EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113334/2018

Held in Edinburgh on 11 and 12 November 2019

Employment Judge: Iain F. Atack
Tribunal Member I Drysdale
Tribunal Member T Lithgow

Ms Jessica Ann Skinner	Claimant Represented by: Ms L Neil Solicitor
David Adamson & Partners Limited	Respondents Represented by: Mr A Wallace Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is: –

1. That the claimant's claim of discrimination arising from disability under section 15 of the Equality Act 2010 is dismissed.

2. That the claimant's claim in respect of a failure to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 is dismissed.

Reasons

Introduction

1. In this case the claimant brings claims of discrimination arising from disability in terms of section 15 of the Equality Act 2010 and of a failure to make reasonable adjustments in terms of sections 20 and 21 of that Act. The respondent denies both claims.

2. The tribunal heard evidence from the claimant and, for the respondent, from Mr. Greig Miller, their valuation director.

3. The parties produced a joint bundle of documents extending to 144 pages. At the commencement of the hearing the claimant presented a schedule of loss and documents relating to mitigation of loss. These documents were accepted by the tribunal but as Mr. Wallace had not seen them previously it was agreed that his cross examination of the claimant upon those documents would be deferred until the second day of the hearing when he had had an opportunity to consider them and take instructions from the respondent. Reference to the documents will be by reference to their page numbers.

4. From the evidence which we heard and the documents to which we were referred we found the following material facts to be admitted or proved.

Material Facts

5. The respondent is a firm of chartered surveyors. It has offices in Shetland, Kirkcaldy and Edinburgh which are manned. They have other offices in London and Aberdeen which are not manned.

6. The respondent employs approximately 45 staff.

7. The claimant was employed by the respondent as a trainee valuation surveyor from 12 September 2016 until she was dismissed on 4 April 2018.

8. At her initial interview with the respondent the claimant made Greig Miller aware that she was scheduled to have an operation. She did not disclose the reason for that operation. Mr. Miller understood it was of a personal nature. The operation was for an operation on her breast.

9. The claimant has a history of back pain. She has suffered from the sciatica since the age of about 14. She had an operation being a left sided lumber microdiscectomy at the L5/S1 level at Aberdeen Royal infirmary and since then had been free of pain until about November 2016.

10. The claimant requested in about November 2016 that she be provided with a better chair as she suffered back pain.

11. She raised the matter of the new chair with Melissa Coutts, the respondent's office manager.

12. The claimant's position was that she raised the matter of the chair several times between November 2016 and March 2017.

13. In early 2017 Melissa Coutts sent an email to Greig Miller regarding the claimant's request for a chair. Greig Miller told Melissa Coutts to carry out a workplace assessment and obtain what was necessary.

14. Greig Miller spoke to the claimant a few weeks later as the chair had not arrived. The claimant informed him that she had been advised that one of her legs was longer than the other and so it was walking which was causing her the problem and not sitting.

15. Greig Miller understood from that conversation that the chair was no longer required and there was no need for any workplace assessment. Those matters were not mentioned again.

16. The claimant was absent from her work with the respondent for a period of 35.5 days from 25 October 2016 until 29 April 2018. Those absences and the reasons for them are shown at page 55.

17. The claimant was absent as a result of sciatica and back pain for 10 days of that period. She was not absent in respect of any sciatic pain since 14 February 2017. The remainder of her absences were not connected with her disability.

18. If the claimant experienced back pain whilst out on a survey she would ask for help from either Greig Miller or Martin Stevens.

19. Rhea Balfour who had been a trainee with the respondent in 2012 qualified as a valuation surveyor in 2013. In 2015 she moved to work in the respondent's Shetland office. She was more experienced than the claimant.

20. At the time when Rhea Balfour went to work in the Shetland office the respondent had a valuation surveyor in Shetland who was due to retire.

21. Following the retirement of that valuation surveyor the respondent had only one valuation surveyor in Shetland, Rhea Balfour and four in their Edinburgh office, including Greig Miller.

22. The claimant filled the role of trainee valuation surveyor in Edinburgh which had been held previously by Rhea Balfour.

23. The claimant was working towards obtaining associateship of the Royal Institution of Chartered Surveyors.

24. As part of her training she would go out to assist on valuations with Greig Miller or Martin Stevens.

25. Valuation surveys are conducted by walking around the property. The survey may involve the taking of readings to test for damp. To take such readings a person requires to bend down.

26. In about September 2017 Greig Miller noticed that the claimant appeared to be limping and in pain.

27. There were times when the claimant was unable to go out on survey because of the pain she was suffering. The respondent, on those occasions, permitted her to remain in the office.

28. The respondent carries out appraisals of each member of staff annually. In the case of the claimant the appraisal was carried out in September 2017, one year after she had commenced employment.

29. Greig Miller had noticed a deterioration in the health of the claimant by September 2017. He noticed she appeared to be in discomfort. At the appraisal he requested the claimant obtain a letter from her GP. to see what could be done to help her, page 19.

30. Greig Miller had requested the letter as he was concerned that the respondent might need to look at adjustments to be made for the claimant to make it easier for her to carry out her work.

31. At the appraisal the claimant had informed Greig Miller that her footwear would resolve the issue of any discomfort she was suffering.

32. The claimant's GP did not provide the letter which Greig Miller had requested be provided. The respondent asked the claimant what was happening and were told that the GP was not going to provide a letter. The respondent did not press the matter further.

33. The claimant obtained new footwear to deal with the problem of the difference in length in her legs by the end of 2017.

34. On 1 March 2017 the respondent received a letter from their bank relating to their authorised overdraft facility, pages 12 – 17. That letter indicated that the maximum overdraft facility which was permitted would be reduced in stages up to 28 January 2018. One of the consequences of exceeding the maximum

permitted limit would be that the bank would be entitled to demand all sums outstanding be immediately repaid.

35. In November 2017 two of the four directors of the respondent indicated they would leave the business. That presented a threat to the turnover of the respondent.

36. The respondent was obliged to pay out the retiring directors. That placed a further financial burden upon their business.

37. The respondent's management accounts for their Shetland office showed a loss for the month of December 2017 of £9232.61 and a loss for the year to date of £7471.75, page 30.

38. The management accounts for the same branch for January 2018 showed a loss for that month of £7537.63 and for the year to date of £15,009.38, page 34.

39. Greig Miller decided that the business in Shetland could not continue as it was. The information he received from Rhea Balfour was there was no reason to expect an improvement in the valuation survey business in that branch.

40. Greig Miller decided that one of the two surveyors in Shetland would require to be made redundant. The two surveyors were Rhea Balfour and a quantity surveyor, Lawrie Simpson.

41. The respondent ascertained that Mr. Simpson could become qualified also as a valuation surveyor in a relatively short time.

42. Greig Miller told Rhea Balfour that he was thinking of making her redundant. She offered to return to the Edinburgh office where she had previously worked.

43. If Rhea Balfour had left or decided to go to work for another firm there would have been no need for the respondent to consider a redundancy in their Edinburgh office.

44. The Edinburgh branch did not have sufficient business to provide work for both Rhea Balfour and the claimant.

45. Rhea Balfour was a qualified valuation surveyor. She had a relationship with clients and it was hoped she could bring in work. She could also provide cover for work in Shetland if that was required.

46. Mr. Miller met the claimant and informed her that her position had been selected for redundancy.

47. Following that meeting Mr. Miller wrote to the claimant on 5 March 2018 confirming her selection for redundancy and advising her that her last day of employment would be 5 April 2018, page 46.

48. The letter explained that the claimant was unqualified and inexperienced in relation to others. The letter also stated that the claimant's attendance record had been comparatively poor to date but that was not the primary reason for her selection as the respondent understood the circumstances involved in those absences.

49. Mr. Miller had looked at the government website before meeting with the claimant. The purpose of looking at the site was to ascertain factors which he might take into account in a selection for redundancy.

50. That website informed him that absences from work were a factor which could be considered in selecting for redundancy.

51. The claimant's absences were not a material factor in the decision to dismiss her. They were only a very minor consideration and were only considered because of the information stated on the government website.

52. No other trainee was employed by the respondent.

53. Martin Stevens was due to retire and would not be replaced.

54. The respondent had operated historically on a business model of using an overdraft to fund their business. Prior to February 2018 the level of the overdraft had not been close to approaching the threshold imposed by the bank.

55. By the end of February 2018 the respondent's overdraft facility was very close to the maximum limit imposed upon it in terms of the letter of 1 March 2017. The extent of that overdraft is shown at page 44. The respondent was concerned that the authorised overdraft limit could be breached.

56. The authorised overdraft limit has been further reduced in terms of a letter from the bank dated 5 April 2018, page 56.

57. The redundancy exercise undertaken by the respondent was not a sham. It was caused by the financial situation in which the respondent found itself.

58. The respondent is part of a marketing group but itself is a Scottish Limited company and does not have offices in Bahrain or Qatar as alleged by the claimant.

Submissions

Claimant

59. For the claimant Ms. Neil submitted the claimant had been treated unfavourably because of something arising in consequence of her disability. It is for the claimant to identify the treatment about which she is claiming and by whom. The claimant had absences from work and the respondent knew of her disability. She had requested an orthopaedic chair and for an assessment to be done but that did not happen. The unfavourable treatment was to dismiss her and that was because of the something arising from her disability namely her absences.

60. The burden of proof was on the respondent to show that the reason for dismissal was as they said and was not related to disability.

61. In Ms Neil's submission there was nothing to suggest that the financial situation in which the respondent had found themselves was anything out of the ordinary. It was shortsighted to dismiss the claimant and the employment tribunal could consider if a lesser option could have been considered instead.

62. The claimant had asked for reasonable adjustments to be made and none had.

63. She referred to the mention of absences by the respondent in the ET3 and submitted that indicated that the question of absence was a material factor in the decision to dismiss the claimant.

64. The claimant suffered a disadvantage in that when bending down to obtain a reading for damp in a property she suffered pain. She had requested a chair and that was not provided. The respondent also failed to provide an occupational health assessment.

65. With regard to the time bar point, which she anticipated the respondent would make, it was her position that a breach of a failure to act was a continuing act continued up until the end of employment.

66. Ms. Neil referred to the schedule of loss which had been lodged but indicated that if the claim under section 15 failed then she would restrict the claim for compensation for the reasonable adjustment claim to £4000.

Respondent

67. Mr. Wallace pointed out that we were not, in this case, concerned with the fairness of the dismissal as the claimant could not claim unfair dismissal due to her lack of service.

68. In his submission the reason for dismissal was redundancy. This was due to the financial condition of the respondent and the employment tribunal cannot consider the business efficacy of that decision.

69. The respondents were entitled to choose to select the claimant for redundancy once Rhea Balfour had volunteered to return from Shetland to Edinburgh.

70. The redundancy was not a sham as the claimant had argued and the financial evidence which had been produced had not been challenged.

71. The claimant must be able to show that she was treated unfavourably because of something arising in consequence of her disability. She alleged that the unfair treatment was that her absences were taken into account. That was not the case. The matter of absences was not the reason for her selection for redundancy.

72. The claimant's absence record was not a primary consideration. He referred to ***Barton v Investec Henderson Crosthwaite Securities Ltd***. (below) and submitted that the claimant had failed the first part of the test set out in that case.

73. He accepted the respondent knew the claimant's condition. But the condition of sciatica only applied until February 2017 and after that all her absences were for other reasons.

74. The claimant did not ask for any adjustments after March 2017. The situation had improved because of the footwear provided to her. The matter of the chair was not raised at the appraisal and the respondent had reason to assume the condition did not have an adverse effect.

75. The claimant had not shown there was a prima facie case of discrimination.

76. So far as the claim for reasonable adjustments was concerned it was Mr. Wallace's position that the claim was time barred. There had been no mention of the chair and any other adjustments after March 2017, only before that date.

77. The claimant did not raise a grievance and the fact that she did not do so indicated that she did not consider anything was going wrong in the workplace.

78. In any event it would not be just and equitable to extend the time limit as no reason had been given to enable the tribunal to exercise its discretion in such a way.

79. If however the employment tribunal allowed the claim, it was his position that the claimant had not identified the provision criterion or practice in either her ET1 or the agenda for the case management hearing and the respondent had no fair notice of the claim.

80. No evidence had been produced as to how the proposed adjustment could help the claimant and simply suggesting physiotherapy was not enough. It was also his position that the respondent did not know of the disability at the relevant time.

81. Finally, he submitted it would not be just and equitable to award any compensation but if the tribunal was minded to award any it should be reduced and subjected to a "Polkey" reduction. The only reason the respondent looked at absences was because the government website had suggested it. If the tribunal was minded to award anything in respect of injury to feelings the award should be at the lower end of the bottom band of ***Vento***.

82. The parties referred to the following cases:-

Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKESAT/0397/14

Barton v Investec Henderson Crossthwaite Securities Ltd. [2003] IRLR 332

Ayodele v Citylink Ltd and another [2018] IRLR 114

Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434

A v Z UKEAT/0273/18

City of York Council v Grosset [2018] EWCA Civ 1105

Williams v The Trustees of University Pension & Assurance Scheme and another [2018] UKSC 65

Hall V Chief Constable of West Yorkshire Police UKEAT/0057/15

Charlesworth v Dransfields Engineering Services Ltd. UKEAT/0197/16

IPC Media Ltd. V Millar UKEAT/0395/12

Copal Castings Ltd v Hinton UKEAT/0903/04

Leeds Teaching Hospital NHS Trust v Foster UKEAT/0552/10

Noor v Foreign & Commonwealth Office UKEAT/0470/10

Abertawe Bro Morgannwg University Local Health Board n Morgan [2018] EWCA Civ 640

Pnaiser v NHS England and another [2016] IRLR 170

Decision

83. Section 15 of the Equality Act 2010 provides as follows: –

(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 that disability.

84. It is necessary for the claimant to show that she has suffered unfavourable treatment and that the treatment is because of something arising in consequence of her disability. In this case the claimant's disability is sciatica. The "something", she argues, is taking into account disability related absences in the redundancy process and also that she was subjected to a "sham" redundancy resulting in her dismissal. This is the case as set out in the ET1 at page 92.

85. We were satisfied that the redundancy was not a sham. The attitude shown by the bank cannot be ignored and it was clear to us that if the respondent breached the covenants imposed by their bankers the consequences would be very serious.

86. We accepted that having considered the management accounts for the Shetland branch and the fact that the overdraft was rising to close to the limit imposed by the bank, the respondent needed to take action.

87. There was no reason to question the accuracy of the figures produced to us for the Shetland branch. The fact that the wages had gone up slightly in January we did not consider to be a particularly relevant factor as the major fact was that the losses were continuing and were ongoing. There was therefore a real risk that the covenant to the bank would be broken.

88. Initially, the redundancy was confined purely to the Shetland branch and the decision was to remove one of the surveyors based there. Rhea Balfour offered to return to Edinburgh. There was no requirement for an extra person in Edinburgh and accordingly Rhea Balfour's return put the claimant at risk.

89. We accepted the respondent's evidence that it made more sense from a business point of view to retain a qualified person and lose an unqualified trainee. We accepted that the training of a trainee took time for qualified persons such as Mr. Miller and Mr. Stephen. On the other hand, Rhea Balfour could work on her own. We rejected the claimant's allegations that she went on surveys alone or prepared her own reports. That evidence was unsubstantiated and was denied by Mr. Miller.

90. We were satisfied that the choice of the claimant as the person to be dismissed was because she was a trainee. We accepted Mr. Miller's evidence that he only looked at the claimant's absences because the government website suggested absences could be a factor. In any event there was no absence due to disability since February 2017. All the other absences were for non-disability reasons. The

majority of absences over the period of employment did not relate to the claimant's disability.

91. We were satisfied that if the claimant's absences played any part in the decision to dismiss her they were minor and played nothing more than a trivial part in the decision to dismiss. They were not a significant influence on the decision to select her for redundancy.

92. The claimant was not treated unfavourably as a result of something arising from her disability. The dismissal was by reason of redundancy. That redundancy was not a sham. There was a genuine need to reduce headcount and expense. We concluded that the reason for dismissal was redundancy and that the claimant's absences from work played no significant part in her selection.

93. We are required to consider what was the alleged discriminator's reason for the treatment in question. The burden of proof is on the claimant and in our opinion she has failed to show the unfavourable treatment which she suffered was because of her disability. All that she has shown is that she is disabled and that she suffered the unfavourable treatment of being dismissed. That by itself is not enough. We were not persuaded that she was selected for redundancy because of "something" arising from her disability.

94. The claimant has failed to show a prima facie case of discrimination. The burden of proof has therefore not shifted to the respondent in terms of section 136 of the Equality Act 2010. Even if we were wrong in that, and a prima facie case of discrimination had been shown, we were satisfied that the respondent has discharged the burden of proof by showing that the reason for the unfavourable treatment was because of the financial situation of the respondent and the fact that Rhea Balfour had returned to Edinburgh. That had nothing to do with something arising from the claimant's disability.

95. We accepted the respondent's evidence regarding the reason and that it was not "because of" something arising from the claimant's disability. Accordingly the claim under section 15 is dismissed.

96. Section 20 of the Equality Act 2010 provides that the duty to make reasonable adjustments comprises three requirements: –

> 1. A requirement, where a provision, criterion or practice (PCP) 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.
>
> 2. 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.
>
> 3. 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.

97. It is the respondent's position that this aspect of the claim is time barred.

98. The claimant requested a chair which she considered would help to alleviate the pain which she was suffering. We were satisfied on the evidence that the claimant had made this request to Melissa Coutts and that the request had been relayed to Mr. Miller who had agreed to the provision of an appropriate chair and for a workplace assessment to be carried out, When Mr. Miller inquired of the claimant what was happening with regard to the chair he was informed that the problem which had been causing her pain was as a result of one of her legs being longer than the other and that this could be cured by corrective footwear. The claimant advised Mr. Miller that the problem was not sitting but was walking.

99. Mr. Miller then assumed that was no need for the chair and nothing further was done about it or the workplace assessment. We considered that he was entitled to the view that the matter of the chair and workplace assessment had been resolved . There was no evidence the matter had ever been raised with him again

and it was not raised at the time of the appraisal. At the appraisal in September 2017 Mr. Miller was concerned about the fact that the claimant appeared to be in some pain and requested a letter from her GP as to what if anything the respondent could do to help her.

100. On balance we accepted Mr. Miller's evidence that the conversation with the claimant did take place as he alleged. The claimant had an opportunity at that appraisal meeting to have raised the matter of the chair had that still been an issue. The fact that it was not raised persuaded us that Mr. Miller's evidence was on balance preferable and that the matter of the chair or more accurately the need for the chair had been resolved. It had been resolved by the respondent being informed the problem was not caused by sitting.

101. We were satisfied the matter had never been raised again with Mr. Miller and even on the claimant's own evidence the last time any request was made for the chair was in March 2017.

102. A complaint of a failure to make reasonable adjustments must be made within three months of the date of the act complained of – section 123 (1) of the Equality Act 2010. The employment tribunal does have discretion to extend that time when it considers it is just and equitable to do so. In this case the last request for a chair was made in March 2017. As stated we accepted Mr. Miller believed the matter of the chair had been resolved and that it was no longer required. There was no continuing act of failure to provide reasonable adjustments in respect of the chair or workplace assessment.

103. In ***Robertson v Bexley Community Centre t/a Leisure Link*** (above) the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now section 123 (1)(b) "there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend the time so the exercise of the discussion is the exception rather than the rule."

104. We were not given any satisfactory explanation as to why we should exercise any discretion to allow this aspect of the claim to be received late. The claim in respect of a failure to provide an orthopaedic chair should have been made at the latest within three months of March 2017 which is when the claimant says the matter was last raised by her.

105. The claimant has set out at page 129 the specific adjustments she claims should have been made by the respondent. We did not hear any evidence that she was ever required to bend down to test for damp when she was feeling pain and no evidence was led about her having to climb into attics or carrying ladders. There was no evidence travelling by car posed a problem or that she be was asked unnecessarily to climb in and out of cars to collect keys. The evidence which we accepted was that when she was in pain the respondent was quite content to allow her to remain in the office and not go out on survey. That was a reasonable adjustment which they made. No evidence was led as to any occasion when the claimant was in pain but was required to go on a survey.

106. Whilst the claimant gave evidence that Martin Stevens was not happy if he had to get out of the car rather than the claimant or having to do damp testing work himself there was no evidence that the claimant had been made to do these things. On the contrary, the claimant's evidence was that Mr. Stevens did these things if she had objected for whatever reason. She did not give any evidence that she was made to do these tasks whilst in pain and that she had communicated that to the respondent.

107. In respect of the specific adjustments the claimant submits the respondent should have made, as set out at page 129, we were satisfied that the respondent had made reasonable adjustments on the basis that they did on the claimant's own evidence, not require her to get in and out of cars if she was feeling pain or to test for damp by bending down whilst in pain. If the claimant felt too much pain to go out on a survey the respondent made the adjustment of allowing her to remain in the office.

108. We agreed with Mr. Wallace's submission that the claimant had not specifically identified the provision criterion or practice which she alleged put her at a

particular disadvantage in relation to persons who are not disabled. In her ET1 she has referred to the respondent having failed to make reasonable adjustments but has not at any stage specified which of the three requirements under section 20 she is basing her case upon.

109. Insofar as the claim is based upon a failure to provide an orthopaedic chair and workplace assessment we have found that claim to be presented out of time and have not been given any satisfactory basis upon which we might exercise our discretion to extend the time limit as no reason has been given for the delay in raising a claim for a failure to make reasonable adjustments.

110. In our opinion the claim for reasonable adjustments has been presented out of time and for that reason is dismissed.

111. If we had not taken the view that the claim was out of time and should be dismissed we would have found on the evidence and for the reasons set out above that the respondent had complied with any duty upon them to make reasonable adjustments.

112. For these reasons the claims are dismissed.

Date of Judgement: 10th December 2019
Employment Judgement: I Atack
Date Entered in Register: 13th December 2019
And Copied to Parties