Case Number: 3200173/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Orszagh**

Respondent: **PrimeView Estates Ltd**

Heard at: **East London Hearing Centre** **On: 24-27 October 2017**

Before: **Employment Judge Brewer**

Members: **Mrs A Berry**
Mr N Turner OBE

Representation

Claimant: In person

Respondent: Mr J Barwick (Surveyor)

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. **The claim for direct disability discrimination (s.13 Equality Act 2010) fails and is dismissed.**

2. **The claim for disability harassment (s.26 Equality Act 2010) fails and is dismissed.**

3. **The claim for discrimination arising from disability (s.15 Equality Act 2010) fails and is dismissed.**

4. **The claim for unfair dismissal fails and is dismissed.**

REASONS

Introduction

1 This case was listed to be heard before a full Tribunal over three days at a preliminary hearing held by Judge Gilbert. At that hearing Judge Gilbert set out a detailed list of issues by agreement with the parties and also made a number of case management directions in relation to bundles and witness statements.

2 At the outset of this hearing we were faced with a bundle of documents prepared by the Respondent which was not paginated; we had a separate bundle containing various medical records provided by the Claimant which was also not paginated; we had no witness statement from the Claimant, we had no witness statement from either the dismissing or appeal managers in this case; we were provided with some witness statements from the Respondent which touched upon some aspects of the case.

3 We canvassed with the parties and discussed whether the case could go ahead in light of the above. Given the generous time limit and the willingness of the parties, we were content that we could deal with any difficulties posed by the evidence in chief being given orally. The parties agreed.

4 In the event we heard from the Claimant, Mr Bones, Ms Murphy and Mr Barwick for the Respondent. We also note that at the outset of the hearing the Claimant confirmed that the only impairment she was relying upon as amounting to a disability is uveitis.

Issues

5 In short the legal issues in this case are as follows.

6 **Disability**:

6.1 Was the Claimant a disabled person within the meaning of section 6 Equality Act 2010 by reason of her uveitis at the relevant time, being at the date of her dismissal?

6.2 If so, for the purposes of direct discrimination, did the Respondent know or ought it reasonably to have known that the Claimant was a disabled person as set out above and, if so, when did it know/ought it reasonably to have known?

7 **Direct discrimination**:

7.1 Did the Respondent treat the Claimant less favourably than it treats others by dismissing the Claimant because she was disabled?

8 **Discrimination arising**:

8.1 Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the uveitis?

8.2 If so, can the Respondent show that such treatment was justified as a proportionate means of achieving a legitimate aim?

9 In relation to the claim set out in paragraph 8, the Claimant says the one week she took off as sick leave prior to her being notified of a potential redundancy arose in consequence of her uveitis and her redundancy was because of the time off.

10 In relation to justification, the Respondent says that the need to manage staff absence in a business with very few employees was critical and justifies the dismissal.

11 **Harassment**:

11.1 Did the matters complained of, set out in the agreed list of issues amount to the Respondent engaging in unwanted conduct related to the Claimant's uveitis which:

11.1.1 Had the effect of violating the Claimant's dignity, or

11.1.2 Had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

12 **Unfair dismissal**:

12.1 Was there a genuine redundancy situation?

12.2 Was the pool unreasonably narrow?

12.3 Was there reasonable consultation?

12.4 Was there a reasonable search for alternative employment?

13 Insofar as not dealt with above, or in the judgment below, the factual issues in the case are as set out in the agreed list of issues set out by Judge Gilbert.

Law

14 The relevant parts of the Equality Act are as follows:

6 Disability

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) A reference to a disabled person is a reference to a person who has a disability.

(3) In relation to the protected characteristic of disability –

(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;

(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.

(4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section) –

(a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

(b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

Schedule 1

Part 1

Long-term effects

2(1) The effect of an impairment is long-term if –

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

2(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

2(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

2(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

13 Direct discrimination

(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.

(8) This section is subject to sections 17(6) and 18(7).

15 Discrimination arising from disability

(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.

