



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr W Mortimer

v Benchmarx Kitchens & Joinery Ltd

Heard at: Watford

On: 5 & 6 August 2020

Before: Employment Judge Alliot
Mrs I Sood
Mr T Maclean

Appearances

For the Claimant: In person

For the Respondent: Miss Rosine Dawson (Solicitor)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claims are dismissed

REASONS

Introduction

1. The claimant was employed by the respondent as a kitchen designer on 18 December 2017. He resigned with immediate effect on 23 November 2018. By a claim form presented on 24 November 2018, following a period of early conciliation between 27 September and 27 October 2018, he brought claims of wrongful dismissal (constructive)/unauthorised deduction of wages and disability discrimination. The respondent defends the claims.

The issues

2. The issues were set out by EJ McNeill QC in a case management summary following a closed preliminary hearing held on 27 September 2019. They are as follows:-

“Time limits/limitation issues

- (i) Were all of the claimant's complaints presented within the time limits set out in s.123(1)(a) of the Equality Act?

- (ii) If not, is it just and equitable to extend time pursuant to s.123(1)(b) of the Equality Act?

Constructive dismissal/wrongful dismissal

- (iii) Did the respondent act in repudiatory breach of the claimant's contract of employment in failing to pay him sick pay and/or in treating him in the manner set out in his grievance?
- (iv) If so, did the claimant resign in response to the respondent's breach of contract?

Disability

- (v) Was the claimant a disabled person within the meaning of s.6 of the Equality Act at all relevant times because of severe anxiety and/or autism?

Equality Act, s.13: Direct discrimination because of disability

- (vi) In failing to pay the claimant's sick pay and/or in treating the claimant unfavourably as set out in his grievance and/or in dismissing the claimant, was the claimant treated less favourably than it would have treated others ("comparators") in not materially different circumstances?
- (vii) If so, was this because of the claimant's disability?

Equality Act, s.15: Discrimination arising from disability

- (viii) Did the claimant's period of sickness absence arise in consequence of the claimant's disability?
- (ix) Did the respondent treat the claimant unfavourably in not paying him sick pay and/or as set out in his grievance and/or by dismissing him because of his sickness absence?
- (x) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim?
- (xi) Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability at the relevant times?

Unauthorised deductions/breach of contract

- (xii) Is the claimant entitled to be paid damages and/or compensation in respect of the respondent's failure to pay him sick pay?
- (xiii) To how much notice was the claimant entitled?
- (xiv) What is he entitled to by way of damages in respect of his notice period?

Remedy

- (xv) What is the claimant entitled to by way of an award for injury to feelings if his disability discrimination claim succeeds?

(xvi) What damages or compensation is he entitled to in respect of his financial losses?"

The evidence

3. We have been provided with a bundle running to 240 pages. In addition we had witness statements and heard oral evidence from the following:-
 - 3.1 The claimant;
 - 3.2 Mr Sean Mahon, employed by the respondent at the time as Regional Director
 - 3.3 Mr Steve Bareham, employed by the respondent at the time as Operations Director

The law

4. Disability
 - 4.1 Pursuant to case management orders, the respondent informed the tribunal on 6 December 2019 that it accepts that the claimant was a disabled person for the purposes of the Equality Act 2010 by reason of anxiety and autism. Nevertheless, the respondent does not accept liability and disputes that it had knowledge of the claimant's disabilities at the material times. As such the disability issue is resolved.
5. Knowledge of disability
 - 5.1 As far as direct discrimination is concerned, the alleged less favourable treatment has to be because of the claimant's disability. Accordingly, if the employer is able to show that it was genuinely unaware of the claimant's protected characteristic then it will not be liable. As regards disability discrimination, s.15(2) provides that sub-section (1) does not apply if the employer shows that the employer did not know, and could not reasonably have been expected to know, that the employee had the disability.
6. The Code of Practice on Employment (2011) provides as follows:-
 - “5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person”.
 - 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.”

7. Direct discrimination

7.1 The alleged treatment has to be less favourable than the treatment of others. The comparator that we have taken in this case is a non-disabled employee who goes on sick leave during his/her probationary period.

8. Wrongful dismissal

8.1 S.95 ERA 1996 provides as follows:-

“95. Circumstances in which an employee is dismissed

(1) For the purposes of this part an employee is dismissed by his employer if...

(c) The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”

8.2 To be entitled to terminate the contract without notice, the claimant has to establish:-

8.2.1 That the respondent was in fundamental or repudiatory breach of contract. There may be a series of breaches of contract, the last of which represents the “final straw”.

8.2.2 The claimant has to resign in response to the respondent’s breach.

8.2.3 The claimant must not have affirmed the contract.

The facts

9. The claimant was employed by the respondent on 18 December 2017. At the time he was 40 years old. He was well qualified, having a degree in industrial design. He had extensive experience in kitchen design and had been recruited from a competitor.

10. The claimant’s contract of employment provided as follows:-

“14. PROBATIONARY PERIOD

All new employees will be required to complete a period of probation of six months, to the satisfaction of the appropriate manager. Timekeeping, conduct, performance and satisfactory attendance will be monitored.

...

Sickness

Only Statutory Sick Pay conditions will apply during the probationary period provided the notification procedures are adhered to.

Induction Training

All induction training must be completed within the probationary period to the satisfaction and standard of performance required by the Company.

A review of performance will be held on completion of the probationary period. Failure to meet the standards of performance required by the company may result in termination of employment.

...

The manager will confirm satisfactory completion of the probationary period to the personnel department.”

And

“18. SICK PAY SCHEME

Provisions relating to notification of absenteeism due to sickness or injury, together with details of payment (if any) made to you whilst you are absent from work as a result of sickness or injury, are contained within the Employee Handbook.”

11. The Employee Handbook contains the following:-

“6.2.8 Our Sick Pay Policy

It’s important to note that you’re not automatically entitled to receive sick pay, even if you’ve provided us with a doctor’s Med 3/fit note. Any sick pay you receive will be entirely at our discretion.

... “

“6.2.9 When we might withhold sick pay

We reserve the right to withhold sick pay in certain circumstances. These include:

...

- If you’re still in your probationary period”

“8.2 Your probationary period

Your offer of employment is subject to the successful completion of a six month probationary period. During this time, we’ll assess and review your work performance and general suitability for your role and if we find these to be satisfactory, your employment with us will continue.

However, if your attendance, time keeping, work performance or conduct isn’t up to the required standard, then we may take remedial action or terminate your employment without recourse to formal disciplinary proceedings. We also reserve the right to extend your probationary period in appropriate circumstances. ...”

12. On 13 March 2018 the claimant had his first performance review with his manager at the Farnborough branch, Mr Steve Cornell. Without going into detail, this raised some concerns about the claimant's performance and objectives to work towards were agreed. That document was signed by the claimant.

13. Towards the end of March/early April 2018 the claimant transferred to the Guildford branch. He told us that he had worked previously in Guildford and knew it better. As far as management of the claimant is concerned, initially the move to Guildford appears to have been a success. In his later grievance the claimant stated:-

“Moving to Guildford my new manager (Duncan Hair) was much more amenable.

...

My new manager seemed very nice and was far more organised with clear processes established in store.”

14. We have the claimant's GP notes which show that on 11 April 2018 the claimant attended his GP with a problem identified as “Hypomania”. The history is described as follows:-

“Hypomania Racing thoughts and disturbed sleep over last few weeks and creeping up over last three months. First child four months old and changed jobs at the same time. Previous history of what sounds like Bipolar disorder over some years but Practice records only go back to 2015. ... Good insight at present ... Reluctant to consider medication at this time. ... Agreed referral to Community Mental Health Team.”

15. After about a month Mr Hair left and the claimant's new manager was Ms Joanne Mulhearn. She took over in May 2018 and promptly took a week's holiday.

