



## **EMPLOYMENT TRIBUNALS**

**Claimant:** Miss D Gibbons

**Respondents:** Star Jerk Hut Ltd – R1  
Mr R Stoddart – R2

**Heard at:** Croydon **On:** 26/2/2020-28/2/2020

**Before:** Employment Judge Wright  
Mrs A Williams  
Mr E Maw

**Representation:**

**Claimant:** Mr W Brown - solicitor

**Respondents:** Mr Stoddart

## **JUDGMENT**

It is the unanimous Judgment of the Tribunal that the claimant was not a disabled person for the purposes of the Equality Act 2020. In addition, her dismissal was not unfair. Her claims for notice pay and holiday pay also fail. Accordingly, all her claims are dismissed.

## **REASONS**

1. This case was listed for 3 days and although at the case management hearing, the respondents said they intended to call three witnesses, the evidence was very limited. The claimant, who has been represented throughout, provided a witness statement running to 9 paragraphs and an impact statement in respect of her disability running to 11 paragraphs. The respondents who were no longer represented, produced for R2 a witness statement of 26 paragraphs.
2. There was a bundle of approximately 190-pages, of which 30-pages were pleadings, 140-pages where the claimant's medical records of which only approximately 20-pages were relevant to the condition of arthritis. The other documents were payslips, bank statements, a P45 and one letter. This was not a case where the Tribunal was overwhelmed with documents and in fact, there was a complete absence of evidence which it would have been possible to produce and to refer to.
3. On 12/2/2020 the claimant's representative made an application that the claimant's evidence be given by means of video link. The reason was that she was in New York as her father had been taken ill.
4. The respondent objected to the application; in the main on the basis that for justice to be served, the Tribunal should hear the evidence 'live' and in person.
5. Any such evidence needs to comply with Rule 46

#### **Hearings by electronic communication**

A hearing may be conducted, in whole or in part, by use of electronic communication (including by telephone) provided that the Tribunal considers that it would be just and equitable to do so and provided that the parties and members of the public attending the hearing are able to hear what the Tribunal hears and see any witness as seen by the Tribunal.

6. The Tribunal does not have the equipment to hear evidence via video link. The Crown Court does however have such facilities and despite the respondent's objection, the claimant's application was granted and the Tribunal sat for the second day of the hearing in the Crown Court.
7. It took approximately 45 minutes to set the link up. The Tribunal was ready to hear the evidence and then some further time was spent on the

link. It quickly became apparent that there was too long a 'delay' on the link for it to be effective.

8. The Tribunal was mindful of the overriding objective. If the case (relating to events prior to August 2018) were delayed, it may be some time before a resumed hearing could be listed so that the claimant could attend in person. Although she was in New York, she was prepared to give her evidence on this occasion and it was her application to give evidence via video link.
9. Mr Brown said he communicated with the claimant via WhatsApp telephone calls. It transpired that the video link could be maintained, with the audio link muted and it was possible, for the parties and the Tribunal (there were no members of the public in attendance) to hear the claimant's answers to the questions put, with Mr Brown's telephone in 'speaker' mode. It was practicable to proceed in this manner and it complied with Rule 46. In any event, the claimant's evidence took approximately an hour.

#### Law

10. The claimant claims she was unfairly dismissed. Section 98 of the Employment Rights Act 1996 (ERA) provides:
  - (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
    - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
    - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
  - (2) A reason falls within this subsection if it—
    - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
    - (b) relates to the conduct of the employee,
    - (c) is that the employee was redundant, or

- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

11. The definition to disability is found in section 6 of the Equality Act 2010:

- (1) A person (P) has a disability if—
  - (a) P has a physical or mental impairment, and
  - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Was the claimant disabled at the relevant time, as per the definition under s.6 EQA?

12. The claimant relies upon the condition of arthritis.

13. The respondents did not deny that there was medical evidence which confirmed the claimant suffers from and has been diagnosed with arthritis.

14. The nub of the definition and with burden of proof is on the claimant, is whether or not the arthritis had a substantial and adverse effect upon her ability to carry out day to day tasks, at the relevant time, which ended on 31/8/2018. The claimant's impact statement set out that since the birth of one of her children in 2012 she began to suffer from arthritis. She said this caused her to be unable to: stand up for more than five minutes; sit up straight in a chair for more than five minutes; about three times per week, be unable to walk without assistance; not able to lift objects, for example, she cannot carry shopping; struggle to climb stairs and finds it difficult to

- get up from the toilet, struggle to do housework and has to sit down when loading the washing machine; and; cannot take a bath and can only stand up to have a quick shower.
15. The claimant did not say when these difficulties started (other than she referenced the onset of the arthritis in 2012). She also did not say when her condition deteriorated, or whether or not it had improved. The impact statement is dated 30/4/2019 (pages 38-39).
  16. This is contrasted with the claimant's witness statement (dated 21/2/2020) in which the claimant said her duties when working for R1 included serving customers, washing-up dishes, preparing basic food such as salads and assisting the Chef.
  17. In her witness statement the claimant also referred to the time she had to take off work to attend medical appointments. Although the Tribunal had 140-pages of medical notes, it was not taken to specific evidence of the claimant's medical appointments. She also referred to being on medication for her arthritis and again, the Tribunal was not taken to that evidence.
  18. It was put to the claimant in cross-examination that when she worked for R1 she prepared meals, served customers, brought stock and items up from the basement and stocked the fridge. The claimant agreed this was the case although she said the items she brought up from the basement were not heavy.
  19. Surprisingly during cross-examination, the claimant insisted on at least four occasions that she was not disabled. She was very emphatic and adamant about that.
  20. The respondents adduced an eight-minute video of the claimant posted on Facebook on 20/6/2017, which essentially showed her 'partying'.
  21. The Tribunal finds that if the claimant's condition was as seriously debilitating as she said it was at the relevant time; then she simply would have been unable to work. She was working in a moderately physical environment of a takeaway restaurant and some level of mobility would be required. If the claimant's condition was as serious as she claimed it was, (she says that she could not sit nor stand for more than five minutes at a time) then she would have been unable to carry out the role in the way she described. In fact, she would have been house-bound if she really was unable to sit or to stand for more than five minutes at a time. It is logical to

- say that she could have executed the role as she set out in her witness statement and which in evidence she agreed she performed, if her symptoms were as bad as she described them.
22. It was put to the respondent that the claimant's day-to-day difficulties as described, related to her home life and therefore, the respondent could not have known how she struggled in terms of showering and performing household chores. That is correct, however, it is also correct to say that many of the work-based tasks, such as serving customers, preparing food and retrieving stock and stocking fridges are very similar to the tasks at home which the claimant said she could not do.
23. It is also correct to say that the respondent did not dispute the fact that the claimant had arthritis; however, having a diagnosis, does not automatically mean that she is disabled for the purposes of the EQA. Arthritis is not a deemed disability under the EQA.
24. In questioning the claimant confirmed she had not requested and Mr Stoddart agreed no request had been made to make any adjustments due to the claimant's condition. Mr Stoddart said if the claimant had requested any adjustment he would have made them for her.
25. The Tribunal simply did not accept the claimant's evidence. Her impact statement listed day-to-day tasks she said she could not do, yet at the relevant time, she was working for R1 working eight hour shifts twice a week. There was no medical evidence to corroborate the difficulties she said she was experiencing. If the claimant was really unable to sit or stand for more than five minutes at a time, in view of the lengthy medical reports the claimant relied upon (but did not take the Tribunal to), there would have been some reference to the difficulties she said she was experiencing.
26. The Tribunal finds on the balance of probabilities, the claimant was not a disabled person as there was no substantial and adverse effect on her ability to carry out day-to-day tasks. The conclusion is therefore the claimant is not disabled and the s.15 EQA claim fails.

Was the claimant dismissed or did she leave of her own volition?

27. In respect of the unfair dismissal claim, the Tribunal was presented with two versions of events.

28. The claimant's version is that in early August 2018 Mr Stoddart/R2 told her he planned to close the restaurant down for a short period to carry out a refurbishment. The claimant says that in the latter part of August 2018 a friend told her the restaurant had re-opened and she was surprised to hear this and contacted Mr Stoddard. Mr Stoddard told her, her position was no longer available, she went to the job centre to sign on and was told that she needed a letter from her employer. This resulted in the letter from Mr Stoddard (page 183).
29. The claimant seeks to link her dismissal to her absences to attend medical appointments and that Mr Stoddard resented this.
30. It is noted that the claimant led no evidence in respect of the absences which she says led to her dismissal.
31. Mr Stoddard's case is that following a dispute with the landlord, a new lease was signed in August 2015 for three years. The lease terms were not favourable and R1 began to suffer financial difficulties. There was also an inspection by the local authority and improvements/renovations were required. On 31/7/2018 he held a meeting with all the staff and informed them of the prospect of the business closing. As a result of that on 1/8/2018 the claimant and another member of staff said they wished to leave the business and it was agreed the claimant would leave at the end of the month (i.e. 31/8/2018 which is the agreed termination date). Mr Stoddard said the claimant then asked him for a letter to take the Job Centre in order to claim benefits (it is noted that whatever version of events is correct, whether the claimant was dismissed or she left voluntarily, this is a potential benefit fraud) and he agreed to provide it. He has expressed his regret at this action.
32. The Tribunal finds that the letter does not assist as both parties agreed it was produced for the purpose of the benefits agency and the Tribunal finds that was after the claimant was dismissed on her version of events or on the respondents' after the claimant decided to leave. It is undated and it is not signed.
33. The claimant referred to making an application for benefits at the Job Centre, however the Tribunal was not provided with any evidence of this. There was no evidence for example from the friend who told the claimant R1 had re-opened. The text messages referred to were not produced (it was said on the claimant's behalf that Mr Stoddard dismissed her by text message on 31/7/2018).

34. It was also put to the respondent why would the claimant leave voluntarily and just 'walk away' when she would have been entitled to a redundancy payment. It was also put that it was nonsense that the claimant would simply leave when she was entitled to a redundancy payment, however small. On that point, why in this scenario, the claimant did not demand a redundancy payment from R1? Mr Stoddard's explanation was that she claimant did not ask as she was willing to walk away voluntarily. The business however did not close down at that point, in fact there was no closure of R1 and no entitlement to a redundancy payment. The Tribunal also notes that this was a very informal employment relationship, there was no written contract and other than one letter, no other written documents.
35. It is a fact that R1 was in financial difficulties, eventually the business closed down and there is currently an application to strike it off the companies' house register; although a Caribbean fast food restaurant under a different name does exist at the same premises.
36. It is also a fact that the claimant did visit the US embassy to obtain a visa (there was a dispute over whether she was given time off to do this or she did it in her own time, but not of the fact that she visited the embassy) and she is currently in the US. Mr Stoddard had said the claimant intended to relocate to the US and it was noted she has been in the US for some time.
37. The Tribunal accepts the evidence of Mr Stoddard that he accommodated the claimant's absences and continued to pay her during those absences. It should also be noted that the claimant worked two shifts of 8 hours a week. She said that she would take one or two days off a month for medical appointments. Mr Stoddard said besides medical reasons, there were other reasons for the claimant's absences, such as childcare issues, family or domestic disputes or other illnesses unrelated to her arthritis. This was evidenced by the large number of medical records, for example, there are 23 different dates of consultations listed during 2018. Mr Stoddard tolerated this as the claimant was considered a family friend.
38. The claimant's evidence was not clear and her two witness statements contradict each other. The Tribunal tried to establish what dates the claimant said she was dismissed and what was her last working day. It is still not clear what the claimant's case on this aspect was. Her verbal evidence contradicted her ET1 and her witness statement dated February 2020.



39. The claimant generally lacked credibility. For example, she was claiming to be disabled under the EQA, yet as previously noted, she stated emphatically four times that she was not disabled. When asked if she was visiting the US or residing there, she replied 'no comment'. When asked if she chose to leave the employ of R1 to take up residence in the US, she said that was her 'private life'. There was also the video of her 'partying' taken at a time when she said she was disabled. In contrast, Mr Stoddard's evidence was credible. He admitted his mistake in terms of providing the letter for the benefit claim. He could have denied knowledge of the letter, but he did not, even though the letter was detrimental to him.
40. Based upon those findings, the Tribunal finds that there was no dismissal of the claimant and that she voluntarily resigned on 1/8/2018, worked during August and the 31/8/2018 was her last day of employment. The Tribunal rejects the claimant's version of events and accepts that of the respondents.
41. As the unfair dismissal claims fails, the claim for wrongful dismissal/notice pay also fails.
42. In respect of the holiday pay claim, the Tribunal finds contrary to what the claimant asserted, that she had not received any holiday pay, her holiday pay was paid in July 2018 (page 35) as there was a payslip evidencing this and bank statements showing the same.

Employment Judge Wright

04/03/2020