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

26 Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

15 The relevant parts of the Employment Rights Act are as follows:

136 Circumstances in which an employee is dismissed.

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if) –

(a) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),

139 Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind,

or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(c) is that the employee was redundant, or

(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 administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

16 The following principles from the case law has been considered and applied.

17 In relation to normal day to day activities, in **Ekpe v Commissioner of Police for the Metropolis [2001] IRLR 605** the EAT held that:

"what is normal cannot sensibly depend on whether the majority of people do it. The antithesis... is between that which is 'normal' and that which is 'abnormal' or 'unusual' as a regular activity, judged by an objective population standard".

18 Work activities may therefore be normal day to day activities.

19 In **Chacón Navas v Eurest Colectividades SA [2006] IRLR 706**, (the ECJ confirmed that the effect on a person's abilities at work should be taken into account. It held that disability in the context of the Framework Directive means:

"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".

20 The emphasis on "professional life", rather than merely normal day-to-day activities, was reaffirmed in **Ring v Dansk Almennyttigt Boligselskab and another C-335/11**, in which the ECJ refer to something that

"may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers".

21 In relation to whether an impairment was likely to recur we refer to the judgment in **SCA Packaging Ltd v Boyle [2009] UKHL 37**, in which the House of Lords upheld the decision of the Northern Ireland Court of Appeal that "likely" in the context of the Disability Discrimination Act 1995 means that something could well happen and we see no reason why that should not apply to the same provisions now contained in the Equality Act 2010.

22 In **McDougall v Richmond Adult Community College [2008] IRLR 227** the Court of Appeal confirmed that the likelihood of the recurrence of a disability must be assessed at the date of the act of discrimination.

23 The burden of showing disability lies on the Claimant (**Kapadia v London Borough of Lambeth [2000] IRLR 699**, Court of Appeal). It is for the tribunal to determine the matter for itself on the balance of probabilities.

24 The leading case on establishing whether an employee has been dismissed by reason of redundancy is **Safeway Stores plc v Burrell [1997] IRLR 200** (EAT), (approved by the House of Lords in **Murray and another v Foyle Meats Ltd (Northern Ireland) [1999] IRLR 562**) in which the EAT formulated a three-stage test for applying section 139 of ERA 1996:

1. Was the employee dismissed? If so,

2. Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished (or did one of the other economic states of affairs in section 139(1) exist)? If so,

3. Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage 2 above?

25 Only if the answer at all three stages is "yes" will there be a redundancy dismissal.

26 A tribunal will not look behind the employer's decision or require it to justify how or why the diminished requirement has arisen, provided it is genuinely the reason for the dismissal (**Moon v Homeworthy Furniture (Northern) Ltd [1976] IRLR 298**). See also **Association of University Teachers v University of Newcastle upon Tyne [1987] ICR 317**, in which the EAT decided that a lecturer was redundant, notwithstanding continuing student demand for his course. The University was entitled to decide that it could no longer afford to offer such a course, following a cut in funding.

27 Before selecting an employee for dismissal on grounds of redundancy, an employer must consider what the appropriate pool of employees for redundancy selection should be otherwise the dismissal is likely to be unfair (**Taymech Ltd v Ryan UKEAT/663/94**). However, in deciding whether a redundancy selection was unfair, a tribunal must decide whether the employer's choice of pool was within the range of reasonable responses. The tribunal should not substitute its own view as to what the

pool should have been for that of the employer (**Hendy Banks City Print Limited v Fairbrother and others UKEAT/0691/04/TM**).

28 A redundancy dismissal is likely to be unfair if, at the time of dismissal, the employer gave no consideration to whether suitable alternative employment existed within its organisation (**Vokes Limited v Bear [1973] IRLR 363**).

Findings of fact

29 Having considered the evidence we make the following findings of fact.

30 The Respondent is a small property company and at the date of termination of the Claimant's employment it had three main parts to its business being sales, lettings and property management. The Claimant was employed as the Property manager. Her role was essentially to manage the provision of services, such as plumbing, electrical work etc. on behalf of the landlords of rented properties.

