held by Employment Judge Davies on 22nd November 2017 the respondent conceded that the claimant was a disabled person by reason of her back condition (sciatica) and depression but stated that the respondent's knowledge of her physical disability was an issue in the case.

2. We canvassed the issues with the claimant and the respondent's representative at the outset. The claim for unfair dismissal is whether the respondent had a potentially fair reason for dismissal namely capability; whether it acted reasonably in treating that reason as sufficient for dismissing the claimant and whether the decision fell within the band of reasonable responses.
3. In relation to disability discrimination, the claims are set out in the further information provided by the claimant's former representative at p.49 of the bundle. There is a claim under s.15 of the Equality Act 2010 in that the claimant claims that she was treated unfavourably because of something arising in consequence of her disabilities and that this treatment was not justified. The claimant's claim is that her sickness absence arose in consequence of her disability because she could not sustain a satisfactory level of attendance. The claimant pleads the dismissal as the unfavourable treatment.
4. The claimant also brings claims for failure to make reasonable adjustments. The claimant's first claim for reasonable adjustments is that the respondent applied the PCP of the attendance management policy trigger points to her. She claims that she was put at a substantial disadvantage relative to non-disabled comparators in that she was less able to comply with the terms of the policy and was more likely to face disciplinary action. She claims that the attendance policy ought to have been modified in her favour to allow for a more generous allowance of absence before she hit the trigger points.
5. The claimant's second claim for reasonable adjustments is that the respondent had a practice of not following its occupational health report recommendations. In particular it failed to follow the recommendation that she be moved away from finance and into a less stressful role and it failed to recognise her medical condition as a disability. She was put at a substantial disadvantage in comparison to non-disabled employees because she was more likely to reach the trigger points more quickly and face disciplinary proceedings and/or dismissal. The reasonable adjustment would have been to alter her duties or assign her to a new post.

6. There was a question as to whether the claimant claimed that the policy ought to have been adjusted in 2012 and 2015 and if so whether her claims were out of time, having not been brought within the three-month time limit.
7. We find that the claims for unfair dismissal and disability discrimination are not well-founded for the following reasons.
8. The facts that we found were these. On 21st May 2013 the Claimant was issued with a First Written Warning under the respondent's Management of Attendance Policy. At that time the claimant was working in Register Maintenance Admin Team 6 which was part of Customer Filing Services. She worked 24 hours per week over three days and term time only. The claimant's pro rata trigger points that would trigger action under the policy were at that time 7 days self certified absence in any rolling period of 12 months; more than 11 days total absence (medically certified and self certified) and more than 3 occasions of absence in the previous 12 months.
9. On 9th April 2013, the claimant had put in an application for a lateral transfer. The reasons she gave for so doing were to utilise the skills that she had gained from the three NVQs that she had completed; to reduce the stress and strain put on her home life; to improve her health issues and to help her be in a better position to support her family. Subsequently the internal transfer application was accepted by Finance and following a discussion that the claimant had with Mark Jones on 18th June 2013, the claimant was transferred to the Finance team.
10. On 14th May 2013 Paul Sollis, the claimant's then line manager, wrote to her because she had been absent for a total of 7 days over 4 separate occasions since 21st May 2012. The claimant was then issued with the first written warning on 21st May 2013 as she had had 7 self-certified absences on 4 occasions in one rolling year. She did not appeal this warning.
11. The claimant was advised that her attendance would be monitored over a two-year period and that if her sickness absence levels exceeded the triggers she would be given a final written warning. There were subsequently some discussions between Karen Watkins and HR regarding the validity of this warning and whether it had been issued on an erroneous basis, however the warning was subsequently confirmed by HR as the claimant had been absent on more than 3 occasions in a rolling 12 month period.
12. The claimant transferred to the Finance Team and Karen Watkins became her line manager. The claimant had some difficulties getting into work in the mornings and the respondent agreed to adjust her hours so that she could start work at 1030 instead of 1000.

