Case Number: 3400159/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs J Rook	**v**	**Milton Keynes Education Trust**

Heard at: Cambridge **On:** 30 & 31 October 2017

Before: Employment Judge Ord

Representation

For the Claimant: Mr RK Rook (Lay Representative)

For the Respondent: Miss C Urquhart (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint that she was unfairly dismissed is not well founded and the claim is dismissed.

RESERVED REASONS

Background

1. The claimant was employed by the respondent from 12 November 2007 until 18 September 2016 when she was dismissed on the ground of capability through the respondent's Staff Attendance Monitoring and Capability Procedure. She claims that her dismissal was unfair.

The Hearing

2. Evidence was heard from the claimant, and the respondent called four witnesses; Gina Thomas (Human Resources Manager); Michelle Currie (Chief Executive); Sheila Bushnell (School Business Manager) and Caron Gardner-Potter (Deputy Head Teacher at Herongate School, another school which is part of the respondent Trust). Reference was made to a bundle of documents and closing arguments were advanced by both representatives.

The claims

3. The only claim advanced by the claimant was that she had been unfairly dismissed. The claimant was allegedly dismissed on the ground of capability which is a potentially fair reason for dismissal according to s.98(2)(a) of the Employment Rights Act 1996.

The facts as found

4. The claimant began employment at Walton High School on 12 November 2007 as a personal assistant to the vice principal.

5. On 1 July 2011 the claimant was advised that Walton High School was acquiring academy status and was to be part of the Milton Keynes Education Trust, the respondent in these proceedings. The Transfer of Undertakings (Protection of Employment) Regulations 2006 [TUPE] applied, and the claimant's employment transferred to the respondent.

6. In early February, 2016 the respondent announced a re-organisation of the administrative staff employed within it. There was a timescale for implementation with the re-organisation to take place with effect from September 2016, the beginning of the academic year 2016/17.

7. The claimant was advised through a support staff briefing in February 2016 of a job evaluation process for support staff posts as part of the re-organisation which was taking place. The claimant was also provided with a job description for a role "business support assistant (level support 2)" and it was explained to her that the re-organisation of the administrative team meant that the respondent would no longer use personal assistants so that the claimant and others affected would take on the role of business support assistant working as a team.

8. The claimant met with her line manager, Karen Malone, to discuss the new role. Through Miss Malone the respondent said that the job description for the new role was a close match to the claimant's previous role.

9. The claimant was unhappy with the re-organisation and the role into which she was assimilated. The reason for this is expressed by the claimant in her witness statement when she says that she had been "trained to work as a PA and [has] never sought any other role as I get great job satisfaction completing a task in its entirety and working on a one to one basis". The new role did not offer work on a one to one basis, but rather as part of an administrative/business support team and no evidence was advanced to suggest that any roles existed within the re-organised administrative/business support team where people worked on a one to one basis.

10. The claimant was given a new contract for signature but did not sign it.

11. In July 2016 the claimant was given what she described as "a list of general clerical tasks" to be carried out over the summer. The respondent had set out the tasks which required completion from an administrative/business support point of view in preparation for the new school year, and allocated specific individuals to carry out certain tasks. One of the tasks which the claimant has allocated against her was the allocation of locker keys (and thus locker numbers) for the students at both Walton High and Brooklands. Although the claimant said that she had been required to "clear out student lockers" that task was specifically assigned to another member of staff.

12. The claimant describes her treatment by being given her specific tasks to carry out as part of the team over the period before the beginning of the next academic year as "demeaning, demoralising and de-motivating". In evidence she said that the work was not fitting with the job she was employed to do.

13. In July 2016 the claimant was specifically given details of the new role and salary, the salary of the new role was slightly higher than that of her previous role.

14. On 8 August 2016 the claimant attended a general practitioner and was certified as being unfit for work with anxiety. The respondent asked the claimant to undergo an assessment by Occupational Health and on 17 August 2016 referred the claimant to Milton Keynes Occupational Health Services.

