Case Number: 3311942/20

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Renata Kowalczyk	v	DHL Aviation (UK) Ltd

Heard at: Watford Employment Tribunal (by CVP) On: 7 March 2022

Before: Employment Judge Allen; Ms J Hartland & Ms S Williams

Appearances

For the Claimant: Mr Gracka, consultant
For the Respondent: Ms Kaye, counsel

RESERVED JUDGMENT

1. The claim of disability discrimination is not well founded and is dismissed.

2. The claimant was unfairly dismissed.

3. The Respondent will pay the claimant the total sum of £17,258 being comprised of basic award and future loss of earnings as set out below.

The Claims

4. The Claimant has brought claims for disability discrimination and unfair dismissal under her ET1 filed on 24 September 2020. (Claim for notice pay having been withdrawn and judgment entered in that respect on 16 July 2021).

The Issues

Disability Discrimination

5. Is C disabled within the meaning of s.6(1) Equality Act 2010 ('EqA')?

6. Did the Respondent know, and could reasonably have been expected to know, that the claimant had the disability S.6(2) EqA?

Discrimination arising from Disability (S15 EqA)

7. Did R treat C unfavourably because of something arising in consequence of her disability contrary to S15 EqA?

8. The alleged unfavourable treatment relied upon by C is her dismissal.

9. The alleged matter arising in consequence of disability relied upon by C is C's inability to do her job at the time and her absence levels.

10. If so, can R show that the treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (S20 EqA)

11. Did the duty to make reasonable adjustments arise?

12. Did R apply the following provision, criterion or practice ('PCP') generally, namely:

    12.1 'Providing untidy work environment' or

    12.2 'As part of arranging alternative roles for disabled staff during sickness absence candidates need to meet the same criteria external candidates'

    12.3 'Dismissals take place if no work can be secured as a phased return could only take place over a short period of time'.

    12.4 Did the application of the PCP place C at a substantial disadvantage when compared with persons who are not disabled.

    12.5 Did R know that C was disabled and that she would likely be placed at a substantial disadvantage by the PCP because of her alleged disability?

13. Would the following adjustments have been reasonable in the circumstances:

13.1 'Offer a clean and tidy work environment'

13.2 'To offer C an office-based job, either at junior position at the HR, or in fact any job office for that instance'

13.3 'If none were available at the given moment, R could swap her role with someone who currently was in such office job'

13.4 'Not to dismiss her, but await a moment, when such role become available (or wait until 7 September 2020 when C was deemed medically fit to attend work')

14. Would these measures have avoided the alleged disadvantages?

15. When did the alleged failures to make reasonable adjustments occur?

Unfair Dismissal

16. Did R have a potentially fair reason for dismissing the Claimant under s98(2) Employment Rights Act ('ERA') 1996? C believes R should have made adjustments to allow her to return to work. R relies on C's medical capability or in the alternative some other substantial reason.

17. If so, did R act fairly and reasonably in treating that reason as a sufficient reason for C's dismissal in the circumstances and did it follow a fair procedure?

18. Did C's dismissal fall within the range of reasonable responses that a reasonable employer in those circumstances may have adopted?

19. Did R follow a fair dismissal in dismissing C? If not, would following a different procedure have made any difference to the outcome?

Remedy

20. If C is successful in whole or in part, what level of compensation for losses should be awarded to her?

21. What award for injury to feelings should be made, if any?

22. If the dismissal was unfair, should any reductions be made to compensation awarded either by virtue of Polkey v AE Dayton Services Ltd [1987] IRLR 503?

23. Did C contribute to her dismissal and if so, should any compensation and basic award awarded to her be reduced to reflect her conduct?

24. Has C mitigated her loss?

25. Is C able to prove any loss?

FINDINGS OF FACT

26. The Respondent provides freight logistics services at a number of UK airports.

27. The Claimant was employed as a warehouse agent on a part time basis (3 days per week) in the respondent's warehouse at Heathrow airport from 18 September 2017 until 15 August 2020 when her employment was terminated on notice.

28. ACAS conciliation took place between 12 June 2020 and 12 July 2020 when it issued its certificate and the Claimant filed her claim with the Employment Tribunal on 24 September 2020.

Coronavirus

29. The Tribunal takes judicial notice of the following facts:-

    29.1 On 26 March 2020 Coronavirus lockdown measures came into force. Phased lifting of lockdown commenced on 1 June 2020.

