



EMPLOYMENT TRIBUNALS

Claimant: X

Respondents: 1. Y
2. Z

HELD AT: Manchester **ON:** 29 and 30 January 2018

BEFORE: Employment Judge Howard
Mrs C Linney
Mr P Stowe

REPRESENTATION:

Claimant: Mr R Lees, Counsel
Respondents: Mr P Maratos, Consultant

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claims of direct discrimination and discrimination arising from disability, pursuant to sections 13 and 15 of the Equality Act 2010 are not well-founded against both respondents and are dismissed.

REASONS

1. We heard evidence from the claimant; and, on behalf of the respondents, from Mr Z (the second respondent) and Gareth Ellis, Directors and Jayne Bird, administrative assistant. The witness statement of Clare Smith, Business Development Manager, was admitted with the claimant's consent.

2. During the proceedings we were referred to documents contained within an agreed bundle.

The Issues

3. At the outset of the hearing we agreed the issues to be determined with the parties as follows:

- (1) Was the claimant a disabled person?

It was conceded by the respondents that the claimant was a disabled person because of anxiety and depression at the relevant time.

It was agreed that the 'relevant time' was at the termination of the claimant's employment, which, during the proceedings, the parties agreed was 21 November 2016.

- (2) Direct discrimination:

Was the claimant treated less favourably than the respondents would treat others because of her anxiety/depression? The claimant relied upon a hypothetical comparator and identified the less favourable treatment as her dismissal on 21st November 2016.

- (3) Section 15 discrimination arising from disability:

- (i) Did the respondents treat the claimant unfavourably because of something arising in consequence of her disability? The claimant identified her dismissal as the less favourable treatment and her sickness absence between 8th and 21st November 2016 as the "something arising" in consequence of her disability. The respondents' representative conceded in closing submissions that the claimant was dismissed because of her sickness absence and it was not disputed that the sickness absence related to her disability.
- (ii) Can the first respondent show that the treatment was a proportionate means of achieving a legitimate aim? The first respondent identified the legitimate aim as maintaining client relationships which was a crucial element of the claimant's role and argued that the decision to dismiss was proportionate in the circumstances.

Knowledge:

- (iii) Can the respondent show that it did not know and could not reasonably have been expected to know that the claimant was disabled because of her condition of anxiety/depression?

- (4) Section 136 applied in respect of the burden of proof:

- (i) Are there facts from which the Tribunal could decide in the absence of any other explanation that the claimant was dismissed because of her disability of anxiety/depression?
- (ii) If so, can the respondent show an alternative explanation for the treatment?

- (5) The first respondent did not rely on the statutory defence at S109 Equality Act 2010 in respect of any unlawful conduct of the second respondent, Mr Z.

Rule 50 Application

4. After giving her evidence, claimant's counsel asked that the claimant be released from further attendance that day. The claimant's counsel and the claimant indicated their understanding that the Tribunal would proceed to hear evidence from the respondents' witnesses and to determine the claim in her absence and the request was granted. Evidence was concluded by the end of that day. The following day submissions were made and we deliberated and gave judgement. The claimant's counsel explained that she had suffered a significant adverse reaction to giving evidence and was unable to attend.

5. Following delivery of judgment, claimant's counsel requested written reasons. The Tribunal was concerned that those reasons being publicly available on the internet might have the effect of further aggravating the serious adverse reaction which the claimant was now suffering and the Employment Judge explored this with claimant's counsel. The Tribunal decided that, in these circumstances, an anonymity order would be appropriate to limit any further aggravation of the claimant's condition and risk to her health and wellbeing. Claimant's counsel and the respondents' representative were both supportive of this approach.

6. As the first respondent is a very small employer, it would be easy to identify the claimant if the respondents were named, and so we decided to extend the terms of the anonymity order to both respondents. An order that the claimant and the respondents be anonymised to X, Y and Z, respectively, was made.

Findings of fact relevant to the issues

7. The claimant was employed by the respondent as a Business Development Manager from 1 August 2016. The first respondent is a small recruitment agency consisting of eight employees, including the two directors and three Business Development Managers ("BDM"). Each BDM is responsible for his or her own separate client base. The success of the business is dependent upon maintaining and building upon that client base, ensuring good relationships with the clients and providing a good level of service.

8. The claimant relies upon her impact statement which was contained within the bundle for a full account of her disability which was not challenged by the respondent and does not need to be repeated here, save that she has had anxiety and depression for a significant part of her adult life.

9. On appointment to the position of BDM the claimant was not asked and did not disclose the fact that she had anxiety and depression. The claimant was concerned that she might not have been employed had she revealed her condition so did not do so.

