EMPLOYMENT TRIBUNALS

Claimant: **Mr S Gibson**

First Respondent: **Committed 2 Communications Limited**
Second Respondent: **Sesame Consulting Limited**

Heard at: **Bristol** **On:** **29 to 31 October 2018**

Before: **Employment Judge O'Rourke**
Members Ms J Le Vaillant
Dr J Miller

Representation
Claimant: **In Person**
First Respondent: **Ms Bundy – HR officer**
Second Respondent: **Mr Woolmore - Director**

JUDGMENT having been sent to the parties on 7 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was engaged by the Second Respondent, an employment business, to work as an agency worker with the First Respondent. The First Respondent ran a contact centre carrying out fund-raising campaigns for charities. The engagement, which was with the First Respondent throughout, commenced on 25 July 2017 and concluded on 2 February 2018. Following that termination, the Claimant brought claims of disability discrimination and breach of contract in respect of pay in lieu of notice, against both Respondents.

2. There was a preliminary hearing on 29 May 2018, which determined that the issues before the Tribunal were as follows:

   (1) Was the Claimant disabled, subject to s.6 of the Equality Act 2010 ('the Act')? The Claimant states that he suffers from Non-Epileptic Attack

Disorder (NEAD). Neither Respondent conceded this point, leaving the matter for the Tribunal to decide.

(2) If so, had he suffered discrimination arising from disability, subject to s.15 of the Act? The allegations of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act are as set out below (as numbered in the case management order): no comparator is needed:

4.1.1 An inability to earn bonuses, nor progress through the First Respondent's structure, due to disability-related sickness absence, having been told on 26 January 2018 by Mr Ashley Horn that it would be unfair on other employees if allowances were made for his condition;

4.1.2 Due to him requesting of HR (Ms Bundy), on 2 February 2018, as to whether there was some other mechanism by which he could improve his earnings, he was dismissed, on 3 February 2018;

4.1.3 Being disciplined for time off due to disability-related illness;

4.1.4 Being told erroneously by Mr Steve Morrisey, on or about 11 November 2017 (tbc) that he had signed a form acknowledging a disciplinary finding against him, thus causing him anxiety as to what his condition may be when subject to seizures and what he might agree to under those circumstances;

4.1.5 Being told by Mr Morrisey, on or about 18 November 2017 (tbc) that if he hadn't changed his hours of work (which the Claimant states he did because of his disability), he would have been hitting his targets.

4.1.6 On suffering seizures, being required to sign a release form before being permitted to leave the workplace.

4.1.7 Being given no notice of dismissal.

5. Can the Claimant prove that the Respondents treated him as set out in paragraph 4.1 above because of the "something arising" in consequence of the disability?

6. Can the Respondents show that the treatment was a proportionate means of achieving a legitimate aim? The Respondents are being permitted to file amended Responses and this is an issue they should deal with in those documents.

7. Alternatively, can the Respondents show that they did not know, and could not reasonably have been expected to know, that the Claimant had a disability? In this respect, the First Respondent accepts that they were aware that the Claimant suffered from a medical condition, but not necessarily that it was a disability and the Second Respondent agrees that it was aware from the outset that the Claimant had informed them that he was disabled, but not of the

detail of his condition, or of any adjustments that might be required of them.

8. Breach of contract

8.1 It is not in dispute that the Second Respondent dismissed the Claimant without notice.

8.2 The Second Respondent accepts that the Claimant was not dismissed for gross misconduct, but contends that his contract of employment did not entitle to him to any notice of dismissal. The Second Respondent was referred to s.86(1)(a) of the Employment Rights Act 1996, as to the minimum entitlement to statutory notice. Mr Woolmore said that if the Claimant was so entitled, he would be paid the requisite amount.

The Law

3. We referred ourselves to s.15 of the Equality Act 2010 and s.86 of the Employment Rights Act 1996 (as to the entitlement of employees to statutory notice).

4. We remind ourselves that, in respect of the claim of discrimination arising from disability, the burden of proof is on the Claimant to show that the alleged acts of unfavourable treatment took place as he described and that if that is the case, he was so treated because of 'something arising' in consequence of his disability. In that event, the burden then shifts to the Respondents to show that any such treatment was a proportionate means of achieving a legitimate aim.

