



THE EMPLOYMENT TRIBUNAL

Claimant: Miss A Hemsley

Respondent: Georganics Limited

Held at: London South On 7 and 8 March 2022 (By video)

Before: Employment Judge Siddall, Ms C Wickersham and Mr N Shanks

Representation

For the Claimant: In person

For the Respondent: Mr A Rocchi, Director

JUDGMENT

The decision of the tribunal is that:

1. The claim for direct discrimination because of the protected characteristic of disability brought under section 13 of the Equality Act 2010 does not succeed and it is dismissed.
2. The claim for disability-related discrimination under section 15 of the Equality Act 2010 succeeds.
3. The claim for harassment related to disability does not succeed and is dismissed.
4. The claimant is awarded a total sum of £14,223.16 which consists of:
 - a. Loss of earnings from date of dismissal to 5 January 2021 of £2,930.16
 - b. Injury to Feelings of £10,000
 - c. A 10% uplift for failure to deal properly with the grievance of £1,293.

REASONS

1. The claimant brought claims for unfair dismissal, direct disability discrimination, discrimination arising from disability under section 15 Equality Act 2010 and harassment. The claimant was not employed for two years with the respondent and at an earlier hearing she withdrew her claim for unfair dismissal.

2. The respondent accepts that the claimant was at all material times a person with a disability. She has ME and Fibromyalgia.
3. We heard evidence from the claimant and from Mr Alessandro Rocchi of the respondent.
4. The facts we have found and the conclusions we have drawn from them are as follows.
5. The respondent is a small business which manufactures dental products, employing 17 people. The factory is based in Haywards Heath. Prior to the pandemic the respondent had an office in Hove but the lease on this building was not renewed and all staff moved to the Haywards Heath site.
6. The claimant commenced employment with the respondent on 16 March 2020. She worked for the company for just under eight months. Her employment was terminated by the respondent on 20 November 2020, purportedly on grounds of redundancy.
7. During discussions with the respondent prior to joining the company, the claimant disclosed that she had an underlying health condition. After commencing employment she recorded on the HR system that she had ME and Fibromyalgia. Under the section 'action needed' she stated: 'none at present – adjustments maybe needed in the future if the severity fluctuates'.
8. The claimant believed that she would have a starting salary of £30,000. In an email dated 27 February 2020, Mr Rocchi stated that the salary would be £27,500 with a review after a probation period of three months, in line with offers to other new staff.
9. The claimant initially had the job title of Marketing Administrator.
10. The initial working arrangement was that the claimant would work two days in the respondent's office and three days at home. Very soon after she commenced employment, the first national lockdown began. The claimant alongside other staff worked full-time on a remote basis. Mr Rocchi told us that he spent the first lockdown in Italy and did not return to the office until September 2020.
11. In late May 2020 there were discussions around the claimant's job description and responsibilities. It was agreed that the claimant would assume managerial responsibility for the rest of the marketing team. Mr Rocchi stated that the role would involve the claimant returning to work at the office for two days a week and that this was 'compulsory'.
12. On 26 May 2020 the claimant requested to continue working from home for the time being as she was in the vulnerable category due to her health conditions. She also asked about salary for the new role.
13. Mr Rocchi said that the role would reflect an increase to £30K. He would be happy for the claimant to continue working remotely 'till government suggests otherwise'. However once lockdown was lifted he would expect the claimant to work two days a week at the office.
14. The claimant requested that the new salary should start from 1 June 2020 but Mr Rocchi indicated that it would not increase until the claimant was back working in the office.
15. In the meantime, the claimant started to manage the two other members of the marketing team.
16. There was later agreement that the salary rise would take effect on 1 August 2020. From this date, she was described as 'head of marketing' on her email