10. The first few months of the claimant's employment went really well. She was described as a "model employee", and everyone agreed that she was very good at managing her clients, was pleasant and bubbly, had good working relationships with the directors and her colleagues and was a real asset to the business. As the claimant explained to us, during that time she was managing her mental health condition well whilst at work and certainly gave no indications to her employer or colleagues that she had anxiety and depression. This was consistent with how Mr Z

and the other witnesses described their experience of working with her; her attitude and her personality.

11. What Mr Z did not know was that the claimant had a traumatic personal history and was facing the prospect of giving evidence at the trial of her former partner for assaults against her. The trial was due to start on 31 October 2016 and the claimant was summoned for the whole three days of the scheduled trial. During the week before the trial she told Mr Z and apologised that she had not informed him earlier. Mr Z was sympathetic and arranged for her to be paid in full whilst she was at court, reassuring her that she must take whatever time she needed for the trial. His supportive attitude was reflected in the claimant's subsequent text; *"Thanks Nick, been brilliant about things. Have a good time.* The claimant did not reveal her underlying health condition to Mr Z.

12. The claimant attended court over the following week. Mr Z had gone on holiday and there was some limited contact between the claimant and Mr Ellis. The trial extended over the whole week rather than the 3 days originally scheduled and Mr Ellis asked the claimant if she would be able to come in for a couple of hours one afternoon. The claimant replied giving details of the charges against her former partner and stating, *"I need to take some time to gather myself back together. I hope that you can understand. If pay is an issue please don't pay me. My health is more important to me at this time"*, to which Mr Ellis replied, *"Jan, it's ok and if you need tomorrow off too you can. Absolutely no pressure to come in. I'm sorry if that's how it came across yesterday, it was not my intention. Will pay you as normal too. Your health is more important."* The claimant relied upon this exchange as evidence of the company being unsupportive. However, having heard from Mr Ellis, we found that there was nothing inappropriate about his enquiry and his response was caring and sympathetic in tone. It was also clear from the claimant's text that the request for *"some time"* was to cope with the impact of the trial upon her.

13. Mr Z returned home from holiday late Sunday evening on 6 November and received a text from the claimant saying:

"Hi Nick, sorry to bother you on a Sunday. Just to let you know I can't come back into work. Jamie contacted me yesterday. My emotions are still raw. I know I'll come to terms. It's going to take me a little bit longer than I thought. Jan".

14. On Monday 7 November Mr Z texted the claimant suggesting that they meet for a coffee and a catch up, but stating *"up to you, no pressure, just let me know"*. The claimant was happy to meet and Mr Z agreed to pick her up; she texted; *"Are you going to sack me for being a d**k?"* to which Mr Z replied *"No"*.

15. Mr Z told us that over lunch the claimant had talked about the trial and he was concerned about the effect on her but she made no mention of having anxiety and depression. He reassured her that she could take as much time as she needed to get back into work and they discussed her doing later starts. That afternoon the claimant returned to court as the jury returned their verdict, acquitting the accused. The claimant texted Mr Z telling him the outcome and that her ex-partner had followed and intimidated her that the police were coming. She asked to come in at 10.00am the next day to *'ease myself back in'*, to which Mr Z replied, *"Yes, no worries"*. We accepted Mr Z's recollection of his discussion with the claimant, being consistent with the tone and content of their text exchanges.

16. In fact, the claimant came to work at 8.00am the following morning. However, after a couple of hours she was unable to continue and her colleague, Jayne, found her in tears. Jayne told Mr Z that she was not fit to work, and Mr Z offered to drive her home. The claimant recalls discussing very little during that car journey and described Mr Z's attitude as being "impatient". Mr Z, insisted that he was supportive to the claimant, and we accepted his evidence of what was discussed between them as being more consistent with the supportive relationship that they had had up to this stage and the tenor of their text communications.

17. Mr Z agreed to go via her sister's house so that she could pick up the number of a counsellor for domestic violence, and he then dropped her home. The claimant told him that she was considering moving out of the area to get away from her ex-partner. Mr Z told us that she was clearly suffering a traumatic response to the trial, the verdict and subsequent events, and she gave no indication that her emotional state and inability to work had been caused by anything other than a reactive episode to these events.

18. The claimant was absent from work through ill health from that point up to her dismissal.

19. The company was holding a celebratory event which the claimant was due to attend. On 10 November she texted Mr Z stating:

"Hi, though to let you know it's unlikely I will be coming to the do, Hope you all have a great time. I'm still waiting for doctor to finish their morning calls. Should have been yesterday but missed their calls and in the process of an injunction, so I feel safe. If you need me to provide any doctor's note I can for you, as he may prescribe something to help with sleep, etc."

20. On 13 November she texted Mr Z stating:

"Hi Nick, hope you all enjoyed your evening last night and apologies for not coming back to you. I'm still not fit for work. Thought to let you know. If I no longer have a job I understand as I'm going to need time to recover. I'm happy to return the phone back to you."

