



EMPLOYMENT TRIBUNALS

Claimant: Mr K Misevicius

Respondent: Greenyard Fresh UK Limited

Heard at: Lincoln

On: Monday 17 June, Wednesday 19 June and Thursday 20 June 2019

Before: Employment Judge Blackwell

Members: Ms D Newton
Mr C Goldson

Representatives

Claimant: In Person

Respondent: Mr M Bloom, Solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is:-

1. The claims of unlawful deduction from wages in respect of arrears of pay and holiday pay are dismissed on withdrawal by the Claimant.
2. The claim of discrimination pursuant to Section 15 of the Equality Act 2010 (the 2010 Act) fails and is dismissed.
3. The complaint of a failure to make reasonable adjustments pursuant to Sections 20 and 21 of the 2010 Act also fails and is dismissed.
4. The claim of harassment pursuant to Section 26 of the 2010 Act also fails and is dismissed.

RESERVED REASONS

1. Again the Claimant represented himself and gave evidence on his own behalf. Mr Bloom continued to represent the Respondents and he called again Ms R L Wood and in addition on these main issues Mr T Mabotja, a Team Leader, Ms K L Sindall, a Production Manager and Mr S Juskevicius, a Supervisor to give evidence. We continued to have the same bundle of documents and again references are to page numbers in that bundle.

Issues and the Law

2. Mr Misevicius brings a claim of direct discrimination in respect of the protected characteristic of disability. It is common ground that Mr Misevicius was disabled within the meaning of Section 6 of the 2010 Act from 2014 with type 1 diabetes. Section 13 Equality Rights Act 2010:-

“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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex:-

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).”

3. The second claim is brought pursuant to Section 15 of the 2010 Act:-

“Section 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.

(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.”

4. The third claim is brought pursuant to Section 20 of the 2010 Act:-

“Section 20 - Duty to make adjustments:-

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three 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 a 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 comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to:-

- (a) removing the physical feature in question,
- (b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to:-

- (a) a feature arising from the design or construction of a building,
- (b) a feature of an approach to, exit from or access to a building,
- (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
- (d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

(12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.

(13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.”

5. The final claim is brought pursuant to Section 26 of the Equality Act:-

“Section 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.

(2) A also harasses B if:-

- (a) A engages in unwanted conduct of a sexual nature, and
- (b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if:-

- (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:-

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are:-

- age;
- disability;
- gender reassignment;
- race;
- religion or belief;
- sex;
- sexual orientation.”

Findings of Fact

6. It is agreed that at all material times Mr Misevicius was disabled within the meaning of the 2010 Act with the physical impairment of Type 1 Diabetes.

7. We adopt the findings of fact made in connection with the preliminary point.

8. Thus the Claimant began his employment with Greenyard on 8 August 2016 initially as a Production Operative but then he became a Production Machine Operative with effect from 5 July 2017 though he had been carrying out those duties on a temporary basis for some months beforehand. The relevant job description is at pages 79-81.

9. The Respondents are in the business of packing and distributing various varieties of fruit and have some 250 employees in total.

10. The layout of the factory in which Mr Misevicius worked is at page 274 and it can be seen that there are a number of production lines.

11. Mr Misevicius's first duty as a machine operator was to set up each production line prior to its use. On his evidence such an exercise would take some 10-20 minutes. He would have other duties once the line was up and running including the adjustment of speed and temperature; such functions being carried out at a computer keyboard. On the Claimant's own evidence he had no particular problems at work until October 2017. He enjoyed his work.

12. He says that from that date he had disagreements with his Team Leader, Mr Mabotja and with Supervisors Ms Cale and Fatmir Shabani. He says that he disagreed with the way in which these colleagues asked him to work.

13. On 22 October 2017 Mr Misevicius complains that Ms Cale invited him to “set 2 lines, provide training to key operators and assist with packaging and change the speed of the line”.

14. Ms Cale did not give evidence. However Mr Juskevicius did give general evidence about the changing of lines. What he said was that in a team led by a Team Leader there would normally be one machine operator and that when the factory was busy that team would work exclusively on one line. The factory was busy the majority of the time. When the factory was not busy there were occasions when it would be necessary to move from one line to the next depending upon production needs.

15. It is clear that any such move was sequential. The machine operator would proceed to the new line, set it up and he would be followed by the whole team and then production on that line would get into full swing. The line from which they had moved would cease to operate.

16. This complaint of being required to move from one line to another seems to be at the root of Mr Misevicius’s case. We have to say that on the evidence that we have heard, him being asked to set up a new line and thereafter maintain it, he was simply being asked to do his job. None of the matters that he complained of above are out with the job description.

17. Mr Misevicius goes on in relation to 22 October that he became under such pressure that he forgot to take his insulin which is of course essential in the regulation of type 1 diabetes.

18. He went to accident and emergency and we can see at 132-134 the medical records relating. We note there is no reference to diabetes nor to forgetting to take insulin. There is reference to problems at work “currently having work pressure. Being asked to do more at work and is struggling. Has informed his Manager but they don’t seem to take any notice”.

19. Mr Misevicius raised the issue with Mr Juskevicius and we can see the notes of that meeting at pages 93 and 94. Mr Misevicius does make reference to the fact that he is diabetic and makes the complaint again that he was asked to set up 2 lines and to adjust the speed on the line. He also complains that he was given additional help, in cross examination he said that he felt humiliated by being offered additional help. He also described work as “like I’m in prison and concentration camp”. He also complained that his colleagues were gossiping about the fact that he had acquired a new car. Mr Juskevicius offered a move to a different shift but Mr Misevicius refused.

20. Mr Misevicius went off work with stress which led to a meeting on 8 November with another Supervisor, Mr Mays. The notes of that meeting are at pages 95 and 96.

21. Mr Misevicius repeated his complaint about being asked to work on 2 lines, complains about an issue with a Supervisor, Fatmir Shabani, describing it as a personality clash. Mr Misevicius also asks that in general production lines should be lowered and the correct number of operatives deployed.

22. It seems to us that those requests are unreasonable and are clearly a matter for supervisors to decide.

23. On 18 November 2018 Mr Shabani wanted the speed of a line to be increased but instructed one of the line operatives, Ms Sontos, to carry out the task even though Mr Misevicius was present and could have carried out the job. It is clear that Mr Misevicius was offended by that action. He clearly lost his temper and swore at both Mr Shabani and Ms Sontos (see the interview notes beginning at page 97).

24. Mr Misevicius's evidence was that between that date and April 2018 he continued to be placed under pressure by being asked to work too quickly and on more than one line at a time. We do not accept that he could work at more than one line at the same time and we cannot see that he was being asked to do any more than his normal duties as a machine operator. We also note that in February 2018 Mr Misevicius was asked to work 2 extra shifts on 2nd and 22nd of that month. He accepts that he was not obliged to do so but nevertheless worked both those extra shifts. As he said in cross examination "they help me, I help them".

25. On 27 March 2018 Mr Misevicius was again working in Mr Mabotja's team. The sequence of events which does not appear to be in dispute is that before the standard mid-morning 15 minute break, Mr Misevicius had prepared line 4 to pack red plums.

26. After the break Mr Mabotja instructed Mr Misevicius to set up line 6, also for red plums. Mr Mabotja's explanation when asked was that someone on line 4 had complained of back pain.

27. During cross examination Mr Misevicius added to his written evidence that he believed Mr Mabotja deliberately made him set up line 6, that no one had complained of back pain, and that Mr Mabotja had done so deliberately to provoke him knowing that such provocation would affect his diabetes. Mr Bloom put to him that he was making this up as he went along given that there is no reference to such an accusation anywhere in the bundle, in the pleadings or in Mr Misevicius's evidence in chief. We agree with Mr Bloom.

28. From 28 March to 11 April Mr Misevicius was on holiday but he was admitted to hospital with diabetic ketoaciditis.

29. Mr Misevicius alleges that that admission was a direct result of the pressure that was being put on him at work. We note that the admission to hospital was some 5 clear days into his holiday. We also note at page 115 the comments of those that treated him between 2 and 6 April. We think the more likely explanation is that Mr Misevicius mis-managed the administration of insulin.

30. On 16 April Mr Misevicius returned to work and he says that he had a discussion with Mr Juskevicius in which he said that stress at work had caused his recent admission to hospital. Mr Juskevicius has no recollection of any such discussion. However it is clear that there was a return to work interview conducted by Ms Cale and we see that at pages 275 and 6. There is no reference to any difficulties at work and in answer to firstly the question "is this something you might suffer from again?". The answer is "I think no". And in answer to the question "is there anything the company can do to help?". The answer is "no".

31. Still on 16 April. It is clear Mr Misevicius made a request not to work with Mr Mabotja in discussion with Mr Juskevicius's and with Ms Cale as notetaker which we see at 116 and 117. That meeting once again dealt with the events of 27 March because Mr Juskevicius had been absent from work up until 16 April. The notes are consistent with the events of 27 March as described above. Ms Juskevicius accuses Mr Mabotja of disrespecting him but that seems simply to be a repetition of the allegation that he was made to set up line 6. There is no reference to either Mr Misevicius being over worked or to his diabetes.

32. It is further clear from that meeting that Mr Juskevicius is asserting that what Mr Mabotja asked Mr Misevicius to do on 27 March was no more than to do his job.

33. Mr Misevicius in cross examination said that it was on that date that he decided to resign because of the effect that pressure at work was having on his health.

34. On 20 April he hand delivered to work the letter of resignation which appears at page 120. It read as follows:

"I am writing to notify you that I am resigning from my position as Machine Operative in Greedyard UK Company (sic). My last day of employment will be 20/5/2018. I appreciate the opportunities I have been given during my time with your company as well as your professional guidance and support.

I wish you and the company the best of success in the future. If I can assist with the transition to my successor, please do let me know."

35. When cross examined about the contents of that letter Mr Misevicius said that it was a standard form of resignation letter downloaded from the internet by a colleague. He did not ask for the letter to be read to him before he delivered it. We do not believe that explanation.

36. By letter of 23 April Ms Sindall on behalf of the company accepted the resignation saying that she was naturally disappointed with that decision.

37. On 8 May 2018 Mr Misevicius wrote a further letter which reads as follows:

"I hereby withdraw my resignation of 20 April 2018. The conditions surrounding my resignation have changed and I would appreciate the opportunity to resume my job as Machine Operative.

I undertake to perform to the best of my abilities. Although I realise the process may not be that straightforward I will await your reply.

I enjoy working at the company and hope to make a positive contribution to the team. Thank you for considering the withdrawal.”

38. In relation to this letter Mr Misevicius said that it was drafted for him by a company that provides employment and benefit advice. He says that he did not give them any instructions as to its contents and did not have the letter read over to him before it was posted. Again we do not accept that evidence.

39. Ms Sindall met with Mr Misevicius on 10 May to discuss the request set out in the letter of 8 May. There is one conflict of evidence in relation to that discussion namely that Ms Sindall says that Mr Misevicius through an interpreter told her that the change in circumstances was that a job offer he had had prior to his resignation had been withdrawn. Mr Misevicius denies that anything was said to that effect. We prefer Ms Sindall’s evidence.

40. What is common ground is that Ms Sindall explained that she could not accept the withdrawal of the resignation because Mr Misevicius was plainly unhappy at work and also that generally his attitude and behaviour did not merit reconsideration of that decision. When asked why, Ms Sindall gave the example of Mr Misevicius swearing at his supervisor and others on 27 March. She also referred to his relationship with the Supervisors Ms Cale and Mr Shabani.

41. Mr Misevicius effectively sought to appeal that decision by writing to the Managing Director, a letter at 126-129. On this occasion Mr Misevicius says that he drafted the letter and it was translated for him.

Conclusions

42. The complaint of direct discrimination is pleaded as follows:-

“The Claimant submits that he was subjected to direct discrimination contrary to Section 13 of the Equality Act 2010. The Claimant tendered his resignation on 20 April 2018. The Claimant sought to retract his resignation on 8 May 2018. The Claimant repeated his request at a meeting with the Respondent on 10 May 2018. The Respondent’s letter to the Claimant dated 10 May 2018 did not explain why the Respondent refused to accept the Claimant’s retraction of resignation. In the absence of any reasonable explanation the Claimant submits that this refusal was because of his disability. The Respondent had not recruited to the Claimant’s petition and the Claimant could have continued in his role without any inconvenience to the Respondent. Therefore because of the Claimant’s disability the Respondent treated the Claimant less favourably, the less favourable treatment being the refusal to consider, and also accept, his retraction resignation. The Claimant relies on a hypothetical comparator of a machine operator who tendered and then retracted their resignation within their notice period who does not share the Claimant’s disability.”

43. It seems to us that the sensible approach to this claim is to examine why Greenyard acted as they did ie not to permit the retraction of the resignation. The reason is crystal clear and has nothing whatsoever to do with Mr Misevicius's disability. It was because Ms Sindall formed the view that given that Mr Misevicius was plainly unhappy at work, had problems with a number of his managers and had sworn at two of them, it was not appropriate to permit Mr Misevicius to return. The claim of direct discrimination therefore fails.

44. The Section 15 claim is pleaded as follows:

"The Claimant submits that he was suffering from the effects of his disability when he submitted his resignation (stress, anxiety and confusion). This was a special circumstance warranting further enquiry. When he sought to retract that resignation and the Respondent rejected his request this was unfavourable treatment because of something that arose from his disability."

45. We accept that the rejection of the request does constitute unfavourable treatment. Mr Bloom helpfully drew our attention to the approach suggested by Simler J in the case of **Pnaiser v NHS England** UK EAT 137/15/LA and in particular at paragraph 31. Thus we need to look carefully at the conscious and unconscious thought processes of Ms Sindall. The something arising in consequence of Mr Misevicius's disability does not have to be the main or sole reason for the unfavourable treatment but must have at least a significant or more than trivial influence on the unfavourable treatment.

46. Ms Sindall's motives are irrelevant. The purpose of Section 15 is to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment. Plainly however there has to be a causal link and in our view there is none whatsoever between Ms Sindall's actions and Mr Misevicius's disability. The reasons why Ms Sindall acted as she did are set out above and we are satisfied that she had neither consciously or subconsciously considered Mr Misevicius's disability in reaching the decision that she did.

47. The failure to make reasonable adjustments claim is put as follows:

"The Claimant submits the Respondent's ongoing practice or criterion or requiring the Claimant to work more than one production line and to carry out other duties in addition to his own (packing, training staff, etc) placed him at a substantial disadvantage compared to those who are not disabled. In particular the Claimant was placed under significant stress. Stress exacerbates the Claimant's disability of type 1 diabetes. Such was his stress on certain occasions that he forgot to take his insulin causing him further medical complications. The Claimant submits that reasonable adjustments would have been to:-

- a) Listen to his concerns about this health and allocate some of the Claimant's additional duties to other members of staff.
- b) Allow the Claimant regular rest breaks to ensure he ate and drank and took his medication.
- c) Ensure he was supported at work.

d) Involve occupational health to obtain a report of any other adjustments that would have prevented the substantial disadvantage he suffered.

Secondly the Claimant submits the Respondent's one off provision, criterion or practice of refusing to investigate and refusing his retraction of resignation placed him at a substantial disadvantage compared to others who were not disabled. The Claimant submits that a reasonable adjustment would have been to consider properly this request to retract his resignation and to allow him to continue in employment."

48. Dealing with the first PCP first. In our view this can be dealt with very simply. There is no evidence that what Mr Misevicius was asked to do, and which we have found was no more than the normal duties of a machine operator, placed him at a substantial disadvantage compared to those who are not disabled.

49. Mr Misevicius accepted that his disability did not affect him at work and it is clear that from reviewing the evidence as a whole that that is right.

50. Although it is not necessary to do so we would comment as follows on reasonable adjustment (a). Mr Misevicius as a matter of fact did not express concerns about his health and was actually offended when additional assistance was offered to him.

51. As to (b); it is plain as a matter of fact that regular rest breaks were permitted.

52. As to (c); it is clear from a review of the evidence that Mr Misevicius was supported at work, he was for example offered a change of shift, his managers looked into each of the events about which Mr Misevicius complains in a thorough and objective way.

53. As to (d); as a matter of law a reference to occupational health cannot constitute a reasonable adjustment.

54. As to the second complaint in relation to the PCP of a failure to accept the retraction of resignation, since this is a one off event it cannot as a matter of law constitute a PCP.

55. The Section 20 complaints must therefore fail.

56. The final complaint as to harassment is pleaded as follows:

"The Respondent was aware of the Claimant's disability and did nothing to prevent him from unwanted treatment relating to his disability. Such treatment included being subjected to unfair treatment and a hostile working environment."

57. There is no evidence whatsoever of there having been any unwanted conduct related to the relevant protected characteristic of disability.

That claim must also fail.

58. In summary Mr Misevicius is a man who had pride in the job that he did but it is clear that in general he felt he knew better than those supervising him. He resented instructions to set up a new line and in particular he resented such instructions when it came from Mr Mabotja. On the evidence we have heard, nothing that Mr Misevicius was asked to do was out with the normal duties of a machine operator. The instructions he was given were it seems to us reasonable and lawful instructions. In the words of Mr Mabotja at page 119 “he (Mr Misevicius) was not happy to change the line over after he went to report that he was not happy with what I asked him which I only asked him to do his job but he got angry with me”.

Employment Judge Blackwell

Date 27 June 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE