



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss Danielle Gare

v

Oakdale Care Homes No.2 Limited

Heard at: Cambridge

On: 13 September 2022; and continuing on
24, 25, 26 April 2023

Before: Employment Judge M Ord

Members: Mr A Hayes and Mr D Snashall

Appearances

For the Claimants: Mr N Woodhead, Lay Representative

For the Respondent: Mr N Brockley, Counsel

RESERVED JUDGMENT

1. It is the unanimous decision of the Employment Tribunal that the Claimant was the victim of unlawful discrimination because of something arising in consequence of her disability, Endometriosis, when she was dismissed.
2. The thing arising from her disability was her periods of absence and the unfavourable treatment was dismissal.
3. The Respondent has not established that the dismissal was a proportionate means of achieving a legitimate aim.
4. The remaining complaints brought by the Claimant are not well founded and they are dismissed.

REASONS

Background

1. The Claimant was employed by the Respondent at Timken Grange Care Home from 14 October 2020 to 23 March 2021, on which date she was dismissed with a payment in lieu of notice.

2. Following a period of Early Conciliation which began on 9 May 2021, the Claimant received her Early Conciliation Certificate on 13 May 2021 and presented a claim to the Employment Tribunal on 17 June that year complaining of disability discrimination.
3. Disability was initially denied, but following the disclosure of medical evidence and an Impact Statement the Respondent admitted that the Claimant was disabled by virtue of Endometriosis, at the material time, but denied knowledge, factual or imputed, of the condition amounting to a disability.
4. At a Preliminary Hearing on 10 February 2022, the Claimant's complaints were established as follows:
 - 4.1 Firstly, direct discrimination contrary to s.13 of the Equality Act 2010 ("EqA"). The alleged less favourable treatment relied upon was the act of dismissal.
 - 4.2 Secondly, the unfavourable treatment because of something arising in consequence of disability, contrary to s.15 EqA 2010. The Claimant said the thing arising was her periods of absence and that the unfavourable treatment was dismissal. The Respondent said that the Claimant's dismissal was, if relevant, a proportionate means of achieving a legitimate aim; the legitimate aim being to ensure safe staffing levels at the home. The Claimant says she had asked about working in other areas of the home, but that the Respondent failed to pursue that either properly or at all.
 - 4.3 Thirdly, the Claimant said that there was a failure to make reasonable adjustments contrary to §.20 and 21 EqA 2010. The provision, criterion or practice relied upon was the Respondent's inclusion of all absences when considering dismissal and that a reasonable adjustment would have been to ignore absences related to disability.
5. It is of note that at the time of that Preliminary Hearing the Respondent denied that it operated any trigger points for taking action in relation to absence management and relied upon the contention that the Claimant's absence was having an impact on the Home and safe staffing levels. In fact, the Respondent has, it transpires, trigger points as can be seen from the relevant Sickness Absence Policy.
6. The Respondent denied all the Claimant's complaints. Whilst accepting that the Claimant was, at the material time, disabled the Respondent said that the Respondent did not know and could not reasonably have known that the Claimant was disabled by virtue of her condition.
7. At the Hearing the Claimant gave evidence, as did Mr Nathan Woodhead on her behalf. Mr Woodhead is the Claimant's partner and also acted as

her Advocate before us. The Respondent called evidence from Mrs Emma Oldershaw who was at the time the HR Director for Halcyon Care Homes previously Oakdale Care Group, who operated the Home where the Claimant worked. Reference was made to a Bundle of documents.

