



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Button

Respondent: Maple Employment Limited

Heard at: Nottingham

On: Monday 26, Tuesday 27 and Wednesday 28 June 2017

Before: Employment Judge Moore

Members: Mrs G K Howdle
Mr W J Dawson

Representatives

Claimant: In Person

Respondent: Ms B Clayton of Counsel

JUDGMENT

1. The unanimous decision of the Tribunal is that the Claimant's claims for discrimination arising from disability under Section 15 of the Equality Act and harassment under Section 26 of the Equality Act 2010 fail and are dismissed.

REASONS

Background

2. This is a claim for discrimination arising from disability contrary to Section 15 of the Equality Act 2010, harassment contrary to Section 26 of the Equality Act 2010 and a claim for outstanding holiday pay.

3. The ET1 was lodged on 24 November 2016.

4. The case was heard over 3 days at the Nottingham Employment Tribunal.

5. The Tribunal heard witness evidence from the Claimant and her husband Mr Timothy Button.

6. Witnesses for the Respondent were Jennifer Priestly, sole trader and majority shareholder of the Respondent, Stephen Baker, shareholder of the Respondent, Scott Joy, Operations Manager for the Respondent,

Rachel Bullivant, Receptionist for the Respondent, Jay Roberts, and Management Account Trainee for the Respondent.

7. There was an agreed bundle of documents before the Tribunal running which totalled 320 pages.

Issues

8. Section 15 – Discrimination Arising from Disability

a. The detriment relied upon by the Claimant was her dismissal.

b. Did the Respondent know or could have reasonably been expected to know that the Claimant had the disability. The Respondent denied knowing that the Claimant was disabled until shortly before the decision to dismiss her on 16 September 2016.

c. Has the Respondent treated the Claimant unfavourably because of something arising in consequences of her disability? The “something arising in consequence” was the Claimant’s sickness absence from work which the Claimant maintains resulted in her dismissal. The Respondent maintains the reason for the dismissal was poor performance.

d. If the Tribunal find the reason for the dismissal was the Claimant’s sickness absence, can the Respondent show that its actions were a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the Respondent was “efficient running of the business”.

9. Section 26 – Harassment

a. Has the Respondent engaged in unwanted conduct related to the Claimant’s disability? The Claimant maintains that during her sickness absence she received constant emails and other written communications from the Respondent as well as telephone calls.

b. Did the conduct have the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading or humiliating environment for the Claimant?

c. In an effect case only, in deciding whether the conduct had the effect referred to, the Tribunal should take account of the Claimant’s perception, other circumstances of case, whether it is reasonable for the conduct to have that effect.

10. The holiday pay claim was conceded by the Respondent during the hearing and the holiday pay claim will be dismissed within 28 days of the date of this judgment unless either party applies to restore that claim.

The Law

11. **Section 15 of the Equality Act provides as follows:-**

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.

12. Section 26 of the Equality Act 2010 provides as follows:-

(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.”

13. We made the following findings of fact.

14. The Claimant commenced employment on 2 February 2016 as a Senior Accounts Assistant. The Respondent is an accountancy firm which employs 20 employees. The Claimant has a condition called NEAD (non-epileptic attack disorder) which is a disorder that causes tingling in the head, blurred vision, loss of awareness or consciousness, shaking and seizures. It can also cause difficulty in walking and irregular shaking movements in the legs. The Respondent conceded that the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010.

15. On the date the Claimant commenced her employment with the Respondent she had an induction with Rachel Bullivant who was employed as a Receptionist with the Respondent who also undertakes administration and HR type duties. The induction was the first one that Rachel Bullivant had conducted.

16. In the course of a meeting between Rachel Bullivant and the Claimant they completed an induction training booklet which the Tribunal had sight of. This contained induction training with a series of tick off procedures covering such matters as office policies and procedures (lunch break, hours of work etc), a guided tour of the facilities in terms of health and safety in a walk round, introduction to departments, computer training and terms of employment.

