



EMPLOYMENT TRIBUNALS

Claimant: Ms Gemma Tarr

Respondent: Futon Limited

Heard at: London South

On: 14 and 15 May 2019

Before: Employment Judge E Fowell

Ms C Edwards

Ms H Bharadia

Representation:

Claimant: In person

Respondent: Ms A Ibrahim, HR Manager

RESERVED JUDGMENT

The complaints of disability discrimination are dismissed.

REASONS

Introduction

1. The claimant, Ms Tarr, was employed the respondent as an Assistant Store Manager in their Tunbridge Wells store until her resignation on 29 April 2018.
2. As the name suggests, Futon Ltd sells futons and other items for the home from a range of stores around the UK and employs about 91 staff nationally. Ms Tarr was only with them for a matter of weeks, from 4 March that year, and she resigned followed a grievance in which she raised about health and safety issues in the store

and about her relationship with the store manager Ms Maria James. The grievance was rejected and, on the basis that the working relationship had broken down, she was transferred to the company's Brighton store. She was not willing to move and so she resigned.

3. She did not have enough qualifying service to bring a claim of unfair dismissal, but instead she brings complaints of disability discrimination. It is accepted by the company that she has a disability, namely anxiety and post-traumatic stress disorder (PTSD), which was diagnosed in 2016. It is not necessary to go into the reason for that diagnosis.
4. The specific complaints raised under the Equality Act 2010 are of
 - a. harassment contrary to section 26,
 - b. discrimination arising from her disability contrary to section 15,
 - c. direct discrimination contrary to section 15, and
 - d. failure to make reasonable adjustments contrary to section 20.
5. Those provisions provide:

26. Harassment

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

15. Discrimination arising from disability

- (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.

13. Direct discrimination

- (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.

20. Duty to make adjustments

...

- (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. ...

6. There is also a particular provision dealing with the burden of proof:

136. Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (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.

7. In deciding these issues we heard evidence from Ms Tarr, and on the part of the respondent from the store manager, Ms James, and from a floating relief manager, Ms Gisela Zawada. We were also assisted by a bundle of about a hundred pages.

8. It was clear throughout the hearing that Ms Tarr struggled with her anxiety and found the proceedings stressful. Fortunately she was accompanied by her partner and we were able to take time over the questions, helping her to identify the areas in dispute and assisting her with formulating the necessary questions and taking more frequent breaks. Having done so we were satisfied that she was able to take an effective part and to go through with the respondent's witnesses all of her concerns.

9. Having considered the evidence presented we make the following findings

Findings of Fact

10. The Tunbridge Wells store had three full-time staff including the manager: Ms James as manager, an assistant manager – the role taken by Ms Tarr – and another full-time member of staff, together with some extra help, usually from a student, over the holiday periods. Ms James had been managing the store for about 15 years.

11. Ms Tarr's first day was a Sunday. It was a busy day in the shop and Ms James did not have time to go through with her the normal health and safety training, but Ms Tarr shadowed Ms James throughout the day. It was a positive start and at the end of that day Ms Tarr was happy with her new role.

12. The next day was a day off for Ms James and Ms Zawada came in as the relief manager. She went through with Ms Tarr the relevant paperwork. At some point in the day Ms James popped in with coffee and croissants for them. There was then some manual handling training and a risk assessment. During this discussion Ms Tarr was asked about any conditions she had and revealed that she had non-specific back pain but also PTSD, anxiety and depression. It was the first indication the respondent had about her mental health problems and it was something of a surprise to Ms Zawada, coming as it did in the middle of a discussion about physical capabilities. Nevertheless, Ms Tarr was generally positive about her abilities and was experienced in retail, so Ms Zawada merely recorded those facts on the form. Later that day she

telephoned Ms James to let her know about it.

13. There is no dispute that Ms James knew about these mental health problems but this brings us immediately to one of the central disputes in this case, whether or not Ms Tarr ever discussed her mental health with Ms James. According to the claimant's witness statement,

“Three days into the employment I had mentioned to Maria that Gisele and I completed the health and safety forms, they were in the folder and that I had put my depression and anxiety on there as well. Maria then said something along the lines of stating that “mental illness did not exist.” I stewed on this for a few days and realised I could not bring it up as my anxiety makes confrontation terrifying, and Maria had already displayed verbally aggressive behaviour.”

14. Ms James on the other hand says that they had a good working relationship and discussed many things together such as Ms Tarr's love for her cat, her plans with her boyfriend, the book she had written and sold on the Internet and about a trip to the United States; in return she had told Ms Tara about her dog, her son, her love of poetry, yoga, her family in Colombia and so on. In short, they had a good relationship but, she stated:

“She never told me about her mental illness and we never [had] a conversation on the subject.”