8. Based on the evidence before us, we have made the following findings of fact.

Findings of Fact

9. The Claimant was employed from 14 October 2020 to 23 March 2021 as a Host with her primary responsibilities relating to the residents' nutrition and hydration, including recording these matters and assisting with stock control.
10. The Claimant's employment was subject to a six month probationary period. Her working pattern was three twelve hour shifts followed by three days off, thus averaging 42 hours per week.
11. On 28 September 2020, before commencement of her employment, the Claimant completed a Medical Questionnaire as part of her Application Form. In that document she confirmed that she had regular scans for her condition that may require surgery in the future and that she suffered from Raynaud's disease and had a childhood history of epilepsy.
12. On the following day a document entitled "Risk Assessment in Relation to a Medical Condition" was completed by Georgie Thompson, the Respondent's Head of Care and Compliance. This confirmed the following:
 - 12.1 The Claimant had the most severe level of Endometriosis (Stage 4), with large cysts growing and she had undergone previous diagnostic procedures over a period of time.
 - 12.2 In relation to that condition she would require time off for scans and there would be times when her pain was such that she would not be able to attend work. This would be worse around her menstrual cycle.
 - 12.3 The Claimant was to follow the Sickness Reporting Policy if she was absent and a Return to Work Interview was to be implemented after each sickness period.
 - 12.4 Any absence of more than two weeks was to prompt a weekly call from the Management Team to discuss her return to work and the question of reasonable adjustments.
 - 12.5 Modifications identified were for flexibility around scans, of which she would give as much notice as possible and possible future IVF treatment. The document recommended that an extra member of

care staff was to be put in place so that a Care Assistant could act as Host on those occasions.

- 12.6 The Claimant did not believe that her condition would affect her work whilst she was at work.
- 12.7 The Claimant had not had an epileptic seizure since the age of six, but the risks associated with the condition were identified in the form.
- 12.8 In relation to Raynaud's disease, the Claimant disclosed painful joints in the winter and the need to warm her hands before handling anything cold.
13. There was an email regarding pain management said to be attached to the form, we have not seen it.
14. Mrs Oldershaw confirmed that a copy of the document should be placed on the Claimant's Personnel file, that a copy would be sent to the relevant Manager, in this case Isobel Scott, and that a copy would be provided to the Claimant.
15. The Claimant had received her copy and that copy was photographed and attached to her claim form.
16. Mrs Oldershaw told us that on 23 March 2021 when she and Mrs Scott met, there was no copy of the form on the Claimant's Personnel file and that she did not know that any Risk Assessment form had been completed and so there was no impetus to search for one.
17. We reject that logic for two reasons. First, we are satisfied on the balance of probabilities that Mrs Scott either had or had been given a copy of the Risk Assessment at the same time as the Claimant received hers. Secondly, on considering the Medical Questionnaire which identified three conditions, Endometriosis, Raynaud's disease and childhood Epilepsy, it ought to have been obvious to both Mrs Scott and to Mrs Oldershaw that a Risk Assessment would have been required in relation to the Claimant.
18. Rather than make enquiries about the existence of this document, Mrs Oldershaw was content to look at a Monitoring Form, although on what basis that document remained on the Claimant's Personnel file five months after it was completed, we have not heard.
19. We find as a fact, on the balance of probabilities, that Mrs Scott knew of the Risk Assessment and further, that had she and Mrs Oldershaw read it and considered it they would have concluded that the Claimant was disabled as a result of her Endometriosis. It was stated to be at the most severe stage (Stage 4) and clearly lasted for more than 12 months as it referred to three surgical procedures in the last two years and referred to times when pain was sufficient to prevent the Claimant from coming into

work, worsening around the Claimant's menstrual cycle. That pain would have been sufficient, based on the evidence in the Claimant's Impact Statement, to affect her day to day activities.

20. If Mrs Scott and Mrs Oldershaw had any doubt that the condition was disabling following their reading of that document, then simple further enquiry of the Claimant, her General Practitioner and / or Occupational Health could easily have been made. Instead they closed their minds to the matter and relied on a single answer in an Equal Opportunities Monitoring form when the Claimant was asked did she consider she had a disability and she had answered 'no'.
21. The duty on the Respondent is to make a reasonable enquiry. The Respondent, in particular Mrs Scott and Mrs Oldershaw, ought reasonably to have known that the Claimant was disabled at the material time and had they made the simplest and most obvious enquiries this would have been apparent to them.
22. The Claimant had had one part day of absence on 3 December 2020 due to her condition. She had to leave early that day because of the level of pain she was experiencing. Shortly thereafter, she was required due to the Regulations pertaining in regards the Covid pandemic, to isolate for 14 days before her anticipated surgery relating to her condition which was scheduled for 30 December 2020.
23. Accordingly, the Claimant was required to remain off work from 15 October 2020 ahead of that planned surgery.
24. The Claimant had advised the Respondent by email to Isobel Scott on 3 December 2020 at 4.04 that afternoon that she had contacted the relevant Hospital department as she had been suffering extreme levels of pain and that she had been given a surgery date of 30 December 2020 so that her last day at work would be 14 December 2020 to enable her to isolate for the relevant period.
25. In that email the Claimant apologised for the period of absence, as in particular it was covering the Christmas period. She expressed the hope that,

