



5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123646/2018

10

Heard in Glasgow on 26 September 2019

**Employment Judge: Lucy Wiseman
Members: Kirsty Ramsay
James Burnett**

15

Mr David Gall

**Claimant
In Person**

20

Border Cars Group Ltd

**Respondent
Represented by:
Mr Eadie -
Solicitor**

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30

The Tribunal decided to dismiss the claim.

REASONS

35

1. The claimant presented a claim to the Employment Tribunal on 18 December 2018 alleging he had been discriminated against because of the protected characteristic of disability. The claimant, who has Type 1 Diabetes, asserted he was dismissed two days after making enquiries about reasonable adjustments.

E.T. Z4 (WR)

2. The respondent entered a response denying the allegations and asserting the claimant had been dismissed because the respondent concluded the claimant was not capable of performing the role to a satisfactory standard.
3. An issue arose at the commencement of the hearing regarding a police investigation into a document which is said by the respondent to be fraudulent. Mr Eadie understood the investigation was ongoing. The claimant understood from the Police in Dumfries that he would not be questioned until the validity of the document in question had been ascertained.
4. The Tribunal retired to consider this matter. We reconvened to discuss the matter further with the parties and to understand how pivotal the document was to the dismissal. The claimant advised the Tribunal that he wished to withdraw the document and proceed with the hearing.
5. The Tribunal questioned whether the claimant wished more time to consider the position, but he confirmed he was content with his decision. The Tribunal made clear that should the claimant not be successful with his claim, he could not seek to revisit the document at that stage.
6. The members of the Tribunal confirmed they had not read the documents in the Inventory prepared for the hearing. The Employment Judge invited the claimant to remove the document in question from each member's documents, and the documents available on the witness table. This ensured the Tribunal did not read, and had no sight of the document in question.
7. We heard evidence from the claimant and from Ms Danielle Hughes, who had been the Group HR and Customer Care Supervisor at the time of these events. We were also referred to a number of jointly produced documents. We, on the basis of the evidence before us, made the following material findings of fact.

Findings of fact

8. The respondent was in the motor trade business focusing primarily on the sale of new and used cars and carrying out repair work to all vehicles owned by

customers. The respondent operated multiple sites, held several dealerships and employed approximately 300 employees.

5 9. The respondent went into administration on 23 July 2019. The dealerships have removed their stock of vehicles, premises have closed and all employees have been made redundant.

10 10. The claimant commenced employment with the respondent on 15 October 2018 as a Warranty Administrator. The letter of offer of employment was produced at page 26. The letter confirmed the claimant was employed on a six month probationary period, during which time he would receive training, advice and guidance to help him become familiar with and competent in performing the work. The appointment was subject to satisfactory completion of the probationary period.

11. The claimant's hours of work were 8.30am until 5pm with half an hour for lunch.

15 12. The claimant has Type 1 Diabetes. This was diagnosed in 2005. The claimant has to inject himself every time he eats; he has to check his blood glucose levels and ensure ketones are at a reasonable level and he has to use food to generate energy. The claimant wears an armband sensor to monitor his blood glucose levels and can view the results in graph format on his mobile phone.

20

13. The respondent was aware of the claimant's health condition because the claimant disclosed it at the interview and on the health questionnaire.

14. The claimant was interviewed by Mr Tom Roche, After Sales Manager, who asked what his diabetes entailed. The claimant told Mr Roche that his diabetes was under control, that he used insulin, but that each day was different. The claimant did not inform the respondent of the need for any adjustments to be made.

25

15. The claimant reported to Mr Roche, his line manager. Mr Roche arranged for "Anthony" from the Carlisle branch to train the claimant. There were eight

30

face-to-face meetings between Anthony and the claimant, and the claimant was provided with a guide setting out the processes and procedures.

16. The claimant used his mobile phone to monitor his blood sugar levels throughout the day. The claimant was aware of notices within the workplace prohibiting the use of mobile phones whilst at work. He did not speak to his line manager or anyone else to seek permission to use his mobile phone, or explain to them why he was using it.
17. The claimant telephoned Ms Danielle Hughes, Group HR and Customer Care Supervisor, on 3 December 2018 and a note of that telephone conversation was produced at pages 223 – 224. The claimant contacted Ms Hughes for clarification regarding the lunch break and whether he could adjust his hours to provide for a one hour lunch break. The claimant told Ms Hughes that “*with my diabetes, I’ve got to go out and get some prescriptions and stuff like that so I’ve been rushing back or I haven’t been able to drive, stuff like that, and if I take an extra 10 minutes, so if I know I have to stay until 5.30 then I can tell myself that.*”
18. Ms Hughes explained to the claimant that he would need to speak to his line manager, Mr Roche but she did not imagine there would be a problem with it.
19. The claimant was ill in the early morning of 4 December. The claimant knew he had to comply with the absence management procedure and phone his line manager or, in his absence, another manager, to advise them of his absence. The claimant delayed going to A&E so that he could make the telephone call.
20. The claimant tried to phone Mr Roche but could not get him. He tried the company switchboard but it was too early for his call to be answered. The claimant then sent an email message (page 55) to inform the respondent of his absence.
21. The claimant returned to work on 5 December. A return to work interview was conducted by Mr Roche and a form (page 56) was completed. The form recorded the claimant’s blood sugars had been high due to an infection and

that he had gone to A&E where he had been prescribed antibiotics. Mr Roche confirmed the claimant had to make contact with him/someone during the first day of absence.

- 5 22. The claimant telephoned Ms Hughes on 5 December and a note of that conversation was produced at page 225. The claimant told Ms Hughes that he had tried to wait as long as possible before going to A&E so that he could phone Mr Roche. Ms Hughes advised that if he needed to go to hospital, he should go and not delay and that no-one would expect him to delay going to A&E until the company had opened.
- 10 23. The claimant was asked to attend a meeting with Mr Roche and Ms Hughes on 6 December 2018. Mr Roche advised the claimant he had failed the probationary period because of the standard of his work and that he had not picked things up as quickly as required by the job. The claimant disagreed that his performance had been below standard. Mr Roche confirmed his
15 employment would be terminated with immediate effect.
24. Mr Roche had, in reaching his decision regarding the standard of the claimant's work, had discussions with Mr John Blenkinsop, his line manager and Anthony. The view was that the claimant was struggling to pick up the job and was needing a lot of support; and, even with a level of support he was not
20 performing to the standard expected.
25. Ms Hughes sent a letter of dismissal to the claimant dated 11 December 2018 (page 74) which confirmed the claimant's employment ended on the 6 December 2018. The letter confirmed the claimant had a right to appeal against the decision.
- 25 26. The claimant had, on 7 December (page 64) sent a letter of appeal to John Blenkinsop and copied it to Aaron Jamieson. The claimant complained that he had not had training other than from Anthony, who had had limited time due to his own workload. The claimant argued that he had performed well and that he had only had four claims which he had been unable to process.

27. Mr Blenkinsop responded to the claimant (page 66) stating that because the claimant was still in the probationary period, there was no appeal process available to him.

28. The claimant then received the letter of dismissal stating he did have the right of appeal, and so he sent an email to Mr Blenkinsop and Ms Hughes (page 79) stating he believed his disability led to the termination of his employment. The claimant further argued that he could demonstrate from the evidence that his performance had not been below standard.

29. Mr Blenkinsop responded (page 83) to confirm the respondent would not be responding to any further communication from him.

30. The claimant gained alternative employment on the 1 May 2019 for four/five weeks. He has been in receipt of Universal Credit since this employment ended.

Credibility and notes on the evidence

31. There were no issues of credibility in this case. The claimant was a credible witness although at times his evidence was not straightforward because he was focussed on proving what the respondent said was wrong, rather than giving his account of what occurred. The claimant described the adjustments he required as being: (i) a longer lunch break because it was important to get away from his desk; (ii) to be allowed to use his mobile phone to monitor his blood/sugar levels and (iii) to have a First Aider on site in case he needed someone to administer an epi-pen.

32. The claimant acknowledged that he had not, at the return to work meeting with Mr Roche or in the appeal letters, made any reference to adjustments. The claimant was of the opinion that he should not have to “educate” people or be expected to tell everyone about his disability.

33. The claimant told the Tribunal there was a notice up warning employees that using their mobile phone at work was not acceptable and was considered “time theft and fraud”. The claimant had not understood he would be so strictly

managed and would not be able to use his phone. The claimant alluded to colleagues at work telling him he was being watched, but there was no evidence to suggest the claimant had ever spoken to his line manager (or anyone else) to seek permission to use his phone. The evidence suggested the claimant simply proceeded to use his phone.

34. Ms Hughes was a credible witness who responded to the claimant's questions to the best of her ability.

Claimant's submissions

35. The claimant submitted he had been dismissed after several examples of discrimination. The observations of staff regarding his performance were based on a "diabetic performance", and this had caused him to ask about reasonable adjustments. The respondent had failed to distinguish between disability-related absence.

36. The respondent admitted no adjustments had been made. The claimant submitted it was not his responsibility to ask for adjustments. The claimant considered that if he had been given the opportunity to explain his disability, his employment would have continued.

Respondent's submissions

37. Mr Eadie adopted the respondent's ET3 for his submissions. He submitted the claimant had been dismissed for reasons of capability which had nothing to do with disability. The concerns regarding the claimant's performance predated the discussions on 3, 4 and 5 December and this, it was submitted, added weight to the respondent's position.

38. The respondent took the decision the claimant's performance was not up to the required standard and decided to dismiss him. The respondent was entitled to expect performance of a reasonable standard. The claimant had training and the respondent, it was submitted, had done everything required of them before taking the decision to dismiss. Mr Eadie submitted dismissal was a legitimate aim and had been done in a proportionate manner.

39. There had not been a request for reasonable adjustments to be made. The claimant did not raise the matter with Ms Hughes until 3 December. Ms Hughes had responded positively and told the claimant to raise it with his line manager.

5 40. Mr Eadie submitted the claim could not succeed and should be dismissed.

Discussion and Decision

41. We firstly had regard to the terms of section 15 of the Equality Act which provides as follows:-

“A person (A) discriminates against a disabled person (B) if –

10 *(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. ...”

15 42. There are four elements which must be made out in order for the claimant to succeed in a section 15 claim:

- there must be unfavourable treatment;
- there must be something that arises in consequence of the claimant’s disability;
- 20 • the unfavourable treatment must be because of (ie caused by) the something that arises in consequence of the disability and
- the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

25 43. We considered each of these four points. The claimant argued that he had been treated unfavourably when he was dismissed by the respondent. There was no dispute regarding the fact the claimant had been dismissed. We were satisfied that dismissal amounted to unfavourable treatment.

44. We next considered whether there was something that arose in consequence of the claimant's disability. The claimant argued that his request for reasonable adjustments arose in consequence of his disability. We accepted the request for reasonable adjustments was "something" which arose in consequence of the claimant's disability because the need for adjustments was directly connected to the disability.
45. We then considered whether the unfavourable treatment, that is the dismissal, was caused by the request for reasonable adjustments. We, in considering this argument, had regard to a number of points. We firstly had regard to the fact the respondent was aware the claimant had Type 1 Diabetes. Mr Roche asked the claimant about it at the interview and the claimant told him he used insulin and that his condition was well controlled. The claimant did not, at that time, make Mr Roche aware he may need adjustments to be made.
46. We secondly had regard to the fact that between 15 October 2018 and 3 December 2018, the claimant did not discuss his condition with his line manager, or anyone else in management. He did not seek adjustments or explain why he needed a longer lunch break or to look at his mobile phone to monitor his blood sugar levels. We formed the impression from the claimant's evidence that he was occasionally late back from a lunch break and used his mobile phone. The claimant referred to feeling "watched" and told the Tribunal he had not realised he would be "so strictly managed and would not be able to use [his] phone".
47. We thirdly had regard to the fact the claimant spoke with Ms Hughes on 3 December to enquire about a longer lunch break. Ms Hughes responded positively to the claimant's enquiry and informed him to raise it with his line manager, Mr Roche. Ms Hughes did not anticipate this would be a problem.
48. We fourthly had regard to the fact the claimant did not raise the issue of a longer lunch break with Mr Roche. We acknowledged there was little time to do so, however it appeared the claimant made a conscious decision not to raise it with Mr Roche during the return to work meeting on 5 December.

49. The claimant did not suggest that he had raised the issue of reasonable adjustments with Mr Roche: nor did he suggest that Mr Roche would have known of his discussion with Ms Hughes regarding that matter on 3 December.

5 50. We lastly had regard to the fact that there was no dispute it was Mr Roche who made the decision to dismiss the claimant, after having regard to his performance during the probationary period and having spoken with Mr Blenkinsop and Anthony. There was no suggestion Ms Hughes had any part in the decision-making process.

10 51. We next stood back and considered all of the above factors and asked ourselves whether there was evidence to support the claimant's position that his dismissal had been caused by the request for reasonable adjustments. We concluded that in order for the dismissal to have been caused by the request for reasonable adjustments, Mr Roche would need to have known of
15 the request and acted upon it. We were entirely satisfied, based on the evidence before us, that there was nothing to suggest Mr Roche knew of the claimant's request of Ms Hughes for reasonable adjustments. There was no evidence to suggest Mr Roche knew of the claimant's request for reasonable adjustments, and in those circumstances, the request for reasonable
20 adjustments could not have been the cause of the dismissal.

52. We noted, in addition to this, that the issue of the claimant using his mobile phone at work was something that was never raised by the claimant with the employer. Accordingly, this could not have formed any part of the cause of the dismissal.

25 53. We decided, for these reasons, to dismiss the claim.

54. We should say that the claimant did seek to argue that his performance had been affected by his disability. The claimant, during his submission spoke of "diabetic performance". The claimant also referred to the respondent not distinguishing "disability-related absence". These issues did not form part of
30 the claimant's legal case, which was defined by him at the preliminary hearing

and noted in the Employment Judge's Note at page 21 where it was stated
*"The claimant will say that two days after making enquiries about reasonable
adjustments, he was dismissed. The unfavourable treatment was dismissal
which occurred as a consequence of his disability..."*

5 55. The claimant did not, at any time, seek to amend his claim to introduce new
complaints. Accordingly, this Tribunal must determine the claim before it. The
claim before us was a claim that the claimant had been treated unfavourably
by the employer when it dismissed him, and that the dismissal was caused by
something arising in consequence of his disability. We have set out our
10 decision regarding that complaint above. It is not for this Tribunal to determine
issues which are not part of the legal case before it.

Employment Judge:

Lucy Wiseman

Date of Judgement:

24 October 2019

15

Entered in Register,

Copied to Parties:

25 October 2019

20

25

