EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 24, 25 and 26 November 2021

Claimant: Ms L Hazra

Respondent: Capital Arches Group Ltd t/a McDonalds

Before: Employment Judge Mr J S Burns
Members Ms J Marshall and Ms S Lopez-Barillas

Representation
Claimant: In person
Respondent: Mr D Brown (Counsel)

Interpreter (first day only) Mrs F S Jabbar (Bengali)

JUDGMENT

The claims are dismissed

REASONS

1. The claims are for direct disability discrimination, (section 13) failure to make reasonable adjustments for disability (section 20) and discrimination arising from disability (section 15) Equality Act 2010. The specific acts/omissions claimed as discrimination are set out in our conclusions.

2. It is agreed that the Claimant was disabled by reason of osteoarthritis affecting her hands during the material time, namely the few months up to her resignation on 30/8/2019.

3. We heard evidence from the Claimant, and then from the Respondent's witness Ms M Miernik, (the Claimant's former line manager), Ms C Costa (the Respondent's Head of Operations Support), and then from Mr K Ukpai (Area Manager). The documents were in a Claimant's bundle of 147 pages and Respondent's bundle of 213 pages. We were supplied with a Respondent's skeleton argument and chronology by Mr Brown, and at our request he referred us to two authorities, namely Urso v DWP UKEAT/0045/16/DA and Kingston upon Hull v Matuszowicz 2009 ICR 1170. The hearing was conducted by CVP because of the pandemic. There were no technical problems.

4. We explained the procedure and the issues to the Claimant at the outset.

5. A Bengali interpreter had been arranged by the tribunal but she was not needed as the Claimant preferred to speak in English during the hearing, and with the Claimant's consent we discharged the interpreter at the end of the first day.

Findings of fact

6. The Claimant commenced employment with the Respondent on 3 August 2017 working in a McDonalds restaurant in London. She worked in the kitchen in which she had to spend long hours cooking at fryers and carrying frozen food between the freezer and fryers.

7. On 16/12/2018 the Claimant asked for her shift to be re-scheduled because she was feeling tired and sick. She did not give any other details and her request was for a temporary change which was granted.

8. On 25 May 2019 the Claimant indicated that she was suffering from pain in her hands and could not come to work that day.

9. There was a conflict of evidence about whether in addition the Claimant had complained orally to Ms Miernik in April or May 2019 about her hand pain and requested a change of role. The Claimant's evidence about this was vague. There is no contemporary documentary evidence to support this and we do not find that conversation proved.

10. The Claimant reduced her shifts to two days a week as from May 2019.

11. The Claimant thereafter attended work without suggesting that she was experiencing any health problems until she sent an email on 7 June 2019 stating '*I am sick and I cannot come to work. I have pain all of my fingers' joint'*.

12. A further email was sent stating '*I am still sick. I am not coming today'* on 9 June 2019.

13. On 16 June 2019 the Claimant's hands were X-rayed. This revealed degenerative changes in the joints of her fingers and hands. The Claimant described this at the Tribunal as '*osteoarthritis in every joint in both my hands"*. The Claimant did not disclose this XRay to the Respondent until after she issued her tribunal claim.

14. Claimant's GP issued a fitness note on 25 June lasting until 25 July 2019 which stated that the Claimant had bilateral hand pain and that she could work provided she took regular breaks, avoided heavy lifting and avoided activities which exacerbated pain.

15. The Claimant claimed she sent this GP note to Ms Miernik, (the Claimant's line manager) first on 25th and then again on 28th June 2019. We have not been shown any such email dated 25 June and find that it was sent for the first time on 28th June.

16. Ms Miernik's email response the same day was that the Claimant could take time off or shorter shifts.

17. The Claimants email response was two days later on 30 June 2019, the contents of which response suggesting that there must have been an oral discussion between the Claimant and Ms Miernik between the two emails.

18. We find that Ms Miernick told the Claimant orally on 28 June 2019 that she wasn't to work in the kitchen or undertake any kitchen duties with immediate effect, and that on the same day Ms Miernik sent a Whatsapp message to all managers confirming this.