"everyone will be understanding"

and said that she had been planning to work on Christmas day as she,

"really wanted things to be fair"
26. At 4.37 that afternoon, Mrs Scott replied asking the Claimant to,

"Let me know if there are any changes. Hope it goes ahead and you can get on with your life pain free"

The Claimant was giving the Respondent 11 days' notice of her anticipated absence.

27. Unfortunately, on 29 December 2020 the day before it was due to take place, the Claimant's operation was cancelled and a new date was to follow. The Claimant would therefore have been able to return to work but suffered a bout of sickness / diarrhoea which under the Respondent's rules required her to remain off work for 48 hours. Accordingly she did not return to work until 2 January 2021.
28. On 14 January 2021, Ms Tompkins conducted the Claimant's Probationary Review. According to that document, an employee will score 1 if their performance in any specific area was unsatisfactory and 5 if it was satisfactory. Quite how scores of 2, 3 or 4 are awarded on that scale we asked Mrs Oldershaw, but received no clear answer. The Respondent appears to be making, in our collective view, some sliding scale between satisfactory and unsatisfactory.
29. Be that as it may, the Claimant scored 5 in six of the eleven categories, 4 in two more and for each of Attendance, Managing Time and Sickness a score of 3. It was recorded that she was waiting for an appointment for surgery. There was no comment under the sections 'Progress to Date', or 'Future Targets / Goals' to indicate that the Claimant's record was of concern. The Review was overall positive.
30. On 8 January 2021, the Claimant had a one day pre-planned holiday as she was moving house.
31. Later in January 2021, the Claimant contracted the Coronavirus. She missed 6.5 working days between 20 January 2021 and 1 February 2021. But for that absence, the Claimant had worked as far as we have been told, completely satisfactorily in this period.
32. On 9 March 2021, the Claimant was suffering severe pain and after her shift went home and called 111. She was advised to go to the Accident and Emergency Department, where she was kept overnight and scans were carried out. She was then sent home from Hospital and the Claimant contacted the Respondent.
33. Because she had been in Hospital overnight, she was unable to attend work due to the Respondent's Policies and the then prevailing Government Guidelines for 10 days. She was due to return to work thereafter.
34. There was a telephone discussion between the Claimant and the Respondent, in the shape of Mrs Scott, on 23 March 2021. According to the Claimant, she was telephoned by Mrs Scott who told her not to attend work until after her surgery and that it was important that she would return to work only when well enough to do so.

35. According to Mrs Oldershaw who was present in the room at the time Mrs Scott spoke to the Claimant, but on her own evidence could not hear what the Claimant was saying believing this was a call from the Claimant. According to Mrs Oldershaw, after the telephone call Mrs Scott told her that the Claimant had said she did not know when she would be able to return to work as she was taking medication which would impact on her ability to carry out her role. The Claimant denied that this was the case. She said she was not taking any medication, had stopped taking pain killers seven days beforehand and was told by Mrs Scott not to return to work.
36. Mrs Oldershaw's evidence was that she had not heard Mrs Scott tell the Claimant not to come to work.
37. Having considered this dichotomy of evidence, we unanimously prefer and accept the Claimant's evidence in relation to this telephone call. First the Claimant's telephone records show an incoming call from the Respondent at 12.56 on 23 March 2021, not an outgoing call. Further, the Claimant had at all times demonstrated a desire to be at work. She was not, we accept and find as a fact, taking any medication that would have prevented her from working and her medical records confirm this. She had not required any time off due to medication previously. Her apology for being unable to work during the Christmas period and her concern for the fairness of her absence and its impact on others, speaks to her work ethic.
38. We are satisfied that the Claimant was ready and able to return to work and was told not to by Mrs Scott. The subsequent events of that date corroborate this. The Claimant was dismissed very shortly after the call, by email, and we conclude that Mrs Scott would not have wanted the Claimant to be ready to attend work when her employment was about to end.
39. At 2.33pm that day, Mrs Oldershaw sent to the Claimant an email enclosing a letter of termination. The letter of dismissal referred to the Claimant's probationary period and listed five occasions of absence, all which were said to be due to "*gynaecological health issues*" apart from the period of isolation prior to the expected surgery on 30 December 2020. The Respondent said it discounted the absence due to Covid-19 when considering the periods of absence relating to the Claimant's employment.
40. The letter of dismissal referred to the Claimant telling Mrs Scott that she was not fit for work due to prescribed medication and that she was unable to indicate when she might return to work. The letter stated that,

