



EMPLOYMENT TRIBUNALS

Claimant: Ms J Batchelor

Respondent: Abellio London Ltd

HEARD AT: CROYDON

ON: 11, 12, 13 July 2017; (Chambers) 14 July 2017

BEFORE: EMPLOYMENT JUDGE HALL-SMITH

MEMBERS: Mr A Kapur
Mr N Shanks

Representation

Claimant: Mr F Neckles, Union Representative

Respondent: Mr S Meyerhoff, Solicitor

JUDGMENT

1. The Claimant's complaints of unlawful racial discrimination are not well founded and are accordingly dismissed.
2. The Claimant's complaints of unlawful sex discrimination are not well founded and are accordingly dismissed.
3. The Claimant's complaints of unlawful deductions from pay are not well founded and are accordingly dismissed.
4. The Claimant was unfairly dismissed by the Respondent, within the meaning of section 98(4) of the Employment Rights Act 1996.
5. The Claimant's complaint of disability discrimination is well founded to the extent set out in these Reasons.
6. The Claimant was denied her right to be accompanied in December 2013, contrary to section 10 of the Employment Relations Act 1999. The Tribunal makes a nominal award of £2 to the Claimant.

7. The Claimant was not subjected to any detriment on the ground that she had exercised or sought to exercise her right to be accompanied.

REASONS

1. By a claim form received by the Tribunal on 24 March 2015 the Claimant Ms Josy Batchelor brought complaints of unlawful discrimination on grounds of race, sex and disability, unauthorised deductions from pay, breach of contract and unfair dismissal against the Respondent Abellio London Ltd.
2. At the hearing the Claimant was represented by Mr John Neckles, Trade Union Official, who called the Claimant to give evidence before the Tribunal.
3. The Respondent was represented by Mr Steven Meyerhoff, Solicitor who called the following witnesses on behalf of the Respondent, Mr Frank Ayeni, Staff Manager at the Beddington depot, and Norman Flemming, Operations Manager at the Respondent's Beddington depot.
4. There was a bundle of documents before the Tribunal contained in two lever arch files.

The Issues

5. The issues to be determined by the Tribunal involved the following:

Disability Discrimination

- a. The Respondent conceded that the Claimant was a disabled person at all material times as a result of an injury to her left knee.
- b. The Claimant's complaints involve discrimination arising in consequence of disability (Section 15 of the Equality Act 2010), involving the Claimant's dismissal.
- c. The Claimant also contends that the Respondent failed to make reasonable adjustments, namely a failure to seek and Occupational Health report assessment of the Claimant's likely return to work prior to her dismissal.

Victimisation

- d. The Claimant relies upon an email dated 15 April 2014 as a protected act. The Respondent accepts that the email relied upon amounted to a protected act.
- e. The Claimant contends that she was subjected to the following detriments because of the protected act namely:

- i. The denial of the contractual rights of accompaniment at a fact find/investigatory hearing;
- ii. The denial of contractual and legal rights for accompaniment on 19 and 27 December 2013 and on 30 May 2014;
- iii. Unauthorised deductions from wages and the financial hardship caused as a direct result;
- iv. A failure to provide the Claimant with a dismissal notice and reason for her dismissal written or oral;
- v. Dismissal with six weeks notice;
- vi. Failure to provide the Claimant with her contractual sick pay entitlement of eighteen weeks full eighteen weeks half and thereafter 28 weeks SSP;
- vii. Failure to pay the Claimant her correct sickness entitlement pay on the due dates (Friday) when they fell;
- viii. Failure to afford the Claimant the contractual right at an investigatory hearing by an independent different officer to that of a disciplinary officer prior to the commencement of her disciplinary capability hearing on 30 May 2015;
- ix. The failure of the Respondent to afford the Claimant an impartial JUDGE to chair her disciplinary capability hearing;
- x. The failure of the Respondent to seek an Occupational Health report assessment of the Claimant's likelihood to return to work date prior to dismissal.

Direct Race Discrimination

- f. The Claimant describes herself as white English.
 - g. The Claimant contends that the matters pleaded in paragraphs (a – j) involved less favourable treatment of her because of her race.
6. The Claimant relies upon the following as comparators:
- Danny Johnson,
 - Francis Neckles,
 - Santigie, Kargbo,
 - Paul Dorma,
 - Slawomir Bogacki,

- Cecil Markland,
- Tajddeus Campbell.

7. All the comparators relied upon are normal white.

Direct Sex Discrimination

8. The Claimant relies upon the allegations of victimisation paragraphs (a) – (j) as allegations of direct sex discrimination because of her sex. The Claimant relies upon the same comparators.

9. The right to be accompanied, Employment Relations Act 1999

- a. Did the Claimant seek to exercise her right to be accompanied by a Trade Union representative from the PTSC pursuant to Section 10(3) of the Employment Relations Act 1999?
- b. Did the Claimant suffer any detriment on the ground that she sought to exercise her right to be accompanied at capability hearings?

