



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss R Burns

**Respondent:** Global Labour Supply Limited

**Heard at:** Lincoln

**On:** Wednesday 23 and Thursday 24 January 2019

**Before:** Employment Judge Hutchinson

**Members:** Mrs J M Bonser  
Mr W J Dawson

## Representatives

**Claimant:** In Person

**Respondent:** Mr R Port, Solicitor

# RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is: -

1. The claims of disability discrimination fail and are dismissed.
2. The provisional hearing for remedy listed on 20 May 2019 is cancelled.

# RESERVED REASONS

## Background and Issues

1. The Claimant presented her claim to the Tribunal on 7 August 2017. She had been employed by the Respondent at their premises on the Kiln Lane Trading Estate, Stallingborough, North East Lincolnshire as a Labour Planner/Recruiter. She had commenced her employment on 1 June 2015 and was dismissed on 1 March 2017. The reason given for her dismissal by the Respondents was redundancy.

2. The Claimant disputes that that was the real reason for her dismissal. She says that she was dismissed because the Respondents wanted to dismiss her because of her disability which she describes as fibromyalgia. It was not in dispute that the Claimant suffered from that disability and the Claimant did not have sufficient service to be able to claim unfair dismissal under Section 94 of the Employment Rights Act 1996.

3. The legal issues had previously been discussed at a telephone Preliminary Hearing conducted by my colleague Employment Judge Legard on 2 July 2018. These were identified as follows: -

3.1 Direct disability discrimination under Section 13 Equality Act 2010 (EQA): -

3.1.1 Was the Claimant dismissed because she was disabled?

The Claimant relies on a hypothetical comparator for the purpose of establishing less favourable treatment.

3.2 Discrimination arising from disability under Section 15 EQA: -

3.2.1 The unfavourable treatment the Claimant relies upon is her dismissal. She says that she was dismissed because of her inability to perform her role to the required standard and/or her inability/reluctance to use an out of hours contact telephone. Both these disabilities, she contends, arose in consequence of her disability.

The Respondent defends the claim on the straightforward basis that her dismissal had nothing whatsoever to do with either of the above and that the reason for dismissal is redundancy. Alternatively, or in addition, the Respondent seeks to defend the claim because of lack of knowledge of her disability and, if required, justification.

3.3 Duty to make reasonable adjustments under Section 20 EQA: -

3.3.1 The relevant provision, criterion and practice ("PCP") were as follows: -

- A requirement to operate an out of hours mobile phone service
- A requirement to perform a full-time labour planner role

3.3.2 Did either PCP put the Claimant at a substantial disadvantage in comparison to a none disabled person?

3.3.3 If so, what steps, if any should the Respondent have taken to avoid the disadvantage?

3.3.4 At all material times did the Respondent know or ought it reasonably to have known that the Claimant was disabled and was likely to be placed at the relevant disadvantage?

## **Evidence**

4. The Tribunal heard from the following: -

- The Claimant
- Marc Bendon, Agency Manager
- David Jobes, Managing Director
- Gordon Jones, HR advisor and General Manager

5. The Tribunal also had the benefit of an agreed bundle of documents and where I refer to page numbers it is from that bundle.

6. David Jobes gave convincing and consistent and credible evidence, although the other witnesses were not so consistent. This included the Claimant. The Claimant's evidence was not credible and where there was a dispute we preferred the evidence of Mr Jobes. There was little in the way of any documentary evidence. The Respondents are a small employer. It was surprising that despite his qualifications Gordon Jones had no notes of any of the important meetings particularly for a man with 30 years of experience in Human Resources.

## **Facts**

7. The Respondent company supply labour to the ports industry on the river Humber. This is for loading and discharging ships visiting Hull, Goole and Immingham. It had been in business since 1999. Its main customers are Associated British Ports ("ABP"), Global Shipping Services Limited, East Trans and DFDS.

8. The company placed around 120 temporary workers per day with these clients. The workers are mainly engaged in Stevedoring but also worker as fork lift truck drivers, tug driving and general labouring jobs.

9. In May 2015 the Respondents advertised for a Labour Planner and although the Claimant did not have much experience in the recruitment industry she was appointed with effect from 1 June 2015. Her contract of employment is dated 22 May 2015 and is at pages 74-7.