"due to the reasons stated above, I am terminating your employment during your probationary period with immediate effect"

The letter was signed by Mrs Oldershaw. The Claimant was to be paid in lieu of notice and for 103 hours of accrued annual leave, which she had accrued during her period of employment.

41. In that letter and in her witness statement to which she affirmed the truth before us, Mrs Oldershaw spoke of “her” decision to dismiss the Claimant. But when she was asked about this, in particular whose decision it was to dismiss the Claimant, Mrs Oldershaw said that it was Mrs Scott’s decision that she supported and which was confirmed by Mrs Oldershaw’s own superior who was not identified to us.
42. The decision, Mrs Oldershaw confirmed, had rested with the Home Manager Mrs Scott.
43. Promptly on receipt of the letter of dismissal, 94 minutes after the email was sent to her, the Claimant replied. She commented on the fact of her being dismissed by email with no prior warning or discussion. She confirmed that she had told Mrs Scott that day that she was well and able to return to work and that it was Mrs Scott who insisted that she remain absent from work until after her operation. The Claimant confirmed that her anticipated next working day would have been 25 March 2021. The Claimant repeated what she said she had told Mrs Scott, that she was taking no medication and had ceased taking pain killers one week previously. The Claimant also said that she had told Mrs Scott the anticipated date of her surgery and stated that as a recovery time was expected to be approximately six weeks, she would be ready to return to work after the operation on or about 1 June 2021.
44. The Claimant questioned the calculation of absence. Part of the period referred to was annual leave, part due to Policies requiring isolation pre-operation and not working after a visit to Hospital and not working for 48 hours after a bout of sickness and / or diarrhoea. She concluded that,

“to be dismissed as a nuisance because of a medical issue unexpectedly worsening, that I was open about it from the outset and will be rectified next month, makes it clear that... loyalty is one sided.”

36 minutes later Mrs Oldershaw replied reiterating that the Claimant was still, contrary to her belief, within her probationary period and said it was disappointing that the Claimant had not returned to work in December 2020 (in the period when the Claimant could not work because of an episode of diarrhoea and vomiting).
45. Mrs Oldershaw stated that the fundamental justification for the Claimant’s dismissal was the Claimant’s high absence level and the impact it had on the Residents and the Home. It was said that the Residents pay inter alia for a “dining experience” which was “lacking” when the Claimant was not able to attend work.
46. The Claimant replied again at 17.28 that day, repeating her concerns, but there the correspondence ended.

47. It is against that factual background that the Claimant brings her complaints.

The Law

48. The Equality Act 2010 provides:
- 48.1 Under s.4: Disability is a protected characteristic;
- 48.2 Under s.13: A person discriminates against another if they treat that person less favourably than they treat, or would treat, others because of a protected characteristic;
- 48.3 Under s.15: A person discriminates against a disabled person if they treat that person unfavourably because of something arising in consequence of their disability and cannot show that the treatment is a proportionate means of achieving a legitimate aim. The section does not apply if the alleged discriminator did not know and could not reasonably have been expected to know that the person had the disability;
- 48.4 Under s.20(2): Where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, then A must take such steps as it is reasonable to have to take to avoid the disadvantage; and
- 48.5 Under s.21: A failure to comply with s.20 is a failure to make reasonable adjustments and A discriminates against a disabled person if they fail to comply with that duty in relation to that person.

