



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MRS L KELLY

AND

Respondent
NANDO CHICKENLAND LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 8TH / 9TH / 10TH APRIL 2019

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS: MR P CHARLES
MS J SOUTHHALL

APPEARANCES:-

FOR THE CLAIMANT:- MR D KELLY (HUSBAND)

FOR THE RESPONDENT:- MR M DIFELICE (SOLICITOR)

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim for unfair dismissal is dismissed.
2. The claimant's claims of disability discrimination in the failure to make reasonable adjustments pursuant to s20 Equality Act 2010 are dismissed.

Reasons

1. This is the decision of the tribunal in the case of Mrs L Kelly v Nando's Chickenland Ltd. By this claim the claimant brings claims of constructive unfair dismissal and disability discrimination. All of the disability discrimination claims are claims of a failure to make reasonable adjustments contrary to s 20(3) Equality Act 2010. It is not in dispute that at all relevant times the claimant was a disabled person within the meaning of s6 Equality Act 2010 by reason of the condition of depression and anxiety.
2. The respondent is a well-known chain of restaurants and the claimant was employed as a supervisor in the Swansea restaurant from 15 February 2013 until 3rd April 2017 when notice she had given on 5th March 2017 expired. The General Manager of the restaurant (known within Nando's as the Patrao) was Tina Kelly, the claimant's sister in law. She went on maternity leave on 28th August 2016 at which point Mr Matthew James became the Acting General Manager. There are no complaints of any events prior to this point either as acts of discrimination or as acts contributing to her resignation.
3. The claimant has a number of complaints about Mr James conduct as Acting General Manager. She states that she was due to have monthly reviews but that these never took place; that she herself had concerns about a number of aspects of, in particular the health and safety regime; and that she had been approached by other members of staff who had concerns about lack of uniform and PPE, lack of cleaning products; and lack of training. She alleges she attempted to raise these with Matthew James but that when she did so she avoided or told he was not available. In her ET1 she alleges that this happened on several occasions, and so she decided to wait until Tina Kelly returned from maternity leave to raise these points.
4. The rights and wrongs of these issues are not all strictly relevant for our decision. However they are disputed by Mr James and some are part of the reasonable adjustments claim so we will deal with them as they arise.

Reasonable Adjustments

5. It is convenient to deal first with the claimant's allegations of failure to make reasonable adjustment as, if any or all of these are made out it will necessarily inform the decision as to whether she was constructively dismissed.
6. Before considering the individual allegations we remind ourselves that the constituent elements of section 20 are that the employer has a provision, criterion or practice (PCP) which places the disabled person at a substantial disadvantage in comparison with persons who are not disabled and that there are steps which could remove that disadvantage which it is reasonable for the employer to be required take.
7. Secondly, we have taken the allegations below from the list set out by the claimant. The claimant's witness statement is almost entirely silent as to any of the claims themselves and there is very little primary evidence before us from the claimant in

- respect of them. This is not, and is not intended as a criticism of the claimant who has no legal representation, but in our view reflects the fact that the complaints are in reality a list of events with which she is unhappy, many of which are difficult to fit within the legal structure of a claim for reasonable adjustments, and some of which do not appear to engage the question of disability at all. Moreover a number of them rest on a legal fallacy. The claimant has throughout the hearing been described by her and her representative as a “vulnerable adult” who was owed a duty of care by the respondent and that any alleged failure in that duty of care is necessarily an act of discrimination. Whilst it is true that all employers owe their employees a duty of care a breach is not necessarily an act of discrimination; in deciding whether the claimant has made out any of her claims of discrimination we must apply the statutory tests.
8. Allegation 1 – The first allegation is of the failure to hold regular review meetings. It is in truth difficult to analyse this as a failure to make reasonable adjustments. On the evidence before us, which was not disputed, during Mr James’ time as acting General Manager review meetings were scheduled on a monthly basis. It is not in dispute that these did not take place in the claimant’s case. Mr James explanation is that they got on very well and that she preferred to have informal chats to formal review meetings so that is what happened. Mr James evidence is that prior to becoming acting General Manager he had been told in a meeting with Tina Kelly and the claimant about the claimant’s condition and he had shared with her that he too suffered from significant issues around anxiety and depression.
 9. In effect the respondent’s submits that the reality is the exact opposite of the allegation. It had a PCP of holding formal monthly review meetings which it did not apply to the claimant. Thus the claim is bound to fail as the PCP was not in fact applied to her on her own evidence. Alternatively on the respondent’s evidence although this was not consciously an adjustment in respect of disability, the respondent had adjusted its usual practice to accommodate the claimant. Therefore the claim is equally bound to fail if we accept the respondent’s evidence. In our judgment this analysis is correct, but for completeness sake we do accept Mr James evidence and accordingly we cannot identify any PCP which placed the claimant at a substantial disadvantage nor any failure to make any adjustment however the PCP is constructed.
 10. Allegation 2- This relates to shift patterns. It is alleged that the claimant worked a Friday PM shift from late August 2016 and continued as part of her normal shifts to work weekend shifts. She could therefore find herself working a late shift followed by an early shift overnight on Friday/Saturday or Saturday/Sunday. The claimant alleges that as tiredness as a trigger for her depression that rotating her in this way placed her at a substantial disadvantage.
 11. In this case the PCP is rotating staff to do late followed by early shifts on consecutive days. The respondents point out that the possibility of doing late/early on Saturday/Sunday had always been part of her rota about which she had never complained. Prior to August 2016 she had worked Monday, Thursday and any weekend shifts. This was changed to Monday, Friday pm and any weekend shifts, at

