EMPLOYMENT TRIBUNALS

Claimant: Mr E Smith

Respondent: Intelling Limited

Heard at: Manchester **On:** 11 and 12 February 2019

Before: Employment Judge Rice-Birchall
Miss S Howarth
Ms B Hillon

REPRESENTATION:

Claimant: Miss A Smith, Lay Representative. Mother
Respondent: Miss L Halsall, Consultant

JUDGMENT

The judgment of the Tribunal was sent to the parties on 11 March 2019. These are the written reasons, as requested by the Claimant.

REASONS

Disability

1. It had been determined at a preliminary hearing held on 4 July 2018 that the claimant was disabled within the meaning of the Equality Act 2010 because of anxiety/depression.

Representation

2. The claimant was expecting representation but confirmed that he was happy to proceed in the representative's absence. He was instead represented by his mother, Miss Smith. There was no other representative on record on the file.

Issues

3. The issues to be determined had been agreed previously as set out below and were listed in a case management agenda. The parties agreed at the outset of the hearing that these were the issues to be determined:

Section 15 claim:

a. Did the respondent have the required knowledge about the claimant as a disabled person?

b. Did the respondent treat the claimant unfavourably by:

   i. dismissing him;

   ii. not considering moving him to a sales role;

   iii. not providing additional support; and

   iv. not following disciplinary procedures.

c. Was the claimant treated in this way because of the following which arise from the claimant's disability:

   i. his anxiety;

   ii. his difficulty dealing with people on the phone or face to face; and/or

   iii. lack of experience of cold calling.

d. Did the Respondent have a legitimate aim for its treatment of the claimant . If so, what was it?

e. Did the respondent act proportionately to achieve that legitimate aim?

Section 20-21 claim: failure to make reasonable adjustments

f. Did the respondent have the required knowledge about the claimant as a disabled person?

g. Did the respondent apply the following provisions, criteria or practices (PCPS):

   i. a requirement for all employees to be flexible; and

   ii. a requirement for all employees to work on any type of campaign.

h. Did these PCPs disadvantage the claimant due to his disability?

i. Was the respondent under a duty to make adjustments for the claimant?

j. Did the respondent fail to make those reasonable adjustments?

k. Would the following adjustments have been reasonable:

   i. placing the claimant in a customer service role only;

ii. providing additional support if he was working in a sales role; and/or

iii. following the disciplinary procedure.

Documents

4. There was an agreed bundle of documents. At the outset of the hearing the Respondent produced some additional documents (which it stated it had disclosed to the claimant in advance but which Miss Smith had not seen because they had been disclosed to the solicitor who was assisting the claimant but who was not on record) and sought to introduce them into the bundle as they were relevant to the Claimant's dismissal. Miss Smith agreed to their inclusion in the Bundle.

Witness evidence and Credibility

5. We heard evidence from the claimant and his mother. The Tribunal found that both gave open and honest accounts of their experiences.

6. For the respondent, the Tribunal heard from: Catie O'Mahoney, the Respondent's HR Director; Kim Massey, Assistant Operations Manager; Liam Radford, Operations Manager; and Tom Allen.

7. The respondent's evidence was evasive, confusing and contradictory. By way of example, the witnesses were not able to clearly enunciate the reason for the claimant's dismissal. In the pleadings, the Respondent relied on capability as the reason for dismissal, but explained that, because the claimant had under two years' service, no process had been followed. That reason was also given in the witness statements of both Catie O'Mahoney and Liam Radford. However, the respondent's case, put both at the hearing and in submissions, was that the claimant was dismissed because of his length of service and the respondent's requirement for fewer employees, a totally different state of affairs to what was pleaded and what information was given to the claimant at the time of his dismissal. There was a lack of documentary evidence to back up the respondent's assertions of addressing performance issues, for example, or making adjustments as alleged. The respondent was also unable to answer basic questions, including who the claimant's line manager was.

The Facts

8. The respondent runs campaigns on behalf of its clients and employs staff according to the requirements of those campaigns. It therefore employs a fluctuating number of employees given the fluctuating needs and numbers of those campaigns.