The Conclusions

49. Applying the relevant Law to the facts found, we have reached the following conclusions.
50. The Claimant was open about her medical conditions on 29 September 2020, prior to commencing her employment when there was a Risk Assessment in relation to her medical condition.
51. Prior to this on 16 September 2020, when completing her Application for employment, the Claimant had completed a form, one section of which was headed "Equal Opportunities Monitoring", which it was said,

"will be treated with the upmost confidentiality"

and that

“it will not be considered in assessing information on your Application Form and is not included in the shortlisting process”

52. The Claimant had, in answer to the definition of disability which was quoted under the then repealed Disability Discrimination Act 1995, stated that she did not consider herself to be disabled under that definition.
53. We note with substantial concern that this information which included details of gender, marital status, nationality and religion, was stated,

“to be used to monitor the operation of Equal Opportunities Policy and the effectiveness of advertising and for no other reason”.
54. However, five months into the Claimant’s employment and six months after her providing this information, Mrs Oldershaw and presumably Mrs Scott, used this “*know*” as the basis for their denying, at least in substantial part, knowledge actual or imputed of the Claimant being disabled. Quite why the information was still available to either of them at that time when its stated purpose was solely as set out above, we are unable to say. The Risk Assessment form which Mrs Oldershaw confirmed should be copied onto the Claimant’s Personnel file as well as to the relevant Manager, here Mrs Scott, and to the Claimant set out a number of matters regarding the Claimant’s medical condition. Most importantly it stated that the Claimant had severe Stage 4 Endometriosis, would require time off for scans and would experience severe pain relative to her menstrual cycle which was sufficiently severe to prevent her from being able to work. She was also possibly to undergo surgery in the future.
55. We are satisfied, based on the evidence we have heard and seen in the Bundle, that the level of pain would have been sufficient to impact the Claimant’s day to day activities to a substantial adverse degree.
56. The Claimant was told in that document to follow the Sickness Absence procedure, thus suggesting that it would be applied to her throughout her employment including during any probationary period and indeed, there was nothing in the Sickness Absence Policy to indicate that the various policies and procedures including that one do not apply during a period of probation.
57. The Claimant received a copy of the Risk Assessment form and we are satisfied on the balance of probabilities that Mrs Scott received a copy, as she should have done.
58. Mrs Oldershaw told us that on 23 March 2021 there was no copy of the Risk Assessment form on the Claimant’s Personnel file, but no search was made for it because Mrs Oldershaw said that she did not know if one had been completed so there was no reason to believe one had. Whilst we accept that there was no copy on the Personnel file, we do not accept that that was a reasonable excuse to make no further enquiry. The Medical Questionnaire disclosed three conditions which warranted Risk

Assessment: Endometriosis, Raynaud's disease and a previous history of Epilepsy. Mrs Oldershaw should have been aware that a Risk Assessment must have been completed, but rather she relied on the fact that in a document which on its face was only to be used for Equality Opportunities monitoring and was to be treated with, "*the utmost confidentiality*". The Claimant indicated that she did not consider herself to be disabled under the definition quoted therein.

59. That was a lack of adequate enquiry.
60. In any event, we find that Mrs Scott was aware of the contents of the Risk Assessment form. On any proper reading of it she should have been aware that the Claimant had a disability and / or should have been aware that further enquiry needed to be made to determine whether the Claimant was disabled within the meaning of the Equality Act 2010. This could have been done by making further investigation of the Claimant or her General Practitioner with her consent, or by making an Occupational Health referral. Had she done so she would inevitably have been told that the Claimant was disabled within the meaning of the Equality Act 2010.
61. The decision to dismiss was made by Mrs Scott from whom we had not heard. We have had to consider what was in her mind, or ought to have been in her mind, at the time she made the decision to dismiss the Claimant.
62. We are satisfied that the reason why the Claimant was dismissed by Mrs Scott was because of her level of absence, not because she was disabled. That was the motivation for Mrs Scott, "*wanting that outcome*" as Mrs Oldershaw put it in her evidence.
63. Accordingly, the Claimant's complaint of direct discrimination fails, she was not dismissed because of her disability. We accept Mrs Oldershaw's evidence that a non-disabled person with the level of absence during a probationary period would have been dismissed.
64. What arose from the Claimant's disability was her periods of absence. These were extended on two occasions due to the Coronavirus pandemic, first when she was isolating for 14 days prior to planned surgery in December 2020, which surgery was unfortunately cancelled 24 hours before it was due to take place, and secondly when she was required to remain away from work for 10 days after being in Hospital overnight. Both the surgery and the Hospital visit were caused by the Claimant's Endometriosis.
65. These absences arose as a result of the Claimant's condition. They were the things arising from the Claimant's disability. The Claimant was treated unfavourably as a result of those absences when she was dismissed.
66. The fact that some of the absences were wrongly attributed by the Respondent to the Claimant's condition, matters not. The Respondent has