31 The owner of the company is Mr Shabeer Dad. Before the Claimant's dismissal the Respondent also employed Mr Ummer Dad, a Director and in essence overall manager of the company on a day-to-day basis, Mr Abdul Bashir who dealt with lettings, Mr Akber Ali who dealt with sales, Mr Jack Bones who assisted with property management and other matters and Mr Hamzah Dad who, we were told, did a bit of everything.

32 In September 2016 Shannon Murphy joined the company. She was employed at apprentice level as an administrative assistant. Her salary is around £8,000 per annum. Mr Bones left the company before the Claimant was dismissed.

33 Mr Bashir was paid a low basic salary of £12,000 per annum and earned commission. By the time of the Claimant's dismissal Mr Bashir had given notice to leave the company because of a reduction in his commission earnings. Mr Ali was paid entirely by commission and, again, by the time of the Claimant's dismissal he too had given notice to leave, again because of reduction in his earnings. When Mr Bones left the company his gross pay was around £11,000 per annum. The Claimant received the highest fixed salary in the company outside of the directors.

34 The Claimant was employed from 2 April 2014 to 21 November 2016 when she was dismissed with a payment in lieu of notice.

35 During her employment the Claimant had little time off sick from work but she said that she used holiday for hospital appointments and sickness.

36 We accept the evidence of Ms Murphy who we found to be a credible witness, that property lettings in the company are stagnant. Following an expected decrease in lettings over the Christmas period, because people do not tend to move over the Christmas period, and some recovery from that in January, lettings have not increased or increased significantly. We also accept the evidence of Mr Barwick that generally the market for property management services is becoming squeezed at one end by cheaper alternatives and at the other by greater regulation.

37 The Claimant has a long history of ailments and there is no need for us to go into those in detail here because as set out above she now contends only for uveitis as a disability.

38 From 7 November 2016 to 13 November 2016 the Claimant was off sick because of uveitis, which is essentially inflammation of the eye, although in this case it was accompanied by a 30% loss of vision in one eye. This was the Claimant's second bout of uveitis following one in 2014, although we note on that occasion she had no time off work as a result.

39 On 16 November 2016, Mr Ummer Dad wrote to the Claimant as follows:

> *"Further to a Director's meeting yesterday in regards to the business. I wish to invite you to a consultation meeting tomorrow in regards to potential redundancies being considered. I wish to hold the meeting tomorrow Thursday 17 November 2016 at 11am. I will be happy to answer any questions you may have at the meeting".*

40 In the event that meeting did take place. The Claimant emailed Mr Dad on the same day, at 11.49, setting out various matters, and Mr Dad emailed the Claimant on the same day, but later in the afternoon, stating, amongst other things:

> *"Following the consultation meeting today in regards to redundancy and in particular discussions we have had in regards to possible part-time hours. I will be having another Director's meeting on Saturday in this regard. After the Director's meeting this Saturday and due consideration. I will give you a final decision on Monday."*

41 In the event there was a Director's meeting on Saturday 19 November and a further meeting between Mr Dad and the Claimant on 21 November 2016 at which he handed her a letter terminating her employment. That says, amongst other things as follows:

> *"Following the consultation meeting with you on 17.11.2016 and further to a Director's meeting on 19 November 2016 in regards to possible part-time hours for you as discussed during the consultation meeting to try and avoid making you redundant. Please note that unfortunately the decision is that I cannot offer this at the moment as PrimeView will longer require a separate property management department. Therefore the final decision is that I will be terminating your employment today on 21.11.2016. Please see the reasons for terminating your employment (redundancy) with PrimeView and breakdown of your entitlement below."*

42 The letter goes on to explain that the main reason for the redundancy is that the amount of work has reduced and the company no longer required a dedicated property manager. Mr Dad goes on to say that property management work will be split over different departments.

43 The Claimant was paid redundancy pay and four weeks pay in lieu of notice. She was also given the right of appeal. We find as a fact that Mr Dad had considered

along with the other director, the Claimant's suggestion of working part-time and had rejected that.