9. The claimant commenced employment on 22 February 2016 as an apprentice on the Missguided Campaign for the respondent. The respondent was unable to say at any point in time who the claimant's team leader was.

10. In October 2016, the claimant attended a disciplinary meeting due to sickness absence with Liam Radford, a senior manager. At that meeting, the claimant informed Liam Radford of his anxiety and showed him the letters which appear at

pages 167 and 127 of the bundle. They included an appointment for Manchester Mental Health.

11. On 1 December 2016 the claimant sent a text to Tom Johnson, who he believed was his team leader at the time, explaining that he had had a panic attack.

12. On 20 January 2017, the claimant's employment was terminated for the first time. It is not possible to correctly establish the reason for the termination of his employment. The letter confirming the termination of his employment, which was sent on 2 February, simply states that he has not reached the required standard without reference to anything more.

13. The claimant appealed that decision on 9 February 2017, making it clear that he had no idea that management were not satisfied with his performance, that he had informed the leadership team of his problems with anxiety and that no process had been followed other than he had received a first written warning following his conversation with Liam Radford about sickness, not performance as suggested.

14. The claimant was invited to an appeal hearing on 7 March 2017. The decision was made to overturn the decision to terminate the claimant's employment and to reinstate him, albeit to a role which was no longer that of an apprentice (as, in fact, it was discovered that he had not received any training of any sort as an apprentice, as a result of which the Respondent had to pay him back pay as he was entitled to be paid at a rate which was not an apprentice rate).

15. The claimant re-joined the respondent on 20 March (his employment was stated to be continuous from 22 February 2016 when he commenced employment) and was employed as a Customer Service Adviser on the Missguided Campaign. The Tribunal accepts the claimant's evidence that he spoke to Tom Allen on his return to work about his anxiety.

16. In April 2017 the claimant was moved onto the O2 contract which was sales based rather than customer service based. As a result, the role involved more phone based work. The Tribunal was given no credible explanation of how the claimant and the few colleagues who were also selected for this move were selected, rather than the remaining 30+ team members. There was no consultation process. The claimant did not make a fuss because he had only just returned to work after his successful appeal.

17. The claimant's anxiety levels soared in this new role and he went to see his GP in May 2017 and was signed off sick. He remained off sick until 20 June 2017. Around the same time, the claimant's mother wrote to Catie O'Mahoney from HR and someone called "Rebecca" to thank them for reinstating her son but also to explain her serious concerns for his mental health following the transfer to the O2 campaign and the sales role.

18. Catie O'Mahoney subsequently met with the claimant, albeit that he was on sick leave, to discuss the claimant's mental health and work. He had a further meeting with Catie O'Mahoney on 16 June 2017.

19. Subsequent to that meeting, the claimant wrote to Catie O'Mahoney on 18 June 2017 to inform her that he understood that some of his colleagues had been

reinstated to the MissGuided Campaign and requesting that he should also be transferred back to it. Catie O'Mahoney confirmed by email that the claimant would be transferred back to that campaign with hours of 2.00pm to 10.00pm. This was to enable the claimant to have more support.

20. The respondent informed us, though with no written evidence to demonstrate as much, that the claimant returned on the "glide path", which was aimed to ease employees, for example after a period of sickness absence, back into achieving the targets and demands. It began with lower targets and demands which gradually increased to the "normal" level. The claimant accepted that he was on that pathway.

21. The claimant's evidence, which the Tribunal accepts, is that he was not made aware of any performance issues and that, to the contrary, Kim Massey informed him that he was on track and making good progress. There was no documentary evidence of any file notes or disciplinary issues, with the exception of a "critical fail", which the respondent said would have been discussed with him (although they could not confirm that it had actually been discussed with him and there was no documentary evidence of such a discussion). In any event after a certain number of critical faults, usually three, employees would face disciplinary proceedings. There was no evidence of such proceedings in relation to the Claimant in the bundle.

22. On 12 July 2017, having returned to work on 20 June 2017, the claimant had a return to work meeting with Kim Massey who had become his line manager.

23. On 14 July 2017, without warning or consultation, just two days after the return to work meeting, the claimant's employment was terminated. He did know at the time that some of his colleagues had also been affected and had also had their employment terminated. The claimant admitted that, in the days prior to his dismissal, he had been leaving work early as there had not been enough work for him to do.

