



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100406/2020

Held in Edinburgh on 19th and 20th January

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**Employment Judge A Jones
Tribunal Member J Lindsay
Tribunal Member G McKay**

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Mr M Harkness

**Claimant
In Person**

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McDonald's Restaurants Ltd

**Respondent
Represented by
Mr R Dunn, of counsel
instructed by
DAC Beachcroft**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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It is the unanimous judgment of the Tribunal that the claimant's claims do not succeed and are dismissed.

REASONS

Introduction

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1. The claimant lodged a claim of unfair dismissal, automatically unfair dismissal on the basis of having made a protected disclosure and disability discrimination. Following case management, the claimant's claims were clarified, and a List of Issues was produced to the Tribunal. The claimant agreed that the list of issues was accurate. A joint bundle of documents was

lodged in advance of the hearing and as was agreed during case management, written witness statements were also provided. The claimant sought to lodge some additional documentation at the commencement of the hearing. The Tribunal admitted the documents but expressed some concern to the claimant in relation to the relevance of some of those documents.

2. The written witness statements formed the evidence in chief of the witnesses who were also cross examined. Having listened to the evidence and considered the documentation to which reference was made during the proceedings, the Tribunal found the following facts to have been established.

Findings in fact

3. The claimant was employed by the respondent as a Crew Member at their Galashiels restaurant from 6 February 2015 until the termination of his employment on 27 October 2019.
4. From April 2016, the claimant was absent from work on a number of occasions. On those occasions the Fit note provided by his GP stated that the absences were caused by depression.
5. The claimant has suffered from mental health issues for a number of years and these issues predated his employment with the respondent.
6. The claimant was issued with a first written warning on 28 August 2017 following the claimant's failure to attend work for a scheduled shift.
7. The claimant was issued with a final written warning for lateness in attending a shift on 7 September 2017.
8. The claimant raised concerns with the respondent regarding the use of out of date buns on 24 February 2018.
9. The claimant was dismissed from his employment on 2 April 2018 after he was late to attend a shift on 23 March 2018.
10. The claimant appealed against this dismissal on the basis that there had been a lack of care and attention towards his mental health. The appeal was successful, and the claimant was reinstated to his role.

11. The respondent met with the claimant on 2 May 2018 to discuss what reasonable adjustments could be put in place to facilitate a successful return to work for the claimant.
12. The claimant and respondent agreed to have review meetings between the claimant and his manager once a month (page 86). Shift pattern and length of shifts was also discussed.
13. The claimant's manager met with him on 17 May 2018 at which time the claimant wished to increase his shifts.
14. Thereafter the claimant continued to have a number of absences. The respondent met with the claimant on his return to work and discussed whether further adjustments were required.
15. Meetings took place with the claimant on 9th, 20th, and 27th June, 28th July, 1st and 16th August, and 29th September 2018.
16. The claimant raised a grievance on 30th September regarding the number of shifts he was allocated. While the grievance was not upheld, the Operations Consultant who dealt with the grievance recommended that the claimant should be scheduled for three shifts a week for a period to demonstrate that he could maintain this level of attendance and that thereafter the claimant's shifts could be increased to four per week if the trial was successful. It was also recommended that the claimant meet with Mr Granton, the Business Manager once a fortnight and the Operations Consultant Group People Manager.
17. The claimant was referred for an Occupational Health assessment, which took place on 26 March 2019. At that time, the claimant had been absent from work since 8 March. A report was provided to the respondent which indicated that the claimant was unfit for work, that there were no adjustments which could enable a return to work and that a potential return date could not be identified. The report also stated 'I think it unlikely that Matthew will be able to give regular and effective service in the short to medium term. Prognosis beyond this time is currently not clear and it is not possible to advise on timescales for a sustained return to work.'

18. A health review meeting took place on 8 May 2019 although this was rescheduled to 21 May. The claimant met with Ms Temple. The claimant indicated that he did not wish to come back to work but that he was not going to just leave. The claimant asked for a settlement agreement at the meeting with financial compensation.
19. A further meeting took place on 21 June 2019. At that meeting the claimant indicated that his employment with the respondent had caused his mental health issues to deteriorate. When the claimant was asked what he wanted to happen, he said 'I've said it before but you said its not going to happen, a settlement. I feel like I can just close the door and get on with myself.'
20. At the meeting Ms Temple said that she was going to adjourn the meeting for four to six weeks to allow the claimant to take advantage of support available to him through AXA. This was a service which was offered to employees with more than three years' service. Ms Temple also advised the claimant that at the next meeting, one of the outcomes could be a capability dismissal.
21. The respondent wrote to the claimant's GP on 13 June requesting a report from them. The GP responded by letter dated 19th June. The GP indicated that the claimant had not been seen since 2nd May and that there was no plan to return to work.
22. A further health review meeting took place on 24th July 2019 at which the claimant advised Ms Temple that he had made arrangements with AXA and that they had provided twelve sessions of CBT which were due to start soon. The claimant also said that he was feeling a bit better but that he did not think he wanted to return to work. He did say that he would appreciate to be able to use the sessions from AXA before his employment was terminated on the ground of capability.
23. A further meeting took place on 23rd October. At that meeting the claimant indicated that he had attended six or seven of the AXA session and that they had helped him. He also said 'I just need an end to this, every advert or anything I see to do with McDonald's sets me off I'm just done with it.' He also indicated that he wanted an end that day so he could move forward with an appeal and a discrimination claim and unfair dismissal claim.

24. The claimant was advised at the end of this meeting that Ms Temple had decided to dismiss the claimant on grounds of capability but that he could appeal against this decision. That decision was confirmed to the claimant in a letter dated 29th October. The claimant was paid outstanding holiday pay and four weeks' pay in lieu of notice.
25. The claimant appealed against this decision in a letter dated 4th November.
26. An appeal hearing took place on 11th November and this was chaired by Ms Anderson who is an Operations Consultant. Notes were taken of the meeting. The claimant indicated at the meeting that he did not want to come back to work but that he should be offered a financial settlement.
27. Ms Anderson did not uphold the claimant's appeal and her decision was set out in a letter dated 3rd December.
28. The claimant has not worked since his dismissal and has been in receipt of Personal Independence Payment since 29 March 2019.

15 **Observations on the evidence**

29. The Tribunal heard from Ms Temple and Ms Anderson on behalf of the respondent and the claimant gave evidence on his own account. The Tribunal found all the witnesses to be generally credible and reliable. They gave their evidence in a straightforward manner. The only evidence not accepted was in relation to Ms Anderson who, when referred to paragraph 14.1 of her statement by a Tribunal member suggested she had meant that the claimant had not accessed all of the AXA sessions available to the claimant rather than as her statement suggested, any of them.

Issues to determine

- 25 30. The parties had agreed a list of issues, and these were accepted by the Tribunal. Put shortly, the issues were:

Was the claimant unfairly dismissed?

Was the principal reason for the claimant's dismissal that he made a protected disclosure in February 2018?

Did the claimant's dismissal constitute discrimination arising from his disability and if so, was the treatment a proportionate means of achieving a legitimate aim?

Relevant law

5 31. Section 98(2)(a) of the Employment Rights Act 1996 ('ERA') provides that capability is a potentially fair reason for dismissal.

32. If the employer establishes a potentially fair reason for dismissal, then the Tribunal is required to determine whether that dismissal was fair within the terms of section 98(4) ERA which provides that:

10 'the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason
15 for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

33. Section 103A ERA provides that 'An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee
20 made a protected disclosure).

34. Section 43B ERA sets out the meaning of a protected disclosure. This includes a disclosure that the health or safety of any individual has been, is being or is likely to be endangered (Section 43B(1)(d)).

35. Section 15(1) of the Equality Act 2010 ('EQA') provides that 'A person (A) discriminates against a disabled person (B) if – (a) A treats B unfavourably
25 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.'

Submissions

36. The claimant made brief but structured submissions addressing the issues raised in the list of issues. The claimant criticised the respondent for failing to review his fit notes from prior to the first occasion on which he had been dismissed in 2018. He said that the respondent should have taken steps sooner to provide him with support and had the respondent done this then he would not ultimately have been dismissed.
37. In relation to his claim of automatically unfair dismissal, the claimant said that he made a disclosure to the Operations Consultant in February 2018 in relation to out of date buns and that this had been the cause of the first and second dismissal.
38. The claimant then said that his dismissal was as a result of his absences, all of which were disability related. He accepted that it was a legitimate aim of the respondent to require him to attend work but said that his disability put him at a disadvantage.
39. For the respondent, it was said that capability was the reason for dismissal and that the claimant had never suggested another reason for dismissal. It was said that there was no evidence that the claimant raising the issue of out of date buns had contributed to his dismissal and that in any event these events had taken place 10 and 20 months before either of the dismissals.
40. The respondent said that there was no suggestion that the claimant's dismissal was procedurally unfair. Reference was made to the case of **S v Dundee City Council** [2013] CSIH 91 in relation to the question of whether the dismissal was within the band of reasonable responses, and that in particular a balancing exercise was required in order to consider the question of whether the employer can be expected to wait longer for an employee to return to work. Taking these factors into account, the respondent submitted that the decision to dismiss fell firmly within the range of reasonable responses. The claimant was absent for 117 days by 26th March 2019 and then was absent continuously until his dismissal. There was substantial consultation with the claimant both in writing and in person. Medical evidence was obtained, and the claimant's views were sought at length.

41. The respondent's position was that the claimant wanted to leave, that it had waited to allow the claimant the opportunity to explore treatment options, that none of the medical advice gave any hope about a return and that the claimant's health remains poor.
- 5 42. The respondent also submitted that even if the Tribunal found that the claimant had been unfairly dismissed, no compensation should be awarded. The respondent highlighted that the claimant had exhausted his sick pay and that had the respondent waited longer to dismiss, the claimant would not have had any income in the meantime.
- 10 43. In terms of the claim of automatically unfair dismissal, the respondent highlighted the time which elapsed between the claimant raising the issue of the buns in February 2018 and his dismissal in October 2019. It was submitted that there was no causal link between the two events and that Ms Temple, whose decision it was to dismiss, had no involvement with the
15 incident. Finally, in this regard, there was insufficient evidence to demonstrate that there was a 'disclosure of information'.
44. Turning to the issue of discrimination arising from a disability, the respondent accepted that the dismissal was something arising from the claimant's disability. However, the respondent's position was that dismissal was a
20 proportionate means of achieving a legitimate aim, being the need for employees to attend work. The respondent made reference to ***O'Brien v Bolton St Catherine's Academy*** [2017] ICR 737 as authority for the proposition that if the dismissal was fair then it was also proportionate in terms of section 15 EQA.

25 **Discussion and decision**

45. The Tribunal was very grateful to the claimant for the professional manner in which he conducted himself and to the respondent's agent for his careful conduct of the case and the provision of written submissions.
46. The Tribunal had considerable sympathy with the claimant and the
30 circumstances in which he found himself. The Tribunal could appreciate that he had reasonably formed the view that if the respondent had picked up on

his mental health issues at an earlier stage, and taken steps to support him, then he may not ultimately have been dismissed. However, this did not assist the claimant in establishing the claims which were before the Tribunal.

Unfair dismissal

5 47. The Tribunal was satisfied that the reason, and the only reason, for the dismissal of the claimant was capability. The Tribunal had no hesitation in accepting that the decision to dismiss was that of Ms Temple and Ms Temple's alone. The claimant did not adduce any evidence which suggested that Ms Temple was influenced in her decision-making process by the claimant raising issues of out of date buns or indeed any matter other than
10 the claimant's capability.

48. The Tribunal was also satisfied that the respondent had followed a fair procedure. Ms Temple met with the claimant on four separate occasions. She had consulted the claimant on the medical information which was available
15 and his views on a return to work or any reasonable adjustments which might be made to assist him.

49. The decision was also within the band of reasonable responses. The claimant's absences had been numerous and the claimant had been continuously absent for almost seven months by the time of his dismissal.
20 The Tribunal was mindful that the claimant was on a 'zero hours' contract and that the respondent did not produce any evidence that his ongoing absence was causing operational difficulties. However, that is just one issue to consider when balancing all relevant factors. The claimant was being managed by the respondent in that there were regular meetings in order to
25 assess his ability to come back to work. Further, and crucially, the claimant said on a number of occasions, not only that he did not want to come back to work, but that the ongoing uncertainty about his continued employment was adversely impacting upon his mental health.

50. The Tribunal accepted as genuine Ms Temple's view expressed in her last
30 meeting with the claimant, that it would be cruel to keep the claimant's employment going as it was having a detrimental impact.

51. In addition, the Tribunal was of the view that the respondent had obtained sufficient medical evidence and that evidence gave no hope of a return to work at any stage in the medium term. The respondent had taken time to give the claimant the opportunity to access counselling facilities from AXA in case this caused sufficient improvement in his health. The claimant had however
5 ceased those sessions midway through and gave conflicting reports of whether they had been of assistance. While the claimant did suggest that they had been of assistance shortly after, his evidence before the Tribunal was that in the long term, they had not in fact helped him.
- 10 52. It was clear to the Tribunal that the claimant wished to leave employment in order to regain his health, but that he wished to be compensated beyond his contractual entitlements in that regard. Faced with the claimant's position, the medical advice and no suggestion of any adjustments which might facilitate the claimant's return to work, the decision to dismiss was within the band of
15 reasonable responses and the claimant's dismissal was fair.

Automatically unfair dismissal

53. Having established that the reason, and the only reason for the dismissal of the claimant was the issue of his capability, the claimant's claim that he was dismissed for making a protected disclosure cannot succeed.

20 Discrimination arising from disability

54. The issue for the Tribunal to determine in relation to this matter was whether the dismissal of the claimant had been a proportionate means of achieving a legitimate aim. The claimant accept that it was a legitimate aim of the respondent for its employees to attend work. The question was whether it
25 was proportionate in the circumstances of the respondent to have dismissed the claimant. The Tribunal took account of the passage in **O'Brien** to which the respondent referred.
55. However, the Tribunal also considered whether even though the dismissal was fair, it could still be suggested that the treatment was not justified. In
30 particular, the Tribunal considered whether there was any other action the respondent could have taken. In its view there was not. This was a situation

where an employee was saying, more than once, not only that they did not wish to work for the employer anymore, but in fact their continuing employment was detrimental to their mental health.

56. While again, the Tribunal was mindful that if steps had been taken at an earlier stage to support the claimant given his disability, then dismissal may not have occurred, the Tribunal could only consider the facts relevant to the claims before it. The Tribunal concluded that dismissal was proportionate in the particular circumstances of the case.

57. In all of these circumstances, the claimant's claims fail and fall to be dismissed.

15 Employment Judge: Amanda Jones
Date of Judgment: 25 January 2021
Entered in register: 26 January 2021
and copied to parties