15. On 25 August 2016 the claimant was seen by Doctor Sarangi. He submitted his report to the respondent on 31 August 2016. The doctor's view was that non-medical interventions (in particular, completion of an outstanding grievance process and a robust discussion regarding underlying workplace issues) were the key to the claimant's ability to return to work. The claimant had lodged a formal grievance on 22 August 2016, between the date of referral to Occupational Health and the appointment itself.

16. In that grievance, and in the covering letter, the claimant referred to complaints that she had made in the past about the behaviour of some senior managers and referred to an underlying culture of age discrimination, and her belief that her recent "unacceptable treatment" was a symptom of this. She referred to noticing that other older members of staff were discriminated against. In her formal grievance notice she gave a number of examples of what she described as ageism or ageism and victimisation. I pause to note that no allegation of age discrimination has been made in these proceedings and no evidence to suggest any treatment which the claimant was subject to was motivated by age or any other protected characteristic was given.

17. Around this time the claimant also became aware of an earlier referral to occupational health and the form that was completed as part of that

referral in 2005. That had been drafted by Mrs Thomas and in it Mrs Thomas made what the claimant says were adverse comments regarding her. Further, the referral form sent in August 2016 had a job description which the claimant said did not match either the job description she had previously been given for her new role as business support assistant, nor a job description for her previous role.

18. On 19 September 2016 the claimant lodged a formal grievance against Mrs Thomas complaining that the contents of the occupational health referral forms were libelous ("the second grievance").

19. On 25 September 2016 Ms Currie arranged for a formal hearing into the second grievance to be held on 26 September, saying it was important that an early hearing took place in view of the serious nature of the allegations made. On the same day Ms Bushnell wrote to the claimant inviting her to attend formal stage 1 sickness absence review meeting following her period of sickness absence which had been continuous since 2 August.

20. The claimant said that the invitation to the formal stage 1 sickness absence review meeting was an act of retaliation against the fact that she had lodged a second grievance, but no evidence was led to suggest that this was in fact the case. The notice of the sickness absence meeting was sent out 46 minutes after acknowledgement of the formal grievance (both sent by email), but I find that that was no more than a coincidence of timing. I find that the issue of the invitation to the stage 1 sickness absence review meeting took place because the claimant had reached the trigger point of a long term absentee (someone absent from work for more than 28 days) at which point the line manager is to consider convening a stage 1 formal sickness absence review meeting so that the position can be reviewed. The claimant had reached the trigger point and the invitation was issued. I find as a fact that the invitation to the review meeting was neither in response to nor an act of retaliation following the lodging of the second grievance.

21. The date for the meeting to discuss the claimant's second grievance was changed from 26 to 30 September, but on 27 September the claimant said that she would not attend the hearing because she remained absent from work and did not believe it to be in her best interests to attend a meeting to discuss the grievance. She said that view was supported by her doctor although no medical evidence was provided to support that statement either then or subsequently. The claimant went on to say that she had obtained evidence that Mrs Thomas had published a libel against her in 2015 and asked for Miss Thomas to retract the comments made to the occupational health team and provide a letter of apology so that further distress was prevented and future embarrassment to Mrs Thomas was avoided.

22. Ms Currie, who was the grievance manager, had agreed to investigate the grievance relating to the 2015 comments even though they were more

than 3 months old and thus outside the scope of the respondent's grievance procedure.

23. The claimant had also said that she would not attend the stage 1 formal sickness absence review meeting due to her ill health, and the hearing was rescheduled for 5 October, which was also the date fixed for the hearing of the claimant's first grievance.

24. On 2 October 2016 the claimant advised the respondent that she would not attend the hearing to consider her grievance. Mr Duff, Chair of Governors and grievance manager subsequently set out in writing his decision on the grievance by letter dated 5 October. Mr Duff gave a detailed response to each of the elements of the claimant's grievance, none of which were upheld. The claimant was reminded of her right of appeal against the decision within seven working days of receipt. The claimant lodged an appeal on 10 October and the appeal hearing took place on 17 October. The claimant again wrote to the respondent to say that she would not attend the appeal hearing but on this occasion set out lengthy written responses to the outcome of the grievance as her bases of appeal.