10. The Claimant contends that she suffered the following detriments:

- a. Denial/threat of a right to be represented/accompanied by a Trade Union Official or representative on 19 and 20 December 2013 and 30 May 2014.
- b. Dismissed on six weeks' notice.
- c. Being denied the right of a contractual investigatory hearing prior to dismissal;
- d. Was the Claimant automatically unfairly dismissed for exercising her right to be accompanied at capability hearings?

Breach of contract

- e. Was the Claimant wrongfully dismissed in breach of contract? The Claimant contends that the Respondent failed to pay her, her correct notice pay.

Unauthorised deductions of pay

- f. The Respondent concedes that the Claimant was entitled to receive 18 weeks of full pay and subsequently 18 weeks of half pay.
- g. Did the Claimant receive the correct amount of sick pay?

Unfair dismissal

- h. The Claimant contends that she was automatically unfairly dismissed on grounds of asserting a statutory right namely her statutory right to be accompanied at hearings.
- i. The Claimant contends that she was unfairly dismissed within the meaning of Section 98(4) of the Employment Rights Act 1996.
- j. The Respondent contends that the Claimant was dismissed for the potentially fair reason of capability.
- k. The Respondent denies the alleged or any unlawful discrimination of the Claimant.

The Facts

- 11. The Respondent Abellio London Ltd, operates public transport services in areas of London and Surrey. The Respondent operates from six depots and employs over two thousand members of staff.
- 12. The Claimant Josy Batchelor was employed by the Respondent as a PCV Driver (passenger carrying vehicle). The Claimant's employment as a Bus Driver commenced on 21 January 2008.
- 13. The Claimant was clearly a dedicated and conscientious member of the Respondent's staff and she worked at the Respondent's Beddington depot.
- 14. Apart from the immediate circumstances of the termination of the Claimant's contract of employment, there was very little conflict of evidence between the parties.
- 15. The Claimant sustained an injury to her left knee and was signed off sick from work by her general practitioner on 6 September 2013. The Claimant never returned to work for the Respondent.
- 16. Mr Norman Flemming, the Operations Manager, at the Beddington depot was responsible for managing staff sickness absence at the depot.
- 17. On 13 September 2013 Norman Flemming wrote to the Claimant inviting her to attend a welfare review meeting to discuss her current medical condition. The meeting was scheduled to take place on 17 September 2013, (page 83).
- 18. On 17 September 2013 the Claimant wrote to Mr Flemming, (page 87), informing him that that she was on crutches, had limited mobility in her left leg and that she was currently waiting and appointment to start physiotherapy and an MRI scan. The Claimant also provided an appointment card from the hospital where she had recently attended a fracture clinic.

19. The welfare meeting was rescheduled to take place on 23 September 2013 but the Claimant who was still signed off did not attend. On 2 October 2013 the Claimant emailed Norman Flemming stating that she was still walking on crutches and that an MRI scan would take place on 11 October 2013. In her email the Claimant also alleged that she was not receiving her full sick pay entitlement.
20. The Claimant attended a reschedule welfare meeting on 9 October 2013 (page 97), during which the Claimant informed Norman Flemming that she had knee ligament damage and was due to have an MRI scan. The Claimant was informed that an appointment would be made for her to see the Respondent's Occupational Health.
21. On 14 October 2013 Norman Flemming wrote to the Claimant inviting her to a "further capability hearing" on 18 October 2013. The letter included the following:

Please bring with you any appointments for specialists and any prescribed medication you may be taking. At the meeting there is the possibility that a decision may be made with regards to your future employment.

You are entitled to be accompanied by a workplace colleague or an official Trade Union representative. Should you wish to be accompanied it is your responsibility to ensure their attendance".

22. The Tribunal was surprised that such a letter should have been sent to the Claimant proposing a meeting only nine days after the Claimant had attended a meeting with Norman Flemming. At that stage the Claimant had not been referred to Occupational Health and there was no medical evidence yet available to Norman Flemming. The Tribunal considered that it was unfortunate that at that stage the Claimant was informed in the letter that there was a possibility that a decision might be made with regards to her future employment.
23. It was Norman Flemming's evidence to the Tribunal that the meetings in September and October and October 2013 were meetings under the informal stage of the process, he referred to them as welfare meetings and accordingly, in circumstances where the Claimant had only been away from work for a period of about six weeks we considered that it was premature to alert the Claimant that a decision might be made at that stage relating to her future employment.
24. The Claimant received the result of her MRI scan dated 14 October 2013, (page 99). On 7 November 2013 the Claimant by email to Norman Flemming, (page 107), informing him of the results of her MRI scan which had confirmed a tear in her ligament with a fluid filled cyst on the back of the ligament and that she had been informed that she would require surgery.
25. On 28 October 2013 Norman Flemming wrote to the Claimant, (page 102) inviting her to attend a welfare review meeting to discuss her current

medical status on 30 October 2013. The notes of the meeting on 30 October 2013 are at pages 104 – 105).