- signature. The claimant continued to work at home with the consent of Mr Rocchi, on the grounds of her health condition.
17. Over the summer period the claimant made two visits to the office to collect work-related items but she did not go inside the building. She was concerned that the working environment at Haywards Heath was not safe. It was her evidence which was not disputed that the marketing team did not have a dedicated office. They would work at a table in the break room where production staff would come in at lunchtime to have their meal. It was therefore shared space.
 18. The tribunal noted that after government restrictions had been relaxed over the summer, the advice on attending work changed on 22 September 2020 as Covid cases rose again. People were advised to work from home where possible.
 19. We have noted that there were messages exchanged between Mr Rocchi and the claimant the following day, 23 September 2020.
 20. Mr Rocchi pointed out to the claimant that new government advice stated that anyone who could not work at home should attend their place of work and that the risk of transmission of COVID could be reduced if guidelines were followed. He stated that the other members of the marketing team should go back to work and asked the claimant what she wanted to do.
 21. The claimant said that she was not comfortable returning to work. Mr Rocchi asked her if she planned to remain working at home for the six-month period envisaged by the government guidance?
 22. The claimant replied by noting that there was 'a lot of evidence' about Covid causing long term health problems for people with her conditions. She said that she was happy to keep the situation under review but she noted that a large spike in cases was being predicted. She said that she thought working from home was the 'safest course of action'. She said that she had visited the site but did not consider that it was Covid secure.
 23. Mr Rocchi said in evidence that a health and safety risk assessment had been carried out at the site but there was no copy of it in the bundle. The claimant said that she was never shown such an assessment.
 24. In mid-October the claimant was contacted by a person who was enquiring about a marketing position which was being advertised for the respondent, dated 17 October 2020. The person would be responsible for marketing strategy and running projects. The position was full time with a salary range from £13,900 to £45,600. The advert specifically states that remote working would not be possible.
 25. The claimant was understandably concerned about this advert as she had no prior knowledge of it. It is not surprising that the claimant concluded that someone was going to be recruited to replace her. She sought a discussion with Mr Rocchi which took place on 23 October 2020. The claimant recorded the conversation, apparently without Mr Rocchi's knowledge.
 26. Mr Rocchi's intentions during this conversation are not clear. The statements he made to the claimant are ambiguous. He did however state that the respondent was considering whether to keep the claimant's role or make it redundant. He said that the respondent had concerns from a performance and profitability point of view. He raised the question of the development of the marketing strategy, which he was concerned had not been completed

- (although the claimant said that she was awaiting his input). He explained that they were considering recruiting to a 'higher level/bigger picture focus'.
27. Mr Rocchi also raised the fact that the claimant had not returned to the office and said that the role was 'probably in a bit of a pickle because of that'.
 28. The claimant says in her witness statement that she came away from this meeting unsure whether the respondent had started a redundancy process or intended to commence disciplinary or capability proceedings.
 29. Mr Rocchi asked the claimant to think about the situation over the following week while she was on leave. He said that another meeting would be scheduled after that.
 30. On 1 November 2020 the claimant submitted a grievance about the way in which she had been treated. She asked that consultation continue by email.
 31. Following this, we note that a revised advert for the new post was issued which stated that hybrid working was a possibility. The advert also referred to an additional requirement that candidates should have five year's marketing experience. We understand from Mr Rocchi that he eventually recruited someone to fill this role at a salary of £40,000. We accept that there were some differences between the claimant's role and the new role.
 32. Mr Rocchi replied to the claimant on 2 November 2020 rejecting her concerns. He said that he had no record of her having a diagnosis of ME and Fibromyalgia despite the fact that this was recorded on the HR system. He confirmed that the company was considering making her role redundant but that they were in a consultation process. He referred again to the fact that she had not returned to work and asked about what adjustments she needed. He stated that the office had been assessed as Covid compliant. Mr Rocchi asked for the claimant's response 'by Thursday'.
 33. The claimant wrote back to Mr Rocchi on 3 November 2020. She complained about the short deadline. She asked why she was being treated differently from other members of staff, none of whom had been placed at risk of redundancy. She also asked why she could not carry out the new role with adjustments. She suggested that the company should limit its use of freelancers to save money.
 34. Mr Rocchi replied on 4 November stating that 'the main issue that I am struggling with in this situation is the apparent change in your ability to work in the office...I have been trying to do is understand from you why you are now unable to work in the office 3 days a week as you had originally signed up to do'. He rejected the proposal to stop the use of freelancers. He said he would take forward the claimant's suggestions about ways of avoiding redundancy.
 35. On the same day a member of the claimant's team contacted her to tell her that they had been told that she was being made redundant.
 36. The tribunal note that the second national lockdown started on 5 November 2020. On that day, solicitors instructed by the claimant wrote to the respondent alleging unfair and discriminatory treatment and asking for the redundancy process to be paused.
 37. The claimant was signed off sick with 'mental and physical exhaustion' on 5 November 2020 for two weeks.
 38. By letter dated 6 November 2020 the respondent terminated the employment of the claimant on grounds of redundancy. The respondent stated that the role of marketing administrator (the original job title) was not working for them and that they required 'a more skilled and comprehensive role of Marketing

