EMPLOYMENT TRIBUNALS

Claimant: Ms S Afitlhile.

First Respondent: BUPA Care Homes (GL) Ltd.
Second Respondent: Jane Madden.
Third Respondent: Dawn Murphy.

Heard at: Leeds
On: 2,3,4 September 2019
Deliberations: In Chambers on 5 September 2019

Before: Employment Judge Shepherd

Members: Mr Q Shah
Mr M Taj

Appearances:

For the Claimant: Dr Mapara, lay representative
For the Respondent: Ms Datta, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim brought by the claimant of unfair dismissal is not well founded and is dismissed.

2. The claims brought by the claimant of race discrimination and disability discrimination are not well founded and are dismissed.

REASONS

1. The claimant was represented by Dr Mapara and the respondent was represented by Ms Datta.

2. The Tribunal heard evidence from:

Sybil Afitlhile, the claimant;
Jozef Olegnik, former residential home manager
Jane Madden, second respondent;
Dawn Murphy, third respondent.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 181. The Tribunal considered the documents to which it was referred by the parties.

4. The claims brought by the claimant were for unfair dismissal, race discrimination and disability discrimination. At a preliminary hearing on 8 May 2019 the complaints of discrimination were identified as direct discrimination because of race and disability. The claim form presented to the Tribunal referred to a requirement to make reasonable adjustments and referred to an adjustment to the schedule in order that the claimant might be exempt from night duty which would relieve the pressure on the claimant's knees. In the grounds of resistance, the respondent referred to reasonable adjustments and denied that there was a duty to make reasonable adjustments and, if the claimant had been put at a substantial disadvantage the respondent submitted that they took such steps as were reasonable in the circumstances. The witness statements by the respondent's witnesses provided evidence in respect of reasonable adjustments. Reasonable adjustments had been addressed in the Occupational Health report, the capability hearing and the appeal hearing. It was covered in both the witness statements provided by the respondents.

5. During discussions at the commencement of the hearing the question of whether this was, in reality, a claim pursuant to section 15 of the Equality Act 2010 was raised. The respondents allege that the reason for dismissal was capability and it was made clear, on behalf of the claimant that the discriminatory act relied on was the dismissal. The respondent's case was that the claimant was dismissed on the basis that the claimant was incapable of performing the role in which she was employed. This was alleged by the claimant to be an act of discrimination. This is an allegation of unfavourable treatment because of something arising in consequence of the claimant's disability. The something being the claimant's ability to carry out her role. This was a relabelling exercise. The factual allegations remain the same and the respondents were aware of those allegations.

6. In the circumstances, the Tribunal considered it just and equitable to allow the claimant to amend her claim to include claims of failure to make reasonable adjustments and to include claim pursuant to section 15. The Tribunal did not consider it appropriate to adjourn the hearing on the basis that the advice provided to the

respondent would have been different if the nature of the claims had been entirely clear at an earlier stage.

7. The claimant also sought to rely on a comparator, Mr Olegnik who was already a witness at the hearing as the claimant had been informed, on the first morning of the hearing, that Mr Olegnik had suffered from the same medical condition as the claimant but had not been dismissed. Mr Olegnik had left the first respondent's employment in 2014. He was employed as a manager of Cleveland House care home. The respondents were given time to investigate and ascertain whether they could locate any details of Mr Olegnik's employment and consideration of his medical issues. The respondents carried out investigations and provided to the Tribunal, on the second morning of the hearing, some documents in respect of Mr Olegnik and indicated that further enquiries would be made with regard to the personnel file. It was indicated that the proposed comparator was not in the same material circumstances as the claimant. Dr Mapara, on behalf of the claimant, abandoned the application to rely on Mr Olegnik as a comparator.

8. The issues for the Tribunal to determine were discussed and agreed as follows:

Unfair Dismissal

What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996.

Did the respondent hold that belief in the claimant's lack of capability on reasonable grounds?

Was the decision to dismiss within the range of reasonable responses available to the respondent?

If the dismissal was unfair, did the claimant contribute to dismissal by culpable conduct?

Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Race discrimination

Was the dismissal of the claimant less favourable treatment because of the claimant's race.

The claimant relies on hypothetical comparators and says that a white employee would not have been dismissed in the same circumstances.

