



EMPLOYMENT TRIBUNALS

Claimant Respondent
Natalie Cope v **Razzle Dazzle Costumes Limited**

Heard at: Birmingham (hybrid) **On:** 22 and 23 September 2022

Before: Employment Judge Wedderspoon

Members : Mr. Forward
Ms. Stewart

Representation:

Claimant: In Person

Respondents: Mr. Tidy, Litigation Consultant

JUDGMENT

1. The claim for unfair dismissal is well founded and succeeds.
2. The claim for wrongful dismissal is well founded and succeeds.
3. The claimant was a disabled person at all material times.
4. The claim of discrimination arising from disability is not well founded and is dismissed.
5. The claimant is awarded £7,448.96 in total :-
 - (a)£2,880 basic award;
 - (b)Loss of statutory rights of £500;
 - (c)Notice payment of £1,920
 - (d)Loss of earnings £2,148.96 (gross).

REASONS

6. By claim form dated 1 November 2021 the claimant brought complaints of unfair dismissal, wrongful dismissal and disability discrimination. ACAS was notified on 20 September 2021 and the ACAS certificate is dated 1 November 2021. The list of issues were identified at a Preliminary hearing on 14 April 2022 as follows :-

Claims and Issues

Unfair Dismissal

(1)Was the claimant dismissed ? The respondent denies dismissal. The claimant contends that whatever occurred between her and the respondent on 8/9 September 2021 was misinterpreted by the respondent;

(2) If the claimant was dismissed what was the reason for dismissal? The claimant considers that dismissal was due to the respondent's concerns that she would need time off due to her disability. Clearly if that were the case the dismissal would be unfair.

(3) If the dismissal was unfair did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities that the claimant actually committed the misconduct alleged.

Wrongful dismissal

(1) If the claimant was dismissed what was the claimant's period of notice?

(2) Was the claimant paid for that notice period ?

(3) If not was the claimant guilty of gross misconduct or did she do something so serious that the respondent was entitled to dismiss without notice ?

Disability

Did the claimant have a disability as defined in s.6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide

(a) It is not in dispute that the claimant has undergone a colostomy.

(b) Did it have a substantial adverse effect on the claimant's ability to carry out day-to-day activities?

(c) Did not did the claimant have medical treatment including medication or take other measures to treat or correct the impairment?

(d) Would the impairment have had a substantial adverse effect on her ability to carry out day to day activities without the treatment or other measures?

(e) Are the effects of the impairment long term?

(a) Discrimination arising from disability

(1) It is not in dispute that had the respondent dismissed the claimant that would have been unfavourable treatment;

(2) Did the following things arise in consequence of the claimant's disability?

The claimant's case is that the respondent had concerns about possible future sickness absence by her

(3) Did the respondent dismiss the claimant because of those concerns

(4) Was the treatment a proportionate means of achieving a legitimate aim

(5) The Tribunal will decide in particular :

(a) Was the treatment an appropriate and reasonably necessary way to achieve those aims;

(b) Could something less discriminatory have been done instead

(c) How should the needs of the claimant and the respondent be balanced?

(d) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability ? From what date?

Remedy unfair dismissal

1.1 The claimant does not wish to be reinstated or to be re-engaged

1.2 What basic award is payable to the claimant if any

1.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so to what extent?

1.4 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.4.1 What financial losses has the dismissal caused the claimant?

- 1.4.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 1.4.3 If not, for what period of loss should the claimant be compensated?
- 1.4.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 1.4.5 If so, should the claimant's compensation be reduced? By how much?
- 1.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 1.4.7 Did the respondent or the claimant unreasonably fail to comply with it ?
- 1.4.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 1.4.9 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 1.4.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 1.4.11 Does the statutory cap of fifty-two weeks' pay or £89,493 apply?

2. Remedy for discrimination or victimisation

- 2.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 2.2 What financial losses has the discrimination caused the claimant?
- 2.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 2.4 If not, for what period of loss should the claimant be compensated?
- 2.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 2.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 2.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?
- 2.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 2.9 Did the respondent or the claimant unreasonably fail to comply with it ?
- 2.10 If so is it just and equitable to increase or decrease any award payable to the claimant?
- 2.11 By what proportion, up to 25%?
- 2.12 Should interest be awarded? How much?

The hearing

7. The Tribunal was provided with an electronic bundle of 78 pages. The claimant gave evidence. The respondent called two witnesses, Ken Parker and Keri Edwards.
8. The Tribunal read the witness statements and hearing bundle prior to the commencement of the evidence.

The Law

9. Where an employee has used unambiguous words to resign their employment, they cannot say they did not mean what they appeared to mean. In **Denham v United Glass Limited EAT 581/98** the EAT found that the claimant had resigned in clear and unambiguous terms. What the EAT went on to say is that it is only where there is doubt as to whether the employee intended to resign that the Tribunal can go on to consider whether there were special circumstances. In the case of **Sovereign House Security Limited v Savage (1989) IRLR 115** it was held unambiguous words of resignation spoken in the heat of the moment did not necessarily amount to a resignation; an employee should be given an opportunity to satisfy the recipient that he did not intend to bring the employment relationship to an end. In the case of **Willoughby v CF Capital plc (2012) ICR 1038** before accepting an employee's resignation the employer should satisfy himself whether the giver of the notice really intended to give notice of resignation. Notice given orally in the heat of the moment by words may quickly be regretted. An employer is advised to allow a cooling off period. Further in **Kwik Fit (GB) Limited v Lineham (1992) ICR 183** it was held a prudent employer would allow a reasonable period of time to elapse before accepting a supposed resignation. The length of time that is reasonable for a prudent employer to wait before accepting a supposed resignation is a question of fact for the Tribunal.

Contributory Fault

10. Pursuant to section 123 (6) of the Employment Rights Act 1996 the Employment Tribunal may reduce the compensatory award where it considers it to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action by the employer. The starting point is to consider whether the claimant had been guilty of "blameworthy conduct" (**Nelson v BBC (No. 2)**). The next stage is to consider whether the blameworthy conduct contributed to or caused the dismissal. If so the Tribunal should consider to what extent the blameworthy conduct contributed to or caused the dismissal and apply the appropriate deduction to compensation.

Wrongful dismissal

11. If the respondent establishes that the claimant was guilty of an act of gross misconduct, it is entitled to dismiss the employee without notice. The Tribunal is to determine on the evidence whether the claimant did commit an act of gross misconduct. If he did not he is entitled to be paid notice.

Disability

12. For the purposes of section 6 of the Equality Act 2010 (EqA) a person is said to have a disability if they meet the following definition :
*“A person (P) has a disability if –
(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long term adverse effect on P’s ability to carry out normal day to day activities.”*
13. The burden of proof lies with the claimant to prove that she is a disabled person in accordance with that definition.
14. The term “substantial” is defined at section 212 as “*more than minor or trivial*”. Normal day to day activities are things people do on regular basis including shopping, reading and writing, having a conversation, getting washed and dressed preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, socialising (see D2 to D9 of the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011).
15. Further clarity is provided at Schedule 1 which explains at paragraph 2 :
*“(1) The effect of an impairment is long term if –
(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.
(2) If an impairment ceases to have a substantial adverse effect on a person’s ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.”*
16. Likely should be interpreted as meaning “it could well happen” rather than it is more probable than not it will happen; see **SCA Packaging Limited v Boyle (2009) ICR 1056**. In the case of **Patel v Metropolitan Borough Council (2010) IRLR 280** the EAT stated that the issue of whether the effect of an impairment is long term may be determined retrospectively or prospectively. A claimant must meet the definition of disability as at the date of the alleged discrimination.
17. In the case of **Nissa v Waverly Education Foundation Limited UKEAT/0135/18** a warning was given not to concentrate solely on a diagnosis which will be relevant but not determinative. HHJ Eady stated “*the correct question was to consider what the effects of the impairments were at the material time and to consider whether there was information before the ET which showed that viewed at that time it could well happen that the effects of the impairments would last for more than 12 months.*”
18. As to the effect of medical treatment, paragraph 5 provides :-
*(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if- (a) measures are being taken to treat or correct it and (b) but for that it would be likely to have that effect.
(2) Measures include in particular medical treatment..”*

19. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" The guidance should not be taken too literally and used as a check list (see **Leonard v Southern Derbyshire Chamber of Commerce (2001) IRLR 19**).

20. Some guidance is given in paragraph B1 as to the meaning of "Substantial adverse effects" namely

"The requirement that an adverse effect on normal day to day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect."

Burden of proof

21. Section 136 (2) and (3) of the Equality Act 2010 states

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the Court must hold that the contravention occurred; (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efobi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

22. To establish a prima facie case, the Claimant has to show that she was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination'.

(Madarassy v Nomura International plc [2007] ICR 867 at [56] per Mummery LJ)

23. Pursuant to section 15 of the Equality Act 2010 "a person A discriminates against a disabled person B if (a) A treats B unfavourably because of something arises in consequence of B's disability and (b) A can not show that the treatment is a proportionate means of achieving a legitimate aim.

24. Under section 15 there is no requirement for a claimant to identify a comparator. The question is whether there has been unfavourable treatment : the placing of a hurdle in front of or creating a particular difficulty for or disadvantaging a person (see **Trustees of Swansea University Pension and Assurance Scheme & Anor v Williams UKEAT/0415/14**). It is a question for the Tribunal to determine what unfavourable treatment is. In the case of **Charlesworth v Dransfields Engineering Services Limited (UKEAT/0197/16)** it was held that section 15 EqA requires unfavourable treatment to be because of something arising in consequence of the disabled person's disability. If the something is the effective cause an influence or cause that operated on the mind of the alleged discriminator to a sufficient extent whether consciously or unconsciously the causal test is satisfied.

The issue of disability

25. The respondent disputed that the claimant was a disabled person at all material times. The respondent contended there was insufficient information provided by the claimant to establish the effect on everyday activities.

26. There is no dispute that the claimant underwent a colostomy. The Tribunal accepted the oral evidence of the claimant that this affected her physical and mental health. When she had conversations with others she became anxious and worried. She was concerned that others would be aware of her stoma bag. As a result she had difficulty getting out of bed in the morning. She suffered panic attacks and was conscious that people knew about her stoma bag. She struggled to eat and lost 3 stone in weight. The claimant had to adjust her diet to avoid eating foods which took longer to digest. She was unable to drive for several months.

27. The Tribunal determined having heard all of the evidence that at all material times the claimant was disabled within the meaning of section 6 of the Equality Act 2010. The medical evidence of dated 25 February 2022 referred to the fact that the claimant had "a physical disability since 2020 and required surgery to give her a colostomy". It further stated that this was a difficult situation to cope with and more so when it happens in an emergency. The medical report referred to the fact that the claimant's condition lasted for well over a year and continued to give the claimant quite a lot of difficulties which required her being given sick notes.

28. The claimant had a physical impairment which required her to have a stoma bag. This was a measure to deal with her physical impairment. Consequent upon the stoma bag measure the claimant had a mental impairment including anxiety and panic attacks as a result of a heightened concern about people being aware of her stoma bag.

29. The physical and mental effects of her impairment lasted for or were likely to last more than 12 months. The stoma bag was a form of treatment from her

initial physical issues. Following the stoma bag, the claimant had to modify her diet as a measure to correct the impairment. In the absence of the stoma bag and the measures the claimant adopted the Tribunal concluded that the claimant would not have been able to function as well including being able to attend work. The stoma bag consequently affected her mental health which meant the claimant struggled to get out of bed in the morning, suffered panic attacks and general anxiety. The physical and mental impairments lasted and were likely to last for more than 12 months and had a more than minor effect on her everyday activities.

