



EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT

RESPONDENT

MS K BOERS

V

CORNELIUS ELECTRONICS LIMITED

HELD AT: CARDIFF

ON: 17 & 18 MAY 2018

EMPLOYMENT JUDGE: MR M EMERY

MEMBERS: MRS B A CURRIE

MRS C WILLIAMS

REPRESENTATION:

FOR THE CLAIMANT

Mr D Williams (friend)

FOR THE RESPONDENT

Mr A Griffiths (Counsel)

JUDGMENT

The Judgment of the Tribunal is the claims of disability discrimination fail and are dismissed.

REASONS

The Issues

1. The claimant was employed for 13 months at her date of dismissal. She claims that she was dismissed because she is disabled and the claim is set

out in the list of issues as one of direct discrimination (paragraph 4 page 35). The claimant suffers from epilepsy, and the respondent accepts she is disabled as defined within the Equality Act.

2. On reading the claim form it was apparent to the Tribunal that the claim also encompassed one of one of discrimination for a reason arising in consequence to her disability – or disability related discrimination, in particular the following statement: “given her disability sometimes does have an effect on her decision making, she feels the decision to dismiss her for the offence was grossly unfair” (page 8). The claimant is alleging she drove her car after being suspended for driving after her licence had been revoked, because her epilepsy had an effect on her decision making; this arises in consequence to her disability, and she was dismissed as a consequence.
3. On discussion Mr Griffiths accepted that the respondent could properly address both a direct disability and a disability-related discrimination claim without the need for an adjournment. It had in fact dealt with a defence to a disability-related claim in its defence (paragraph 25 page 28).
4. The issues the Tribunal considered were as follows:
 - a. Was the claimant dismissed because of her disability? She relies on a fellow employee, DC, as a comparator.
 - b. Was the claimant dismissed for a reason arising in consequence to her disability? If yes, was the decision to dismiss a proportionate way of the respondent to meet a legitimate aim?

Adjustments at the hearing

5. The claimant’s epilepsy has recently been poorly controlled. The claimant was told she could take rest breaks whenever she required, and Employment Tribunal Clerks who have experience and training in how to manage epilepsy kindly introduced themselves to the claimant, to be available if required.

Witnesses

6. We heard evidence from the claimant and from her partner, Chris Mortimer. From the respondent we heard evidence from Ms Gay Williams the Health and Safety Manager with the respondent who liaised with the claimant on work-related issues, and who suspended and provided witness evidence on the disciplinary issue, Ms Shelley Jones the HR Consultant who assisted at the disciplinary hearing and drafted the letter of dismissal, and Mr Brendon Ward a Director of the respondent who dealt with the appeal against dismissal.
7. On the first morning of the hearing and prior to hearing evidence the Tribunal read all witness statements and the majority of the documents within the Tribunal bundle.

8. I do not recite all of the evidence we heard, instead I confine the findings to the evidence relevant to the issues in this case. Also, this judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The Facts

9. The claimant was employed by the respondent as a Production Operative. She had initially commenced as an agency employee in March 2016. The respondent was aware prior to and throughout her employment of the claimant's long-term condition of two forms of epilepsy - Grand Mal and Absences.
10. In 2017 the claimant had two Grand Mal fits. As a consequence the DVLC were informed by her GP, and the claimant's driving licence was revoked. The respondent was aware her licence was revoked. On the claimant's return to work her duties were amended to take account of her recent attacks, and Ms Williams was assigned to assist/coordinate. The claimant alleges that she was monitored during this period. The Tribunal accepts that the claimant would have felt she was being monitored, and since her dismissal she considers this to have been negative monitoring. It is however the Tribunal's view on the evidence we have seen that the respondent and Ms Williams acted appropriately in the claimant's return to work.
11. At the start and end of the respondent's factory shift around 200 employees arrive and leave the premises, which are situated near busy roads with other businesses and a local school having similar start and end times. There is congestion and potential risk to staff and others at the beginning and end of the respondent's shifts. On 30 June 2017, the claimant was observed driving to work and leaving her car outside the premises. She lives around ½ mile from her job, and she has no difficulty walking to work.
12. The respondent was - we found - understandably and significantly concerned about this fact. At a return to work interview on the same day, Ms Williams asked the claimant if she had regained her licence, she said no, and indicated she had been driving on other days. Ms Williams referenced the issue of duty of care, the fact the claimant was breaking the law, and health and safety issues, and Ms Williams stopped the conversation to seek further advice (pages 46-47). Later that day the claimant was suspended from work by Ms Williams and she was told that this was because of the risks caused by the claimant's actions and her breach of duty of care towards employees and the public (page 48).
13. After being suspended for driving her car to work while being medically unfit to do so, the claimant was observed leaving work, climbing into her car and driving off.
14. At the subsequent investigation meeting the claimant said it was not an issue for the company if she was parking across the road "what's across the road got to do with Cornelius Electronics? I wasn't on their property..." She said

she drove because she was tired, and “sometimes I can’t be arsed to walk, or if it’s raining, or it’s windy, I prefer to take my breaks in my car...” (page 52). The respondent gained witness evidence of the claimant driving on more than one occasion after her licence had been revoked (pages 54-55).

15. The disciplinary allegation set out in writing to the claimant on 7 July 2017 was that the claimant had continued to drive to and from work without a valid licence, putting herself and employees at risk; and she had ignored the reasonable instruction of her employer not to drive while medically prohibited (pages 56-7).
16. The disciplinary hearing took place on 11 July 2017; the claimant again denied it was relevant because she was not parked on work premises “... I’m not even [parked] near here...”. When asked about the risk she was taking, she said ‘Yeah but it could happen to anyone, a lorry could come speeding down the road...’. When asked why she had “jumped straight back into her car” on being suspended, she responded “Well I’m not going to leave it here” (pages 59-60).
17. The claimant received confirmation of summary dismissal on grounds of driving without a licence and having placed herself, company property and other staff at risk, and that she had ignored the reasonable instruction of her employer not to drive without a valid licence; considerations included the fact she compromised the safety of herself and others; the reputational harm to the company, a well-regarded employer in its community; the need not to be seen condoning such behaviour; driving without a valid licence was outside the spirit and values of the company, and there was no justification for her actions. Reference was made to the claimant’s failure to show any remorse, and the fact that the employer could not be sure she would not drive again (pages 61-63).
18. The claimant appealed her dismissal, saying she believed her disability had affected her judgment, and this was a one-off incident. She said she considered she was being discriminated against as a result of her disability. She said she had not committed a criminal act, she had not received an instruction not to drive, she also mentioned that another employee had been investigated for a similar offence and not dismissed. She said she had shown remorse (pages 64-67).
19. Mr Ward heard her appeal. The claimant accepted that she had driven to work a few times; she did not accept she had committed a criminal act as she had not received a conviction. She said she did not recall Ms Williams telling her not to drive after she had been suspended; on being asked why she had done so after being suspended for driving while not having a licence, she said “As I said I was annoyed, and upset and it was daft” (pages 85-89).
20. The dismissal was upheld, Mr Ward finding (amongst other findings) that there was no evidence the claimant’s judgment was impaired, that he was satisfied she had driven on several occasions, that the claimant had committed a

criminal act, that she had been informed not to drive by Ms Williams (pages 91-95).

21. The claimant's comparator, DC, was called to a meeting on 30 June, the company having been told by the claimant that DC was driving without a licence. DC was interviewed by Ms Williams, DC admitted driving on a provisional licence, she said she had car insurance and did not drive with passengers. Ms Williams suspended DC from work. DC was observed waiting for her husband, and her husband picked up her car and drove them home. At her subsequent disciplinary hearing, DC expressed remorse and said she had not driven alone since. She was given a final written warning.

Submissions

22. For the respondent Mr Griffiths argued that the claimant could not show she was treated less favourably than her comparator DC; there were clear differences, including the remorse shown, the fact the claimant ignored an explicit instruction not to drive, there as a lack of understanding or insight, and there was clear view of employer that the claimant could not be trusted not to drive again. None of these factors were there with the comparator. A hypothetical comparator, i.e. one who was not disabled but who ignored a company instruction not to drive (say while disqualified) would also have been sacked.
23. Equally, the employer can show the reason why she was dismissed was nothing to do with her disability, it was because of the misconduct by driving, the failure to obey a reasonable management instruction, lack of insight and lack of remorse.
24. In relation to the s.15 claim there was no evidence the claimant drove because she was in some way affected by her disability. In fact the evidence was the opposite, she had known what she was doing. In any event, given the facts, there as a proportionate aim – health and safety of staff and the surrounding area, the reputation of the company, the need not to condone lawbreaking, and dismissal was in the circumstances the only proportionate means of achieving this legitimate aim.
25. For the claimant, Mr Mortimer handed up a handwritten submission which we read. She denied receiving an explicit instruction not to drive while being suspended. She denied committing a criminal act.

The Law

Equality Act 2010

26. s.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.
27. s.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.
28. s.23 Comparison by reference to circumstances
 - (1) On a comparison of cases for the purposes of section 13, ... there must be no material difference between the circumstances relating to each case.
 - (2) The circumstances relating to a case include a person's abilities if—
 - (a) on a comparison for the purposes of section 13, the protected characteristic is disability;
29. The relevant "circumstances" that the claimant and comparator must share are those which the employer took into account in deciding to treat the claimant as it did, with the exception of the element of disability (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).
30. We noted the statutory test for direct discrimination, that the less favourable treatment must be "because of" disability. We noted that the tribunal should consider the "reason why" the claimant was treated less favourably: what was the employer's conscious or subconscious reason for the treatment? (*Nagarajan v London Regional Transport and others* [1999] IRLR 572)
31. We noted the test for discrimination arising from disability, in particular the case of *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 – that there are two distinct steps to the test to be applied by tribunals in determining whether discrimination arising from disability has occurred
 - a. Did the claimant's disability cause, have the consequence of, or result in, "something"?
 - b. Did the employer treat the claimant unfavourably because of that something?

The Tribunal's conclusions on the facts and law

32. The Tribunal accepted that the respondent's decision to suspend and discipline the claimant was justified, as it had legitimate grounds to suspect the claimant had, and would continue, to put herself and others in her vicinity to unacceptable risk were she to continue driving. We accepted the factors set out at paragraph 17 above and in the dismissal letter were all findings which were properly made by the respondent on all of the available evidence. We found that the respondent conducted the suspension, disciplinary and appeal processes appropriately.
33. On her claim for direct discrimination, it is for the claimant to show that she has been subjected to less favourable treatment in comparison to an employee who is not disabled. We did not consider the claimant was able to prove this. In particular, we accepted that the reason why the claimant was

dismissed, and her comparator was not, was not in any way connected to the claimant’s disability; instead it was because of the far more serious disciplinary offences committed by the claimant, in particular her failure to obey Ms Williams’ instructions, her lack of remorse and the fact the respondent could no longer trust her. There were accordingly significant material differences between the circumstances of DC and the claimant. We accepted that the reason why the claimant was dismissed was because of the factors at paragraph 17 above, and not because of the claimant’s disability.

- 34. The claimant had also alleged she was discriminated against for a reason arising from her disability – namely confusion on the day she was suspended leading her to drive.
- 35. We asked ourselves the *Weerasinghe* question – did the claimant’s epilepsy cause her to become confused, leading her to drive? We considered not. We considered that the claimant drove, not because she was confused, but for the reasons he gave at the appeal interview – she was annoyed and upset.
- 36. In any event, we considered that if we were wrong and that the claimant drove for a reason arising from her disability, the respondent in any event succeeds in the statutory defence. Had the claimant caused an accident around work, the employer would have had irreparable damage done to its clear legitimate aims - the health and safety of employees and the public in surrounding areas to its site, and to its reputation. We considered that dismissal was, in the circumstances, a clearly proportionate means of achieving these aims, in particular because of the claimant’s lack of insight.
- 37. For these reasons, the claims fail.

Judgment sent to the parties
On

EMPLOYMENT JUDGE M EMERY

.....3 July 2018.....
For the staff of the Tribunal
office

Dated: 15th June 2018

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