If the claimant established facts from which the Tribunal could conclude that the difference in treatment was because of the protected characteristic of the claimant's race, has the respondent shown that the treatment of the claimant was not because of the claimant's race?

Discrimination arising from disability

Has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant was a disabled person at the material time?

Did the respondent treat the claimant unfavourably?

If so, was it because of something arising in consequences of the claimant's disability?

What was that something arising?

Does the claimant prove that the respondents' treatment of her was because of the something arising in consequence of her disability?

Does the respondent show that the treatment of the claimant was a proportionate means of achieving a legitimate aim?

Discrimination by failure to make reasonable adjustments:

Did the respondent apply a provision criterion and or practice ("PCP") to the claimant?

If so, did the application of any such PCP put the claimant at a substantial disadvantage in relation to relevant matter in comparison with persons who are not disabled?

If so, did the respondent take such steps that were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant however it is helpful to know the adjustment asserted as reasonably required and they are to be identified in the list of issues.

Did the respondent now know or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

Findings of fact

9. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

9.1. The claimant was employed by the first respondent as registered nurse at Cleveland House care home from 7 November 2002.

9.2. The second respondent, Jane Madden, was employed by the first respondent as a Regional Director. The third respondent was employed as the Registered Manager of Cleveland House care home.

9.3. The claimant suffered an injury to her left knee in or around 2005. The respondent's witnesses were not aware of this injury.

9.4. The claimant underwent a left knee replacement operation in 2008.

9.5. In November 2017 the claimant underwent a further knee replacement operation on the same knee and was off work from 21 November 2017 until 22 January 2018.

9.6. The claimant attended a return to work interview on 30 January 2018. A statement of fitness for work from the claimant's GP advised that she should not be required to work night shifts for a period of 12 weeks. That adjustment was made by the respondent.

9.7. The first respondent referred the claimant to Occupational Health. A number of attempts were made to arrange Occupational Health appointments. The claimant failed to attend appointments arranged and Occupational Health closed their file following repeated failures by the claimant to respond to correspondence and to attend appointments.

9.8. Dawn Murphy, the claimant's line manager, referred the claimant to Occupational Health in May 2018. Dawn Murphy said that she was keen to ascertain whether there was any way in which the first respondent could support the claimant and she wanted guidance from Occupational Health and whether the claimant was receiving the appropriate medical support.

9.9. On 22 May 2018 the claimant's GP provided a statement of fitness for work indicating that the claimant should not undertake night duty for a period of eight weeks. The first respondent implemented this adjustment.

9.10. The claimant was invited to an appointment with Occupational Health on 25 July 2018. The claimant failed to attend that appointment. She informed dawn Murphy that she had lost the letter of invitation

9.11. A further Occupational Health appointment was arranged for 2 August 2018. The claimant was late for this appointment and therefore could not be seen by the consultant.

9.12. The claimant attended an Occupational Health appointment on 13 December 2018.

9.13. On 17 December 2018 Dawn Murphy sent an email to Helen Haller, Employee Relations Partner, in which she stated:

> "Sybil came to see me today and said the Occupational Health Doctor had told her that he didn't feel she was safe to work in the environment she is in.
> He seemingly said that she was a risk to herself, residents and other staff regarding Health and Safety for both herself and others.

I asked what he advised and she said he would be giving his report to BUPA for them to take appropriate measures.
Because Sybil has told me this is there any actions I should be taking or do I have to wait for the report? Maybe I think outside the box, but I don't want an accident to happen and she say that we were aware she was unsafe."

9.14. And Occupational Health report was provided by Dr Batman dated 20 December 2018. In that report it is stated:

"**Fitness for Work and Recommendations**

- She has explained to me that she works 12 hour shifts. She has on previous occasions been required to do night work. On night work she could be the only registered nurse on duty. On day times she tells me that there is one other registered nurse. She tells me that the home is over four floors with considerable distance between.
- She clearly has significant reductions in mobility in all joints of her lower limbs. I am concerned at her mobility and the impact on her functionality in order to be able to safely move patients and those in care.
- I am worried that in the event of an emergency requiring an evacuation she would have difficulty in mobility both from herself and also helping other persons in the home. She would have clearly significant difficulty using the stairs with any speed and could become an obstruction for others trying to get past. She has also had a number of falls and would have significant difficulty getting up if she was working alone.
- In conclusion it is my professional opinion that she has difficulty undertaking helpful roles, would not be able to respond in an emergency, would be unable to undertake any cardio – pulmonary resuscitation should it be required.
- I would also believe there is a foreseeable risk of her further damaging the joints of her lower limbs due to moving immobile patients particularly for movement out of bed, in and out of bathing conditions etc.