17. What was said during this induction was a significant dispute of fact between the parties and crucial to the issue of knowledge of disability. The Claimant's evidence was as follows. The Claimant informed Ms Bullivant of her disability (as she had done at every other employment she had undertaken for the past 10 years). The Claimant's evidence was that she specifically informed Ms Bullivant she had NEAD and that she was

susceptible to having seizures if she was put under undue stress and pressure. The Claimant was then instructed by Ms Bullivant to note this in her induction booklet so that Scott Joy (her line manager) could read and sign the booklet the significance of this being that Mr Joy would have been aware of the Claimant's disability.

18. The induction booklet was annotated in handwritten notes adjacent to the sickness policy checklist with a tick and then the words "*explained about vulnerability to seizures*". The Claimant accepted in cross examination that she had written those words in the induction booklet. There was a further handwritten entry next to personnel records checklist which read as follows:

"Informed of NEAD on 02 02 16 – classed as disabled employee."

19. The Claimant accepted in cross examination that she had written the words "classed as disabled employee" but could not recall who had written the words "informed of NEAD on 02 02 16".

20. There was also dispute about what had happened to the induction booklet after the meeting. The Respondent's position was that they did not retain a copy of the induction booklet and it was normally retained by the employee who was then required to ensure that they obtain the appropriate sign off from the relevant managers once they completed the relevant sections of the induction. The induction booklet produced to the Tribunal was a document produced by the Claimant and it was the Respondent's case that they had never seen the wording outlined above prior to the disclosure exercise in the course of the Tribunal proceedings. This is important due to the dispute between the parties as to the knowledge issue about disability which we return to below.

21. The Claimant's evidence about the induction booklet is that after the comments had been written Rachel Bullivant left the room with the booklet, photocopied it and returned. The Claimant assumed Rachel Bullivant had retained a copy of the booklet and the Claimant herself retained a copy. The Claimant did not give the booklet to Scott Joy to sign. Her explanation for this was that she assumed Rachel Bullivant would have done so.

22. Rachel Bullivant's account of the induction meeting was markedly different. Rachel Bullivant and the Claimant subsequently became friends and evidently had a close relationship outside of work. They shared personal experiences and provided support to each other and the friendship was a good one.

23. The Claimant gave Ms Bullivant lifts home and has also lent Ms Bullivant money on occasions. Ms Bullivant's evidence to the Tribunal was that the Claimant did not disclose any health issues to her at that meeting and had she done so she would have immediately disclosed this to Jennifer Priestly the Director of the company to ensure a duty of care to all employees. Ms Bullivant had previously worked in a residential home for the elderly and also for a company specialising in special educational needs and severe challenging behaviour in a managerial type role. She had been a first aider on site and she had also cared for a young woman who had suffered from a range of different types of epileptic attacks as well as a young adult who suffered from the same condition as the

Claimant (NEAD). In this context Ms Bullivant told the Tribunal that if the Claimant had disclosed her NEAD to her at that induction meeting she would have made absolutely sure the Company carried out risk assessments so they would know how to support her in the event of a seizure.

24. The Claimant accepted that other than informing Rachel Bullivant of her condition on 2 February 2016 she did not at any time after that date discuss the condition with anyone else or inform anyone else until 12 September 2016 about which we make further findings of fact below.

25. We preferred the evidence of Ms Bullivant that the Claimant did not inform Ms Bullivant at the induction meeting of her disability or of the fact that she had NEAD or the fact that she was susceptible to having seizures. In doing so we are very careful to emphasise that we do not find that the Claimant was untruthful in her evidence. The reason we preferred Ms Bullivant's evidence is that we were struck by the Claimant's insistence that she informed Ms Bullivant at the induction meeting in cross examination by repeatedly saying she **would** have informed her as she has informed other employers in the past.

