EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Kevens	**v**	**Boots Management Services Ltd.**

Heard at: Cambridge **On**: 2, 3 July 2018 and 10 August 2018 (discussion day)

Before: Employment Judge GP Sigsworth

Members: Mr C Davie and Mr B Smith

Appearances
For the Claimant: Mr R Clements, of Counsel
For the Respondent: Mr G Baker, of Counsel

RESERVED JUDGMENT

1. The majority judgment of the Tribunal is that the Claimant was disabled at all material times by reason of the impairment to her spine.

2. The unanimous judgement of the Tribunal is that:

   2.1 The Respondent did not unlawfully discriminate against the Claimant because of her disability

   2.2 The Respondent did not unlawfully discriminate against the Claimant in consequence of something arising from her disability.

RESERVED REASONS

1. The Claimant's claims as pleaded are for disability discrimination in relation to her dismissal or non-renewal of her fixed term contract of employment. She brings claims of direct discrimination and discrimination arising as a consequence of disability. The pleaded claims also include claims for holiday pay, sick pay and unpaid wages. The disability alleged relates to the Claimant's spine and a herniated disc, causing her symptoms and allegedly impacting on her ability to undertake normal day to day activities. The Respondent denies that the Claimant was disabled at the material time or, even if she was, that they had a requisite knowledge of any disability established. The Respondent also takes a jurisdiction point on time, claiming that the claim was brought out of time by reference to the date on which the decision to dismiss was made. Ultimately, however, at the beginning of the second day of the hearing the Claimant withdrew her financial loss claims for wages, sick pay and holiday pay, although they may continue into the context of the remedy claim. Further, the Respondent conceded that the claim is in time, as they accept that time runs from the date of dismissal and not the date on which the decision to dismiss was taken.

2. The Claimant gave oral evidence on her own behalf, and called a former colleague, Ms Megan Brookman. The Respondent called two witnesses, Mr Nick Hamby, store manager; and Ms Katie Arrowsmith, assistant manager. There was also an agreed bundle of documents, plus some additional documents provided by the Claimant, of some 130 pages. At the end of the evidence, the Tribunal read written submissions from the Respondent and heard oral submissions from both the Claimant and the Respondent. As there was insufficient time for a determination of the case to be made on the second day, judgment was reserved.

Findings of Fact

3. The Employment Tribunal made the following relevant findings of fact:

    3.1 The GP records indicate that the Claimant first sought medical advice / input in January 2017 in relation to her back issues. Shooting pains and paraesthesia down the legs was noted. Pain relief was prescribed. The Claimant continued to see her GP on and off through 2017, in March, April, May, June, July, August and September in relation to her spine issues. Diagnosis was given by the GP as spinal stenosis, awaiting surgery. In January 2018, a GP entry records that there were ongoing back issues. It was noted that the Claimant had a spinal surgical appointment at the end of the week.

3.2 The hospital referral letter of 24 January 2017 to the GP indicates that the Claimant was found to have, on examination on 24 January, left sided lumbar spine / leg pain and paraesthesia persisting for six months. If severe, it radiated into the left posterior thigh. She had occasional left calf and foot pain. There was intermittent left sided numbness to the dorsal and sole of the foot. It was observed that sitting, walking or bending aggravated the position. The hospital referral letter of 9 February 2017 indicates that recent MRI scan findings showed a disc herniation at the base of the spine, (L5 – S1). This was a narrowing in the space for the Claimant's nerves, resulting in impingement of the nerve roots which could account for her back and leg symptoms. The Claimant was referred for a course of physiotherapy to see if that would ease the symptoms. A consultant in pain medicine and neuromodulation saw the Claimant on 6 November 2017 and performed bilateral lumbar facet and sacroiliac joint injections together with right L5 – S1 transforaminal epidural injection using local anaesthetic and steroids. In a follow up clinic on 19 December 2017, the Claimant reported that she had experienced some pain relief that lasted a very short period of time. Unfortunately, the pain had returned and was still affecting her right side. She was taking morphine, Gabapentin and Zomorph for pain relief.

3.3 The Claimant's disability impact statement, which was disclosed in March 2018, statted that the herniated disc in the lower lumbar region of her spine caused shooting pain in her back and down her legs to her feet, tingling, numbness in her right leg and right foot, lack of reflex on the right side, muscle weakness, and loss of motor skills at that time. The Claimant asserted that she followed Boots' rules and policies on sickness absence, reporting it as appropriate and providing sick notes. On a couple of occasions when she tried to return to work she found that she could not cope and had to tell management she needed to return home. She said that Boots was aware of all her appointments. At the date of writing the impact statement, she said that she had to use a wheelchair / electric scooter when outside the house and a walking stick to help her balance and support herself when walking. She had to move home and could no longer get in the shower at her previous address and so had disabled access at her new property with a walk-in shower and a chair therein. These symptoms and adjustments were not current during her employment with Boots. She said that her steroid and local anaesthetic injections into her spine had not worked, and as of March 2018 she was awaiting a further appointment with the surgeon to discuss a back operation.

3.4 The first sick or fit note provided by the GP is dated 20 March 2017, and indicates that the Claimant was not fit for work because of having back pain and physiotherapy, and she was signed off until 27 March 2017, and then in a second sick note until 30 March 2017.

There were two periods of self-certificated absence, one on 16 February 2017 for musculoskeletal and back problems and one between 15 and 20 March for disc herniation. A further fit note from the GP is dated 4 March, signing the Claimant off until 4 May, indicating back pain and awaiting injection. Following termination of her employment, the GP further signed the Claimant off sick from 22 May to 22 July for spinal stenosis, awaiting surgery. Then from 21 July to 21 October 2017 for the same reason.

3.5 The Claimant was initially employed by the Respondent from 12 December 2016 as a Christmas temporary sales assistant on a fixed term contract until 27 January 2017 at Bedford interchange Boots store. She worked 37.5 hours a week, from 6.00am until 3.00pm, with one hour for lunch and another half hour break in the day. It was a small store with one manager and either one or two assistant managers, and some 25 members of staff. Initially, the Claimant worked as a customer assistant on the tills, then she moved to the operations team where she merchandised the store. The Claimant was regarded by the Respondent as a good worker although it was said that she talked to colleagues a lot but not to the extent that formal action was required. A typical day's work for the Claimant would be delivering from the cages / dollies to the shelves on the sales floor and also working in the stock room filling up wheeled display units with new offers and new lines. She was required to merchandise the shelves on the sales floor and would frequently be kneeling or up a ladder. Mr Hamby told the Tribunal that he did not notice the Claimant having any difficulties with this, and she never raised the issue of disability with him, even though he walked the floor of the store every day. Likewise, Ms Arrowsmith said that she was never approached by the Claimant to indicate she had issues or that she wished for adjustments to be made, or in the context of medical appointments. It would appear that the store management would not necessarily see fit notes, which would be put by payroll or by HR onto the personnel file. These were kept instore, but it is not clear how often Mr Hamby or Ms Arrowsmith looked at them.

3.6 The store did not spend its Christmas staff budget, and Mr Hamby was told that he would lose the budget if it was not used. Therefore, he decided to extend the Christmas fixed term contract in the Claimant's case to 28 February 2017, with the same duties and hours as before. In fact, the Claimant was the only Christmas temporary staff to be extended. The other seven were students and they went back to college. The Claimant was extended because she could work mornings and late shifts. However, shortly after this, Mr Hamby's area manager e-mailed him and others on 29 January 2017 indicating that there had been an overspend on salary in the area, and that all recruitment must stop, and all vacancies should be removed from the system. The area manager

followed this e-mail up with further e-mails of 11 February and 19 February 2017, indicating that staff budgets needed to be cut.

3.7 Nevertheless, in late January or early February Mr Hamby decided to further extend the Claimant's contract and had discussions with her about this. It would seem that she must have asked him for an employment reference because there is a document dated 31 January, signed by Mr Hamby, giving the claimant's current salary, her date of employment from 12 December and her end date as being 29 April 2017. This ties in with the decision Mr Hamby made on 20 February 2017 that the Claimant would be given a formal extension to her fixed term contract to 29 April 2017. Her role was unchanged, but her notice period was now four weeks as she had passed through the three month probation period. Therefore, the Claimant would need notice of termination by 1 April 2017. The Respondent's evidence was that, despite the knowledge of the cuts required, Mr Hamby and Ms Arrowsmith decided to honour their agreement with the Claimant and extend her contract, as they had already told her that they would do so. Mr Hamby told us that he had discussed it with his area manager who had okayed it and told him not to do it again. We accept that evidence.