44 On 25 November 2016, the Claimant appealed against the decision to dismiss her. The basis of her appeal was:

> *"The position of property manager is still very much an active and very busy position, and that you have assigned this role to Mr Hamzah Dad and Ms Shannon Murphy".*

45 On 28 November 2016, Mr Shabeer Dad responded to the letter of appeal. He agreed to set up an appeal meeting which was due to take place on Wednesday 7 December at 4pm *"if that is convenient to you".* In that letter Mr Dad also asked the Claimant whether the appeal letter contains *"all the issues on which you rely".* The reason he asked that question is because the Claimant's appeal letter raises issues which are as he put it:

> *"entirely different from those which apparently concern you when you spoke with Ummer in the office".*

46 The letter from Mr Dad also confirmed that the Claimant could be represented at the hearing and that he would chair it. He does say that there is a possibility that he may be called abroad at short notice and states that if that is so he will exercise his right to designate another person to act on his behalf, in this case Mr Barwick.

47 On 29 November 2016, the Claimant responded the above stating first that she would be replying in full *"shortly"* and saying also that she would attend the scheduled appeal meeting but went on:

> *"however, should you get called away at short notice, I will postpone and await for you to reschedule, as I would like this meeting to be conducted by yourself".*

48 She also requested to be able to record the appeal meeting.

49 Mr Shabeer Dad responded to the 29 November email on 1 December, confirming that the Claimant could record the appeal meeting but saying that he would not agree to the Claimant postponing the appeal unilaterally if he, Mr Dad, could not attend. He pointed out that there was nothing in the appeal process which is personal to him by which he meant that he was not required to hear the appeal and that he could delegate that role to another person.

50 On 6 December the Claimant asked for the appeal scheduled for the next day to be postponed because she was seeking union representation. This was agreed by the Respondent on 7 December in an email from Mr Ummer Dad, who ended his email by saying this:

> *"Shabeer is writing to you separately on the arrangements going forward"*

51 On 12 December 2016, the Claimant wrote again this time to both Shabeer and Ummer Dad confirming that she would be attending the appeal meeting alone *"should you wish to reschedule".*

52 She also said that she wanted the meeting held on any day of their choice *"next week".* In the event there was no appeal meeting. Instead there were further exchanges of correspondence which became increasingly adversarial. For example on 16 December 2016 the Claimant wrote again both to Shabeer and Ummer Dad and stated amongst other things:

> *"I do not declare that I have a disability, however, I do have a long standing condition with my incompetent veins/valves – that I stated that this did not interfere with my work, is incorrect. I did not permit it to interfere with my work, and was very mindful that I did not take time off for this condition."*

53 She also asked them to let her know the date of the appeal meeting. However, as we have found, instead of there being an appeal meeting there was in fact a written response to the appeal from Mr Shabeer Dad, on 23 December 2016, and, in short, although it is a reasonably lengthy response it says that the appeal is rejected and Mr Dad ends by saying:

> *"I am sorry not to be able to reach some better outcome for you in your appeal but I trust you will understand the reasoning and that the original decision was not taken likely."*

Conclusions

54 The first question we have considered is whether the Claimant falls within the definition of disability pursuant to section 6 of the Equality Act 2010. As we have said the Claimant relies on the condition uveitis. The Claimant has had two such episodes, some two years apart, but we have noted that in relation to the first episode that apparently had no adverse effect on her ability to carry out normal day-to-day activities because in fact, she carried on as normal, which is a credit to her but does not assist her in her claim. There is therefore before us only one incident in which the uveitis caused her to be off sick from work and we would accept had, for a short period, an adverse effect on her ability to carry out normal day-to-day activities. The medication the Claimant was prescribed seemed to relieve the pain she was suffering very quickly.

