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EMPLOYMENT TRIBUNALS

Claimant: **Miss C. Munro**

Respondent: **Hot Tub Assist Ltd**

Heard at: **East London Hearing Centre**

On: **9th September 2021**

Before: **Employment Judge Barrowclough**
Members: **Mr Peter Lush**
Mr Lak Purewal

Representation

Claimant: In Person
Respondent: Mr Stephen Wyeth (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that all the Claimant's complaints of disability discrimination fail and must be dismissed, and that her claim of unauthorised deductions from wages is dismissed upon withdrawal.

REASONS

1 By her claim, presented to the Tribunal on 14 October 2020 following an ACAS early conciliation period between 19 August and 19 September that year, the Claimant Miss Charlotte Munro raised a number of complaints against Hot Tub Assist Ltd, a hot tub and pool installer and service and maintenance provider, by whom she was employed between 29 August 2019 and 20 May 2020. Those complaints comprised allegations of unfair dismissal, unauthorised deductions from wages, and disability discrimination. The Respondent accepted that it had employed the Claimant between those dates, at the end of which period she had been dismissed, the given reason being redundancy, and resisted all the Claimant's claims.

2 The Claimant's unfair dismissal complaint was struck out on 24th November 2020 by EJ Crosfill because she lacked the necessary two years' qualifying service, and at a

preliminary hearing on 15th February 2021 EJ Massarella made case management orders and directions. The Claimant then confirmed that her claim of unauthorised deductions from wages had been resolved and would be dismissed at the final hearing (which we duly did), and that her remaining claim was exclusively of disability discrimination. The disability relied upon by the Claimant is epilepsy, and her complaints are of (a) direct disability discrimination (s.13 Equality Act 2010), (b) discrimination because of something arising in consequence of her disability (s.15), and (c) a failure to make reasonable adjustments (ss. 20 & 21). EJ Massarella went on to identify the issues to be determined by the Tribunal at the final hearing.

3 The Claimant was accompanied at the hearing before us by her father and represented herself, giving evidence in support of her claim. The Respondent was represented by Mr Wyeth of counsel, who called as witnesses (a) Ms Clare Martin, the Respondent's delivery and service manager, (b) Ms Kelly Hoy and (c) Ms Lauren Sear, both of whom are employed by the Respondent as service administrators. In addition to statements by the witnesses from whom we heard, we were provided with an agreed bundle of documents and a short chronology. At the outset of the hearing, Mr Wyeth indicated that the Respondent accepted that the Claimant was at all material times disabled as defined in section 6 of the 2010 Act by reason of her epilepsy.

4 The relevant factual background can be summarised as follows. The Respondent's business is the delivery, installation and subsequent maintenance, service and repair of hot tubs and pools, which are manufactured in and imported from America. The Respondent is a small undertaking, with no HR department, consulting ACAS about staff and personnel issues as and when necessary, operating from a depot and office in Chelmsford. Other than the company's directors, its staff consisted of a delivery and service manager (Ms Martin), a field service manager (Mr Andy Ovens, who is seriously ill with cancer and from whom we did not hear), two service administrators (Ms Hoy and Ms Sear), and the Claimant as delivery co-ordinator and administrator, all of whom apart from Mr Ovens were required to work from the Respondent's office prior to the Covid-19 pandemic. In addition, there is a team of team of delivery installers and technicians, who generally work on site and from their respective homes.

5 As noted, the Claimant commenced employment with the Respondent on 29 August 2019 as delivery co-ordinator and administrator, her line manager being Mr Ovens, who in turn reported to Ms Martin. It is accepted that the Claimant was not provided with a contract of employment or written terms and conditions of employment. Ms Martin told us and it was not disputed that the Claimant's duties in that role related to the delivery of hot tubs and pools to customers, being responsible for booking and scheduling appointments and then organising the delivery team. The Claimant was not involved in the servicing of and troubleshooting for tubs and pools which had already been delivered and installed, which is a significant part of the Respondent's business, save only briefly and peripherally as part of the office skeleton crew at Christmas 2019, when she answered phone calls, passed on messages, and helped service technicians with customers' payments when her colleague Kelly Hoy (also on Christmas duty) was engaged elsewhere. In addition, the Claimant briefly covered for Ms Martin early in 2020, when she was absent due to a family emergency.

6 The Respondent, including Ms Martin and the others in their office, was aware from the outset of the Claimant's employment that she suffers from epilepsy. The Claimant was quite open about that fact, which she confirmed in writing in the employee's particulars form

(page 51 in the bundle) early in her employment. No enquiries were made by the Respondent concerning what (if any) restrictions the Claimant's condition might entail at work, and we were not told of any issues or problems arising or being raised as a result of it during the Claimant's period of employment. As noted, up until the onset of the Covid-19 pandemic, all the Respondent's office staff were required to work from that office, with the sole exception of Mr Ovens because of his serious medical condition; and the Claimant did not object to or raise any concerns concerning that requirement.

7 On 17 March 2020 there was an altercation or argument in the Respondent's office between the Claimant and Ms Sear concerning whether or not a particular task had been undertaken by the Claimant. Ms Sear was on leave on the following day, when the Claimant was called to a meeting with Ms Martin, in which Mr Ovens participated by video link. The Claimant was told to avoid any repetition or similar incident with other staff members in future, and a note (page 53) was placed by Ms Martin on her personnel file recording the incident and the advice given, a similar note being entered on Ms Sear's file.

8 By 18 March there was general and informal talk amongst the Respondent's staff about Covid-19 and it's potential impact, since quite apart from the Claimant's epilepsy, Ms Sear suffers from asthma and Ms Hoy from diabetes. On that day the Claimant asked Ms Martin and Mr Ovens if she could work from home, in order she said to protect or shield her father, who she visited regularly. That request was refused since at that stage it was not considered sufficient or necessary, and the Claimant thereafter commenced sick leave due to stress. In fact, the Claimant was only absent due to illness for three working days before the country entered lockdown on 23 March, when the Respondent effectively shut down until 16 April, all but two of its staff being furloughed, including the Claimant.

9 On 16 April the Respondent recommenced limited maintenance and servicing operations, involving only those engineers who were willing to attend customers' homes; and four days later on 20 April resumed its' delivery service. However that was limited to only one installation team, rather than the usual six teams, because of employees' safety concerns and also because the American manufacturers and suppliers of tubs and pools were in a simultaneous lockdown. Ms Martin, who together with Ms Hoy had been the only members of staff not furloughed and continuing to attend the office, discovered that she was able to undertake customers' reduced booking and delivery requirements as part of her role.

10 Given the reduction in the Respondent's business caused by the pandemic, and uncertainty about how long it, the nationwide lockdown and the furlough scheme might last, the Respondent's directors decided that they needed to reorganise their business to make it more efficient. It was they, Ms Martin told us, who decided that the Claimant should be made redundant, since it was considered that her duties as the sole delivery co-ordinator and administrator could be covered by her line manager Mr Ovens and Ms Martin. Accordingly, a video meeting was arranged for 13 May 2020, which the Claimant, Ms Martin and Mr Ovens attended, at which the Claimant was informed of the termination of her employment by reason of redundancy. It is accepted that the Claimant was not provided with any warning or prior notice of what would be discussed or communicated at that meeting, or informed that she could then be accompanied; and also that, since the Respondent was not making up the discretionary 20% shortfall in salary in addition to government funding for any staff, the Claimant was not then a financial burden on or cost to the business.

11 The video meeting was a short one, about ten or fifteen minutes' long, and the Claimant was told that the decision to dismiss her would be confirmed in writing. Mr Ovens email of the same date to the Claimant is at page 56. It details her final day of employment (20 May) and her financial entitlements (initially disputed but since resolved); expresses regret at having to let her go since '*due to the current climate the company cannot support your current role'*; informs the Claimant of her right of appeal; and finally states that any personal property at the office would be returned to her as and when it reopened. The Respondent also made clear that the Claimant would be offered first refusal on any suitable role with the company that became available within the following three months; and indeed Ms Martin confirmed in her evidence to the Tribunal that the Claimant had performed well whilst employed by the Respondent.

