



EMPLOYMENT TRIBUNALS

Claimant: Ms C. Douglas

Respondent: The Clancy Group of Companies

Heard at: Watford (by CVP)

On: 27 and 28 May 2021

Before: Employment Judge McNeill QC
Mr R. Aldritt
Ms L. Thompson

Appearances

For the Claimant: In person

For the Respondent: Ms C. Millns, Counsel

Judgment having been sent to the parties on 11 June 2021 and written reasons having been requested in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013 (the request being notified to the Employment Judge on 12 August 2021), the following reasons are provided.

REASONS

- (1) The Claimant brings claims against the Respondent for direct sex and disability discrimination; discrimination arising from disability; a failure to make reasonable adjustments; and harassment related to disability.
- (2) The issues in the case (save in relation to harassment, which the parties agreed was a live issue) were defined at a case management hearing in front of Employment Judge Postle on 22 September 2020 and are set out in a case management summary sent to the parties on 29 September 2020. At the time of this Tribunal hearing, disability remained in dispute.
- (3) At the case management hearing, a two-day time estimate was agreed with the parties. Neither party notified the Tribunal in advance of her hearing that the time estimate might be inadequate or requested a postponement of the hearing. The Tribunal heard evidence, deliberated and gave judgment with oral reasons within the time allotted.

- (4) Oral evidence was adduced before the Tribunal from the Claimant and, on behalf of the Respondent, from Mr Wayne Clarke (the Claimant's senior Line Manager), Mr Paul Banyard (Energy Authorising Manger and the Claimant's technical mentor) and Ms Clare Oliver (Early Talent Manager who managed the apprentice programme for the Respondent). The witnesses were cross-examined and the Tribunal was referred to a substantial number of documents in an agreed bundle. Detailed written submissions were provided by both parties and a number of authorities and statutory provisions referred to.

Findings of Fact

- (5) The Respondent company is a national construction company operating across a number of sectors, including the rail sector. In April 2019, the Respondent's UK Power Networks (UKPN) business unit advertised four apprenticeship roles for Apprentice Electrical Fitters. The Claimant applied and was successful.
- (6) The Claimant was employed by the Respondent as an apprentice electrical (high voltage) fitter on a three-year apprenticeship. Her work involved cable routing from a main distribution board, working down in culverts and working at heights with cooling systems. Her contract of apprenticeship commenced on 15 July 2019 and terminated on 30 August 2019. Her working hours were 7.30 am to 5 pm, Monday to Friday.
- (7) 7.30 am was the stated time to start work for the Claimant and other employees but in practice work rarely started on site at that time. Employees arrived, they would change and maybe have a cup of tea or a cigarette. There would then be a morning briefing when employees would be told what work they would be doing that day. It was not common practice to start on site at 7.30 or for the morning briefing to commence promptly at 7.30.
- (8) During her induction on 15 July 2019, the Claimant explained to someone named Louise Parsons, who was carrying out her induction, that she suffered from "chronic menstrual pains" and had been prescribed Mefenamic acid pills. The Claimant explained some of her symptoms to Mr Parsons, who encouraged her to record this in her New Starter Pack where there was a box headed: "Voluntary declaration of any disability". The Claimant did as she was advised and recorded her condition in the Pack. Later in the form, when the Claimant was asked if she had a disability, she indicated that she had not.
- (9) The New Starter Pack document (which was a lengthy document) was sent to the Human Resources (HR) Department. There was no evidence before the Tribunal that the HR department took any action on the Claimant's voluntary declaration of disability, whether by asking the Claimant about the impact of her condition on her, or how it might affect her work, or at all.
- (10) The Claimant has suffered with irregular and painful menstrual periods since September 2007 or before with deteriorating symptoms from June or July 2018. For some years before 2018, her symptoms were already significant and causing her problems both at work and outside. Some months she experiences

significant pain and discomfort, nausea and feeling faint, in particular when she does not take her medication. During her menstrual cycle the Claimant can struggle with severe pain in her pelvis, back and legs. Occasionally, she struggles to wash or eat. She also suffers from fatigue.

- (11) From time to time, she finds lifting anything heavy or standing for any period of time difficult. The lifting has been a problem for some years. Her menstrual symptoms interfere with her sleep and can affect her mental state. That problem goes back some years and to a time before July 2018. She sometimes finds it difficult to do basic household chores, including shopping, cooking and laundry.
- (12) The Claimant has taken prescribed medication which has caused side-effects such as stomach aches, diarrhoea, dizziness, drowsiness and vomiting. The pain and symptoms fluctuate from month to month. She has medicated in the past with paracetamol and more recently with co-codamol. She is currently waiting for tests to see whether she may have fibroids and/ or some underlying endometriosis.
- (13) The Claimant did not consult her doctor about her symptoms until early July 2018, when she was absent from work for two weeks, with a fit note confirming a diagnosis of dysmenorrhea. Shortly before, the Claimant had been in hospital for suspected appendicitis because the Claimant was in severe pain. There were no findings relating to her appendix and other tests were negative. It was shortly after that that the diagnosis of dysmenorrhea was made.
- (14) The Claimant's condition has affected her working life. On some occasions, when she worked as a professional driver from 2015-2018, her menstrual symptoms affected her concentration. She had concerns that she could not drive safely. Diarrhoea and vomiting created embarrassing situations for her at work. For a time, she worked at Royal Mail but struggled to complete some of her duties which involved walking, lifting and climbing stairs. When working for the Respondent in the construction industry, she had serious symptoms, when she was unable to climb ladders, use elevated work platforms or work at height (although she did not suffer any serious symptoms in July 2019). Problems with concentration could impact her ability to use power tools.
- (15) The Claimant suffers with symptoms on a monthly basis both before and during menstruation. She has done so every month for the past ten years. Sometimes her symptoms are manageable and have no significant impact on her ability to work or conduct her normal day-to-day life. At other times, her symptoms are much more serious.
- (16) Following her induction, the Claimant started working on the Respondent's St Pancras site.
- (17) On 24 July 2019, the Claimant attended for work but later in the day, she was given permission by Mr Clarke to attend for a meeting to be assessed by

her local authority in connection with an application she was making for housing, as she was facing homelessness.

- (18) On 25 July 2019, the Claimant attended for work. Mr Clarke contacted her at 07.48 and asked if she was coming in to work that day and when. The Claimant, who was in work at the time, replied that she was in work but that her phone battery was low.
- (19) On 7 August 2019, the Claimant was late for work. She spoke to Mr Clarke and explained she had had transport difficulties. She was living in Crawley at the time. Mr Clarke told the Claimant that she must keep good timekeeping and attendance. The Tribunal was referred to some signing-in sheets but Mr Clarke did not see those sheets until this case was brought and his reference to the Claimant's timekeeping and attendance was based upon what he observed or was told by others.
- (20) On 13 August 2019, which was a Tuesday, the Claimant arrived at least 15 minutes late for a training course in Dartford. She did not contact Mr Banyard, who was delivering the course, to say that she would be late, and he started the training session without her. The Claimant blamed heavy traffic at the time but in fact she had missed her turning.
- (21) Mr Banyard informed Ms Oliver about the Claimant's lateness, who sent an email on the following Friday (16 August) to the Claimant. The email read as follows:

"I hope you're well and you are enjoying your time at Clancy so far.

It has been brought to my attention that since you started your apprenticeship with us, there have been ongoing issues with timekeeping (on site and at the Dartford office for training).

Please can I remind you that your start time on site is 7.30 am. When travelling to Dartford for training courses, again please ensure you arrive in plenty of time as not only does this delay the trainer, it also impacts on everyone else who is attending the course as well.

If you are having issues with travel, please could you speak to Wayne Clarke so we can try and resolve this as soon as possible.

We invest a lot of time and support into our apprentices and want to help as much as possible, however this requires commitment and ownership from our apprentices to make it work for everyone".

- (22) This letter was triggered by the Claimant's late arrival at the training course. But it was against a background of problems with the Claimant's timekeeping on other occasions. The Tribunal did not accept that the Claimant was late "virtually every day" as Mr Clarke stated in his oral evidence. In his written statement, he said that by 7 August 2019, the Claimant had been late to arrive to site twice. This the Tribunal accepted.

- (23) On 20 August 2019, the Claimant woke up with significant pain and discomfort. She felt faint and nauseous and found it difficult to get ready for work. She had run out of the medication she took. She did not want to let her team down and she attended for work.
- (24) She explained to her mentor, John Lawlor, at work that she was in pain and struggling due to “women’s problems”. He told her to see how she progressed during the morning and told her he could carry on if she needed to take a break to sort herself out.
- (25) The Claimant carried on working but sat down several times because of discomfort in her pelvis, back and legs. She had started to feel nauseous and to sweat. There was a leak of menstrual blood through her clothes. She changed her overalls and then resumed working for about two hours. She and Mr Lawlor then decided that she was not fit for work and Mr Lawlor encouraged the Claimant to go and see Mr Clarke and explain the situation.
- (26) The Claimant spoke to Mr Clarke and told him she was having “bad women’s problems”. He found the situation awkward, as did the Claimant. The Claimant explained that she had really bad period pains and had run out of medication. She said she needed to go home because she was not feeling well and was struggling. Mr Clarke told the Claimant to go home and that he hoped to see her back at work the following day.
- (27) She then went home on the train, taking her soiled set of overalls home to wash.
- (28) The Respondent denied in its response that the Claimant’s work clothing was soiled and that she took any soiled work clothing home. It contended that it *“did not note any staining on the Claimant’s PPE work clothing that would be consistent with the Claimant’s claims of soiled PPE work clothing”*.
- (29) The Claimant relied on the contention that the Respondent *“did not note any staining”* in bringing a claim for harassment, on the basis that inspection of her work clothing for signs of soiling was unwanted conduct that violated her dignity.
- (30) The Respondent did not call any evidence before the Tribunal that would support the contention that the Claimant’s work clothing was inspected and that no signs of staining were noted. The Claimant did not ask the Respondent’s witnesses about this. It was stated by Counsel, on instruction, that the overalls would have been inspected after the end of the Claimant’s employment when the overalls were to be passed to someone else. The Tribunal concluded, as a matter of fact, that there was no inspection of the overalls while the Claimant was employed and that the Claimant’s account of soiling and taking her overalls home to wash was true.

- (31) On 21 and 22 August 2019, the Claimant messaged Mr Clarke to say that she was still not well and would not be attending work. That was the normal way of communicating this type of matter.
- (32) The Claimant's message sent on 22 August was sent shortly after 6 am.
- (33) Shortly after 8 am, the Claimant received an email from Mr Clarke stating that the Respondent had decided to terminate her contract of employment. Mr Clarke stated that the Claimant had "not displayed the commitment and desire to succeed as an apprentice" and that the company was "reluctant to invest a significant amount of money in [her] career development". Her last day of employment would be 30 August 2019.
- (34) Mr Clarke made the decision to terminate the Claimant's contract after some consultation with others. The reason for the decision, the Tribunal concluded, was that the Claimant had been absent from work and late for work on a few occasions, including on 13 August for the critical training session, in the short period during which she had been employed and that her sickness absences on 20, 21 and 22 August then triggered and caused the decision to dismiss. No consideration was given to the fact that the absences on the afternoon of 20 August and on 21 and 22 August were genuine absences attributable to the Claimant's chronic menstrual condition (diagnosed in July 2018 as dysmenorrhea).
- (35) There was no right of appeal against this decision. The Claimant sought to speak to Geoff Bennet from UK Power Network (UKPN), who was the link between the Respondent and UKPN (the business unit which advertised the apprenticeship roles), and to Ms Oliver. She also asked for HR contact details but these were not provided.
- (36) Mr Bennet called the Claimant on 30 August to say that the decision of the Respondent would not change.

Law

- (37) The legal principles were not in dispute between the parties.
- (38) In relation to disability, it was for the Tribunal to determine in accordance with section 6 of the Equality Act 2010 (EqA) whether the Claimant had a physical or mental impairment with a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities. It was not essential that there should be medical evidence in order for the Claimant to prove that she was a disabled person but medical evidence could assist in understanding her condition.
- (39) For the Respondent to be liable for direct disability discrimination, discrimination arising from disability or a failure to make reasonable adjustments, the Respondent must have had actual or constructive knowledge of her disability.

- (40) In relation to the Claimant's claims for direct disability and direct sex discrimination, the Tribunal must consider whether the Claimant was treated less favourably than a relevant comparator (actual or hypothetical) because of her sex or disability. The relevant comparison requires that there should be no material difference between the circumstances of the Claimant and the comparator and, for the purposes of direct disability discrimination, the circumstances include a person's abilities. The act of discrimination alleged was dismissal.
- (41) In relation to both her direct discrimination claims, the Claimant relied on a hypothetical comparator. For the purposes of her sex discrimination claim, the appropriate comparator was a male apprentice during a probationary period with a similar history of timekeeping issues and absences as the Claimant. For the purposes of her sex discrimination claim, the same comparator would apply, with the additional circumstances that the comparator was someone without the Claimant's disability but with similar abilities to the Claimant.
- (42) The Claimant also brought claims under section 15 and sections 20 and 21 of the EqA. In relation to her section 15 claim, there are two distinct steps to the test: (1) did the Claimant's disability cause, have the consequence of, or result in "something"; and (2) did the employer treat the Claimant unfavourably because of that "something"? - **Basildon & Thurrock NHS Foundation Trust v Weerasinghe** UKEAT/0397/14. In order to succeed, the Claimant must show that her disability resulted in her absence from work and that the Respondent dismissed her because of her absence from work. The Respondent might then be able to show that the dismissal was a proportionate means of achieving a legitimate aim.
- (43) In relation to her reasonable adjustments claim, the Claimant relied on the Respondent's absence policy and the decision to dismiss as the provision, criterion or practice (PCP) under section 20(3) of the EqA. If that PCP was made out, did it put the Claimant, as a disabled person, "*at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled...*". If so, the Respondent was required to take "*such steps as it is reasonable to take to avoid the disadvantage*".
- (44) The Claimant alleged harassment pursuant to section 26 of the EqA, relying on the inspection of her clothing for signs of soiling as "*unwanted conduct*" within the meaning of section 26(1)(a) of the EqA.
- (45) In considering all the allegations of discrimination, the Tribunal had in mind the provisions of section 136 of the EqA in relation to the burden of proof.
- (46) The Claimant provided written submissions about the Claimant's contract of apprenticeship but it was not clear how this assisted the Claimant when her claims, as considered and defined at the case management hearing, were not for breach of contract but for unlawful discrimination.

Discussion and Conclusion

- (47) The Tribunal first considered the issue of disability. It considered that issue on the specific facts of this case and its findings should not be taken as involving any more general conclusions on whether dysmenorrhea or heavy periods constitute a disability.
- (48) The Tribunal first considered whether the Claimant suffered from dysmenorrhea or chronic menstrual problems (the precise label to be attached to the Claimant's symptoms was not important) at the date of her dismissal, namely 22 August 2019, which was the relevant date.
- (49) The Tribunal concluded on the basis of the factual findings above that the Claimant did suffer from menstrual problems, diagnosed as dysmenorrhea in June 2018. She had suffered symptoms associated with that condition for many years as at 22 August 2019. This was a physical impairment within the meaning of the EqA.
- (50) On the basis of the Tribunal's factual findings, the Claimant's chronic menstrual condition had had an adverse effect on her normal day-to-day activities for many years. Her symptoms included severe pain, nausea, faintness and fatigue. Without painkilling medication they would have been even more disabling. Those symptoms affected her normal day-to-day activities both at and outside the workplace.
- (51) The effect of her condition on the Claimant was significantly more than trivial. When she had symptoms, they could affect her ability to lift heavy items, stand for any length of time and the carrying out of normal day-to-day tasks. Her work, sleep and mental state were affected.
- (52) The condition was long-term. Although it may not have been sufficiently serious as to qualify as a disability in her teens and early adulthood, it was properly characterised by June or early July 2018 as a long-term condition for which medication was prescribed. The Claimant's symptoms were not constant and, if she took medication, could sometimes be controlled before or when she had a period. They symptoms nevertheless occurred on quite a regular basis and many times a year.
- (53) In short, the Tribunal concluded that the Claimant was a disabled person within the meaning of section 6 of the EqA.
- (54) In relation to knowledge, the Claimant had volunteered at her induction that she had a condition which she considered to be a disability. This does not mean without more that she did have a disability. However, the flagging up of the condition was enough to put the Respondent on notice that the Claimant may be a disabled person within the meaning of the EqA. It would have been reasonable for the Respondent to investigate with the Claimant the nature of her condition and whether it might amount to a disability. The fact that in another part of the investigation pack the Claimant said she was not disabled, did not negate that duty.

- (55) Had the Respondent carried out such an investigation, it would have discovered the serious nature of the Claimant's condition and its impact on her. The Tribunal took into account the EHRC Code at para. 5.15, which provides that an employer must do all they can reasonably be expected to do to find out if a worker has a disability. That was not done in this case.
- (56) Although the Claimant did not make out actual knowledge of her disability, the Tribunal was satisfied that the Respondent ought to have known that the Claimant had the disability relied on.
- (57) In relation to direct sex discrimination, in order for the burden of proof to shift to the Respondent, the Claimant would need to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent had discriminated. The Claimant did not reach that threshold. In all likelihood, a properly constructed hypothetical male comparator would have been treated in the same way as the Claimant. Apprenticeships with the Respondent involve some considerable investment in the individual and there was no reason to think that an apprentice who had problems with timekeeping, as the Claimant did, shortly after starting work, and was then absent from work for reasons of ill-health would have been treated any differently from the Claimant.
- (58) The Tribunal similarly concluded that there was no evidence to suggest that a hypothetical male non-disabled comparator, with similar abilities to the Claimant, would not have been treated in the same way as she was.
- (59) In relation to the section 15 claim, the Tribunal has found as a fact that the Claimant was dismissed because of her absences on 20, 21 and 22 August 2019, against the background of some poor timekeeping and other absences. The absences on 20, 21 and 22 August were disability-related and the Respondent ought to have known that the Claimant had the disability. Applying the analysis in **Basildon & Thurrock v Weerasinghe**, the claim is made out subject to justification.
- (60) In relation to justification, it is a legitimate aim to expect employees to observe good timekeeping and attendance. It was not, however, proportionate to dismiss the Claimant when she had been given an informal warning in relation to timekeeping only six days before her dismissal and when the only attendance issue after that informal warning was a three-day genuine sickness absence, which commenced when only one working day had passed after the warning was given. The Respondent did not make out, in the circumstances, that that dismissal was a proportionate means of achieving a legitimate aim.
- (61) As to reasonable adjustments, a one-off act such as dismissal does not constitute a PCP: **Ishola v Transport for London** [2020] EWCA Civ. 112. Provisions of an absence management policy could amount to a PCP but the Claimant's dismissal did not result from any application of the absence management policy. It resulted from the Respondent treating her poor timekeeping and absences as matters of a lack of commitment or conduct.

(62) In any event, and although the burden is not on employees to specify what reasonable adjustments should be made, the Claimant's condition was a hidden condition and it would not be reasonable for the Respondent at the relevant time to have made adjustments when it had no knowledge of the specific difficulties caused to the Claimant by her condition.

(63) The claim for harassment was not upheld on the basis of the Tribunal's factual findings. There was no evidence that the Claimant's overalls were inspected while she was employed by the Respondent and the Claimant did not question any of the Respondent's witnesses about this matter.

Remedy

(64) After explaining to the parties its findings on liability, the Tribunal went on to consider remedy. The Tribunal was provided by the parties with a Schedule of Loss and Counter Schedule.

(65) The Claimant claimed compensation for injury to feelings. She was very distressed by her dismissal. The apprenticeship was a good opportunity for her. She felt let down and suffered a significant loss of confidence.

(66) The Claimant had other problems in her life at the relevant time including with her family and as a result of homelessness. Where her distress related to those matters rather than her dismissal, they would not be reflected in any award for injury to feelings.

(67) The Tribunal concluded that the proper award for injury to the Claimant's feelings was £10,000 together with interest of £1,415.89 giving a total figure of £11,415.89.

(68) In relation to financial losses, the Claimant's period of employment was short. Within less than a month of starting her employment, there were two occasions of poor timekeeping. On 7 August 2019 the Claimant was warned about her timekeeping and told that she must observe good timekeeping and attendance.

(69) Less than a week later, the Claimant was at least 15 minutes late in attending a course that was critical to her apprenticeship. In giving evidence to the Tribunal, the Claimant said that the letter that was written to her on 16 August was not because of her late arrival on the training course, to her knowledge.

(70) The Tribunal concluded that her timekeeping was unlikely to improve. She did not appear to recognise that good timekeeping was important. Mr Clarke saw this as a lack of commitment. There was no doubt about the Claimant's abilities on a technical level and her performance was good.

(71) The Claimant had a three-month probation period. Her contract of apprenticeship was expressly stated to be subject to successful completion of that probation period. The Tribunal concluded on the basis of its factual

findings that the Claimant would not have successfully completed her probation period and that her employment would have ended after three months.

(72) Based on net losses of £465 a week, the Claimant's losses for the period to 15 October 2019 were agreed between the parties to be £3,172. The appropriate figure for interest is £417.14, giving a total figure of £3,589.14.

(73) The total sum payable to the Claimant by the Respondent is therefore £15,0005.03.

(74) The Tribunal considered whether any uplift was appropriate for failure to follow the Acas Code of Practice on disciplinary and grievance procedures. It concluded that it was not. The reason for dismissal was a capability matter (the Claimant's absences from work for ill-health reasons) to which the Acas Code of Practice does not apply.

Employment Judge McNeill QC

Dated: 21 August 2021

Sent to the parties on:

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For the Tribunal:

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