55 There is no medical or other evidence before us, although the Claimant asserted it, that her uveitis was likely to recur or, if it did, recur in a way similar to that which she suffered in November 2016. This is despite a whole bundle of the Claimants medical evidence, some additional medical evidence in the main bundle and clear directions from the Tribunal that one of the issues was whether the Claimant was a disabled person and that all relevant documents should be exchanged and an agreed bundle provided for the hearing which indeed it was. In the circumstances we cannot and do not conclude that the uveitis amounted to a disability within the meaning of section 6, and that therefore for these purposes the Claimant is not a disabled person pursuant to the Equality Act 2010. It follows inevitably from this that the claims of direct disability discrimination, disability harassment and discrimination arising from disability must and do fail.

56 That leaves the claim of unfair dismissal about which we have reached the following conclusions.

57 The initial burden of proof is on the Respondent to show what the potentially fair reason for dismissal was. In this case the Respondent contends that the Claimant was dismissed by reason of redundancy which is a potentially fair reason under section 98(2)(c) of the Employment Rights Act 1996. We are satisfied that the Respondent has discharged that burden. The evidence showed that the Respondent did indeed have a diminished requirement for employees to carry out work of a particular kind, in this case property management. We remind the Claimant, because despite going through the issue in considerable detail she seemed confused about this, that the issue was not whether property management work had diminished, it was whether the Respondent required fewer people to do 'work of a particular kind'. In this case the Respondent states, and the evidence was clear, that they did not require a dedicated property manager and as a result were reducing the headcount.

58 That being the case we have now turned our mind to the process which was followed. In relation to the question of the fairness of a dismissal we remind ourselves of a number of things, most importantly that it is not for us to decide whether what the Respondent did is what we would have done. We are not to step into the employer's shoes. The question for us is whether what the Respondent did fell within a band of reasonable responses, and in determining that we must take into account the employer's size and administrative resources and equity and the substantial merits of the case.

59 That said we have considered a number of process issues and the first of those is whether the pool, which in this case was a pool of one, the Claimant, was reasonable in all the circumstances. On balance we find that the Respondent did act reasonably in selecting a pool of one. The Claimant was the only person dedicated to property management. That was her primary role although we accept she may well have undertaken other tasks but she was employed by the Respondent and paid a fairly sizeable salary for being the property manager.

60 We note that had Mr Bashir not been under notice he may have been included in the pool, because it is possible that the Claimant and he may have been able to do each other's work. But in the end that was not the case. He had decided to leave in any event. The Respondent had decided to disperse property management work amongst the other employees and therefore acted reasonably in selecting a pool of one in this case.

61 It follows from that issues around the choice and use of selection criteria do not arise in this case.

62 We have then turned our mind to the question of consultation. It is fair to say that there was not a lot of consultation in this case, but the question is whether what was done was reasonable in all the circumstances taking into account the size and the resources of this employer. On balance we consider that the consultation in this case was reasonable. In reality there was very little to discuss with the Claimant and the one issue she did raise, that of working part-time, clearly was discussed amongst the directors on any reasonable reading of the evidence, and for the reasons set out in the bundle, and referred to above, was rejected. In short they did not require a property manager whether full-time or part-time.

63 The next issue therefore is that of the search for alternative employment, and although there was some discussion about that during the course of the first day of the hearing, we find that in essence there was no alternative employment for the Claimant to be deployed into. This was in the context of changes being made by the Respondent and in particular the wish to produce a more flexible group of employees given the smaller number they now had, and changes forced upon them by the various resignations which we have alluded to above.

64 Finally we consider the issue of the appeal meeting which did not take place. An appeal is not an essential requirement of a fair redundancy process (see **Robinson v Ulster Carpet Mills [1991] IRLR 348**, Court of Appeal, and **Taskforce (Finishing & Handling) Ltd v Love EATS/0001/05**). The issue is whether overall, taking into account the entire process, what was done was reasonable. We have concluded that it was notwithstanding the lack of an appeal meeting.

65 For all those reasons we find that overall the process was within the band of reasonable responses and that the Claimant was not unfairly dismissed and in those circumstances her claim must fail.

Employment Judge Brewer

9 November 2017