



THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Carr

Respondent: Laura Ashley Limited

Heard at: North Shields Hearing Centre **On:** Wednesday 20th March 2019
& Thursday 21st March 2019

Before: Employment Judge Speker OBE DL

Members: Mr S Wykes & Ms E Wiles

Representation:

Claimant: Lay Representative Alexander Amatosi

Respondent: Lay Representative Mr A Famutimi

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claimant has not established that he was discriminated against on the grounds of the protected characteristic identified and accordingly this claim is dismissed.

REASONS

1. This is a claim of disability discrimination brought by the claimant alleging breaches of sections 15 and 26 of the Equality Act 2010, namely discrimination arising from disability and harassment.
2. At a preliminary hearing before Employment Judge Buchanan on 21st September 2018 the claims being brought were identified. A claim included initially for sexual orientation discrimination was dismissed following withdrawal by the claimant and that was set out in a judgment dated 26th September 2018.
3. At that preliminary hearing the claimant and respondent were each ordered to file further and better particulars of the claim and response. Pursuant to that order further documentation was filed and served. The claimant was also ordered to file a

letter or other medical evidence to confirm that he lives with HIV positive infection. A letter which he produced, which was included in the bundle at page 158, was from the Genito-urinary Department of University Hospital of North Durham and was dated 17th April 2018. While the letter did refer to the claimant's infection, the need to be on life-long medication and the effect of changes in medication, the letter did not specifically refer to "HIV" positive infection. However in the further and better particulars filed by the respondent and at this hearing, the respondent accepted that the claimant is HIV positive and therefore in law a disabled person. This is in accordance with paragraph 6 of schedule 1 to the Equality Act which provides that inter-alia HIV Infection is a deemed disability. This means that from the point of diagnosis there is no need to satisfy the various elements of the statutory test of disability set out in section 6 of the Equality Act 2010.

4. The tribunal heard oral evidence from the claimant himself. He called two witnesses namely his husband David Carr and Catriona Beany a long-term friend. In addition, signed witness statements were tendered in evidence from Elaine Bateman, Anita Sutton and Sonya Beckett. The first of these three was a person who had given counselling to the claimant and the other two were former employees of the respondent.

For the respondent oral evidence was called from Judith Hopper Assistant Manager and April Robson, Store Manager, both of whom worked in the Laura Ashley store where the claimant was employed. A bundle of documents running to 195 pages was provided to the tribunal.

5. The tribunal found the following facts:
 - 5.1 Laura Ashley Limited is a textile design company and international retail chain operating a large number of retail outlets. One of these is at Unit 2, Mercia Retail Park, Pity Me, County Durham. It was at this store where the claimant became employed as from 2nd December 2017. He was engaged as a full-time sales leader on a temporary contract. The role involved interaction with customers and working in the store's two departments, fashion and home.
 - 5.2 The claimant is a gay man. He and his witness David Carr are married. Late in 2007 the claimant was diagnosed as being HIV positive and as a result was on regular medication.
 - 5.3 The claimant did not mention his HIV plus status at the time of commencement of his employment and it was not discussed.
 - 5.4 The claimant received induction training from the respondent and completed this satisfactorily.
 - 5.5 The manager of the store April Robson was the claimant's line manager. There were two assistant managers namely Emma Watson and Judith Hopper.

- 5.6 On the third day of the claimant's employment namely 6th December 2017 he considered that Emma Watson was rude and aggressive towards him in front of customers and this caused him embarrassment.
- 5.7 Following a short illness from 14th – 16th December 2017 the claimant decided to disclose at work his HIV positive status. There was a conflict of evidence as to how this was done. The claimant stated in his statement that he disclosed this in a meeting with April Robson, Emma Watson and Judith Hopper but in evidence he said that it was disclosed to April Robson and Emma Watson. The respondent's case was that the claimant informed April Robson and Judith Hopper separately. The tribunal accepts the account that information was communicated to the manager and two assistant managers at the same time and that no adverse comment was made by any of them. The claimant also communicated the fact of his HIV positive status to other members of staff. The claimant submitted in his statement that Emma Watson subsequently made two adverse comments to him about as to whether he had passed on the infection and he found those comments upsetting. He did not raise this with his manager or anyone else.
- 5.8 Throughout his employment the claimant found that Emma Watson's attitude towards him was oppressive, unfair and bullying which conflicted with the style of management generally operated in the store by April Robson. Evidence from Judith Hopper as well as from the signed statements of Anita Sutton and Sonya Beckett indicated that the behaviour of Emma Watson was similar in relation to all members of the staff and not only the claimant. Emma Watson was not called to give evidence. It was statement that she no longer works for the respondent.
- 5.9 On 25th February 2018 the claimant's husband David Carr, at the suggestion of the claimant, offered Judith Hopper a lift to hospital for an appointment in relation to her serious medical condition. The claimant and Judith Hopper were on very friendly terms. The claimant pressed Judith Hopper to accept the lift from David Carr which she agreed. When Judith Hopper got into the car (the claimant was not present) he commented on seeing a hip flask. David Carr said it belonged to the claimant and was a birthday present. The tribunal accepts that the claimant regularly referred to the glove compartment in his husband's car as being his "car bar" a reference to the fact that it would contain some alcohol. The claimant himself does not drive. The reference to the car bar was regarded as a joke.
- 5.10 During this car journey Ms Hopper initiated a conversation about a rumour circulating at work to the effect that there were issues about the claimant's use of alcohol. Ms Hopper said this was in terms of people asking whether others could smell alcohol on the claimant. David Carr stated that he took this conversation to be a suggestion that the claimant was drinking at work. He asked Ms Hopper who was spreading the rumour and she eventually acknowledged that it was Emma Watson. Subsequently David Carr informed the claimant about the rumour and the claimant was upset.

- 5.11 The claimant raised this matter with April Robson the manager. She asked him if he wished the matter to be taken further. The claimant maintained that he did wish it to be taken further but Mrs Robson states that he said that he did not. In the event it was not pursued. No reference was made to the claimant having raised a formal grievance or to the company's grievance procedure, which was not produced to the tribunal. The claimant did not raise the matter again until after he left the respondent's employment.
- 5.12 The claimant had been working on a temporary contract and was interested in securing a permanent post. He made an application by a letter dated 21st March 2018 for the role of part-time sales leader on a permanent post. Mrs Robson stated that she had not seen the letter or could not recall seeing it until after these proceedings commenced. On 30th March Mrs Robson had a discussion with the claimant about him gaining a permanent post. However, after five minutes the conversation was interrupted as the store was very busy at the time. The claimant asked if he could resume the discussion the next day but this did not happen. Mrs Robson did say to the claimant words to the effect that he should not worry about it and that it was "business as usual" indicating that she saw the future as the claimant continuing to work at the store. The claimant noted that he was still on the rota to continue to work in the store even though his temporary contract was due to expire on 31st March.
- 5.13 On 6th April shortly after the claimant commenced work at 8.30am an incident occurred in the store. The claimant answered an external telephone call because no-one else picked up the phone. The call was from a staff member ringing in sick. The claimant informed Emma Watson the assistant manager on duty and she berated him for answering the call. The claimant felt that he was treated very unfairly and was upset. He handed in his keys and left the store saying he was leaving "with immediate effect". He described this in his claim as the straw that broke the camel's back. The following day the claimant received a letter from Emma Watson which was dated 6th April about his having walked off shift and handed in his keys "without explanation" and asking him to contact her to discuss his position, pointing out that he was in effect talking unauthorised absence.
- 5.14 The claimant wrote a letter on 6th April to Amanda Waterfield Head of Retail Operations in London. This was a lengthy letter about his reasons for having left the store and setting out what amounted to a grievance, with comments in relation to absences, accusations about drinking, his not been given the permanent job and expressions of dissatisfaction as to the conduct of staff, particularly the assistant managers. David Carr also wrote to Amanda Waterfield in support of the claimant.
- 5.15 On 9th April Amanda Waterfield wrote to the claimant acknowledging his letter of resignation and asking him to confirm whether he really did wish to resign. She offered a grievance meeting to take place on Friday 13th April. The claimant asked to postpone that, which was agreed and it was rearranged for 19th April. However on the day before this namely 18th April the claimant sent an e-mail confirming that his resignation was to be treated as effective and he

would not be attending on 19th April. This was acknowledged and it was noted that the claimant would not be attending the grievance hearing. However a letter sent to the claimant from Sharon Brown, stated that the respondent had undertaken an investigation into the matters which he had raised in his letter and had found that there had been no bullying, harassment or discrimination or any concerns about the claimant's drinking. The letter suggested that comments about this had been light-hearted.

- 5.16 On 4th June on the invitation of Sharon Brown, the claimant wrote a grievance letter and the respondent then invited the claimant to attend a meeting. When he said he felt uncomfortable about entering the store, he was offered that he could attend at a neutral venue. Several dates were offered for the claimant. Ultimately on 27th June Amanda Waterfield acknowledged the claimant had written to formerly withdraw from the appeal process. A further appeal hearing was offered but this was not taken up and the claimant then lodged his application with the tribunal on 17th July 2018.

SUBMISSIONS

6. On behalf of the respondent Mr Famutimi submitted that there had been no discrimination. The claimant's exception taken to comments about his drinking, whether correct or not, were not related in any way to his disability. Furthermore, there had been no formal refusal to give the claimant a permanent job and any delay in resolving that issue was not connected with his disability.
7. Mr Famutimi referred to the burden of proof set out in section 136(1) 2 of the Equality Act 2010 as well as to the case of Madarassy v Nomura International Plc (2007) IRLR 246 and guidance given at paragraph 77 in relation to the burden of proof.

Mr Famutimi referred to the two-stage test and submitted that the claimant was required to show "facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed an act of discrimination". Mr Famutimi referred to other cases including Khan v The Home Office [2008] EWCA Civ. 578 and Johal v Commissioner for Equality and Human Rights UKEAT/0541/09. He submitted that on the claimant's case, his allegations with regard to alcohol or the full-time job were not such as to raise an inference as to discrimination in relation to HIV positive. The allegations made by the claimant with regard to Emma Watson were again not capable of giving rise to a case of discrimination bearing in mind that the evidence provided to the tribunal from the claimant and indeed from the claimant's own witnesses was to the effect that Emma Watson's treatment of all staff was the same and there was nothing to indicate that this related in any respect to HIV positive infection.

8. It was also submitted that the chronology put forward by the claimant did not support this inference, bearing in mind that in his own statement he suggested that even at the beginning of his employment, Emma Watson treated him oppressively and unfairly and this was before she had been made aware of his disability. Insofar as the claimant suggested that some reasonable adjustments be made for him in

relation to his disability, at no time did he raise any matter to make the respondent aware that his HIV positive condition required any adjustments.

9. On behalf of the claimant Mr Amatosi submitted that the claim was made out. He commented in detail with regard to the issues as set out in the appendix to the notes at the preliminary hearing held by Employment Judge Buchanan. He drew a connection between the claimant's illness, his absences from work which he had had, and a need for break which should have been made available for him to take his medication and the fact that alcohol could aggravate the impact upon the claimant taking into account the medication he was taking. He also stressed that changes in his medication and the effects of this were significant factor. He submitted that the discriminatory treatment of the claimant could be pointed to the fact that he had communicated that he was HIV positive.
10. Mr Famutimi commented that the suggestion of a claim based on reasonable adjustments was new and had not been pleaded.

THE LAW

11. The claim of discrimination arising from disability: Section 15 Equality Act 2010, harassment: Section 26 Equality Act 2010. Burden of Proof: Section 136 Equality Act 2010

Findings

12. The burden of proof applicable is set out in section 136 of the Equality Act 2010. This was applied by the tribunal to the two separate claims made by the claimant in this case of disability discrimination and harassment.
13. The tribunal was required to answer the question "Are there facts from which the employment tribunal could decide that the claimant was treated unfavourably in consequence of the disability." The tribunal unanimously found that it was not persuaded that there were such facts. As the claimant appeared to have been subjected to unfavourable treatment there was no evidence that this related to him being HIV positive. On the evidence, the treatment by Emma Watson was not referable to the claimant's medical state and was of a type meted out to other members of staff as shown and confirmed in the evidence of Judith Hopper, who was called by the claimant himself and also in the written statements by two former employees. Contrary to the claimant's assertion later in his evidence the treatment was connected with his communicating his disability, his own initial statement indicated that he was subjected to this type of oppressive treatment as early as the third day of his employment which was before he said he had notified anyone at work that he was HIV positive.
14. The tribunal did not find any material on which to base a connection between rumours which circulated concerning the claimant's use of alcohol and him being HIV positive. Similarly there was no material on which to base any connection as to the slight delay in dealing with the claimant wishing to have a permanent post to the fact that he was HIV positive. The evidence from the claimant was to the effect that the manager April Robson treated him very well and extremely fairly and his

descriptions of her in the letters which he wrote to the respondent are testimony to this. The tribunal unanimously find that none of the unfavourable treatment arose from the disability. Without repeating all that we have said above and for the similar reasons the tribunal unanimously found there was no evidence of harassment or unwanted conduct which could be related to the claimant's disability.

15. Accordingly for the above reasons we did find that the disability discrimination claims are not established and accordingly they are both dismissed.

16. However the tribunal felt it appropriate to say that there were some concerns with the way in which issues were dealt with by the respondent in particular with regard to the following:

- i) There was no production to the tribunal of any relevant policies or training on disability issues or as to the concept of reasonable adjustments
- ii) The tribunal was not provided with any relevant grievance or disability procedures although the respondent may have such policies
- iii) there was a lack of understanding on the part of the manager as to what if any action should be taken where an employee discloses the fact of being HIV positive
- iv) the process with regards to gaining a full-time post appeared to be vague which could cause confusion to staff members
- v) the process of dealing with sickness absence and return to work interviews was inconsistent and in some respects tokenistic

The tribunal offers these comments constructively for the benefit of the respondent and its employees. However one of these concerns affected the tribunal's conclusion that the claims were not made out.

EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 15 April 2019**

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