



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr Declan Sweeney

J W Hughes Building Construction Limited

Heard at: Watford Employment Tribunal

On: 6-8 June 2022

Before: Employment Judge Allen; Mrs J Hancock & Mr S Holford

Appearances

For the Claimant: Mr Whitehouse (Solicitor)

For the Respondent: Mr England (Counsel)

JUDGMENT

Wages and holiday pay claims were withdrawn by the Claimant at the beginning of the hearing and are dismissed.

The Claimant's claims for disability discrimination under Ss 13, 15, 19, 20 & 21 are not well founded and are dismissed.

Reasons

Referred to in these reasons are the following employees of the Respondent

TT - Contracts manager and Claimant's line manager - live witness during the hearing

FB - Construction Director - live witness during the hearing

MK - Contracts Manager - live witness during the hearing

JH - Senior officer of the company which bears his name - did not give evidence or make a statement

CL - Construction Assistant - did not give evidence or make a statement

FINDINGS OF FACT

- 1) The Respondent is a construction firm with a turnover of £8,000,000 per year specialising in the building and development of commercial and residential properties.
- 2) The Claimant was employed as a project manager by the Respondent between 29 June and 10 July 2020.
- 3) The Claimant is a man in his 40's who has worked in construction for over 20 years with a BSc in construction management, site management safety training and CSCS level degree.
- 4) The Claimant is disabled in accordance with the terms of the disability act, by reason of atypical facial pain (neuralgia) and occipital neuralgia. The Claimant described in detail how a flare-up develops during his oral evidence:

'I have to get home, I feel it come on, let people know it's coming on, I let people know it's going to get stronger in the next couple of hours'

- 5) The Claimant was continuously certified unfit for work between 21 August 2019 until 30 June 2020.
- 6) In 2020 the Respondent was looking to recruit a project manager to manage one of their 3 sites and interviewed a number of candidates, including the Claimant.
- 7) The Claimant was offered the job in writing on 23 March 2020, and the Tribunal takes judicial notice of the fact, that was the same day the government announced the country would be going into lock down on 26 March 2020.
- 8) The Claimant impressed the Respondent, was engaged and commenced employment on 29 June 2020. We heard evidence on the reason for the delay in commencement. The engagement letter of 23 March states:

'firm date for commencement could not be established' (due to covid measures).

The letter went on to say

'We understand that you have works stability at present'

In his statement and oral evidence FB was quite clear the Claimant informed him

'he would not be available to start for an extended period. Because he was on a problematic project and he didn't want to leave his current employer in a compromising position without having sufficient time to organise cover for him leaving. He therefore stated he wouldn't be able to start for a further six weeks.'

We also heard from the Claimant that he did indeed inform the Respondent he was in employment when he was not, as he felt if it was known he was certificated unfit for work it might affect his candidacy.

It is significant that his stated commitment to the fictitious employer increased his value to the Respondent, made the company even more keen to hire him and prepared to wait for him to become available.

- 9) We heard that the Claimant was recruited for the Respondent's Earls Court site. We do not accept the Claimant's assertion that he was recruited for another site and was helping out on the Earls Court site until the other site was ready. The Respondent was very clear they only had 3 sites and there was no other in the pipeline.
- 10) The Claimant was recruited as project manager to oversee, manage, and run all elements of the project and site, and to ensure that staff were adhering to health and safety obligations and method statements. We accept the Respondent's evidence that construction sites are very dangerous places and if something were to go wrong, such as something falling, the outcome could be devastating. These things were the project manager's responsibility and health and safety is one of the most important functions of the project manager. The project manager ensures that works get done in the right way and that the right method is used. He directs everyone to make sure they are in the right place, doing the right thing and makes sure that the equipment is safe to do the work safely. Everyday a project manager would be required to make sure all personnel are signed in and any new personnel inducted to the site, ensure any tasks being done by the operatives are done in the correct method, following the RAMS documents, any safety checks and subsequent paperwork is filled out. Liaising with external contractors and consultants, ensuring all operatives are wearing the correct PPE, etc.
- 11) The Earls Court site was an 'airspace' scheme; which means the Respondent was adding a new floor above an existing building; with steel beams and scaffolding in place to ensure it will be secure. Such a scheme entailed particular risks to the residents of the building, passers-by and workers on site. In the circumstances Health and Safety was of paramount importance.
- 12) On 29 June 2020 the Respondent went through induction procedures, including an equal opportunities recruitment monitoring form, which has been marked at the 'disability' question that the Claimant was not disabled. We note that the Claimant asserted this evidence could not be relied upon because he had neither signed nor dated the form, however, he did not deny completing it and TT, the Claimant's line manager, asserted in his statement that the form was completed during the induction.
- 13) At Para 19 of TT's statement he describes concerns about the Claimant's performance on 1 July 2020. TT had to keep correcting the Claimant, who was giving out incorrect information and was interrupting during a meeting. After the meeting he raised his concerns with the Claimant. This evidence was unchallenged by the Claimant. The tribunal questions whether it is significant the Claimant went sick the following day.
- 14) On 2 July 2020 the Claimant was unwell and did not attend for work. It is accepted by all that he did not inform his line manager, TT, that he would be absent.
- 15) On 2 July the site foreman informed TT that the Claimant had not arrived at 7:30 and was still absent at 8:30. TT was not initially concerned, assumed he may have been delayed due to transport issues and would be arriving shortly.

- 16) A number of the Respondent's managers tried to call the Claimant from 8:30am onwards and TT commented that the Claimant's phone was not switched off, which if it had been, would have given him cause for concern.
- 17) We note that the Claimant did send a text to CL who was described by FB as a construction assistant. CL was deployed to a different site at the time. The message that the Claimant was unwell and unable to attend then passed through a number of hands before it reached TT. We heard no evidence as to when that text was sent but TT sent one to the Claimant at 9:32am which, among other things enquired if he would be in the following day and referred to the message sent to CL.
- 18) At that point TT concluded the Claimant would not be in and 'paused' the site [meaning all work was halted]. He then made arrangements to redirect himself to the Earls Court site and arrived between 11 and 11:30am. The site had to be paused for health and safety issues because there was no site supervisor there to ensure it was being operated safely, in line with H & S legislation and regulations.
- 19) We reject the Claimant's assertion that CL was a project manager based at the Earls Court site and able to take responsibility for H & S on the site. Given CL was described as a construction assistant by the Respondent's witnesses, responsible for among other things collecting materials, we conclude it is more likely than not the Claimant is mistaken. If this were correct TT would not have made arrangements to cover the site himself on any of the days the Claimant was absent.
- 20) Nothing was heard from the Claimant until 6:07am on Monday 6 July (when he sent a text to TT) that he would be into work that day and he states he will contact TT if ill again. We heard from the Claimant in oral evidence that he had seen the missed calls from 3 of the Respondent's employees on Sunday, TT, FB and CL. He said that he chose not to reply or return calls as he preferred to explain "man to man" on Monday why he was absent.
- 21) We heard from TT that he and FB attended the Earls Court site on 6 July, because they had not heard from the Claimant before 6:07am that day, by which time they had already changed their diaries on the assumption he would not be in.
- 22) Later that day TT and FB held a return-to-work interview with the Claimant. We saw a RETURN-TO-WORK interview sheet, completed by hand by TT, in which he records the reason for absence was vomiting and diarrhoea. Also recorded is that TT thought the reason for absence might be that the job was beyond the Claimant's capabilities, given his performance the week before. The Claimant assured him any issues were due to new environment and new procedures, apologised for not reporting absence and said he understands the reporting requirement.
- 23) The Claimant gave oral and statement evidence that he did disclose his disability during this meeting. We do not find the Claimant a credible witness on this point.
- 24) We heard evidence from FB that he observed issues with the Claimant's performance; specifically, as regarded drawings and the placement of windows.
- 25) On 9 July the Claimant was absent and, again did not report it to management. Unsuccessful attempts were made to contact him by phone. TT again rearranged his commitments and covered the site.
- 26) On 10 July TT attended the site on the assumption that, in the absence of contact from the Claimant, the site would again be uncovered by management. To his surprise the Claimant did attend. He spoke briefly to the Claimant who told him he had not attended on 9 July for personal reasons.

- 27) TT and FB held a return-to-work interview and the Claimant repeated that he had not attended for personal reasons. We note the Claimant's statement and oral evidence are inconsistent on whether the meeting took place at all.
- 28) Notes of RETURN-TO-WORK interview record:
- a) The reason for absence was 'personal reasons';
 - b) Reminded the claimant a 2nd time about the reporting lines; also
 - c) Repeats TT is very worried that Claimant is not up to the role and there will be an accident on site.
- 29) The Claimant says in his statement that his disabilities were discussed, but in live evidence he said not, and that they had been discussed at the previous meeting.
- 30) TT then had a discussion with MK, who in turn had a discussion with JH. The decision was to dismiss the Claimant.
- 31) Later that day TT informed the Claimant that he was dismissed. He added the final paragraph to the same Return To Work form explaining that there was no other option than to dismiss.
- 32) 14 July 2020 MK wrote to the Claimant setting out the reasons for dismissal which states:
- 'my associates report that, following 2-day period of unplanned absence week commencing 29th June 2020, reporting lines were reiterated for the communication of such absence from work. Further unauthorised absence ensued week commencing 6th July 2020 and the reporting lines previously detailed remained unobserved.'*
- 33) The 3rd paragraph of the same letter states:
- 'Absences within such a short period of time raised concerns.*
- Which were compounded by misdirected communications.'*
- 34) The second statement could have 2 interpretations. Having also reviewed MK's email of 16 July we conclude that it means inconsistent directions to workers on site.
- 35) On 16 July the Claimant responded to MK, disclosed his disability and stated:
- '... I'd like to add the reason I was sick on those days was due to me having occipital neuralgia and atypical facial pain which I get flare ups every now and then. These are chronic diseases and something I can't help; however, I want to work. Therefore, is it possible to appeal the decision at this time?'*
- 36) We conclude that the underscored words above make it more likely than not this was the first occasion the Claimant had disclosed his disability to anyone in the company.
- 37) MK responded later that same day. Significantly he says:
- 'Thank you for explaining your condition and I sincerely sympathise with your suffering. However, as this complaint is reoccurring and can affect your performance at work, we would politely question why this was not brought to our attention in line with your appointment?'*
- 'Nevertheless, your illness has no bearing on your dismissal, rather the questions raised concerning your taking direction, following protocol and imparting inconsistent information.'*

'We fully appreciate that you wish to work and we are apologetic for this situation, but as we have concluded that you do not possess the attributes that we are searching for to support the roll, we do not feel it would be fair for either party to continue with your employment.'

38) During the hearing the Claimant was asked if he took any further action on receipt of this email and he was clear he did not. MK confirmed that he did not hear again from the Claimant until this became the subject of proceedings.

39) On 12 August 2020 MK wrote in response to the Claimant's solicitors' letter of 10 August. In which he stated:

'You were informed by your client that on 6th July 2020 he informed the company that he suffers from a number of serious medical conditions that have a substantial adverse effect on his ability to carry out normal day to day activities this statement is incorrect. At no time prior or during your client's appointment did he relay information concerning his medical conditions to the company or any of its management team.'

'If your client had explained this condition on 6 July or during either of his back to work interviews, the matter would have been appropriately recorded and there would be little need for him to "like to add" these details subsequently.'

'a back to work interview was conducted and records made on Monday 6 July by TT, contracts manager.'

'.....on Friday 10th July a further back to work interview was conducted by TT, contracts manager.'

'a request to appeal our decision was received from your client via e-mail on the 16th of July..... the application was strongly considered by our management team but was subsequently declined due to your client's inability to take direction and follow protocol, thus compromising the health and safety of other site personnel. This information was imparted within the e-mail response by Mike 16th July 2020, as noted within your correspondence.'

40) We accept that the reasons for absence on all 3 days was disability.

41) The unfavourable treatment claimed by the Claimant was unfair dismissal and refusal to hear an appeal.

42) The contract of employment specifically excludes the company's disciplinary and capability policies during the probationary period.

43) Given the Claimant's concerted efforts to conceal the fact he had been signed off by his GP as unfit to work for a prolonged period; and present himself as in employment; it is more likely than not that had the Respondent made enquiry into potential disability the Claimant would have continued to conceal it. TT and FB identified that there were concerns about performance but given the reasons the claimant put forward to explain his absences there was insufficient information for the Respondent to conclude there was a disability issue to be explored.

44) The tribunal was referred to the following case law:

Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18

Stott v Ralli Ltd 2022 IRLR 148, EAT,

And IDS handbooks Volume 4 Chapter16 paragraphs 4-6 and Chapter 20 paragraph 20.51

CONCLUSION

- 45) Issue - was the Claimant a disabled person? - Yes the tribunal had no difficulty concluding the Claimant was disabled within the meaning of statute and this was also conceded by the Respondent in correspondence in September 2021.
- 46) Issue - Section 13 Equality Act 2010 (EqA) - Was the dismissal less favourable treatment than would have been applied to hypothetical comparators in not materially different circumstances; namely a person with 2 instances of unreported absence comprising 3 days in the first 2 weeks of employment?

It is not disputed that the Claimant was dismissed. We are satisfied that the Claimant was not dismissed because of his disability. The Respondent would have dismissed any employee in the same circumstances. On the date that decision was made the Respondent had no knowledge of the disability.

- 47) Issue - Section 15 EqA - something arising as a consequence of the disability namely:
- 3 days sickness absence on 2, 3 and 9 July 2020. As stated above the tribunal concluded the 3 days of absence was something arising from the Claimant's disability.
 - Poor performance, in the sense of not contacting the Respondent to advise them of absence. The Claimant's argument is that, in consequence of his disability, he was unable to contact the Respondent to advise them of his absence.

We heard evidence from the Claimant at para 4 above that as the flare-up progressed there was a window in which he could have notified the Respondent that he was becoming unwell. We conclude that TT would not have objected if that notice had come in time for him to rearrange his commitments, even if it had been the middle of the night, he says as much in the 2nd RETURN-TO-WORK interview.

Disability related absence was not the reason for the Claimant's dismissal; poor performance was but that did not arise from the disability. We are satisfied that, on the day the Claimant was dismissed, the Respondent was unaware of the disability. We have rejected the Claimant's evidence that he disclosed at the back to work meeting on 6 July or at any other time before dismissal, that he was disabled.

- 48) Issue - refusal to consider an appeal.
- a) Not stated in the issues at the case management hearing but raised since and disclosed in documents available to the Respondent well before today's hearing, was the issue of the refusal to grant the appeal. The Claimant asserts this is part and parcel of the dismissal.
 - b) There was no unfairness to the Respondent in hearing the claim as regards the refusal to grant an appeal as this was included in the documents disclosed well before the hearing. We are satisfied this case is different from the Baldeh case where there was no mention of disability until it was raised during the appeal hearing itself, that's not the case here.
 - c) Rejection of the request for appeal could be construed as unfavourable treatment.

- d) It is not disputed that the Claimant raised his disability on 16 July 2020, at the same time he asked for an appeal.
 - e) We heard evidence that the Respondent considered the disability before they rejected the request for appeal.
- 49) Issue - Section 15 EqA - something arising as a consequence of the disability in respect of the refusal to hear an appeal.
- a) The something arising would be the disability related absences, however, the decision to dismiss was based on conduct and performance none of which was disability related since we did not accept the Claimant's evidence that it was his disability which prevented him from reporting his absence, as required. The Respondent did give serious consideration to hearing an appeal, before rejecting it.
 - b) The refusal to hear an appeal was not in our view unfavourable treatment because of something arising from a disability. In our view, given the contract terms regarding probation, the Respondent would have refused to consider an appeal from any employee with such conduct and performance issues during probation and said "*due to your client's inability to take direction and follow protocol, thus compromising the health and safety of other site personnel.*"
 - c) We distinguish this case from Baldeh in that her performance issues arose from disability in that her communications were coloured by her depression. We've rejected the Claimant's argument that failure to report was disability related; and there has never been any suggestion that his poor performance on site was disability related.
 - d) We are satisfied that the Respondent has provided justification for the decision to dismiss (of which the appeal was a part) namely it was a proportionate means of achieving the legitimate aim of ensuring that a project manager was present at the site, for health and safety reasons and ensuring that a project manager was present at the site, for business reasons to enable the smooth running of the activities on the site.
- 50) Issue - reasonable adjustments Sections 20 & 21 EqA - do not arise as the Respondent did not have the requisite knowledge until after dismissal.
- 51) Issue - Section 19 EqA - did the Respondent apply a Provision, Criterion or Practice (PCP) to the Claimant which was discriminatory in relation to a relevant protected characteristic of the claimant?

Section 136 EqA, which applies to any proceedings brought under the Act, requires the Claimant to show 'prima facie evidence' from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of discrimination. S.136 goes on to provide that, once the Claimant has shown a prima facie case, the tribunal is obliged to uphold the claim of discrimination unless the Respondent can show that no discrimination occurred.

Under Section 19.2 the Claimant is required to establish elements a-c, before the Respondent is required to establish d. S19.2 a-c are:

- a) The Respondent applies, or would apply, it [the PCP] to persons with whom the Claimant does not share the characteristic,

- b) The Respondent puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share it,
- c) The Respondent puts, or would put, the claimant at that disadvantage, and
- d) The Respondent cannot show it to be a proportionate means of achieving a legitimate aim.

It is for the Claimant to identify the PCP which he says put him at a disadvantage. Failure to do so could defeat what would otherwise be a good claim. PCPs include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions.

The claimant identifies the following as PCPs applied to him:

- i) The disciplinary and dismissal policies, in particular the PCP, to refuse to consider the effects of an employee's illness on his attendance and, performance, before making any disciplinary decisions.

We heard no evidence that there was any PCP that refused to consider the effects of an employee's illness on his attendance and or performance before making any disciplinary decisions in this case.

- ii) The sickness absence policies and procedures, in particular the PCP to dismiss without procedure, any employee that is absent from work or is unable to communicate with the Respondent due to the effects of an illness.

We heard no evidence that this was a part of the sickness absence policy and procedures.

- iii) The PCP of disapplying the policies and procedures to probationary employees.

It is common ground that the contract specifically excludes the discipline and capability procedures during probation.

We conclude that notwithstanding what it says in the contract the actual practice of the employer was to go through a disciplinary and capability process which for a small company without HR support was a fair and reasonable process. We heard evidence that the Respondent actually identified issues of conduct and performance with the Claimant; allowed time for him to improve, and offered support which he refused. We also heard evidence that, had the Claimant disclosed disability earlier, the Respondent would have considered if reasonable adjustments could and should be made.

52) Issue - did the Respondent apply the PCP(s) to the Claimant - no it did not.

53) Issue - did the Respondent apply or would it have applied the PCP to people with the Claimant's disabilities - No; we conclude the procedure followed by the Respondent in the back to work interviews is evidence that it would have treated any employee in the same way.

54) Issue - Did the PCPs put people with the Claimant's disabilities at one or more particular disadvantages, when compared with people without the Claimant's disabilities, in that -

the group is more susceptible to be dismissed, because they are more likely to have time off because of sickness; are more likely to be unable to contact the Respondent and all are more likely to have time off within their probationary period.

The evidence we heard was that the issue was not the absences themselves, but the failure to report and we were satisfied that the Claimant could have reported.

55) Issue - Did the PCPs put the Claimant at that/those disadvantages at any relevant time answer - no for the reasons already discussed above.

56) Issue - If so, has the Respondent shown the PCPs to be a proportionate means?

We are satisfied that the Claimant has failed to discharge its burden of proof on the first three points so this point does not arise.

Employment Judge Allen

Date: 28 June 2022.

Sent to the parties on: 30 June 2022

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For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.