    29.2 The NHS wrote to those identified as 'medically vulnerable' recommending that they self-isolate ('medically vulnerable' is a term applied to those who were at particular risk from coronavirus some of whom were disabled).

Respondent's sickness policy

30. The Respondent has a clearly defined sickness policy.

31. At para 4 (Pg 72-3) under 'Sickness Absence Procedure' the policy sets out the responsibility of the employee in maintaining contact with their manager either weekly or 'as agreed'.

32. Para 8 (Pg 75) makes it plain that failure to attend an OH appointment may result in Company Sick Pay (CSP) being withheld; it also states that SSP will be paid where an employee had exceeded their sick leave entitlement under the scheme.

33. Para 11 (Pg 78) deals with long term sickness benefit and applies to those with not less than 12 months service and covered by a Dr's medical certificate. Where there have been 2 periods of such leave within an 8-week period OH may link the 2 together. 26 weeks CSP may be paid where an employee has 24 months service or more calculated on a 12-month rolling calendar.

34. Para 18 (Pg 81) deals with OH referrals and makes it plain that where reasonable adjustments are recommended by a medical certificate an OH referral may assist a manager who has concerns about an employee's health or adjustments. Managers are advised to discuss referral with the employee, give reasons and encourage an open exchange of information. It also advises employees to inform their manager if they feel their condition may be related to an activity at work.

35. It goes on to make plain that if the employee does not keep the appointment or does not consent to the Respondent obtaining further medical information from a medical professional then the Respondent will only be able to make decisions based on the available information. (Pg 82).

36. Para 20 (Pg 83) explains that after 3 weeks of absence the employee will be placed on a sickness management process and will be monitored by OH and HR. After 4 weeks a meeting will be arranged either at work or home visit to discuss absence and alternative duties/options. At this point there must be weekly contact and a regular monthly meeting.

37. Any action under consideration regarding the ending of an employee's employment must firstly have been discussed with the individual in capability meetings and the employee must have been made aware previously that their employment was 'at risk' as a result of their continued absence (Pg 86). The Company will request updated medical evidence before any decision is made to terminate an employee's contract on the grounds of capability.

Disability

38. The Respondent disputes it was aware of this fact at the time of dismissal.

39. During a trip to Poland in May 2019 the claimant visited a doctor and was told she had asthma.

40. July 2019 - the claimant consulted her UK GP about her asthma.

41. October 2019 - the claimant had an asthma review with her GP surgery.

42. 13 November 2019 - her GP records note an asthma management plan identifying dust as a trigger. The claimant gave oral evidence that she didn't think she had an asthma management plan.

43. 19 November 2019 - the Claimant self-referred to Occupational Health ('OH'). This was the first time she had made her employer aware of her diagnosis since she received it in May.

44. 5 December 2019 - the company nurse assessed the claimant for OH purposes and asked her for a copy of her asthma management plan. The claimant consented to this report being shared with the respondent. The claimant was provided with a number of 'Blow test' devices and asked to return the results. The claimant asserts that she provided the results to the company nurse. The OH department has no record of receiving the results.

45. 12 December 2019 - the Respondent received a copy of the OH report which explained that the Claimant had recently been diagnosed with asthma, the main trigger or allergen appearing to be dust. The OH report recommended the Respondent consider keeping the Claimant in the 'Exceptions Department' or in an office-based environment as her symptoms were not as bad in these areas. The report recommended she have regular one-to-one meetings with her line manager and confirmed the Claimant was to provide further information around her prognosis.

46. The 'Exceptions Department' - was located on a mezzanine level in the warehouse and was raised above the main floor of the warehouse.

47. The Respondent commissioned an environmental study of the warehouse.

48. 15-16 January 2020 - The environmental study was carried out.

49. 31 January 2020 - GP's certificate stated the claimant was fit for work in an office environment.

50. 31 January - 2 February 2020 - the claimant was absent from work, noted as sick leave in the Respondent's records.

51. 10 February 2020 - environmental report prepared for the Respondent. (Bundle Pg 109) photographs show the warehouse was well ordered and not noticeably dusty. The report concluded dust levels were insignificant. It is not clear when the Respondent received the report.

52. A meeting was arranged with the company doctor and OH consultant for 5 March 2020 which for various reasons was refixed twice before it took place.