- Strategist or Head of Marketing'. They stated that no alternative employment was available. The letter does not refer to a right of appeal.
39. The respondent engaged an HR consultant to deal with the claimant's appeal. He rejected the claimant's concerns about her redundancy and found that a genuine restructure had taken place. He did not accept the concerns she raised about disability discrimination.
 40. The claimant appealed that decision. She said that the consultant had failed to deal with her allegations of harassment and that they had not addressed the lack of a fair redundancy process. She alleged disability discrimination.
 41. A second consultant dealt with the appeal. It was agreed that the redundancy process had been poorly executed. The HR consultant also acknowledged that despite what Mr Rocchi had said, the claimant had made clear her health conditions of ME and Fibromyalgia to the respondent and had also communicated the risks posed to her health from Covid.
 42. The claimant explained in evidence that she had been very unwell with her health conditions when she was younger. It had taken her eight years to get into full time employment after that. The respondent's attitude to her need to work from home had caused her anxiety and distress. She had experienced a flare up of her symptoms in November 2020 causing her to be signed off for two weeks. She stated that she could not afford to remain off work for a long time after that as she had just bought a new house and needed to pay the mortgage. She had to look for work immediately.
 43. Following her dismissal, the claimant underwent surgery on her hip in December. She was not able to find employment prior to that, but commenced new employment on 5 January 2021. However the effects of her dismissal remained with her for around six months. She continued to suffer from pain, exhaustion and 'brain fog', and found that she could do little more than go to work. She had to reduce other activities.

Decision

44. In our discussions the tribunal have focussed on the period from September 2020 until the date of termination of the claimant's employment on 6 November 2020. We note that in late September Mr Rocchi had agreed that the claimant could continue working from home although her team members would have to go in for some days each week. We find however that by mid-October Mr Rocchi was dissatisfied with the working arrangements. He started to consider his options. Without any discussion with the claimant, the respondent decided to advertise for a Marketing Strategist role that would be based at the office. This would automatically exclude the claimant. The respondent stated that they were looking for a higher-level role but we note also that the salary range went from £13,900 to £45,600 - a range that would be likely to attract candidates with very wide differences in experience. Ultimately a person was recruited on a salary of £40,000, a higher amount than the claimant was being paid.
45. When the advertisement came to the claimant's attention she sought a discussion with Mr Rocchi who confirmed that he was considering making her role redundant. He referred to concerns about the claimant's performance although we note that there is no record of any specific matters having been raised with the claimant prior to this point. Mr Rocchi also expressed the view

- that it would be better for the claimant to be made redundant than face disciplinary or capability procedures. We find that Mr Rocchi's primary motivation in advertising a new role and discussing with the claimant her potential redundancy was the fact that she had not returned to the office. We accept that he ultimately recruited at a higher level but find that it is more likely than not that the restructure was not considered until a decision had been made that the claimant's role could not continue.
46. We then turned to the specific claims and made the following decisions.

Direct Disability Discrimination

47. The allegations of direct discrimination are set out at paragraph 36 of the Issues set out in the case management order dated 25 November 2021.
48. The respondent has demonstrated extremely poor employment practice in the way in which the claimant was treated. We refer for example to the fact that the new job was advertised without any discussion with her; and the failure to investigate her grievance until after she had been dismissed. This is unfavourable treatment but we are not satisfied that any other person would have been dealt with in any different way. We agree that the claimant suffered less favourable treatment in that after the respondent decided to review the operation of the marketing team, it was only her role that was put at risk, not that of her two colleagues. However we do not accept that this was because of her disability. We find that the claimant was put at risk because she was working full-time from home, and we go on to consider this in the context of her claim under section 15 of the Equality Act 2010.