3.8 The Claimant went off sick on 15 March with the first few days off self-certificated, as stated above. Then a sick note was given by her GP from 20 – 30 March, - back pain, having physiotherapy. On the Claimant's return to work, somewhat surprisingly no notice to terminate her fixed term contract was given, but she was asked to attend a return to work interview with Ms Arrowsmith on 3 April 2017. Ms Arrowsmith filled out a return to work interview form, which gave the Claimant's reason for absence as disc herniation / slipped disc, the fact that she was waiting for spinal specialist input, and the fact that the Claimant could not lift and so she was asked to seek help for any heavy or strenuous work. We find that this is the date on which the Respondent knew that the Claimant had a back issue. The Respondent's case, which we accept, is that Mr Hamby and Ms Arrowsmith met at the end of February 2017 to discuss the payroll cuts required by the area. The Claimant's generic role could be picked up by management and her colleagues, and a decision was made before her sickness absence not to further renew her contract. The Claimant identifies three comparators who she says were all kept on when she was not. These were colleagues who began fixed term contracts in October 2016, and therefore were not Christmas temps like the Claimant. Ms Michaela White-Kinsella was a customer assistant who worked on the tills, and it would not have been a viable option for management to have picked up this role as it would take too much of their time. The roles of Ms Nikki Miljevic and Ms Rihanna Podaija were more complicated than the standard customer assistant role. Ms Miljevic worked in the sun shop and the skin care department which required knowledge of

those products and was in an area of the store that took a high amount of takings. Ms Podaija covered the fragrance counter in the morning and alsocovered the cosmetic department including the No.7 counter, and she was trained to do this. The managers did not feel comfortable taking on these roles in addition to their management roles. As the Claimant worked in the operations team she did not require specific product knowledge, and did not need to be in one place all the time. Ms Arrowsmith felt confident in picking up her duties and they were simple enough duties to be delegated to other members of the team. We accept these explanations, and they indicate to us that the Claimant's position was not comparable with the others. She could have been put back on the tills, but the fact is that there was already somebody working there.

3.9 Ms Arrowsmith had a meeting with the Claimant on 10 April 2017, which was minuted. It is headed 'Record of Investigatory Interview', but is clearly a meeting to discuss the Claimant's termination of her fixed term contract and to encourage her to apply for full time jobs within Boots. The Claimant had been issued with formal notification of the termination of her contract on 3 April 2017, which was a letter that was not given to her at the return to work interview of the same date. It was at the interview of the 10 April 2017 that the Claimant was formally given four weeks' notice to end her contract on 8 May 2017. By this time the Claimant was off sick again, having been signed off on 4 April for one month. The Claimant indicated at that meeting that she felt that the termination of her contract was something to do with her being off work, pointing to the timing of that termination. However, Ms Arrowsmith gave the salary issue as the reason for terminating her contract and she has denied to us that it was because the Claimant was off sick. Although the Claimant was told she could apply for vacancies she did not in fact do so at this store. The Claimant made an application to another store for a No.7 adviser position in April 2017 where, on the application form, in answer to the question: "Do you require any adjustments or assistance?", she replied, "No". This indicated to us, that the Claimant was reluctant to talk to Boots management or to refer to Boots management any difficulties that she might have been having, which informs our finding that the Respondent did not have the requisite knowledge of the Claimant's disability until the return to work interview of 3 April. We note that the Claimant had her medical appointments with her GP largely after her working hours, and it would seem that she would have been very reluctant to say anything to Ms Arrowsmith, for fear of losing her position. However, we would just comment that if the Respondent did know from about mid-February (on the Claimant's case) that she had a spinal impairment and this was impacting her ability to lift etc., this would surely be adverse to her case on discrimination because, even with that knowledge, the Respondent still renewed her fixed term contract, from 20 February to 29 April.

