EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Genevieve Akofio-Sowah	**v**	Norfolk and Suffolk NHS Foundation Trust

Heard at: Norwich **On:** 23, 24, 25, 26 January 2023

Before: Employment Judge Postle

Members: Mrs L Gaywood and Mr B McSweeney

Appearances
For the Claimants: Mr Omope, Solicitor
For the Respondent: Mr Ross, Counsel

JUDGMENT

1. The Claimant was not unfairly dismissed.

2. The Claimant's claims under the Equality Act 2010 for the protected characteristic of disability, particularly claims for discrimination arising from disability s.15 and failure to make reasonable adjustments s.20, are not well founded.

3. The Claimant is Ordered to pay the Respondent's costs in the sum of £10.491.00.

REASONS

1. The Claimant brings claims to the Tribunal under the Equality Act 2010 for the protected characteristic of disability, particularly claims for discrimination arising from disability, s.15 and a claim for reasonable adjustments s.20 – 22. There was also a claim for ordinary unfair dismissal under the Employment Rights Act 1996.

2. The disability relied upon is rheumatoid arthritis which is conceded by the Respondents, together with knowledge.

3. The specific and agreed issues are set out in a document found at page 54 – 57 of the Hearing Bundle. The Respondents advanced the potentially fair reason to dismiss as capability and / or in the alternative some other substantial reason.

4. In this Tribunal we have heard evidence from the Claimant through a prepared witness statement and for the Respondents, Ms Landells Line Manager of the Claimant, Mr Damon Williams Employee Relations Consultant and Ms Winsom Robotham Associate Director of the Respondents; all giving evidence through prepared witness statements.

5. The Claimant's Solicitor chose not to cross examine Mr Williams and thus the Tribunal warned in those circumstances his evidence would be accepted as unchallenged.

6. The Tribunal also has the benefit of a Bundle of documents consisting of 395 pages, together with a chronology. There is also the Claimant's opening submission and the Respondent's written note on the Law.

7. The facts of this case are as follows.

The Facts

8. The Claimant commenced her employment with the Respondents as a Clinical Support Worker on 21 March 2016. The Claimant worked at Walker Close; which is an in-patient department for assessment and treatment of Adults with severe mental health issues and learning difficulties. Patients can be violent without warning, therefore it is a requirement of the job that all those who work on the Wards within Walker Close have to undertake annual PMA training in order to protect themselves, their colleagues and of course the patients. PMA is Prevention and Management of Aggression. The job of a Clinical Support Worker is clearly a physical job.

9. During 2020, the Claimant experienced periods of absence from work which triggered the Respondent's Absence Management procedures. At pages 82 – 99, 106 – 125. Accordingly, on 31 August 2020 the Respondent conducted a Return to Work Meeting with the Claimant. At this point the Claimant had been absent for 34 days in a rolling 12 month period (against the Respondent's threshold of 16 days) over a total of five episodes of absence (against the Respondent's threshold of 4 episodes). The Claimant's latest absence between 9 July and 11 August 2020 had lasted 19 days and was a product of rheumatoid arthritis crisis.

10. It was acknowledged by the Respondents that the Claimant's absence was due to a chronic medical condition complicated by the impact of Covid-19, but the Respondents decided to seek Occupational Health advice. In particular, advice was sought on the implications of Covid-19 on the Claimant's ability to perform her role, due to it being clinical and patient facing and as a result of non-Covid-19 secure. In the meantime, with

effect from 7 September 2020, the Claimant commenced a non-clinical return to work whereby the Claimant was able to work from home to avoid the physical activities involved in the Claimant's Clinical duties, which exacerbated her condition.

11. Following receipt of the Occupational Health Report dated 15 October 2021, pages 160 – 163, the Respondents convened a wellbeing discussion with the Claimant on 9 November 2020, pages 170 – 171. During the meeting, the parties discussed the implications of the Claimant's increased diagnosis, she had recently been diagnosed with sickle cell anaemia in addition to rheumatoid arthritis and described the Claimant as being in a high risk group in relation to Covid-19 and recommended working from home until she had completed a course of high dose steroids. Upon the Claimant then being fit to return, she should remain in a Covid secure environment until advised otherwise given that her role was patient facing, therefore not Covid secure. The parties also discussed the option of redeployment to another role better suited to the Claimant's current and long term wellbeing needs. This was summarised in a letter to the Claimant dated 11 November 2020.

