EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100059/2021

Held in Edinburgh on 20, 21 22 June 2022

Employment Judge A Jones
Tribunal Member Ms M Watt
Tribunal Member Ms J Grier

Ms A Harris	**Claimant** **In person** **Supported by** **Ms Guldberg** **(mother)**
Adecco UK Ltd	**First Respondent** **Represented by:** **Ms Onslow, counsel** **Instructed by** **Mr Bacharach,** **Solicitor**
Amazon UK Services Ltd	**Second Respondent** **Represented by:** **Mr Lockley,** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not discriminated against because of a disability and by the first or second respondent. The first respondent did not fail in a duty to make reasonable adjustments for the claimant. The claimant's claims are therefore dismissed in their entirety.

E.T.Z4(WR)

REASONS

Introduction

1. The claimant raised claims of disability discrimination and unpaid wages. There have been four preliminary hearings in this case. At the third preliminary hearing, the claimant was required to lodge a deposit in relation to some of her claims and some of her claims were struck out. By the time of the final hearing, the remaining claims before the Tribunal were that:

    i. the failure of the First Respondent to put in place a person of contact for the claimant on her return to work around 12 October 2021 was either a failure to make a reasonable adjustment or direct discrimination in relation to the claimant's disability,

    ii. the termination of the claimant's assignment with the second respondent was direct discrimination by the first respondent because of the claimant's disability, and

    iii. the second respondent exerted third party pressure on the first respondent to terminate the claimant's assignment with them which amounted to direct discrimination because of the claimant's disability.

2. The claimant has been diagnosed with Borderline Personality Disorder and both respondents accept that she was a disabled person for the purposes of section 6 Equality Act 2010 ('EA') at all material times.

3. Although initially it was said that the claimant's mother would represent her at the final hearing, in the event it was the claimant who cross examined the first respondent's witness and who made submissions at the conclusion of the hearing. The respondents were represented by counsel and the first respondent also had an instructing solicitor present.

4. A joint bundle of documents was produced and written witness statements were also produced. The claimant applied to add a skeleton argument which she had produced in advance of the hearing to her written witness statement

and there being no objection to this, this was admitted in so far as it added to the claimant's evidence.

5. The first respondent produced three witness statements, although in the event only one witness, Mr McIver attended to give evidence. Ms Aleknaviciute who had taken notes at one of the meetings with the claimant was not thought to be necessary, given that Mr Hunter had been due to give evidence and he chaired the meeting in relation to which there was a dispute as to the accuracy of the notes. In the event however, Mr Hunter did not attend to give evidence due to a misunderstanding on his part. There was one particular factual issue in dispute with which Mr Hunter could have provided the Tribunal assistance. However, in the circumstances, and taking into account the overriding objective, it was not thought appropriate to adjourn and order his attendance at the Tribunal.

6. The second respondent had intended to call one witness, a Mr Morrish, but despite efforts on their part (which were not disputed by the claimant) to secure his attendance at the hearing, he was not available. The second respondent then suggested calling another witness, but as it appeared that this witness could not give evidence on any of the facts in dispute, and the claimant indicated that she would not cross-examine that witness, it was not thought necessary to insist on his attendance.

7. The Tribunal did not have regard to the written witness statements where the witness did not attend at hearing in reaching its findings.

Findings in fact

8. Having considered the evidence before it, the documents to which reference was made and the submissions of the parties, the Tribunal found the following facts to have been established.

9. The claimant was employed by the first respondent as an associate. The first respondent places temporary workers to work on assignments with its clients, including the second respondent.

10. The first respondent placed the claimant on an assignment with the second respondent from 12 May 2020. The claimant was engaged in the second respondent's EDI4 operations in the pack department.

11. The claimant had agreed to the terms and conditions of the first and second respondent and the second respondent's handbook. These included requirements to:

    a. Co-operate during any investigatory meetings held by the first respondent (p235).

    b. Not to take a mobile phone, camera or other recording equipment into the work areas (although this was relaxed during COVID to allow staff to take a mobile phone which could only be used in an emergency) p254 and p268).

    c. Photography, audio/video recordings or live streaming in the facility was not permitted (p268).

    d. Non-disclosure of confidential information which included the layout of the premises and technology used (p269).

12. Around 9 July 2020, the claimant was involved in an incident with another member of staff. No action was taken against either member of staff.

13. The claimant made a shift change request on 17 July 2020. She said that the change was required as she needed more support at home and made no reference to her mental health. That shift change request was granted.

14. The claimant was involved in an incident on 2 October with a security guard employed at the second respondent's premises. The claimant submitted a grievance concerning this issue.

15. The claimant was involved in a further incident on 3 October involving a pack problem solver. Mr McElhinney, a shift manager, sought to take a statement from the claimant regarding that incident and the one the previous day. The claimant was suspended following a meeting with Mr McElhinney.

16. A meeting took place between the claimant and Mr McIver, the first respondent's site manager on 9 October to discuss the claimant's return to work and her grievance. The claimant informed Mr McIver at that meeting that she had been diagnosed with Borderline Personality Disorder. The incidents in which she had been involved were discussed. No disciplinary action was taken against the claimant in relation to either incident.

17. It was agreed at that meeting that the claimant would be given a point of contact with the first respondent she could approach whenever there was a situation where she felt her condition may be triggered. The claimant was advised that Stephen Hunter and Andy McLeod, both of whom were shift managers would be persons of contact on the basis that one of them would always be on shift at the same time as the claimant.

18. The claimant returned to work on 12 October. Between 12 and 16 October the claimant had a discussion with Stephen Hunter about him being a person of contact. She did not voice any concern in this regard.

19. On 16 October 2020 it was brought to the first respondent's attention by the second respondent that the claimant may have been in breach of the second respondent's policies. In particular two posts were seen on the claimant's personal facebook account with what appeared to be videos of the workplace. One video showed the claimant dancing and was annotated with 'who said nightshift has to be boring ae [emojis] getchaaa groove on. Love working with these maniacs [emojis]'. The claimant's facebook page is accessible by over 1000 facebook friends. A further video showed the workplace and was accompanied by a post which said 'The moment Shona Nicol realise her tapes been tampered wi Hahahahahah x'

20. The claimant did not attend work for her shifts on 19 or 20 October and did not inform the first respondent in advance as she was contractually required to do. The policy of the first respondent was that if an associate had two instances of 'no call no show' they would be issued with a 'record of concern' and if there were three instances, the associate's assignment may be terminated with immediate effect.

21. The claimant attended for work on 22 October. She was asked to attend a meeting with Stephen Hunter who sought to ask questions about the facebook posts. During the meeting the claimant refused to give the name of the person who took the video of her dancing. The claimant left the meeting before Mr Hunter was able to ask all the questions he had prepared to ask the claimant. The claimant was advised that she was being suspended while the matter was investigated further.

22. Mr Macleod interviewed another associate Ms MacDonald on 22 October regarding the facebook posts. Ms MacDonald confirmed that she had taken the video of the claimant dancing, that it had been the claimant who had tampered with a colleague's tape machine and that she was sorry for her involvement.

23. The claimant submitted a further grievance on 23 October 2020.

24. Mr Hunter and Mr MacLeod forwarded the notes of meetings with the claimant and Ms MacDonald to Mr McIver.

25. On 24 October 2020, Mr McIver had a conversation with Mr Craig Morrish who was the second respondent's Workforce Staffing Manager. He updated Mr Morrish regarding the investigations which had been conducted and advised him that he intended to terminate the claimant's assignment and to issue Ms MacDonald with a final written warning. Mr Morrish did not object to this course of action and did not seek to interfere in any way with Mr McIver's decision making.

26. Mr McIver decided to terminate the claimant's assignment on the basis of her breaches of the policies of the second respondent and her unwillingness to co-operate with the investigation which was conducted, by in particular refusing to say who had taken the video of her dancing.

27. Ms MacDonald was issued with a final written warning on 24 October and her suspension was lifted.

28. On 25 October, Mr Hunter telephoned the claimant's mobile phone and advised her that her assignment was being terminated.

29. The claimant sent an email on 26 October 2020 appealing against the decision.

30. An appeal hearing took place on 12 November by telephone. The claimant had asked to be accompanied at that meeting by her representative, Ms Guldberg. That request was refused. Ms Guldberg is the claimant's mother, but the claimant did not inform the first respondent of this. The appeal hearing was chaired by Mr McIver. Mr McIver explained to the claimant that she had not been dismissed by the first respondent, but that her assignment with the second respondent had been terminated, and that he could seek redeployment for her to another company. The claimant advised Mr McIver that she had obtained alternative employment and that she did not want to take up another position with the first respondent.

Observations on the evidence

31. The Tribunal appreciated that the claimant found the proceedings before it very difficult and on a number of occasions she became very agitated and somewhat argumentative. To her credit however she apologised to the Tribunal (and personally to counsel for the second respondent) for her conduct which she attributed to her condition. It was also apparent that initially the intention had been for the claimant's mother to conduct the proceedings on her behalf. However, the claimant advised the Tribunal that her mother suffered from MS and had memory issues, therefore her mother did not in fact take much part in the proceedings. All of that said, the Tribunal did sometimes find it difficult to follow the claimant's evidence. The claimant's original position was that the respondent had failed to put in place persons of contact for her to speak to if she felt her condition was about to be triggered. However, her evidence was in fact that she was aware that she had been given two persons of contact but that she did not find them acceptable to her.

32. The claimant's position was that the second respondent had put pressure on the first respondent to terminate her assignment. However, she did not have any evidence of that whatsoever. She relied on the terms of the conversation she had with Mr Hunter who she alleged said that 'my hands are tied, it was

Amazon's decision'. Unfortunately, as explained above Mr Hunter did not attend the Tribunal to give evidence. The Tribunal did however have his written witness statement which had been signed by him. In submission, the Tribunal was referred to **Harvey** and the extract regarding the weight to be attached to witness statements where the witness did not attend. In the event, we found that we did not have address this issue. Mr McIver's unchallenged evidence was that he had taken the decision to terminate the claimant's assignment. It was not put to him in cross examination that he had been pressured to do so by anyone. Therefore, even if Mr Hunter had said that it was Amazon's decision (which in any event the Tribunal found to be entirely unlikely given that Mr Hunter was contacting the claimant on the instructions of Mr McIver), the Tribunal's view was that he was likely to have been mistaken in that respect.

33. The Tribunal found Mr McIver to be a wholly credible and reliable witness. He was subject to very little in the way of cross examination, and was not challenged on his position that he and he alone was the person who took the decision to terminate the claimant's assignment.

Submissions

34. In submissions, the claimant made reference to her skeleton argument which had previously been lodged. The claimant indicated that her grievances had not been dealt with and that the persons of contact who had been put in place were not reasonable or effective and that there was a conflict of interest in that Mr Hunter was involved in investigating incidents in relation to the claimant. The claimant's position was that she had not recorded or distributed the videos which were given as the reason for the termination of her assignment. She said that there was no investigation into whether there had been any damage done to the tape machine of her colleague. She also said that she had co-operated in investigations and that Ms MacDonald was treated more favourably than her. She said the reason she had refused to give Ms MacDonald's name was because Ms MacDonald's father had died and that she did not want to put her job in jeopardy.

35. The claimant also pointed to a picture on a facebook page where there were staff photographed making the shape of EDI4. She said that the people in this picture should have been similarly disciplined.

36. The claimant referred to the skeleton argument she had submitted. She also said that by not objecting to the proposed course of action of terminating her assignment, Mr Morrish and therefore the second respondent were putting pressure on the first respondent to take this action. She said that what they should have done was to satisfy themselves that sufficient investigations had been carried out to justify such a termination.

37. Both respondents provided detailed submissions in writing and spoke to the submissions. The second respondent's position was that the unchallenged evidence of Mr McIver should be accepted that it was his decision alone to terminate the claimant's assignment. It was said that even if the claimant's evidence regarding the conversation she had with Mr Hunter was accurate, Mr McIver's unchallenged evidence was such that there was only one conclusion open to the Tribunal in relation to the case against it. It was also said that the claimant's case against the second respondent had changed over time. The claim itself was not lodged until after the initial claim against the first respondent, it was initially said that there was an email which supported the claimant's allegations of third party pressure and that in any event it could not be said that doing nothing (in that Mr Morrish did not object) could amount to putting pressure on the first respondent to terminate the claimant's assignment.

