



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss C Lowell

**Respondent:** Whitbread Group PLC t/a Costa Coffee

**Heard at:** Nottingham

**On:** 21 and 22 October 2019

**Before:** Employment Judge Brewer  
Ms H Andrews  
Mr J Khalil

## Representation

**Claimant:** In person

**Respondent:** Mr M Foster, Solicitor, Weightmans LLP

# JUDGMENT

The unanimous decision of the Tribunal is:

- 1 The claim of direct disability discrimination fails and is dismissed**
- 2 The claim of disability harassment fails and is dismissed**

# REASONS

## Introduction

1. This case was listed for a 2-day hearing before a full tribunal. The Claimant represented herself. She gave evidence on her own behalf and called 1 witness, Jo-Ann Kelleher. The Respondent called 2 witnesses, Leigh Calladine, Area Manager, East Midlands, and Carlean Loseby, Store Manager, Nottingham Castle Marina Store. We had an agreed bundle of documents and

written witness statements which were taken as read. The procedure had been set out in detail at a case management hearing conducted by Judge Heap on 18 October 2019.

## Issues

2. The Claimant claims direct disability discrimination and disability harassment. The Claimant says that she attended an interview with Mr Calladine and Ms Loseby and at that interview Ms Loseby made comments which amounted to direct discrimination and harassment.
3. The Respondent conceded that the Claimant meets the definition of disability under s.6 Equality Act 2010. The issues therefore are as follows:
  - a. Did Ms Loseby know or ought she reasonably to have known that the Claimant was disabled?
  - b. Did Ms Loseby make the comments attributed to her by the Claimant?
  - c. If so, did the comments amount to less favourable treatment of the Claimant because of her disability compared to a hypothetical comparator and/or disability harassment?
  - d. If so, what is the appropriate remedy?

## Law

4. The law is set out in the Equality Act 2010.
5. Direct discrimination is set out in s.13 the relevant parts of which are as follows:

### **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...*

*(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...*

6. Harassment is set out in s.26 the relevant parts of which are as follows::

### **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.

(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...

7. In relation to comparators the relevant part of the law is as follows:

**23 Comparison by reference to circumstances**

(1) On a comparison of cases for the purposes of section 13, 14, or 19 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...

**Findings of fact**

8. The Respondent is Whitbread Group PLC of which Costa Coffee ("Costa") is a part.
9. From April 2013 until she resigned in April 2016 the Claimant had been employed by Costa as a Barista Maestro (essentially a senior Barista who was a keyholder and who therefore was responsible for opening and closing the store and who was paid a premium rate accordingly). The reasons why the Claimant left the Respondent in 2016 are not material to the present case.
10. In 2013 the Claimant worked 1 or 2 8-hour shifts with Carlean Loseby at Costa's Giltbrook store shortly before the Claimant moved to work at Costa's West Bridgford store where she remained until her employment terminated.
11. In late September 2018, Mr Calladine needed to recruit a store manager for his Birmingham Drive Through store. Mr Calladine is responsible for recruiting store managers. The store managers are responsible for recruiting staff for their store.
12. Mr Calladine had intended to call a contact with the name Claudia, however, by mistake he rang the Claimant. He explained to her what had happened, and they had a conversation. The Claimant expressed an interest in returning to work for Costa and Mr Calladine said he was aware that there were vacancies

at both the Nottingham Castle Marina and Nottingham Daleside stores. The Claimant said she would be interested in working at the Castle Marina store. The store manager at Castle Marina is Carlean Loseby.

13. Following that telephone call an informal interview was arranged between the Claimant and Ms Loseby. Mr Calladine was also in attendance. The interview took place in the public area of the Castle Marina store on 2 October 2018.
14. At the end of the interview, which lasted no more than 30 minutes, Ms Loseby offered the Claimant the job of Barista on a full-time basis at the Castle Marina store. The Claimant was asked to visit the West Bridgford store to collect her previous personnel file.
15. On 3 October 2018 the Claimant sent a text to Mr Calladine. That appears at page 64 of the bundle. The text said:

*“Sorry Leigh. Did not like at all Carlean comment “last time I worked with you, you were on antidepressants and you had a breakdown, it may happen again and we are a busy store and is coming up to Christmas...” I think that sums it up. No chance I have someone with this opinion be my manager. It was worth a try so thank you Leigh for believing in me and offer me a job but it wouldn’t work” [sic]*

16. On 6 October the Claimant raised what is referred to as a grievance (page 65/66 of the bundle). As a result an investigation was carried out by Chris Liddell and he responded to the Claimant on 8 December 2018 to the effect that there was a conversation about availability at the 2 October meeting but that was simply in the context of the Claimant having to work only at certain times of the day. The complaint was not upheld.
17. By a claim from received on 9 January 2019 the Claimant brings claims of direct disability discrimination and disability harassment.

## Discussion

18. We have noted of course that the Respondent has conceded that the Claimant meets the definition of disability in s.6 Equality Act 2010. What the Respondent does not concede is that it knew or ought reasonably to have known that the Claimant was disabled at the material time – 2 October 2018. Specifically, we have considered whether Ms Loseby knew or ought reasonably to have known of the disability.
19. The Claimant’s position is that in 2013, she cried in front of Ms Loseby and told her she was taking anti-depressants. Ms Loseby has no recollection of this. We are of the view that given that the Claimant said this had occurred in 2013, some 5 or so years before the 2 October 2018 interview, it is not surprising that Ms Loseby did not recall this incident even if it took place exactly as described by the Claimant. Moreover, the evidence in this case is that in fact the Claimant’s sickness absence record is unremarkable. Her evidence was that in 3 or so years working for Costa she had around 3 weeks off sick and thus it would seem that sickness absence was not an issue. Further, given that at

most the Claimant and Ms Loseby worked together for 2 shifts, and that the Claimant had no time off during those shifts, it is unclear why it is suggested that Ms Loseby would have an issue with the Claimant's ability to attend work. Even if the crying episode occurred as the Claimant says, and even if that is to be described as a 'breakdown', it did not lead to a period of sickness absence, so there is no logical reason why, some 5 years later, Ms Loseby would refer to it in the context of a discussion about the Claimant's availability for work. This is even more striking when we remember that all three witnesses who attended the 2 October meeting agreed that Ms Loseby was the recruiting manager and offered the Claimant the full time Barista role.

20. We do note the Claimant's assertion, and it was no more than that, that she believed that Ms Loseby was forced by Mr Calladine to offer her the job. The Claimant offered no evidence to support this assertion or belief and we accept the evidence of both Ms Loseby and Mr Calladine that this was not the case. It was always the decision of Ms Loseby whether to recruit the Claimant and we accept her evidence that she was pleased to have an experienced Barista to recruit.
21. We also note that in her oral evidence, in cross-examination, the Claimant asserted that after the interview she was so upset that she immediately called her partner and her friend, Stacey Baptiste, and told them what had happened. We do note that there is no evidence from the Claimant's partner at all and although there is a witness statement from Ms Baptiste, a) she failed to attend the hearing and b) the statement says nothing about the Claimant contacting Ms Baptiste immediately after the interview. We find that if the Claimant had done as she says she would have adduced evidence as the witnesses are readily available to her.
22. It is clear that during the interview there was a discussion about availability. Mr Liddell makes that clear in his findings set out at page 82 of the bundle. No doubt he was relying on the note of a conversation between Sally Pound and Ms Loseby which took place on 7 December 2019 (page 80). But this availability is related to the hours for which the Claimant would be available to work, not any historic issue of availability about which, we note, there is no evidence in any event.
23. For these reasons we find that Ms Loseby did not make the comments referred to above. We find that there was a discussion about availability, but this was prospective, not historic and there was no reference to a breakdown or to a concern about sickness absence.
24. We find that even if the Claimant did break down in front of Ms Loseby and tell her she was on anti-depressants in 2013, Ms Loseby did not recall that incident in 2018, and that in the absence of any further information and given the Claimant's low absenteeism, neither Ms Loseby specifically, nor the Respondent generally knew or ought reasonably to have known that the Claimant was a disabled person for the purposes of the Equality Act 2010 on 2 October 2018.

25. For that reason, the claim of direct discrimination, that is less favourable treatment because of disability, fails.
26. We also find as a fact that Ms Loseby did not refer to the Claimant's "breakdown" nor did she connect the Claimant taking anti-depressants with her availability and thus we find that there was no unwanted conduct within s.26 Equality Act 2010, and thus no harassment, which claim also fails.
27. We would also add the following. Any manager recruiting staff, particularly in the run up to or during a busy period, would be concerned that the recruit was available when rostered to work, and in that context we see nothing surprising in a discussion about availability with a potential new employee particularly where she has limited availability as appears to be the case with the Claimant. We find that Ms Loseby would have had exactly the same discussion with any potential recruit in circumstances which are not materially different to the Claimant's and thus we find that there was no less favourable treatment of the Claimant in this case. In our judgment both claims would fail for this reason alone.
28. We do wish to comment on one matter that was of concern. In her evidence, Ms Loseby said that she had some equal opportunities training over 3 years ago and none since. Mr Calladine said that mental health issues had been on the Respondent's agenda for around 18 months and had a high profile. In the circumstances we are surprised that store managers, who, on the face of it, are the major recruiting force for Costa, do not have much more regular training or updates on equal opportunities issues including how to spot mental health and deal with mental health issue which can be challenging in any business. Whilst we are not in a position to make a formal recommendation, we do hope the Respondent notes this concern and addresses it.

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Employment Judge Brewer

Date 22 October 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

Note

Written reasons will not be provided unless a written request is presented by either party within 14 days of the sending of this written record of the decision.

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