16. On 29 May 2018 the claimant had a meeting with Ms Mulhearn. We have a Weekly Designer Meeting form for the month of May. This contains various figures, principally the claimant's monthly target of £34,000 against his sales figures of £14,890. In the “Any other business” section various aspects are recorded as needing more or getting better. At the bottom of that form the following is recorded:-

“Probation to be extended for three months. Both Wayne and I agreed best course of action as not had enough time and training to make the judgment call.”

17. At that stage Ms Mulhearn had only worked with the claimant for approximately eight days.

18. The claimant's evidence in his witness statement about this meeting is that halfway through the normal sales aspect of the meeting he was taken out of the office and, whilst walking around the store, Ms Mulhearn mentioned the area manager “David Potter”. He records she told him that Mr Potter had asked her to deal with matters relating to his probationary period and that

she said that she felt she had not known the claimant long enough and needed a further three months to properly assess him.

19. We did not hear from Ms Mulhearn or have a witness statement from her. During the grievance investigation process she was interviewed and in relation to this issue answered:-

“Agreed to extend probation because I wasn’t in a place to pass his probation as only worked with him eight days and didn’t know him well enough yet.”

20. We have been shown a letter dated 29 May 2018 apparently from Ms Mulhearn to the claimant. This states:-

“I am writing to you further to our meeting held on 29 May 2018 which was held in connection with your probation.

Throughout your probation your performance and conduct has been monitored in line with the standard Company probation procedure. During the meeting it was discussed that you have failed to reach the standards expected of you. The reasons are:

- Mainly due to lack for (sic) training given
- Moving branches during your probation and not settled into role
- Haven’t set up a good customer bank as of yet
- Haven’t hit personnel sales target whilst in Guildford store

As such your probation will be extended for a further three months.”

21. The claimant’s evidence was that he was simply told that his probation would be extended. He disputes that he agreed to this. He did also say in evidence that in any event he wanted to consider things as he was not earning enough commission. The claimant also told us that he did not receive the letter dated 29 May on that date. In the grievance investigation interview Ms Mulhearn was asked as follows:-

“Final point I want to ask is about the letter of probation extension. Meeting on 29th – how did you deliver letter?

Answer: Handed to him in store at his desk on that same day.”

22. We have an email exchange on 16/17 August 2018 when the claimant was definitely sent a copy of the 29 May letter, in which he states that he had never seen the letter before that time.

23. In the absence of direct evidence from Ms Mulhearn we are not prepared to find that the claimant agreed to the extension of his probation period. We find that the claimant was in effect presented with a done deal and told his probation period was extended. Further we have proceeded on the basis that the claimant only received the letter dated 29 May on 17 August 2018. However, we find that the claimant knew his probation period had been extended from 29 May 2018.

24. On 4 June 2018 the claimant went off sick.

25. Given the code of practice and the examples within, we have considered what evidence has been put before us as to whether there was any conduct by the claimant or the way he presented himself whilst at work that should have prompted a reasonable employer to embark on a chain of enquiry as to his health. Notwithstanding the claimant's visit to his GP on 11 April 2018 reporting hypomania, we have had no evidence as to whether the claimant was acting in any way abnormally whilst at work. During the grievance investigation interview with Ms Mulhearn there was the following exchange between Mr Mahon and Ms Mulhearn:-

“You worked with him approx two weeks prior to sickness commencing?”

Answer: Yes

In that time had Wayne shown any signs or made any remarks to his mental or physical exhaustion as to his reasons he told you on 4 June he would be sick?

Answer: Not that I recall in specifics. I can remember having conversations all of us (myself, Wayne, Charley and Jack) with regards to babies and sleepless nights and his wife was ill. But I don't recall any conversations between myself and Wayne.”