19. The Claimant worked shifts on 29th and 30th June 2019 outside the kitchen and behind the counter in the restaurant - not having to lift heavy baskets of fried food. However during her shift on 30th June a manager Oie instructed her to go and help again in the kitchen doing some light work preparing burgers for 45 minutes. This was contrary to Ms Miernik's instructions which were that the Claimant should not work in the kitchen at all The Claimant declined to work in the kitchen and offered to go home early. The manager agreed to this and so the Claimant ended her shift early and went home.

20. The Claimants next shift was on 6 July 2019 by which time it had been arranged for her to work in the lobby ("lobby" being the name used for the restaurant dining area). Her work there included helping people place orders on the screen, cleaning tables and replenishing straws and serviettes. At first, she also did mopping and taking out the rubbish and changing the bins but she soon found that the mopping and dealing with the bins was also causing pain so she stopped doing those tasks. While working in the lobby her work was intermittent and not continuous.

21. The Claimant at the suggestion of her GP asked for an OH assessment and on 9/7/19 Ms Miernik escalated the matter to the People Department and it was picked up by Ms C Costa who started to arrange the OH assessment and also arranged for Mr Ukpai (the Area Manager) to visit the Claimant at the Liverpool street restaurant where she was then working to discuss the way forward with her.

22. On 13 July Mr Ukpai met the Claimant for this purpose. There was a conflict of evidence before us as to what was said. No note was taken at the time. The Claimant suggested that Mr Ukpai had told her "*we will dismiss the thing*". This was denied by Mr Ukpai who explained that he would have stated that once the OH report was to hand they would meet again to discuss it. The words which the Claimant attributes to Mr Ukpai do not make sense in themselves or in context and we prefer Mr Ukpai's evidence on this point.

23. The Claimant carried on her week-end work in the lobby during July and August but suffered increasing hand pain such that she could not do even the light tasks which she had been given.

24. The OH assessment took place on for 13/8/19. On 14/8/2019, the Claimant emailed Ms Miernik as follows '*the doctor verbally warned the job I am doing is not fit to me. I have Saturday and Sunday shift. Should I come to my scheduled duty or not?'*

25. Ms Miernik's email reply was "*If your doctor warned you that this job is not fit to you it is only one way to fix this. You will need to resign but this is up to you. If you feel you can continue the job on the lobby that's fine by me but if you think you cant then we will have to cancel your shifts . Please let me know your decision".*

26. The Claimant replied to that email quickly saying she was waiting for the doctor's report and would decide what to do after receiving it and in the meantime she would attend her shift.

27. Ms C Costa received the OH report on 20 August 2019. Its conclusions were as follows: *'Following today's consultation which included a physical examination there was clinical objective evidence of osteoarthritis in both hands and wrists. This together with her history of joint pains involving her back, hips and feet suggest a diagnosis of generalised osteoarthritis.... Primary generalised arthritis is not a condition amendable to cure but can be managed by the promotion of mobilisation, the use of analgesia and the avoidance of activities that exacerbate the condition. Despite this, it is a permanent condition that is gradually progressive with age. In my medical opinion Lily appears unfit for her normal duties and any duties requiring manual handling activities, catering and cleaning or frequent use of both hands. Realistically I struggle to see how she can remain effective in the environment she currently works within and I cannot reasonably suggest medical adjustments that would facilitate regular and effective service. I would therefore suggest if an alternative redeployment position is not currently viable or available that consideration of medical incapacity takes place.'*

28. The Respondent emailed the Claimant on 23 August 2019 to inform her that it had received the OH report and that a second welfare meeting would be arranged with Mr Ukpai. The Claimant was offered such meeting on Saturday afternoon 24/8/19 or Sunday morning 25/8/19. The purpose would have been to discuss the report and whether and if so how the Claimant could still be retained reasonably as an employee by the Respondent in the light of its conclusions.

29. The Claimant early on 24/8/2019 sent an email stating that she '*still had pain in her finger joints and it was getting worse ever day and is beyond her imagination*".

30. The Claimant without confirming either time she had been offered for her welfare meeting, turned up on the morning of 24th (which was the wrong time) and so the meeting did not occur and was re-arranged for 29th August at the St Pauls restaurant.

