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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107494/2019

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Held in Glasgow on 29 and 30 November 2021

**Employment Judge A Jones
Tribunal Member D McDougall
Tribunal Member J Haria**

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Ms A

**Claimant
In person**

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Ministry of Defence

**Respondent
Represented by
Mr A Gibson
Solicitor-Advocate
Morton Fraser, solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The unanimous judgment of the Tribunal is the claimant's claims should be dismissed.

REASONS

35 **Introduction**

1. The claimant raised a claim of disability discrimination. Orders were made in terms of Rules 50(3)(b) and 50(3)(d) in relation to the anonymity of the claimant and restricted reporting. These Orders are to have permanent effect. At a

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preliminary hearing on 2 December 2019, the issues for the Tribunal to determine at a final hearing were identified.

2. The claimant's claims were identified as disability discrimination in terms of

(i) section 13 the Equality Act 2010 ('EqA') in relation to the claimant's sister's disability (that is associative discrimination),

(ii) section 15 EqA in that the claimant had been treated unfavourably because of something arising in consequence of her disability, and

(iii) that the claimant had been harassed in terms of section 26 EqA because of her disability.

3. The respondent conceded that the claimant and her sister were disabled for the purposes of the EqA, but denied that the claimant had been subjected to any unlawful treatment either related to her sister's disability or her own.

4. A joint inventory of productions was lodged by the parties. The claimant gave evidence in person and the respondent called one witness ('Mr D') who had been the decision maker in relation to the grievances which the claimant had lodged.

5. Having listened to the evidence and considered the documents to which reference was made in evidence and heard the submissions of the parties, the Tribunal made the following findings in fact.

Findings in fact

6. The claimant was employed as a welfare advisor by the respondent from August 2016 until her transfer to another post within the MOD around 12 August 2019.

7. The claimant was based in an open plan office space. She worked with three colleagues who were at the same grade as her, a line manager (Ms B) and a 'countersigning manager' (Mr C), who was the claimant's next line manager. There were also around four other staff in this office space, but they primarily worked out of the office.

8. When the claimant started in her role, she was given training mainly by colleagues who provided 'on the job' training. The claimant's duties were to provide advice to or otherwise signpost veterans and their families who telephoned seeking advice on various matters.
- 5 9. The claimant also received training on IT issues, but the respondent suffered difficulties with its IT system at the relevant time which caused disruption to the training and IT access for the claimant.
10. Initially the claimant and her colleagues had a positive working relationship.
- 10 11. As the claimant and her colleagues worked in an open plan office and were often on the phone, the office could become noisy. On occasion, Mr C would ask those in the office to be quieter in their discussions. One such occasion was 17 May 2018. He did not at that time single the claimant out in this regard or suggest that she was lazy or stupid.
- 15 12. The claimant raised a grievance against Mr C on 25 May 2018, alleging that he had been rude to her on 17 May 2018.
13. The claimant was then off work from May 2018 until January 2019 initially suffering from work related stress and then on annual leave.
14. During that time efforts were made to resolve the claimant's grievance by mediation, but this was unsuccessful.
- 20 15. The claimant was, in terms of the respondent's policies, required to keep in touch with the respondent during her sickness absence. The claimant's contact with her line manager was sporadic and the claimant was reluctant to maintain an appropriate level of communication with her line manager.
- 25 16. A meeting took place in terms of the respondent's attendance management policy on 16 August 2018 between the claimant and her line manager, with a note taker present. The claimant recorded that meeting without advising those present requesting permission. The claimant's conduct during that meeting was aggressive and not constructive.

17. On the claimant's return to work in January 2019, the atmosphere in the office deteriorated and relations between the claimant and her colleagues and the claimant and her managers continued to break down.
18. The claimant subsequently raised complaints of bullying and harassment against the line manager and Mr C and completed the relevant documentation within the respondent's policies on 22 and 23 March 2019 in that regard. The complaints related to the incident the claimant said had occurred on 17 May 2018 and a number of other matters including arrangements regarding the claimant's flexi time.
19. The claimant's sister had an accident in early February 2019 which resulted in her breaking her hip and being hospitalised. The claimant provides care for her sister who had a number of serious health issues. The claimant was on leave for two weeks following her sister's accident visiting her in hospital and walking her dog and then providing care at home for her once she had been discharged.
20. When the claimant returned from this period of leave, she tried to record her absence as one week special leave and one week annual leave. The respondent's policies indicate that special leave must be approved and will ordinarily only be provided for one or two days paid with additional unpaid leave thereafter. The maximum paid leave which can be authorised is five days.
21. Ms B emailed the claimant on 19 February 2019 and advised her that she could take two days as paid special leave and would have to take unpaid leave or annual leave for the other three days the claimant had sought to take as special paid leave.
22. Thereafter the claimant worked 7am until 2pm every day. She did not discuss how long she would continue to work these hours with her managers. The respondent operates a flexi time system where employees can complete their working hours between 7am and 7pm. However an employee cannot be in debit in terms of their hours by more than 11 hours and 6 minutes over any four week period. An employee is not permitted to use annual leave in order