13. The claimant went off sick with stress on 3rd to 6th March 2014 inclusive. Gale Lawler conducted a return to work interview and made a referral to occupational health. She was then absent on 24th June 2014 for vomiting. On 15th July 2014 Occupational Health produced a report. The report is at pages 183 to 184 of the bundle. This confirmed that the claimant had a long history of depressive illness. It was also confirmed that this would fall under the Equality Act 2010. It was stated that there was no reason why she was not fit for her role but that her condition may impact on her sickness absence levels. Following on from this, Karen Watkins completed a stress risk assessment on 17th July 2014.
14. From 9th to 15th September 2014 (4 days) the claimant was absent with acid reflux. She was further absent from 3rd to 6th November 2014 with depression (4 days). The claimant was then referred to occupational health. Occupational Health prepared a report dated 19th November 2014. It stated that she had been suffering from anxiety and depression for some time, which appeared to be due to personal issues. No adjustments were recommended at work save for the claimant taking regular breaks from her desk to improve posture and concentration. The report commented that the claimant should not have a higher rate of absence than she had had in the past. It was noted by the OH Advisor that the claimant's flexible working and term time hours appeared to assist her with her issues and to manage her work. The advisor noted that the claimant was in receipt of counselling from the staff counsellor and that when this service was due to stop in 2015, she would need to access counselling through her GP.
15. Karen Watkins wrote to the claimant on 24th November 2014 as she had exceeded her trigger points under the policy (10 days over 4 occasions) by taking 12 days over 4 occasions. She attended a meeting on 1 December 2014 and Mrs Watkins wrote to her on 1 December 2014 to issue her with a written warning. She did not appeal this written warning. She was advised that her attendance would be monitored for a 6 months period ("the improvement period") and that she should not exceed 5 days self-certified over 2 occasions or 8 days medically certified over 2 occasions. She was advised that if her attendance was satisfactory over that period she would be monitored for a further 6 months ("the sustained improvement period") and during the whole period her level of absence should not exceed 10 days self-certified over 4 occasions and 15 days medically certified over 4 occasions during any 12 months period. The claimant was warned that if she hit her triggers she may be given a final written warning.
16. On 18th December 2014 there was a meeting at which the claimant was represented by her trade union representative, convened to discuss the written warning and any support that was to be made available to her. The assistance outlined to the claimant was the services of a staff counsellor, a later start time and the option to take regular breaks throughout the day. It

was suggested to the claimant that she might want to utilise her private healthcare and to book a place on the respondent's mindfulness course. It was proposed that her case be referred on this occasion to the Occupational Health Physician as opposed to the Occupational Health Nurse and Dr Nash of Occupational Health provided a report on 12 January 2015.

17. The claimant, it was advised, suffered from stress and depression for which she took prescribed medication and that there was a background of family stressors. It was also noted that she suffered from IBS, which had caused some of her absences in 2014. The adviser stated that the claimant's stress, depression and IBS was stable but that she may have further short periods of sickness absence in the future. The adviser advised that the conditions were unlikely to be covered by the Equality Act as they were not having an impact on her day-to-day activities to the extent they would be considered to be disabilities under the Act. Dr Nash advised that she would expect a similar or reduced level of sickness absence over the next year.
18. On 26 January to 6 February 2015 the claimant was off sick for 8 days due to a chest infection. She was also off between 18 and 21 May for 4 days having fallen on the bus whilst travelling to work on 14 May. Karen Watkins had a return to work meeting with the claimant on 26 May and referred her to Occupational Health again. Occupational Health provided a report on 2 June 2015, this stated as follows: "*As you are already aware Ms McKenley-Jones sustained an injury whilst travelling on a bus on 14 May 2015 and subsequently attended the hospital and was advised that she remain absent from work for 2 weeks due to her type of work with Companies House. She has since returned one week ago and has experienced lower back pain and pain down her right leg*". The Occupational Health Adviser recommended physiotherapy and that the respondent carried out a DSE assessment to her seating. The claimant was supplied with a new chair.
19. Karen Watkins wrote to the claimant on 4 June 2015 as she had been absent for 8 days medically certified and 4 days self-certified in the last 6 months. She was invited to a meeting on 18 June 2015 and Karen Watkins issued her with a final written warning following a meeting on 23 June 2015. The claimant was put on an improvement period during which she was advised not to exceed 5 days self-certified and 8 days combined on 2 occasions and she was warned on this occasion that if her attendance was unsatisfactory it could result in her dismissal. She was told that if she satisfactorily completed this period she would be put on a sustained improved period for a further 6 months where her full triggers would apply.
20. The claimant appealed against the final written warning to Dave Bayliss. The grounds of appeal were contained in a letter from her trade union representative, Ryan Gordon, dated 7 July 2015. It was submitted that the claimant had displayed a significant improvement with regards to her

