EMPLOYMENT TRIBUNALS

Claimant: **Miss I McMahon**
Respondent: **AFS Advisers Ltd**

Heard at: Bristol (by video) **On: 25 and 26 January 2021**

Before: **Employment Judge C H O'Rourke**
Ms L Simmonds
Ms P Simpson

Representation
Claimant: In person
Respondent: Mr Williams - solicitor

JUDGMENT having been sent to the parties on 3 February 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The Claimant was employed by the Respondent for approximately three months in 2018, as a Protection Advisor, until her dismissal, on one week's notice, with effect 29 June 2018. As a consequence, she brings claims of discrimination arising from disability and unlawful deduction from wages and the Respondent, in turn, counterclaims for training costs and the Claimant's retention of a mobile phone.

2. There have been three case management hearings in this matter and the final hearing has been twice adjourned. Since those hearings, the issues have narrowed, to the following:

    a. It is accepted that the Claimant was disabled, by virtue of anxiety and depression, at all relevant times.

    b. In respect of the s.15 Equality Act claim, the issues are:

        i. It is not disputed that the Claimant suffered unfavourable treatment by being dismissed.

ii. Was that dismissal because of something arising as a consequence of her disability? The Respondent denies this, stating that she was dismissed for underperformance and poor attitude.

iii. Did the Respondent know, or could they reasonably be expected to know that the Claimant was disabled? This issue is also disputed by the Respondent.

iv. The Respondent did not seek to rely on the statutory defence of any discrimination being a proportionate means of achieving a legitimate aim.

c. The unlawful deduction from wages, failure to pay notice pay and the Respondent's counterclaim are all related, in that the Respondent accepts that they did not pay the Claimant her final month's salary, or her pay in lieu of one week's notice, as they considered that they could set off such sums against those allegedly owed to them by the Claimant, namely £2000 for training costs and the sum of £476.28, for the non-return of a mobile phone.

The Law

3. We reminded ourselves as to s.15 Equality Act 2010.

4. As to the reasonable expectation that an employer could know of an employee's disability, we note the Equality and Human Rights Commission's Code of Practice on Employment 2011, which states:

'*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 …*

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. ….'

5. The case of **Abbey National v Chagger 2010 ICR 397 EWCA** ruled that if there was a chance that, apart from the discrimination, an employee would have been dismissed in any event, that possibility had to be factored into the measure of loss, on the same basis as a *Polkey* deduction.

The Facts

6. We heard evidence from the Claimant and from Mr Andrew Rushworth, the sole director of the Respondent.

7. The Respondent provides financial services, will-writing and estate planning and at the time of the Claimant's employment, had only two other part-time employees and two self-employed sales consultants.

8. A chronology of what we consider to be relevant matters is as follows:

20 February/1 April 2018 – the start date of the Claimant's employment. There is some discrepancy here between the contract and what the parties say, but the actual date itself is not of primary significance.

1 April to 21 May – there are a series of emails between the Claimant and the Respondent in which suggestions are made as to how she can improve her performance and to which her reaction is positive [88-95].

2 June – in an exchange of emails with the Respondent, the Claimant asks that the Respondent '*check your tone and make sure that it's not incredibly rude'* (referring to their correspondence), indicating to us a degree of friction developing.

7 June – in an initial telephone conversation that day, Mr Rushworth raises further concerns about the Claimant's performance, with she stating that *'I do learn, I feel Andrew, I feel like when you tell me to do one thing, I do do it and then I'll be told to do a different thing'.* Mr Rushworth refers to having a *'proper conversation*' on Monday (11th June) in '*which we'll go through the other things as well'.* [105].

7 June – later that same day, at about 5pm, Mr Rushforth received a voicemail from the Claimant stating that she couldn't wait until Monday and he decided that he would speak to her, particularly as she had called a couple of times. As with all such calls in the business, the call was recorded and a transcript has been provided of this approximately hour-long call. We note the following excerpts:

From the outset, the Claimant says that she's '*got depression and anxiety and I think that with everything that's going on in my personal life with my mum and my health it's just stressing me the fuck out'.*

Shortly afterwards, she says '*Yeah, I've got depression and anxiety. I've had it since I was 16/17 and I think that after I've been getting stressed about work and there's a few things that I wanted to talk to you about. About that. But I just feel that like with everything that's been going on with my mum and the house'* and later *'For the past two weeks, I've started having panic attacks again.'* It's clear to us, from Mr Rushworth's reactions, which are non-committal '*yea*'s or '*right*' that he is unwilling to engage in this part of the conversation.

The Claimant told him that she'd spoken to her doctors and that they suggested she take a week off '*to try to get myself sorted'.*

From there on the conversation focuses on the Claimant's work and Mr Rushworth's expectations in respect of it. There are lengthy conversations detailing the processes involved and the contents of the Claimant's calls to clients. Mr Rushworth refers to the number of consultations being more about quality rather than quantity [116]. He complimented her as being '*knowledgeable, precise and confident … and very good at giving lots of advice to helping people get to where they want to be and that's why I said*

to you … that I see why you were so good as a mortgage consultant' [117]. He goes on to say '*'there are other areas that you know that if you would prefer to go down different routes that you could do this. I'm crying out for a paid mortgage advisor'*, which the Claimant rejected in strenuous terms.

In response to that, he says '*obviously there's a position there. If you know you to want to stick to what you're doing, we just need to make sure that you know that there is that support in place to get you to where you need to be.'*

After some time discussing general work-related matters, the Claimant said '*I will completely hold my hands up and say for the past two weeks, I've been really shite. I've just been spending half my days crying but you know I'll get over that. I'm back on my medication, so that's exciting.'*

Later on, Mr Rushworth refers to cash flow problems and the need to take out loans to '*pump into the business, so this is why I said to you please get those policies on risk … because I'll not have enough money at the end of the month.'* [122]. Her response to that is '*Don't tell me this shit, keep it to yourself. I don't need, it's not that I don't care. Obviously I care, I don't want your business to collapse. I think it's a fantastic idea and I would like to work with you for ages, but don't tell me that shit. I'm aware that you need the money and I need to submit more business, but telling me that just stresses me out.'*

Later, in response to her saying she may be signed off sick by her doctor and that during this time she didn't think she would be allowed to work, Mr Rushworth said '*the situation with being signed off is if that you then don't want to work it, you don't, but it doesn't mean you can't work'* [123].

There was later discussion of the Claimant turning self-employed [124], but the Claimant did not, at least at that point, wish to consider that possibility.

The Claimant also requested that she be provided with her targets and KPIs as '*I don't even know what level I should be aiming for*'. Mr Rushworth says '*right*' and went on to particularise the target as £10,000 per month, with an aiming point of £7500 and that '*if it's under £5000, it's not worth it'*

The discussion then ended on a cordial note.

11 to 19 June – there are a series of text messages, in which, essentially, Mr Rushworth is checking up on whether the Claimant is working or not [131-132].

20 June – in response to his last text, of 19 June, saying 'Hi *Isobel, are you calling today?'*, she responds, '*Hi Andrew, sorry to mess you about. I'm still really struggling. I've got an appointment on the 1st with some psychiatrists and don't think I'll be back at work before then. Thanks Isobel.'* [133]. Mr Rushworth does not respond directly to that text.

22 June – Mr Rushworth dismisses the Claimant by letter, stating that the reasons for dismissal are '*being absent without leave, failing to follow sickness reporting procedures and failure to meet company and FCA standards'.* He requests return of company equipment [138].

Thereafter there is continuing correspondence, but not of relevance to our determination.

9. Discrimination Arising from Disability. We consider now the two issues in dispute in respect of this claim, as follows:

   a. Was the Claimant's dismissal because of something arising in consequence of her disability? We conclude that it was, for the following reasons:

      i. Her absence from work and her performance issues were clearly linked to her mental state and therefore her disability. While Mr Rushworth asserts that one of the reasons for dismissal was her failure to follow the sickness reporting procedures, we note that the policy set out in the contract [76] states that an employee can self-certify for seven days and in that period only needs to contact the employer on the first day, not, as he asserts in the Grounds of Resistance, daily. It is correct that the Claimant did not provide a doctor's fit note, until after her dismissal, to cover this period, but nor did Mr Rushworth pursue such a document. In respect of performance, there were no major concerns as to her performance, prior to early June, when her mental health worsened and indeed prior to that point, Mr Rushworth is often complimentary towards her. From the point, however that her mental state worsens and her performance declines and despite Mr Rushworth seeking to subsequently rely on that period of alleged underperformance to justify dismissal, it is the case, as we have found that any such underperformance arose from her disability and therefore was discrimination.

      ii. We consider that the true prompt for Mr Rushworth's decision to dismiss the Claimant was his receipt of the text of 20 June, referring to her to seeing a psychiatrist and being unlikely to return before the end of the month. He dismissed her peremptorily only two days later, without further contact or discussion. While we note his denial on this point and his belated evidence that he was unsure that he'd seen the text, we don't accept that to be the case. He was accustomed to text communication with the Claimant and had not, prior to his evidence in this hearing, mentioned the possibility that he may not have seen the text, either in his grounds of resistance, or in his witness statement. We are confident therefore that he did see the text and that triggered the dismissal. While Mr Rushworth asserted that he had, in fact, decided to dismiss the Claimant in early June, we do not

accept that assertion, because, firstly, if that was the case, why had he not in fact dismissed her earlier? His answer to that question was that he didn't wish to do so while she was on sick leave, but we note that this consideration did not prevent him from doing so on 22 June. Also, we consider that the general tone of the second 7th of June phone call was that the Claimant would be retained by him, possibly in another role, or with extra training, or with self-employed status. What, in our view, changed that position, was the Claimant's continued disability-related absence and as stated, her reference in her text of 20 June, to seeing a psychiatrist and being unlikely to return before the end of the month.

b. Respondent's State of Knowledge as to the Claimant's Disability. We find that even if the Respondent did not in fact know definitively, at the time, that the Claimant was disabled, there is ample evidence, in our view, that, objectively, it was reasonable for him to have had such knowledge and we find this for the following reasons:

i. The Claimant clearly flagged up, right at the outset of the second phone conversation, on 7 June that she was suffering a long-term mental illness, exacerbated by family concerns and that she was suffering panic attacks again. She referred to her doctors suggesting that she take a week off, to '*get herself sorted*' and that she would improve now that she was '*back on her medication'*. Mr Rushworth said in evidence that this conversation was just one small part of a very lengthy call and that therefore he didn't place much emphasis on it and he also said that the connection had been poor, implying that he may have missed parts of it. We don't accept that explanation, however, as it is clear from the transcript that he showed no curiosity whatsoever in respect of these issues, making only non-committal answers and studiously not enquiring further into it. His entire focus (as also indicated by the subsequent text messages) was as to whether or not the Claimant was going to process clients and therefore bring in fees. We consider, applying the EHRC Code that this behaviour fell well short of reasonable enquiry by him. In respect of the poor telephone line, we simply record that it did not otherwise prevent him from conducting an hour-long call and where there are moments he doesn't hear properly, he is recorded as saying so, but not when the Claimant's health is discussed. We can only conclude that Mr Rushworth was not interested in the Claimant's medical condition, beyond the effect it may have on his business.

ii. Secondly, on 20 June, Mr Rushworth was informed by the Claimant that she was to see a psychiatrist, clearly indicating that she had a more complex mental health condition than he perhaps may have previously realised and

which again, should have prompted him to make further enquiry. However, as we have found, that information instead prompted him to dismiss her.

10. Unlawful deduction from Wages and the Counterclaim. As stated, the Respondent accepts that they have withheld the Claimant's salary for June 2018, to include a week's notice pay, but state that they wish to set this off against the sums claimed in their counterclaim. In respect of such sums, we find as follows:

    a. Training Costs of £2000 – although the Respondent provided no corroborative evidence of these costs (beyond a mention of the figure in the training costs agreement [83]), we consider that in view of the training having taken place over two weeks and involving the Claimant staying in a hotel, with meal costs and being transported to the north of England, such level of costs are, we accept, likely to have been incurred. The Claimant cannot dispute her liability for such costs, as the agreement, which she signed, is clear on this point.

    b. The Mobile Phone – again, no corroborative evidence was provided, by either party, as to the value of this phone, but the Claimant accepts that she has retained it, when she should not have done. In the absence of such evidence and by way of general equity, we simply take a mid-point between her valuation (£120) and the Respondent's (£476) – that is £298.

11. Accordingly, therefore, the counterclaim succeeds and the Claimant is ordered to pay the Respondent the sum of £2298.

12. In turn, the Respondent made unlawful deductions from wages (to include notice pay), for the month of June, with normal monthly net pay being £1300 [May payslip 147]. While the Respondent asserts that they are not liable to pay the Claimant for the period that she was absent from work, there is no contractual entitlement to make such deductions. However, from a general just and equitable perspective, the Claimant, having been effectively on sick leave for the period 11 June to 22 June, her earnings for that period would have been limited to SSP. Her week's pay in lieu of notice should be a normal week's pay. However, we await further calculations from the parties, in the remedy hearing to follow, as to the calculation of this figure.

13. Application of the Polkey Principle. Applying **Chagger**, we consider that in this case, the Claimant's eventual dismissal, on non-discriminatory grounds was inevitable, within, we estimate, a three-month time period. We come to that finding for the following reasons:

    a. The Respondent is a small company, heavily dependent on cash-flow from its handful of consultants. The prolonged absence of even one of those would have a disproportionate effect, compelling the Respondent to take relatively prompt steps to replace the Claimant, in due course.

b. While the Claimant's submissions on this point indicated that she felt she could have returned to work relatively soon, all the indications were, in fact, that she would not have been able to. The medical evidence she provided indicated that she had ongoing serious symptoms until well into September, when her condition begins to improve [33] and she finds alternative, but obviously less stressful employment, in a toy shop. While she considered that based on her past experience of being paid full pay for ten months while on sickness absence from a previous employer that, by implication, the Respondent should have been willing to do something similar, this is simply not a precedent that either legally, or practically, could be applied to an employer of this size. We are confident that in the face of ongoing sickness absence, the Claimant would have been fairly dismissed, following fair and reasonable procedure, on capability grounds.

14. Accordingly, therefore, her loss of earnings is limited to three months' SSP, for the period July to September.

Judgment

15. The Claimant's claim of disability discrimination succeeds, but her loss of earnings is limited to three months' SSP. Compensation for injury to feelings will be considered in the separate remedy hearing.

16. The Respondent's counterclaim succeeds, in the sum of £2,298.

17. The Claimant's claim for loss of earnings succeeds, for a sum to be calculated in the remedy hearing.

REMEDY

1. We heard brief evidence from the Claimant and brief submissions from both parties.

2. In respect of the unlawful deduction from wages, the parties agreed, following discussions between them that the deductions due to the Claimant for pay from 1 to 22 June and for one week's pay in lieu of notice was £960.87.

3. In respect of loss of earnings thereafter, based on weekly statutory sick pay of £95.85 per week, for thirteen weeks, the figure is £1246.05

4. In respect of injury to feelings, the Claimant referred to her schedule of loss, in which she said that she'd been unable to return to a job in the financial services industry, which would have been her wish, due to the act of discrimination, albeit that she didn't fully blame the Respondent for that. She was also prevented from applying for another role, as Mr Rushworth refused to give her a reference. When challenged that in fact he had only said this in the context of her refusal to return the mobile phone and that he would be obliged to mention this

fact in a reference [145] and she was asked, therefore, why she had not simply returned the phone, she was unable to explain, becoming very upset.