5 make up any debit in hours. The claimant had been in debit in terms of flexi hours prior to her leave to make arrangements for her sister and the hours the claimant was working increased that debit every day. There was also a practice within the office of ensuring that there was someone present to answer the phones until 5pm every day.

10 23. Ms B and Mr C became increasingly concerned regarding the failure of the claimant to engage in constructive discussion regarding her working hours and the claimant was required to attend a meeting on 14 March 2019 to discuss the matter. The claimant had previously refused to engage with her line manager to discuss the matter. The claimant was advised that if she did not attend the meeting then, in line with the respondent's policy, the right to flexi time could be removed and the claimant would be required to revert to normal working hours from 18 March 2019.

15 24. The claimant attended the meeting on 14 March and was accompanied by a trade union representative. The respondent offered for the claimant to reduce her flexi debit over a sixteen week period. The terms of the proposal were put in writing in an email to the claimant and copied to her trade union representative. The claimant was advised to accept this offer by her trade union representative.

20 25. The claimant however was concerned that the respondent would withdraw the offer which had been made. Therefore the claimant worked twelve hour days in order to reduce her flexi time debit. She did not discuss this in advance with the respondent.

25 26. Around this time the claimant advised her line manager that she only wished to communicate with her and Mr C by email.

27. On 18 March Mr C, when leaving the office said goodnight to the claimant who ignored him. On 19 March, Mr C sent an email to the claimant indicating that she should be civil towards him and Ms B.

30 28. The requirement to manage the situation with the claimant had a detrimental impact on the health of Ms B.

29. The respondent introduced a Carer's passport policy around December 2018 where those employees with caring responsibilities could have these committed to writing together with any arrangements agreed for the employee to fulfil their responsibilities. This passport would then travel with the employee to any different roles without the need for them to renegotiate arrangements with any new line managers.

30. The claimant raised the possibility of a Carer's Passport with her line manager around February 2019. Ms B then emailed the claimant on 7 March 2019 asking to discuss the matter further with the claimant but the claimant said in response in an email to her 'this email has been sent in a perfunctory manner with no real desire to cater for my circumstances.' There was no further discussion between the claimant and the respondent regarding a Carer's Passport.

31. The claimant's complaints were thoroughly investigated by an independent investigative officer appointed by the respondent, who was a former senior police officer. The investigation took some time and involved interviews both in person and on the phone with the claimant, the respondents to her complaints and various colleagues. A report which included all relevant statements and all documentary evidence which had been collated during the investigation was provided to Mr D and the claimant once it was complete.

32. Mr D wrote to the claimant by letter dated 11 March 2020 and advised the claimant that her complaints had not been upheld other than in relation to one matter which was partially upheld.

25 **Observations on the evidence**

33. It was clear to the Tribunal that the claimant had been adversely affected by her experiences while working for the respondent as a welfare advisor. She had a number of health conditions herself and together with the responsibilities she had for family members who also had significant health conditions, and the breakdown in relations between the claimant and her colleagues, she was clearly placed under considerable stress. The Tribunal formed the view that

while the claimant genuinely believed that she had been discriminated against by the respondent, and sought to give her evidence in a truthful and honest manner, she was unable to see that her conduct during the relevant period was not constructive to good working relations. She had become distrustful of her colleagues and viewed any interactions with them in a negative light. Therefore the Tribunal had some reservations as to the reliability of the claimant's evidence.

34. Mr D gave his evidence in a straightforward manner and was both credible and reliable.

10 Relevant law

35. Section 13 EqA provides that a person discriminates against another person if, because of a protected characteristic, he treats the other person less favourably than he treats or would treat others. Disability is a protected characteristic by virtue of section 6 EqA. Following the case of **EBR Attridge Law LLP v Coleman [2010] ICR 242**, it is accepted that a person may be discriminated because of a disability in circumstances where it is not them, but someone else who has a disability. This is generally known as associative discrimination, in that a person is said to have been discriminated against because of their association with another person who has a disability.

36. Section 15 EqA provides that it will be unlawful to treat a person unfavourably because of something arising in consequence of their disability, unless it cannot be shown that the treatment is a proportionate means of achieving a legitimate aim.

37. Section 26 EqA sets out the circumstances in which a person may be subject to harassment related to disability. Harassment will take place where there is unwanted conduct which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Submissions

38. The claimant made oral submissions which summarised her evidence and explained briefly why she believed that she had been discriminated against. In essence the Tribunal understood the claimant's position to be that if she had not been off work caring for her sister, she would not have been treated in the way that she had been particularly in relation to issues around her flexi time and that Mr C was rude to her because of who she was and that she was a disabled person.
39. The respondent provided written submissions which were read by the Tribunal during an adjournment. The respondent's position was that the situation described by the claimant in relation to her interactions with her managers was not accurate. That there was no less favourable or unfavourable treatment of her and that the allegations of harassment were no more than the respondent's attempts to manage the claimant.

Discussion and decision

40. The claimant's claims were entirely lacking in specification in advance of the hearing, which was regrettable. It was appreciated that the claimant was not represented but there was little specification provided by the claimant in advance as to the specific allegations she was making. Her grievance had been broken down into eleven allegations by the investigating officer and the claimant's evidence as to which of these allegations were said to amount to breaches of the EqA was confusing and at times contradictory.
41. In terms of the claimant's claim of associative discrimination, this appeared to relate to the issue of the flexitime arrangements which the claimant was permitted to have. The Tribunal understood that the claimant was suggesting that she would not have been required to attend a meeting at which there was a threat of the withdrawal of her flexitime, if she had not been required to take time off to care for her sister.
42. The Tribunal could not accept that the claimant was treated less favourably than a hypothetical comparator in this regard. The claimant did make reference to a colleague who she said had been spoken to about her flexitime in an informal manner, but no specification of the circumstances was

provided. No further information regarding a hypothetical comparator was put forward by the claimant and the Tribunal was of the view that a hypothetical comparator was someone who was in a similar situation in relation to their flexitime (that is being in debit to the extent of the claimant), but for other reasons. The Tribunal also took into account that the claimant was not constructive in her discussions with her managers. She refused to engage with them to reach a solution which would work for both her and the respondent. The Tribunal formed the view that the claimant was not treated less favourably than another employee who did not have caring responsibilities would be treated. Rather the Tribunal was of the view that the respondent required the claimant to attend a meeting to discuss her working hours because the claimant had by that stage refused to discuss matters with her managers and expressed the wish that any communications be in writing. The Tribunal was of the view that there was no evidence presented to it that the treatment of the claimant was in any way related to her disability or the disability of her sister. It was not less favourable treatment at all, but simply the respondent seeking to manage an employee with whom relations had broken down. The proposal which was put forward for the claimant to manage the issue with her working hours could not be seen to be less favourable treatment. The Tribunal accepted that the proposal that the claimant reduce her flexi debit over a sixteen week period was a generous one. While the Tribunal appreciated that the claimant was genuinely concerned that this proposal might be withdrawn, there was no basis for that view. The Tribunal accepted that the respondent was seeking to work with the claimant to come to a solution to the issue, but that the claimant was not willing to engage with them in this regard.

43. The Tribunal accepted the respondent's submission that it was not clear what the claimant said amounted to harassment and what she said amounted to unfavourable treatment because of her disability. The Tribunal also accepted that there was no evidence that the claimant had been treated unfavourably at all. It was clear that her perception was that she was treated unfavourably, but there was simply no evidence to substantiate that perception. The claimant indicated that she was excluded from work events, but she had not sought to argue that this amounted to discrimination on the ground of her

disability by her colleagues or that this amounted to harassment by her colleagues. The claimant's position was that it was her managers who had treated her unlawfully and there was simply no evidence that this was the case. Both Ms B and Mr C were in a difficult position in that they were required to manage an employee in circumstances where it was clear that the working relationship had broken down. The tone and the content of emails sent by the claimant to her line managers was not constructive and indeed appeared confrontational.

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44. The Tribunal did not accept that the claimant had been called a derogatory term by Ms B, which the Tribunal understood the claimant to suggest could amount to harassment.

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45. Therefore there was simply no evidence which would allow the Tribunal to find that the claimant had been discriminated against because of something arising from her disability or that she had been subject to unwanted conduct related to her disability.

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46. While there was some reference by the claimant to an issue in relation to the provision of a chair, it was not suggested that this amounted to either direct discrimination or harassment.

47. In these circumstances, her claims fall to be dismissed.

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Employment Judge: A Jones
Date of Judgment: 16 December 2021
Entered in register: 21 December 2021
and copied to parties

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