her request as she was attending counselling on Thursdays. It follows submits the respondent, that the risk of working consecutive late and early shifts on Saturday/Sunday had always been present as part of the claimant's normal shift rota and was not something she had ever requested to change. The change to doing a Friday pm shift, thus creating the risk of doing consecutive late and early shifts on Friday/Saturday was made at her request. In addition it automatically follows that if she worked late/early shifts Friday/Saturday she could not do late/early on Saturday/Sunday; it could by definition happen only once in any given weekend and she could not therefore have been at any greater disadvantage on any given weekend after the shift change than she had been before it. There cannot, therefore, even on the claimant's case be any greater disadvantage than had ever previously been the case. Fundamentally the practice about which the claimant complains was specifically requested by her to allow her to attend counselling. It was in fact an adjustment which she had asked for and which was agreed to by the respondent. Somewhat paradoxically it submits that the criticism is not of failing to make a reasonable adjustment but of having done so, and that in reality the claimant's case is that the reasonable adjustment would have been to have refused her own request for a reasonable adjustment.

12. Allegation 3 and 4 are allegations of refusals to accommodate the claimant's requests to change shifts. It is not either the claimant or respondent's case that it had a PCP of refusing to change shifts; indeed part of the claimant's complaint is the specific refusal on these occasions when other request both for her and other members of staff had been accommodated. They are therefore specific individual decisions and are not in any event PCPs so are bound to fail as claims for a failure to make reasonable adjustments. In any event in both cases it is not in dispute that the request related to childcare issues. This point is explicit in allegation 4 "*Another reasonable request to change shifts over the half term period to allow Lauren to be at home with her children during the school holidays as there was no other childcare available*" It follows that we are unable to identify a PCP, and certainly not one that related to the claimant's disability in any way.
13. Allegation 5 - The claimant alleges that she was told that one staff party was compulsory. Again it is accepted that there was no PCP that staff parties were compulsory, so that if this was said and was intended to be taken seriously it was a one off decision taken by an individual manager and cannot amount to a PCP. Again in any event it is difficult to see how this placed the claimant at a substantial disadvantage because of her disability, as it is not in dispute that she did attend other staff parties which were not compulsory.
14. Allegation 6 –This is an allegation that as a lone female supervisor the claimant should be accompanied by a male manager on New Year's Eve and Beaujolais Nouveau day which are both very busy in Swansea. The claimant contended that as a lone female manager with no door security staff she would have to deal herself with drunken customers. The PCP appears to be the practice of randomly giving shifts to male or female managers without ensuring that there is a mixed complement, at least on potentially rowdy nights. This appears to relate directly to gender rather than

- disability, and it is impossible to see how this PCP placed her at a disadvantage in comparison with non-disabled employees.
15. Allegation 7 – This relates the denial of requests to be accompanied at disciplinary meetings. It is not in dispute that the claimant did request that she be accompanied by her husband at the grievance meeting, which was agreed by the respondent. The respondent's evidence is that there was no equivalent request in relation to the disciplinary investigation meetings. Although the respondent does have a PCP of not allowing an individual to be accompanied at investigation meetings, as the employment handbook makes clear this can be relaxed in the case of disability or difficulty with the English language. If the claimant had made any such request it would have been considered and in all likelihood agreed given that it was in relation to the grievance meeting. Put simply in the absence of a request there was no failure to make reasonable adjustments. In our judgement this is correct. There is no evidence before us of any request in relation to the disciplinary investigation meetings.
 16. The second part of allegation 7 is of the failure to explain the reasons for her suspension. The respondent submits that this is factually incorrect. The claimant was given the reason in the suspension letter, in the investigatory meetings and in detail in the interview notes sent with the invitation to the disciplinary hearing. If the PCP is the failure to provide detail at an early stage this would not in any event be a reasonable adjustment as the whole purpose of an investigation is to establish the facts.
 17. The third is the continued use of Liam Reilly as a notetaker in investigatory meetings despite her request that he not do so. Again the respondent submits that a decision to use an individual as a notetaker at one meeting necessarily cannot be a PCP. In addition the reason the claimant initially gave was that he should participate as he knew those who were making the allegations, which is a complaint unrelated to disability.
 18. Allegation 8 – This relates to Mark Witherspoon's conduct of the grievance meeting which made the claimant feel uncomfortable. Once again the respondent asserts that Mr Witherspoon's conduct of an individual meeting cannot amount to a PCP, and that, although we have not heard directly from Mr Witherspoon, the claimant's assertion is contradicted by the documentary evidence. Firstly there is the fact that he permitted the claimant to be accompanied by her husband, which is itself an adjustment to the usual procedure. Secondly at the outset of the meeting he specifically questioned whether the meeting should proceed in the light of the claimant's health, and that it was she who wished to proceed; and that later on he specifically asked if she was strong enough to go through with it and how he could help her get through it. Moreover after she resigned he gave the opportunity to rethink and retract if she wished to. The respondent asserts that this entirely contradicts an assertion that he conducted himself in a manner that was unsympathetic to the claimant.

19. We accept the respondent's submissions in respect of all the allegations and accordingly dismiss the claims for the failure to make reasonable adjustments.

Constructive Dismissal

20. The events which led to the claimant's resignation began on 6th February 2017. On that day she was due to have a meeting with Tina Kelly who had returned from maternity leave. During that day Ms Kelly was approached by Liam Reilly who told her that three members of staff had made allegations against the claimant. They took the advice of HR, and Ms Kelly and Mr Reilly interviewed Jon Maxwell who was one of those who had made allegations. During that meeting Mr Maxwell made allegations of what amounts to sexual harassment against the claimant. Somewhat curiously the claimant decided herself to call Mr Maxwell before this tribunal and he has confirmed that what he told Ms Kelly and Mr Reilly was true.
21. Following advice from HR when the claimant arrived she was informed by Ms Kelly that she was suspended which was confirmed by letter the following day. In the ordinary course of events as Ms Kelly was the General Manager she would have investigated the allegations, but as she was the claimant's sister in law this was inappropriate and Genevieve Thomas was appointed to do so. The initial investigatory interviews had been conducted by Liam Reilly on 6th February 2017. Ms Thomas interviewed the claimant on 11th February and seven witnesses on 18th February. Following that investigation four areas of complaint emerged; the claimant's conduct on a staff night out on 1st February 2017; her conduct on an evening in November 2016, her conduct at the Christmas party; and her conduct at a party in June 2016. Three of the allegations broadly alleged forms of sexual harassment. The allegation relating to the Christmas party did not, and was not considered on its own serious enough to merit disciplinary action. The other three did and the claimant was invited to a disciplinary hearing in respect of them. It was due to take place 6th March, but on 5th March 2017 the claimant tendered her resignation.
22. In addition to the disciplinary process on 12th February 2017 the claimant submitted a formal grievance. The grievance meeting took place on 23rd February. The grievance outcome was sent on 15th March 2017 and did not therefore play any part in the claimant's decision to resign. Her complaints about the conduct of the hearing have been dealt with above.
23. In her resignation email the claimant stated that the accusations by other members of staff had made her situation untenable; that the investigation had been dragged out; that whilst 15 members of staff had been interviewed only six sets of interview notes had been supplied; and that members of staff had openly spoken of their lack of confidence in her. In addition in the hearing she has advanced two further bases. Firstly she contends that the allegations against her were made up as those who had made them believed that she was going to blow the whistle on their own misbehaviour such as drug taking; and that they were persuaded or encouraged to do so by managers within the respondent who knew that she was going to complain about the matters which became the subject matter of her grievance.

24. There is no evidence that the allegations were invented and indeed the claimant has called evidence from Mr Maxwell that at least some are true. Moreover Mr Maxwell has explained the process by which he agreed to give a statement after initially not wanting to become involved which, he says, was entirely his own decision.
25. In our judgment the investigation was conducted extremely promptly; and that the claimant was sent the only notes that were relevant for her disciplinary hearing and that it is not factually correct that she had not been supplied with any relevant documents. Moreover it is unsurprising that members of staff who alleged that they were the victims of or had witnessed sexual harassment should have concerns about her.
26. In general terms once these allegations had been made they had to be investigated. Having been investigated and being at least plausible it was inevitable that they would have to proceed to a disciplinary hearing, not least because as the claimant herself accepted they amounted, if true, to gross misconduct which could justify dismissal. Similarly the grievance process was conducted promptly and obviously seriously and with thoroughness.
27. It is not alleged that any express term of the claimant's contract of employment had been broken and she must, therefore be relying on the implied term of mutual trust and confidence. This is implied into every contract and is fundamental, that is to say that breach of it will entitle the employee to resign as having been constructively dismissed. At the risk of stating the obvious it is not sufficient that an employee subjectively believes that he or she can no longer work for the employer, the test is whether objectively the implied term has been broken. Looked at both individually and cumulatively we are unable to identify any fundamental breach of contract on the part of the respondent in respect of any of the allegations outlined above entitling the claimant to resign.
28. It follows that all the claimant's claims must be dismissed.

Polkey

29. Although it is not strictly relevant given our decision on liability, had we concluded that the dismissal was in any way unfair we would have applied a 100% Polkey reduction to any compensation as we have no doubt that on the basis of the investigatory interviews the claimant would have been found to have committed the misconduct alleged and would have been summarily dismissed in any event on 6th March 2017.

**Judgment entered into Register
And copies sent to the parties on**

12 April 2019

EMPLOYMENT JUDGE

Dated: 11 April 19

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for Secretary of the Tribunals