Answers to Specific Questions

Is the employee able to perform some form of work?

She clearly could undertake some form of very limited non-manual work, but my concerns are around mobility, emergency situations, and undue effect on the joints of the lower limbs by moving difficult and immobile patients.

There is a foreseeable risk to here already damaged joints from manual handling.

> **If the employee is currently unable to perform their normal duties will they be able to resume these in the future?**
>
> Unfortunately, the condition that she has in the knees and other joints of the lower limbs is one of the chronic and progressive nature. She has had two knee replacements on the left-hand side it is my opinion at this moment in time the right knee would be unsuitable for a replacement.
>
> **What temporary adjustments are needed to facilitate a return to work?**
>
> Due to the nature of her condition it is difficult to advise on any adjustments or recommendations to make change."

9.15. On 21 December 2018 the claimant attended a meeting with the third respondent, the second respondent attended as a notetaker. The claimant was placed on paid ill-health suspension.

9.16. The claimant was invited to a Capability ill-health meeting to take place on 3 January 2019. It was indicated in the invitation letter that a decision as to the outcome of the capability meeting would only be made on the day and after all evidence had been reviewed but that it was only fair and appropriate to make the claimant aware that the possible outcome may be to dismiss if the capability issue due to ill health was upheld.

9.17. On 3 January 2019 the claimant attended a formal capability hearing. The hearing was before Dawn Murphy. Helen Haller, ER Partner, was the notetaker and the claimant was accompanied by a Trade Union representative of her choice, Michael Parkinson. Within the notes of that hearing it is provided that Dawn Murphy said:

> "You have said what you feel in report is correct and wouldn't want to place residents in trouble"

The response from Michael Parkinson is shown as follows:

> "– would agree, if terminated in fairness ill health reasons. SA said twice agrees with report in the conversation, conclusions are that they can't think of any adjustment. Not dealt with Bupa before ill-health, general considerations can do unlikely other locations will also work. Agree with HH lower role wouldn't be suitable work as our GN no other suitable SA doesn't think"

Following an adjournment Dawn Murphy informed the claimant that her employment was terminated on grounds of ill-health.

9.18. Dawn Murphy said that she considered dismissal to be the only appropriate option in the circumstances. She said that the claimant and her representative had agreed that no adjustments and/or alternative roles would be appropriate. She said that, by claimant's own admission, she was

permanently unfit for the duties of her nursing role and that any problems would not get any better. She did not consider that any more could be gained from further capability meetings as the claimant had clearly set out her position on her health and did not consider any adjustments to her role to be appropriate and was not interested in alternative employment.

9.19. On 9 January 2019 Dawn Murphy wrote to the claimant. In that letter it was stated:

> "We discussed in the meeting that you were not fit enough to continue in your current role and no other role or adjustments would be suitable to you at this time. You regularly seek the support of your GP who have indicated they have done all they can for you in terms of your ongoing health. Occupational Health confirmed your mobility would impact your functionality to be able to safely care for residents in the home. They also confirmed your condition was progressive and of a chronic nature. You confirmed you agreed with the medical information provided to BUPA. In view of this, we decided to dismiss you from BUPA's employment due to capability specifically relating to sickness."

The claimant was provided with payment in lieu of 12 weeks' notice and paid her outstanding holiday entitlement.

9.20. The claimant appealed against her dismissal. In her letter of appeal, the claimant referred to her accident at work in 2005 and her medical condition. She said she would "like to know if I am made "redundant on medical grounds". She said that nothing had been done for her following her accident and surgery in 2008. She said that she felt she had been badly treated by the management. The claimant did not indicate that she disagreed with the Occupational Health report or refer to any reasonable adjustments.

9.21. The claimant attended an appeal hearing before Jane Madden on 6 February 2019. The meeting had been rearranged and relocated to another care home. The notes of that meeting show that it was indicated that the claimant had arrived without a representative was asked if she was happy to proceed or whether she would like to postpone the meeting. The claimant agreed to continue with the meeting. In the meeting the claimant referred to her accident said that she had been injured at work. The claimant asked for redundancy but was informed by Jane Madden that she had not been made redundant.