- absence over the last 6 months, in particular her last period of absence had taken place near to the end of the 6 month period and the second period of absence had taken place due to an incident that was beyond her control. She had slipped on the wet floor of a bus and had injured her back. The incident was due to the negligence of the bus company and there was no likelihood of future absence for the same reason.
21. The meeting took place on 22 July 2015. Mr Bayliss completed a short contemporaneous note which is in the bundle at page 236. The claimant explained the circumstances of her accident in that she slipped as she was getting off as the bus floor was wet. She said that she felt pain in her shoulder and neck and that the following morning she felt pain in her coccyx. She had attended hospital and had been advised to take time off work. She said that she had filed a claim against the bus company, but she did not provide any evidence of such to Mr Bayliss or indeed to the respondent at any point thereafter. She explained that her absence in February 2015 was related to her IBS and acid reflux. She said that she had seen a specialist on two occasions and was waiting for an appointment. She said that she had some family issues.
 22. On balance having regard to the notes of Mr Bayliss and the evidence that we heard we find that the claimant did not allude to any long standing back complaint and that her symptoms were communicated to the respondent as symptoms of an injury. The claimant had in fact been referred to Occupational Health, which attributed the lower back pain to the injury on public transport and did not connect it to any long-standing back condition.
 23. We find that the respondent at that point in time did not, or could not reasonably have been expected to know that the claimant's absence for those 4 days was related to any long-standing back condition. The information before it from the claimant and from Occupational Health was this was an injury to her back sustained by a fall on the bus.
 24. Mr Bayliss upheld the final written warning and issued the letter dated 29 July 2015 to the claimant, informing her that her attendance would continue to be monitored during the sustained improvement period and that her attendance would be considered unsatisfactory if her sickness absence exceeded 5 days self-certified or 8 days combined on two occasions. She was warned that dismissal could then ensue.
 25. Between 27 and 29 October 2015 the claimant was absent with a chest infection. Karen Watkins had a return to work discussion with her on 3 November 2015 at which she said she had been prescribed antibiotics and had sought medical advice. The claimant did not have any further absences until the meeting on 5 January 2016 and at the end of that 6 month improvement period Karen Watkins met with the claimant to discuss her

- attendance. She was advised that her attendance would continue to be monitored during the sustained improvement period and unsatisfactory attendance may result in consideration being given to her dismissal. The claimant was then absent for 4 days between 22 February and 25 February 2016 owing to a cystitis/urine infection, which was alluded to later on as a gynaecological condition. At a back to work discussion Karen Watkins advised the claimant that she would continue to be monitored and that she would be close to breaching her trigger points.
26. From 25 April the claimant had 3 days off with laryngitis, which meant that she had exceeded her trigger points. Karen Watkins had a back to work discussion with her on 3 May 2016, the notes of which are at page 257 of the bundle. On the basis that the claimant had exceeded her triggers the matter was then referred to HR and she was referred to Occupational Health. The Occupational Health report is at page 269 of the bundle, in particular it is noted as follows: *“My colleague indicated that your employee had had 3 or 4 periods of sickness absence in the past year, these were due to infections and not related to her underlying health conditions.”*
27. At paragraph 4 of the report and in response to a question put by the respondent, the Occupational Adviser said this, *“regarding her ability to render a reliable service and attendance the employee has a number of long-term health conditions that have the potential to affect her performance and attendance. That said her recent periods of sickness absence have not been related to these health conditions. It is difficult to predict her future sickness absence other than to state that the recent pattern is likely to give an indication of future attendance. You may wish to consider the above modifications and this may help your employee to sustain her attendance in terms of her psychological health.”* In relation to the modifications, what the Occupational Adviser was referring to was a relation to the claimant experiencing some difficulties coping at work, the likely trigger for which were personal stresses and her psychological ill-health. It went on to recommend a stress risk assessment and that the claimant be moved to a less demanding role might have a positive effect on her performance in the workplace.
28. This, we noted, was in the context of the claimant experiencing some difficulties coping at work and due to her personal stresses and psychological ill-health and was not related to her short term absenteeism issues.
29. The respondent then took formal action against the claimant but this was in relation for the short term absenteeism and was under the management of attendance policy and was not in relation to any performance at work issues.