38. Counsel for the first respondent made five key points to summarise their written submissions.

    a. The claimant had not established that she had been subjected to less favourable treatment than Ms MacDonald or any hypothetical comparator which could be constructed. The circumstances of Ms MacDonald were wholly different in that she had no involvement in the second video and had both co-operated during the investigation and shown remorse. It was said that there had been no evidence regarding

the picture of staff forming the shape of EDI4 and that in any event it appeared that this was an official photograph. Moreover, it was not something which had ever been brought to the attention of the first respondent to deal with. Further, it could not be said that the appointment of persons of contact could amount to less favourable treatment.

b. In considering the reason why the claimant had been treated in the way that she had [reference being made to **Efobi v Royal Mail** [2021] ICR 1263], the claimant had failed to provide any evidence that the termination of her assignment or the appointment of persons of contact was because of her disability. Even if the Tribunal were satisfied that the claimant had met the burden of demonstrating that, absent a reasonable explanation for the treatment, the treatment was because of her disability, the respondent had established perfectly reasonable explanations for their treatment of the claimant.

c. All of the evidence should be considered against the backdrop of the respondent having supported the claimant in that no action was taken against her in relation to previous incidents and as soon as the first respondent became aware of the claimant's condition, they took steps to support her.

d. On a factual basis, the claimant now accepted that persons of contact were put in place. The question of reasonableness was not relevant for those purposes and the claimant didn't raise any concern regarding the identity of the people until after she was suspended.

e. The Tribunal was finally reminded of the legal reasons why the claimant was ordered to pay a deposit in relation to her claims. In particular it was said that the claimant had failed to establish a provision, criterion or practice which put her at a disadvantage which would then place the first respondent under an obligation to make reasonable adjustments. It appeared that the claimant was saying that the disadvantage was that she did not have people to contact and the

reasonable adjustment was that people should be put in place for her to contact which could not be correct.

Discussion and decision

Did the termination of the claimant's assignment by the first respondent amount to less favourable treatment because of the claimant's disability in terms of section 13 EA?

39. The claimant relied upon Ms MacDonald in this regard as a comparator as Ms MacDonald was given a final written warning and not dismissed. However, Ms MacDonald was not a relevant comparator. It is well established that a relevant comparator's circumstances must not be materially different from that of a claimant for the purpose of assessing whether the claimant has been less favourably treated. Ms MacDonald was only involved in one of the videos in that she admitted filming it and putting it on her snapchat page. The claimant appeared in a video, and uploaded two videos to her facebook page. The respondent understood the claimant to have interfered with the tape machine of a colleague. The Tribunal found the claimant's argument that she had not technically uploaded the first video as it had been Ms MacDonald who shared the video initially on her Snapchat profile unconvincing. In any event, the respondent was entitled to conclude that the claimant posted two videos on her facebook page. She refused to say who had filmed the videos. She did not show remorse and left the investigatory interview before all the questions could be asked. In contrast, Ms MacDonald had only been involved in one video and she co-operated fully with the investigation and answered all the questions put to her. She also showed remorse for having breached the relevant policies.

40. The claimant did not put forward any facts which would allow the Tribunal to conclude that a hypothetical comparator would have been more favourably treated. While the claimant pointed to a picture from a facebook page where

people made the shape EDI4, to state the obvious, this was not a video. There was no evidence led as to who had taken the picture, whether it was official or not and there was no suggestion that anyone had been disciplined as a result. It was not the personal facebook page of someone who worked at the second respondent's premises. The first respondent had not been asked to deal with the issue.

41. In any event even if it could be said that the Tribunal had enough information to consider the claimant's treatment compared with a hypothetical comparator, the Tribunal was satisfied that the claimant was not treated less favourably. The claimant had clearly breached both the terms of her contract with first respondent (by not co-operating in an investigation) and by uploading two separate videos to her personal facebook page. Further, rather than apologise, she simply sought to argue that she hadn't uploaded the videos. In addition, the claimant had already been involved in a number of incidents in recent months and had failed to attend for work on two occasions. The Tribunal was satisfied that the reason why the claimant was treated the way in which she was in terminating her assignment with the second respondent was that she had breached the policies, did not engage fully with the investigation which was conducted and had not shown any remorse for doing so.

42. The claimant argued that her treatment was not 'fair' and that the respondent did not follow the correct procedures. While the first respondent could have acted differently in how the claimant was treated, for instance by seeking to reconvene an investigatory meeting, or by following their own policies more closely, this would have been more relevant if the claimant was claiming that she had been unfairly dismissed. The claimant did not however have sufficient service to make such a claim. It may be open to a Tribunal to draw an inference from 'unfair' treatment of an employee if it is so unreasonable that it raises a question in the Tribunal's mind as to whether the reason for the claimant's treatment is because of a protected characteristic. However, in the present case, the Tribunal did not conclude that the claimant's treatment was so unreasonable as to suggest that there was a discriminatory reason for her

treatment. The Tribunal accepted the reason for the claimant's treatment was the reason put forward by the first respondent.

43. In these circumstances, the Tribunal was satisfied that the claimant was not treated less favourably than a person without her protected characteristic was or would have been treated and that the claimant's assignment was terminated because of her conduct in relation to the breaches of the second respondent's policies, her failure to fully engage in the investigatory process and failure to recognise that her conduct had been unacceptable.

Did the second respondent directly discriminate against the claimant by exerting pressure on the first respondent to terminate the claimant's assignment with them?

44. There was no evidence whatsoever to substantiate this claim. Mr McIver took the decision to terminate the claimant's assignment. The lack of objection to that course of action by Mr Morrish did not amount to pressure. Mr McIver told Mr Morrish what course of action he was proposing to take in relation to both the claimant and Ms MacDonald. There was no evidence from which the Tribunal could deduce that the claimant was subjected to less favourable treatment than an actual or hypothetical comparator. In any event, there was no evidence to suggest that Mr Morrish was aware that the claimant was a disabled person. Whether or not Mr Hunter told the claimant that 'his hands were tied' or 'it was Amazon's decision' was nothing to the point. Mr McIver's unchallenged evidence was that he took the decision. The second respondent did not exert any pressure whatsoever.

Did the first respondent directly discriminate against the claimant by failing to appoint a person of contact for her?

45. The Tribunal found it very difficult to understand what claim the claimant was making in this respect. There was no evidence about any comparator and in any event the claimant accepted that both Mr Hunter and Mr MacLeod were appointed for her to contact if she felt that her condition was likely to be

triggered. There was no less favourable treatment whatsoever in this regard. The claim was therefore bound to fail.

Did the first respondent's failure to appoint a person of contact amount to a failure to make a reasonable adjustment in terms of sections 20 and 21 EA?

46. The claimant conceded in evidence that Mr Hunter and Mr MacLeod were appointed for her to contact. On that basis her claim was bound to fail. If it could be said that the claimant's claim was that the reasonable adjustment required was that the person of contact must be acceptable to her, she did not seek to amend her claim in that respect. Even if the Tribunal had allowed the claimant to amend her claim during the proceedings in this regard, the claim was bound to fail. The claimant did not lead any evidence whatsoever to establish a provision, criterion or practice ('PCP') which put her at a substantial disadvantage. It may be that she was seeking to argue that the PCP was the failure to provide her with a person of contact. However, that was also the adjustment she was seeking, and it could not as a matter of logic also amount to the PCP. Even if it could be said that the PCP and the reasonable adjustment could be the same, the respondent put in place the adjustment sought. While the claimant sought to argue that the adjustment was not reasonable as the individuals concerned had 'a conflict of interest', there was no evidence to suggest this was the case. Moreover, the claimant did not raise this at the time she was informed who was being appointed. While she made a reference to not being comfortable with the individuals who were appointed in her grievance which was lodged after her suspension, this could not found a claim of a failure to make a reasonable adjustment by the first respondent. Having failed to establish a PCP, the claimant's claim falls at the first hurdle. The Tribunal was also very confused as to how the claimant could advance such a claim when she admitted that she had been given points of contact. Her claim in this regard was also bound to fail.

47. In all these circumstances, the Tribunal concluded that the claimant had not been subjected to any discriminatory treatment by either the first or second respondent and the first respondent had not been under a duty to make reasonable adjustments in respect of the claimant.

Employment Judge: Amanda Jones
Date of Judgment: 29 June 2022
Entered in register: 29 June 2022
and copied to parties