25. The appeal panel was chaired by Mr Rymarz. He wrote to the claimant on 20 October 2016 attaching a copy of the outcome of the grievance appeal hearing. The original grievance outcome was upheld in full.

26. In the meantime the stage 1 formal sickness absence review meeting had been postponed several times. It was originally arranged for 27 September, postponed to 5 October 2016 and thereafter to 10 October before being finally arranged to take place on 11 October at the claimant's own house, apparently on the advice of her Trade Union representative. The claimant then advised that she was unable to attend that meeting. On 14 October 2016 Ms Bushnell wrote to the claimant advising that as the claimant had been unable to attend the meeting Ms Bushnell had reviewed the claimant's absence in line with the employee attendance monitoring and capability procedure for staff. She found that the claimant had been absent continuously since 2 August 2016 up to and including 10 October 2016 which was a total of 47 working days. The claimant's most recent fit note indicated that she would be absent from work until 9 November 2016. Through the period since October 2014 the claimant had been absent from work on a 141.5 working days, with 11 occasions of absence.

27. Ms Bushnell further pointed out that the workplace grievances had been concluded as suggested by the occupational health doctor. It was pointed out to the claimant that as of 9 November 2016 she would have been absent from work for 3 months with no known likelihood of her date of return to work. Ms Bushnell advised that the claimant's attendance was unsatisfactory and that she would be issued with a first warning together with a recommendation that the matter should proceed to a capability

hearing as set out in the procedure. The claimant was advised of her right of appeal against the decision but no appeal was lodged.

28. On 26 October 2016 Ms Bushnell wrote to the claimant advising that an attendance and capability hearing would take place on 3 November 2016 to review the claimant's ongoing sickness absence, the impact of this upon the administrative team; further to receive an update from the claimant on her medical condition. The claimant was advised that one possible outcome of the meeting might be to dismiss the claimant from her employment on the basis of her ongoing sickness absence. The claimant was advised of her right to representation by a Trade Union official or a colleague at that meeting.

29. The claimant did not attend the meeting 18 November 2016 but was represented by her Trade Union representative, Miss Hughes. The meeting was chaired by Ms Currie. Ms Bushnell presented the management case and advised that the claimant had submitted a further doctor's certificate indicating that she would be absent until at least 8 December 2016, stating anxiety as the cause of her absence.

30. On behalf of the claimant Miss Hughes said that the claimant's emotional stability was deteriorating as the claimant had formed the view that she was being de-skilled and demoted as an outcome of the job evaluation process, and raising, for the first time, an alleged lack of consultation. Miss Hughes said that the claimant had built a picture in her head that she had been demoted and "due to the perceived loss of status" that would prevent her from returning to work.

31. On 25 November 2016 the respondent wrote to the claimant confirming the outcome of the capability hearing. Ms Currie advised that having taken time to consider the matter, and with reference to sections 11.2 and 12 of the staff attendance monitoring and capability procedure it was unlikely that the claimant would return to work within an acceptable time frame. She said that in the light of the impact of the continued absence on the administrative team she felt that she had no alternative but to dismiss the claimant with effect from 18 November 2016. A payment would be made in lieu of notice, with a further payment for accrued but untaken annual leave. The claimant was advised of her right of appeal against the decision and lodged an appeal on 1 December 2016.

32. There were five grounds of appeal. The first was that the claimant said Miss Hughes considered the report of the meeting not to be true and accurate. The second was that no agreed minutes had been approved, the third that the capability exercise had not been carried out in a fair and equitable manner, the fourth that the dismissal letter contained inaccurate statements, and the fifth that the date of dismissal was the date of notification (25 November) not the date of hearing (18 November).

