EMPLOYMENT TRIBUNALS

Claimant: **Miss L Roden**

Respondent: **Guy Bridger Ltd**

Heard at: **Bristol** **On: 31 August – 2 September 2021**

Before: **Employment Judge Reed**
Members Mr E Beese
Mr H Launder

Representation
Claimant: **In Person**
Respondent: **Mr G Hine, Solicitor**

JUDGMENT having been sent to the parties on 6 October 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the claimant Miss Roden said that she had been unfairly dismissed by her former employer Guy Bridger Ltd ("the Company"). She also said that she had been unlawfully discriminated against. It was conceded by the Company that she was disabled by reason of depression and she said that she had been directly discriminated against, harassed and that there had been a failure to make "reasonable adjustments" to avoid the disadvantage to which her disability put her. She also said she was entitled to a payment representing notice.

2. We heard evidence from Miss Roden and on her behalf from her former colleague Mr Lothian. We also heard evidence from Mr Bridger, the owner of the Company. On the basis of their evidence and the various documents we were shown we reached the following findings of fact.

3. Miss Roden began working for the Company in 2016 (she contended she had continuous service back to 2003 but nothing turned on that for our purposes).

4. It was conceded that throughout the period that concerned us, Miss Roden was disabled by reason of depression and that that fact was known by the Company.

5. Miss Roden claimed that she had been mistreated in various ways by the Company from early 2018. She told us she had been monitored by Mr Lothian her colleague; she had been wrongly denied a bonus; and Mr Bridger had canvassed with her the possibility of her salary being reduced. She said her disability was the reason for those matters.

6. Mr Bridger denied having asked Mr Lothian to monitor Miss Roden. He accepted that he had canvassed with Miss Roden a possible reduction in her salary but claimed that that was connected to her availability and had nothing to do with her disability. He also accepted that Miss Roden had not received a bonus that other employees had. He said the reason for that was she was in a different category from them. They had been responsible for producing a large number of tax returns in a very short period and she was not a member of the group that undertook that work.

7. In October 2018, Miss Roden suffered an assault which resulted in her taking time off work.

8. She returned to work in the early part of 2019. She did a limited amount of work and it was made clear by Mr Bridger that if she wanted she could expand the number of hours that she was working but in any event beyond January she undertook no work for the Company. Her sick pay expired in May of that year. She received a last payment from the Company in July.

9. There was then no formal contact between her and the Company until April 2020, when in effect she sought her P60 but instead of receiving that document, on 30 April she was sent her P45 indicating her employment was terminated.

10. Under s98 of the Employment Rights Act 1996 there are five potentially fair reasons for dismissal. If the Company established that one existed in this case, we would be bound to go on and ask if the Company acted reasonably in treating the reason as justifying dismissal.

11. Under s13 of the Equality Act 2010 A person (A) discriminates against another (B) if, because of a protected characteristic such as disability, A treats B less favourably than A treats or would treat others.

12. S26 of the 2010 Act provides that a person (A) harasses another (B) if—

    (a) A engages in unwanted conduct related to a relevant protected characteristic, and

    (b) the conduct has the purpose or effect of—

    (i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

13. Under s20 of the 2010 Act, where a provision, criterion or practice of an employer puts an employee at a substantial disadvantage, the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

14. Miss Roden said the following acts amounted to direct discrimination, alternatively harassment:

    a) Monitoring her work
    b) Failing to give her a bonus
    c) Asking her to take a £1 per hour pay cut
    d) Refusing to allow her to return to work on a phased basis
    e) Dismissing her

15. Miss Roden also said that by refusing to allow her a phased return to work the Company had failed to make a "reasonable adjustment".

16. She further said that she had been unfairly dismissed by the Company and that her contract had been breached in that she had not been given notice of dismissal.

17. We first address the events of 2018. Miss Roden told us that not only was a reduction in pay canvassed with her but she was told in terms that her disability was the reason why it was.

18. It was clear that the reduction was indeed canvassed with her. In the course of his oral evidence Mr Lothian accepted that the availability or otherwise of Miss Roden during particular hours of the day was related to the potential reduction in her salary. Indeed in her own evidence Miss Roden accepted that that was the subject that was canvassed in the course of the relevant meeting. We of course heard from Mr Bridger on this subject and on balance we were prepared to accept his evidence to the effect that the canvassing of the reduction was not related to Miss Roden's disability but to concerns that he had about her availability, which in turn were unrelated to disability. It followed that this could not amount to direct discrimination or harassment.

19. We then turned to Miss Roden's assertion that she had been unlawfully denied a bonus. It was certainly the case that some of her colleagues received bonuses in January 2018 and she did not. The reason for that state of affairs was simply the different position she was in from them.