5. Mr Williams had no cross-examination, but made submissions as follows:

   a. The award should be in the lower Vento Band, as the whole affair was over a two-month period and therefore not prolonged. (The Claimant countered that the effect on her had lasted much more than two months).

   b. It was a one-off incident.

   c. It was clear from the Tribunal's judgment that it considered Mr Rushworth's actions as indicating indifference to the Claimant's condition, rather than being malicious.

6. Conclusions. We find that the appropriate level for the award for injury to feelings is in the bottom quarter of the middle Vento Band, i.e. £13,000. We do so for the following reasons:

   a. While the events that occurred during employment are limited to a two-month period, we accept that the effects upon the Claimant of that discrimination were longer lasting.

   b. It is clear from the medical evidence provided by the Claimant that she has had a long history of suffering from her mental condition. While working for a previous employer, in November 2017, worry by her about how she had handled a phone call, '*triggered a significant increase in her anxiety symptoms'* [37], resulting in several months' sickness absence. The treating doctor considered this not to be work-related stress *per se*, but a reflection of her susceptibility and underlying health condition.

   c. It seems to be the case therefore that even working for a relatively benign or well-resourced employer (in that case London & Country Mortgages Ltd), she could suffer a significant downturn in her health, without any adverse action by her employer.

   d. Undoubtedly, her dismissal and the manner of it caused her great distress, sufficient to mention it several times in subsequent visits to her doctors [33 to 34], over the following three or so months.

   e. The notes do record an improvement in late September 2018 [34], which is the time that she found alternative employment.

   f. However, the notes for 2019 record further declines in mental health and for all we know, that situation continues, perhaps contributing to the highly emotional manner in which the Claimant conducted the hearing.

g. What the notes also record is that there were other stressors affecting her, to include the illness of her grandparents and her relationship with her mother and indeed the Claimant herself accepted, in evidence that she didn't fully blame the Respondent for her failure to re-enter the financial services industry.

h. While the Claimant is clearly a particularly vulnerable person, employers must take employees as they find them and if the effect of their actions on some employees is greater than perhaps on others, then that is a consequence they must accept. As we have found, Mr Rushworth was completely indifferent to the Claimant's condition and focused entirely on his own needs. This lead to his peremptory and clearly very upsetting dismissal of the Claimant, on false grounds, which resulted in her suffering, in our view, for at least three or four months, the direct effects of his actions. While, therefore the incident was one (or perhaps two)-off, the consequences were relatively long-lasting and for the Claimant, serious.

i. That therefore, to our mind, places the award in the middle band and we choose the lower end of that band as, as time went on, the Claimant found other work and as she effectively accepts, she cannot really blame the Respondent for her inability to return to the sector, there being many other factors potentially preventing her from doing so. She has completely misconstrued (again, as she seemed to latterly accept) the Claimant's email about her reference.

7. Adding interest to an award of £13,000, at 8% per annum, for 949 days, comes to a figure of £2704, which added to the award, gives a total of £15,704.

8. Therefore, final remedy judgment is as follows:

a. The Respondent is ordered to pay the Claimant the sum of £15,704 in respect of injury to feelings.

b. The Respondent is ordered to pay the Claimant the sum of £960.87 in respect of unlawful deductions from wages and pay in lieu of notice.

c. The Respondent is ordered to pay the Claimant the sum of £1246.05 in respect of loss of earnings.

d. The Claimant is ordered to pay the Respondent the sum of £2,298 in respect of counter-claimed damages.

Employment Judge O'Rourke

Date: 11 February 2021

Reasons sent to the parties: 25 February 2021

FOR THE TRIBUNAL OFFICE