53. 2 June 2020 - the Claimant had a telephone consultation with the Respondent's OH consultant.

54. 5 June 2020 - the OH consultant notified the Respondent that it did not have consent from the Claimant to share the contents of its report. The claimant gave evidence that she did not agree with the contents of the report and wished to

discuss it with her GP. The email she sent at the time indicated she wished to discuss the report with the author. She did neither. Over 2 years has elapsed since these events and in the circumstances, we do not consider the discrepancy significant.

55. 10 June 2020 - the Respondent's OH consultant informed the Respondent again that the Claimant had not consented to release the report.

56. 12 June 2020 - the Respondent's OH consultant confirmed they still did not have the Claimant's consent to release the report.

57. This report was never disclosed to the Respondent. In her statement the claimant asserts the report contained mistakes and omissions including that she had no symptoms and should work in the 'flyer sort' department which the claimant felt was dusty and untidy. Her statement also says she wanted to discuss the report with the doctor who prepared it.

58. 13 January 2022 - in an email (Bundle Pg 49) the Respondent accepted the Claimant was disabled in accordance with the terms of S6 Equality Act 2010 at the relevant time.

Claimant's Absence

59. The Claimant initially went on sick leave on 31 January 2020 and provided a fit note until 12 March 2020 due to asthma. The Claimant returned to work on 7 February 2020 in the Exceptions Department. This is corroborated by the Respondent's records of the Claimant's attendance which show:

    59.1 the claimant was on continuous sick leave from 28 February - 15 August 2020.

    59.2 She was also shown as sick on 1-2 February 2020 although the claimant insists this is incorrect. Given these records were contemporaneous it is more likely than not they were accurate.

60. The Respondent uses different measures between its sickness policy which refers to 26 weeks on CSP and its attendance record which noted the claimant had been absent 496 hours in a 12-month period. Since the claimant works part time it is reasonable to calculate her absence in hours however it makes it difficult to calculate when the 26 weeks CSP would expire. 26 weeks from 28 February would expire on 28 August 2020 or 21 August 2020 if 1-2 February 2020 is also counted. The sickness policy also states that 2 periods of sickness in an 8-week period may be counted as a single absence. In this instance we find that these absences were

for the same reason and in the circumstances find that this approach was reasonable.

61. Further medical certificates for absences from work cover the period 9 April 2020 - 7 September 2020. There is no certificate to cover the claimant's absence between 12 March and 9 April however we find there is no reason to believe it was not covered.

62. The Claimant's line manager, MK (Operations Manager) led a welfare meeting with the Claimant on 28 February 2020. A number of points were discussed, including that the Claimant was to contact an asthma nurse via her GP to work on an asthma action plan. From this we conclude the claimant had not informed the Respondent that an asthma management plan had been drawn up by her GP practice on 13 November 2019. Had the claimant raised this with her GP practice following the 28 February meeting it is more likely than not she would have been reminded of this fact. We heard evidence the claimant undertook legal training in Poland and was working for a law firm in or near London at the time of the hearing. The Claimant was also informed that the Respondent did not have any office-based vacancies on that date. However, the Claimant was made aware of the advertisement board for job postings as well as the internal weekly email and website. The Respondent confirmed it wished to refer the Claimant to its company OH consultant. At page 123 of the bundle the claimant was told not to return to work until she was signed fit by her GP.

63. The Claimant again went on sick leave from 28 February 2020 and thereafter remained absent until her employment was terminated on 15 August 2020.

64. The Claimant was invited to attend a second welfare meeting with MK on 11 March 2020. In this meeting, and in response to suggestions about returning to work, the Claimant confirmed that she had not yet been able to meet with her doctor as he had been on holiday. Following the meeting, the Respondent provided the Claimant with a job advert for an office-based position; however, no application was received from the Claimant for this role.

65. 14 May 2020 - the Claimant notified the Respondent that she had received a message from the NHS Coronavirus Service advising that she should shield at home. The subsequent 'shielding' letter stated that by 1 August 2020 she could return to work in a Covid safe environment.

66. 7 June 2020 - The Claimant had a third welfare meeting by telephone with MK and by this time it was confirmed that the Claimant had been absent for a total of 496 hours in a 12-month period. MK noted that the Claimant had not yet consented to releasing the medical report and the Claimant agreed that she would arrange to

speak to her GP. Of the Dr's OH report she said she was almost not coughing and there had been a misunderstanding with her English, she stated she needed to send an email (5 days after the meeting on 2 June 2020 she had not done so). A further welfare meeting was arranged for 14 June 2020 by which time the Claimant agreed she would have spoken to her GP.

67. 10 June 2020 - the Claimant requested that the scheduled welfare meeting be rearranged so she could speak with her doctor.

68. 12 June - 12 July 2020 - ACAS conciliation process.

69. 15 June 2020 - the Claimant informed the Respondent that she would not be attending the rearranged welfare meeting on 16 June 2020 and that 'the person representing her' would be in contact with the Respondent directly. The Claimant was reminded that, in accordance with the Respondent's Sickness Absence Policy, she was required to maintain proper contact with the Respondent and if she failed to do so she would only be entitled to Statutory Sick Pay ('SSP').

70. 21 June 2020 - The Respondent contacted the Claimant to discuss her ongoing absence. The Claimant confirmed that she did not want to talk to the Respondent and her representative would be in contact on her behalf. The Claimant did not provide any update on her absence.

71. The Respondent invited the Claimant to attend a capability meeting as part of the Respondent's sickness absence process on 10 July 2020. This meeting was arranged to discuss the Claimant's ongoing absence from work, her capability to work in her current role and continuing employment. The Claimant was informed that whilst this meeting would not lead to the termination of her employment, this was something that would need to be discussed. The Claimant was informed of her right to be accompanied and was notified that her attendance was required. The Claimant was also informed that if she failed to attend any future meetings then important decisions may be taken in her absence.

72. 10 July 2020 - The Claimant did not attend the meeting and a further meeting was scheduled for 20 July 2020 but the Claimant failed to attend this meeting also. The Respondent held the meeting in the Claimant's absence and reviewed the available evidence.

73. 16 July 2020 - the claimant was told she would no longer be paid company sick pay as from 14 June 2020 but would continue to receive statutory sick pay because she had refused to maintain contact with management as required by the sickness absence policy. (Pg 162).

74. 22 July 2020 - The Respondent wrote to the Claimant to inform her of the outcome of the meeting and confirmed that it had not seen any medical information since

the Claimant was seen by OH in December 2019. However, one of the proposals from OH was around the Claimant working in an office-based position. As a position had become available, the Respondent notified the Claimant of the vacancy and asked that she confirm by 27 July 2020 if she wished to be considered for it. The Claimant did not respond.

75. 23 July 2020 - KL Law Ltd wrote to the Respondent enquiring of a response to their email of 13 July 2020. KL Law Ltd informed the respondent that they were instructed to act on the claimant's behalf, the matter had been registered for ACAS conciliation and invited the Respondent to make a settlement agreement or they would issue proceedings (Pg 169).
76. We heard evidence from the Respondent that whilst the vacancies forwarded to the claimant required experience she did not have, they were considered suitable for her. The Respondent also gave evidence that training would be provided to her if her application was successful. However, it was conceded that this information was not provided to her. The claimant gave evidence that having reviewed the job descriptions for both posts she concluded she did not meet the criteria and so did not apply. The Respondent was aware of this fact as the claimant stated that was the reason she had not applied for the first vacancy forwarded to her (Bundle Pg 139).
77. 5 August 2020 - the Claimant was invited to attend a further capability meeting on 13 August 2020 as part of the Respondent's sickness absence process. The Claimant was again made aware that the basis for this meeting was to discuss her ongoing absence from work, her capability to work in her current role and continuing employment. The Claimant was informed that one potential outcome of the meeting was the termination of her employment on notice and she was informed of her right to be accompanied. The Claimant failed to attend, it was held in her absence and the Respondent reviewed the available evidence.

78. 14 August 2020 - The Respondent wrote to the Claimant informing her of its decision and noted that:

    a) it had not had sight of any up-to-date medical evidence;
    b) the Claimant had remained absent from the business since February 2020; and
    c) The Claimant had failed to express an interest in, or apply for, any of the office-based vacancies the Respondent had alerted her to.
    d) The Respondent confirmed that the Claimant's employment would be terminated on 15 August 2020 and she would receive a payment in lieu of her contractual notice of four weeks.
    e) The Claimant was also informed of her right to appeal.

79. 15 August 2020 - the claimant's contract of employment was terminated.

