EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR J SLOPER	**AND**	**WATCHES OF SWITZERLAND OPERATIONS LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 17TH / 18TH / 19TH FEBRUARY 2021

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS: MRS D ENGLAND**
MS G MAYO

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR M HAWORTH**

JUDGMENT

The unanimous judgment of the tribunal is that:-

The claimant's claims of:

i) Discrimination arising from disability (s15 Equality Act 2010)

ii) Failure to make reasonable adjustments (s20 Equality Act 2010)

are dismissed.

Reasons

1. By this claim the claimant brings a claims of disability discrimination; the allegations being of discrimination arising from disability (s15 Equality Act 2010), and the failure to make reasonable adjustments (s20 (3) Equality Act 2010. As set out below it is not in dispute that he is a disabled person with the meaning of s6 Equality Act 2010.

2. The hearing was conducted as a hybrid hearing with the claimant attending in person and the respondent participating via Kinley CVP (cloud video platform). The tribunal is grateful to the parties for their flexibility. We have heard evidence from the claimant; and from Ms Karen Coghlan and Mr Omar Choudhary for the respondent.

3. The law is not in dispute between the parties. The relevant sections of the Equality Act 2010 are set out below and our specific findings are set out in our conclusions.

   S15 Discrimination arising from disability

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

   (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.

   (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

   S20 Duty to make adjustments

   (1)Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

   (2)The duty comprises the following three requirements.

   (3)The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Facts

4. There a very few disputes of fact between the parties, although each invites us to draw different inferences and conclusions from those facts.

5. The respondent operates a store under the trading name Goldsmiths in Cribbs Causeway shopping mall outside Bristol. For the period with which we are concerned the claimant was employed as Deputy Store Manager, having joined in June 2017, and Ms Coghlan was the Store Manager. Originally Mr Jason Fitzgerald was National Sales Manager, to whom Ms Coghlan reported. He was replaced by Mr Choudhary in early 2018.

6. The claimant was diagnosed with Bipolar Affective Disorder in 1991 and it is not in dispute that he is a disabled person within the meaning of s6 Equality Act 2010. The claimant did not disclose the existence of the condition in his New Starter form which was completed on 26th May 2017; nor formally to the respondent at any stage, although it is accepted that he told Ms Coghlan in the circumstances set out below.

7. Although not strictly relevant for our purposes the first event upon which the claimant relies on is an incident in October 2017 in which he alleges he was assaulted by one of assistant managers. As a result he accepted an offer of employment from another retailer. When Mr Fitzgerald discovered what had happened he persuaded the claimant to retract his resignation.

8. In December 2017 it was confirmed that the claimant had successfully passed his probationary period.

9. At some point in late 2017 or early 2018 the claimant told Ms Coghlan of his Bipolar Affective Disorder. Whilst Ms Coghlan puts the conversation in November 2017, and the claimant in January 20198, the circumstances are not essentially in dispute. Another member of staff had been absent and diagnosed with Bipolar disorder. Ms Coghlan had met with her and an HR representative to discuss adjustments on her return to work. After the meeting Ms Coghlan discussed this with the claimant and mentioned that the other member staff had stated that she was doing well and was no longer on medication. The claimant stated that if diagnosed with Bipolar disorder she would have to stay on medication and when asked how he knew he told Ms Coghlan that he was Bipolar. He stated that he was fine, and that his condition was managed. He asked Ms Coghlan not to mention it to anybody else at the store. Ms Coghlan's evidence which we accept is that she kept his confidence and did not tell anyone else.

10. The claimant was dismissed on 13th August 2018. The primary evidence as to events from early 2018 until that point comes from review meetings held between the claimant and Ms Coghlan. The respondent submits that they reveal clear contemporaneous concerns as to the claimant's performance, the claimant that they are highly complementary and point to his performing well. For the reasons set out below in our judgement the perspectives are

not necessarily mutually inconsistent. It is not necessary to refer to all of them but we will refer to some to illustrate the approach and conclusions each party invites us to take. There is no dispute that these records are accurate.

11. Ms Coghlan points to a meeting on 22nd February 2018 at which she explained that the claimant was not at the level she wanted him to be and was not acting as a Deputy Manager should. She suggested that a Personal Development Plan (PDP) would assist him. This is supported by an email she sent that same day to Rebecca Lemon -Hawes setting out her concerns and asking her to assist. This is referred to again in the notes of a one to one meeting of 9th March 2018 at which it was stated that Ms Lemon-Hawes had agreed to assist in writing a training plan. In fact that had not been completed by the time of a one to one meeting on 10th April 2018. At a meeting on 7th June 2018 she expressed concerns again about his management style; and at a meeting on 17th July 2018 she stated that she wanted to see the claimant "elevate your presence as Deputy Manager" and set out a number of specific concerns. On 3rd August she stated that she had not seen much evidence of a change in behaviours.

12. The respondent invites us to conclude from the contemporaneous documentation that whilst there was praise for some aspects of the claimant's performance that there were consistent concerns being expressed as to his management ability and no evidence of any significant improvement.

13. In addition the respondent relies on the evidence of Mr Choudhary. He makes a number of very specific criticisms of the claimant's performance and in evidence before us states that some of them were sufficiently serious, "severe", that they could have resulted in disciplinary action. Whilst they did not, the accumulation of them caused him to have significant doubts as to the claimant's ability to fulfil the role of Deputy Manager.

14. The claimant points to the fact that in all of the meetings there is consistent and at points glowing praise for what he had achieved. In particular he refers to the meeting of 17th July 2018, less than a month before he was dismissed in which Ms Coghlan states " results are fantastic and consistent- your passion support and encouragement is evident and demonstrated every day," and after the passage relied on by Ms Coghlan as being critical of the claimant she concludes "I have to mention the great results you are achieving with NPS, Cust Exp and GSC keep driving the team and delivering exceptional results. Well done." The claimant does not accept the criticisms made of him by Mr Choudhary .His evidence is that he is either being criticised for other peoples' errors, specifically in relation to the agreement of excessive discounts, or that minor one off errors or incidents have been exaggerated out of proportion. The claimant invites us to conclude from this that whilst there may have been areas in which he could improve the overall picture is of considerable achievement and

success, and that to go from the high praise of the 17th July to summary dismissal on the13th August is inconceivable.

15. Before setting out our conclusions as to these contentions we will set out the rest of the facts leading to the claimants dismissal.

16. In addition to the disclosure as to the fact of his Bipolar Affective Disorder the claimant had told Ms Coghlan of a number of other events in his personal life which he contends are significant. He had told her about his being in touch with a younger man to whom he had lent money. Ms Coghlan thought he was obsessed and was being used, an assessment with which the claimant now agrees; and he had told her he had been referred by his GP for counselling sessions.

17. The specific events leading to the dismissal were that Ms Coghlan returned from holiday on 13th August 2018.She states that she was frustrated by a number of aspects of the claimant's performance in her absence and by an incident that had occurred that morning. She spoke to Mr Choudhary and decided that the claimant should be dismissed. Her evidence is that this decision was hers and that she had in reality procrastinated too long over it. Mr Choudhary 's evidence was that the decision was Ms Coghlan's but that he could have challenged her if he disagreed, but as he did not her decision stood.

18. As a result the claimant was invited to a meeting that day at which he was told that he was to be dismissed with immediate effect and paid twelve weeks in lieu of notice.

19. The claimant sought to appeal and the issue was dealt with by Mr Howarth. By a letter dated 24th August 2018 he informed the claimant of the reasons for dismissal and that as his dismissal was not on disciplinary grounds but as result of a business decision he had no right of appeal.

Conclusions

20. Before dealing with the specific allegations we should make a number of general comments. The first is that it is hard not to be extremely sympathetic to the claimant. It is clear that there were aspects of his role which he performed to a very high standard and equally clear that he was personally very well liked and held in very high regard. Whilst the meetings we have summarised above do contain areas of improvement for him it is difficult to read into them any sense that his job was at risk. Certainly the claimant was given no specific warning that a failure to improve in specific aspects of his performance in a particular timeframe could result in dismissal. As a result he was dismissed entirely out of the blue with no warning on 13th August 2018, having successfully passed his probationary period some months earlier and having been persuaded not to resign in the circumstances set out above by the respondent.

21. However, as we stated during the hearing there is, and can be, no claim for unfair dismissal as the claimant had less than two years' service at the point of termination. In addition it is not part of our role to determine whether Ms Coghlan was correct in her view that the claimant should be dismissed, or whether there were other options that she could have taken at that point, but only whether she genuinely held that view and if so for what reasons.

22. As is set out above the notes of the meetings which we have summarised and set out extracts from above contain both praise and criticism of the claimant. In retrospect the respondent emphasises the criticism and the claimant emphasises the praise. We have concluded that the views set out above are not necessarily mutually inconsistent, but more pertinently that we accept Ms Coghlan's evidence. They do reflect the fact that she had reservations as to his performance. Whilst the claimant has criticisms of her, and does not agree with some of the opinions she expressed, her evidence was in our view transparently honest and we accept it.

23. The claimant's first claim is for discrimination arising from disability (s15 Equality Act). There are two allegations of unfavourable treatment. The first is his dismissal and the second is the refusal of the appeal.

24. Dealing with the appeal first the respondent asserts that the decision maker in respect of the appeal, Mr Howarth did not know of the diagnosis of bipolar disorder. Ms Coghlan had kept the claimant's confidence and had not told anyone else. If this correct, which we accept it is, Mr Howarth neither knew or could have known of this. Moreover the something arising from disability is said to be "stress and anxiety, franticness and low mood." The respondent submits that in addition to not knowing that the claimant had been diagnosed with bipolar disorder Mr Haworth did not and could not have known that these were symptoms of or a consequence of bipolar disorder, nor more fundamentally and as a matter of fact that the claimant suffered from them. The reason that the claimant was not offered an appeal was because a business decision had been made to terminate his employment and as he had less than two years' continuous service the law did not require them to offer him one. On that basis they contend that there is no evidence that there was any causal connection between the disability or something arising from the disability and the unfavourable treatment. If we accept this the claim is bound to fail.

25. In our judgment there is no evidence before us which would satisfy the first stage of the Igen v Wong stage and allow us to conclude in the absence of an explanation from the respondent that the dismissal of the appeal was discriminatory in the sense that there was any causal link between the decision to dismiss the appeal and something arising from disability. Even if there had been we accept Ms Coghlan's evidence that she had not broken the claimant's confidence and it follows automatically that Mr Howarth could not have known of the bipolar disorder, and that there can be no causal link between it and the decision to dismiss the appeal. There is no evidence

that the explanation given by the respondent in the letter as to the reason for the dismissal of the appeal is not true, and it follows that this part of the claim must be dismissed.

26. That leaves the claim in respect of dismissal. The claimant's claim is not that there is any direct connection between his disability, his performance and his dismissal. He does not assert that any failure in his performance was causally linked to the Bipolar disorder. Indeed as set out above he does not accept that there could have been any serious criticism of his performance in any event. Accordingly the "something arising from disability" is not alleged to be any under-performance itself. His case is that during the meeting on 13th August he asked about being placed on a Performance Improvement Plan (PIP), but was informed that it would make him stressed, frantic and that he was sensitive so that it was not an option. The claimant submits that Ms Coghlan, who he says made the remark and took the decision to dismiss knew of his bipolar disorder, knew that he had become obsessed with a younger man and had been giving him money, and knew that he had been to see his GP and had been referred to counselling in May 2018. His case is that "a child of three" would have linked those events and that Ms Coghlan must herself have made the link between the Bipolar disorder, his obsessive behaviour and the subsequent need for counselling in respect of his mental health. If she did it follows that stress, franticness and sensitivity she identified she must also have perceived to be symptoms or consequences of the bi-polar disorder. If that is correct the refusal to place him on a PIP was at least in part causally linked to the "something arising from disability". As being placed on a PIP was the claimant's suggested course of action, which on his account Ms Coghlan rejected in favour of dismissing him, the dismissal was also necessarily causally connected to the "something arising from disability". There are potential difficulties with this analysis in that it is essentially an argument that but for the rejection of the suggestion of a PIP the claimant would not have been dismissed but those will only be relevant if we accept as a fact that Ms Coghlan made the remarks attributed to her.

27. The respondent submits that she did and makes the further submissions set out below. Firstly Ms Coghlan's evidence is that she does not recall making those remarks, and does not believe that she did, specifically as she would not have used the word frantic. In cross examination the claimant could not initially remember who had used those words but eventually plumped for Ms Coghlan. This is significant as, if Mr Choudhary did not know of the Bipolar disorder, even if he had used those words the necessary link would not exist. It is only if spoken by Ms Coghlan that any link could even in theory be established and on the evidence there is no sufficient basis to draw that conclusion. Moreover the evidence is that the claimant had one conversation about bipolar disorder with Ms Coghlan in November 2017/January 2018 between eight and ten months earlier and on anybody's case there was no discussion of the symptoms of Bipolar disorder, and the claimant does not suggest he had mentioned any. Even if Ms Coghlan said the words attributed to her in those circumstances the

idea that she had independently formed a view of a link to bipolar disorder is fanciful. Even if the claimant contends that she should have made that link her evidence is that she did not and if this is true there is no such link and the claim must fail.

28. The first question is therefore the narrow factual one of whether Ms Coghlan made the remarks attributed to her. If she did not there is no evidence, even on the claimant's case, before us of any causal link between the decision to dismiss and something arising from disability. As set out above we accept the evidence of Ms Coghlan. However, that evidence is nuanced in that she does not quite deny having used the words but states that she has no recollection of doing so and does not recognise the language as the type she would have used. Equally as set out above the claimant's evidence was less than certain or compelling that she had done so. We have concluded on the balance of probabilities that we do not find that Ms Coghlan used the words attributed to her and it follows that on the evidence the causal link cannot be established and this claim must also be dismissed. For completeness sake we also accept Ms Coghlan's evidence that the reason she did not consider a PIP was that she had already given the claimant sufficient opportunity to improve and hat she had in fact delayed too long. If this is correct, which we accept it is, there is no factual link between the "something arising from disability" and the decision not to invoke a PIP.

29. The next claims are for the failure to make reasonable adjustments. The PCP's relied on are "not operating a formal PIP"; not addressing anxiety /stress within PIPs and/or only using PIPS where employees do not have stress/anxiety; and not having a support system for addressing stress and anxiety.

30. The last can be dealt with relatively briefly. The evidence before us is that the respondent did have an employee support service of which the claimant was aware although he did not use it. That assertion is therefore not supported by the evidence, and there is therefore no evidence before us that any such PCP existed and this part of the claim must necessarily fail.

31. In respect of first and second the evidence does not support the claim that either was a PCP applied to the claimant in our judgement. Ms Coghlan took a specific decision not to place the claimant on a PIP but to dismiss him. Her view was that, as summarised above, that he had been given a reasonable opportunity to improve his performance, albeit not in the context of a formal PIP and had finally felt herself forced to the decision that he should be dismissed. This is self-evidently a specific one off decision made in the context of the claimant's employment, and is in our judgement in fact the opposite of applying a PCP. Although a one off decision might be reflective of an underlying practice and might permit a tribunal to find, where the evidence exists, that there is such a practice and therefore a PCP (see *Ishola v Transport for London 2020 EWCA Civ 112, CA*) in this case in our judgement there is no evidence that it was anything other than a

specific one off decision. Again in the absence of being able to identify a PCP which was applied to the claimant it follows It follows that these claims must equally necessarily fail.

32. Although for the reasons set out above we are extremely sympathetic to the claimant it follows that as a matter of law the clams must fail.

Employment Judge Cadney
Date: 19 February 2021

Judgment and Reasons sent to the parties: 06 April 2021

FOR THE TRIBUNAL OFFICE