20. Mr Bridger told us, and we accepted, that the bonus in question was to reward certain employees who had worked particularly hard in producing tax returns within specific deadlines. Miss Roden pointed out that she also completed tax returns but her principal area of responsibility was payroll. The bonus paid at that time was a specific reward for a specific piece of work done at that time. She was not a participant in that work. There was an obvious reason for her not to receive the payment, it had nothing to do with her disability and it followed that she was not directly discriminated against or harassed.

21. We then turned to the assertion that Miss Roden was being monitored. In this regard it was important to note that Miss Roden could give no direct evidence of that matter. She said that Mr Lothian told her that he had been told to monitor her by Mr Bridger. In essence that became a conflict of evidence between Messrs Lothian and Bridger and in short we preferred the evidence of Mr Bridger to the effect that no conversation to that effect had taken place. We did not believe Miss Roden had been monitored (or that Mr Lothian had been instructed to that effect) and it therefore followed that her claims of direct discrimination and harassment related to that matter failed.

22. We then turned to the events of 2019. Miss Roden alleged that she was directly discriminated against and harassed in that she was refused a phased return to work. One might assume that by that Miss Roden meant that she expressly required or requested such a return and she had been turned down. That was not, however, what she suggested in the course of her evidence. She was given a limited amount of work to do until she was well enough to increase it. She never asked for a phased return and indeed she did not seem in her evidence to us to suggest that a phased return was feasible.

23. We concluded that Miss Roden was not refused a phased return to work so her claims of direct discrimination and harassment relating to that allegation failed.

24. There was a further claim arising out of that matter which was a failure to make reasonable adjustments. It was suggested at the case management hearing in this matter that the Company had applied a provision, criterion or practice (PCP) of refusing to allow Miss Roden to have a phased return to work. That could not sensibly be regarded as a PCP. That was a “one off” event. The more apt PCP would have been the requirement for her to undertake her normal duties, which by reason of her mental condition at the time she could not. That PCP would arguably have put her at a substantial disadvantage requiring the Company to take such steps as were reasonable to avoid the disadvantage. However, given the finding referred to above, the provision of a phased return would not have been a relevant adjustment. She had never indicated that she wished such a return but more fundamentally, such a return would not have been feasible, as she seemed to concede. It followed that her claim of a failure to make reasonable adjustments failed.

25. Next we addressed the termination of Miss Roden’s employment. She was issued a P45. It was suggested on the part of the Company that her contract had been frustrated before it was issued such that there was no dismissal.

26. The doctrine of frustration provides that a contract is terminated by operation of law where without the default of either party a supervening event occurs which was not reasonably foreseeable at the time when the contract was made which renders further performance of the contract either totally impossible or radically different from what the parties bargained for.

27. The various tests to be applied in determining whether there has been frustration are set out in the case of Marshall v Harland and Wolff. They involve consideration of whether Miss Roden was in a pivotal position such that she had to be replaced fairly quickly. It was never suggested that that

was the case here. The guidance was expanded in the case of Egg Stores v Liebovici which obliged us to consider the actions of the employer itself. In the previous December Mr Bridger had sent a message to Mr Lothian which effectively acknowledged that Miss Roden was still on the books of the Company at that time. It did not seem to us that anything happened between that date and April to suggest that the doctrine of frustration might have any application.

28. Taking into account all of the relevant considerations, we did not believe the contract was frustrated. Miss Roden was still an employee of the respondent in April 2020 and it followed when she received her P45 effectively telling her that her employment had terminated some time the previous year, that amounted to a termination at that time by the Company. A unilateral termination by an employer is a disimissal.

29. We then had to ask if there was a potentially fair reason for dismissal,

30. There might have been such a reason here – either capability in the sense of her inability to attend work, or conduct if she had been able to attend but had simply decided not to. Whether it could sensibly be said there was a reason for dismissal when the Company had not directed its mind to the subject was a moot point but one that did not detain us. As Mr Hine conceded, given the fact that there was no procedure adopted by the Company and no effort to establish exactly what Miss Roden's position was, if this was a dismissal it was in any event bound to be unfair.

31. We then had to consider whether the dismissal was an act of direct discrimination or harassment.

32. As far as direct discrimination was concerned, it was not suggested by Miss Roden that the real reason for her dismissal was that Mr Bridger wanted to "get at" her because she was disabled. That clearly was not an accurate description of the motivation for the production of the P45, which seemed to be the result of a failure by the Company to properly to consider the implications of what it was doing.

33. As far as harassment was concerned, we had to ask whether the dismissal was unwanted behaviour related to disability with the purpose or effect of violating Miss Roden's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.