The Appeal

80. The Claimant appealed the decision and was invited to attend a hearing on 26 August 2020 with DR (Senior Operations Manager).

81. 24 August 2020 - the Claimant's solicitor emailed the Respondent confirming that the Claimant did not wish to attend the appeal hearing as she had lost trust in her employer and would be commencing proceedings in the Employment Tribunal.

82. 27 August 2020 - ME (HR Advisor) contacted the Claimant to give her a further opportunity to attend and rescheduled the hearing for 2 September 2020. The Claimant failed to attend the rescheduled appeal hearing and it proceeded in her absence.

83. 9 September 2020 - The Respondent wrote to the Claimant to confirm the outcome of the Claimant's appeal and the decision to terminate her employment on notice was upheld.

THE LAW

Discrimination arising from disability

84. S15 Equality Act 2010

(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.

85. In *York City Council v Grosset [2018] ICR 1492*

Sales LJ stated *'If the defendant does know that there is a disability, he would be wise to look into the matter more carefully before taking unfavourable action'.*

By reference to an example at paragraph 5.9 of the EHRC Employment Code of Practice, he also stated that *'it is not suggested that the employer has to be aware that the employee's loss of temper was due to her cancer, but only that the employer should be aware that she suffers from cancer (i.e., so that the employer cannot avail himself of the defence in subsection 15(2))'.*

86. In *A Ltd v Z 2020 ICR 199, EAT*, Z was dismissed by A Ltd due to her poor timekeeping and numerous sickness absences, which she explained by reference to various physical ailments. In fact, the absences were due to mental impairments

– stress, depression, low mood and schizophrenia – which amounted to a disability. An employment tribunal upheld her claim for discrimination under S.15. In its view, A Ltd had constructive knowledge of Z's disability because before dismissing her it had received GP certificates and a hospital certificate indicating that there was a real question about her mental health. It was therefore incumbent on A Ltd to enquire into Z's mental wellbeing. Its failure to do so precluded A Ltd from denying that it ought to have known that Z was disabled.
The EAT held that the tribunal had erred because it had not taken into account what the employer might reasonably have been expected to know had it made enquiries. The tribunal had found that Z would have continued to suppress information about her mental health problems, would have insisted that she was able to work normally and would not have agreed to any medical examination that might have exposed her psychiatric history. Therefore, A Ltd could not reasonably have been expected to know that she was disabled and, as a result, the EAT allowed the employer's appeal and ordered that Z's discrimination claim should be dismissed.

Unfair Dismissal

87. S98 Employment Rights Act

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- the reason (or, if more than one, the principal reason) for the dismissal, and
- that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) N/A
(d) N/A

(3) In subsection (2)(a)—

(a) 'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) 'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), 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.

(5) N/A

(6) Subsection (4) subject to—

(a)sections 98A to 107 of this Act, and

(b)sections 152, 153 [238 and 238A] of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).

2) The House of Lords' decision in *Archibald v Fife Council 2004 ICR 954, HL*. There, A had suffered complications from surgery that severely impeded her mobility and left her unable to continue in her job as a road sweeper. She applied for over 100 'desk jobs' with the Council but as these posts were at a higher grade, she was required to undergo a competitive interview process. A was unsuccessful in all her applications and was eventually dismissed. She brought a claim of discrimination by way of a failure to make reasonable adjustments, arguing that the Council should have transferred her to one of the posts without an interview.
The House of Lords held that the duty is triggered in circumstances where an employee becomes so disabled that he or she can no longer meet the requirements of his or her job description. Although other forms of disability discrimination do not require that a disabled person be treated more favourably than fellow employees, the duty to make reasonable adjustments is different and necessarily entails a degree of positive discrimination, in that employers are required to take positive steps that they would not have to take for others. Moreover, depending on the circumstances, the duty could require an employer to transfer a disabled employee to a vacant post at a slightly higher grade — if the employee is qualified and suitable for the job — without requiring him or her to undergo a competitive interview.

CONCLUSION

Disability

88. We have no difficulty in concluding the Claimant is disabled within the meaning of s.6(1) Equality Act 2010. This was accepted by the Respondent in writing on 13 January 2022 having had the opportunity to review medical evidence disclosed by the Claimant since the commencement of her claim. The disability is by reason of asthma.