26. On 11 November 2013 the Claimant was referred to Occupational Health, (page 109). The referral asked the following specific questions, namely:

How is the knee and what is the damage done?

Is there an operation on the cards to fix it? If so what would the recovery time be?

27. The Tribunal noted that the referral form also contained a box headed "Other matters, included possible job modifications if relevant", but there was no entry in that section of the referral.

28. The Occupational Health report on the Claimant dated 19 November 2013 stated that the Claimant was using a crutch, had difficulty doing everyday activities at home and that she could only stand for short periods of time without the use of the crutch. The report also stated that the Claimant was unfit to work, that it was unlikely that the condition would get better without surgery, and that if the Claimant did undergo surgery the combined waiting period for the operation and the following recovery period would be likely to take many weeks.

29. On 20 November 2013 there was a further meeting between the Claimant and Norman Flemming. The notes of the meeting which were headed "sickness interview" (pages 112 – 113 of the bundle). The conclusion of the hearing recorded in the notes contained the following:

NSF (Norman Flemming) informed JB (the Claimant) that she has been off work for some time now and it is clear to see that no improvement has been made apart from the fact that she has gone from using two crutches to one. NSF also commented that it appears unlikely that JB was to pursue work for the foreseeable future, as a result of her injuries and expected as required.

NSF informed JB that at the next meeting she would need to provide the Company with an expected presumption to work or return to work was immanent, at such capability hearing which would be arranged over the next few weeks.

JB explained that she understood what had been said in relation to a capability hearing, and that she needs to furnish her manager with a return to work date or a return to work date would be immanent".

30. On 29 November 2013 Norman Flemming wrote to the Claimant inviting her to a capability hearing to take place on 4 December 2013. It actually informed the Claimant that she was entitled to be accompanied by a workplace colleague or an official Trade Union representative. In the letter the Claimant was informed that there was a possibility that a decision might be made regarding her future employment. The Claimant informed

Norman Flemming that she was unable to attend and that she requested seven days notice to arrange transport and representation.

31. On 4 December 2013 the Claimant emailed Norman Flemming informing him that his instruction to attend the meeting were breach of procedure for failing to give the required minimum notice of 48 hours, that he was in breach of her contractual rights of notice and she requested a postponement of the proposed meeting as her chosen representative Mr Francis Neckles of the Bus Workers Alliance was unavailable to attend. The letter was written indistinctly different terms than the earlier correspondence which had taken place between the Claimant and Norman Flemming. The Claimant provided dates to avoid for a further meeting and the Claimant concluded her letter with the following.

Secondly, please note Mr Francis Neckles is my chosen Trade Union representative I will not allow or tolerate any usurping of my contractual or legal rights of accompaniment by Abellio and its officers and any instructions as to whom I can have to represent me at my sickness/capability hearing, which you sought to impose upon me. To that end, I am forwarding a copy of this communication to your HR Department, so you can take and receive proper legal advice in regards to same.

Please further note, any denial rights for accompaniment I will deem would be a much victimisation, discrimination, harassment and bullying on grounds of my race and sex which will result in me bringing claims against you and Abellio in the future to rectify the same. I therefore hope this action will not be necessary and I look forward to you complying with my reasonable request.

32. The Tribunal considered there was no justification for the Claimant in adopting such a confrontational approach at that stage having regard to the tone and nature of the correspondence which had previously passed between the Claimant and Norman Flemming. It was common ground that Mr Francis Neckles had been suspended by the Respondent and had been banned from its premises.
33. The Tribunal was driven to the conclusion that the contents of the letter were prompted by Francis Neckles knowing that the Respondent would most likely object to him representing the Claimant in circumstances where he had been banned from entering its premises. In her claim form the Claimant alleged that Mr Francis Neckles was a person whom “the Respondent has an immense hatred for”. The Tribunal found the letter provocative and that it had raised potential allegations of discrimination on grounds of the Claimant’s race and sex and victimisation in the absence of any justification on the facts. The Claimant had never previously complained of discrimination and on the balance of probabilities we concluded that Francis Neckles having regard to the tone of the letter, was endeavouring to use the Claimant as a means of furthering his own dispute with the Respondent and was thereby potentially laying the ground work for a potential claim by the Claimant against the Respondent.

34. The Claimant attended a capability hearing on 19 December 2013 which did not proceed because the Claimant had attended with Mr Francis Neckles and she was told that he could not represent her as he was not allowed on any of the Respondent's premises.