The Facts

5. We heard evidence from the Claimant.

6. On behalf of the Respondents, we heard evidence from:

- Mr Clark, the First Respondent's Managing Director, who made the decision to terminate the Claimant's engagement.
- Ms Bundy, the First Respondent's HR officer, who dealt with the Claimant throughout his engagement.
- Mr Woolmore, the sole director of the Second Respondent.
- Messrs Horn and Morrisey – managers at the First Respondent.

7. Whether Claimant Disabled. We deal firstly with that issue, as it is clearly central to the claim. Neither Respondent seriously challenged whether the Claimant was disabled, under the terms of s.6 of the Act, leaving the matter to be decided by this Tribunal. At case management stage, the parties were offered the opportunity to obtain expert medical evidence, if they wished, to determine the issue, but decided against it. Bearing in mind that the definition

of disability is an impairment having a substantial long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities, we find that the Claimant's impairment meets that definition and that he is therefore disabled, for the following reasons:

(1) His uncontested disability impact statement [15] set out that he was diagnosed with NEAD in July 2010 and he said in evidence, pending any medical developments in the future, it was likely to be a life-long condition (and therefore by its nature 'long-term'). He set out that he can be subject to seizures at random times and duration. The severity of the seizures range from '*grand mal'* to increased body temperature and pain in the spine and neck. At least one day's rest is required for him to recover from such seizures. The seizures can also lead to unstoppable sleep, mental absences, or forgetting how to walk, or use cutlery. He is unable to hold a driving licence and it can be dangerous for him to be alone in risk areas, such as kitchens or bathrooms, or to leave home alone.

(2) While, over the years, he has developed strategies to cope with this condition, involving exercise, diet and reducing stress, he continues to suffer seizures.

(3) A letter from the Department of Neuropsychiatry at Southmead Hospital Bristol, dated 1 March 2016 [17] confirms the diagnosis and the description of the seizures, their random nature and the effects upon him.

(4) The Disorder clearly has a substantial adverse effect on his ability to carry out normal day-to-day activities, such as staying awake during the day, driving a car, being without the supervision of others, attending work routinely, due to the requirement to rest and sometimes being unable to carry out routine functions, such as walking or using cutlery.

8. The Claimant's 'Employment' Status. The Claimant accepted, during the Hearing that his only contractual arrangement was with the Second Respondent, as a worker, not an employee and that he had been supplied to the First Respondent as an agency worker, acquiring no employment status with them. He accepted, therefore that as there was no contractual entitlement to notice pay in his contract for services with the Second Respondent [75, paragraph 9] and as he was not an employee, he could not rely on s.86 of the Employment Rights Act 1996, as to the payment by the Second Respondent of statutory notice. He accordingly withdrew that claim (and the associated allegation of unfavourable treatment within his discrimination claim) and which was accordingly dismissed.

9. General Context of Events. We come to our decision, against the following background:

(1) Communication Shortcomings. There are, in our view and as we think both Respondents generally accept, several examples of communication shortcomings in this case. Payment of a bonus was central to much of the Claimant's allegations, but the First Respondent,

even at this Hearing, was unable to effectively communicate the terms of such bonus structure. No documentation whatsoever was provided in respect of the scheme and it is therefore understandable that the Claimant may not have fully understood its terms. Secondly, despite the Claimant and Ms Bundy both stating that they had a good working relationship, with frequent meetings, she misled him, at a meeting on the day of termination of his engagement, into thinking that there may be other opportunities for him, when in fact she knew that his position was to be terminated. It is understandable therefore for the Claimant to feel aggrieved when, only hours later, he received the Second Respondent's email terminating his engagement. Turning to the Second Respondent, Mr Woolmore accepted the inappropriate nature of his termination email and apologised for that. Both parties failed to address the Claimant's grievance, despite it raising issues of potential discrimination, a surprising omission on their part. This, we find, leads us to the second contextual issue.

(2) The Respondents' perception as to the Claimant's Status. It is clear to us that neither Respondent fully accepted responsibility for the Claimant and were unaware of their potential joint and several liabilities for acts of discrimination. This resulted in a lack of action on either part, with both parties considering the other would resolve, or take responsibility for the issue, but neither did.