30. The claimant was invited to a formal meeting to discuss her triggering the attendance management policy on 20 July 2016. She was warned that an outcome could be her dismissal. Mr Neil Hartley chaired the meeting and was provided with a copy of Lauren Wood of HR's sickness absence report, a copy of this was also provided to the claimant. The claimant was represented at the meeting by Mr Howells, her trade union representative. There were notes of the meeting at page 276. These were compiled by Leanne Elliott of HR but were not verbatim minutes of the meeting.
31. The claimant acknowledged that she had been off with a chest infection, laryngitis, a gynaecological illness, an accident on a bus where she had injured her back and another respiratory illness. She said that her respiratory illnesses had been due to her damp house. The claimant stated that if she were moved to the post room this would help the pressures in her home life and would greatly benefit her health and wellbeing such that there would be an improvement in her attendance at work. She felt that her sick record had deteriorated after her mother's passing and she mentioned that her granddaughter was born with cerebral palsy and that her grandson was born with brain damage, ADHD and epilepsy. She stated that she had a history of depression.
32. Mr Hartley considered the position. He determined that whilst the claimant had argued for a move to another role there was no evidence that this would improve her attendance. Neither she nor Occupational Health had presented evidence of a link between the pressure in the claimant's role and her sickness absence. Mr Hartley did not agree that the post room job would be a less demanding role as this was a time critical role, dealing with sensitive and high risk documents. He did not consider that it would be reasonable for another team to take on someone who had not maintained a sufficient level of attendance when there was no evidence that a move would improve attendance.
33. Mr Hartley considered that the claimant's department had done all it could to provide her with the necessary support. He concluded on the evidence before him that the recent absences had not been attributable to the underlying health conditions. He dismissed the claimant on 19 August 2016 and she was paid 13 weeks in lieu of notice. She was given a right to appeal within 10 days. She submitted a grievance on 13 September 2016 but this was out of time and so was not considered as an appeal.

The Law

Unfair Dismissal

34. Under section 98 of the Employment Rights Act 1996 the respondent has to show a potentially fair reason for the dismissal. In this case the

respondent asserts that it relates to the claimant's capability under section 98(2)(a). If the employer discharges the reason it falls to the Tribunal to determine the question of whether the dismissal is fair or unfair by having regard to whether in the circumstances including the size and administrative resources of the employer's undertaking it acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissal. This shall be determined in accordance with the equity and substantial merits of the case (s.98(4)).

35. Having regard to that section we remind ourselves that employers have at their disposal a band of reasonable responses. It is our function to determine whether the respondent's decision to dismiss fell within that band and not to say what we personally would have done had we been in the respondent's position (***Iceland Frozen Foods Ltd -v- Jones [1983] ICR 17 EAT; Foley -v- Post Office and Midland Bank -v- Madden [2000] ICR 1283***).

Disability Discrimination

36. Under section 15 of the Equality Act 2010 a person A discriminates against a disabled person B if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. An employer has a defence under s.15(2) if it shows that it did not know and could not reasonably have been expected to know that the person had a disability. The duty to make reasonable adjustments arises where there is a provision, criterion or practice which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage. An employer discriminates if they fail to comply with a duty.
37. Under s.20 of the Equality Act 2010 an employer is under a duty to make reasonable adjustments where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with a non-disabled person. The duty is on the employer to take such steps as are reasonable to take in order to avoid the disadvantage.

Conclusions

38. The respondent dismissed the claimant for reasons of capability, which were related to her short-term absenteeism. Having heard evidence from Mr Hartley we find that the claimant was dismissed under the respondent's managing attendance policy.
39. Having regard to reasonableness, we noted that the claimant had been under a final written warning for her sickness absence and was subject to

triggers. We noted that the decision-maker observed that there were no work related factors for the short spells of absence and that the claimant's recent periods of absence were not related to her long standing gastro-intestinal condition or to her psychological ill health. This was as per the Occupational Health report.

40. In reaching his decision to dismiss, the decision-maker took into account that the claimant had been provided with support by the respondent and that this was as follows: Occupational Health support; the services of an on-site counsellor; the services of the Employee Assistance Programme; that she had been given special leave on a number of occasions to assist with her personal and domestic issues; that she had been given an adjusted start time and frequent breaks; that she had been signposted to a mindfulness course; that she had been given special equipment; that she had been subjected to a risk assessment in 2014 and that she had had a DSE assessment to her seating.
41. We find that despite the claimant's representations that a move to another department would improve her health, there was no medical evidence before the respondent that this would in fact be the case or that such a move would improve her level of short-term absenteeism. There was no evidence before the respondent of any link between the claimant's absenteeism and her particular role. Her performance issues were an entirely separate issue. It was reasonable for Mr Hartley to conclude that the claimant had been provided with support. The claimant's absences were unrelated to her long-standing ill health conditions. It was reasonable for the respondent, following Occupational Health advice and the Claimant's communications, to conclude that this was the case. There was no evidence that would have indicated that the claimant had attributed her absence following the fall on the bus to any long-standing back condition. There was indeed no evidence that any of the historic absences were attributable to any back condition. We do not consider that the respondent or its Occupational Health Advisers would have been on notice that there was any underlying back issue and particularly when the claimant had not stated that this was the case.
42. Mr. Hartley took into account the claimant's long service but did not consider that this ought to afford her mitigation. He was entitled on the evidence to come to that conclusion as he was of a view that to find otherwise would be unfair to others who were subject to the policy and we find that this is a sufficiently coherent rationale.
43. It follows that we find that the dismissal fell within the band of reasonable responses and was fair in all the circumstances of the case.
44. Turning now to disability and we turn first to the claim under section 15 of the Equality Act 2010 we find that the dismissal was unrelated to the

Claimant's disability; that the Claimant was on a final written warning; that her absences which triggered her dismissal under the management of attendance policy were unrelated to any long-standing back condition, to IBS or to depression. We do not find that there is any evidence that the respondent knew or could reasonably have known that the absence due to back pain consequent upon the injury on the bus was linked to the claimant's sciatica.

45. Whilst the claimant had been given a special chair we do not conclude from this that the respondent knew that she had ongoing sciatica related to the injury. There is no evidence before us of this. Even if the claimant's 4 day absence had been linked symptomatically to her sciatica we find that the respondent acted reasonably in investigating this via Occupational Health and by way of meeting with the claimant. There were no prior absences for sciatica therefore the Respondent did not have any actual or constructive knowledge at the relevant time that any absence was related to a long standing back condition. We therefore dismiss the claim under section 15.
46. We come now to reasonable adjustments. We find that the PCP was the trigger points in the respondent's management of attendance policy, which had been pro-rata'd in the claimant's case. The claimant did not appeal the initial written warning but did appeal the final written warning in 2015. There were Occupational Health reports from the respondent. We find that in respect of the absences which triggered the final written warning and the absences which triggered the claimant's dismissal the policy did not put the claimant at a substantial disadvantage as compared to non-disabled people as the absences were not related to her long standing ill health conditions. Further we find that for the reasons we have given the respondent did not have any actual or constructive knowledge of her sciatica, if that had any linkage to the symptoms she experienced following her fall from the bus. Therefore we find there was no duty on the respondent to adjust the policy.
47. In any event we do find that save for the claim for dismissal, the other claims are out of time as the claimant did not present a claim to the Tribunal after she received her final written warning. She had union representation at the time and would have had an opportunity to raise a claim at that stage. We do not find that is just and equitable to extend time for presentation of a claim which should have been submitted 4 years ago and we noted that in respect of all witnesses, including the claimant and indeed the respondent's witnesses, there was difficulty in recollecting full events going back nearly 4 years.
48. In terms of the second part of the reasonable adjustments claim we find that the respondent has not followed the recommendation in the Occupational Health report to move the claimant to another department. There was a link between the claimant's performance issues and her psychological ill health,

however, we do not find that the failure to follow this recommendation puts her at a substantial disadvantage compared with non-disabled persons because it was not an operative factor in Mr Hartley's decision to dismiss. The claimant was dismissed for short-term absences which were unrelated to performance issues. Mr Hartley had no evidence that moving her to another department would indeed have improved her absence record, that the absences were work-related or related to her long term health conditions. A non-disabled employee who had been off sick for short-term absences would also have been facing dismissal under the management managing attendance procedure. Mr. Hartley's evidence was that the felt bound to apply the policy consistently. For those reasons the claims are dismissed.

Employment Judge A Frazer

Dated: 25 March 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

.....31 March 2019.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS