



EMPLOYMENT TRIBUNALS

Claimant

Mr F Viljoen

v

Respondent

Booker Limited

Heard at: Norwich (by CVP)

On: 16, 17, 18 & 20 August 2021

Before: Employment Judge Postle

Members: Mrs A Gibson and Mr A Kapur

Appearances

For the Claimant: In person.

For the Respondent: Mr D Piddington (Counsel).

RESERVED JUDGMENT

The claimant's claims under the Equality Act 2010 for the protected characteristic of disability are not well founded.

RESERVED REASONS

1. The claimant brings claims to the Tribunal under the Equality Act 2010 specifically for direct discrimination s.13, indirect discrimination s.19, failure to make reasonable adjustments s.20, harassment s.26 and victimisation s.27.
2. The specific issues arising out of the claimant's claims were identified following two case management hearings before Employment Judge Anstis on 15 May 2020 and Employment Judge Pearl on 11 December 2020. Those issues have helpfully been set out by Counsel for the respondent in this hearing which identifies each matter the claimant complains of and it would appear that Mr Viljoen the claimant accepts they are the issues to be determined.

3. The respondent accepts the claimant has a disability being that of depression and/or anxiety. The respondent does not accept knowledge namely that they knew or ought reasonably to have known the claimant was a disabled person.
4. In this Tribunal we have heard evidence from the claimant through a prepared witness statement and a further supplemental witness statement.
5. For the respondent we have heard evidence from Mr Wells an Area Manager of the respondent's Medway branch who conducted the claimant's disciplinary, Mr McIntosh an Area Manager at the Tunbridge Wells branch who conducted the claimant's appeal, Mrs Pink an HR and Development Manager at the respondent and Mr Edwards at the relevant time was the Operational Support Manager covering the respondent's branch at Slough in the absence of a Branch Manager. Mr Edwards also had a supplemental witness statement, all of those witnesses gave their evidence through prepared witness statements.
6. The Tribunal also had the benefit of bundle of documents consisting of 522 pages and a further supplemental bundle of 38 pages.

Credibility

7. The Tribunal noted the claimant was frequently evasive in answering straight forward and direct questions put to him in cross examination. On some occasions the claimant point blankly refused to answer a question when challenged on a number of issues despite the Tribunal prompting the claimant for an answer.
8. The respondent's witnesses were clear in their evidence and provided frank and honest answers.

Legal identity of the respondent

9. The respondent legal identity is clearly Booker Limited despite the claimant's insistence that the respondent's title should be Booker Group Limited. The respondent's documentation contained in the bundle clearly evidences the fact that the respondent's correct title for the purpose of these proceedings is Booker Limited, one example at page 131. The respondent has sensibly taken no issue with the claimant over the naming of the identity of the respondent as Booker Group Limited.

The Facts

10. The claimant was employed as a Branch Assistant at the Slough branch from 21 June 2018 until his dismissal with notice on 15 October 2019. Branch assistants have a general role, they are under the supervision of supervisors, co-ordinators or team leaders. Branch assistants do a variety of tasks such as unloading deliveries, placing goods in correct areas for example the freezer section, the chilled area, ambient goods, goods at

room temperature and replenishing the branch shelves. Branch assistants are required to concentrate on focussing time on their duties throughout their shift. The claimant mostly worked in the chilled room which would involve the claimant checking dates of goods, stock rotation, putting the chilled goods deliveries in the chiller room and generally help out in the branch according to the needs of that branch.

11. The respondent is a wholesaler to restaurants, convenience stores and other similar businesses. The branches are similar to supermarkets but much bigger, the aisles are much wider, shelves bigger, higher and on the whole goods are sold in bulk to its customers.
12. In early July 2019 Mr Edwards as the Operations Support Manager was sent to the Slough branch as the Branch Manager had left and another key post was vacant, he was to cover effectively as the caretaker manager. It was clear to him when he arrived at the branch it was not functioning as well as it should be in the absence of a Branch Manager previously.
13. On 11 July Mr Edwards has cause to speak with the claimant whether by phone or in person (it matters not) as the claimant had reported sick with a bad back. During this conversation the claimant raised a number of issues as to how the branch was being run either at supervisor level or management. The claimant had previously raised a grievance on 24 June (page 155) in summary that covered manual handling at the branch, personal protection equipment the lack of and what the claimant perceived was an increased workload. The grievance letter makes no mention of the claimant being discriminated against or the respondent in some way being in breach of the Equality Act. It's only reference to working conditions was the affect on the claimant's mental health and personal wellbeing. It was decided that Mr Edwards who was covering the store was the best person to deal with the grievance. Following which Mr Edwards when in the branch when the claimant was working walked round the store and talked to the claimant as he would with other branch assistants and reassured the claimant to focus on his work and the tasks he was required to perform and not those of other colleagues (employees) as they were known.
14. It is clear that the claimant was not an easy branch assistant to work with, it was further clear that he could be erratic being calm one moment and angry the next. In fact the claimant was very precise and literal for example on one occasion when Mr Edwards asked to speak to the claimant for 2 minutes the claimant would stand, look at his watch and as soon as the 2 minutes was up he would simply walk off. Mr Edwards would be unable to persuade the claimant to remain to finish the conversation. It is clear that the claimant became fixated on issues around the branch and what he perceived was the failings at the branch or other colleagues.
15. It is clear before any prospective colleagues joined the respondent they would be asked to specify the size of the uniform and the personal protection equipment they required. They were all issued safety shoes

(thick soles and reinforced uppers) cargo trousers, t-shirts and a jumper or fleece. They would also be issued a pair of gloves and a woolly hat. For those working in the branch's freezer department they would be issued with additional clothing and there were stipulated rules as to how long they could work in the freezer area which had been assessed by a Health & Safety Officer as had the requirements for personal protection equipment.

16. The chiller room runs at temperature between 5 and 8 degrees Celsius. It is also clear that when the claimant raised the issue that he did not think he had appropriate gloves and a hat for working in the chilled room, Mr Edwards checked with the company's Health & Safety Officer and was informed that the hat and gloves that had been issued met the relevant Health & Safety requirements for working in the chilled rooms of the respondent's branches.
17. It is clear the claimant continued to complain about the gloves that he had been issued with. Mr Edwards told the claimant that he had checked with Mr Thackery the Health & Safety Officer who had confirmed that the gloves and hat met the respondent's Health & Safety obligations. Mr Edwards in fact told the claimant if he wanted alternative gloves and that he thought was better for working in the chilled room then the claimant was authorised to purchase them and the respondent would reimburse the claimant. Mr Edwards recalls by the end of August the claimant had purchased alternative gloves and the claimant was reimbursed. That is clear from the grievance outcome letter of 29 August at page 242 which specifically refers to that point.
18. In relation to the claimant's grievance there was a meeting held on Friday 28 June convened by Mr Harris the Area Manager at Brighton. The outcome letter of that meeting is of the same date at page 184. In that letter Mr Harris reassured the claimant that there was to be a new senior team in Slough and that they would be reviewing the current ways of working. That he had arranged for the claimant to meet Mr Edwards on Thursday 11 July in Slough to work through some of the issues that had been raised by the claimant.
19. On 8 July the claimant again wrote to HR (page 185) regarding various issues in the store and requesting an appeal meeting. The claimant then went off sick on 9 July with a bad back (page 189) the doctor's fit note confirming back pain unspecified.
20. There is a back to work meeting on 15 July at which the claimant confirms the reason for absence was back pain and the support he required was no heavy lifting for 10 days, light duties and reference to gloves being required for cold room (page 192). The claimant returns to work on 15 July and on 19 July by email to HR appeals the recent grievance which when reading it references breaches of Health & Safety Regulations, his back injury which the claimant asserted comes from manual handling between the 1st and 8th July. The fact that the meeting between Mr Edwards and the claimant in his view did not resolve operational issues

and the fact that despite the doctor's note the claimant believed his workload had been increased. It is clear when the claimant started working at the respondent he would have been given manual handling training as part of his induction, the training is set out at pages 114-118. It is clear that a key message is that if you think something is too heavy or difficult to move you obtain assistance from a colleague or use one of the manual handling equipment in the branch namely a pallet truck.