26. It was also telling that the Claimant did not appear absolutely sure that she had informed Ms Bullivant at that meeting. Furthermore we took into account the fact that when the Claimant cross examined Ms Bullivant she did not directly challenge Ms Bullivant on the dispute between their two accounts of that meeting. In other words the Claimant did not challenge Ms Bullivant that she was not telling the truth about that meeting.

27. In relation to the induction booklet, we find that the Claimant annotated the booklet and took the booklet away with her after the induction meeting. We also find that the Respondent was not on notice of her condition by virtue of the induction booklet. That information was first disclosed to the Respondent during the course of these proceedings. We accept Ms Bullivant's evidence that she did not write the words "informed of NEAD on 02 02 16" and that it was not her handwriting. Therefore we find that the Respondent was not aware of the Claimant's disability following that induction meeting on 2 February 2016.

28. There were no other circumstances from which the Respondent should have reasonably been expected to know about the Claimant's disability. Ms Bullivant was aware the Claimant had occasional headaches but quite reasonably did not attribute this to anything more serious. The Claimant gave evidence that occasionally her leg would give way but this was not reported to or observed by anyone at the Respondent.

29. On 21 June 2016 the Claimant was promoted to Head of Management Accounts. The Claimant was provided with a confidentiality agreement and a new contract of employment which was duly signed on 1 July 2016 confirming her promotion to Head of Management Accounts.

30. Ms Priestly gave evidence that following the Claimant's promotion it became apparent that the Claimant was struggling with reorganising her time and was not providing feedback on tasks and failing to prepare KPI's. There was no meaningful evidence before the Tribunal to support these contentions that there were problems with the Claimant's performance.

The Claimant was unhappy with the performance of someone who reported to her called Jay Roberts who was a Management Trainee Accountant.

31. The next incident of note was on 16 August 2016 when the Claimant e-mailed Jennifer Priestly asking for a meeting with her due to issues that she was having with Jay Roberts. The Claimant informed Ms Priestly that Jay was causing her issues in work for her to correct and chase up.

32. The Claimant was due to be on annual leave from 25 August to 7 September 2016. On the morning of 24 August the Claimant went to see Jennifer Priestly and they had a discussion about Jay Roberts. Jennifer Priestly asked the Claimant to focus on her own work rather than other team member's quality of work namely Jay Roberts. Later that day the Claimant and Rachel Bullivant had a one to one meeting.

33. The Respondent later claimed that the Claimant had failed to provide any handover prior to going on annual leave. We find that this was not the case and that the Claimant had provided a workflow to Rebecca Flynn and specifically informed Ms Priestly of this on 25 August 2016 which was the first day of her holiday. The Tribunal saw evidence that Ms Flynn then cascaded the list of the Claimant's jobs to be monitored throughout the time that she was on holiday to Ms Priestly later that day.

34. During the Claimant's annual leave the Claimant had a meeting scheduled with a client called EMBS. The meeting was generally a standard weekly one where the Claimant would visit the client to collect post and run through any issues. For reasons that are not clear Mr Roberts e-mailed the client on 2 September 2016 to ask what the meeting was about and if there was anything he could help with. The client responded later that day to say it was a standard weekly meeting and that they did not think they would need to run through anything next week but that one of the directors returned the following week so it may change. Mr Roberts confirmed to Mr Baker later that day that that meeting should just be to collect the post. However on 6 September 2016 Mr Roberts e-mailed Ms Priestly and Mr Baker to say that he had a scheduling clash the following day which was in respect of this meeting with EMBS but that he had another meeting at the same time with another client and asked for guidance on what he should do. Ms Priestly replied to Mr Roberts, copying in the Claimant who was still on annual leave at this point as follows "Jay, it's a spectacular balls up on the scheduling" referencing the fact that in her view the Claimant had failed to adequately hand over the EMBS meeting. Mr Roberts subsequently clarified back to Ms Priestly that the meeting with the EMBS was to collect post and have an informal catch up.

35. The Claimant had been copied in and had not been requested by Ms Priestly to respond. Ms Priestly gave evidence that it was standard practice to copy people in on e-mails even if they are on holiday so that when they return from leave they are able to understand what has happened in their absence. On this occasion the Claimant replied, despite being on holiday so it was apparent that the Claimant must have been checking her e-mails whilst on leave. The Claimant explained to Ms Priestly that the "spectacular balls up" as she had called it was not a

meeting but a process where Mr Roberts had been instructed to “nip round” to EMBS to collect the post and that this should not be a major issue. Ms Priestly then responded to the Claimant in an e-mail on the same date in which she raised concerns that the Claimant had not left any work plan or notes or idea of what was going on and when and that she had not had a handover. Ms Priestly also raised an issue with the Claimant that she had authorised two other people to be on leave at the same time as her and there had been occasions when no one had been in a department.

36. This prompted a counter reply from the Claimant on the same day in which she disputed those concerns that had been raised by Ms Priestly and raised the fact that she was under significant stress and had been working considerable hours and that she had left full instructions.

37. The Claimant returned to work from annual leave on 8 September 2016. In her absence it had come to light that the Claimant had arranged training for the team. There were a number of issues which in relation to the Claimant’s performance that the Respondent relied upon which we found difficult to follow as they were not explained clearly enough in evidence. We do however accept that the Respondent had concerns about the Claimant’s performance that were genuine. There was a meeting between the Claimant and Ms Priestly on 9 September 2016 in which Ms Priestly raised matters that she was concerned about that had come to light during the Claimant’s annual leave including the lack of handover notes and quality of work that was being produced by her. A meeting was scheduled for 12 September 2016 with the Claimant to discuss these issues in detail.

38. On 12 September 2016 at approximately 9.15 am Mr Button telephoned Ms Priestly. There was a dispute between Ms Priestly and Mr Button about the content of that conversation. Ms Priestly’s account is that Mr Button informed Ms Priestly that the Claimant had a migraine and that she was still sleeping and she would not be well enough to drive. Ms Priestly says that there was no indication that the Claimant would not be returning to work the following day and that Mr Button informed Ms Priestly that the Claimant was under a lot of stress due to personal reasons. Ms Priestly insisted that Mr Button made no mention of any disability or existing medical condition.

39. Mr Button’s account of that conversation differed. Mr Button’s witness evidence to the Tribunal was that he had explained the Claimant was suffering from a migraine but had gone on to say that her left leg was giving way and it was not safe for her to drive and be at work due to the symptoms of her disability potentially getting worse which could result in the Claimant having a seizure if she fails to rest. Mr Button’s account is that Ms Priestly did not acknowledge what she had just been informed by Mr Button in any way other than to say the Claimant did not have any coping mechanisms and “everybody loses somebody at some point”. It was accepted in the ET3 that Ms Priestly made the comment about coping mechanisms.

40. When cross examined on this point Mr Button accepted that as far as he was aware at the time he made this phone call he thought that the Claimant had informed her employers and they were fully aware of the Claimant’s condition of NEAD .

41. Following that phone call Ms Priestly sent an e-mail to Ms Bullivant, copied to Scott Joy and Stephen Baker which read as follows:

“Rachel, Marie won’t be in she isn’t well. Tim thinks she will be off for a few days. Can you look at her appointments and see what she needs to be addressed?”

42. There was no mention in this e-mail from Ms Priestly of the fact that Mr Button had informed her of the Claimant’s disability or the fact that she would be prone to seizures.

43. The panel member Mrs Howdle preferred the account of Mr Button that Mr Button did inform Jennifer Priestly of the fact that the Claimant had a disability and could have seizures. Employment Judge Moore and the other panel member Mr Dawson were impressed with Mr Button’s credibility and honesty and make no finding that Mr Button was being untruthful. However we preferred the account of Ms Priestly and the reasons that we did so were the context of the e-mail that Ms Priestly subsequently sent in which she made no mention of being informed of this the Claimant’s condition. We find that Ms Priestly would not simply have dismissed being informed of such a serious condition of one of her employees and failed to mention it in this email. We also take into account that Mr Button sincerely believed when speaking to Ms Priestly that Ms Priestly was already aware that the Claimant had this condition. Ms Priestly was not aware that the Claimant had this condition at this point and on the Claimant’s own evidence the only person she had ever informed was Rachel Bullivant on 2 February 2016, it never being discussed again. For these reasons we preferred the account of Ms Priestly and we find in the majority that Mr Button did not specifically refer or use the words disability or seizures to Ms Priestly during this conversation. We do accept Mr Button’s account that he informed Ms Priestly that the Claimant would not be in work for the next few days at the very least.