Discrimination arising from Disability (S15 EqA)

89. S15(2) EqA provides a limited statutory defence. It is for the Respondent to show that it did not know, and could not reasonably have been expected to know, that the claimant had the disability. If the Respondent is successful in establishing that lack of knowledge all other issues pertaining to disability discrimination fall away and need not be considered by this tribunal.

90. Applying the principles set out in *York City Council v Grosset [2018] ICR 1492* and *A Ltd v Z 2020 ICR 199, EAT* above we find that the Respondent did not know and could not reasonably have known that the claimant had a disability on the following grounds:

    90.1 Whilst it is accepted the claimant was diagnosed with asthma in May 2019 the Respondent was unaware of the diagnosis until December 2019 when the claimant self-referred to the respondent's occupational health department.

    90.2 This referral was insufficient to constitute knowledge of disability given asthma is not a condition on which statue confers automatic disability status.

    90.3 The Covid 'shielding' letter is evidence that the claimant had been identified as 'medically vulnerable' to coronavirus and is persuasive but not conclusive evidence she may be disabled.

    90.4 The Respondent took steps to enquire into the claimant's asthma by referring the claimant to its Occupational Health doctor for an expert assessment.

    90.5 The claimant declined to give consent for the doctor's report to be disclosed to the Respondent on the grounds she did not agree with the contents. There is some confusion over whether she wished to discuss the report with the author or her GP. Discussion with the author would be more logical however, she did neither so this confusion is not material.

90.6 In our view the Respondent satisfied the requirement to make enquiry into the claimant's report of disability in that it:

90.6.1 Provided her with blow test equipment
90.6.2 Advised her to seek an asthma management plan through her GP practice
90.6.3 Held a number of welfare meetings with her under its sickness policy
90.6.4 Referred her for an occupational health assessment with a doctor;

90.7 The claimant's failure to consent to disclosure of medical reports whilst within her rights severely limited the information available to the Respondent upon which to draw conclusions and make informed decisions.

90.8 The only material available to the Respondent on which to conclude disability was:

90.8.1 the company nurse's OH report, identified issues and next steps but did not identify that the claimant was disabled;
90.8.2 GP medical certificates, identified issues and solutions but did not identify that the claimant was disabled; and
90.8.3 'shielding' text and subsequent letter the claimant received and forwarded to the Respondent. This was evidence that the claimant was medically vulnerable to the coronavirus but was not conclusive on the question of disability

90.9 Whilst it is clear from the material available to the Respondent that the claimant had asthma it was insufficient for the decision maker to conclude she was disabled.

Unfair Dismissal

91. The Respondent asserts the reason for dismissal was Capability or in the alternative some other substantial reason. We found that the main reasons for dismissal were as the Respondent asserted namely:

91.1 That the claimant had been absent for 496 hours in a 12-month period [S98(1)b & (3)a ERA, Capability on grounds of health]; and that
91.2 The claimant did not intend to return to work for the Respondent at all [S98(1)b ERA Some Other Substantial Reason].

92. Both are fair reasons for dismissal in accordance with S98(1)b ERA.

<u>If so, did the Respondent act fairly and reasonably in treating that reason as sufficient for the Claimant's dismissal in the circumstances and did it follow a fair procedure?</u>

93. The decision to dismiss was made on 14 August 2020 and in the letter to the claimant were stated to be that:

    93.1 the Claimant had remained absent from the business since February 2020; and
    93.2 The Claimant had failed to express an interest in, or apply for, any of the office-based vacancies the Respondent had alerted her to.

94. We also note that:

    94.1 On page 123 the claimant was instructed not to return to work until she was signed fit to do so by her GP.

    94.2 The claimant had provided GP's medical certificates that stated she was unfit to work until 7 September 2020.

    94.3 The Respondent's own sickness policy states *26 weeks CSP may be paid where an employee has 24 months service or more calculated on a 12-month rolling calendar* at para 9 above. The first day of sickness absence taken from the Respondent's records was 28 February 2020. We note the claimant was also absent on 1-2 February.

    94.4 The claimant had been advised she should self-isolate as a person medically vulnerable to the coronavirus. The letter stated she could return to work in a covid safe environment from 1 August 2020.

95. Given these 4 factors the decision to dismiss on 14 August 2020 was premature. However, whilst covid cannot be ignored as a factor the claimant was certificated unfit to return to work until 7 September 2020 because of asthma.