21. Once again Mr Edwards checked with the Health & Safety Officer that the claimant was not asked to do anything excessive or abnormal and on checking the branches list of items that were delivered the Health & Safety Officer confirmed there was nothing abnormal or excessive. The height of the branches shelving was also checked as were the ladders provided and the Health & Safety Officer confirmed these were satisfactory.
22. Mr Edwards spoke to the claimant and made it clear he was not being asked to lift anything more than would ordinarily be required of colleagues, again if he was not comfortable lifting any items he should leave it or ask for assistance.
23. It is also clear when the claimant had returned to work on 15 July following a bad back Mr Edwards put him on light duties. Particularly the claimant was put on cleaning duties round the branch mainly sweeping and mopping. The claimant was also asked if he was ok with scraping up sticky tape residue on the floor of the branch and confirmed that he was. The claimant also wanted to carry on working in the chilled room and Mr Edwards made it a condition that the claimant was to avoid any heavy lifting and certainly nothing more than 15 kilograms. If it was in excess of that weight he should leave it and obtain assistance.
24. As previously mentioned it was clear that when Mr Edwards arrived at the branch at Slough it was not efficient and that some assistants were not working very quickly. It is accepted that Mr Edwards therefore started monitoring the amount of work that was being done by assistants. As the Branch Manager Mr Edwards would receive a branch schedule each day which indicated the number of pallets that were arriving at the branch. The respondent had carried out a time and motion study previously and Mr Edwards was aware that it took 35 minutes to deal with a mixed pallet and 10 minutes to deal with a bulk pallet. A pallet being a large wooden tray with bulk goods put on by forklift truck blades. A mixed pallet is one that has cases of different goods.
25. Mr Edwards therefore when commencing his time at Slough allowed assistants 1 hour per pallet and then reduced to the standard times in which to clear a pallet.
26. It is clear the claimant did not think much of one of the branch assistants Mr Willoughby or that his work was up to standard. He would argue with this branch assistant. There had been a previous altercation between the two of them in May and on 19 July the claimant was involved in a further

altercation with Mr Willoughby. At that point the claimant was signed off with stress the GP's fit note indicating stress at work and that was to last until 26 July. There was then a further fit note signing the claimant off until 7 August citing stress at work.

27. So when the claimant returned on 8 August Mr Edwards started to monitor the claimant's work as he was doing the same with all other teams and colleagues at the branch. The claimant's workload from 8 August is accepted probably did increase, Mr Edwards started to move the claimant and all other Slough colleagues towards the respondent's expected speeds of working in dealing with pallets. That applied to every colleague in the branch.
28. The claimant's appeal against the grievance took place on 8 August and the minutes of that meeting are at pages 215-232. The claimant attended with his USDAW representative and the meeting was conducted by Mr Gibney an Area Manager. The meeting was lengthy lasting over 2 hours.
29. On 29 August the claimant receives an outcome of the grievance meeting (pages 241-243). It is clear the areas discussed were once again personal protective clothing, manual handling concerns, lack of support in the chilled room, concerns around return to work on light duties and finally a risk assessment for the chilled room. It should be noted that the first point on personal protective clothing was upheld though noted that on the day the meeting took place the claimant was already in possession of two new pairs of gloves that he had purchased himself and that Mr Edwards had agreed he would be reimbursed for in any event. The other concerns were not upheld. In the grievance outcome letter Mr Gibney comments about the claimant raising during the course of the meeting that he had experienced some mental health issues and suggests if the claimant needs any additional support he should speak with his GP or make use of the Employee Assistance Helpline and provides the telephone number. It appears nothing further came of this mentioning of mental health issues at that stage. In fact before receiving the outcome of Mr Gibney's decision on the claimant's grievance, the claimant was already emailing HR on 29 August complaining about issues in the branch and the delay in responding to his grievance appeal, PPE and an alleged altercation he had had with Mr Edwards about being asked to work under the supervision of Mr Ruggier and, alleged continued abuse the claimant was asserting he was being subjected to by management at the respondent's.
30. In relation to supervision issues the claimant's line manager was Mr Burrough the Replenishment Supervisor. When this supervisor had a day off the only other colleague on the shop floor who had the appropriate knowledge to supervise the claimant was a Mr Ruggier the Stock Control Supervisor. The claimant did not think highly of either of them, in fact described them as incompetent supervisors on previous occasions.

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31. It is clear on 22 August when Mr Burrough was not in Mr Edwards placed him under the supervision of Mr Ruggier for the day and likewise on 29 August. The reason for this is every branch assistant each day needs a supervisor to oversee their work, give them direction and help them with any issues and support their needs. The only other suitable colleague on those days to supervise the claimant was Mr Ruggier.
32. The respondent operates a policy of company sick pay which is based on length of service: 6-12 months = 1 week and 1-2 years = 2 weeks. As the claimant in the recent absence from sickness had exhausted the company sick pay he would only be paid Statutory Sick Pay and of course the first 3 days are waiting days at which no employee is ever paid. When the claimant questioned his pay in August he received a response from HR confirming the company sick pay had been exhausted.
33. On 1 September (pages 246-250) the claimant emails Mrs Pink with a further grievance once again raising all sorts of operational issues, repeating previous issues raised and a whole host of further issues aimed at management and Health & Safety. What the claimant does not state in the grievance is that he is being discriminated because of a disability.
34. On 5 September Mrs Pink acknowledges the grievance and sets out what has already been covered in previous grievances and what are the new issues, they being issues with supervisors ignoring instructions, specific issues with Mr Ruggier, communications with Mr Edwards, being asked to go to B&Q to buy a tool to deal with sticky residue and not being given a new hat.
35. On 8 September he raises further issues with Mrs Pink over his relationship with Mr Willoughby.
36. On 9 September Mrs Pink acknowledges the claimant's concerns advising that Mr Edwards has been asked to speak with the claimant when he is back in the branch the following day, namely the 10th September.
37. Booker's absence management procedure is automatically triggered when a colleague in a rolling 52 week period has 3 separate sickness absences of 15 days or has 1 absence of 16 days or more (page 96). Once the trigger is met the colleague is invited to a disciplinary hearing where the absences are discussed.
38. On 5 September 2019 Mr Edwards issued the claimant with a notice of disciplinary hearing because his absence levels had automatically triggered Booker's absence management procedure (page 301). The claimant had been absent on 3 separate occasions: 16-18 May 2019, 9-13 July 2019 and 22 July-7 August 2019 (page 119).
39. Mr Edwards' decision to move the claimant to a disciplinary hearing for his absences clearly had nothing to do with his disability it was simply the fact that the claimant had triggered the procedure because of his absences. In

any event the claimant did not receive any disciplinary sanction for those absences.

40. On 4 September Mr Edwards interviewed the claimant about his argument with Mr Willoughby on 19 July. The claimant accepted he had had an argument with Mr Willoughby and accepted the gist of Mr Willoughby's statement (page 203) that he had been abusive using bad language as a result of which the claimant may have committed misconduct. The interview with the claimant is at pages 259-299.
41. On 9 September (page 306) the claimant was invited to a further grievance hearing and disciplinary hearing which had been arranged for 13 September and enclosed with that letter were the investigation notes in relation to the altercation with Mr Willoughby. The claimant was warned one potential outcome of the disciplinary hearing could result in warning and further if the claimant already had a live first or final written warning then any additional warnings may result in the termination of the claimant's employment. That letter went on to advise the claimant of his right to be accompanied at that meeting.
42. The claimant was then signed off sick from 9th to the 19th. The reason stress at work. The claimant has a return to work meeting on 20 September – reason for absence stress at work.
43. In the meantime the claimant's disciplinary over the altercation with Mr Willoughby takes place on 1 October conducted by Mr Bartlett Area Manager for Bournemouth who had no previous dealings with the claimant and the claimant was once again accompanied by his Trade Union representative. The minutes of that disciplinary are at pages 311-320.
44. The upshot of the disciplinary as confirmed in the minutes is:

“I will not be taking any action on this matter but we need to stop having conversations like this. Frank you need to stop getting into these sorts of situations again. You are already on a live warning. Can I suggest a mediation session when you return from your sick leave with Jack.”
45. The claimant confirms that he would also like a mediation session with Carl a van driver as well.
46. On 25 September there is a problem over the claimant's Statutory Sick Pay in that the claimant seems to think that he should have been for 2 days work when he was off sick which are in fact waiting days. This was explained to the claimant by HR in an email of 25th.
47. On 26 September there is an attempted mediation between the claimant and Mr Willoughby conducted by Mr Edwards and the note of that is at pages 506-511. This in fact followed a further altercation between the claimant and Mr Willoughby on 24 September. Mr Edwards having spoke to the claimant suggested that a line be drawn under what happened and

at the same time Mr Edwards suggested likewise to Mr Willoughby. Mr Willoughby was willing to agree and would attend the mediation meeting. However later on 26 September the claimant sent an email to Mrs Pink at HR advising he was not prepared to draw a line under the issues with Mr Willoughby (pages 333-334). Ultimately, Mr Edwards did manage to get the claimant and Mr Willoughby into the meeting however the claimant walked out of the meeting at the end and was not willing to move forward and wanted to go back over historical issues and disputes with Mr Willoughby. Whereas Mr Willoughby made it clear in the meeting that he was willing to move forward.

48. The outcome of the grievance meeting on 1 October is communicated to the claimant on 14 October by Mr Bartlett (pages 354-356) these were summarised as previously by Mrs Pink and were not upheld. The claimant was once again given the right of appeal.
49. In the meantime on 1 October branch assistant Mr Salman complained to Mr Burrough that during the day and the previous day the claimant had been taking photographs at work and of Mr Salman without his permission. Mr Salman's statements are pages 343-344. Mr Burrough brought this to the attention of Mr Edwards who believed there were potential privacy and data protection issues arising. Having spoken to the legal team they advised Mr Edwards that taking photograph of someone without their permission could be a breach of the Data Protection Regulations.
50. Mr Edwards therefore on 1 October held an investigation meeting with the claimant about the complaint. Mr Edwards was shown photographs on the claimant's phone clearly of Mr Salman. Mr Edwards was therefore satisfied that there was an issue that should go forward to a disciplinary hearing to determine whether or not the claimant had committed any Data Protection breach.
51. The claimant was then invited to a disciplinary hearing on 7 October by letter (page 352) the allegation was set out regarding a potential breach of the Data Protection Policy, the hearing was to be conducted by Peter Wells Area Manager at Medway who had no previous knowledge of the claimant. The investigation notes, copies of the photographs and copies of the Data Protection Policy were included with the letter inviting the claimant to the disciplinary hearing. The claimant was also advised of his right to be accompanied by his Trade Union representative.
52. Meanwhile on 7 October the claimant lodges his first claim to the Employment Tribunal alleging various forms of discrimination.
53. The disciplinary hearing duly took place on 15 October and notes of that hearing are at pages 357-375 and once again the claimant was accompanied by his Trade Union representative.

54. Mr Wells determined that the claimant had taken a photograph being personal data of a colleague without their consent on the claimant's personal mobile phone and was going share those photographs without their consent.
55. Mr Wells further determined that the focus on GDPR being very serious felt that the claimant was wrong in his actions. Further, Mr Wells was satisfied the claimant had been trained on Data Protection at the start of the claimant's employment. Mr Wells determined that a breach of the Data Protection law before GDPR was an example of gross misconduct in the respondent's disciplinary procedure (page 108) however what the claimant had done in isolation Mr Wells' opinion did not merit the claimant being dismissed. Mr Wells considered that a final written warning was the right level of sanction. However when Mr Wells called Human Resources to check that his decision of the final written warning would be in line with other similar disciplinary sanctions across the company he was informed that the claimant's record showed a final written warning would lead to dismissal as the claimant was already on a live warning for previous misconduct. That being so the claimant was dismissed with notice and the decision to dismiss was confirmed to the claimant in a letter of 16 October (page 376).
56. What is clear in the course of the disciplinary hearing the claimant's Trade Union representative refers to the claimant having a mental health condition and for the first time suggests this might be deemed a disability. However, he does not suggest such a potential disability is the reason why the claimant took the photographs.
57. The claimant was given a right of appeal. He exercised that right of appeal. That appeal again was conducted by an Area Manager from another branch a Mr McIntosh and it appears the claimant does not take issue with the handling of the appeal other than the outcome which he disagreed with namely the sanction of dismissal was upheld.

The Law

s.26 harassment on the grounds of the claimant's disability

58. The Tribunal will be looking to see whether the respondent engaged in unwanted conduct. Then was the conduct related to the claimant's protected characteristic. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant?
59. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for the claimant?

60. The Tribunal in considering whether the conduct has that effect taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

S.13 direct discrimination on the grounds of disability

61. In effect, has the claimant been subjected to less favourable treatment than the respondent would treat others who do not have the claimant's disability?
62. If the claimant shows that there has been less favourable treatment namely proves primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of a protected characteristic. The Tribunal will look to the respondent for an explanation and does it prove a non-discriminatory reason for any proven treatment.

S.19 indirect discrimination on the grounds of disability

63. The Tribunal will consider whether the respondent applied any provision, criterion or practice and whether the application of such a provision, criterion or practice put non-disabled people at a particular disadvantage when compared with the claimant.
64. If the claimant satisfies the Tribunal that he was put at a disadvantage can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

S.27 Victimisation

65. Firstly has the claimant carried out a protected act as set out under s.27 namely the bringing of proceedings under this Act, giving evidence or information in connection with proceedings under this Act, doing any other thing for the purposes of or in connection with this Act, and/or making an allegation (whether or not express) that A or another person has contravened this Act?
66. If the claimant shows there was a protected act has the respondent carried out the treatment that the claimant relies upon as a result of it?

S.20 reasonable adjustments

67. Again, did the respondent apply a provision, criterion or practice which put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? If so, did the respondent take such steps as was reasonable to avoid the disadvantage. The burden of proof does not lie on the claimant.

Conclusions

68. The respondent accepts the claimant has a disability of depression and anxiety. As set out in the issues the question of knowledge remains an issue. Throughout the course of the hearing the claimant himself acknowledged that at no time during the course of his employment did he ever consider himself to be a disabled person by reason of depression and anxiety. It is accepted he had encountered difficulties working with colleagues which led to him taking time off work. However, it is clear to the Tribunal and it is acknowledged by the claimant that on the facts the respondent could not reasonably have known or concluded in the course of the claimant's employment that he was suffering from a disability namely depression and anxiety. Notwithstanding this the Tribunal has dealt with and determined the claimant's claim.

Harassment (s.26)

69. The first head of the claimant's allegations is a claim for harassment on the grounds of disability namely under s.26 of the Equality Act 2010.

70. The first point to make is this could fail on the grounds that the respondent did not have and could not have reasonably known of the claimant's disability. However, notwithstanding this Tribunal have nevertheless dealt with each of the claimant's allegations under this head.

71. The first being that Mr Edwards increased the claimant's workload from 19 July 2019. It is accepted by the respondent that the workload of all colleagues at the Slough branch was slowly increased. Mr Edwards the caretaker manager was aware the branch had not been running efficiently and efficiencies were needed at that branch to increase the workload of all individual colleagues.

72. Indeed when the claimant returned in July from a period of sick leave as a result of a bad back the claimant was never asked to do work over and above his normal level indeed the claimant was told not to carry out any heavy lifting, to leave it and obtain assistance from a colleague. At the end of the day all colleagues' workloads started to increase as a result of Mr Edwards considering a time and motion study that had been carried out in relation to the time it took to clear pallets and all staff were simply being asked originally to clear pallets after 1 hour and then reduced to 45 minutes. The claimant was not treated any differently from any other work colleague in this respect and therefore this claim fails.

73. The second allegation is that the claimant's work was being monitored after 8 August 2019, this is in relation to the efficiencies throughout the branch. As a matter of fact the claimant was not unique in having his work monitored as this was being encountered by every work colleague in the branch in order to approve efficiency. Therefore this was not done because of any disability and therefore this claim fails.

74. In relation to the third allegation of harassment being placed under supervision by Mr Ruggier on 22 and 29 August. It is accepted by the respondent that this happened, the reason for this was that all colleagues each day had to be supervised and on the two days in question the claimant's normal supervisor was absent and therefore Mr Ruggier who the claimant in fact did not get on with was nominated to supervise the claimant. This was entirely unrelated to the claimant's disability as the claimant acknowledged himself under cross examination.
75. The fourth allegation under harassment is instituting absence related proceedings against the claimant on 3 September 2019. Again it is accepted that this factually happens. The reason for this again is accepted by the claimant was unrelated to the claimant's disability simply the fact that under the respondent's sickness absence management he had triggered/set off in the number of days absence he had encountered. Ultimately no sanction was imposed. On one occasion it was accepted there had been no back to work interview conducted. Again the claimant accepted that this was not related to the claimant's disability and in fact any other colleague who was non-disabled who had triggered the absence management procedure policy would have been treated in exactly the same way. This claim therefore fails.
76. The fifth allegation under harassment is disciplinary proceedings being instituted against the claimant on 4 September 2019. On a factual basis it is accepted that this happened but again the claimant conceded this had nothing to do with the claimant's disability and was in relation to an altercation between the claimant and Mr Willoughby whom the claimant had history with. Clearly a person who was non-disabled would have been treated in exactly the same way and this claim therefore fails.
77. The sixth allegation under harassment is Mrs Pink failing to respond to an email dated 8 September 2019, that is clearly on the evidence before this Tribunal incorrect. The email correspondence illustrates that Mrs Pink acknowledged the correspondence (pages 309-310) and made arrangements for the issues that the claimant had raised to be addressed when the claimant returned from a period of sickness absence. The mediation had been proposed. This is clearly unrelated to the claimant's disability and simply on a factual basis not accepted and untrue. This claim therefore fails.
78. The seventh allegation is the altercation with Mr Willoughby on 24 September. Again the factual basis is not disputed as there was an altercation with Mr Willoughby. Quite how this is advanced is a mystery to the Tribunal, it is clearly unrelated to the claimant's disability and therefore fails.
79. The eighth and final allegation under harassment is the claimant being suspended from work on 1 October 2019. Again factually the claimant was suspended on 1 October 2019 the reason for his suspension was there had been an allegation by another colleague that the claimant had

been taking photographs of that colleague during the working day without that colleague's permission. As a result of Mr Edwards' investigation and concerns raised by colleagues the claimant was suspended pending further investigation. This clearly had nothing to do with the claimant's disability and would have happened to any other non-disabled person who had behaved in such a manner.