12 The Claimant did not appeal the decision to terminate her employment, albeit raising her concerns about the pay she believed was due to her. There was a succession of email exchanges between the parties relating to the sums payable to the Claimant by way of furlough pay, the rate at which it should be paid and whether the sum should be made up by 20%, and statutory sick pay, culminating in the Claimant's suggestion that she had been discriminated against by the Respondent because of her epilepsy. Ms Martin responded on 23 July, stating that she would look into the pay issues raised and denying that the Claimant had been in any way discriminated against.

13 On the following day, 24 July, the Claimant became aware that the Respondent was advertising online for an office administrator. A copy of that advertisement is at pages 77/78 in the bundle. It specifies that the role is full time and permanent, that '*all the training required'* will be provided to the successful candidate, that previous experience of customer service is preferred, and that someone is '*urgently needed*' to fill the role.

14 The Claimant did not apply for or express an interest in the advertised vacancy. In her evidence, she told us that she had not done so because of the Respondent's delay in responding to her emails and dealing with her queries about her outstanding pay, and because even though the advert had appeared within three months of her dismissal, she didn't know how to approach the matter. Ms Martin's evidence was that the advertisement had been more or less generic, with standard wording used in relation to training being provided; but that in fact the vacancy was on the maintenance and service side of the business, which had picked up dramatically once the original lockdown conditions were eased, rather than delivery and installation. She and Mr Ovens had discussed whether to offer the role to the Claimant, but had decided not to do so since the Claimant's prior experience had been limited to installation and delivery, which as all the office staff from whom we heard confirmed she appeared to find stressful. Ms Martin's evidence was that in fact the service side of the business is more demanding, since it tends to involve disgruntled customers and harassed engineers. The Respondent did receive a number of applicants for the role, one of whom was appointed. The successful candidate came from a service background, and remained with the Respondent until April 2021, when she left of her own volition.

15 Finally, Mr Ovens wrote to the Claimant on 5 August stating that all the monies due to her had been paid, explaining the decision to pay her sick pay rather than furlough pay, and confirming that he and Ms Martin had been undertaking and sharing the duties in her former role between themselves. The Claimant then contacted ACAS, who told her that Ms Martin had confirmed that the reason she had not been offered the vacancy in July was

because it was for the service rather than the delivery department, and in due course issued her claim.

16 As already noted, the issues to be determined were helpfully set out at the preliminary hearing on 15 February this year. The Claimant's disability and the Respondent's knowledge of it at all relevant times are accepted.

17 In relation to the complaint of direct discrimination, has the Claimant proved on a balance of probabilities facts from which we could reasonably conclude, in the absence of a satisfactory explanation, that the Respondent is guilty of unlawful discrimination? If so, then the burden of proof shifts to the Respondent to prove, once again on a balance of probabilities, that its treatment of the Claimant was in no way infected by discrimination; and if it fails to do so, then the complaint must succeed. In our judgment, no prima facie case of discrimination has been established, and the burden of proof does not transfer to the Respondent. Whilst it is accepted that the Claimant suffered the detriment of being dismissed, there is nothing in the evidence we heard and read to link the termination of her employment to the fact of her epilepsy, or to suggest that she was treated worse than anyone else who did not suffer from epilepsy would have been treated by the Respondent.

18 The Claimant was employed with the Respondent having full knowledge of her condition, and it is not alleged that that gave rise to any less favourable treatment of the Claimant during the course of her employment until she was dismissed. Virtually all undertakings in the UK faced great difficulties from March 2020 onwards as a result of the Covid-19 pandemic and the nationwide lockdown, and the Respondent was no exception: it could neither supply and install new tubs and pools, nor service, maintain or repair existing customers' equipment; and its' future prospects were uncertain, depending upon the length and impact of the pandemic and the lockdown. Additionally, it was clear and we accept that Ms Martin and Mr Ovens could between them adequately cover the Claimant's duties as delivery co-ordinator and administrator. In such circumstances, it seems to us that it cannot be said that it was unreasonable for the Respondent to reorganise its business in the interests of efficiency and economy, whether or not the Claimant was then a financial burden. Equally, it can hardly be said to be illogical or inappropriate to limit the redundancy pool to the Claimant alone, since it was within her department that the slowdown was most prolonged, maintenance and service recovering relatively swiftly after the easing of restrictions in April 2020, and Ms Sear and Ms Hoy both being significantly longer term employees (who would, unlike the Claimant, be entitled to redundancy payments) and already assigned to and experienced within the maintenance and service function. Concerning the Respondent's decision not to offer the Claimant the office administrator role in July 2020, that is limited to evidential significance only, since it is not relied upon as an act of less favourable treatment. Secondly, the Claimant did not in fact apply for the role. Finally, the decision not to approach the Claimant proceeded from the apparently widely shared view that it might well be too stressful for her, based upon her earlier performance as delivery co-ordinator and administrator, a less taxing role: and therefore from an assessment which was not coloured by or related to the Claimant's disability on the evidence we heard. Overall, no question of less favourable treatment which is referrable to the Claimant's epilepsy arises, and we dismiss this complaint.

19 Turning to the complaint of discrimination arising from a disability, in breach of s.15 Equality Act 2010, we have already found that the Claimant's request to work from home was in order to protect or shield her father, whom she visits regularly, with the advent of the

pandemic, rather than because she was suffering from stress, as the Claimant asserts. It is difficult to say whether the Claimant's absence from work on 19, 20 and 23 March 2020 was attributable to stress or, as appears to us more likely, because she felt aggrieved at having been (as she thought) unfairly disciplined on 18 March due to the altercation in which she said Ms Sear, rather than herself, had been guilty of verbal abuse, as set out in the Claimant's witness statement. Furthermore, there was no medical or other evidence before the Tribunal to link any stress experienced by the Claimant to her epilepsy. In any event, and if we were wrong in coming to those conclusions, and the Claimant's request to work from home and her subsequent absence from work were in fact caused by stress arising in consequence of her disability, that would not ultimately assist the Claimant, since we find that was not the cause or reason for, or related to, her dismissal. For the reasons outlined above, we find that the Claimant was made redundant because of the Respondent's decision to reorganise and economise due to the substantial impact on its business of the Covid-19 pandemic and the related uncertainties about its future business. This claim must also be dismissed.

20 Finally, we consider the Respondent's alleged failure to make reasonable adjustments, in that it refused the Claimant's request on 18 March to allow her to work from home, rather than attend their office. For substantially the same reasons already given, this complaint must fail as well. First, there is no evidence to link or connect any stress which the Claimant experienced to her condition of epilepsy, or to any increased risk of seizures. Secondly, the Claimant's request to work from home was not put forward on the grounds of stress, and the Respondent was not made aware of any medical reason for that request. Thirdly, the Claimant was self-certifying for her sickness absence from 19 March until 23 March, which was the day on which the national lockdown was announced, with the Claimant thereafter furloughed until her dismissal: so that the requirement to work from the Respondent's office did not apply in the Claimant's case for more than five days at most, including a weekend. That in our judgment would not amount to placing the Claimant at a substantial disadvantage in comparison to someone without the Claimant's disability. For the sake of completeness, we record that there must be an issue of whether this allegation, which crystallised on 24 March 2020 was presented in time, the Claimant's ET1 being presented on 14 October 2020, albeit not being identified as such at the preliminary hearing. Without determining the point, which was raised for the first time by Mr Wyeth in his closing submissions, and although the Claimant told us that she did obtain advice from a CAB, we would be inclined to extend time for presentation under the 'just and equitable' principle. That however would not affect the ultimate outcome.

21 For these reasons, all the Claimant's complaints of disability discrimination are dismissed.

Employment Judge Barrowclough

26 October 2021