96. We heard evidence that the decision to dismiss was also based on the assessment by the decision maker that the claimant had no intention of returning to work on 7 September 2020, this decision was based on the invitation by the claimant's solicitor to make an offer of settlement or the claimant would consider issuing proceedings in the Employment tribunal (Acas conciliation had already taken place although was not identified specifically as a factor). However, the decision maker failed to take into account that the claimant's line manager told her in February 2020 that she should not return to work until her GP had signed her off as fit to do so (page 123 of the bundle); and

97. That the claimant had not applied for either of the available office-based vacancies that arose during this period. We note that DHL is a substantial organisation with significant staff turnover. We have also taken judicial note of the fact that due to

the effects of Lockdown and the coronavirus the bottom had fallen out of the job market and there was little if any movement nationally.

98. Para 18 (Pg 81) of the Sickness Absence Policy provides that there is no requirement for an employee be disabled to qualify for reasonable adjustments. We heard evidence the Respondent had made reasonable adjustments for employees who were not disabled but where the employer considered it appropriate.

99. In this case we have found the Respondent did not have the required knowledge of the claimant's disability for her to succeed in a claim of disability discrimination under the provisions of the EqA. However, it is clear the Respondent did make reasonable adjustments for her; namely she could continue to work in the 'exceptions department' as advised in the OH report prepared by the company nurse.

100. The claimant's GP recommended that the claimant would benefit from an office-based position. The company nurse's OH report made a similar observation.

101. The case of *Archibald v Fife Council 2004 ICR 954, HL. (para 89 above)* is authority for redeploying a disabled employee to an alternative post of 'slightly' higher grade without competitive interview. That is not the case here. In the absence of evidence of disability there was no obligation on the Respondent to transfer the claimant without competitive interview. In the circumstances asking the claimant if she was interested in either post and inviting expressions of interest from her was reasonable.

102. What was not reasonable, in our view, was the failure to communicate to the claimant that in the opinion of her managers she was capable of filling either post with training and such training would be provided to her if she was successful. Especially as the claimant notified her manager during the June welfare meeting that she had not applied for the first vacancy forwarded to her because she did not believe she met the job requirements.

103. We heard evidence from the claimant that having reviewed the job descriptions for both posts she saw that they required specific experience she didn't possess, assumed she had no chance of securing either so did not apply.

Did C's dismissal fall within the range of reasonable responses that a reasonable employer in those circumstances may have adopted?

104. We remind ourselves that the range of reasonable responses is wide and it is not for this tribunal to substitute what it might have done for the respondent's decision in the circumstances given:

104.1 The claimant's line manager had told her in February not to return to work until her GP signed her as fit to do so;
104.2 The claimant was certificated sick until 7 September;
104.3 Had been advised to self-isolate as medically vulnerable to coronavirus although from 1 August 2020 she could return to work in a 'covid-safe' environment; and
104.4 Failure to communicate key information about the office-based vacancies, including that lack of experience was not a bar to her application being successful and that training would be provided to her if she were successful.

105. We concluded the dismissal fell outside the range of responses a reasonable employer in those circumstances may have adopted.

106. We note that:
106.1 As of 16 June 2020, the claimant withdrew from the sickness absence process and on the face of it was in breach of the sickness absence policy's requirement to maintain regular contact. The claimant had maintained contact up to that point;
106.2 ACAS were notified of this case and that conciliation was carried out between 12 June and 12 July 2020; and
106.3 On 23 July 2020 (and possibly 13 July 2020) the Respondent was invited to make a settlement offer by the claimant's solicitor.

The claimant was of the view that the Respondent had breached the implied terms of trust and confidence in that it wished to terminate her contract rather than see her return to work. On the face of it the Respondent had acted in accordance with its policies however, we found that the Respondent knew why she had not applied for the first vacancy and failed to provide the claimant with key information about her candidacy as discussed above. In those circumstances we conclude her assessment of the situation was more likely than not to have been reasonable as was her decision to appoint a third party to act for her and did not contribute to her dismissal.

REMEDY

Basic Award:

2 x 1.5 x £348.00

£ 1,044.00

Immediate and Future loss of Earnings:

a) if remained with the Respondent 52 x £307.00

£15,964.00

b) receipt of Universal Credit £14,001

Loss of Statutory Rights

£ 250.00

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Employment Judge Allen

Date: 31 May 2022

Sent to the parties on:

7 June 2022

For the Tribunal Office

Note

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