Discrimination Arising from Disability

49. We turn to consider the same allegations under the heading of the section 15 claim for disability-related discrimination.
50. We agree that it was unfavourable treatment to: advertise the new role without the claimant's knowledge; put her at risk of redundancy; fail to investigate her grievance; and to dismiss her.
51. We also agree that the claimant was working full time from home as a consequence of her disabilities: she had a genuine fear that if she contracted Covid that her conditions could be greatly exacerbated. This was 'something arising' as a consequence of her disabilities.
52. Was the unfavourable treatment because of the claimant's preference to work from home? We find that it was. In giving his evidence, Mr Rocchi agreed that this was a key issue for him. We noted that it was a topic he had raised with the claimant in late September 2020 and previously. At that point he had agreed that she could continue working from home. However he mentions it in some detail during the conversation on the 23 October 2020 and again in his responses to her grievance. On 4 November he stated that this was the 'main issue that I am grappling with'. We also give weight to the fact that when the new role was first advertised, Mr Rocchi specified that the work could not be done remotely. We find that this is the reason why he put the claimant at risk and made her redundant.
53. Was this treatment justified? We agreed that Mr Rocchi had some legitimate aims in wanting the claimant to be back in the office. He wanted her to be

- present to manage the two other members of the marketing team. In the longer term he wanted the Head of Marketing to be available for events and shows. He considered that the marketing role was important for the future performance of the business. The respondent is a small business and Mr Rocchi wanted the Head of Marketing to be in the office working alongside him from September 2020 onwards.
54. Was his action in dismissing the claimant proportionate? We find that it was not. We consider that there were other less discriminatory options available to the respondent. First they could have considered adopting a wider redundancy pool and offering the claimant something like the marketing administration role that she had been doing previously, even if they decided to recruit at a higher level for someone to head up the team. Second when the advert was amended the respondent conceded that hybrid working was possible, even for the more senior role. This casts doubt upon Mr Rocchi's objections to home working. Third it was not reasonable and proportionate to dismiss the claimant for not returning to work at the office during the second national lockdown, given her health conditions and the government advice in place at the time. Fourth there was no discussion between the respondent and the claimant over any Covid risk assessment that had been completed for the office to see if any of her concerns about coming back in could be alleviated, nor any discussion about adjustments to reflect her particular health conditions. Fifth Mr Rocchi sought no advice about any particular health risks that the claimant would face if she had to come back into the office. Sixth, there was a failure to carry out a genuine consultation process to see if a way forward could be agreed.
55. The claim under section 15 therefore succeeds.

Harassment

56. Following the case management hearing in November 2021 the judge ordered the claimant to provide further details of her claim for harassment related to disability. We have seen her list at pages 33 and 34 of the bundle. With all due respect to the claimant, many of her complaints are about the poor employment practices adopted by the respondent, and his efforts to persuade her to return to work in the office. She does not complain that Mr Rocchi used abusive or offensive language towards her. We accept that the claimant was upset by many of the things that happened, but this does not mean that the conduct had the effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. A number of these provisions might have been better raised under other provisions of the Equality Act. Although we accept that the claimant may have legitimate grounds for complaint about various matters, such as the fact that her team members were told about her redundancy before she was, we do not find that this amounted to harassment nor that it was related to her disability.

Remedy

57. We award the claimant her loss of earnings from date of dismissal to 5 January 2021 of £2930.16 when she started work in a job with a higher salary.

58. We agree that any award for injury to feelings should be in the middle band. The poor treatment that the claimant received from the respondent lasted for a relatively short period, but resulted in the loss of her job. We have heard what the claimant had to say about the effect of her illness in the past and her struggle to get back into employment, only for her to be dismissed for reasons related to her disabilities around eight months later. We accept that what happened created an exacerbation of her symptoms leading to pain, fatigue and brain fog for over six months. Nevertheless the claimant was in her role with the respondent for a short period of time. She has shown herself to be very resilient in finding new work so quickly. We have noted also that she has not produced any medical evidence to support her assertion that the treatment she received caused a significant worsening of her conditions. We conclude that whilst we are satisfied that the dismissal of the claimant caused her considerable distress and that this in turn is likely to have had an effect on her physical symptoms, an award towards the lower end of the middle band is appropriate. We award her £10,000.
59. We accept that the respondent did make some efforts to address the grievance by hiring an HR consultant. However the grievance was initially dismissed by Mr Rocchi. The grievance was not properly considered until after the claimant's employment was ended. The effect of this was that the claimant was not able to meaningfully influence the outcome of the consultation process. There was no genuine consultation with her and nor were her concerns properly addressed prior to dismissal. The process could have been paused or extended. In fact, it became fairly irrelevant. We consider an uplift is appropriate but given that the respondent made some efforts to address the grievance we will uplift the award by 10% or £1293.

Employment Judge Siddall
Date: 8 March 2022.

Sent to the parties on
Date: 8 April 2022