(3) Poor Record-Keeping. In the context of the First Respondent being a medium-sized organisation, the ET3 stating that it employed 43 persons and having reasonable management resources, its record-keeping fell short. No written record was produced to us of any of the discussions held with the Claimant, particularly so when he raised the issue of discrimination with Ms Bundy in November. Nor was any written communication with him provided, as to any of the issues before us. This may be simply symptomatic of their lack of effective procedures, but we think there is a link with the two other identified contextual issues, communication shortcomings and their perception as to his status.

10. Discrimination Arising from Disability. We consider the facts as to each of the alleged acts of unfavourable treatment below.

11. An Inability to Earn Bonuses and to Progress. The Claimant asserted that due to his disability-related sickness absence he was unable to earn a bonus, or to advance his career with the First Respondent. He referred to a conversation with Mr Horn on 26 January 2018, when Mr Horn allegedly told him it would be unfair on other employees if allowances were made for his condition. The First Respondent states that the bonus scheme had been adjusted to not disadvantage the Claimant for time taken off due to illness. Mr Clark said in evidence that in fact 'compliance' (i.e. the requirement that the staff, when speaking to potential donors, complied with relevant legislation (e.g. General Data Protection Regulations and the Privacy of Electronic Communications Regulations) 'stuck rigidly to an approved script'. That compliance was measured and recorded and staff needed to achieve either 75 or 90% compliance (depending on which team they were in), to meet the target. If they failed to do so they could never qualify for a bonus.

Coaching was available to assist staff in reaching these targets. Reiterating our general view on communication shortcomings, it's clear to us that it was not really until this Hearing that the Claimant fully understood that fact, which he accepted, regardless of his disability, was a fundamental requirement. Therefore, it is self-evident that the true reason for the Claimant not achieving his bonus was his inability to meet the compliance target, not his sickness-related absence. He did not therefore, on his own admission, suffer unfavourable treatment that was because of something arising from his disability.

12. Discussion with Ms Bundy on 2 February 2018. The Claimant said that he thought that his skills, education and experience could be put to better use and arranged a meeting with Ms Bundy. She heard what he had to say and it was agreed evidence that she said that she '*would look into other opportunities'* for him. As outlined already in our general context paragraph, this was of course untrue, as she knew his position was to be terminated. The Claimant asserted that his raising of this issue with Ms Bundy was the cause of the termination of his position. We do not, however, find that to be that case, for the following reasons:

    (1) It was undisputed evidence, from both Respondents that the First Respondent was experiencing a shortfall in work, resulting in the need to terminate contracts with agency staff. This had been the case for some time, but came to a head in January 2018, with, as Mr Clark said, a loss of 1253 working hours and the '*sending home of agency workers, on an ad hoc basis, as activity kept running out*.' The Claimant confirmed that that had happened to him and others. Also, it was agreed evidence that the Claimant had, at the staff Christmas party, made remarks to Mr Clark, while drunk, which indicated a lax view as to compliance. Clearly, therefore, both as an agency worker and a person identified as not meeting or perhaps taking compliance targets seriously, the Claimant's position was at risk.

    (2) It was clear from the Respondents' first three witnesses' evidence that the termination had been discussed for some time before that date, with Ms Bundy approaching ACAS for advice in January and Mr Clark communicating his final decision to Mr Woolmore on 1 February, by telephone, the day before Ms Bundy's meeting. His telephone record [67] shows a call on that day to Mr Woolmore and Mr Woolmore confirmed that call. Mr Woolmore said that he did attempt to call the Claimant on 2 February, but couldn't get through, as the number he held for the Claimant was out of date, hence him sending his email [3] late that afternoon. It's clear therefore that the decision to terminate the Claimant's position had already been well advanced and that his discussion with Ms Bundy had no effect on that outcome. Therefore that cannot constitute unfavourable treatment.

