



EMPLOYMENT TRIBUNALS

Claimant: Mr D Freeman

Respondent: Nottingham Boat Company Ltd

Heard at: Nottingham **On:** 23, 24 and 25 April 2019

Before: Employment Judge Brewer
Mr R N Loynes
Mr W J Dawson

Representation

Claimant: In person

Respondent: Ms A Pitt, Counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is:

- 1 The claim for direct disability discrimination fails and is dismissed
- 2 The claim for discrimination contrary to section 15, Equality Act 2010 fails and is dismissed
- 3 The claim for failure to make reasonable adjustments fails and is dismissed

REASONS

Introduction

- 1 In this case the Claimant brings claims for disability discrimination (direct and 'arising from') and failure to make reasonable adjustments under the Equality Act 2010. The Claimant represented himself. Ms Pitt of counsel represented the Respondent. We have an agreed bundle and we heard oral evidence from the Claimant and for the Respondent from Mr Robinson, Mrs Robinson and Mr Ellis. We had witness statements from each witness. We heard and have taken into account submissions from both parties.

Issues

- 2 At a preliminary hearing held in person on 14 January 2019 the parties agreed the issues which were set out in a detailed note by EJ Faulkner and which we do not need to repeat here.

Law

3 We set out here a summary of the relevant law.

Direct Discrimination

4 Section 13 of the Equality Act 2010 prohibits less favourable treatment of a disabled person because they are disabled. For this type of discrimination to occur, the employer or other person must know, or reasonably be expected to know, that the disabled person has a disability.

Discrimination arising

5 Section 15 of the Equality Act 2010 prohibits the unfavourable treatment of a disabled person unfavourably because of something arising from, or in consequence of, the disability, such as the need to take a period of disability-related absence. It is, however, possible to justify such treatment if it can be shown to be a proportionate means of achieving a legitimate aim. For this type of discrimination to occur, the employer or other person must know, or reasonably be expected to know, that the disabled person has a disability.

Reasonable adjustments

6 Sections 20 and 21 of the Equality Act 2010 set out the framework for the duty to make reasonable adjustments. Schedule 8 contains further provisions applicable to that duty (see paragraphs 1, 2, 5 and 20). In particular, there is no duty on an employer to make reasonable adjustments if he does not know or could not reasonably be expected to know that the employee has a disability and is likely to be placed at the relevant substantial disadvantage.

7 Knowledge of disability, whether actual or constructive, must be knowledge of the following three matters:

- a. the impairment (whether mental or physical);
- b. that it is of sufficient long-standing or likely to last 12 months at least;
- c. that it sufficiently interfered with the individual's normal day-to-day activities to amount to a disability.

8 However, there is no need for the employer to be aware of the specific diagnosis of the condition.

9 Finally, we note section 136 of the Equality Act 2010 and the so-called shifting burden of proof which we have referred to below.

Findings of fact

10 We make the following findings of fact (references to 'Doc' are to the document numbers in the agreed bundle).

11 The Claimant was employed by the Respondent as a paint shop sprayer from 19 February 2018 to 11 May 2018 on which date he was dismissed.

12 The Respondent is a small company with around 18 employees at the material time. The Respondent's business is bespoke boat building which involves them receiving the steel shell of the boat and then constructing the particular vessel to the customer's requirements. The key tasks are spraying

and finishing. It is not necessary to go into further detail of the processes adopted by the Respondent save that the work environment is what may be described as health and safety critical.

- 13 The Respondent is owned and run jointly by Mr and Mrs Robinson. Mrs Robinson undertakes all of the administrative work.
- 14 The material facts can be stated quite shortly.
- 15 The Claimant suffers from a bowel disease, Microscopic Lymphocytic Colitis ("colitis"). During his employment he advised a colleague, Mr Tongue, of this.
- 16 On 2 March 2018 the Claimant resigned from his role, but he was persuaded after a meeting with Mrs Robinson and Mr Ellis, to withdraw his resignation and he returned to work on 6 March 2018.
- 17 On 19 March 2018 the Claimant had a day off as his car had broken down.
- 18 Between 23 and 27 March 2018 the Claimant went on pre-booked holiday.
- 19 At that point and into early April the Respondent was happy with the Claimant's performance and he had a good appraisal on 9 April 2018 (Doc 18a) and was given a small pay rise.
- 20 On 19 April 2018 the Claimant had a day off sick.
- 21 In late April 2018 Mr Ellis asked an experienced colleague of the Claimant's, Mr Clark, to give support to and train the Claimant in certain new tasks.
- 22 On 2 May 2018 the Claimant left work early due to sickness and he returned on 5 May 2018.
- 23 By 10 May 2018 the Claimant's line manager, Mr Ellis, had been noting and receiving reports that the Claimant was being negative, un-cooperative, swearing and being what has been termed aggressive.
- 24 This came to a head on 11 May 2018 when according to Mr Ellis the Claimant was negative, argumentative and swearing at him.
- 25 Mr Ellis says he then had a conversation with Mr Robinson about the Claimant to the effect that it was time to 'let him go'.
- 26 At around 11.00 am the Claimant was called into a meeting with Mr Ellis and Mr Robinson. The meeting was short. The Claimant was dismissed with immediate effect.
- 27 After the meeting Mr Ellis accompanied the Claimant to retrieve his personal belongings.
- 28 By a Claim Form dated 31 May 2018 the Claimant made the claims set out above (Doc 37). Initially the Respondent denied that the Claimant was disabled within the meaning of section 6 Equality Act 2010 (Doc 39) but that matter was dealt with at a preliminary stage it being determined that the Claimant met the requirements of section 6 and thus at the date of dismissal, dismissal being the only act of discrimination complained of, he was a disabled person.

Discussion and conclusion

- 29 The Tribunal was of the view that had the Claimant brought a claim for unfair dismissal he would have succeeded. The procedure adopted to dismiss the Claimant fell far short of what would be considered reasonable in all the circumstances and we have considered whether we can draw an adverse inference from this. However, we are satisfied that Mr Robinson did not act in a way he had not acted previously when dismissing staff in such circumstances. He readily accepted that with hindsight he had not been following best practice but he had never received an ET claim previously and there was therefore no impetus to change. The company did not access expert HR or legal advice before although we note that since this claim they have subscribed to an HR consultancy and we commend them for that step.
- 30 The key issues in this case are whether the Respondent had actual or constructive knowledge of the disability at the date of dismissal and in relation to the reasonable adjustments claim whether the Respondent had actual or constructive knowledge of the substantial disadvantage the Claimant contends for, and what was the reason for the dismissal.
- 31 Turning first to credibility, we found none of the witnesses save for Mr Ellis, to be entirely credible. Each changed their evidence to some degree. The Claimant admitted telling lies to his employer but seemed to suggest that because he was honest before us about being dishonest previously this made him more, not less credible. Not surprisingly Miss Pitt took the opposite view. Credibility is not all or nothing and we have been greatly assisted by the evidence of Mr Ellis. Mr Ellis had not been present at the hearing until he was called to give his evidence. He had been abroad until the end of the second day of the hearing. He left the Respondent's employment in June last year and there was no suggestion from the Claimant that Mr Ellis was supporting the Respondent's case either out of loyalty or indeed for any other reason.
- 32 That said, we turn to the issue of knowledge.
- 33 The Claimant told a colleague, Mr Tongue, that he had colitis following his absence on 19 April 2018. In our judgment the fact that a work colleague not in any management position was aware of the fact of the colitis did not fix the Respondent with knowledge of a disability (whether actually or constructively). All Mr Ellis knew was that the Claimant had an upset stomach and we find that this was not sufficient to fix the Respondent with the requisite knowledge. Indeed the Claimant says in his witness statement that as at 2 May 2018 "the Respondents were still unaware of my disability". We agree. We also find that this was not sufficient to expect that the Respondent should investigate the state of the Claimant's health further.
- 34 The Claimant went off sick again on 2 May 2018. Putting the Claimant's case at its highest, he told Mr Ellis he had 'abdominal problems' that day, he told Mr Robinson that he had flu like symptoms and he told Mrs Robinson that he had been told by his GP that he had a chest infection. Again we find that this was not sufficient to fix the Respondent with the requisite knowledge of his disability, whether actually or constructively.
- 35 We now come to a major area of dispute. The Claimant says that on 10 May 2018 Mr Ellis told him that Mr Tongue had told him, Mr Tongue, that the Claimant had told Mr Tongue of the colitis. Mr Ellis simply denies that this conversation took place. Mr Ellis says he learned of the colitis late in the

afternoon of 11 May 2018, after the Claimant's dismissal. He says he told the team after lunch of the dismissal and later that day Mr Tongue told him what the Claimant had said about having colitis.