The Law

4. The relevant provisions of Equality Act 2010 are as follows:

4.1 Section 4, disability is a protected characteristic.

4.2 Section 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 abilities to carry out normal day to day activities.

4.3 Schedule 1, paragraph 2, Long-term effects

(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.

4.4 Section 212 (1) (general interpretation), "substantial" means more than minor or trivial.

4.5 Section 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.

4.6 Section 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.

4.7 Section 23, Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person's abilities if –

(a) on a comparison for the purposes of section 13, the protected characteristic is disability:

(b) …

4.8 Section 39, Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B) –

…

(c) by dismissing B:

(d) by subjecting B to any other detriment.

4.9 Section 136, 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 provisions.

5. The basic question in a direct discrimination case is what are the grounds / reasons for the treatment complained of? – see Amnesty International v Ahmed [2009] IRLR, EAT 84, EAT. The EAT recognised the two different approaches of James v Eastleigh Borough Council [1990] IRLR 288, HL, and of Nagarajan v London Regional Transport [1999] IRLR 572, HL. In some cases, such as James, the ground / reason for the treatment complained of is inherent in the act itself. In other cases, such as Nagarajan, the act complained of is not discriminatory in itself but is rendered so by discriminatory motivation, ie by the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in a way he / she did. Intention, in the case of both direct discrimination

and victimisation, is irrelevant once unlawful discrimination is made out. We should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – see Anya v University of Oxford [2001] IRLR 377, CA.

The EAT in T-Systems Ltd. v Lewis, UK EAT/0042/15/JOJ makes clear that, leaving disability and knowledge aside, there are five elements which a tribunal is well advised to consider separately and make clear findings on. First, there must be a contravention of section 39 (2). Second, there must be unfavourable treatment. Unfavourable treatment is that which the putative discriminator does or says, or admits to do or say, which places a disabled person at a disadvantage. Third, there must be "something arising in consequence of the disability". This "something" must be part of the employer's reason for the unfavourable treatment. Fourth, the unfavourable treatment must be because of something arising in consequence of disability. The question is whether the something arising in consequence of the disability operated on the mind of the putative discriminator, consciously or unconsciously, to a significant extent. The burden of proof provisions may be relevant. Fifth, there is the issue of any justification. The employer may raise a defence that the treatment was a proportionate means of achieving a legitimate aim. See also Basildon and Thurock NHS Foundation Trust v Weerasinghe, UK EAT 0397/14.

Insofar as is necessary, we would apply the familiar two stage process for the burden of proof provisions in discrimination cases. We refer to the well known authorities of Igen v Wong [2005] IRLR 258, CA; and Madarassy v Nomura International PLC [2007] IRLR 246, CA. The Claimant must first establish a first base or prima facie in a case of direct discrimination etc. by reference to the facts made out. If she does so, the burden of proof shifts to the Respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached and the Respondent's explanation is inadequate, it would not merely be legitimate but also necessary for the Tribunal to conclude that the complaint should be upheld. In Madarassy, it was held that the burden of proof does not shift to the employer simply by the Claimant establishing a difference in status (eg race in that case) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which the Tribunal "could conclude" that on a balance of probabilities the Respondent has committed an unlawful act of discrimination. Save that the Tribunal has, at the first stage, no regard to evidence as to the Respondent's explanation for its conduct, the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the Claimant or the Respondent, or whether it supports or contradicts the Claimant's case – see Laing v Manchester City Council [2006] IRLR 748, EAT, as approved by the Court of Appeal in Madarassy.

The Respondent's counsel referred to the judgment of Lord Justice Singh in Ayodele v Citylink Ltd [2018] ICR 748, CA. At paragraph 93, the learned judge said: "The language of section 136 makes it clear that, if the inference of discrimination could be drawn at the first stage of the enquiry, then it must be drawn by the court or tribunal. The consequence will be that the claim will necessarily succeed unless the Respondent discharges the burden of proof, which Mr Dennis accepts does lie on it, at the second stage. I can see no reason in fairness why a Respondent should have to discharge that burden of proof unless and until the Claimant has shown that there is a prima facie case of discrimination which needs to be answered. It seems to me that there is nothing unfair about requiring the Claimant to bear the burden of proof at the first stage. If he or she can discharge that burden (which is only one of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage.

