EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MISS C WATKINS	AND	AVELLA HAIR LIMITED

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 7TH JANUARY 2020

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MRS J JEFFERY**

JUDGMENT

The judgment of the tribunal is that:-

I) The claimant's claim for automatically unfair dismissal pursuant to s99 Employment Rights Act 1996 is dismissed.

II) The claimants claims for direct discrimination an or harassment pursuant to sections 13 and 26 Equality Act 2010 on the grounds of disability are dismissed.

III) The claimant's claim of having suffered unfavourable treatment on the grounds of pregnancy/maternity contrary to s18 Equality Act 2010 is dismissed.

Reasons

1. By this claim the claimant brings a claim of unfair dismissal on the basis that her dismissal was automatically unfair pursuant to s99 Employment Rights Act 1996, and claims for disability discrimination and discrimination on the grounds of pregnancy or maternity.

2. The parties have both consented in writing to the case being heard by an Employment Judge alone via CVP (cloud video platform) for which the Employment Judge is very grateful.

3. The case came before EJ Goraj for a case management hearing on 1st October 2020 at which she gave case management instructions. Those have been complied with save for that in relation to the exchange of witness statements which both parties today have said that they did not understand that meant that they themselves had to prepare one; as a result neither party has prepared or exchanged a witness statement for today's hearing. This is not a criticism of either party but led to the question of whether the case could proceed today. The Employment Judge gave both parties the option of seeking an adjournment so as to allow them to prepare a witness statement and receive one from the other party, but each indicated that their preference was to proceed today with all the evidence being given orally.

4. In fact since the hearing both parties have supplied written witness statements. As neither party has had the opportunity to cross examine the other on the contents of the witness statements I have not taken them into account in reaching my decision although in reality and in any event they add little to the evidence given orally and as set out in the pleadings.

The Law- Disability discrimination

13 Direct discrimination

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others*

26 Harassment

> *(1) A person (A) harasses another (B) if–*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of–*

(i) violating B´s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if–

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if–

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B´s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

The law – Pregnancy or Maternity discrimination

18 Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

The law – Automatic Unfair dismissal

99 Pregnancy and childbirth

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if–

(a) the reason (or, if more than one, the principal reason) for the dismissal is that she is pregnant or any other reason connected with her pregnancy

Facts

5. There are in reality very few significant disputes of fact, but each party invites me to draw very different inferences and conclusions from those facts as is set out below.

6. The respondent is a hairdressing business and the claimant was employed under a contract of apprenticeship, with Swindon College as the training provider, from March 2018, when she was in her second year of a hairdressing apprenticeship having started at a different salon, and with a view to obtaining a Graduate Level 2 hairdressing qualification which she was due to obtain in July 2018.

7. The disability relied on is epilepsy. The respondent does not challenge the fact of the claimant's epilepsy, it having been diagnosed in 2009; nor that it amounted to a disability, and nor that the respondent was aware of it from the start of the claimant's employment. The parties agree that it required regular time off for medical appointments and that the claimant was always permitted to attend without any reduction in salary.

8. The first allegation is that in or about June 2019 Mrs Jeffrey asked the claimant whether "this is the job for you" in reference to her condition of epilepsy. Mrs Jeffrey does not dispute saying this, but asserts that it should be considered in context. Firstly, there is no question of her being anything other than sympathetic to the claimant in respect of her epilepsy. As is set out above, from the beginning of the claimant's employment she had known of the claimant's epilepsy and had always permitted any time off required because of it. The specific circumstances were that the claimant had been absent from 1st to 7th July 2019. On her return the claimant told Mrs Jeffery that she was suffering regular seizures, which were potentially contributed to by anxiety whilst at work. It was agreed that the claimant's workload would be removed and would only be restored when she felt well enough to return. Mrs Jeffrey's evidence is that this happened after some two to three weeks, and that the claimant wished to continue with hairdressing and contacted Swindon College to extend her studies . The comment was made in the context of Mrs Jeffery's helping the claimant and asking that if the stress of work was potentially contributing to triggering seizures whether she should continue; and any other employee in similar circumstances would have been treated the same way. This is not in dispute, but the claimant contends that the comment simply should not have been made.

9. The second allegation relates to the claimant's return from a pregnancy related sickness absence. She was absent from 6th to the 19th February 2020, and on her

return on 20th February 2020 she discovered that her hairdressing prices had been removed from the window and clients had been removed from her column in the book and transferred to other stylists. In a meeting later that day with Mrs Jeffrey criticisms were made of her work which she did not and does not accept were either genuine or valid. Mrs Jeffrey's evidence is that there had been concerns about the quality of the claimant's work for some time. She had not passed her level 2 qualification and the claimant had decided to continue by attending college during her day off, whereas previously this had been during work time in accordance with the standard apprenticeship contract. This, she says, was the claimant's decision and in the circumstances the claimant could not have reasonably believed that her work was beyond criticism. She accepts that she had not personally addressed any concerns to the claimant as she did not want to undermine her confidence. However, whilst the claimant was off sick she and other stylists had dealt with the claimant's regular customers. She says that the quality of the work they discovered was unacceptable and that the other stylists told her that she had to raise this with the claimant as it was not acceptable and could damage the business. In addition there were a number of complaints voiced in the claimant's absence as to the quality of her hairdressing. As a result she decided that the claimant needed more training to bring her up to the required standard. She does not dispute that as a result she had removed the claimants prices, and given her customers to other stylists. She arranged a review meeting at which she intended to say to the claimant that she proposed that they stop booking clients for the claimant for a while and go back to doing training. She alleges that the claimant became aggressive and stormed out of the salon saying that she wasn't coming back. Irrespective of exact circumstances of her leaving the meeting it is not in dispute that she left the salon that day and resigned, nor that the trigger for and reason for her resignation were the removal of her price list and customers and the comments about her performance.