21. We accepted Mr Z's evidence that he understood from these texts that the claimant needed time to recover from the trauma of the trial.

22. On 15 November 2016 the claimant emailed Mr Z stating:

"Hi Nick, further to my text messages yesterday I'm still not fit for work. Please could you advice if you've terminated my employment and if you require company property back."

23. At no stage had Mr Z indicated or suggested to the claimant that her employment might be terminated and he replied:

"I'd like to know what's happening with you as I feel we're in a situation that unless we're aware of your situation I cannot make any informed decision. I wanted to speak to you rather than text or email. Jan, I appreciate you're not in the right place at present but you're asking me to make a decision without knowing the whole facts of what you're wanting to do yourself. Please understand we're a caring employer"

and want the best for you but need to be kept u-to-date as [to] the situation. I would appreciate a chat with you either in person or on the phone. I await your decision. Kind regards..”

24. We accepted Mr Z's evidence that he had tried on several occasions to contact the claimant by phone but that his calls had gone straight to voicemail.

25. The claimant replied:

“Hi Nick. I'm on antidepressants at present and not well enough to return at this time as it takes 1-3 weeks to have effect. I'm also waiting for counselling to assist with trauma. I asked if you needed a doctor's note previously to cover me for the period whilst I'm unwell. I understand you have a business to run. If you are unable to keep my position open for me? Or if you have to terminate my employment.”

26. Mr Z replied:

“Jan, please can you supply us with your sick notes. We've paid you normal wages up to 13 November however we have to transfer you now to SSP. Please let me have your sick notes ASAP. If you want to return your phone or I can collect it, so that you are not being annoyed with clients and candidates. I will keep it and answer this accordingly. We as a company will review the situation in discussion with yourself. If your situation changes please advise ASAP.”

27. On 17 November the claimant emailed:

“Nick, a doctor's note has been sent to you for tomorrow. Regards”

28. Mr Z confirmed that he had received the sick note, which was for the period from 13 November 2016 to 30 November 2016, and stated that the claimant could not work because of *“anxiety with depression”*.

29. Mr Z told us that when he realised that the claimant was going to be unable to work until at least the end of November, and given that she appeared content for her employment to be terminated, he decided that the needs of the business were such that he should dismiss her, and so at 8.46 on 21 November he emailed her:

“Dear Janine, I've received your sick note from the doctor and see that you're not going to be able to return until at least early December if then. With this in mind I'm sorry to advise that the business cannot be without you for so long and will have to find someone to fill your role. It's with regret we have to do this and I wish you all the very best for the future. Will return your sick note so you can pass it on to DWP who will pay your sick pay. As of today we have not received your company mobile phone and any other company information you may have. Please can you return these within the next five working days. Wishing you all the best for the future. Kind regards. Nick.”

30. The parties agreed and we found that this email amounted to a termination of the claimant's employment.

31. Subsequently the claimant asked Mr Z by email to confirm in writing that her employment was being terminated, and Mr Z replied:

“As per our email previous, as you cannot give Pendle Personnel a date of return at this stage we’ll have to get someone to replace you as the business needs this so will forward you your P45 and return your sick note as per previous email. We wish you all the best for the future.”

32. In email correspondence following termination, the claimant described her condition as *“substantial” and progressively deteriorating further*. The Employment Judge explored what the claimant meant by this phrase with her. The claimant was adamant, in her evidence to us that she was not referring or alluding to any disability in that email.

The Law

33. Direct Disability Discrimination

S13 Equality Act 2010 provides:

“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.”

34. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

“On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

35. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person’s abilities. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in several cases, including *Amnesty International v Ahmed [2009] IRLR 884*, in most cases where the conduct in question is not overtly related to disability, the real question is the “reason why” the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

36. Discrimination arising from disability

S15 Equality Act 2010 provides:

‘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.'

37. The Tribunal reminded itself of the correct test to apply; which was reiterated by the Employment Appeal Tribunal in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14/RN; which is to focus on the need to identify two separate causative steps for a claim to be established - first, that the disability has the consequence of 'something', and second that the treatment complained of as unfavourable was because of that particular 'something'.

38. A legitimate aim is one which must be legal and non-discriminatory, and one that represents a real, objective consideration. The means of achieving that aim must be proportionate – that is, appropriate and necessary in all the circumstances.

39. Knowledge

It is for the respondent to prove that it did not know or could not reasonably be expected to know that the person had the disability. This goes further than knowledge of a substantial impairment, but requires knowledge or reasonable expectation of knowledge that the impairment has a long term, substantial adverse effect on ability to carry out normal day to day activities in accordance with the definition of disability at S6 EqAct 2010.

40. Para 2(1) of Schedule 1 EqAct 2010 provides that the effect of an impairment is 'long term' if it; 'has lasted 12 months; is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected'. The House of Lords in *SCA Packaging Ltd v Boyle* 2009 ICR 1056 HL defined 'likely' in this context as 'could well happen'. This formulation is echoed at para C3 of the Guidance to the Equality Act 2010.

41. Likelihood of how long an impairment will last should be determined at the date of the discriminatory act; *Richmond Adult Community College v McDougall* 2008 ICR 431 CA and paragraph C4 of the Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant to that assessment.

42. Burden of proof

S136 Equality Act provides as follows:

'Burden of proof

(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 subsection (2) does not apply if A shows that A did not contravene the provision.

43. On the application of the burden of proof, the Tribunal was guided by what is commonly known as the revised Barton guidance; *Barton v Investec Henderson Crossthwaite Securities Ltd* 2003 ICR 1205, as set out in revised form in *Wong v Igen Ltd* 2005 ICR 931. The Tribunal reminded itself, following *Madarassy v Nomura*

International plc 2007 IRLR 246, that there has to be more than simply a difference in treatment and status before a tribunal can conclude that an act of discrimination has occurred. In *Laing v Manchester City Council and others* 2006 IRLR 748, in relation to the two-stage process of analysing the evidence, the EAT provided clarification that a tribunal should have regard to all the facts at the first stage of the process to see what proper inferences can be drawn.

The Tribunal's Conclusions

Section 13 – Direct Discrimination

44. The reason for the claimant's absence was her ill health which arose from her disability. Mr Z dismissed the claimant because of her sickness absence and the impact upon the business.

45. We found that Mr Z would have taken the same approach to someone in similar circumstances whose ongoing absence was impacting upon the business and who had given clear indication that they were accepting of a termination of employment, but who was not disabled.

46. In those circumstances the claimant was not dismissed because of her anxiety and depression but because of the impact of her sickness absence upon the business.

47. Applying the burden of proof, there were facts before us from which it could be concluded that the claimant was dismissed because of her depression, as her dismissal followed shortly after a fit note upon which her anxiety/depression was stated. However, we accepted Mr Z's explanation as to the reason why he made the decision to terminate at that time, which was because of the absence and the impact upon the business rather than the claimant's disability of anxiety and depression.

48. Accordingly, the claim of direct discrimination is not well-founded and is dismissed against both respondents.

Section 15 – Discrimination arising from disability

49. The respondents accepted and we found that the claimant was dismissed because of her sickness absence, which arose in consequence of her disability of anxiety and depression.

50. We found that Mr Z's decision to dismiss was in pursuit of a legitimate aim; maintaining client relationships to meet the needs of the business.

51. When considering whether the respondents adopted a proportionate means of achieving this aim, we balanced the fact that this was a small employer with no dedicated human resource function; that the claimant undertook a crucial role to the success of the business; that she had been enquiring about and tacitly inviting the termination of her employment against the fact that the claimant's absence through ill health had been for a mere two weeks and that she had submitted a fit note which clearly stated that she had a mental health condition. In the circumstances it was reasonable to expect Mr Z to have paused, explored alternative options and made further enquiries before terminating her employment. We decided that the respondent had not adopted a proportionate means of achieving that aim.

Knowledge

52. We considered whether the respondents knew or could reasonably be expected to know that the claimant was disabled. Mr Z had been informed by the contents of the fit note that she had 'anxiety with depression' and was aware from the claimant's email that she was on medication. We were satisfied that he knew or could reasonably be expected to know that the claimant had an impairment which had a substantial adverse effect on her ability to carry out normal day to day activities.

53. However, at 21st November 2016, when Mr Z dismissed the claimant we found that he did not know and could not reasonably be expected to know that her condition was likely to last 12 months. The claimant had at no stage disclosed that she had an underlying and long-term health condition and in her communications with the respondent she attributed the state of her mental health to reaction to the trauma of the trial, verdict and subsequent events and nothing more. The respondent did not know that the claimant's condition was long term.

54. We found that, in these circumstances, the respondents could not reasonably be expected to know that the claimant's condition might have lasted for 12 months, in the sense of 'could well happen'. The claimant had been very secretive about her underlying health condition, which is, of course, her right. We asked ourselves whether, had Mr Z made further enquiries, the long-term nature of the claimant's health condition would have come to light and decided that, given the claimant's decision not to reveal her underlying long-term condition and her evidence that she was not alluding to disability in her post-dismissal email; the weight of the evidence available to us pointed away from that conclusion. We found that it was most unlikely that the long-term nature of the claimant's condition would have come to light and we concluded that the respondent could not reasonably be expected to know of it.

55. The respondents successfully rely upon the defence provided at section 15(2) of the Equality Act 2010 and the claimant's claim of discrimination arising from disability is dismissed against both respondents.

Employment Judge Howard

Date 6th February 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

13 February 2018

FOR THE TRIBUNAL OFFICE