26. We find that there was nothing in the way the claimant was performing at work prior to him going off sick that would or should have prompted the respondent into making further enquiries as to his health.
27. On the 5 and 8 June 2018 the claimant attended his GP complaining of a bad back. Be that as it may, the first fit note that he obtained from his GP, dated 12 June 2018, describes the following condition:-
- “Fatigue – under investigation/management”
28. Thereafter, there were a further six fit notes covering the period up to 12 November 2018, all of which gave the condition as “Ongoing investigations”.
29. Having gone off sick on 4 June the claimant was paid his normal salary for June 2018. The claimant thought that he was being paid contractual sick pay. This was an error. It is clear to us and we find that the claimant was paid his normal salary for June in error. This was probably because the payroll date for calculation was 10th of each month and the fit note submitted on 12 June was too late to prevent the claimant being paid his normal salary for June. Thereafter the payslips show that the claimant was paid statutory sick pay for the preceding month. The claimant was paid statutory sick pay for June in July. He therefore received his normal salary for June and sick pay for June. Thereafter he was paid monthly statutory sick pay up until his date of resignation on 23 November 2019.
30. It was only when the claimant received his July payslip that he realised that he was being restricted to statutory sick pay.

31. Towards the end of July it would appear that Ms Mulhearn was endeavouring to set up a meeting to discuss the claimant's sickness absence. On 27 July 2018 the claimant sent an email to Ms Chloe Snooks, employee relations advisor, stating:-

“I have been in discussion with Joanne Mulhearn this afternoon who has told me you are advising her on matters relating to my work absence. I am getting very confused as she said she hasn't got your email address, yet you are advising her on the criteria which is to be discussed in the meeting scheduled for Monday...”

32. Ms Snooks replied on 27 July 2018 as follows:-

“I have been in contact with Joanne via telephone to discuss your absence from work, my role as an employee relations advisor is to support managers in the application of the absence management process.

I have attached a copy of the absence policy for you, this is available to all colleagues on my work file.

I can assure you that the support your manager has offered you is intended to support you during your ongoing absence and potential return to work as per policy. Please feel free to contact our employee assistance programme advisors who are an independent company, operated by Aviva and they will be able to give you further advice on this process & any other employment processes... “

33. On 29 July the claimant sent an email to Ms Snooks stating as follows:-

“As you have not been able to provide me with any details, I do not feel adequately prepared and am now very unsure about the motives of the meeting. As a result I will be unable to attend Monday's meeting, due to the stressful and disorganised way it has been approached.

Once I understand who's called this meeting and the criteria wishing to be discussed, I will do my best to prepare and provide you with any details I can reasonably be expected to supply at this point in time.

Finally, I have noted I am missing a large amount of my pay this month (approx. £1,000). My contract stipulates that after June 18 I will be entitled to full pay for a period of 12 weeks for health related absences. Please could you assist me in ensuring this money is paid into my account without delay, as my funds are very limited.”

34. On 31 July the claimant sent a further email to Ms Snooks stating as follows:-

“... Given that my current condition relates to mental and physical health issues of which anxiety forms an element, I believe I have made a simple and reasonable request for adjustment in the way you wish to engage with me.”

35. The claimant went on to state that he wanted to restrict communication to email.

36. Although we do not have it, it would appear that HR wrote to the claimant on 10 August as the respondent wanted its occupational health consultant to investigate the claimant's health.
37. On 16 August 2018 the claimant was written to to extend his probation period for a further three months. This was due to the fact that he was on long term sickness absence and there had been no ability to review his performance in the interim.
38. Also on 16 August 2018 the claimant was sent an email by Ms Snooks. This states:-

"I have spoken to Joanne in relation to your sick pay and she has advised me that your probationary period was extended on 29 May 2018 for three months due to the fact that you had recently transferred from another branch and she had not has enough time to assess your performance.

She advised me that a letter was given to you in person and this was discussed in a review face to face, to confirm this is why you are still only in receipt of sick pay as it is the company's policy that we do not pay occupational sick pay whilst a colleague is still in their probationary period.

...

Can you confirm whether or not you received the GP consent form I sent you via post and if you've had a chance to review this as of yet?

...

The purpose of gaining your consent is to be able to write to you(r) GP to understand the symptoms you are suffering with and ensure that we are doing everything we can to support you.

I know that you have mentioned to me that you are also suffering from anxiety and depression. However your GP notes have not stated this and therefore it would be good to gain their medical professional opinion so we can ensure we are offering the right support, your GP may also be able to provide us with recommendations to help facilitate your return to work.

Travis Perkins also have an employee assistance programme helpline number which is a completely confidential independent service that is provided to our colleagues by Aviva, should you wish to speak to anyone for further advice or anything their telephone number is ..."

39. We understand the reference to GP notes in this email to be the fit notes.
40. Although we do not have the document, we understand that HR further wrote to the claimant on 24 August endeavouring to get occupational health to investigate his condition.
41. The claimant declined to supply the information that was being requested to allow the respondent to investigate his health condition. He told us in evidence:-

"I didn't feel ready to disclose it to the company especially as before the final diagnosis."

42. This is borne out by an answer the claimant gave during the grievance investigation process when he was asked, 'why did you not want to visit our occupational health advisor?' He replied: "As I have stated previously to ER (Chloe Snooks) the matter will remain private between my doctors and specialists until such time that I return to work and my condition affects the workplace."

And

"As said previously, I do not want an OH visit as I wish the matter to remain private, until such time it affects the workplace."

43. On 14 September the claimant was written to by Ms Mulhearn in the following terms:

"Re access to medical records

I am writing further to HR's letters dated 10 August 2018 and 24 August 2018 and also Chloe Snook's email dated 16 August 2018 in which you were asked to sign the access to medical records form which would have allowed us to obtain a medical report from your GP. To date we have not received a response from you.

The aim of obtaining this medical information was to enable us to assist you at this time. Unless we have up to date medical information our ability to assist you will be limited and it is in the interests of all parties for you to allow us to obtain this information. To this end we have concerns with respect to you assisting us to obtain all relevant medical information.

You have been absent from work since 4 June 2018.

I would therefore like to invite you to attend a meeting on 20 September 2018

...

The purpose of this meeting will be to review the situation and to discuss your ongoing absence and future of the company. Whilst we sympathise with your condition: in the absence of any medical information and given the length of your sickness absence to date we have concerns regarding your ability to return to work. ..."

44. On 18 September 2018 the claimant submitted a formal letter of grievance. This begins:-

"The issue which has led me to lodging this grievance concerns the withdrawal of contractual sick pay as of June 27 2018 and events leading to relocation of stores and abundant issues within both stores. This letter is broken into two parts, discrimination and events."

45. The list of issues has referenced the treatment as set out in this grievance. In our view the grievance is overwhelmingly to do with having his probation period extended and thereby deprived of contractual sick pay. Reference in the events section is made to various complaints about poor management as regards training, opportunity to earn commission, favouritism, etc. The respondent disputes the alleged poor management. It is inevitable that an employer and an employee will have different takes on, for example, why

the employee is not achieving the sales target. We do not consider that we need to make findings of fact on each and every issue between the parties, principally because we have concluded that they do not individually or collectively constitute a breach of the claimant's contract of employment and in any event they were not the catalyst for the claimant resigning.

46. We observe that having put in his grievance the claimant put in his ACAS Early Conciliation Notification on 22 September and the certificate is dated 27 October 2018.
47. On 2 October 2018 the claimant declined to attend the grievance investigation in person and indicated he wanted to deal with it on paper.
48. On 4 October 2018 the respondent posed a series of questions to the claimant which he answered on 11 October 2018. In that document he refers to meeting an employment solicitor on 22 October.
49. Mr Mahon conducted extensive interviews with a number of management individuals during his investigation into the grievance.
50. On 30 October Mr Mahon sent the claimant the grievance outcome letter which runs to 17 pages. The claimant's grievance was not upheld.
51. The claimant was given the opportunity to appeal and did so on 5 November 2018. However, the claimant resigned before his grievance appeal was determined.
52. On 15 November 2018 the claimant had a final diagnosis of autism.
53. The claimant tendered a resignation letter by email on 23 November 2018. This states:-

“I am now writing to inform you that I am resigning from my position as kitchen designer with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am left with no choice but to resign in light of my recent experiences regarding the company's decision to withhold contractually stipulated monies on receipt of information relative to my disability. I believe the company's unfettered use of clause 6.2.8 within the employee handbook has been used as a mechanism to constructively dismiss me, due to my disability. I consider this to be a fundamental breach of the contract on the company's part.”