33. The appeal hearing was held on 13 December 2016. The claimant again did not attend. She was not represented. The appeal was considered by

Mr Duff who found that the others who had attended the meeting verified the notes as being true and a fair reflection of the discussion. No statement from either the claimant or her representative which stated in what way the minutes were said to be inaccurate had been given. He was satisfied that the process followed in the conduct of the meeting on 18 November was such that he was satisfied that the policy had been followed in a fair manner and he confirmed that the question relating to the date of dismissal had been addressed in a separate letter of 7 December 2016. The appeal was rejected.

34. It is against that factual background that the claimant brings her claims.

The Law

35. Under s.94 of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed.

36. Under s.98(1) if is for the employer to show the reasons or the principle reason for any dismissal, and that it is either a reason within sub-section (2) or some other substantial reason such as to justify the dismissal of an employee holding the position which the employee held.

37. Under s.98(2)(a) a reason which relates to the capability or qualifications of the employee to perform work of the type which they were employed by the employer to do is a potentially fair reason for dismissal.

38. Under s.98(3) capability is assess by reference to skill, aptitude, health or any other physical or mental quality.

39. Under s.98(4) where an employer has shown a potentially fair reason for dismissal the question of whether the dismissal is fair or unfair, having regard to that reason, depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason to dismissal the employee and shall be determined in accordance with equity and the substantial merits of the case.

40. I was referred by the claimant to the case of Sandle v Adecco UK Ltd [UKEAT/0028/16] which relates to effective date of termination and the communication of an unequivocal intention to treat the contract of employment as at an end.

41. The respondent referred me to the case of Lynock v Cereal Packaging Limited [1988] ICR 670. In that case the employment appeal tribunal held that in cases of capability dismissals, arising out of ill health, the factors the tribunal may consider include the nature of the illness, the likelihood of it recurring or some other illness arising, the length of the various absences and the spaces of good health between them, the need of the employer for the work to be done by a particular employee, the impact of the absence of others who work with the employee, the adoption and

carrying out of a policy, and importantly emphasised a personal assessment in the ultimate decision and the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made, was approaching.

Conclusions

42. Applying the facts found to the relevant law I have come to the following conclusions.

43. First I am satisfied that the claimant was dismissed for capability arising out of her ill health and for no other reason. There is no evidence to suggest that there was any other motivation behind the claimant's dismissal and I rejected the suggestion that the commencement of the capability procedure was some form of retaliation for the claimant raising her second grievance. That allegation is without any evidential foundation whatsoever.

44. The fact that the second grievance was acknowledged on the same day as and shortly before the letter calling the claimant to the first hearing under the capability procedure was sent amounts to nothing more than a coincidence of time. The claimant had already lodged an earlier grievance which did not prompt any adverse response from the respondent, indeed the respondent was willing to investigate the whole of that grievance notwithstanding the fact that a substantial part of it had been made out of time. Whilst making the allegation that the commencement of the capability process was an act of retaliation to the second grievance, the claimant did not advance a single argument to explain why the respondent might respond in that way when there had previously been, had remained thereafter, willing to investigate and – as I find – investigate fairly both the claimant's first and second grievance. The respondent's witnesses were not seriously challenged in cross examination as regards the bona fides of the commencement of the capability process.

45. Capability being a potentially fair reason for dismissal, the remaining question is whether the respondent acted fairly when treating the claimant's absence as sufficient reason to justify the termination of her employment.

46. At the time the claimant was dismissed she had been absent from work for a continuous period of almost four months and there was no indication of a likely return to work in the near or medium term. Indeed at the formal capability meeting the claimant's Trade Union representative advised the respondent that the claimant had built up a picture in her head that she had been demoted and that due to the perceived loss of status she would be unable to return to work.

47. Although it is not a central part of the case in so far as the issues before me are concerned it is right to say that the evidence which I have heard

and which has been disclosed in the bundle of documents indicates to me that the respondent not only had a legitimate business reason for re-organising the administrative staff it employs but also that it undertook that task in a fair and reasonable fashion. It is clear from the claimant's own evidence that the crux of the problem was as far as she was concerned, is that she did not want to be part of an administrative team but wanted to work as a personal assistant. As she said in her witness statement she wanted to work on a one to one basis. That was no longer how the respondent wanted or required their administrative resource to be managed, and they were entitled to re-organise their staff as they did. On the information before me the role which was given to the claimant, whilst I understand it would not be her preferred role, was suitable and appropriate for her skills and experience and was not, notwithstanding her view, a demotion.

48. At the time the respondent reached the decision to terminate the claimant's employment she remained absent from work as she had been for over four months and on the basis of the information provided by her Trade Union representative, from which she did not demur In any way, she was not able (or at the very least, unwilling) to return to work on the basis that she considered she had been demoted.

49. The medical evidence did not indicate that an early return to work was likely, the previous occupational health report indicated that the resolution of grievances would assist the claimant's return to work but that proved not to be the case.

50. I am satisfied on the evidence given that the impact of the claimant's absence was such that it could not be allowed to continue. The tasks which she would have carried out were being undertaken by other members of staff in addition to their own workload and the administrative staff were already shorthanded. That had been the case for a number of months and the respondent was entitled to conclude that it was no longer acceptable. The respondent's policy had been properly, fully and fairly applied and the claimant was fully aware that she was at that point of the process where one of the potential outcomes of the meeting on 18 November 2016 was the termination of her employment.

51. The claimant's appeal against dismissal was limited in scope and short of detail. However each point was considered by the appeal officer in the face of the claimant neither attending the meeting nor being represented at it. No detail was given to the appeal officer (nor has it been given to me) as regards the alleged defects in the report of the meeting of 18 November 2016, there was no obligation to provide agreed minutes, no explanation has been advanced of how the claimant considered the capability exercise not to have been carried out in a fair and equitable manner (and I do reflect upon the fact that steps taken by the respondent included arranging a meeting at the claimant's own house at her request and the instigation of her Trade Union representative, which the claimant then said she was unable to attend, and the claimant's non-attendance at

every meeting without any medical or other evidence to justify her non-participation), nor did the claimant explain what "inaccurate statements" the letter of dismissal contained.

52. It is well established that in cases relating to fairness or unfairness of a dismissal under s.98(4) a tribunal must not substitute its' own view nor stand in the employer's shoes and consider what it would have done. The question is whether or not dismissal fell with the range of responses open to a reasonable employer, and it cannot be said that in this case dismissal fell outside that range. The claimant had been absent from work for a lengthy period of time and there was no evidence of a likely return to work in the short or medium term, nor indeed any timescale for a return. On the basis of the comments by Miss Hughes on behalf of the claimant the respondent could reasonably consider that there was no prospect of a return to work. An additional burden had been placed on the claimant's colleagues to carry out a share of the claimant's duties as well as their own, and that had persisted for a period of months with no end in sight.

53. In those circumstances the claimant's dismissal was not unfair. The claim is dismissed.

54. One aspect of the matter, however, was raised during evidence before me and it is right that I should comment upon it. The claimant did not attend the hearing on 18 November 2016 but sent a representative. According the notes of the meeting which I have seen in the bundle, that meeting concluded Ms Currie saying that it was "necessary to make a decision as to [the claimant's] continued employment at Walton High" and Miss Hughes confirming that "she understood the potential outcome of the meeting".

55. On the basis of that information no decision was communicated on 18 November 2016 to the claimant or her representative. The claimant received a letter of dismissal dated 26 November and that was the first communication to her of her dismissal. Accordingly the effective date of termination was the date when that letter was received. I understand from matters raised before me that the remaining argument between the parties as to whether or not the claimant had received all monies due to her on termination of employment, and that the effective date of termination was in dispute. The matter was not before me as an issue to determine but I hope that this judgment will assist in resolving that dispute.

_____

Employment Judge Ord

Date: 2 January 2018

Sent to the parties on: .....

.....
For the Tribunal Office