31. However on 29th August 2019 the Claimant was sick so she cancelled the second welfare meeting less than one hour beforehand.

32. Later, at 5:52pm that day, the Claimant emailed the Respondent indicating that she was resigning: Her email to Ms Miernik reads as follows : '*As you mentioned in your previous e-mail I can resign as there is no job which is suit to me. Last Saturday verbally again you informed me that there is no job as I am suffering from arthritis in both my hands…I like to resign from my job as a crewmember*"

33. This resignation was accepted by the Respondent without further discussion about the Claimant's disability.

34. The Claimant was also employed as a till-operator at the fast-food franchise, 'Subway', between 1 May 2019 and 14 August 2019. The Claimant resigned from that employment due to her disability.

35. In correspondence during the course of proceedings, on 9 January 2020, the Claimant stated that she was not working as '*I tried to move other places but I find problem working with hands'*. This is also confirmed in paragraph 6 of the Claimant's witness statement.

Relevant law

36. Section 4 Equality Act 2010 (EA) provides that disability is a protected characteristic.

Direct Discrimination

37. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.

38. It is necessary that an employer have actual knowledge of disability in order to directly discriminate.

Failure to make Reasonable Adjustments

39. Section 20 read with 21 provide that a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments.

40. Section 20(1)(3) provides that where a provision criterion or practice of As puts the disabled person concerned at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it is the duty of A to take such steps as it is reasonable to have to take to avoid the disadvantage.

41. The EHRC's code at 6.28 sets out various matters which must be considered in determining whether it is reasonable to make an adjustment, ie effectiveness, practicability, cost, size of undertaking etc.

42. Para 20(1) of Part 3 of Sch 8 provides that there is no duty to make adjustments if the employer does not know and could not reasonably be expected to know both that a disabled person has a disability and is liable to be placed at the disadvantage. It is not necessary that the employer know the exact diagnosis or cause of the impairment or that each and every element of the definition of a disability is satisfied at the time. The point at which an employer will be found to have actual or constructive knowledge will depend on the particular facts including such matters as to the extent of any sickness absences, what the employee has told the employer, and what other pertinent information is within the knowledge of relevant managers or other relevant officers of the employer.

43. The test whether or not the Respondent has fulfilled or breached its duty to make reasonable adjustments is an objective one.

Disability Related Discrimination

44. Section 15 provides that a person discriminates against a disabled person if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

45. It is a defence if the employer shows that it did not know and could not be reasonably expected to know that the Claimant was disabled.

Onus of proof

46. Section 136 provides that it there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

47. In deciding whether an employee has been forced to resign, the question is 'who really terminated the contract of employment?' (Martin v Glynwed Distribution Ltd [1983] ICR511 (CA) p519G, Sir John Donaldson MR).

Conclusions

48. The Respondent on receipt of the GP note on 28 June 2019 thereby was given actual knowledge that the Claimant had an impairment of her hands which placed her at a disadvantage in the workplace. This was sufficient for the Respondent to have had actual knowledge of the disability from then on.

49. We are not satisfied that before that date that there was sufficient information reasonably available to the Respondent to give it actual or constructive knowledge of the disability.

50. The ET1 was presented on 8 November 2019 and early conciliation commenced on 17 September 2019 and ended on 16 October 2019. Any claim relating to matters before 18 June 2019 is out of time. However, given our findings about the date of the Respondent's knowledge there could be no liability on it before 28 June 2019 in any event so no live time point arises.

51. The first matter claimed as direct disability discrimination is "*sending the Claimant home instead of offering her other duties"* on 30 June 2019. We do not find that she was sent home. The Claimant offered to go home and her offer was accepted. The Respondent manager did not take the initiative or require the Claimant to go home. In any event the reason for the Claimant going home was not her disability itself but rather something arising from it, namely her unwillingness to work in the kitchen doing light work there for 45 minutes as the manager had asked her that day to do.