44. Following the report of the Claimant’s absence Ms Bullivant sent a number of texts to the Claimant to advise that she had sorted out her meetings and that she hoped she felt better soon and also had put her out of office on. These texts were pleasant in their nature from Ms Bullivant and welcomed by the Claimant the following day.

45. The Claimant’s harassment claim relied on communications she subsequently received from the Respondent after her sickness absence began on 12 September 2016. The contact between the Respondent and the Claimant during her sick leave up to her termination were as follows.

46. On 13 September 2016 at 12:22 Ms Priestly e-mailed the Claimant as follows:

“Hi Marie, we didn’t get a phone call today to advise you weren’t coming in, we do expect to be notified, could you let me have an update please of when we can expect you back at work please.”

47. The Claimant replied at 15:31 to say she had not been aware that she had to ring in this morning as her husband had made Ms Priestly aware of the situation yesterday. She informed Ms Priestly that she had

attended the doctor and that he has advised her to self certify for 7 days which took her to the following Wednesday. She informed Ms Priestly that she was going back to see the doctor again on Tuesday of next week and that she would let her know what he said.

48. Ms Priestly responded at 15:37 as follows:

“Hi Marie, it would have been nice, you have client meetings that as Head of Department need to be dealt with. Tim didn’t (sic) that you wouldn’t be in all week when I spoke to him yesterday.”

49. Later that day Rachel Bullivant e-mailed the Claimant at 16:20 and notified her that she had made arrangements to ensure meetings on her calendar are accommodated for. Rachel Bullivant wished the Claimant a full recovery and to see her soon. She also stated to the Claimant that “we”, namely Rachel and the Claimant had spoken before about notifying illness and the procedure.

50. The context of this comment was clarified by Ms Bullivant in cross examination. The reason for making this comment was that the Claimant was alleged to have failed on previous occasions to adhere to the absence reporting procedures. We find that the Claimant had reported in accordance with the Respondent’s absence reporting procedures. She had reported in before 9:15 on the first day of the absence.

51. On 14 September 2016 Ms Priestly sent to the Claimant a letter in which she stated that they had not received any form of explanation from the Claimant to explain the reasons for her absence apart from on Monday 12th when her partner had advised she had a migraine. It went on to say:

“As we have received no explanation for your absence since Monday we would ask you to personally contact Scott by this Friday by telephone.”

52. This letter troubled the Tribunal as it was incorrect that there had not been any form of explanation, only the previous day the Claimant had e-mailed Ms Priestly explaining that she had seen the doctor and she had self certified for 7 days until the following week.

53. On 16 September 2016 Ms Priestly and Mr Baker were in Dubai on business. Both Ms Priestly and Mr Baker gave evidence that at a meeting in the afternoon of 16 September 2016 they took the decision to dismiss the Claimant based on her performance issues. Mr Baker then contacted Scott Joy back in the UK and instructed him and Rachel Bullivant to draft a dismissal letter to send to the Claimant.