not suggested that the re-categorisation of the reasons for absence, within Mrs Oldershaw's statement, meant that the Claimant would have been dismissed for the remaining absences, i.e. those which did not relate to the Claimant's disability.

67. Mrs Scott decided to dismiss the Claimant because of those absences at a time when she knew, or ought to have known, that the Claimant was disabled within the meaning of the Equality Act 2010.
68. The Respondent says that the dismissal of the Claimant was a proportionate means of achieving a legitimate aim. The legitimate aim is said to be the maintenance of safe and sufficient staffing levels within the Home. We accept that that is a legitimate aim.
69. However, the Respondent has produced no evidence at all to suggest that the Claimant's absences were causing staffing levels to be unsafe or insufficient. No staff rotas or other information had been produced to us. Further, the majority of the Claimant's absences were either planned or extended by virtue of the Respondent's own procedures and Government Guidelines at the time. Those two absences amount to 162 of the 218.50 hours of absence in the relevant period.
70. In addition, when Mrs Oldershaw was asked she could not say how dismissing the Claimant would assist in the maintenance of safe and sufficient staffing levels and indeed, confirmed at the time recruitment was very problematic.
71. We note the Claimant's unchallenged evidence that the Respondent in fact did not replace her in her role. We have not been told of any recruitment after the dismissal of the Claimant, or of any efforts to do so. The logic of an organisation being short staffed, seeking to establish safe levels of staffing by dismissing an employee is lost upon the Tribunal.
72. Accordingly, we are not satisfied that dismissing the Claimant was a proportionate means of achieving the legitimate aim of maintaining a safe and sufficient staffing level. Indeed it was not on the evidence we have seen, a means towards that aim at all.
73. Accordingly, the Claimant's complaint that she was the victim of discrimination arising from disability when she was dismissed, succeeds.
74. The Claimant's remaining complaint was that the Respondent should have made a reasonable adjustment to its Sickness Absence Policy by disregarding disability related absences when considering the Claimant's dismissal. We can deal with this complaint very shortly.
75. The Respondent, via Mrs Oldershaw, gave unchallenged evidence that the Respondent would ignore that Policy for every employee during a probationary period. We accept that evidence. The Policy was not applied and therefore would be applied to someone in the probationary

period. Accordingly, any adjustment to the Policy would not have avoided any disadvantage under the Policy as the Respondent did not apply it in any event.

76. We are bound to say that on the face of it, the Policy is one which the Tribunal could consider as potentially discriminatory as it treats disability related absence the same way as other absences. Doubtless this Policy remains in force today. The Respondent will take care to consider it and make any adjustments which it considers necessary taking the appropriate advice.
77. The Claimant's complaint of the failure to make reasonable adjustments, however, fails. The Policy itself was not considered by the Respondent to apply to the Claimant as she was still in her probationary period and therefore no adjustment to it would have avoided any disadvantage that would flow from the application of the Policy. The Respondent took the view that the relevant policy did not apply to the claimant and would have taken that view in relation to any probationary employee.
78. In summary, for the reasons given, the Claimant's complaint under s.15 of the Equality Act 2010, discrimination arising from disability succeeds. The remaining complaints are dismissed.

20 June 2023

Employment Judge M Ord

Sent to the parties on: 21 June 2023

GDJ
For the Tribunal Office.