35. On 20 December 2013 Norman Flemming wrote the following letter to the Claimant (page 120):

I write following the capability hearing you attended yesterday; unfortunately the hearing started and was reconvened as a result of you attending the hearing with Mr Francis Neckles. As explained Mr Francis Neckles is not allowed on any of Abellio's premises as a result he could not represent you.

As you are not happy for the hearing to continue without a Union representative, I had no option to adjourn the hearing to a later date. With that in mind I have rearranged the hearing for Friday 27 December 2013 at 10.00 hours.

As this is the third occasion I have tried to arrange this hearing, failure to attend is in itself a disciplinary offence and may result in further disciplinary action".

36. During the early part of 2014 the Claimant attended further meetings with Norman Flemming. That had been an issue about the Claimant's attendance at an appointment with Occupational Health but the Claimant subsequently attended Occupational Health and the report dated 4 February 2014 (page 137), stated that the Claimant needed crutches and pain relief to cope with everyday tasks and that her mobility had been severely impaired. The report also stated that the Claimant was due to undergo surgery on 5 March 2014 and that it should take approximately four to six weeks to recover.

37. There was a meeting on 7 February 2014 (pages 140 – 141). The Claimant stated that she was happy to proceed with the meeting without representation.

38. The Tribunal was surprised that Norman Flemming wrote a further letter to the Claimant on 17 February 2014 only ten days after the meeting on 7 February 2014 inviting her to an ongoing capability hearing to take place on 20 February 2014. Norman Flemming had been informed that the Claimant was due to undergo surgery on 5 March 2014 and the Tribunal could not see any justification for a further meeting before the Claimant's surgery had taken place. The Claimant would not have been in the position to have given any further information to Norman Flemming until after her surgery had taken place when she might have been likely to have some knowledge of the recovery period.

39. A further capability meeting arranged for 4 April 2014 did not take place in circumstances where the Claimant informed Norman Flemming that she was unable to come to the depot because she was under instruction to have no weight bearing on her injured knee. There was a telephone

conversation between the Claimant on 2 April 2014 during which the Claimant stated that she would be happy for Norman Flemming to visit her at home for a meeting and she also raised a query in relation to her sick pay entitlement.

40. Subsequently the Respondent's payroll informed Norman Flemming the Claimant's sick pay entitlement was nine weeks full pay and nine weeks half pay. The Claimant claimed eighteen weeks full pay and eighteen weeks half pay. Norman Flemming had no responsibility for issues of pay. We found on the evidence that matters of pay and the calculations of what was due to employees was entirely a matter for the Respondent's payroll.
41. On 11 April 2014 Norman Flemming wrote to the Claimant at [page 1710, stating that a home visit had been arranged to take place on 22 April 2014. In his letter to the Claimant Norman Flemming stated that during this visit a conclusion to the capability process would be discussed and a decision made on the Claimant's future employment. The home visit did not take place.
42. On 14 April 2014 the Claimant by an email (page 172) had indicated that she was intending to raise a formal grievance against Norman Flemming and the following day 15 April 2014 the Claimant submitted a written grievance (page 174 – 176) against Norman Flemming to the Respondent.
43. The substance of the Claimant's grievance was in relation to issues over sick pay and deduction of pay and the Claimant also contended that she had been threatened of dismissal on grounds of capability on numerous occasions. The Claimant stated the following:

I have been threatened to being dismissed under grounds of capability on numerous occasions, I feel this is an attempt to force me back to work. Had money deducted, had all payments stopped before my contractual terms of agreement and now as a result I have been left in a very distressed position whereby I have been forced to claim benefits to support myself and my daughter. I feel the way I have been dealt with and treated has been very unprofessional and I have been discriminated against on grounds of my sex, race and my current ongoing injury.
44. The Claimant's grievance was considered by Mr Frank Ayeni who was then Network Performance Manager at the Respondent's Battersea depot.
45. The Tribunal considered it unfortunate that once the Claimant had raised a grievance directed at Norman Flemming that he should have continued to manage her sickness absence.
46. On 8 May 2014 Norman Flemming wrote to the Claimant, (page 188) informing her of missed appointments for Occupational Health meetings and that the Respondent would meet the costs of her travel to and from such appointments in full. Norman Flemming's letter also included the following:

I am also aware, that you have failed to attend a previous appointment made due to the fact you believe a grievance has been raised against me. It's the Company's decisions I continue with this process as the matter which forms part of your grievance has no bearing on your long-term absence from work which I am to monitor and oversee as your Operations Manager.

As you are aware your contract of employment and the Company's long-term sickness policy requires employees to attend Occupational Health appointments to the Company's request and maintain regular contact with the Company throughout the period of absence. Given that you have failed to attend on two previous occasions and this is the third appointment which has been made for you, I must confirm that should you fail to attend on 15 May 2014..... You could face disciplinary action in accordance with Company policy.