54. At approximately 4.30 pm Mr Joy received a telephone call from the Claimant in consequence of the request of the letter that had been sent to her on 14 September 2016 to make contact with him. The Claimant was clearly upset and angry at the content of the letter. During the call to Mr Joy she informed him that she suffered from NEAD. We accept Mr Joy’s evidence that that was the first occasion that the Claimant had ever mentioned that to him. Mr Joy did not know what NEAD meant and as soon as he finished the call he googled the term. He also contacted the Respondent’s business support advisers Peninsula to seek advice about what to do next. Mr Joy then e-mailed Ms Priestly and Mr Baker and informed them that the Claimant had told him that she had NEAD (non-

epileptic attack disorder) and that she had suffered it for years and this was why she was off. Mr Joy then posed the following question:

“Do you still want the letter to go out today or wait until we get a response back? It seems strange not to mention a condition before either on the call or the e-mail we received.”

55. A matter of minutes after being sent that email by Mr Joy, Mr Baker e-mailed a very brief email which stated *“still send the letter”*.

56. Ms Bullivant drafted a letter of dismissal which was dated 19 September, although we accept it was written and prepared on the afternoon of 16 September 2016. The reason it was post dated was that there was a problem with the franking machine and there was a decision taken locally to post date the letter due to the belief that it had to be dated the date it was being actually sent.

57. The letter stated as follows:

“Dear Marie please take this letter as formal notice that your employment with our company has been terminated due to the performance issues discussed with you on Thursday 8 September and further issues have been apparent in your absence. You are not required to work your notice period.”

58. The Claimant received this letter on Monday 19 September 2016.

59. On the evening of 16 September 2016 the Claimant went on to her Facebook page and changed her status to no longer being employed by Maple and put her own business name on there. This was quickly brought to the attention of Ms Priestly by a mutual friend.

60. There followed some correspondence regarding this in that Ms Priestly made various allegations against the Claimant of having resigned, although the Respondent have later accepted that they dismissed the Claimant on 19 September 2016.

Conclusions

61. This was a case that turned on the findings of fact which we have set out above. As such our conclusions are brief. We also observe that had the Claimant brought a claim for failure to make reasonable adjustments the case may have had a different outcome.

Knowledge

62. The first time the Respondent became aware that the Claimant was disabled was when she informed Scott Joy on 16 September 2016 during that telephone call. We also find that there were no circumstances from which the Respondent could reasonably have been expected to know the Claimant was disabled.

Reason for dismissal

63. The Respondent does not have to show that the procedure that was applied to the Claimant would pass the test that would be applied during an unfair dismissal claim.

64. We have concluded that that the reason the Respondent decided to dismiss the Claimant was due to performance issues, although we have some reservation and doubt that the performance issues were anywhere near as serious as they were made out to be. Nonetheless we concluded that the Respondent genuinely had concerns about the Claimant's performance. The fact that these may have been misguided concerns was irrelevant. All the Respondent needed to do in this case was show the reason for dismissal was not arising for the Claimant's disability and in our view they have done so.

65. We do not find the reason for dismissal was the Claimant's disability. The reason we have made such finding is that it is clear from the e-mail that Scott Joy sent on 16 September 2016 that the decision to dismiss the Claimant had already been taken prior to Mr Joy informing Ms Priestly and Mr Baker of the Claimant's disability.

Harassment

66. We accept Counsel's submissions that there was no evidence to support a contention that Ms Priestly intended to cause the Claimant distress and as such the Claimant must rely on the effect of the correspondence upon her.

67. Having regard to the communications sent by the Respondent to the Claimant during the period of her sickness leave between 12 and 16 September 2010, whilst we find that the comments made by Ms Priestly and the nature of some of those e-mails abrasive and unsympathetic we do not go so far as to say that they amount to harassment within the meaning of Section 26 of the Equality Act 2010.

68. A reasonable person in our view would not consider the correspondence and the comment made to violate the Claimant's dignity or create an intimidating, hostile degrading, humiliating or offensive environment for her.

69. Further, the conduct could not have been related to the Claimant's disability in any event as at the time the comments were made and the emails were sent Ms Priestly was not aware of the Claimant's disability.

70. For these reasons the claims are dismissed.

Employment Judge Moore

Date 4 September 2017

JUDGMENT SENT TO THE PARTIES ON
12 September 2017

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FOR THE TRIBUNAL OFFICE