10. The Claimant's duties were to appoint temporary workers from a pool to meet client demand. Temporary workers were generally offered work by way of a text message which would be accepted by a return text message. The Claimant's role included the requirement to input personal data, namely timesheet information concerning labour supplied to customers onto the computer system relevant to the particular workers. The Claimant was also expected to share responsibility for the out of hours mobile phone on an alternate week basis. This was shared between herself and Mr Bendon, Agency Manager.

11. Most communication out of hours was by text message. The total usage of the mobile phone for the period of 13 months between 1 March 2016 and 31 March 2017 amounted to some £88.55 of which £22.96 was a data download. £57.73 was for calls in normal working hours between 9:00 am and 4:00 pm. There was almost no phone usage out of hours during that same period.

12. Until November 2016 the Claimant did not complain about having to use the telephone out of hours.

13. The Claimant's probationary period was for 3 months and this was completed satisfactorily and her pay increased to £23,000 per annum from 1 July 2015.

14. Between 21 October 2016 and 18 November 2016, the Claimant was off sick. Her sick note (pages 81-2) indicated she was suffering from "tiredness symptoms".

15. The Respondents recruited Deborah Toyne on 31 October 2016. She was employed as a Recruitment Assistant and her duties were to assist with marketing and to identify potential new clients and to develop business within the Grimsby food industry. She had knowledge of the Gangmasters regime. It was hoped that the Respondents could obtain a licence with the Gangmasters Licencing Authority ("GLA"). She was expected to share the on call mobile phone duties with Mr Bendon after the Claimant had refused to continue to assist with those duties following the recruitment of Mrs Toyne.

16. When the Claimant was fit to return to work on 21 November 2015 the Claimant held a meeting with Marc Bendon and Gordon Jones. At this stage she had not been diagnosed with fibromyalgia.

17. At the meeting on 21 November the Claimant explained about her symptoms and treatment. She said that despite her problems she had returned to work and she asked to be taken off the out of hours mobile phone. This was agreed to because of her health problems. There were no notes taken of this meeting.

18. She was diagnosed with fibromyalgia when she saw Dr T J Gillett, Consultant Rheumatologist on 16 December 2016. A copy of Dr Gillett's report is at pages 104-5. Having received her diagnosis from Dr Gillett the Claimant attended a meeting on 19 December 2016. Again, there were no notes taken of that meeting. At the meeting the Claimant confirmed that she had been now diagnosed with fibromyalgia. She refused a request from Mr Jones to allow the company to contact her GP and she refused to provide any further explanation of the condition. When Mr Jones asked about the condition he was told to "Google it". They did not discuss working hours or the prospect of her working part time. The Claimant made no such request. There was no referral to occupational health and no further investigation about her condition.

19. The Claimant worked as normal over the next few weeks except for the out of hours mobile telephone. She was also allowed to leave early at times if all her work was completed.

20. During the week commencing 9 January 2017 and 20 February 2017 Mr Benton was away on holiday and whilst he was away the out of hours telephone was covered by Deborah Toyne.

21. On 25 January 2017 the Respondents received an e-mail from Melanie Drayton at ABP attaching a letter from Craig Stevens the Senior Operations Supervisor at ABP (pages 118-9). This advised that APB was giving contractual notice of 3 months to terminate the fertiliser bagging contract with effect from 24 April 2017. This was a substantial part of the Respondent's business.

22. On 20 February 2017 the Respondents also received a letter from GLA advising them that they had not been successful with their application for a licence (page 120-2).

23. On 21 February 2017 there was a discussion in the office between the Claimant and Mr Jones about the fact that she had left the office unattended during working hours on 20 February 2017. A customer had tried to contact the office between 4:00 pm and 5:00 pm and no one was there with authority to answer the query after Mrs Holmes, the Personal Assistant, had answered the

phone. We are satisfied that Mr Jones did not shout at the Claimant. The Claimant admitted that she had left early, but blamed the situation on Mr Bendon who allowed her to leave early. She did not mention anything about her stress levels and the effect it had on her condition. Mr Jones said that whilst he was aware that Mr Bendon would allow the claimant to leave early from time to time it was on condition that all of the office jobs had been completed for the day and provided that the office was still manned until the end of the business day.

