



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110425/2019

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Held in Glasgow on 27 January 2020

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**Employment Judge
Members**

**F Eccles
Mrs L M Miller
Mr D Frew**

Mrs I Mulgrew

**Claimant
In Person**

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McAlpine & Company Limited

**Respondent
Represented by:
Mr R Turnbull -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claims of (i) indirect disability
25 discrimination and (ii) victimisation are not well founded and shall be dismissed.

REASONS

BACKGROUND

1. The claim was presented on 27 August 2019. The claimant claimed disability
discrimination following her return to work after treatment for lung cancer.
30 The claimant complained about failure on the part of the respondent to allow
her to undertake inspection and checking work once she had completed a
phased return to work. The claim was resisted. In their response, accepted
on 26 September 2019, the respondent did not dispute that the claimant is a
disabled person for the purposes of proceedings under the Equality Act 2010
35 ("EA 2010"). The respondent denied having discriminated against the

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claimant. In the event that the claimant was found to have been subjected to discrimination, which was denied, the respondent claimed that they took all reasonable steps to prevent discrimination against the claimant.

2. The claimant identified the legal basis of her claim as indirect discrimination under Section 19 of EA 2010 and victimisation under Section 27 of EA 2010. In response to an Order for additional information, the claimant identified the provision, criterion or practice said to have been applied by the respondent in terms of Section 19 of EA 2010 as;

“Grievance and appeal procedure was followed by the company. I was unaware as I had never received a company hand book in over four years.”

The particular disadvantage to which she claimed to have been put by the provision, criterion or practice when compared with people who do not have her disability was identified by the claimant as her inability to progress in the company and of giving up a skilled job with another employer to undertake checking duties. The remedy sought by the claimant was to return to checking.

3. In relation to her claim of victimisation, the claimant identified the respondent’s Production Manager, Elizabeth Hunt as the person who had subjected her to detrimental treatment because she had complained of discrimination and lodged a grievance. The detrimental treatment was identified as aggressive behaviour on the part of Elizabeth Hunt and being singled her out for criticism for wearing her hair down. The detrimental treatment was said to have occurred on 23, 24 & 28 May and 17 September 2018. The remedy sought for victimisation was mediation.

4. The claim was listed for a final hearing at which the claimant represented herself. The claimant gave evidence. The respondent was represented by Mr R Turnbull, Solicitor. Elizabeth Hunt, Production Manager, gave evidence on behalf of the respondent. The parties provided the Tribunal with a joint bundle.

FINDINGS IN FACT

5. The Tribunal found the following material facts to be admitted or proved; the respondent manufactures and assembles plumbing products. The respondent has around 700 employees at various locations across central Scotland. The claimant is employed by the respondent as a General Operator. The claimant is employed at the respondent's premises in Thornliebank, Glasgow. The claimant is employed on the respondent's twilight shift (16:30 to 22:00, Monday to Thursday). The respondent also operates a day shift (08:00 to 16:30, Monday to Thursday and 08:00 to 15:30, Friday).
6. In March 2018, Elizabeth Hunt, the respondent's Production Manager, placed a notice in the staff canteen (P12/61) seeking expressions of interest to assist with checking and inspection on the twilight shift. The claimant expressed an interest and was subsequently informed by Elizabeth Hunt that along with another General Operator, Alan Walker, she would receive training and instruction on inspection and checking procedures. Elizabeth Hunt also informed the claimant by letter dated 29 March 2018 (P13/62) that inspection duties would be rotated on a weekly basis, her progress monitored over the following three months and duties reviewed at the end of that period. The claimant began checking and inspection duties in addition to her general operator duties from 9 April 2018. The additional duties did not attract an increase in pay. The claimant remained a General Operator.
7. During June 2018, the claimant was diagnosed with cancer and was absent from work until 28 January 2019 while receiving treatment. Around September 2018, another General Operator, Fiona Fullerton was trained to undertake checking and inspection duties on the twilight shift.
8. By agreement the claimant's return to work was phased until 4 March 2019. During the claimant's phased return, Elizabeth Hunt sought to support the claimant by limiting her duties and hours. On one occasion she referred to this as allowing the claimant "*to learn to walk before she could run*". During her phased return the claimant was not asked to undertake any checking or inspection duties.

9. Around the same time as the claimant's return to work, there were concerns on the part of senior management about the level of supervision on the twilight shift. Elizabeth Hunt, while not directly involved in the decision making, was aware of the possibility of changes being made to the twilight shift. She did not consider it appropriate to inform the claimant of any proposed changes. She felt unable to inform the claimant when, or if, she would return to checking and inspection duties given discussions taking place about restructuring the twilight shift.
10. The decision was taken by senior management to appoint at least one additional Charge Hand on the twilight shift. Elizabeth Hunt placed an advertisement for the post of Charge Hand in the staff canteen on 9 April 2019 (P14/63). The advertisement (P14/63) stated that the role of Charge Hand included "*checking job setups*", "*running leaflets and labels*" and "*carrying out carting checks*". These duties were similar, if not the same, as the checking and inspection duties that the claimant had undertaken before her absence from work. The claimant was entitled to apply for the post of Charge Hand. She did not apply. Alan Walker and Fiona Fullerton both applied and were interviewed by Elizabeth Hunt. The decision was taken by senior management to appoint two Charge Hands for the twilight shift. Alan Walker and Fiona Fullerton were appointed to the posts on 23 May 2018. The post of Charge Hand included the checking and inspection duties previously undertaken by the claimant. There was no further requirement on the part of the respondent for General Operators, including the claimant, to undertake checking and inspection duties on the twilight shift.
11. The claimant telephoned Elizabeth Hunt on 25 May 2018 to ask about checking duties following the appointment of two Charge Hands. The claimant was at home. She was upset and agitated on learning that the new Charge Hands would undertake checking duties on the twilight shift. She demanded to know what was happening. Elizabeth Hunt informed the claimant that she would prefer to discuss matters when the claimant was at work. The claimant was unhappy with Elizabeth Hunt's response. The claimant was next in work on 28 May 2018. Elizabeth Hunt was busy replying to correspondence

received by the respondent over the bank holiday. The claimant approached Elizabeth Hunt and demanded that she speak to her. Elizabeth Hunt explained that she was busy and would speak to her later. The claimant insisted that Elizabeth Hunt speak to her that day as she was *“taking a ‘phone call the following day”*. Elizabeth Hunt returned to her office. Around 15 minutes later, Elizabeth Hunt was informed by another employee that there was a disturbance on the factory floor involving the claimant making accusations against her of discrimination. Elizabeth Hunt asked the claimant to come to her office where the claimant continued to accuse her of discrimination. The claimant referred to having cancer and of being *“protected”*. The claimant was angry and agitated. She claimed that Elizabeth Hunt had promised that she would return to checking duties. She accused Elizabeth Hunt of discrimination and referred to the support she would receive in proving discrimination. Elizabeth Hunt was taken aback by the claimant’s behaviour. She expressed concern that the claimant was threatening her and suggested that the claimant could put her grievance in writing. The claimant left the room mid- discussion. Elizabeth Hunt had wanted to discuss a separate matter with the claimant concerning the responsibility of employees to report misuse of drugs in the workplace. She had received a report about a discussion amongst employees, including the claimant, on the subject of drug misuse in the workplace. She called the claimant back into her office. She reminded the claimant of her responsibility to report any misuse of drugs in the workplace.

12. The claimant lodged a grievance on 29 May 2019 (P15/64). In her grievance she requested that *“all reasonable steps to be taken to alleviate the disadvantage I am facing at work”*. She accused Elizabeth Hunt of becoming angry when she asked her in March 2018 what was happening about her checking position. She claimed that Elizabeth Hunt told her that she would return to the position in due course. She stated;

“I was off work for around 9 months and on my return to work at the end of January/beginning of February I did a phase return that lasted a few weeks,

My last meeting with my manager Liz in march I asked what was happening with my checkers position she got very angry with me but told me I would return to that position in due course.

5 *My understanding is that this position was given to a temporary employee as I was told my cancer was terminal hence why I never returned to that position on my return to work.*

Since my return to work there was a job for a charge hand posted on the notice board for the twilight shift I did not apply for this job as liz told me I would be returning to the checkers job a job that I enjoyed doing.

10 *Thursday the 23 rd of may 2 people were given the charge hand position and those 2 people were the 2 checkers but the job had changed so the title QA/charge hand and to my understanding both these workers are still temps. This is not the job that was advertised on the notice board.*

15 *Friday morning I called Liz to ask her what was happening again she got angry and told me she was not going to discuss this over the phone with me she would have a meeting with me on Tuesday when we returned to work.*

On Tuesday I was on my way to the rest room and Liz passed me in the corridor so I asked her if she was ready to have that meeting she said to me "I cant deal with you right now" I told I had contacted someone to find out what my rights were and I was due to call them back on weds to let them know the outcome of the meeting.

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I went back to doing my job and around 15mins later Liz came and got me we went to her office by now she was fuming and accused me of threatening her which was not true. The meeting did not go well to say the least this is why I am now putting it in writing to yourself.

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I now feel upset and completely cheated and lied to I am really stressed out and not being able to sleep at night because of what liz has done I do feel I have been discriminated against because I have cancer.

I have contacted Macmillan at work and discussed the situation with them they have informed me that I am protected by the equality act 2010 and they will support me through this process.

I look forward to receiving your response in writing within 14 days from the receipt of this letter or in line with the company's grievance procedure."

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13. The claimant was invited to a grievance meeting on 12 June 2019. The claimant was accompanied at the meeting by her trade union representative, Karen McKechnie. The grievance meeting was chaired by David Lang, the respondent's General Manager. The respondent produced a written record of the grievance meeting which the claimant was given the opportunity to revise (P16/65-67). At the grievance meeting the claimant accused Elizabeth Hunt of lying to her about a return to checking duties and claimed that she had been discriminated against because of her cancer. It was explained to the claimant that management had made changes to the twilight shift in response to the possible retirement of a Senior Supervisor and as a result, checking duties would now be carried out by the new Charge Hands. There was discussion about the possibility of the claimant being offered lighter duties other than checking and inspection.

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14. David Lang was not persuaded that the claimant had been discriminated against by Elizabeth Hunt. He notified the claimant of the outcome of her grievance in writing on 19 June 2019 as follows:

"In reply to your letter that you sent to KG McAlpine on 29/05/19 on which you raised a grievance in regard to you being discriminated against because you have cancer.

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25 *I have considered your grievance and below is my findings.*

You have claimed that in March the production Manager (Liz Hunt) told you that you would return to inspection duties in due course however Liz states that this is incorrect and she told you changes were being considered to this role.

For business reasons we had decided to appoint a new Charge Hand for the Twilight shift to cover any possible Supervisory shortages due to possible changes in available personnel. A notice to this effect was put up in the factory inviting applications for this role.

5 *Due to an ongoing absence of a member of staff I took the decision to appoint two people to the Charge Hand role on the twilight shift.*

The new Charge Hands will receive training in their new duties on a week about basis and cover any inspection duties during the other week.

10 *You allege that you have been discriminated against because you have cancer. I find no evidence to support this claim.*

You had the same opportunity to apply for the Charge hand role as everyone else.

You are currently carrying out similar duties to the other 'operatives' on the Twilight shift.

15 *Management can and do change the duties of 'operatives' to suit the business needs on a regular basis.*

If the grievance has not been resolved to your satisfaction you may submit a written appeal, stating your grounds of appeal, to the decision maker within one week of the date of this letter."

20 15. The claimant appealed against the decision made by David Lang (P18/69). The claimant attended an appeal hearing on 24 July 2019. The respondent produced a written record of the appeal meeting (P22/73-77). The appeal hearing was before John Gordon, General Manager of the respondent's Hillington site and Steven Scott, General Manager of the respondent's
25 Coatbridge site. The claimant was accompanied by her trade union representative, Karen McKechnie. The appeal was not upheld. The claimant was advised by John Gordon and Steven Scott of the outcome of her appeal in writing on 31 July 2019 (P23/78-79) as follows:

“We have considered the points you made at this meeting and would like to provide our decision to the appeal.

5 *Prior to your absence, which commenced in June 2018 you were carrying out the role of checker which can be carried out by any general operator given training. You started the role on the 9th April 2018 and this role was to be reviewed at the end of a three-month period. You had been in the role for some two months prior to your sickness.*

10 *The three-month review meeting did not take place as you were off sick. David did not feel it appropriate to make contact with you at that time, as you were seriously unwell.*

15 *You returned to work on 28th January 2019 following a period of sickness absence and worked on a phased return as agreed with you and the company up until 4th March 2019. You then approached Liz to ask about returning to your checker duties and you were advised that it would not be possible at that time as there were changes being considered in the factory. This was an informal meeting. Liz was not in a position to advise you of the changes as she did not know at that time what changes the General Manager had decided to make. You did not return to the checking part of that role.*

20 *At the time of your return and in the following three months the General Manager was considering some operational changes. It has transpired that there was a plan to integrate the checking function into the new chargehand role whereby on a weekly rotation basis, one of the two chargehands is completing checking and inspection and the other is working with the*
25 *Supervisor.*

30 *On 9th April 2019 the new job of Chargehand was advertised but you did not apply for this role as you thought you would be carrying out your checker duties within your general operator role. However, you had not been operating in that role for some time by this point. The informal meeting in March with Liz noted that you would not be returning to checker duties and this fact had not changed.*

On consideration, we believe that there was perhaps a lack of clarity in communicating that the role of general operator would no longer include checker duties. Therefore, with regards to the clarity in communication, we apologise and uphold this part of your appeal.

5 *We are now in the process of introducing an enhanced return to work interview for staff who have been on long term sick in order to clarify relevant changes to the workplace that have occurred during their absence.*

10 *However, it's my view that you were not disadvantaged in comparison with any other employee as a result of the lack of clarity. The role of chargehand was advertised and some 4 applicants applied. You were entitled to apply and had equal opportunity to apply for the new role. Your shop steward confirmed that "no one knew about the role" and that "nobody knew they were doing away with checkers' jobs". No one had any advantage over anyone else.*

15 *With regards to your statement that you should have legally been advised of the change of your role, there was not a fundamental change to your role. Your terms and conditions, pay rate, job description was not changed at any point. You still remain in the role of General Operator. With regards to this part of your grievance, we do not uphold your appeal.*

20 *You raised a point at our meeting that it stated in a letter that the disciplinary procedure was being followed. In the letter you receive on 1st July it should have read grievance procedure. This was a typographical error and we apologise for that error.*

25 *You noted that you were having difficulties in communicating effectively with your manager Liz. We would like to facilitate mediation to try to resolve any underlying issues in order to rebuild the relationship and move forward.*

30 *As per our Company Handbook this decision is final. We hope that the apologies and further explanations offered, together with the offer of mediation, gives you some reassurance that the company recognises where it could have performed better, has taken steps to address that, that you have*

not suffered any particular disadvantage compared with others and that the company is committed is trying to assist in rebuilding relationships. Please let me know if you are prepared to consider mediation.”

- 5 16. The respondent’s Handbook includes an anti-harassment and bullying policy, disciplinary procedure and grievance procedure (P11/48-60). Elizabeth Hunt was trained in the respondent’s Handbook and provided training to other employees. She was aware that unlawful discrimination by an employee of the respondent is regarded as gross misconduct. The respondent provides employees with copies of the Handbook. During the grievance procedure the claimant informed the respondent that she did not have a copy of the Handbook. A copy was issued to the claimant. She acknowledged receipt on 10 13 August 2019 (P24/80).
- 15 17. On 17 September 2019 Elizabeth Hunt noticed the claimant working at the packing machine without her hair tied back. The claimant has long hair. The packing machine has moving parts and Elizabeth Hunt was concerned that the claimant might be injured if her hair became caught in the machine. It is the respondent’s practice that when working at machines, employees should tie their hair back for health and safety reasons. Elizabeth Hunt informed the shift Supervisor of her concerns. The claimant was informed by the Supervisor 20 to tie her hair back.

ISSUES

18. The issues before the Tribunal were as follows:
- 25 (i) Did the respondent indirectly discriminate against the claimant by applying a provision, criterion or practice to her that they applied to people who do not have the claimant’s disability and that caused the claimant a particular disadvantage when compared to people who do not have her disability?
- 30 (ii) Did the respondent victimise the claimant by subjecting her to a detriment because the claimant complained of discrimination and brought a grievance about alleged discrimination?

- (iii) If the claimant was subjected to discrimination, did the respondent take all reasonable steps to prevent discrimination against the claimant &
- (iv) If the claims are well founded what, if any, remedy should be made in favour of the claimant.

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NOTES ON EVIDENCE

19. The Tribunal heard evidence from the claimant and Elizabeth Hunt for the respondent. Their evidence was in dispute over what was said to the claimant about undertaking checking duties after her return to work in January 2018. 10 It was the claimant's evidence that she was informed at an early stage that she would be allowed to return to checking duties "*in due course*". Elizabeth Hunt denied having given any such undertaking to the claimant, in part because she was anxious that the claimant complete her phased return to work before undertaking checking duties but primarily because of the 15 uncertainty caused by proposed restructuring of the twilight shift due to staff changes.
20. The Tribunal found that Elizabeth Hunt gave her evidence in a balanced and thoughtful manner. She had a clear recollection of events. She was willing to accept parts of the claimant's case that were not entirely supportive of the 20 respondent's case, such as making the remark "*you should learn to walk before you can run*" and delay in providing the claimant with a company Handbook. In contrast, the claimant's evidence was less persuasive. She was unable to accept that she might be mistaken in relation to any aspect of her case. She had a tendency to exaggerate exchanges with Elizabeth Hunt 25 which undermined the reliability of her evidence. On balance, where their evidence was in dispute the Tribunal preferred the evidence of Elizabeth Hunt to that of the claimant.

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DISCUSSION & DELIBERATIONS

INDIRECT DISCRIMINATION

5 21. In terms of Section 19 of the Equality Act 2010, a person (A) discriminates
against another (B) if A applies to B a provision, criterion or practice which is
discriminatory in relation to a relevant protected characteristic of B's. Disability
is a protected characteristic. It is not in dispute that the claimant, having been
diagnosed with cancer, is disabled for the purposes of proceedings under the
10 EA 2010. The provision, criterion or practice identified by the claimant was;

*“Grievance and appeal procedure was followed by the company. I was
unaware as I had never received a company hand book in over four years.”*

15 22. The respondent did not dispute that they followed their grievance and appeal
procedure in relation to the claimant. They did not dispute that the claimant
was issued with a copy of the company Handbook after she had started the
grievance procedure. In terms of Section 19(2) of the EA 2010, for the
provision, criterion or practice to be discriminatory it must (i) be applied to the
claimant and persons who do not have the claimant's disability; (ii) put the
20 persons who have the same disability as the claimant at a particular
disadvantage when compared with persons who do not have her disability
and (iii) put the claimant at that disadvantage. The disadvantage identified by
the claimant was an inability to progress in the company. There was also
reference by the claimant to having to give up a skilled job to undertake
25 checking duties.

30 23. The Tribunal was not persuaded that the provision, criterion or practice
identified by the claimant put people who have been diagnosed with cancer
at a particular disadvantage when compared with people who have not been
diagnosed with cancer. The Tribunal agreed with the respondent's
submission that there was insufficient evidence, if any, before the Tribunal to
show that because of the claimant's disability she had been disadvantaged

by the respondent's grievance procedure or by any delay in providing her with a copy of the company Handbook. Mr Turnbull on behalf of the respondent referred the Tribunal to the case of **Secretary of State for Trade and Industry v Rutherford & others 2006 ICR 785** in support of the respondent's submission that there was no evidence of group disadvantage. There was no persuasive evidence before the Tribunal that either the grievance procedure or any delay in being provided with company Handbook had prevented the claimant from progressing in the company. The claimant was not prevented from applying for the post of Charge Hand. From the evidence before it, the Tribunal was unable to make any findings that the claimant had been put at a disadvantage by having to give up a skilled job to undertake checking duties, in particular in circumstances where the checking duties were undertaken as part of her existing role as a General Operator.

24. In all the circumstances, the Tribunal did not find that the claim of indirect discrimination was well founded. The Tribunal did not therefore consider it necessary to determine whether the respondent took all reasonable steps to prevent discrimination against the claimant and the claim has been dismissed.

VICTIMISATION

25. In terms of Section 27(1)(a) of the EA 2010, a person (A) victimises another person (B) if A subjects B to a detriment because A does a protected act. It was not in dispute that the claimant had done a protected act by claiming on 28 May 2019 that Elizabeth Hunt was discriminating against her because she had cancer and by lodging a grievance with the respondent on 29 May 2019 in which she alleged that Elizabeth Hunt had discriminated against her under the Equality Act 2010. The Tribunal was not persuaded however, and accepted the respondent's submission in this respect, that the conduct on the part of Elizabeth Hunt about which the claimant complained amounted either to a detriment or was because the claimant had complained of discrimination and/or lodged her grievance.

26. The claimant first complained of discrimination by Elizabeth Hunt on 28 May 2019. Any victimisation of the claimant by Elizabeth Hunt could not therefore have occurred before that date. The claimant submitted that on 28 May 2019
5 Elizabeth Hunt victimised her by reminding her that she should report misuse of drugs in the workplace. There was no suggestion by the claimant that she was being accused by Elizabeth Hunt of misusing drugs or that she was not required to report the misuse of drugs by other employees. The Tribunal did not find that Elizabeth Hunt had behaved in an aggressive manner towards
10 the claimant. Elizabeth Hunt had reminded the claimant of her responsibility to report the misuse of drugs following a discussion involving employees, including the claimant, on the subject of drug misuse. The discussion had been reported to Elizabeth Hunt by another employee. The Tribunal was not persuaded that in all the circumstances the claimant had been subjected to a
15 detriment by Elizabeth Hunt or that she had reminded the claimant about her responsibility to report misuse of drugs in the workplace because of the allegation made against her by the claimant of discrimination.

27. The claimant also submitted that Elizabeth Hunt had victimised her on 17
20 September 2019 by informing a shift Supervisor of her concerns about the claimant working at the packing machine without her hair tied back. It was not in dispute that the packing machine has moving parts and that the claimant has long hair. The Tribunal was persuaded that Elizabeth Hunt was concerned that the claimant might be injured if her hair became caught in the
25 machine and that it is the respondent's practice that when working at machines, employees should tie their hair back for health and safety reasons. It was the claimant's Supervisor who informed the claimant that she should tie her hair back. The Tribunal did not find from the evidence before it that the claimant had been singled out by Elizabeth Hunt for any adverse treatment in
30 relating tying her hair back. The Tribunal was not persuaded that in all the circumstances the claimant had been subjected to a detriment by Elizabeth Hunt or that she had expressed concerns to the claimant's Supervisor about her working at machinery with her hair down because of the allegation made

against her by the claimant of discrimination or because she had brought a grievance alleging discrimination under the EA 2010.

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28. In all the circumstances, the Tribunal did not find that the claim of victimisation was well founded and the claim has been dismissed.

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Employment Judge : F Eccles
Date of Judgment : 10 February 2020
Date sent to parties : 12 February 2020

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