12. Although the Claimant expressed a desire to return to in patient work, the Respondent explained this would be contrary to the Occupational Health advice that had been provided and the Respondent's Covid-19 Risk Assessment (both of which advise the Claimant work in a Covid-19 secure environment which could not be guaranteed in a patient facing role). Accordingly, it was agreed that:

    12.1 The Respondent would explore temporary re-deployment for the Claimant using telephone contact with patients,

    12.2 The Respondents will include the Claimant on the Respondent's Redeployment Register and arrange for the Claimant to obtain experience if a suitable vacancy arose;

    12.3 The Claimant would arrange an appointment with her Consultant to discuss her role and job description; and

    12.4 The Respondent would obtain recommendations from Occupational Health following the advice from the Claimant's Consultant after which a further meeting would be convened between the Claimant and the Respondent.

13. On 5 January 2021, there was a one to one between the Claimant and Ms Landells. The minutes of which are at page 189. There was a further Occupational Health Review on 7 January 2021, the Report being 13 January 2021 at pages 193 – 196; that Report confirmed that the Claimant's level of vulnerability is unchanged, it was not able to provide a timescale for the Claimant's return to her usual role, and the medication taken by the Claimant suppressed her immune system and increased her vulnerability which was in fact now extreme.

14. There were two further one to one meetings between the Claimant and Ms Landells on 24 February 2021 and 8 April 2021, which led ultimately to a further Occupational Health Report as the Claimant remained working from home (having been temporarily re-deployed to work for the Respondent's Wellbeing Service and after she had obtained advice from her Consultant), a further Occupational Health Review was arranged. That took place on 5 May 2021 and the Report is at pages 207 – 211.

15. The Occupational Health Review suggested that,

> "*The Claimant's symptoms level and functional status are not compatible with a return to her current role at the present time. It is not felt a return to work will be successful in the next six months as there are no adjustments and / or restrictions which could reasonably be expected to enable her to perform the core duties of her substantive role."*

16. The recommendation was medium term re-deployment into a role which does not have significant physical demands. Medium term was defined as nine months with the intention of allowing sufficient time for changes to the Claimant's treatment to be made by her specialist and thereafter a period of at least three months, ideally six months, for the changes to take effect.

17. The Occupational Health Report had identified the Claimant was experiencing difficulties kneeling and standing back up. The Claimant's role required the PMA training. The Claimant had reported to Occupational Health that patients come in very unwell needing frequent restraint and PMA and that during these tasks patients often dropped down suddenly causing her more intense right shoulder pain.

18. On 12 May 2021, the Claimant is invited by letter (page 216) to a formal Attendance Management Meeting to discuss her wellbeing and the impact this may have on her long term ability to fulfil her substantive role. The meeting was also to discuss the need to continue to explore re-deployment and encourage the Claimant to apply for any suitable roles. The invite letter makes it clear the outcome could be the termination of her employment on the grounds of ill health capability.

19. On 13 May 2021, Ms Landells emailed the Claimant about an administrative post and the possibility of putting in a late application, page 217.

20. The Formal Attendance Management Meeting took place on 21 May 2021, where the Claimant was accompanied by her Trade Union Representative Mr Peter Oakes. The outcome of that meeting was set out in a letter to the Claimant dated 24 May 2021, page 222.

21. The conclusion was that the Respondent, based on a recent Occupational Health Report update of 7 May 2021 and in the context of the extended period that the Claimant had been re-deployed. Together with the fact that

the Claimant was unable to return to her substantive role on the Ward in the foreseeable future (having been absent from the Ward since September 2020), and as no suitable alternative roles had been found the matter was now to be moved to an Attendance Hearing under the Respondent's procedures. The letter went on to warn the Claimant in very clear terms, the outcome of that meeting could be the termination of the Claimant's employment. The meeting would be Chaired by a Director with no previous involvement in the Claimant's case. In the meantime, the Claimant remained on the Re-deployment Register.