54. On 26 November 2018 Ms Mulhearn wrote to the claimant expressing concerns that he may have resigned in haste and inviting him to discuss the issues.
55. On 27 November 2018 the claimant was provided with the grievance appeal outcome which rejected the appeal. On the same day the claimant confirmed his resignation.
56. Mr Bareham told us in evidence that he had made extensive enquiries amongst regional managers as to the payment of contractual sick pay to employees who were in their probation period. Mr Bareham told us that the

universal response was such sick pay was not paid. The only instance Mr Bareham could recall of an individual being paid contractual sick pay during their probation period was an employee who had been injured whilst at work.

Conclusions

57. The claimant was disabled at all material times by reason of anxiety and autism.
58. We find that the respondent's knowledge of the claimant's health and why he was off sick was as follows:-
 - 58.1 From 12 June 2018: "fatigue"
 - 58.2 From 31 July 2018: "mental and physical health issues of which anxiety forms an element"
 - 58.3 From 18 September 2018: In the grievance complaint, mental and physical exhaustion of which anxiety forms a part and a pre-diagnosis of autism.
59. We find that the claimant did not respond to requests from the respondent to investigate his health condition prior to the submission of his grievance complaint and that thereafter he made plain that he did not want occupational health involvement and he wanted the matter to remain private.
60. We find that the respondent made all reasonable enquiries at every stage given the state of its knowledge as to the claimant's health in order to inform it as to the appropriate course of action.
61. We find that the respondent did not have actual knowledge of the claimant's disability at any relevant time. We find that mere references to anxiety and autism do not automatically and necessarily lead to a conclusion that an individual is disabled. Autism spectrum disorder is, as its name suggests, a disorder that has a spectrum of severity and impact. We find that it would only be after investigation that an assessment could be made as to whether or not an individual with autism fell within the definition of disabled under the Equality Act.
62. We find that the respondent could not reasonably be expected to know that the claimant was disabled.
63. In the circumstances, the claims of direct discrimination because of disability and discrimination arising from disability must fail. In any event, we find that not paying the claimant contractual sick pay was not less favourable treatment than a comparator. We find that an able-bodied non-disabled employee taking sick leave during their probation period would also not have been paid contractual sick pay.
64. We find that the respondent was entitled pursuant to the claimant's contract of employment to extend his probation period. We accept that there is no

specific power to do so under the claimant's contract of employment document. We have not found that the claimant agreed to a variation to extend his probation period. However, we find that from 29 May 2018 the claimant was aware that the respondent had extended his probation period and that the claimant made no specific complaint about this other than in the context of him not being paid contractual sick pay. We do not, however, characterise this as him agreeing by conduct to the extension of his probation period.

65. We find that the claimant's contract of employment is silent on the issue of what is the position once the six month period of probation is up but the claimant has not completed it to the satisfaction of the appropriate manager. Dismissal is only referred to as one option. In our judgment in an endeavour to construe to terms of the claimant's contract in circumstances where the six month probation period was about to expire but he had not yet satisfactorily completed it, reference would inevitably be made to the respondent's employee handbook. This makes it quite clear that the claimant's probation period can be extended by the respondent. We find that that was a term of the claimant's contract of employment. Further, we would find that such a term would stand to be implied by virtue of the "officious bystander" test. If the claimant and the respondent had been sitting down at the time of the making of the contract of employment and the officious bystander had posed the question "can the employer extend the period of probation if the employee has not satisfactorily completed his probation period at the six month point" then both would automatically have said "of course yes", given the alternative of immediate dismissal.
66. Consequently, we find that the respondent was not in breach of contract in extending the claimant's probation period and not paying him contractual sick pay when he went off sick.
67. We find that the claimant was not dismissed and that he resigned his employment.
68. For the aforementioned reasons the claimant's claims are dismissed.

Employment Judge Alliot

Date: 28 August 2020

Sent to the parties on: 9 September 2020

N Gotecha
For the Tribunal Office