80. Taking all matters together it is very clear none of the above treatment and its effect was designed in anyway to create a hostile environment and was reasonable for that conduct by the respondent to have been implemented given the claimant's behaviour.

Direct discrimination (s.13)

81. Turning to the claimant's next allegations under s.13 – direct discrimination.
82. Again, the Tribunal repeats this claim would fail at the first hurdle in any event on the grounds that the respondent did not know or could not have reasonably known of the claimant's disability. Notwithstanding this the Tribunal have nevertheless gone on to deal with the allegations and make findings.
83. The first allegation appears to be that the respondent treated the claimant less favourably than it would have treated comparators and in this case a hypothetical comparator in relation to the provocation by Mr Willoughby on 19 July. This is in relation to on the claimant's own admission an altercation with Mr Willoughby which the claimant had history with and at which the claimant admitted to Mr Edwards he had sworn at Mr Willoughby. Firstly, it is not clear what the provocation or altercation was over and in any event had nothing to do with the claimant's disability. It is difficult to see how this is advanced as less favourable treatment on the grounds of the claimant's disability and therefore this claim must fail. The fact of the matter was that these two individuals simply did not see eye to eye and that had nothing to do with the claimant's disability.
84. The second allegation under direct discrimination is being placed under supervision of Mr Luke Ruggier on 22nd and 29th August. As mentioned above, each colleague on a daily basis has to have a supervisor overseeing their work and likewise whom the colleague can turn to if there are problems during their shift. On the 22nd and 29th August the claimant's normal supervisor was absent due to leave and Mr Edwards arranged for the claimant to be supervised by Mr Ruggier no more no less. That had absolutely nothing to do with the claimant's disability. It was in fact the case that on the days in question the only person available to supervise the claimant with knowledge of the claimant's tasks was in fact Mr Ruggier. The claim therefore fails there was simply no less favourable treatment on the grounds of the claimant's disability.

Indirect discrimination (s.19)

85. The next area the claimant advances is indirect discrimination under s.19.
86. The first allegation is in relation to the provision, criterion or practice is the respondent's disciplinary policy. The PCP applied is accepted by the respondent. The issue is whether individuals with a disability are disadvantaged. In the application of the respondent's disciplinary policy there has been no evidence advanced by the claimant of any evidence of any particular disadvantage that a disabled person would be subject to over and above any other non-disabled person.
87. Even if the Tribunal were wrong there is the question of knowledge of the claimant's disability and therefore would not know that any provision, criterion or practice could put a disabled person at a disadvantage. Even if the Tribunal were wrong here it was a proportionate means of achieving a legitimate aim, in fact entirely proportionate and reasonable to have a disciplinary policy.
88. The second allegation is the respondent's absence management policy and the trigger which leads to a disciplinary policy. Again, such a provision, criterion or practice applied is accepted there is no evidence of any particular disadvantage as it is clear from Mrs Pink's evidence that if a person was known to be disabled that would be taken into account when considering the absences when dealing with the absence management procedure.
89. Furthermore, the question of knowledge arises, again the claimant's disability as again the respondent would not know that any provision, criterion or practice such as the absence management policy would put the claimant at a disadvantage and, even if the Tribunal were wrong having an absence management policy is a proportionate means of achieving a legitimate aim. It is entirely reasonable for a respondent company to have procedures in place that monitor absence and trigger procedures for reviewing an individual's sickness record allowing for any disability related absences.
90. The final PCP being the supervision and monitoring of employees and their work, again it is accepted that such a provision, criterion or practice applied there is no evidence that any particular disadvantage to disabled persons in relation to such monitoring over and above any other individual.
91. The question also arises of the knowledge of the claimant's disability as the respondent would not know that the PCPs put the claimant at a particular disadvantage.
92. Even if the Tribunal were wrong there, again it is a proportionate means of achieving a legitimate aim namely it is entirely reasonable to monitor the performance of the claimant particularly where no sanction was imposed in any event for that.

93. In relation to a further allegation of the supervision of Mr Ruggier that simply is down to a personal dislike of him and had absolutely nothing to do with any provision, criterion or practice or in relation to the claimant's disability.

Failure to make reasonable adjustments

94. The next allegation the claimant pursues is the failure to make reasonable adjustments. The claimant relies upon the following PCPs namely: the provision of standard personal protective equipment for the use in the chilled room and the standard rules and/or practices concerning manual handling in the workplace.
95. The first question is whether either of the above amount to a PCP in that respect it is accepted they do by the respondent.
96. The next question is, do they put disabled persons at a substantial disadvantage? Clearly any employee faced with alleged holes in their gloves will have an issue. However the claimant's case fails to show any particular disadvantage over and above a non-disabled person as the claimant clearly was provided with appropriate protective equipment from when he raised the matter with the respondent. If the claimant felt that such equipment was inadequate he was allowed to obtain alternative equipment and to be reimbursed. Not only this but the respondent had sought professional advice from their Health & Safety Officer as to whether the equipment provided by the respondent was appropriate and it was. Clearly this claim fails in relation to personal protective equipment.
97. In relation to manual handling, the claimant was clearly told there was no obligation to involve himself with lifting over and above what he could actually do and if there were tasks that were too heavy for him to undertake he should seek assistance. In relation to an allegation regarding the rotation of potatoes and the weight of them, in the event another colleague within the respondent undertook this task and the claimant was not required to undertake it at any stage. Therefore appropriate adjustments were made despite the fact that the respondent in any event had no knowledge of the claimant's disability.

Victimisation (s.27)

98. The next claim pursued is victimisation on the grounds of the claimant's disability s.27.
99. The protected acts relied upon are as follows:-
- A grievance dated 24 June 2019 (page 155) which the respondent denies such a grievance was a protected act within the meaning of s.27(2).

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- A grievance dated 1 September 2019 (page 246) again the respondent denies that this grievance was a protected act within the meaning of s.27(2).
 - In respect of the first claim issued by the claimant under case number 3324033/2019 which was filed on 7 October 2019 and received by the respondent on 15 October 2019 in that respect the respondent accepts that this does amount to a protected act.
100. The detriments relied upon by the claimant are:
- Mr Edwards increasing the claimant's workload from 19 July.
 - The claimant being suspended from work on 1 October 2019. The respondent accepts factually that happened.
 - The claimant's dismissal on 15 October, again that clearly factually occurred.
101. Again the respondent accepts that the alleged detriments are capable of amounting to detriments if they were found to have occurred in unwarranted circumstances.
102. The question arises, was any detriment said to have occurred because of the claimant's alleged protected acts?
103. It is clear the nearest the claimant gets in the first grievance is the suggestion "I have been subjected to numerous accounts (what I perceive to be) bullying and harassment directly from management and supervisors". The claimant does not suggest there has been some specific act of discrimination or a breach of the Equality Act. The first two grievances when you break them down are related to Health & Safety matters and management issues.
104. In relation to the first detriment the claimant's suspension was because of an allegation of misconduct against the claimant which required investigation as part of an internal disciplinary procedure. Clearly the claimant was suspended because of an allegation he had been taking pictures of another colleague in the workplace without that colleague's permission. Clearly the treatment in suspending the claimant was not because of any protected act, there is a clear explanation by the respondent for that treatment.
105. In relation to the second detriment, the claimant's dismissal was because of the protected act at a time when the claimant was already subject to a live unexpired written warning. The claimant was clearly not dismissed because of any alleged protected act specifically the filling of his claim. His dismissal came about because following an investigation which was reasonable it turned out that the claimant had been taking pictures of a colleague whilst at work without his permission. The respondent rightly

believed that there was a potential breach of the GDPR Regulations of which such regulations they took seriously. The claimant was not dismissed for this but because the claimant at the time was subject to an unexpired live written warning a decision was reached quite reasonably which had nothing to do with the claimant's disability or issuing of any proceedings that the claimant should be dismissed.

Unlawful deduction of wages

106. The final claim is in respect of claim for unlawful deduction of wages. It appeared during the course of these proceedings the claimant accepted that this claim was withdrawn and furthermore accepted the respondent's explanation that the two days that the claimant was not paid for was in respect of the two waiting days under the Statutory Sick Pay scheme which applies to all employees.

Employment Judge Postle

Date: 10-9-21.....

Sent to the parties on:

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For the Tribunal Office