34. This clearly was unwanted behaviour. Miss Roden told us she was shocked to have received her P45, for which she had not asked. Given the degree of her upset and the situation in which she found herself, we also accepted that the production of the P45 had the purpose or effect violating her dignity and creating a humiliating environment for her. Could it be said, however, that the behaviour was related to disability?

35. The reason for dismissal was her absence and the reason for her absence was disability. In those circumstances it appeared to us that the dismissal was indeed related to disability and therefore that she had been unlawfully harassed. For the sake of completeness, had she pleaded the case as one of discrimination arising from disability she would have undoubtedly

succeeded: the dismissal was clearly a consequence of an absence which arose as a by reason of disability. The Company would have been unable to establish justification in circumstances where it failed to adopt any sort of procedure.

36. It was accepted by the Company that Miss Roden had not been given notice of dismissal. That was a breach of contract entitling her to damages representing the wages she would have received during her notice period.

37. Our unanimous conclusion was therefore that Miss Roden succeeded in her claims of unfair dismissal, harassment relating to the dismissal itself and notice but in all other respects her claims failed.

38. By failing to give notice of dismissal the Company had rendered itself liable to damages representing one month's notice, ie £1,950 gross. Applying notional deductions for tax and national insurance reduces that figure to £1,750.

39. It was agreed that the basic award for unfair dismissal was £2,700.

40. Turning to the compensatory award, it was suggested that Miss Roden might have been dismissed fairly at the time that she was dismissed unfairly on the basis of the failure to disclose information relating to her medical condition from the previous year. We did not accept that was the case.

41. We concluded that Miss Roden had made reasonable efforts to mitigate her loss. She told us, and we accepted, that mistakenly she understood she could only return to work if she was able to work 30 hours a week.

42. We did not think there was a prospect she would have been dismissed in April or May 2019 if the Company had acted reasonably. On the contrary given the fact that she was expressing herself interested in returning to work when she understood an offer to that effect had been made in July 2019 we concluded that if proper discussions had taken place at the time in April and May 2019 she would have returned to work at that time.

43. We were also satisfied, however, that she would not have gone back working thirty hours a week or at least not immediately.

44. We had to take a view as to what agreement we believed the parties would have come to in relation to her hours of work at that time. Miss Roden was likely to lose her employment support allowance if she were to go back and work more than 16 hours a week. To a large extent it was a matter of speculation but we concluded that she would have returned working 16 hours a week if the matter had been properly canvassed in April 2019. She would have been on those hours for 6 months but then over the ensuing 18 weeks there would have been a gradual increase in her hours until she was on 30 a week.

45. Beyond that period of roughly ten months we took the view that she would no longer be suffering any loss. We concluded that if she made reasonable efforts to mitigate her loss she would by then have obtained work paying at least as much as she would have earned with the Company.

46. On the basis of a 16 hour week she should have been earning £240 a week gross. At 30 hours a week she would have been earning £450 gross. So for the first six months she lost £6,240 (26 weeks at £240 per week). For the last 18 weeks she lost £6,210. (This assumes a uniform increase from £240 to £450 per week, ie 18 weeks at £345 per week). Making a broad reduction in each case for tax and national insurance the figure for each period to £5,000. That makes a total of £10,000 to which we added £623 to represent the loss of the pension payments she would otherwise have received.

47. Miss Roden received employment support allowance which fell to be deducted from the award, amounting to £3,660. That reduced the award to £6,963, to which we added £500 to represent loss of statutory rights producing a figure of £7,463.

48. We were then obliged to consider whether to apply an uplift to that sum to represent the failure on the part of the Company to observe the relevant ACAS code of practice. There was clearly no procedure whatsoever attendant upon the dismissal. We accepted that there was no malice on the part of the Company, but rather a failure to appreciate the situation it found itself in. In the circumstances considered that an uplift towards the maximum of 25% was appropriate and we awarded a figure of 20%, which produced a final figure for the compensatory award of £8,955.60.

49. We turned to injury to feelings. It is right to observe that the dismissal was a one off act. On the other hand, it was clearly a serious matter and we fully accepted Miss Roden's evidence to the effect that she was deeply upset. She told us she felt she was going through a "grieving process". We concluded that the appropriate award for injury to feelings was £9,000 to which we applied the uplift of 20% producing a figure of £10,800. Interest had run on that figure at 8% for one year and four months producing a figure for interest of £1,152.

50. Finally, it was conceded the claimant was not provided with a contract of employment or a statement of principal terms of employment and we made an award of two weeks' pay or £900.

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Employment Judge Reed
Date: 14 December 2021

REASONS SENT TO THE PARTIES ON
11 January 2022 By Mr J McCormick

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