47. The Claimant did attend the Occupational Health appointment which had been arranged for her and the report dated 19 May 2014 (page 189). The report stated that the Claimant's surgeon had said that she may need further surgery and the conclusions to the report included the following:

She is suffering from a many months history of pain incapacity in her left knee.

She is currently substantially incapacitated. She is hardly able to drive and she uses crutches to walk.

Any improvement seems to be very minimal.

Based on her slow rate of recovery I cannot see any foreseeable prospect of her coping with a return to bus driving for a very long time, by which I mean many weeks, or a number of months".

48. On 27 May 2014, (page 191), Norman Flemming wrote to the Claimant inviting her to a capability hearing 30 May 2014. The letter included the following:

Please bring with you any appointments with specialists, any prescribed medication you maybe taking. At the meeting there was the possibility that a decision may be made in regards to your future employment, which could include a termination of your employment on capability grounds.

You are entitled to be accompanied by a workplace colleague or an official Trade Union representative.

49. The Claimant attended the meeting on 30 May 2014 accompanied by a workplace colleague Beena Patel. The notes of the meeting were at pages 193 – 195 and the Claimant confirmed she was happy for Beena Patel to act as her workplace colleague.

50. The notes of the meeting record that when asked by Mr Flemming whether she thought she was capable of carrying out any form of work, the Claimant's replied *"it is hard to say some days I can sit for a while and other days I am in serious discomfort I am unable to give you an answer that you need at present"*.
51. The Claimant also stated that she was not yet recovered to return to work and that she was not sure when that would be. The Claimant agreed that the recent Occupational Health report was not far wrong and in evidence the Claimant stated that as a non medical person she was not in a position to contradict the contents of the report. On the basis of the medical evidence and the Claimant's own evidence the Claimant was not in a position to return to her duties as a bus driver for a significant period.
52. Sadly, as evidenced by the medical information relating to the Claimant in the Tribunal bundle, the Claimant remained unfit for work and we noted that she was signed off work until 30 June 2014, page 196, and thereafter she continued to suffer from a number of health issues which are fully documented in the Tribunal bundle. The Claimant relied upon such health problems at the earlier preliminary hearing which found that her medical condition meant. that it had not been reasonably practicable to present her Tribunal complaints within the statutory time limits and extended time for their presentation until 23 March 2015.
53. The Tribunal noted that no consideration had been given to the Respondent's duties under the Equality Act 2010 in relation to a disabled employee and we were surprised that Occupational Health had not itself referred to the possibility that the Claimant might be covered by the protection afforded to a disabled person under the Equality Act 2010. There was a brief referral in the note which was bulleted as the following:

No prospect of undertaking alternative means of employment.

54. There was no documentary evidence before the Tribunal that any endeavours had been made to enquire whether any form of alternative work might be available for the Claimant. The Respondent was a large employer which operated from a number of depots.
55. In additional documents provided to the Tribunal on the penultimate day of the hearing by Mr Neckles most of which were ruled inadmissible, by the Tribunal, there was an email from a manager copied to Norman Flemming and sent to another number of other managers the subject being alternative positions. The Tribunal considered the contents of the email wholly uncontroversial and the Tribunal referred Mr Flemming to the email. The email stated the following:

Hi All,

I have a driver who is currently unfit to drive a bus.

Does anyone know of any alternative positions within the business which maybe more suitable for him?

56. No such enquiry was undertaken, as we found, on behalf of the Claimant. Norman Flemming said that he had made enquiries of HR but the notes of the hearing on 30 May 2014 did not reflect that he had done so. The Claimant had previously undertaken light duties during a period when she was pregnant, but the evidence before the Tribunal was that light duties were normally available in circumstances where there was an imminent or likely return to work in the near future. However, in the present case we found that no realistic search had been undertaken in relation to the prospect or possibility of alternative employment for the Claimant who was a disabled employee and accordingly within the scope of the Equality Act 2010.

57. There was an issue between the parties as to how the meeting ended. It was Norman Flemming's evidence which was reflected in the notes of the meeting that there was a short adjournment and that the Claimant was invited back to the meeting and informed that a decision had been made. The notes of the meeting recorded the following:

You have been off sick since September 2014 and within that time you have made little progress. You underwent an operation, unfortunately the damage found was worse than expected, as a result your recovery has been pushed back a lot further than the expected six weeks.

It is my belief that Abellio have given you a reasonable period of time for the operation to take place and a period of recovery, can be expected to be in the region of six weeks. The possibility of an imminent resumption date is not forthcoming, and a likelihood of a return in the not to distant future is unclear.

Because of the nature of your medical condition, the duration of your illness and there being no likely resumption date, I have informed you of my decision to terminate your employment on the grounds of your inability to attend work due to your medical condition. As a result your employment with this Company will terminate today.

Under the terms of your contract of your employment you will be paid in lieu of notice and any outstanding annual leave entitlement you may have. This will be paid by credit transfer in the normal manner.

58. According to the notes of the meeting, the Claimant was also informed of her rights of appeal. It was the Claimant's case that she was not informed of her dismissal at the meeting but was told that Norman Flemming would let her know in due course. Included in the bundle was a letter to the Claimant from Norman Flemming dated 3 June 2014 at pages 197 – 199, in which he stated that he was writing to confirm the outcome of her interview with him on 30 May 2014. The letter provided a history of his management of the process and the various meetings which had taken place and that he had informed her of his decision to terminate her

employment on the grounds of her inability to attend work due to her medical condition.

59. The Claimant contended that she had never received such a letter and that she remained unaware of the outcome of the meeting of 30 May 2014. Included in the bundle was a letter from the Claimant to Norman Flemming dated 18 June 2014, page 204, in which she stated that she was unhappy that the meeting had been conducted by him in circumstances where she had raised a grievance against him and she requested information about the outcome of the meeting.
60. In his evidence Norman Flemming stated that he had sent a copy of his letter of 3 June 2014 to the Claimant which appeared to be corroborated by Metadata printout, page 200, which documented a document headed capability outcome J Batchelor – 30 – 05 – 2014 had been created on 3 June 2014 at 9:57 and had been accessed on 23 June 2014. There was also a photocopy of a file identified as E:/Abellio/Batchelor J with a file as identified as Capability Outcome J Batchelor 30 May 2014.
61. A subsequent preliminary hearing held that the effective date of the termination of the Claimant's contract of employment was 29 November 2014 when the Claimant received a P45.
62. Having regard to the metadata printout and Norman Flemming's own evidence, we found that Norman Flemming did inform the Claimant of his decision to dismiss her at the meeting on 30 May 2014 and that he sent subsequent letters to the Claimant confirming his decision to dismiss. It may well have been the case that the Claimant herself had not appreciated at the meeting that she was being dismissed, and for reasons which were not clear to this Tribunal, a Tribunal at a preliminary hearing held that she was not aware that she had been dismissed, until she received a P45 in November 2014. In any event the Tribunal found that Norman Flemming himself believed that the Claimant's employment had been terminated by him on 30 May 2014.
63. Mr Ayeni informed the Claimant of the outcome to her grievance by letter to her dated 3 June 2014 (pages 201 – 202). The letter provided a detailed summary of his conclusions to the sick pay issue and to the issue raised by the Claimant in relation to her deductions to her pay and the Claimant was informed that payroll would make necessary salary adjustments.
64. In relation to the issue raised by the Claimant about threats from Mr Flemming to being dismissed Frank Ayeni stated that he was satisfied that the information Norman Flemming had provided was to keep the Claimant informed and abreast of the situation which was viewed as good employment practice. The letter included the following:

During the hearing I explained that during extended levels of sickness staff may be required to attend welfare/capability hearings. As a result of these hearings the hearing officer will

inform staff of possible outcomes if a staff member is unable to return to work after a period of time.

65. The Tribunal considered the letters Norman Flemming wrote to the Claimant during the process before the final meeting on 30 May 2014 and we did not consider that the contents of the letters which merely pointed out that her future employment might be considered and that finally the dismissal was a possibility which did not cross the threshold into threats but went no further than informing the Claimant of the possible consequences of continued absence from work. The Claimant did not appeal against the grievance outcome.

66. The Tribunal heard submissions from Mr Neckles on behalf of the Claimant and from Mr Meyerhoff on behalf of the Respondent. Mr Meyerhoff supplemented his oral submissions with written submissions, which the Tribunal considered. The parties' submissions are not repeated in these reasons.

The Law

Race and Sex Discrimination

67. Section 13 of the 2010 Act provides

(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

68. S.15 of the 2010 Act, under the heading Discrimination Arising from Disability, provides:

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.

69. S.27 of the 2010 Act provides

(1) A person (A) victimises another (B) if A subjects B to a detriment because

a. B does a protected act, or

b. A believes that B has done, or may do a protected act.

(2) Each of the following as protected act –

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with

- proceedings under this act;*
- (c) *doing any other thing for the purposes of or in connection with this Act;*
- (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*

70. Section 136 of the Equality Act 2010 contains burden of proof provisions and provides:

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

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

Unfair dismissal

71. The Claimant was dismissed for the potentially fair reason of capability. There was no issue that at the date of her dismissal the Claimant was unable to return to her employment as a bus driver.

72. A fair procedure should involve consultation with the employee, medical information to inform the employer of the prognosis and if and when the employee would be able to return to their job, and whether any alternative suitable post for the employee was available – see **East Lindsey District Council v Daubney [1977] ICR 566.**

73. The statutory framework is contained in section 98(4) of the Employment Rights Act 1996 which provides:

..... 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

Conclusions

74. The Tribunal reached its conclusions having regard to the evidence to the parties' submissions and to the relevant law.

75. During the course of the hearing the comparators relied upon by the Claimant were Mr Tajdeus Campbell and Mr Cecil Markcland. In the

case of Tajddeus Campbell, although it was the Claimant's contention that he had been paid full pay on sickness absence, the Tribunal found that he had been suspended by the Respondent on full pay. Mr Campbell had been dismissed by Norman Flemming but had been reinstated on appeal in circumstances where he was able to resume his post of driving buses by wearing trainers. Accordingly, the circumstances, in our judgment were significantly different from the Claimant's circumstances and accordingly, we concluded that Tajddeus Campbell was not an appropriate comparator.

76. Cecil Markland for the Claimant's other comparator relied upon, had been absent from work from December 2012 to May 2013. Cecil Markland remained at work until July 2013. Subsequently, Mr Markland returned to work in December 2013 and remained employed by the Respondent until his resignation in 2014. Unlike the Claimant he had periods of a return to work and he was clearly fit to return to work long-term in December 2013 until his retirement the following year. In our judgment the circumstances in Cecil Markland's case were very different from those of the Claimant who had been absent from work since September 2013 with no immediate prospect of any return to work on 30 May 2014.

Unfair dismissal

77. The Tribunal was concerned with the haste in which Norman Flemming at conducted the capability hearings with the Claimant. The Tribunal was also concerned that no endeavours appear to be made by Norman Flemming to consider whether there were any alternative roles available for the Claimant. The Claimant was clearly unfit to drive a bus but she had undertaken at light duties in the past. To the extent that Norman Flemming had failed to consider any alternative posts for the Claimant we concluded that the Claimant had been unfairly dismissed within the meaning of section 98 four of the employment rights act 1996.
78. The Claimant was still unfit at at the date of the receipt of her P45 on 29 November 2014. On the evidence having regard to the very significant difficulties that the Claimant experienced with her mobility and her subsequent health problems we considered that it was unlikely that even if Norman Flemming had made attempts to find alternative work there would have been anything suitable for the Claimant against the background of her severe medical issues.
79. The Tribunal noted the following in the Reasons to the Preliminary hearing which extended time for the presentation of the Claimant's claims at paragraphs 12 to 15 of the Tribunal's Reasons, namely

During this time claimant had been suffering from a number of health problems. The claimant was involved in an accident in 2013 resulting in injuries to her left knee. Also, since 2014, she has received cognitive analytic therapy to address long-standing problems and, depression anxiety. She is also suffering from unexplained headaches, distorted vision and a tumour on her pituitary gland.

On 5 January 2015 the claimant was admitted to and remained in hospital for three days. The claimant was admitted to hospital again on 14 February 2015, the scheduled operation and was discharged same day. She says that following the operation, she is in a very fragile mental and physical state and taking very strong painkillers and antidepressants.

The claimant said that the effect of the medication was to put her in, what she describes as a zombified state make it difficult for her to remember things. She says that she was bedridden for much of the time was looked after by a neighbour who helped with such things as getting dressed and taking her daughter to school. She also said that during this time, she was not in a coherent state to address her attention to Tribunal proceedings. That state of affairs continued between and between February and March 2015 there was little improvement, the claimant only being able to function a couple of days a month. The claimant provided medical evidence in support of her various impairments.

80. We consider it would have taken no more than four weeks for a reasonable employer who had made enquiries of the availability of alternative work for an employee as seriously affected by her injury, to have reached a conclusion that there was no suitable work available for the Claimant having regard to the Claimant's immobility. We concluded on the evidence that there would have been no prospect of identifying anything suitable for the Claimant having regard to the severity of her knee condition and her general health issues. Accordingly, we conclude that a reasonable employer could have fairly dismissed the Claimant after a period of four weeks. The Claimant herself never suggested any adjustments which might have enabled her to undertake work in any capacity
81. In any event a Tribunal has determined that the effective date of termination of the Claimant's employment was 29 November 2014 and accordingly the Claimant pursuant to her contract of employment was entitled to any benefits in relation to pay lawfully due to her for the entire period up to 29 November 2014. Having regard to our conclusion that the Claimant was unfairly dismissed, the Claimant is entitled to a basic award but no future loss after 29 November 2014.
82. Turning to the issue of disability discrimination at the Tribunal found that Norman Flemming never considered the fact that the Claimant was or even might have been disabled. The issue of reasonable adjustments, although not part of the Claimant's Tribunal claim, was never considered although we concluded that on the balance of probabilities no reasonable adjustment would have enabled the Claimant to return to work in any capacity.
83. The Claimant's dismissal involved unfavourable treatment of her in consequence of her disability. The Claimant was dismissed before Norman Flemming had undertaken any consideration of the possibility of

alternative roles of the Claimant. Accordingly until such enquiries should have been made, we do not consider that the Respondent would have had any basis for the contention that the Claimant's dismissal amounted to a proportionate means of achieving a legitimate aim. However we are satisfied that it was a legitimate aim for the Respondent to ensure that operatives such as the Claimant were fit and able to drive buses or indeed to undertake suitable alternative work if available, having regard to the nature of its business providing transport to the public.

84. To the extent that the Respondent failed to make any enquiries relating to alternative work at the date of Norman Flemming's decision to dismiss the Claimant, we concluded that at that date the Respondent was unable to show that the decision to dismiss amounted to proportionate means of achieving a legitimate aim.

85. However the Tribunal considered that reasonable enquiries about alternative work would not have taken any longer than one month, and that having regard to the Respondent's operation as a bus company, there would have been no realistic alternative roles for the Claimant. Accordingly after a period of four weeks we concluded that the Claimant's dismissal would have amounted to a proportionate means of achieving a legitimate aim, namely in employing staff who were capable of performing duties commensurate with the Respondent's business of providing transport to the public.

86. In circumstances where it was the Claimant's position that she was unaware that she had been dismissed until the end of November 2014, we considered that there would be little substance to a contention that she had suffered any injury to feelings by being informed of her dismissal in May 2014. In November 2014 the medical records did not evidence that the Claimant was fit to undertake work and accordingly we consider that it was disingenuous for the Claimant to contend that at that stage the Respondent should have arranged for her to attend an occupational health appointment. In any event the Tribunal concluded that Norman Flemming believed that he had dismissed the Claimant on 30 May 2014.

Sex and race discrimination

87. The Tribunal concluded there was no substance to the Claimant's complaints of unlawful discrimination on grounds of sex and of race. The Tribunal found no facts from which it could have decided in the absence of any other explanation that the Respondent had discriminated against the Claimant on the grounds of her sex and race. We concluded on the evidence that the sole reason for the Claimant's dismissal and for her treatment prior to her dismissal was in relation to the Claimant's health issues following her injury and her inability to attend work, and that issues of the Claimant's race and sex played no part.

Victimisation

88. We further concluded at that there was no causal link between the protected act, namely her grievance email of 15 April 2014, and the

treatment complained of by the Claimant. The sole reason for the Claimant's dismissal as we found was capability and any treatment or conduct on the part of the Respondent complained of by the Claimant was not connected in any way to the fact that her grievance amounted to a protected act. Indeed the Claimant's complaints relating to her rights of accompaniment on 19 and 27 December 2013 occurred before the protected act.

Right to be accompanied

89. In relation to the Claimant's complaint of detriment at for the purposes of section 12 of the Employment Relations Act 1999, there was no issue that the Respondent refused to allow the Claimant to be represented by Mr Francis Neckles. Mr Neckles had been banned from entering the Respondent's premises for reasons wholly unconnected with the Claimant's case, and the Respondent's decision to ban him had no bearing on the Claimant's race or her sex. There was only one occasion when the Claimant requested to be accompanied by Mr Francis Neckles which was for the meeting on 4 December 2013. The Tribunal concluded that the Claimant had suffered no detriment as a result of the Respondent's refusal to allow her to be accompanied by Mr Neckles and that accordingly we make a nominal award of £2, see **Toal v GB Oils Limited [2013] IRLR 696**.

90. The Tribunal concluded that the sole reason for the Claimant's dismissal was capability and that the Claimant's request to be accompanied by Mr Neckles for the meeting in December 2013 had no bearing on the Claimant's dismissal. The decision to dismiss the Claimant took place six months after the Claimant's request to be accompanied by Francis Neckles and only after further occupational health reports had been obtained by the Respondent. The Claimant's complaint of automatic unfair dismissal is not well founded and is accordingly dismissed.

91. At the Tribunal concluded that the Respondents disciplinary policy did not form part of the Claimant's contract of employment. During the course of her evidence to the Tribunal at the Claimant accepted that the Respondent's disciplinary policy did not form part of her contract of employment. The Tribunal accepted the submission on behalf of the Respondent at that the Respondents disciplinary policy is clearly intended for issues relating to conduct and performance, and not to issues of capability, which we found were the reasons for the Claimant's dismissal. The Claimant's complaint of breach of contract is not well founded and is accordingly dismissed.

Financial claim

92. Turning to the Claimant's complaint of of unauthorised deductions from wages, the Claimant alleged that statutory sick pay only commenced after the Respondents contractual sick pay had been exhausted. The Tribunal considered that there was no basis for such a contention and that the Respondents sick pay provisions are inclusive of statutory sick pay. Statutory sick pay expires after an absence of 28 weeks, and we noted

that the Respondent had conceded the Claimant's at claim that she was entitled to 18 weeks four and 18 weeks half pay.

93. The Claimant's complaint of unauthorised deductions from wages is not well founded and is accordingly dismissed.

Employment Judge Hall-Smith

Date: 10 October 2017