22. Part of the re-deployment process was that any post the Claimant applied for, the Manager be informed she was on the Re-deployment Register and must be given prior consideration for an interview should she meet essential criteria for the role and then short listed as a priority. The Claimant was provided with support for interview techniques and applications for posts.

23. On 29 June 2021, the Claimant has applied for two posts: Marketing Assistant, and Assistant Practitioner with the Eating Disorder Team.

24. On 15 June 2021, by letter the Claimant is invited to an Attendance Meeting in accordance with the Trust's Policy, page 232. The letter, again, reiterates a possible outcome of the meeting is the termination of the Claimant's employment. The letter also enclosed, pages 224 – 231, a summary Report providing details of the Claimant's health issues, a summary of non-attendance and further, a summary of the actions taken to support the Claimant.

25. The meeting takes place on 1 July 2021. In attendance was: the Chair of the meeting, Director Ms W Robotham; an HR Representative Ms Abby Gosden; the Claimant's Line Manager Ms Landells; the Claimant; and her Trade Union Representative, Mr Oakes. A note taker was also present. The minutes of that meeting are at pages 233 – 236. One area they discussed was the possibility of new treatment for her condition previously canvassed. However, there was still no date for this new treatment to commence which would last six months, with a further three months to monitor how the treatment was working. Thus making that at least another nine months. There were discussions about re-deployment and the Claimant requested more time to secure alternative employment. The Respondent agreed to adjourn the meeting for a further four weeks to see if the Claimant could secure alternative employment, in response to the Claimant's request. The Claimant had acknowledged she was not going to be able to return to work on the Wards.

26. On 13 July 2021, the Claimant received the outcome letter in which Ms Robotham confirms the extension of time of four weeks in order to seek re-deployment.

27. The Attendance Meeting was reconvened on 2 August 2021 (pages 240 – 242), the Claimant attending once again with her Trade Union

Representative. The meeting was again Chaired by Director Ms Robotham. At that meeting the Claimant confirmed she was not successful with the Eating Disorder Team application and her application for the Marketing Assistant role was also not successful. The Claimant confirmed her Line Manager was helping her in the process with interview skills and supporting her. However, apart from an application outside the Trust, no other applications were pending. A short adjournment took place and after the resumption of the meeting, Ms Robotham confirmed that as the situation had not changed since the last meeting, the Claimant's employment was to be terminated on the grounds of ill health capability and she advised the Claimant's right of appeal and the notice period being five weeks.

28. The outcome was confirmed in writing dated 4 August 2021 (pages 243 – 244), the letter confirmed the Claimant could continue to apply for any positions during her notice period. The letter confirms the Claimant's right of appeal.

29. Ultimately, the Claimant did not exercise her right of appeal and her employment ended around 6 September 2021.

The Law – the Employment Rights Act 1996

30. Section 98(1) of the Employment Rights Act 1996, sets out potentially fair reasons to dismiss. Section 98(2)(a) provides capability is a potentially fair reason to dismiss. Section 98(3) defines capability as assessed by reference to skill, aptitude, health or any other physical or mental quality.

31. That of course is not the end of it. The Tribunal has to consider Section 98(4), namely:

> (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 administration 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.

32. In considering fairness, the Tribunal has regard to the ACAS Code of Conduct which suggests in capability dismissals, one should establish the facts of each case, inform the employee of the problem, hold meetings with the employee to discuss the problem, allow the employee to be accompanied, consider a plan / action to proceed with, and of course to provide an opportunity to appeal.

33. In the context of long term absence, the importance of following and considering whether the decision to dismiss is fair and reasonable, will involve:

    a. a discussion at the start of the absence and periodically throughout the duration and inform the employee if the stage when dismissal may be considered as an approach;
    b. personal contact with the employee;
    c. medical evidence / Occupation Health Review;
    d. consideration of the employee's opinion on her condition; and
    e. consideration of alternative employment.