- 36 We have said that we found Mr Ellis to be a credible witness and we unreservedly accept that he was told about the colitis by Mr Tongue on the afternoon of 11 April 2018. As to the credibility of the Claimant's evidence, we note that he had been dishonest in his dealings with his employer and we find it hard to accept his evidence that he was too embarrassed to tell his employer about his medical condition but not too embarrassed to tell Mr Tongue whom he barely knew and did not work with and we do not accept this. If the Claimant could tell Mr Tongue about having colitis he could in our judgment have told his employer.
- 37 Thus we find that the Respondent, at the date of dismissal, 11 May 2018, knew that the Claimant had been off sick on 2 occasions, once with diarrhoea and once with 'stomach problems' (as told to Mr Ellis), or flu like symptoms (as told to Mr Robinson), or a chest infection (as told to Mrs Robinson), but that is all the Respondent knew. It did not know and could not reasonably have known that the Claimant was suffering from colitis, or that he had a long-term condition, or that it had any, let alone any substantial, adverse affect on his ability to carry out day-to-day activities.
- 38 For this reason alone the claims fail.
- 39 We have considered what the position would be if we were wrong about that and we have turned our mind to the 'reason why' issue.
- 40 We are satisfied, given the entirety of the evidence, that Mr Robinson dismissed the Claimant for the reasons he gave to us, that is that the Claimant was negative, un-cooperative and aggressive. The evidence of the Respondent's witnesses on this point, which we have accepted, makes clear that the following sequence of events occurred.
- 41 Mr Ellis had an issue with the Claimant's attitude on the morning of 11 May 2018. He had received a number of previous complaints about the Claimant and this was, for him, what we might call the last straw. He spoke to Mr Robinson and they agreed that the Claimant should leave.
- 42 The Claimant was called into a meeting with Mr Robinson and Mr Ellis at around 11.00 am on 11 May 2018 and after a short meeting, at which his aggressive and un-cooperative behaviour had been raised, he was dismissed.
- 43 Mr Ellis accompanied the Claimant to retrieve his personal belongings. The Claimant left the premises and after lunch, Mr Ellis told the Claimant's colleagues what had happened.
- 44 In the meantime Mr Robinson sent a text to Mrs Robinson, which said: "I've had to let Dean go today, he wasn't doing the team thing" (Doc 76). The reference to the 'team thing' was to the Claimant being negative, un-cooperative and aggressive.
- 45 Mrs Robinson wrote the Respondent's dismissal letter. She contacted Mr Ellis on the afternoon of 11 May 2018 and asked him to produce a note of the issues he had with the Claimant (and we note for the avoidance of doubt that she did not ask for a note of what happened or what was said at the dismissal

meeting). Mr Ellis did this (Doc 26) and he left it on Mrs Robinson's desk.

46 Before Mrs Robinson produced the dismissal letter the Claimant emailed to ask for reasons for his dismissal (Doc 27). Mrs Robinson then produced the dismissal letter at Doc 29a.

47 We accept of course that neither Mr Ellis' note nor the dismissal letter refer to the Claimant's aggressive behaviour, but we accept Mr Ellis' evidence that he did not want that to appear in a dismissal letter as he did not wish to damage the Claimant. Of course there is no reference to aggressive behavior in the dismissal letter because that is based upon the matters set out in Mr Ellis' note.

48 We are satisfied that the reason why the Claimant was dismissed was his conduct and in particular his negative, un-cooperative and verbally aggressive behaviour, not his absences and not his impairment and thus even if the Respondent had actual or constructive knowledge of the disability, that played no part in the dismissal.

49 In our judgment the Claimant did not show facts from which we could decide, in the absence of any other explanation that the Respondent contravened the Equality Act 2010, but even if he had, we are entirely satisfied that that Respondent has shown that it did not in fact contravene the 2010 Act.

50 For all of those reasons the claims fail and are dismissed.

Employment Judge **Brewer**

Date:- 26 April 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....
FOR THE TRIBUNAL OFFICE