24. The claimant attended a meeting at which his employment was terminated. The minutes of that meeting state as follows:

> "R: As you are aware your employment is being reviewed due to performance, attendance or unauthorised absence, behaviours, probation, work volume. As such we have to review your position with the Campaign company. Do you understand this?
>
> C: Yes.
>
> R: You commenced employment with us on 22 February and are currently employed on the MIssGuided Campaign, is that correct?
>
> C: Yes.
>
> R: Due to the above we have made the decision to terminate your employment. You will be paid one week's notice. You have the right to appeal the decision. Do you understand?
>
> C: [No questions] I understand."

25. That is a flagrant disregard of the truth as the Respondent now puts it. It simply does not reflect accurately the situation as it really was at the time according to the Respondent's evidence, which is that there was a requirement for fewer employees. The claimant was, understandably, confused and upset.

26. The respondent did not see fit to explain the circumstances surrounding the claimant's dismissal or to provide any explanation or warning at all. It seems that this was on the basis that the Claimant (and others affected) had under two years' service.

27. The letter of termination is almost identical to the letter sent to the claimant on the first occasion he was dismissed, and again refers to the respondent monitoring all aspects of his attendance, performance, etc., as being the basis of the decision to terminate his employment.

28. It is noteworthy that the respondent's amended grounds of resistance and the witness statements of both Catie O'Mahoney and Liam Radford state that the claimant's employment was terminated due to his capability. However, throughout the respondent's oral evidence, and with reference to the documentation produced to the Tribunal at the outset of the hearing, the position put forward by the respondent Tribunal is that, in fact, this was a redundancy situation. The statistics produced to the Tribunal for inclusion in the Bundle were, it was alleged, quality and absence statistics, though no plausible explanation was given to how they were obtained, what they meant or how they were taken into account. Despite being informed by the respondent that he obtained the statistics, the dismissing officer, Mr Radford, was unable to explain what they meant and how they had been applied.

29. Having pieced together the information provided, the Tribunal made a finding of fact that the real reason for the termination of the claimant's employment was a headcount reduction, as there was a requirement for fewer employees on the MIssguided Campaign. That was evidenced not only by the respondent's oral evidence but by the claimant stating that he was aware that there was less work (as he had been leaving work early on some occasions) and that some of his colleagues had also left at the same time.

30. The Tribunal also tried to understand how the claimant was selected but this proved very difficult on the documents and with the evidence available.

31. The statistics produced included some quality statistics which could not be explained, and also absence information as well as start date. The respondent could not explain to our satisfaction how the claimant's period on the O2 campaign or how his absence for anxiety would have impacted on his statistics, or was or was not taken into account.

32. The Tribunal was also troubled that some employees who appeared to have less service than the claimant were not dismissed and that some of those with less service appeared to have similar quality statistics to the claimant. Further, although the claimant had less than two years' service, he had the longest continuous employment of those "selected" for dismissal, but that may have been because there was an error in that his start date was calculated from March 2017 (when he was reinstated) rather than from his original start date of February 2016.

33. The Tribunal made a finding of fact that the decision to terminate the claimant's employment was made on the basis of certain rankings which were articulated in an email from Catie O'Mahoney in April 2017, albeit in relation to a different reduction in headcount. The respondent first identified those with under two years' service and then considered such things as whether an employee had a specific language skill that is required for the business going forward. Nonetheless, the key criterion was length of service, most notably whether or not the employee had under two years' service.

The Law

34. Section 15 of the Equality Act 2010 states that "a person discriminates against a disabled person if:

a. he treats the disabled person unfavourably because of something arising from, or in consequence of, that disabled person's disability, and

b. he cannot show that the treatment is a proportionate means of achieving a legitimate aim, and

c. he knew, or could reasonably have been expected to know, that the disabled person had the disability."

35. This provision is of relevance where a disabled person is treated unfavourably because of something arising from, or in consequence of, his disability, such as the need to take a period of disability-related absence, rather than because of the disability itself.

36. Unfavourable treatment is different from a 'detriment'. It means placing a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person.

37. The Tribunal must determine first whether the employer treated the employee unfavourably because of an identified 'something', and, second, whether that 'something' arose in consequence of the employee's disability?

38. The first question involves an examination of the employer's state of mind, to establish whether the unfavourable treatment which is in issue occurred by reason of the employer's attitude to the relevant 'something'. The second question involves an examination of whether there is a causal link between the employee's disability and the relevant 'something'. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

39. If it has been established that the disabled person was treated unfavourably because of something arising from, or in consequence of, his disability, the next stage is to consider whether the treatment was a proportionate means of achieving a legitimate aim. It is for the employer to prove justification.

40. Where someone does not know, and could not reasonably have been expected to know, that the person he treats unfavourably has the disability he in fact has, that treatment will not amount to actionable discrimination.

41. The Equality Act 2010 states that the duty to make reasonable adjustments will only apply where a disabled person is put at a substantial disadvantage in relation to a 'relevant matter' in comparison with persons who are not disabled.

42. The duty (to take such steps as it is reasonable to have to take to avoid the disadvantage) applies where a 'provision, criterion or practice' (PCP) applied by the employer causes such a disadvantage.

43. A substantial disadvantage is one that is ‘more than minor or trivial’. Whether a claimant has been substantially disadvantaged in comparison to a person without his disabilities is a question of fact for the employment tribunal to determine.

44. The employer will only be subject to the duty to make reasonable adjustments if he either knows, or could reasonably be expected to know, that the relevant disabled person has a disability and that that disabled person is likely to be placed at a substantial disadvantage by the provision, criterion or practice.

45. The duty requires comparison 'with persons who are not disabled', but they need not be in exactly the same position as the disabled person.

46. The duty is to take 'to take such steps as it is reasonable to have to take' to avoid the disadvantage. The proposed adjustment must be one that has a real prospect of preventing the disadvantage before the adjustment becomes one which the employer is placed under a duty to make.

47. An employer will only be under a duty to make a particular proposed adjustment (and hence only in breach of the duty to make reasonable adjustments if that adjustment has not been made) if it is reasonable in the circumstances to expect the employer to make that adjustment.

48. EHRC's Employment Code of Practice suggests some 'factors which might be taken into account when deciding what is a reasonable step for an employer to have to take' which include: whether taking any particular steps would be effective in preventing the substantial disadvantage; the practicability of the step; the financial and other costs of making the adjustment and the extent of any disruption caused; the extent of the employer’s financial or other resources; the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and the type and size of the employer.

49. EHRC's Employment Code of Practice lists examples of reasonable adjustments, which includes, for example, allocating some of the disabled person’s duties to another worker and transferring the disabled worker to fill an existing vacancy. An employer is not required to make any adjustment which will not cure, or at least limit, the substantial disadvantage at which the disabled person is placed, since in those circumstances it cannot be said to be 'reasonable' under the terms of the Act to make it.

Conclusions

Knowledge

50. As regards knowledge, the Tribunal finds that the respondent had, or at very least could reasonably have been expected to have knowledge of the claimant's disability from October 2016. The Tribunal's findings were that the claimant had a conversation with Liam Radford at around that time during which brought his anxiety to his attention and produced medical evidence. As Liam Radford was a senior manager, this was sufficient to bring it to the respondent's attention.

Section 15 claim

51. The next issue for the Tribunal to determine is whether the respondent did what the claimant alleged was done to him which constitutes unfavourable treatment.

52. It is accepted that the Claimant was dismissed and that the act of dismissal constitutes unfavourable treatment.

53. The Tribunal also accepts that, as an alternative to dismissal, the respondent did not consider moving the claimant back to the sales role. However, the Tribunal does not accept that this was unfavourable treatment of the claimant in the circumstances, which were that it was clear that the claimant did not want that role and in fact had recently been moved away from it at his request and for health reasons.

54. The Tribunal further does not accept that the respondent did not provide additional support to the claimant, as, in fact, there was evidence of support being given: glide path, changes in shifts for additional support, and indeed moving the claimant back to the MissGuided Campaign at his request.

55. Further, the respondent did not fail to follow its disciplinary proceedings in respect of the claimant. In fact, there was no evidence that there were any disciplinary issues to be addressed.

56. A failure to follow disciplinary proceedings could be unfavourable treatment of the claimant, because it would not give him any opportunity to improve, assuming there were disciplinary issues to be dealt with. The claimant states specifically in his letter of appeal, "Had I been told that there were performance issues I would have tried to improve". This, however, was based on the claimant's understandable but mistaken belief that he was dismissed for concerns about his performance.

57. The reason for any unfavourable treatment must be something that arises as a result of the disability, in this case anxiety/depression. In the list of issues, the claimant identifies, firstly, his anxiety as the "something arising". However, that is the disability so that cannot be "something arising" from the disability, although potential the claimant's state of anxiousness could be.

58. The claimant also lists his difficulty in dealing with people on the phone or face to face as "something arising". The Tribunal accept that this is something arising from the claimant's disability, as the claimant has difficulty communicating socially and otherwise with people due to his disability. The claimant's lack of experience of cold-calling could be, but is not necessarily, something arising from his mental health disability.

59. The Tribunal has identified "something arising" from disability and unfavourable treatment. The Tribunal must therefore consider whether the unfavourable treatment is because of the "something arising". In other words, in this case, was the claimant's dismissal because of the claimant's difficulty in dealing with people on the phone or face to face (or anxiety or lack of experience of cold calling). The Tribunal has found that it was not. The Tribunal made a finding of fact that the respondent needed to reduce headcount and that the key criteria for selection was length of service and the fact that the claimant was employed on the campaign in respect of which the respondent's requirements had significantly reduced. As the claimant had under two years' service, and did not have any of the "key skills" identified by the respondent, for example a language skill, he was selected.

60. There was no evidence to suggest that the claimant's dismissal occurred by reason of the respondent's attitude to the relevant 'something', namely the claimant's.difficulty in dealing with people on the phone or face to face. Nor, for the avoidance of doubt does the Tribunal find that it occurred by reason of the claimant's anxiety or his lack of experience of cold calling. The claimant was one of a number of employees selected to be dismissed by reason of redundancy (though that is not how the respondent chose to refer to it at the time) as a result of a need for a reduced headcount.

61. The Tribunal was satisfied, on the evidence before it, that the claimant's dismissal was not affected by "something arising" from his disability as alleged or at all.

62. For the avoidance of doubt, the Tribunal was also satisfied that the fact that, instead of dismissal, the claimant was not considered for a sales role was not affected by something arising from his disability. The claimant was one of a number of employees who were dismissed for redundancy and there was no evidence to suggest that any were offered a sales role.

63. Finally, the Tribunal is satisfied that neither the respondent's alleged failure to provide additional support nor the failure to follow disciplinary procedures were because of something arising from his disability. There were no disciplinary issues to be taken up with the claimant and the respondent did provide additional support.

64. Accordingly this claim fails and is dismissed.

Section 20-21 claim: failure to make reasonable adjustments

65. The claimant must first establish a provision, criterion or practice ("PCP"). The list of issues identified two such PCPs:

(1) the requirement for all employees to be flexible; and

(2) the requirement for all employees to work on any type of campaign.

66. We did not find that there was evidence to suggest that either PCP existed, but if they did, they were not applied to the Claimant to his substantial disadvantage. The claimant was not required to be flexible. He was allowed to stay on the MissGuided Campaign when he requested to do so and was moved from a sales

role, which he did not want to do, upon request. He was therefore not at a substantial disadvantage in relation to non-disabled employees in this regard.

67. Even if the respondent was under a duty to make reasonable adjustments for the claimant, it did so. It had allowed the claimant to return to a customer service role on request. It had also provided additional support to the claimant as mentioned above. It had not followed the disciplinary procedure but that was because there was no need to do so.

68. The Tribunal finds that, in any event, these adjustments would not have had the effect of alleviating the disadvantage faced by the claimant as there was a redundancy situation which required fewer employees. The claimant's employment was terminated because of his length of service.

69. Accordingly, the claim is not made out and it fails.

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Employment Judge Rice-Birchall

Date 9 May 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 May 2019

FOR THE TRIBUNAL OFFICE