24. On 24 February 2017 Deborah Toyne resigned to take up a position elsewhere (page 123).

25. On 27 February 2017 there was a meeting between Mr Jobs, Mr Bendon and Mr Jones. At that meeting they discussed both the GLA situation and the ABP decision. Clearly these two matters would have a significant impact on the viability of the business and Mr Jobs started off the meeting with a proposal that they should close the business down. Mr Bendon suggested that the business should return to how it was run in 2016 i.e. with only one employee, Mr Bendon. Deborah Toyne had already resigned and there was therefore only Ms Burns working in the office. They agreed that she should be made redundant.

26. On 1 March 2017 Mr Jones met with Ms Burns and gave her notice of termination by reason of redundancy. The meeting was short and there was no consultation with the Claimant who was simply called into Mr Jones's office who read her the redundancy letter and asked her to leave the building immediately. The letter is at pages 125-6. The Claimant was distressed by this. He explained to her that the reason for the dismissal though was the loss of the ABP contract and the failure to secure work from the GLA.

27. After the meeting the Claimant handed in a letter which she says was written by her on 28 February 2017. The letter is at page 128 and complains about the behaviour of Gordon Jones. She complained about being distressed by his behaviour during the meeting on 21 February 2017 and another incident which occurred on 24 February 2017 when he had telephoned the claimant after Deborah Toyne had resigned from her employment. She said that he had told her that she would now be expected to be responsible for the out of hours telephone.

28. The Claimant appealed against the decision to make her redundant by way of a letter dated 3 March 2017 (page 129). She expected to be paid normally until the appeal process was complete.

29. Mr Jobs then carried out an investigation into the Claimant's allegations against Mr Jones. He interviewed: -

- Marc Bendon (page 130-2)
- Christine Holmes (page 133)
- Richard Mumby (page 134)
- Richard Hull (page 135)

30. Mr Jobs then wrote to the Claimant on 9 March 2017 (page 136/7). He decided that he did not accept that the Claimant's treatment by the company or by Mr Jones was contrary to any employment legislation nor was it unfair. He went on to say:

"I appreciate that you have asked for an appeal. In the circumstances,

and for the reasons that have already been made clear above, there seems no point in you appealing the decision to make your position redundant. With regard to your request to be continue to be paid normally until this is complete, I consider this to be an end of the matter and no further payment will be made to you.”

31. The Claimant was paid her holiday pay, wages to 1 March 2017 and her notice pay.

## **The Law**

### Direct Disability Discrimination

32. Section 13 EQA provides:

“(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.”

33. This means the Tribunal has to decide whether the Claimant has been less favourably treated than others because of her protected characteristic of disability. In this case the Claimant relies on a hypothetical comparator i.e. someone who did not have her disability namely fibromyalgia.

34. The circumstances of a comparator are considered in the case of **Shamoon v Chief Constable of Royal Ulster Constabulary** [2003] ICR 337.

35. Not only must the comparator be in the same material circumstances as the Claimant but those circumstances must include the disabled persons abilities. Accordingly, when making a comparison for the purposes of establishing direct disability discrimination, a Tribunal must take account of how a person with the same abilities as the Claimant would have been treated (IDS Employment Law Handbook, Discrimination at Work).

### Discrimination

36. Section 15 EQA provides:

“(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. There are 3 elements to such a claim namely: -

37.1 That the disabled employee must have been treated unfavourably.

37.2 That this was because of something arising in consequence of her disability.

37.3 Any allegation will only succeed if the employer is unable to justify the unfavourable treatment by pointing to a valid (.i.e none discriminatory) reason for it.

#### Failure to make reasonable adjustments

38. Section 20 EQA provides:

“(2) The duty comprises of the following 3 requirements: -

(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is the requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparisons with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.”

39. Section 21 EQA provides:

“(1) A failure to comply with a first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against disabled person if A fails to comply with that duty in relation to that person.”

40. In a case of a failure to make reasonable adjustment allegation the Tribunal must identify the provision, criterion or practice (PCP).