Conclusion on Ordinary Unfair Dismissal

34. Clearly the Respondents have advanced a potentially fair reason to dismiss. The next question is, did that fall within the band of a reasonable response of a reasonable employer?

35. It is clear the Claimant's absence from her substantive role was nearly 12 months, she was unable to fulfil that role not only from a physical point of view given her disability and her medication, she was also considered to be at substantial high risk vulnerability to Covid-19 on working on Wards face to face.

36. It is clear the facts of the Claimant's position and illness were established, there was clear medical evidence obtained and prognosis for the future. Which also made it clear that the Claimant's position, if it did not change in the foreseeable future could lead to dismissal. There were regular meetings with her Line Manager to discuss the situation before the matter moved to Formal Attendance procedure. The Claimant was clearly given support and time by her Line Manager in seeking an alternative positions, together with assistance on interview techniques and completing application forms and given priority in short listing if she met essential criteria for any particular role.

37. The Respondents were faced with the position that the Claimant could not undertake her substantive role and was unlikely to do so in the foreseeable future on two counts from the physical point of view and she was unable given her vulnerability to do patient facing Ward duties. In those circumstances, the decision to dismiss as the Respondents could wait no longer, was a fair and reasonable response to the facts known to the Respondents at the time they took the decision to dismiss.

The Law – s.15 Equality Act 2010, Discrimination Arising from Disability

38. Section 15 of the Equality Act 2010 provides,

    (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.

39. The first stage is, what was the relevant treatment? The Second stage is, was it unfavourable? i.e. disadvantage or detriment to the Claimant requires an assessment of the causal connection between the disability, the something arising and the alleged unfavourable treatment.

40. The Tribunal must therefore determine whether the reason, or cause, is something arising in consequence of the Claimant's disability.

41. Finally, the Respondent will successfully defend such a claim if they can show the treatment is a proportionate means of achieving a legitimate aim.

The Conclusions – s.15 Equality Act 2010

42. The Respondents accept that the dismissal amounted to unfavourable treatment linked to the disability.

43. The legitimate aim required in this case, persons performing the Claimant's role to attend and perform in patient care in a face to face setting in the interests of the continued provision of Health and Safety for which the Respondent is required to provide and was also required to comply with its duty under Health and Safety Legislation to provide the Claimant with a safe place of work. In achieving that legitimate aim, the Respondents are a public body the Claimant could no longer perform her substantive role and could not be expected to continue to employ the Claimant in temporary roles whilst also employing Bank, Agency or back filling her position at great cost to the Trust. It had gone on for 12 months, was no longer sustainable and was likely to continue for the foreseeable future. There was in fact no end in sight.

44. Therefore, the dismissal was a proportionate means of achieving their legitimate aims.

The Law - Failure to Make Reasonable Adjustments

45. An employer owes a duty to make reasonable adjustments under Section 20 of the Equality Act 2010 for a disabled person if the employer has a provision, criterion or practice which puts a disabled person at a substantial disadvantage in comparison with a person who is not disabled, to remove that disadvantage.

46. In considering what is reasonable, it is necessary to have regard to:

46.1 the extent to which taking the steps which would remove the disadvantage;
46.2 whether it would be practical;

46.3 the financial cost incurred and the extent to which the employer's activities would be disrupted;
46.4 the employer's financial and other resources;
46.5 the availability of assistance; and
46.6 the nature of the Respondent's activities and the size of undertaking.

47. There must be knowledge of the disability and knowledge that the intended adjustment would remove or reduce the disadvantage for a duty to make reasonable adjustments to accommodate it to exist.

48. The test for reasonableness and importing an objective standard, the question must not be looked at only from the perspective of the Claimant. The Tribunal must also take into account wider implications including operational objectives of the employer.

49. The PCP relied upon in this case is:

a. needing employees who are physically able to join in the PMA role by physically restraining patients; and
b. dismissing employees unable to carry out physical restraint.

50. If one or both of the PCPs put the Claimant at a substantial disadvantage in comparison with those who do not have rheumatoid arthritis, or other underlying health conditions.

51. Without repeating previous evidence, the reason for the Claimant's dismissal on 2 August 2021 had been the fact there was no substantive role available on the Ward and no substantive role the Claimant could perform. Furthermore, under the Occupational Health no reasonable adjustment that could enable the Claimant to return to work on the Ward or Ward based work. Not only because of the rheumatoid arthritis, but the Covid-19 risk and her underlying health conditions.

52. The suggestion that she could return to the Ward and rely upon other colleagues having to perform PMA, is not a realistic or reasonable adjustment given the serious illnesses patients have and their unpredictable behaviour, and the need to have a two to one ratio between staff and patients. Furthermore, to make this adjustment would have put the Claimant, colleagues and other patients at risk and in any event it would not have addressed the Covid-19 issue. Furthermore, any suggestion that a reasonable adjustment the Claimant should be able to walk into alternative roles without interview or meeting the basic criteria is totally unrealistic. The Claimant was given priority for interview if she met essential criteria. That is a sufficient reasonable adjustment.

53. Even if there are PCPs advanced that put the Claimant at a disadvantage, the Respondent clearly took steps that were reasonable to remove the disadvantage such as they were able to do on the facts of this case.

Costs Application by the Respondents

54. At the end of giving Judgment, Mr Ross Counsel for the Respondents made an Application for Costs in relation to the Hearing.

55. The Application made under Rule 76(1), particularly:

> (a) that a party (or the party's Representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted, or
> (b) …

56. The second part of the Respondent's Application was made under Rule 80(1)(a) for wasted costs against the Claimant's Representative. The Application being that the Claimant's Representative was unreasonable or negligent based on the principles of Ridehalgh v Horsefield [1994] CH205. The Respondents relying particularly on the negligence of the Claimant's Representative. It was said that the Claimant's Solicitor had the electronic Bundle for some time, Mr Omope, who was instructed by the Claimant but appeared to be a different firm of Solicitors from those Solicitors the Claimant had been using up until very recently, came to the Tribunal on Monday without the Bundle. Mr Ross goes on to say it was clear, during the course of these proceedings that when one was provided to him during cross examination, he never referred to one single page in the Bundle. Furthermore, the Claimant's closing submission was simply a repeat of his written opening submissions. The Claimant's Solicitors were notified on 13 January 2023 that if the Claimant was to withdraw the claim at that stage, the Respondents would not pursue costs, but if she continued they would. The Claimant's then Solicitors simply countered with a monetary offer to settle her claim which was declined by the Respondents.

57. There was then the situation that one of the Respondent's witnesses who had attended Court and had previously disclosed his statement, Mr Williams, right at the last moment the Claimant's Representative indicated that he was not going to cross examine this witness and made allegations that he was the Claimant's Trade Union Representative, which in the Respondent's mind was bizarre as he had never represented the Claimant and the last time he had acted as a Trade Union Representative was many years previously.

58. Furthermore, when the Respondent's Counsel questioned whether the Claimant's new Representative Mr Omope was a Solicitor, when asked by the Employment Judge to confirm Mr Omope made no comment which is strange to say the least.

59. Mr Ross went on to say that the Respondent being a public body having been brought to the Tribunal unnecessarily in a case that was never going to succeed, they were only asking for the cost for this week which amount

to (including Counsel's fees) £10,491.00; the Respondent's are not VAT registered.

60. The Tribunal gave Mr Omope an opportunity to respond. He said he was not in a position to respond at that stage.

61. Employment Judge Postle made the point that is often the case at the end of proceedings, cost Applications are made and as he is a Solicitor he should be able to respond and be prepared as he was warned of the Application prior to the Hearing. The Tribunal offered Mr Omope an adjournment to consider opposition to the Application and take instruction and the case was put back for 35 minutes.

62. Upon return, Mr Omope said he was only instructed by the Claimant's Solicitors at 4pm on the Friday before the Hearing and only had the weekend to peruse the electronic Bundle and he simply says he objects to any Costs Application. Finally, he comments that the Claimant's case was based on advice believed to be the way forward and his advice was to continue with the claim.

63. Mr Liberti from the Claimant's previous Solicitors had now appeared at this reconvened Costs Hearing, commented on the Bundle situation and he accepted he was unable to comment on the Costs Application as he was not present when the full reasons were given earlier this morning. He accepts that the Final Hearing Bundle was provided by the Respondent's Solicitors on 16 January 2023.

64. The Tribunal then questioned the Claimant on her means. She said she started new employment on 20 December 2020 at a children's home and she was also working for the Prison Service, albeit on the Bank Staff. It was difficult to ascertain exactly her means, when the Tribunal questioned her Schedule of Loss which showed income in January and February last year, eventually the Claimant admitted she had been earning at that stage. The Claimant, albeit on the Bank Staff, confirmed she was not in receipt of any benefits, she said she had no savings and was renting her flat.

The Tribunal's Conclusion on Costs

65. The power to award costs arises under the Employment Tribunal Rules of Procedure 2013, particularly rule 76 and that states that a Costs Order or Time Preparation Order may be made and a Tribunal should consider whether to do so where it considers that,

> (a) If a party (or that party's Representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably, in either the bringing of proceedings (or part) or the way the proceedings (or part) had been conducted, or
> (b) …

66. In relation to the Respondent's Wasted Costs Application, there is also power under Rule 80 which states,

> (1) A Tribunal may make a wasted costs order against a Representative in favour of a party (the receiving party) where that party has incurred costs-
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of the Representative, or
>
> (b) …
>
> (2) …
>
> (3) …

67. The Tribunal were unable to conclude that a Wasted Costs Order was appropriate in this case as it is difficult to untangle what advice, if any, was properly given to the Claimant by the Claimant's Solicitor, or the Solicitor that was representing the Claimant before these proceedings, Mr Omope, who appears to work for a different firm. Clearly, both firms have not waived privilege and it is not clear what instructions the Claimant may have given to both firms of Solicitors. Therefore, it would be difficult to make a Wasted Costs Order against Mr Omope.

68. However, having regard to the three stage process Tribunals should adopt, the Tribunal were of the view that the Claimant / her Representative has behaved in the manner prescribed by the Rule. Namely, has acted unreasonably in the bringing of these proceedings and in the way the proceedings have been conducted. The Tribunal reminds itself that unreasonableness is to attributed an ordinary and natural meaning and not to be interpreted as if it means something similar to vexatious. It is clear the claim should not have been pursued looking at the facts of this case, which would have been known to both the Claimant's Solicitors at the outset and had no prospect of succeeding, it was doomed to fail from the outset. In addition to that, the Tribunal had major concerns over the way the Hearing was conducted over the last two or three days, in particular, the Claimant's Solicitors failing to have a Bundle when they attended Tribunal on Monday in circumstances where he admits he received the Bundle on the Friday, and the fact that very little, if any, of his cross examination was relevant to the issues to be determined and the witnesses. Further, not informing the Respondents well in advance of the Hearing that Mr Williams would not be required as he had no intention of cross examining him. This all leads the Tribunal to conclude this was unreasonable behaviour.

69. The Tribunal then has to decide whether it should exercise its discretion as to whether or not it is appropriate to make a Costs Order and the Tribunal were unanimous it was appropriate to exercise its discretion.

70. Thirdly, in deciding that a Costs Order should be made, the Tribunal then has to decide what should be paid and again were unanimous of the view

that the sum put forward for the costs incurred for just the Hearing this week by the Respondents, was a reasonable sum taking into account Counsel's fees and the Solicitors attendance.

71. On reaching our decision, the Tribunal has had regard to the Claimant's means, but were not convinced the Claimant was entirely open with the Tribunal as to the extent of her employment income and therefore the award which she should pay, is the sum of £10,491.00.

72. That then leaves the Claimant sorting out between the original Solicitors and the Solicitors she instructed for this Hearing, as to whom really is responsible for that sum and clearly that is not a matter the Tribunal cannot go behind but merely raises this as a possibility that the Claimant might wish to address.

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Employment Judge Postle

Date: 10th March 2023

Sent to the parties on: 20.03.2023

GDJ
For the Tribunal Office.