13. Receiving a 'Strike' for time off due to disability-related illness. The First Respondent had an ISO-driven 'strike' process [24-29], whereby failures to meet various targets automatically generated a 'strike' against a staff member. At subsequent 'stage meetings' such strikes would be discussed, advice given as to rectifying behaviours, or mitigating the period for which the

strike was effective. It was clear that a build-up in strikes could result in termination of engagement. The Claimant alleged that at a stage meeting [51-53] with Mr Morrisey on 20 November 2017, he had been awarded a 'strike' due to disability-related sickness absence and been told by Mr Morrisey that he had signed a strike form, acknowledging that event, at an earlier point. He was concerned, firstly that he should not be receiving strikes for such absence and secondly that he may have been signing or completing forms under the after-effects of a workplace seizure, naturally placing him at a disadvantage. Mr Morrisey stated that a strike had been automatically generated by their ISO system, following a period of absence by the Claimant. He had seen an electronically-generated record showing that strike, hence its inclusion on the stage meeting record [51]. However, it was agreed evidence that at some prior point, the First Respondent accepted that they would not record strikes against the Claimant for such absence, but we are unclear as to exactly when (again referring to our general comments as to lack of record-keeping). It is also the case, as stated by the Claimant that when he suffered seizures at work, he was '*treated quite fairly and well … looked after the best I could be'*, with all proper assistance being given to him and with genuine concern as to his welfare. The First Respondent also agreed, at his request, to vary his existing hours of work, for disability-related reasons. In that context, it is clear to us that this was not a Respondent who was seeking to discriminate against him on grounds of his disability, in relation to this incident. While, subjectively, the Claimant may have considered that he was subject to unfavourable treatment, objectively, it is clear he was not, because the recording of the strike was a mistake which was quickly corrected by the First Respondent and therefore falls to be considered as a one-off administrative error on their part, rather than unfavourable treatment. Also, in this meeting, the Claimant asserted that Mr Morrisey had allegedly told him that he had seen a form signed by the Claimant, in relation to this strike, which the Claimant did not recall signing and which therefore lead him to be concerned as to forms being given to him at a time when he was suffering the after-effects of seizures. Mr Morrisey's evidence was that in fact he had not seen such a form, simply an electronic record (obviously unsigned) and that therefore the Claimant was labouring under a misunderstanding. No such form was ever provided to us and therefore on the balance of probabilities, we prefer Mr Morrisey's evidence on this point.

14. <u>The Effect of changing of hours on his ability to earn bonus</u>. The Claimant asserted that in the same meeting, on 20 November, Mr Morrisey had said to him that if he had not changed his hours of work, he would have been hitting targets (and thus earning a bonus). Previously, the Claimant had worked 12-8 pm, but, at his request, those hours were changed, to lessen the risk of seizures, to 10-6 p.m. Mr Morrisey said that he did not recall saying this and that it was 'incorrect' and '*I put this down to call-centre gossip from the fund-raisers, who are exceeding their targets and enjoying the success they gained between 6pm and 8pm*'. In cross-examination, he said that many fund-raisers worked 10-6 and still met their targets. The Claimant did not challenge Mr Morrisey on that latter point and we are inclined to prefer his evidence on this issue, namely that it perhaps originated in gossip between staff.

15. Signing of Release Forms. It was the First Respondent's policy, if a member of staff had to leave the workplace before the end of their shift that they sign a 'going home sick form' [example 39], recording the reason, the time and to whom reported. The Claimant asserted, related to his concerns about the strike form referred to at the 20 November meeting that he was troubled that he may have been required to complete and sign some of these forms while suffering the after-effects of a seizure and therefore not being *compos mentis* to do so. Ms Bundy said that the need to complete the form was a health and safety requirement and that the Claimant did not question it at the time. The Claimant accepted that he knew of the requirement from the outset of the engagement. He also said in cross-examination that it was not a '*huge issue'* and that he didn't perceive it as a problem at the time, until that is his discussion with Mr Morrisey on 20 November, in relation to him allegedly signing the strike form. In the context of the Claimant's acceptance that the First Respondent '*treated* (him) *quite fairly and well … looked after the best I could be'* following seizures, it seems inconsistent to us that the First Respondent asking him to sign a form, which at the time he didn't object to and which now he states was not a '*huge issue'* was unfavourable treatment. We accordingly find that it was not.

16. Conclusion. We find therefore that as the Claimant (upon whom the burden of proof rests) cannot objectively either show that he suffered unfavourable treatment, or, if he did that it was because of something arising from his disability, he cannot succeed in a claim under s.15 of the Act. Accordingly that claim fails and is dismissed.

Employment Judge O'Rourke

Date: 8 November 2018