41. The Tribunal then must ask whether the PCP put the Claimant at a substantial disadvantage in comparison to a none disabled person.

42. If so, the Tribunal must ask what steps if any should the Respondent have taken so as to avoid the disadvantage.

43. We must consider whether at all material times the Respondent knew or ought reasonably to have known that the Claimant was disabled and was likely to be placed at the relevant disadvantage.

#### Burden of Proof

44. Section 136 EQA provides as follows:

“(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.”

45. As is now well established it is not enough for the burden of proof to shift by only demonstrating a difference in status and treatment. There must be some evidence that points towards less favourable treatment because of a protected characteristic to engage the Respondents burden of adducing a non-discriminatory explanation. The appropriate authorities are: -

- **Igen v Wong** [2005] ICR 931
- **Madarassy v Nomura International Plc** [2007] IRLR 246

### **Our Conclusions**

46. It is not in dispute that the Claimant was suffering from a disability at the relevant time. She was suffering from fibromyalgia which had been diagnosed in December 2017. The only information that the Respondents had about her condition was that contained in the fit notes ie that she suffered from “tiredness symptoms” and when they were told that she was suffering from fibromyalgia. The Claimant would not allow them to have details about her condition by contacting her doctor, nor would she discuss her condition with them.

47. The Claimant was dismissed on 1 March 2018 and the reason for her dismissal was redundancy. This was caused by: -

47.1 The loss of the contract with ABP and;

47.2 the failure to obtain a GLA licence.

48. The last event was discovered by the Respondent on 24 February 2018 and at that time the Claimant’s only colleague Deborah Toyne had resigned.

49. At the time of making the decision Mr Jobs knew that the Claimant was suffering from fibromyalgia but it had nothing to do with his decision to dismiss.

50. So, in this case although the Respondent knew about her disability and they accept that they dismissed the Claimant, which is the less favourable treatment complained of, she was not dismissed because of her disability.

51. To succeed with a claim of direct discrimination the Claimant would have had to show that she had been treated less favourably than a real or hypothetical comparator. In this case the Claimant relies on a hypothetical comparator namely a person without fibromyalgia and with the same or similar abilities to the Claimant. Deborah Toyne would have been an appropriate comparator although she had already resigned at the time. We are satisfied that if she had not resigned she would not have remained in employment and that she too would have been dismissed by reason of redundancy.

52. The claim, therefore, of direct discrimination fails.

### **Discrimination arising from Disability**

53. As set out at the beginning of this hearing Employment Judge Legard had identified the issues for us to determine. Again, the unfavourable treatment



relied on by the Claimant is her dismissal. She says that she was dismissed because of

- her inability to perform her role to the required standard and/or
- her inability/reluctance to use an out of hours contact telephone.

She contends that these inabilities arose in consequence of her disability.

54. We are satisfied that the Claimant's dismissal had nothing to do with either of the matters referred to above and that her dismissal was caused by the loss of the contract with ABP and the failure to obtain the GLA licence.

55. The Respondents had no issues about her capabilities to perform her job and there was no issue with the out of hours telephone. She had requested that she could be taken off this duty on her return to work after sick leave and this had been agreed and never been reviewed.

56. In these circumstances the claim of discrimination arising out of disability also fails and is dismissed.

#### Failure to make Reasonable Adjustments

57. We identified at the commencement of this hearing that the relevant PCP's relied on were: -

- A requirement to operate an out of hours mobile phone service
- A requirement to perform a full-time labour planner role

58. We have heard no evidence to substantiate the complaint that the Claimant had been placed at a substantial disadvantage in comparison to a non disabled person in respect of those PCP's.

59. In any event the Respondents had made reasonable adjustments in taking away the responsibility for the out of hours office telephone.

60. They had also agreed to allow her to amend her start and finish times and there was never any other request to reduce her hours. At no stage did the Respondents insist upon a requirement that she should work on a full-time basis.

61. The claim that the Respondent had failed to make reasonable adjustments also fails and is dismissed.

62. The hearing listed for 20 May 2019 is therefore cancelled.

---

Employment Judge Hutchinson

Date 26 April 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE