



# EMPLOYMENT TRIBUNALS

**Claimant**

Miss N Shukar

v

**Respondent**

Next Retail Limited

**Heard at:** Bury St Edmunds (by CVP)

**On:** 4 and 5 February 2021

**Before:** Employment Judge K J Palmer

**Members:** Ms L Davies and Mr B McSweeney

**Appearances:**

**For the Claimant:** In person

**For the Respondent:** Mr W Ho, Solicitor

**JUDGMENT** was sent to the parties on 18 February 2021. The Claimant requested written reasons by e mail on 18 February 2021. The request having been forwarded to E J Palmer on 18 October 2021 reasons are provided in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013:

## REASONS

1. This matter came before us on 4 and 5 February 2021, the Claimant pursues claims in disability discrimination.
2. This matter came before Employment Judge Warren on 20 August 2020 and a Case Management Summary ensued which clarified the claims before this Tribunal. Subsequent to that Case Management Hearing and the Summary produced by Employment Judge Warren, the Respondents accepted that the Claimant was a disabled person for the purposes of Section 6 of the Equality Act 2010 and that the disability was a physical disability involving an injury to her hand. The effects of this had been long lasting.
3. The Claimant pursues claims before this Tribunal for direct disability discrimination, discrimination arising from disability and a claim for reasonable adjustments. Those claims relate to Sections 13, 15, 20 and 21 of the Equality Act 2010.
4. The Tribunal today had before it a Bundle, for which it was grateful, and witness statements. We heard evidence from the Claimant and from Ms Eastment and from Mr Dawes on behalf of the Respondents.
5. This is a slightly unusual case in that the issue before us is a very narrow

one in terms of the factual evidence. Essentially, the evidence revolves around a single discussion that took place between Ms Eastment and the Claimant on 17 June 2019. The Claimant is employed as a Sales Consultant by the Respondents. She remains employed. An earlier claim for unfair dismissal was subsequently withdrawn. Her claims in discrimination centre around a discussion that she had with Ms Eastment. Prior to that, it is worth mentioning that the Claimant had stepped up from her role as Sales Consultant and had for some time taken up the role of Sales Co-Ordinator for an extended period. The end to that extended period came following a Consultation Meeting in April 2019 between the Claimant and Steven Dawes and thereafter she signed a fresh Contract of Employment working part time as a Sales Consultant.

6. The issues in this case surround a meeting on 17 June 2019, which was a casual discussion in the staff room, between the Claimant and Ms Eastment. Ms Eastment is the Claimant's Line Manager and the Assistant Store Manager at the branch where the Claimant works.
7. It is the Claimant's argument that during the course of that discussion, she was first told that there was going to be a recruitment exercise to find a new Sales Co-Ordinator job at the branch, a fact which at that time, the Claimant was unaware of. She then says that she was discouraged from applying because she was told by Ms Eastment that due to her hand injury she was physically incapable of doing the job. It is the Claimant's case that she then decided not to apply, and it is based upon that discouragement that she pursues her claims in disability discrimination, direct discrimination, discrimination arising from disability and reasonable adjustments.
8. That conversation took place on 17 June 2019. The Claimant says that the wording that was used was that she was told that she was physically not capable of performing the new Sales Co-Ordinator job, which she was informed would be a new job. The Claimant said she was told the same on a number of occasions in the same words by Ms Eastment. Interestingly, Mr Dawes was also present at the time and was in the vicinity, but in his evidence, he told us he heard them having a conversation but could not tell what was being said. It is here that there is conflict on the evidence between the Claimant and Ms Eastment.
9. It is worth me pointing out that in these circumstances, that the Tribunal always has a difficult balancing decision to make. It is very often the case in Tribunals that we have competing evidence in front of us and that we have versions of a particular incident or incidents which are at variant between the parties, where there is conflict on the evidence. Not surprisingly, we have that conflict in this case. The burden of proof on the balance of probabilities, is on the Claimant. Therefore, it is on the Claimant to convince us that it was more likely that her version of events was the case than the Respondent's.
10. It is always the case in such circumstances that the Tribunal is duty bound to make a finding of fact that it prefers one party's evidence over the other. This does not mean that it regards that one party has lied or has deliberately told an untruth. Very often it is simply that one party's recollection is different from another's, or that they are mistaken. It does not mean they

have lied.

11. In this particular instance, we heard evidence from the Claimant that she had been told by Ms Eastment that she was physically incapable of performing the new role that was on offer and it was this that discouraged her. Ms Eastment on the other hand, said that she really just had the welfare of the Claimant at heart when she mentioned that there was a new Sales Co-Ordinator position that was on offer. She also pointed out to the Claimant that she ought to think carefully about whether it was something that she really wanted to do, bearing in mind that it was a five day, full time job and that the Claimant had already previously indicated that she was having difficulty completing three days work due to the pain she was suffering in her hand. It is worth mentioning that the Claimant works part time hours currently.
12. It is also worth mentioning that it is common ground between the parties and not a matter of dispute, that when the Claimant was acting up as a Sales Consultant previously, Ms Eastment was helpful towards her and in fact made adjustments to assist her in performing that acting up role.
13. Having carefully analysed that evidence, the Tribunal prefers the evidence of Ms Eastment.
14. The reason why we do that is that we are in difficulties in understanding why it would be that Ms Eastment would bring to the attention of the Claimant the fact that there was a new job up for grabs if she then wished to discourage her from applying. We also feel that Ms Eastment gave her evidence honestly. It would have been very easy for her to shy away from the fact that she brought to the Claimant's attention that the Claimant had had difficulty due to the pain in her hand, in working three consecutive days and that she ought to think carefully before considering working five consecutive days.
15. The Tribunal also believes that it would have been possible, had the Respondents decided that they were going to in some way manipulate the evidence in this case, for Mr Dawes to have said that he had overheard the conversation between them and that he supported Ms Eastment's version. He did not say that and we were also slightly swayed by the fact that we did not find the Claimant's evidence wholly consistent when she said that she had been told the same thing by Ms Eastment on a number of occasions. We were uncertain as to her evidence there.
16. For those reasons and on balance, we decide that we prefer the evidence of Ms Eastment. We consider that the conversation which took place was along the lines of that outlined in the Respondent's evidence, namely that Ms Eastment was concerned for the welfare of the Claimant and was doing what she could to advise her and help her.
17. We are also of the view that we are not persuaded by the Claimant that she decided not to apply for the role because of that conversation. In cross examination, the Claimant had not looked at the role on the intranet or researched it in any way and she did not raise a complaint about the fact that she says she was discouraged from applying for that role until a month and a half later when she raised a grievance.

18. For those reasons we prefer the evidence of the Respondents.

**The Law**

19. We now have to apply that evidence to the Law, and I have to refer to the Sections of the Equality Act 2010 ("EqA") which are relevant.

20. DIRECT DISCRIMINATION – Section 13 EqA

Direct discrimination occurs when:

13. (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

In this case the protected characteristic is disability.

21. We know from the Authorities that we have to imagine how the Respondents would have dealt with someone, a comparator, who was not in the same position of protection as the Claimant. So, how would Ms Eastment have spoken to someone who was not disabled? We find that she would have taken exactly the same position in advising someone who was not disabled who might have had difficulty in working a full five day role. Therefore, we find no different treatment. We would go on to say that even if there was different treatment, we do not consider that it was less favourable treatment. On the evidence before us, we do not consider that having a discussion in that way with the Claimant, could possibly amount to less favourable treatment. That is the case even if it had that effect on the Claimant, which as I have said in our analysis of the evidence, we are not certain it did in any event.

22. For that reason, the Claimant's direct discrimination claim cannot succeed.

23. We have had mind to all of the relevant Authorities and those that have been set out and put before us by the Respondents in their submissions, are those Authorities that we have considered.

24. DISCRIMINATION ARISING FROM DISABILITY – Section 15, EqA:

15. (1) A person (A) discriminates against a disabled person (B) if-

(a) A treats B unfavourably because of something ` arising in consequence of B's disability.

25. Once again, we cannot find in the Claimant's favour here because the discussion between the Claimant and Ms Eastment could not, on any analysis, amount to unfavourable treatment arising out of the disability.

26. With respect to both the direct discrimination claim and the disability arising claim, things might have been different had the Claimant chosen to apply for the role. We would then have seen how the Respondents reacted. She

would really have had to apply for the role to see whether there was any unfavourable treatment meted out to her because of her disability.

27. REASONABLE ADJUSTMENTS – Section 20, EqA:

The key aspect of that claim is there has to be a provision, criterion or practice (“PCP”) that puts the Claimant as a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.

28. In this case, on the Authorities, we simply cannot find a provision, criterion or practice that had been put to the Claimant. She was not told that she could not apply for the role, there was simply a discussion about her applying. She did not even know about the role until it was brought to her attention. There was no PCP which prevented her from applying for that role and potentially getting it.

29. Therefore, for the reasons that we have outlined on the analysis that I have set out, taking into account the various Authorities; including the Authorities that deal with the reversal of the burden of proof in disability cases, most particularly Igen Limited v Wong [2005] IRLR 258, we do not consider that on any of the three grounds that the Claimant is pursuing her claim, she has convinced us that on the balance of probabilities and facts from which the Tribunal could conclude in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful.

30. Therefore, there is no reversal of the burden of proof. The Claimant has failed to get over the first hurdle, for the reasons that we have outlined, and her claims must fail and are therefore dismissed.

21 October 2021

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Employment Judge K J Palmer

Judgment sent to the parties on

25 November 2021

For the Tribunal office