9.22. On 6 February 2019 Jane Madden wrote to the claimant indicating that she had decided to uphold the decision to dismiss the claimant due to capability for the following reasons:

> "You were unable to provide any new evidence with regards to your health. The medical information provided to BUPA as part of your capability hearing with Dawn Murphy confirmed that you would be unable to continue your role due to ill-health.

> You have asked for a redundancy package, however your dismissal is not a redundancy, the nursing role is still in place at Cleveland House. You have received all payments owed to you including notice pay and outstanding holiday pay.
> BUPA's final decision is therefore that you are dismissed from BUPA's employment due to capability specifically relating to sickness."

9.23. On 18 March 2019 the claimant presented a claim to the Employment Tribunal. She brought claims of unfair dismissal, race discrimination and disability discrimination.

The Law

Unfair Dismissal

10. Capability is a potentially fair reason for dismissal under S.98(2) of the Employment Rights Act 1996. It is for the employer to show the reason for dismissal and if it does show that the reason was a potentially fair reason the tribunal will then go on to determine whether the dismissal was fair in the circumstances pursuant to S.98(4).

11. In cases of capability dismissals involving ill health the Tribunal will consider whether the ill health relates to the employee's capability and whether it was a sufficient reason to dismiss. Further, the Tribunal should take heed of the Employment Appeal Tribunal's guidance in *Iceland Foods Ltd v Jones [1982] IRLR 439*. In that case the EAT stated that a Tribunal should not substitute its own views as to what should have been done for that of the employer, but should rather consider whether dismissal had been within "the band of reasonable responses" available to the employer.

12. In the case of *BS v Dundee City Council [2013] CSIH 91* the EAT stated that it is important for employers to consider:

(a) The nature of the illness;
(b) The likelihood of it recurring;
(c) The length of past absences and the intervening periods of attendance;
(d) What reasonable adjustments have been offered and what could be offered, such as alternative work; and
(e) The impact of the absences on the business and other employees.

This was not a case of dismissal for past sickness absences and the focus was on the capability of the claimant to carry out her role.

Direct discrimination

13. Section 13 of the Equality Act 2010 states:

> (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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

Discrimination arising from Disability

14. Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

Duty to Make Reasonable Adjustments

15. Section 20 of the Equality Act 2010 states:

"(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

16. Paragraph 20 (1) of Schedule 8 provides:

" 20 (1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question;

(b) In any other case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement."

17. Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out *in Environment Agency v Rowan [2008] ICR 218*, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

18. Consulting an employee or arranging for an Occupational Health or other assessment of his or her needs is not in itself a reasonable adjustment because such steps do not remove any disadvantage: *Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, EAT; Project Management Institute v Latif [2007] IRLR 579, EAT.*

Discrimination arising from the consequence of a disability

19. Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in *Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14* at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

20. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see *IPC Media Ltd v Millar [2013] IRLR 707*: was it because of such a consequence?

21. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that

disability.

Burden of Proof

22. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

23. Guidance has been given to Tribunals in a number of cases. In *Igen v Wong [2005] IRLR 258* and approved again in *Madarassy v Normura International plc [2007] EWCA 33.*

24. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

25. In *Project Management Institute v Latif (2007) IRLR 579* The EAT gave guidance as to how Tribunals should approach the burden of proof in failure to make reasonable adjustments claims. The burden of proof only shifts once the claimant has established not only that the duty to make reasonable adjustments

has arisen, but also that there are facts from which it could reasonably be inferred, in the absence of an explanation, that it has been breached. It was noted that the respondent is in the best position to say whether any apparently reasonable amendment is in fact reasonable given its own particular circumstances. Therefore, the burden is reversed only once potential reasonable adjustment has been identified. It will not be in every case that the claimant would have to provide the detailed adjustment that would have to be made before the burden shifted, but "it would be necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not". The proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, not even until the Tribunal hearing.

26. In *Romec v Rudham (2007) All ER 206* the EAT held that if the adjustment sought would have had no prospect of removing the substantial disadvantage then it could not amount to a reasonable adjustment. However, if there was a real prospect of removing the disadvantage it may be reasonable. In *Cumbria Probation Board v Collingwood (2008) All ER 04* the EAT stated "it is not a requirement in a reasonable adjustment case that the claimant prove that the suggestion made will remove the substantial disadvantage" the finding of a failure to make a reasonable adjustment which effectively gave the claimant a chance of getting better through a return to work was upheld.

