EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107977/2021

Held on 4th August by Cloud Based Video Platform

Employment Judge O'Donnell

Mr M Cardownie	**Claimant** **In Person**
Sitel UK Ltd	**Respondent** **No appearance and not represented**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:-

1. The claim of unfair dismissal under the Employment Rights Act 1996 having been withdrawn by the Claimant is hereby dismissed under Rule 52.

2. The claim of discrimination arising from disability under the Equality Act 2010 is not well-founded and is hereby dismissed.

3. The claim of breach of contract is not well-founded and is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal, disability discrimination and breach of contract.

2. The Respondent has not lodged an ET3 and so were not entitled to participate in the hearing. They had contacted the Tribunal by email approximately a month before the hearing indicating that they intended to defend the claim and seeking an extension of time to lodge their ET3. However, this application did not comply with Rule 20 and so was refused. The terms of Rule 20 were drawn to the Respondent's attention but no subsequent application for an extension of time complying with the Rules was received. The claim, therefore, proceeds as undefended.

3. Given that the burden of proof lay with the Claimant in relation to the disability discrimination and breach of contract claim, this hearing was convened to hear his evidence.

Preliminary issues

4. At the outset of the hearing, the Tribunal sought to identify the claims being pursued. Normally this would have been done at a case management hearing in advance of a final hearing but such a hearing was not convened because the claim was undefended.

5. The Tribunal noted that the Claimant had ticked the "unfair dismissal" box on his ET1 which would indicate that he was pursuing a claim for unfair dismissal under the Employment Rights Act 1996. However, he did not have the two years' continuous employment normally required for the Tribunal to have the jurisdiction to hear such a claim and his ET1 did not set out a claim for "automatic" unfair dismissal for which the two year rule is disapplied.

6. The Claimant explained that he had understood that he could pursue a claim of unfair dismissal on the grounds of disability discrimination. The Tribunal explained that it appeared that he had conflated a claim of unfair dismissal under the 1996 Act with a claim of discrimination under the Equality Act 2010 (which he had also raised) but that these were separate matters.

7. On considering this, the Claimant indicated that he would withdraw the unfair dismissal claim. There being no objection from the Claimant, the Tribunal dismissed this claim under Rule 52.

8. The remaining claims were discrimination arising from disability under the Equality Act 2010 and breach of contract (the Claimant described this as "wrongful dismissal" but he agreed that he was using this phrase to describe alleged breaches of his contract by the Respondent as set out below).

9. In relation to the discrimination claim, the disability was depression and anxiety. The unfavourable treatment was the Claimant's dismissal and the "something" arising from disability were the absences from work which were given as the reason for the Claimant's dismissal which he alleged were caused by his disability.

10. The breach of contract claim arose from two matters. First, that the Respondent did not follow their disciplinary, grievance and other policies in dismissing the Claimant. Second, that those policies were not available on the Respondent's Shared Drive as stated in the contract.

Evidence

11. The Tribunal heard evidence from the Claimant.

12. The Claimant had also produced documents he wished to rely on. These were not in a paginated bundle and so will be referred to below by their description.

Findings in fact

13. The Tribunal made the following relevant findings in fact.

14. The Claimant has had depression and anxiety for approximately 10 years. He has worked with psychologists to manage his condition and, latterly, he was prescribed medication. It manifests as low energy and motivation which means the Claimant can struggle to get tasks done.

15. The Claimant first saw a psychologist when he was 17 years old in 2013/2014. It was at this time that he was diagnosed with depression and anxiety. He first experienced symptoms about a year before he was formally diagnosed.

16. In August 2017, the Claimant began taking medication for his condition. The Claimant produced a letter dated 3 August 2021 from Murrayfield Medical Centre which shows that he was prescribed Mirtazapine (anti-depressant), Propanolol (anti-anxiety) and Diazepam (sedative) in August 2017. In March 2019, Mirtazapine was replaced with Trazodone but the Claimant had an adverse reaction to this and it was replaced with Citalopram in April 2019. He continues to take Citalopram, Propanolol and Diazepam at the time of the hearing.

17. If the Claimant did not take these medications and did not engage in therapy then he would struggle to get up in the morning and engage in everyday tasks. He would simply turn off his alarm and go back to sleep. He would not engage in self-care such as washing as he would not see the point. He would put off tasks and procrastinate indefinitely. He currently lives with family but, when he has lived alone, he would not cook as he would have no drive to do so and lived on protein shakes.

18. He finds his anxiety debilitating without medication and struggles with public places. He feels everyone is looking at him and wears a hat and hoodies when he goes out. He does not socialise as a result of his anxiety; he struggles to speak to people or even communicate by email or similar communications.

19. The Claimant's condition can impact on his working life if he does not control it; he would have no drive to apply for jobs and has struggled to hold down jobs that he has secured in the past because of the low energy caused by his condition which would lead to him coming to work late, being tired and slow during the working day and have difficulties in engaging with customers.

20. There has been no indication from the Claimant's medical advisers that the effects of his condition are likely to cease in the near future or at all.

21. The Claimant had informed the recruiter for his job with the Respondent about his disability and his team leader was also aware of this.

22. The Claimant signed the Statement of Terms and Conditions of Employment with the Respondent on 18 May 2020 and this document at Clause 1 records his start date as 20 May 2020.

23. The Statement of Terms and Conditions makes reference to a number of policies operated by the Respondent at Clauses 17 (disciplinary policy), 18 (grievance policy) and 19 (appeals policy). The relevant clauses state that the policies can be found on the Respondent's Shared Drive and conclude with the following sentence *"This policy does not form part of your terms and conditions of employment"*.

24. Within the documents which were provided to the Claimant at the start of his employment is one listing all the policies which the Respondent operates in which he confirms that it is his responsibility to familiarise himself with these. They are described as being available on the Respondent's HR Portal. Certain policies are marked with an asterix as being a priority one. This document does not state that these policies have any contractual status.

25. The Claimant was employed as a customer service agent and he worked from home, logging into the Respondent's systems remotely from his own computer.

26. On 17 September 2020, the Claimant received an email from Kevin Wallace, HR Adviser, informing him that he was being dismissed. This email came entirely out of the blue and the Claimant had been given no prior indication that the Respondent was contemplating terminating his employment.

27. The email starts by explaining that, in order to *"realign our business to meet with the client's requirements",* the decision had been made to end his contract and gave him 7 days' notice.

28. It goes on to state that this decision is based on the number of *"unplanned occasions of absence"* and states that there have been nine such absences. It goes on to state that this level of absenteeism does not meet the standards expected by the Respondent.

29. No issues with his attendance had been raised with the Claimant prior to him receiving the email from Mr Wallace. He produced a copy of the Respondent's attendance policy which describes a process involving informal action and a three stage formal absence management policy. None of this was followed and there was no consultation or discussion with the Claimant regarding his absences prior to the email dismissing him.

30. The Claimant was able to identify the nine absences to which the dismissal email refers and the reasons for his absence:-

    a. 16 July 2020 – the Claimant was unwell due to a stomach bug.
    b. 22 July 2020 – the Claimant overslept and logged into work later than his scheduled start time. He attributes this to a manifestation of his depression and anxiety.
    c. 29 July 2020 – the Claimant was unable to log into the Respondent's "AWS" system due to problems with the Respondent's system which required it to be re-built.
    d. 2 August 2020 – the Claimant was again unable to log in for the same reason as 29 July.
    e. The Claimant was recorded as absent on 2 August twice but there was no reason for this second absence.
    f. 15 August 2020 – the Claimant's own internet connection was down preventing him from logging in to the Respondent's systems.
    g. 22 August 2020 – problems with the Respondent's system prevented the Claimant from logging in.

h. 3 September 2020 – the Claimant had an emergency dentist appointment. He attributes this to his depression and anxiety; his condition means that he cannot face going to the dentist and so his dental health has been neglected. This led to one of his teeth splitting and the need for this appointment.

i. 11 September 2020 – the Claimant had a GP appointment to discuss a referral to a psychologist and counselling in relation to his depression and anxiety. He had provided confirmation of this to his team leader who was on leave on the day in question and so HR did not have a copy of the note from the Claimant's doctor.

31. After receiving the dismissal email, the Claimant looked for the disciplinary, grievance and absence management policies on the Shared Drive but could not find these. He emailed Mr Wallace on 18 September 2020 asking for copies of these and these were sent by email the same day.

32. The Claimant had been informed that he had no right of appeal and so he raised a grievance by email dated 21 September 2020 alleging unfair and discriminatory treatment in relation to his dismissal. In the grievance, he sets out the position that he had informed the recruiter that he tended to have one or two doctor's appointments per month. He explained the difficulty in arranging appointments due to the pandemic lockdown and that he had to take his dental appointment at short notice.

33. The grievance goes on to say that he had followed the correct procedure in booking such appointments and that his line manager had never raised an issue about these. It also states that a number of the absences were due to issues with the Respondent's system.

34. The grievance was heard by Paul Faulkner and he issued his decision by email dated 1 December 2020 which was produced to the Tribunal. Mr Faulkner did not uphold the Claimant's grievance because he was *"unable to substantiate your claims that you were dismissed as a result of your levels of absence"*. The email goes on to explain that the Respondent was

required to reduce the number of employees working on the campaign to which the Claimant was assigned and so provided him with one week's notice of the end of his assignment.

35. Mr Faulkner then asserted that the Claimant was not dismissed but that he could see how the Claimant could have believed that he had been because the Respondent chose to share the reasons for his selection as one those whose contract was coming to an end. He then states that the reasons for the Claimant's selection are irrelevant because it was the need to reduce headcount that led to the end of his assignment.

36. The Claimant appealed this decision by email dated 10 December 2020. It sets out five grounds of appeal:-

a. He disagreed with Mr Faulkner's conclusion that his absences had nothing to do with his dismissal.
b. There was a failure to look into how Mr Wallace had handled the Claimant's initial grievance.
c. That the Respondent had failed to follow their own policies which were mentioned in his contract.
d. He believed that he had been discriminated against by the selection process which led to his dismissal.
e. That Mr Faulkner had not looked into the point that the Claimant had raised his need to attend medical appointments with the recruiter who had said this would not be an issue.

37. The Claimant's appeal was heard by Rita Johnstone, Senior Operations Manager, who issued her decision by letter dated 12 January 2021. The Claimant's grievance was not upheld by Ms Johnstone; she did accept that the absence on 11 September was a pre-planned appointment but confirmed that this did not change the outcome and relied on the reason given in the original dismissal email which stated that the number of absences were above the standard expected by the Respondent.

Claimant's submissions

38. The Claimant did not make separate submissions in the formal sense and his evidence set out the reasons why he considered that he had been discriminated against and why he believes the Respondent breached his contract.

39. In relation to the discrimination claim, it was his position that the absences which led to his dismissal were due to his disability.

40. As regards the breach of contract claim, he asserted that the Respondent had failed to follow their own policies in terms of the timescales for dealing with his grievance and not following their disciplinary policy. These policies were also not available on the Shared Drive as stated in his contract.

Relevant Law

41. Disability is one of the protected characteristics covered by the Equality Act 2010 and section 6 of the Act defines disability as a physical or mental condition which has long-term, substantial adverse effects on a person's day-to-day living activities.

42. Schedule 1 of the 2010 Act sets out further provisions in relation to the definition of "disability":-

Paragraph 2

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

Paragraph 5

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular, medical treatment and the use of a prosthesis or other aid.

43. The definition of discrimination arising from disability in the 2010 Act is as follows:-

15 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.

44. This provision does not stand on its own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to

discriminate in particular circumstances. The relevant provision in this case is:-

39 Employees and applicants

An employer (A) must not discriminate against an employee of A's (B)—

by dismissing B

45. Guidance as to how to apply the test under s15 was given in *Pnaiser v NHS England [2016]* IRLR 170, EAT:-

a. Was there unfavourable treatment and by whom?

b. What caused the treatment, or what was the reason for it?

c. Was the cause/reason 'something' arising in consequence of the claimant's disability?

d. This stage of the test involves an objective question and does not depend on the thought processes of the alleged discriminator.

e. The knowledge requirement is as to the disability itself, not extending to the 'something' that led to unfavourable treatment.

46. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

47. In construing the contract of employment, the express terms agreed between the parties are paramount, particularly where these are reduced to writing in the form of a contract which sets out what the parties have agreed.

<u>Decision – disability discrimination</u>

48. The first issue for the Tribunal to determine is whether the Claimant is disabled as defined in s6 of the Equality Act.

49. For the reasons set out below, the Claimant is satisfied that the Claimant's anxiety and depression did have a long-term, substantial adverse effect on his day-to-day activities.

50. The evidence of the Claimant clearly indicated that the effects of his condition had lasted more than a year, the effects having existed since around 2012/2013 with a formal diagnosis in 2013/2014. Further, there was nothing in the evidence heard by the Tribunal to suggest that these effects would last for some time to come and certainly for more than a year. The effects of his condition, therefore, meet the "long term" element of the definition in s6 of the 2010 Act.

51. The evidence of the Claimant also made it clear that, ignoring the steps taken to control his condition such as the medication he takes and therapy, the condition would have a substantial adverse effect on his day-to-day living activities in that he would struggle to engage in any such activities at all. The Tribunal had no reasons to doubt his evidence that he would be unable to get out of bed let alone engage in activities such as washing himself, cooking, cleaning, socialising or taking in part in working life generally.

52. In these circumstances, the Tribunal finds that the Claimant is disabled as defined in s6 of the Equality Act 2010.

53. Turning to the substantive issues of the discrimination claim, there is no question in the Tribunal's mind that his dismissal amounts to unfavourable treatment of the Claimant.

54. The next question is what is the "something" which caused that treatment or, in other words, what was the reason for dismissal. It is quite clear from the evidence, in particular the letter of dismissal, that the Claimant was dismissed due to the absences which he had had from work. Although there might be some suggestion that there was a need for the Respondent to reduce the number of employees, it is quite clear that the reason why the Respondent chose the Claimant as one of the employees who was no longer required

were the absences he had had from work and this is the operative and immediate cause of his dismissal. The "something" is, therefore, the Claimant's absences from work.

55. The Tribunal then turns to the question of whether the "something" (that is, the Claimant's absences) arose from his disability. The difficulty for the Claimant is that very few of the absences were caused by his disability.

56. The Tribunal should be clear that it is not concerned with whether or not it was fair or reasonable for the Respondent to have counted any or all of these absence in deciding to dismiss the Claimant. The Tribunal is only concerned with whether the absences in question arose from the Claimant's disability and it is quite clear that six out of the nine absences had no connection at all with the Claimant's disability arising from matters such as the Respondent's system being down preventing the Claimant from logging on, a stomach bug, the Claimant's internet connection being down and an administrative error that counted the same absence twice.

57. Taking the Claimant's case at its highest, only three absences had any connection with the Claimant's absence at all; the day he overslept, the dentist's appointment and the doctor's appointment. There was no evidence before the Tribunal from which it could conclude that those three absences were decisive and had they not occurred then the Claimant would not have been dismissed.

58. Indeed, at the grievance appeal, it was accepted that the Claimant's GP appointment was pre-planned but that the decision to dismiss would stand regardless. This shows that the Respondent was looking at the absences as a whole rather than on an individual basis and that the absences which did arise from his disability were not a determining factor.

59. The Tribunal considers that this also shows that the GP appointment was not a specific triggering event for the Claimant's dismissal. The Tribunal did give consideration as to whether there was any basis from which it could conclude

that, despite the fact that the majority of the other absences were entirely unconnected to his disability, the decision to dismiss the Claimant was triggered by the absences which did arise from his disability, especially in circumstances where two of these were the closest in time to the dismissal.

60. The evidence of the Claimant was that the Respondent was reducing its staff levels and did, indeed, do so. The Claimant was part of that process rather than being singled out for dismissal. The Tribunal did not consider that the evidence before it provided any basis on which it could conclude that the decision to dismiss was triggered by the absences which did arise from the Claimant's disability.

61. Rather, the evidence shows that the decision to dismiss the Claimant, and others, arose from the decision to reduce staffing levels. The Claimant's absence level was then used to identify him as one of those employees being let go and, as set out above, there is no evidence that it was those absences which arose from the Claimant's disability which were decisive in the decision to dismiss him as part of the broad reduction in staff.

62. In considering whether there was any evidence from which it could draw an adverse inference, the Tribunal was troubled by the contents of the grievance decision by Mr Faulkner which seemed to reach conclusions which had no factual basis. For example, he asserted that the Claimant was not dismissed when he clearly was dismissed, both as a matter of fact and law, when the Respondent terminated his contract. Similarly, Mr Faulkner asserted that the Claimant's absences were irrelevant to the *"end of* [the Claimant's] *assignment"* when the absences are expressly and unambiguously given as the reason for his dismissal in the email from Mr Wallace.

63. The contents of Mr Faulkner's decision letter are a transparent, and not very effective, attempt to "spin" the decision to dismiss the Claimant and distract from what is said in the dismissal email. However, with that being said, the Tribunal does not consider that, on its own, this is sufficient for the Tribunal to draw any adverse inference of discrimination.

64. In these circumstances, the Tribunal is not satisfied that the reason for the Claimant's dismissal amounts to "something" arising from his disability.

65. The Tribunal, therefore, finds that the claim of discrimination arising from disability is not well-founded and it is hereby dismissed.

Decision – breach of contract

66. The first element of the breach of contract claim (that is, that the Respondent did not follow their own policies) can be dealt with in straightforward terms. The relevant clauses of the contract between the Claimant and the Respondent state, in clear and unambiguous terms, that the disciplinary, grievance and appeal policies, which the Claimant says were not followed by the Respondent, do not form part of the Claimant's terms and conditions of employment. These policies, therefore, do not have contractual effect and so any failure to follow them cannot amount to a breach of contract.

67. There was nothing in the statement of terms and conditions signed by the Claimant which made any reference to the absence management policy. This is only mentioned in a document listing the policies operated by the Respondent provided to the Claimant at the outset of his employment.

68. In these circumstances, there is nothing from which the Tribunal could conclude that the absence management policy was expressly incorporated in the terms of the Claimant's contract. Further, there was no evidence in terms of the actions of the parties or from any oral agreement from which the Tribunal could imply that this policy was incorporated into the contract.

69. The Tribunal, therefore, finds that none of these policies formed part of the contract between the Claimant and the Respondent. A failure to follow these policies cannot, therefore, amount to a breach of contract.

70. In relation to the second element of the contract claim (that is, that the policies were not available on the Respondent's Shared Drive), the relevant

terms of the contract do state that the policies are available on the Shared Drive and they were not when the Claimant looked for them.

71. However, there is no evidence that the Claimant suffered any form of loss arising from the absence of these policies on the Shared Drive, especially where the Claimant was provided these policies quickly when he requested them. In these circumstances, the Tribunal considers that this is no more than a technical breach of the relevant terms with no loss to the Claimant and so falls within the *de minimis* principle (that is, that minor or technical breaches of an agreement do not give rise to legal liabilities).

72. In these circumstances, the Tribunal considers that neither element of the breach of contract claim is well-founded and it is hereby dismissed.

Employment Judge: Peter O'Donnell
Date of Judgment: 17 August 2021
Entered in register: 25 August 2021
and copied to parties