Conclusions

6. Having regard to our relevant findings of fact, and applying the appropriate law, and taking into account the submissions of the parties, the Tribunal has reached the following conclusions:

6.1 The majority of the Tribunal conclude that the Claimant was disabled as defined at the material time – in other words, her dismissal / non-renewal of her fixed term contract at April / May 2017. The spinal impairment could be regarded as long term, satisfying the definition in schedule 1 (2) of the Act – likely to last for at least 12 months. On 28 April 2017, the GP notes record that the Claimant had been told that she needed surgery, and she was waiting to see a surgeon. No doubt that would take time, NHS waiting lists being what they are, and the Claimant would need to recover from any surgery. Further, the Claimant's condition has continued and at this hearing the Claimant remains impaired by it, although of course it is not the date of the hearing that is a material point for determination of whether the condition is long term, but the date of the discriminatory act. However, one member of the Tribunal was not satisfied that the Claimant had established by her evidence in her disability impact statement, and her medical records, that her impairment had a substantial impact on her ability to carry out normal day to day activities. We had very little evidence about this, and the Employment Judge regarded it as a border line situation as to whether the Claimant had passed the threshold required by section 6 (1) (b) of the Act – but was prepared to give the Claimant the benefit of the doubt. She clearly had difficulty lifting and carrying boxes etc at work – as is indicated by the return to work form of 3 April 2017. She had symptoms of

weakness and numbness in her right leg, and pain in her spine from which it can be inferred that she had, at the material time, difficulties with walking and no doubt household and domestic tasks as well. The other member agreed with this.

6.2 However, a unanimous Tribunal has concluded that the Claimant was not dismissed or her contract not extended because of her disability, or that the dismissal / non-renewal of the first fixed term contract was because of her absence or difficulties with lifting / carrying at work. We accept the evidence of the Respondent and their witnesses, and in particular Mr Hamby, that although they could extend her contract until 29 April 2017, because of budgetary constraints they could not do so after this date. This is the reason why the Claimant's employment with Boots ended. It was not because of or related to the back issue. We accept that there is a coincidence in time – as Ms Arrowsmith became aware of the back difficulties and the impact of this on the Claimant's work for Boots at the return to work interview, and later on the same date, the Claimant was reminded that her fixed term contract was due to end on 29 April 2017 (with no indication that it would be further extended). However, we conclude that this was a coincidence and no more than that. Clearly, the decision to extend the contract to 29 April was a final extension, in the light of the staff budget constraints, and we accept that Mr Hamby had agreed with his area manager not to further extend it, and he had agreed this back in February 2017, before the issues of the Claimant's back became apparent to the Respondent. The comparators that the Claimant seeks to advance are not true comparators. They were not Christmas temps and they had specialist skills which the Claimant lacked.

6.3 Thus, even if the Claimant establishes a prima facie case of discrimination on the basis of the coincidence in timing – of the return to work meeting after sickness absence, and the decision communicated to her to terminate her fixed term contract – we conclude that the Respondent has satisfied us that the Claimant's contract was terminated and not extended further for the reasons given by the Respondent, and that her disability or the consequences of it had nothing to do with that termination. In terms of the T-Systems case, clearly the Claimant was dismissed and that was unfavourable treatment of her. The Claimant's sickness absence and the difficulties of lifting / carrying at work were something arising in consequence of her disability. However, the Claimant's unfavourable treatment (her dismissal or non-renewal of her contract) did not arise in consequence of disability, as the Respondent has established. Ms Arrowsmith would have been content for colleagues to assist the Claimant with heavy lifting and carrying, as per the note on the return to work interview form. The reason for the unfavourable treatment was the budgetary constraints and the area manager's instruction to reduce costs by

freezing recruitment, which meant in the Claimant's case not further renewing her contract. The Respondent has not raised any justification defence under section 15 (1)(b), but in the circumstances they do not need to. We are entirely satisfied by the Respondent's reason for the Claimant's termination, and that that reason is not connected to her disability.

6.4 The claim therefore fails.

_____
Employment Judge Sigsworth

Date: ……23/8/18……..

Sent to the parties on: .....

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For the Tribunal Office