27. In *Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10/JOJ* the EAT held that when considering whether an adjustment is reasonable it is sufficient for a Tribunal to find that there would be a prospect of the adjustment removing the disadvantage.

28. In *Noor v Foreign and Commonwealth Office 2011 ICR 695* Richardson J stated: "Although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"

29. The Tribunal had the benefit of oral submissions provided by the representatives. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

30. The Tribunal is satisfied that the reason for the claimant's dismissal was a potentially fair reason of capability.

31. The first respondent had obtained a medical report from the Occupational Health physician, Dr Batman. That report indicated that the claimant had difficulty in undertaking her full role, would not be able to respond in an emergency, would be unable to undertake any cardio pulmonary resuscitation. There was a risk of further damage to her health and the respondents were concerned about the risk to the claimant, residents and other employees.

32. The first respondent held a genuine belief in the claimant's lack of capacity. That concern was held on reasonable grounds. It was set out cogently by the third respondent who was the claimant's line manager and the dismissing officer. This was upheld by the second respondent who was the regional manager and heard the appeal.

33. The claimant and her Trade Union representative confirmed that they agreed the contents of the Occupational Health medical report. The capability hearing was arranged to consider whether any reasonable adjustments could be made. It was indicated that the first respondent needed to consider things like change of hours or possible role changes. The claimant's Trade Union representative indicated that the claimant agreed with the medical report and the conclusions were that they could not think of any adjustments to be made. The claimant was offered the opportunity to consider other roles such as that of a Care Assistant, domestic or an administrative role. She was not interested in any of those other roles in view of the physical nature of the duties and/or the remuneration.

34. The claimant agreed with the Occupational Health medical report and its conclusions in the capability hearing, the appeal letter and appeal hearing, the claim she brought to the Tribunal and her written witness statement. Her representative, Dr Mapara said, during the course of the Tribunal hearing, that the medical report had been misinterpreted. However, when pressed, he agreed that he was actually contending that the report was wrong or flawed. This had not been indicated to the respondents at any stage prior to the hearing and there was no reason for them to consider obtaining further medical evidence or a second report.

35. The Tribunal has some sympathy with the claimant who was a long-standing employee. She had worked for 16 years as a registered nurse in the care home. It was extremely unfortunate that her employment should come to an end as a result of her medical condition. This was indicated to be a chronic condition and progressive and there was no indication at the time the decision to dismiss was made that there was likely to be any improvement or any reasonable adjustments to ameliorate the consequences of her incapability.

36. In the circumstances, the decision to dismiss was within the band of reasonable responses available to the first respondent and was not an unfair dismissal.

Race discrimination

37. There was no credible evidence that the dismissal of the claimant was on grounds of the claimant's race. It was not put to the respondents' witnesses that this had been in any way related to the reason for the dismissal.

38. It was not established that a white employee would not have been dismissed in the same circumstances.

39. The burden of proof has not shifted to the respondents as there were no facts established from which the Tribunal could conclude that the difference in treatment was because of the protected characteristic of the claimant's race.

40. If the Tribunal had concluded that the burden of proof had shifted to the respondents then it is satisfied that the respondents have shown that the claimant's dismissal was not because of her race. The Tribunal is satisfied that the respondent has shown that the reason for dismissal was the claimant's capability and concern for her safety and that of residents and other employees. It was in no way related to the claimant's race.

Disability discrimination

Direct discrimination

41. The respondents accepted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.

42. The claimant was dismissed by reason of her lack of capability. It was not established that the claimant was dismissed because of her protected characteristic of disability. If a disabled person simply cannot do a particular job and the employer dismisses for that reason, she has not been treated less favourably than non-disabled person who also, for a non-disability related reason, was unable to do the job. Less favourable treatment can only be established by means of comparison, taking into account the relevant material circumstances.

Discrimination arising from disability

43. If an employer dismisses the employee because of her disability, when it would not dismiss a comparable non-disabled employee, this will amount to direct discrimination under section 13. Where an employee is dismissed not because of her disability per se, but because of something arising in consequence of her disability, such as the capability to perform her role, the dismissal will amount to discrimination arising from disability under section 15 unless the employer can show that the dismissal was justified as a proportionate means of achieving a legitimate aim.

44. In this case the dismissal of the claimant was by reason of her capability. That capability was something arising from disability. In those circumstances, the Tribunal has to determine whether the respondents have shown that the treatment was a proportionate means of achieving a legitimate aim.

45. The respondents have established that there was a legitimate aim of protecting the health and safety of the claimant, the rest of the staff and the care home residents. The Occupational Health report was clear in this regard and, at the time of the dismissal, this report was agreed by the claimant and her Trade Union representative. The report said that the claimant could undertake some of the very limited non-manual work but the Occupational Health Physician's concerns were with regard to mobility, emergency situations and the undue effect on the joints of the lower limbs by moving difficult and immobile patients.

46. The Tribunal has given consideration as to whether the dismissal was a proportionate means of achieving that legitimate aim by balancing the discriminatory

effect on the claimant against the means of achieving the legitimate aim. Should the first respondent have continued to employ the claimant and there had been some injury to the claimant, a resident or another employee, in the light of the Occupational Health medical report, the respondents would have been subject to action or criticism for failing to perform their professional duties. The Tribunal is satisfied that the dismissal of the claimant was a proportionate means of achieving a legitimate aim.

Duty to make reasonable adjustments

47. The respondents had previously made adjustments. They had removed the claimant from the requirement to work night shifts and had provided that there would be another nurse on duty at the same time as the claimant.

48. The provision criterion or practice was the requirement to work normal hours and fulfil the full duties of the claimant's role. These had been summarised by Dawn Murphy, and agreed by the claimant, as follows:

- Participating fully in the overall care of patients;
- Maintaining safe levels of care for residents;
- Ensuring that residents received the highest level of holistic care and attention;
- Supervising closely, all duties involved with seriously ill residents; and
- Being responsible for the safe administration of drugs in accordance with company policy.

Protecting the safety of patients was the claimant's ultimate priority.

49. The Tribunal has considered that the duty to make reasonable adjustments is on the employer, and the fact that a disabled employee and her advisers cannot postulate a potential adjustment will not, without more, discharge that duty. The employer had considered adjustments, other jobs had been offered, such as the administrative role, and the role of Care Assistant or domestic duties. The claimant did not wish to accept these other possible roles.

50. There is another of the first respondent's care homes within the region which is approximately one mile from the Cleveland House care home. There were no suitable vacancies at that care home as any positions would be the same in respect of the physical requirements of the possible roles considered at Cleveland House. The administrative role for Cleveland House was being covered by the administrator for the nearby care home and Dawn Murphy said that she would have liked to have administrative assistant at Cleveland House.

51. During the course of the Tribunal hearing the claimant's representative made a suggestion that had not previously been made by the claimant's representative. He suggested looking into other roles within the Bupa organisation and the possibility of a role in a dental clinic was mentioned. The respondents indicated that Bupa is an international organisation and such clinics would be within a separate company.

52. The claimant's representative was a medical doctor and he indicated in his submissions if the dismissal had been delayed and the claimant had been given the opportunity to obtain a prognosis at a later date, the claimant would have then been capable of performing her role. He said that the Occupational Health report put some fear into the managers, especially those managers with no medical background. He also said that if something happened to the claimant or some of the patients or staff, how would the manager explain herself in view of the damning report on her file. He said he believed that the fear element played a role in the dismissal that had taken place within four weeks of receiving the report.

53. The Tribunal has considered the position at the time of the alleged discriminatory treatment, the dismissal. At that stage, the medical evidence before the respondents was clear that the claimant was incapable of performing her role and that her condition was chronic and progressive and the claimant was permanently unfit for the duties of her role. Dawn Murphy considered that dismissal was the only appropriate option.

54. The claimant and her Trade Union representative had agreed that there were no adjustments or alternative roles that would be appropriate. There was nothing to be gained from further capability meetings and there was no reason for the respondents to consider seeking any further medical evidence. There had been numerous previous attempts to obtain an Occupational Health report. There had been referrals by a previous home manager following the surgery the claimant had undergone in December 2017 but Occupational Health had closed their file following repeated failures by the claimant to respond to correspondence or to attend appointments.

55. In the circumstances, the claims brought by the claimant are not well-founded and are dismissed.

Employment Judge Shepherd

6 September 2019