52. The second matter relied on as direct disability discrimination and also as discrimination arising from disability is "*forcing the Claimant to resign*". The Claimant referred to two matters in particular as the claimed force applied by the Respondent - namely the words which she ascribed to Mr Ukpai on 13 July, (which we have found he did not in fact utter); and Ms Miernik's email to the Claimant of 13/8/2019 (see paragraph 25 above).

53. The email was inappropriate and unwise. It would have been better if Ms Miernik had waited for the OH report and the second welfare meeting and had spoken to Ms Costa before expressing any views about the Claimant's future employment.

54. However, the Claimant did not resign because of the email. Immediately on receipt of the email, she decided to carry on working her shifts.

55. She knew that the purpose of the forthcoming second welfare meeting was to discuss options including whether any further alternative roles could be found for her. She decided of her own volition and before the second welfare meeting to resign, evidently because, without availing herself of the opportunity provided by the Respondent to consider alternatives any further, she herself had concluded that she could not go on working for the Respondent as she could not do even light duties.

56. Shortly before she resigned from the Respondent she had similarly resigned from her other employment with Subway because of her inability to do that work.

57. The Respondent did not force her to resign. Hence without more the claims based on "forcing to resign" must be dismissed

58. For purposes of the reasonable adjustments claim it is agreed that the main features of the Claimant's job in the kitchen up to the end of June 2019, (such as working long periods on the fryer, carrying boxes from the freezer etc) as identified in the list of issues for this claim, can be considered as PCPs which placed her at a substantial disadvantage in comparison with non-disabled employees.

59. We agree with the Respondent's submission that "requiring the claimant to resign" which is also referred to in the list of possible PCPs, cannot be a proper PCP.

60. The question is whether there was any reasonable adjustment which could have been made by the Respondent to allow the Claimant to avoid the disadvantage.

61. The following possible adjustments were identified in the list of issues:
    - "*working in the lobby helping with orders and serviettes"* This adjustment was provided by the Respondent and it did not work because in July and August while doing that work the Claimant suffered severe pain such that she could not continue
    - "*Carrying food to customers*" - the Claimant did not suggest in her witness statement or oral evidence that she could have done this work. By July and August 2019 we find it would have been unsuitable for her as her hand pain prevented her carrying things comfortably or at all.
    - "*Allowing her to take short breaks*". We have limited evidence about this but what we do have suggests that this was provided because the work in the lobby was intermittent and not continuous. It did not help the Claimant because when she resumed work she would again suffer pain.
    - *"Not requiring her to resign* "- we have found that the Respondent did not force her to resign. In any event simply continuing employment cannot in itself be a reasonable adjustment as a matter of law.

62. During the hearing the Claimant suggested another possible adjustment - namely "*allowing her to work on the till*". This would have been unsuitable as it involved use of her hands. The Claimant's inability to work on the till is demonstrated by her resignation from Subway.

63. Given the fact that the Claimant declined to attend the second welfare meeting where this matter could have been discussed, she is not well-placed to make any submission that there would have been a role that she could have filled.

64. The Claimant agreed in final submissions that by August 2019 there was in fact no alternative role she could identify within the Respondent's operation that she could have filled.

65. The Tribunal has likewise been unable to identify any suitable alternative role.

66. We conclude that there were no reasonable adjustments which the Respondent could have made in the period when it had knowledge of the disability.

67. The Claimant suggested during the hearing that if she had not been required to work in the Respondent's kitchens and had been given lighter work at a much earlier date, then by

August 2019 her hands would not have deteriorated to such an extent that she could no longer work at all.

68. However, that is not a claim which could succeed in this matter because we are not considering a personal injury claim, and on our findings, there was no duty to make reasonable adjustments before the end of June 2019.

69. In any event there is no medical or reliable evidence before us that the Claimant's hand problems were either caused or worsened by her work for the Respondent. As stated in the OH report, the Claimant had a history of hand pain going back 15 years before August 2019. It is a permanent condition that is not amenable to cure and which it is gradually progressive with age. We do not have to reach a conclusion about this, but think that it is quite possible that even if the Claimant had done lighter work from an earlier date her condition would have been no better than it was in August 2019.

J S Burns Employment Judge
London Central
26/11/2021
For Secretary of the Tribunals
Date sent to parties : 02/12/2021