15. It will be simpler to describe subsequent events before setting out our preferred version. About two weeks into her new job there was an incident in which Ms Tarr had an anxiety attack of some sort at work, saying repeatedly “I am stupid” and that Ms James calmed her down or reassured her. As we understand it, this followed her forgetting the correct codes for an item when dealing with customers, and she was stressed about having to remember so many codes within a short time of starting work. She said that she felt that Ms James was expecting her to know everything straightaway, although Ms James said that she accepted it would take about three months to learn all these details. Ms James's account is that following this episode she reassured Ms Tarr with words to the effect that they were not doctors, that if they made mistakes nothing very serious was going to happen and no one was going to die. Ms Tarr accepted in her later grievance that Ms James did reassure her but then about 10 minutes later was annoyed with her for not knowing the codes again. It seems to us that this anxiety on her part is likely to be a feature of her mental health problems and not an indication of any unreasonable treatment by Ms James.
16. There are some stairs at the back of the shop which the staff have to negotiate to collect the stock, and it also leads to a little room where they can take their breaks. On about 16 March Ms Tarr had an accident on the stairs and twisted her ankle. That was a day on which she was alone in the shop. It was quite a nasty accident and it appears that there had been a concern about the stairs for some time. However, she soldiered on at work. A day or two later she went to see the doctor who said that she had sprained her ankle but she did not take any time off.
17. About a week later there was an apparently trivial event when Ms James popped into the shop on her day off having just been to the hairdressers nearby. She came in to say hello and there was some ribbing from Ms Tarr to the effect that she had just come in to show off her new hairdo, but this was all in good part.

18. Then, on 11 April Ms James found a note from Ms Tarr to say that Ms Tarr had taken herself off the rota for 1 May. That is not the normal way of doing things. Ordinarily she would ask the store manager for permission to take a day's holiday or to move her shift. Ms Tarr had gone so far as to book in a relief manager for the day. Ms James picked up the phone to her at home and asked her why she had done this. Ms Tarr responded that it was for a personal reason and would not go any further. In reply, Ms James said that she could have the day off on this occasion but that in future this should be arranged with her first. She added that it was also inappropriate to have a relief manager in store that day, since they are not for planned holiday cover, and rearranged her own holiday to be there.
19. There was clearly some awkwardness about this conversation. Ms Tarr was annoyed to be telephoned at home and Ms James was annoyed at what she had done. On balance however we accept that it was inappropriate for Ms Tarr to arrange her own shifts in this way.
20. Ms Tarr described that conversation at this hearing as gentle but firm, although in her grievance interview she used words like huffy and aggressive. We accept that it was in fact reasonable in tone, but also that given Ms Tarr's anxiety and the importance to her of having that day off, she was upset by the conversation. That was the last time they spoke before this hearing.
21. The real reason for wanting the day off was because she was attending a therapy day with a friend to have treatment for PTSD and the therapy day had been arranged because it fell on the anniversary of a significant event in the past which was linked to her PTSD. Ms Tarr said in her later grievance that she did not want to tell Ms James about this because of her archaic views on mental health, but at any event it was agreed that she did not explain it.
22. Later that day, as a result of this conversation, Ms Tarr submitted a written grievance against Ms James. She did so by email to Ms Ayan Ibrahim, the HR manager who represented the company at this hearing. This must have been soon after the conversation as it was sent at 11.01. In her two-page email she mentioned first the comment about mental health issues being in her head or imaginary, then the conversation about the day off, which she described rather more forcefully – "she has repeatedly demanded to know why I needed the day off..." - and described her as aggressive. She also raised a time when Ms Tarr had to ring Ms James to find something, and she had been aggressive and angry on the phone; and also on the same day speaking to her in front of customers in a hurtful way. She described complaints by customers and went on to mention the accident she had had on the stairs, another injury to her little finger and other incidents.
23. The grievance was taken seriously and Ms Ibrahim reacted quickly. She made arrangements so that Ms Tarr was not working with Ms James over the following week, and she contacted Ms James in due course to make her aware that a grievance had been raised against her, but not who had raised it or what it was about. There was a store managers meeting on 17 April which Ms James was due to attend and a grievance interview was then arranged afterwards with Ms Ibrahim and a director of the company. At that meeting the grievance was explained. The notes of that meeting were only supplied to us on our request on the second day of the hearing, but they show that Ms James was questioned firmly and in detail about each concern

raised by Ms Tarr. She was taken aback to learn that Ms Tarr was the complainant, and said a number of times that she thought they had a very good relationship. She absolutely denied ever having any conversation about her mental health with her.

24. The claimant was then interviewed a few days later on 22 April. This time only Ms Ibrahim met with her. In keeping with the approach adopted in the interview with Ms James, Ms Ibrahim explored each area of the grievance thoroughly and quite directly. Ms Tarr found this a difficult exercise and became upset during the process, saying that she wished she had never begun the grievance at all. She was asked to explain what she meant by being harassed at work, and in response Ms Tarr made reference to the occasion when Ms James came into the store to show off her new hairdo. At this hearing however, Ms Tarr accepted this was not an act of harassment. It is surprising therefore that she used this as the first example when asked.
25. Towards the end of the interview Ms Ibrahim asked Ms Tarr about how to resolve the situation. Ms Ibrahim told her that if there was no way of repairing the working relationship she would have to be moved to another store and the nearest alternative was Brighton. Ms Tarr's mental health problems included a degree of agoraphobia. The job in Tunbridge Wells involved a 20 minute walk to work along a safe route, which she was happy to manage, whereas Brighton would involve at least one hour trip by car each day to a much busier and unfamiliar city. She suggested instead that she go part-time, and just work on days when Ms James was not there, and that if this could not be done then the company had better let her go. In response Ms Ibrahim said that she was not letting her go, and that leaving Futon would be entirely her choice.
26. The outcome letter was sent on 26 April. In it, Ms Ibrahim went through in detail each of the complaints raised and concluded that Ms James had never made any remark about mental health, although she gave no reasons for preferring Ms James' account. At the end of a lengthy letter it also stated, without discussion, that the working relationship was not repairable through mediation "as the points you raised are very sensitive matters." She then informed Ms Tarr that she was being transferred to Brighton from the following Monday – "Please arrive at 09:45."
27. It seems to us that she must have realised that this would prompt the claimant's resignation, and it did so; she resigned by email the next day and Ms Ibrahim accepted her resignation half an hour later. There was no discussion about mediation, the part-time option, any other resolution, or about any appeal against the grievance outcome.

Application of the Law to the Facts

Harassment

28. The main factual issue here is whether or not Ms James use words of the sort alleged about mental illness being in Ms Tarr's head or being imaginary. There is a direct conflict between the two on this point.
29. The first point we note is that memory is fallible and that two people can remember the same events in very different ways, and that those memories can also change over time without any dishonesty on either part.

30. Secondly, we note that while Ms Tarr was happy to tell Ms Zawada about her mental health, or at least she was happy to reveal it when asked. This was passed on to Ms James, who therefore knew the important fact that Ms Tarr had PTSD, anxiety and depression. It is surprising that she made no mention of it at the time, and it might have been better if she had, to see if any reasonable adjustments were needed, or to report it to HR. She took the view that this was personal and she should not discuss it unnecessarily.
31. It may be, to put it no higher, that Ms Tarr was expecting more of a response from Ms James, and in the absence of any discussion about mental health she formed the view that Ms James was at some level unsympathetic towards her. We also note that a couple of weeks into her employment she had the anxiety attack, which must be a consequence of her mental health problems, and although Ms James reassured her about it there was no specific discussion about her condition. That would have been an ideal opportunity. For whatever reason, they both appear to have taken the view that this topic was off-limits. In any event the incident over the requested day off shows a marked reluctance on the part of Ms Tarr to get into a conversation with Ms James about the reasons for the day off, which is why she simply made arrangements herself and left a note.
32. Was there then some conversation between them in the first few days in which Ms James said something offensive, or which was construed as such? On balance we cannot conclude that there was. It may be that some remark was made and misconstrued, but we note that nothing was raised by Ms Tarr for about a month, until her grievance. That was immediately after the phone call over the day off, and listed many different complaints. The state of the stairs was at least as significant a part of her grievance. We also note that when asked in the grievance meeting about the harassment, the first incident mentioned was about Ms James showing off her new hairdo. There are also inconsistencies in some of Ms Tarr's account, no doubt the effects of memory or her health problems, but, for example, she accepted that the phone conversation was gentle but firm, unlike her first account, and she accepted much of what Ms James had to say about their friendly conversations at other times. It is of course impossible for us to know what happened between them in private over a year ago. We can only look at the evidence in the round and try to assess which version of events is more plausible. Here, there is the lack of any complaint close to the time it is said to have occurred, and some vagueness and contradictory features in her evidence in describing other events. Ms James on the other hand was able to give her evidence with apparent clear recall and in detail. It has been consistent throughout, including in her grievance interview. She struck us as an experienced manager who had made efforts to get on well with Ms Tarr. There was the incident with bringing in the croissants, and also reassuring her about her worth and capabilities after she became upset. All this was agreed. She also gave Ms Tarr her home number, and they clearly had several conversations about each other's personal lives.
33. The burden of proof on such facts is on the claimant and so on balance, comparing these accounts, we cannot accept that any such comment was in fact made. At its highest, this may be a case of something being said which was misconstrued.
34. If we are wrong about that for any reason, we note that section 26 Equality Act 2010 requires that a comment be made which violates the person's dignity or has the

purpose or effect of creating a hostile, intimidating etc. working relationship. There is therefore a threshold of seriousness in such cases, and Ms Tarr would have to satisfy us not only that some such words were said but that they were sufficiently serious to meet this test. Here, that complaint falls at the first hurdle and the complaint of harassment on grounds of disability cannot succeed.

35. The next complaint is about failure to make reasonable adjustments and this relates to the request to work part-time. There is a simple legal obstacle to success under this heading, which is that the duty to make reasonable adjustments is the duty in relation to the physical or mental impairment in question, and not a duty to make adjustments because of a breakdown in working relations. It is clear in context that Ms Tarr's suggestion about going part-time was simply so that she did not have to work with Ms James any longer and nothing to do with her mental health. She has to show that it was a failure to make reasonable adjustments "in comparison with persons who are not disabled". If we are wrong about that too, we also take the view that it would not have been reasonable to expect the respondent to allow the claimant to work part-time in the context of a store with only three regular members of staff. They were looking for seasonal cover, but Ms Tarr was the assistant manager, which required some continuity.
36. The next complaint is less favourable treatment under section 13. This requires her to show *less favourable* treatment because of her disability, and that invites the question: less favourable than whom? It requires either a real person to compare her situation with or a hypothetical comparator. That hypothetical comparator is a person in exactly the same circumstances as her but for the disability i.e. someone who
 - a. has less than two years service;
 - b. has raised a grievance against the store manager in a store of the same size;
 - c. has had the grievance rejected, and
 - d. the working relationship has broken down, or at least that the management has formed that view.
37. That last item is the most controversial since it is possible that management could form that view for discriminatory motives. To be clear, we conclude that the grievance was properly rejected since we have come to very much the same conclusion after a more extensive exercise. Further, we also accept that the working relationship had broken down. Ms Tarr was not prepared to work with her again, and went so far as offering to go part-time to avoid seeing her again. Beyond that, she said that unless this could be arranged, the company would have to let her go. Ms James was also clear at this hearing that Ms Tarr had lied about her and so they could not work together. So, although there was a lack of any discussion at the time about the possibility of mediation we accept that that reflects the reality of the situation at the time.
38. It seems to us therefore that the non-disabled comparator in those circumstances would have been treated in the same way and offered the chance to move to Brighton. It might be said that a non-disabled comparator might have been able to move to Brighton, but the distance is considerable for a modestly paid job. It would not in our

view be reasonable alternative employment in the context of a redundancy, and so in practice the outcome is likely to have been the same. Hence, this was not direct discrimination on grounds of disability.

39. The final complaint is similar – that of discrimination arising from her disability under section 15. That requires her to identify some *unfavourable treatment* rather than less favourable treatment. Clearly, being forced to move to Brighton is unfavourable treatment. We accept that this was bound to lead to her resignation; indeed that was expected.
40. The next question is whether this was because of “something arising in consequence of her disability”. Usually that means long-term absence or some aspect of her performance. Clearly, the immediate cause was the grievance, and the consequent breakdown of the working relationship. We have considered carefully whether it might be said that her grievance, or the breakdown in the relationship, was something arising in consequence of her disability, i.e. did her disability lead to her disagreement with Ms James. This is not an easy question to address. It appears to us that Ms Tarr’s mental health has played a part in the events that followed, and her perception of the relationship, but it cannot fairly be said that the breakdown in the relationship was in consequence of the disability. That requires a direct connection between the two. As just mentioned, the “something arising” is usually obvious, such a being off work for several months, and there is no question that this is the cause of dismissal or other unfavourable treatment. Here there is no such connection.
41. If we are wrong about that for any reason, that would still not be the end of the matter. There is a defence for the employer to show that the decision to transfer her to Brighton was justified, i.e. that it was a proportionate means of achieving a legitimate aim. Neither party was represented and we heard no argument on that point, but the reality of the matter is that this is a very small store with limited options for redeployment of personnel. The proposal to transfer her to another store, however impractical that might be for Ms Tarr, was essentially the only possible way of continuing her employment. We can identify no less discriminatory way of dealing with the situation and so the decision must be regarded as proportionate.
42. For completeness we note that in each case the facts needed to support the complaint in question - which are capable of supporting the complaint - have not been shown and so the burden of proof provisions were not called into play.
43. Accordingly, and for all the above reasons, none of the statutory tests are met and so the claim must be dismissed on all grounds.

Employment Judge Fowell

Date 15 May 2019