Conclusions

10. The first allegation in relation to the comment about disability is alleged to be alternatively direct disability discrimination and/or harassment. These are mutually exclusive claims.

11. The first question in relation to the claim for direct discrimination is whether the question as to whether she should continue with hairdressing was less favourable treatment within the meaning of s13. There is no actual comparator and so it is necessary to judge this against a hypothetical comparator. As set out above the respondent submits that this remark must be seen in context. Having been supportive of the claimant in the knowledge of her epilepsy it was the claimant herself who had volunteered the difficulties she was having. The solution to that problem in relation to the immediate working situation was agreed between the claimant and respondent which again demonstrates that the context of the remark was of her being supportive. The obvious inference is that any hypothetical comparator would have been treated in the same way. Specifically the respondent asserts that any member of staff whose health was potentially being affected by her work would have been treated in the

same way, as Mrs Jeffrey took and takes the view that her staff members health is more important than their work.

12. There is no actual comparison possible, and nor any comparator whose characteristics were not sufficiently similar to qualify as an actual comparator but whose treatment would allow some inferences to be drawn. It follows that if I accept the respondent's evidence that she would have treated any member of staff in the same way that there is no less favourable treatment within the meaning of s13 Equality Act 2010. Given the clearly sympathetic way that Ms Jeffrey dealt with the claimant generally and with her epilepsy in particular I have concluded that I do accept her evidence, and on that basis that there is no less favourable treatment.

13. In case I am wrong I that conclusion I have gone on to consider whether the comment was "because of " the disability, that is to say the epilepsy itself rather than its consequences. In my view the comment was clearly made because of the claimant's report of the consequences and effect of the underlying condition she was experiencing at that time.

14. For both reasons it follows that the claim for direct discrimination must be dismissed.

15. In relation to harassment the comment was clearly unwanted by the claimant, and was clearly related to the disability in that it concerned the symptoms and effects of epilepsy. The question is, therefore, whether in context and in particular following the application of the s26(4) criteria it should be held to have had the proscribed effect. These criteria are the perception of the claimant, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect. The perception of the claimant (the subjective question) and the other circumstances are those set out above. The third question (the objective test) is whether it was reasonable of the conduct to have had the proscribed effect. For the reasons set out above the respondent's case is that the remark was intended to be supportive and could not reasonably have been interpreted in any other way given that the whole purpose of the conversation was to discuss how to help the claimant with the difficulties at work which had arisen because of the seizures. I accept this analysis and in my judgement it is not reasonable to consider that the comment in context had the proscribed effect and this claim must also be dismissed.

16. For completeness sake it should be noted that this claim is in any event out of time, and but for the subsequent events is unlikely ever to have been raised. In those circumstances even had I upheld the claim in principle I would not have considered it just and equitable to have extended time in relation to it.

17. The second allegation relates to the claimant's removal from work price lists and column and the criticism of her work. These are alleged to be unfavourable treatment because of her pregnancy and/or an illness suffered as a consequence of her pregnancy within the meaning of s18 Equality Act 2010..

18. Clearly the removal of the claimant's price list, the transfer of her customers and comments as to the quality of her work are unfavourable treatment. The question for

me is whether they were made “because of” the pregnancy or the pregnancy related illness. Once again if I accept the respondent’s evidence none of the unfavourable treatment was causally linked to the pregnancy or illness.

19. The essence of the claimant’s case as to why I should not accept the respondent’s evidence is that there had been no criticism of her work prior to this period of sickness absence. If there had been it should and would have been raised with her. Put in the statutory framework if I accept that no criticisms of her work were voiced prior to her pregnancy related sickness absence, but were afterwards that is sufficient to satisfy stage 1 of the Igen v Wong test, and that the tribunal could in the absence of an explanation from the respondent infer that the criticism was discriminatory, and discriminatory because of her pregnancy in that the only thing that had changed in that period was that she had been absent for a pregnancy related sickness. In my judgement this is correct and it follows that the question for me is whether I accept the respondents explanation.

20. The evidence of the respondent is that the actions were not a result of the pregnancy itself, nor of the pregnancy related absence, but the concerns about the quality of the claimant’s work discovered during her absence. In one sense, but for her absence the issues were unlikely to have been discovered or raised and acted upon. However the issue for me is not whether the pregnancy relate absence created the circumstances in which those events occurred, but whether the unfavourable treatment was causally related to the pregnancy or illness rather the things discovered during the sickness absence. Again I accept the respondent’s evidence as to the reason for its actions.

21. The final claim is for unfair constructive dismissal. In my judgement had the claimant been employed for longer than two years the events concerning the removal of work following her sickness absence could arguably have founded a claim for constructive unfair dismissal. However, the only question for me, the claimant having less than two years’ services is whether it falls within s99 (as set out above); that is to say whether the reason or principal reason for the dismissal was the pregnancy. In the case of constructive dismissal that question becomes whether the events that caused the claimant to resign were themselves causally connected to the pregnancy. Given my findings as to why the respondent acted as it did it follows automatically that the reason or principal reason for the events which led to the claimant’s resignation were neither the pregnancy nor connected with the pregnancy. Whilst the claimant perceived a link in my judgement for the reasons given above objectively there was not one; and it follows that that this claim must also be dismissed.

Employment Judge Cadney
Date: 15 February 2021

Judgment and reasons sent to parties: 09 March 2021

FOR THE TRIBUNAL OFFICE