Facts

30. There was a significant dispute of fact between the parties. The Tribunal has resolved these issues by considering what is the most likely than not to have occurred and/or been said.
31. From 8 January 2017 the claimant was employed by the respondent as a factory/supervisor cutter. The claimant had enjoyed a good working relationship with Mrs. Parker (now deceased) who was the wife of Mr. Ken Parker, owner of the business. This is evidenced by the text messages between them from pages 52 to 61 of the bundle when the claimant was in hospital undergoing treatment. Mrs. Parker was empathetic towards the claimant's situation. Mrs. Parker too was undergoing health issues and treatment for her health at this time.
32. A colleague of the claimant's, Sam, resigned in the summer of 2021 (page 62) alleging that the claimant was a bully. This was in the context that the claimant and Sam had fallen out at work.
33. On 31 August 2021 the claimant was informed by the respondent that she had been accused of being a bully by Sam (page 63). The claimant said she had not done anything to upset a colleague and refuted any suggestion she had bullied her colleague. The claimant stated that if she was made to work with Sam, she would have to go on sick leave. Mr. Parker informed the claimant she should remain professional and that both the claimant and Sam were assets to the business. The claimant agreed to be supportive and stay committed to get through a difficult situation.
34. On 8 September 2020 the claimant requested a further meeting with the Parkers. A meeting took place between the claimant and Mr. and Mrs. Parker and at this meeting the claimant threatened to resign if things were not sorted. There is a dispute of fact as to what the claimant actually said to the Parkers. The Tribunal finds on the balance of probabilities that the claimant did not actually resign at the meeting but threatened to resign. The Tribunal did not find that the notes of this meeting accurately represented the exchange between the parties and the claimant did not sign the meeting note prepared by the respondent. Mr. Parker reassured the claimant at the meeting that he would sort things out. The Tribunal found that the claimant was anxious about bullying allegations made against her. Further the Tribunal found that Mr. Parker recognised that an ongoing dispute between colleagues in a workplace could be difficult for the business.

35. On 9 September 2020 the claimant was in an anxious state and telephoned the office to speak to Mrs. Lorna Parker. The claimant was upset with the situation at work concerning her colleague Sam. Mrs. Parker was at a hospital appointment and Keri Edwards informed the claimant that Mrs. Parker was unavailable to chat to the claimant.
36. The Tribunal found that the claimant's anxiety increased when she could not contact Mrs. Parker and her anxiety was intensified by a leak to her stoma bag. Although Keri Edwards disputed that the claimant's stoma bag had burst as there was no apparent evidence of this, the Tribunal accepted on the balance of probabilities that the stoma bag had leaked at this time which exacerbated the claimant's anxious state. The Tribunal relied upon the claimant's evidence and the fact Keri Edwards accepted the claimant was visibly upset at this stage.
37. The claimant attended the office just before 1 p.m. and enquired whether Mrs. Parker had returned. The claimant was visibly upset. Keri Edwards told the claimant that Mrs. Parker was still not back. The claimant placed the keys on the desk and stated "I'm done" with a hand gesture to indicate she was finished. Her anxiety at this stage was "going through the roof" and the claimant was visibly shaking. The claimant's stoma bag had burst and she had a leak. What the claimant did not say is that she was resigning nor did she say she was not coming back to work.
38. The Tribunal determined it would have been apparent to Ms. Edwards that the claimant was very anxious and clearly upset. The claimant had returned her keys to the workplace before when she went on holiday. In the context of this situation with heightened anxiety and upset, the Tribunal determined the employer should have been cautious to consider that the claimant was terminating her employment by these words and actions. Keri Edwards recorded in a document about the events of 9 September 2021 "*she emphasised her action by crossing and then un-crossing her arms when saying I'm done! She clearly made it known she was resigning from the company.*" The Tribunal preferred the evidence of the claimant that Keri Edwards did not give the claimant an opportunity of one hour to calm down. The claimant did hug Keri Edwards and then left site. The Tribunal determined that this was not a goodbye hug but rather that Keri recognised that the claimant was upset. The claimant passed Mrs. Lorna Parker as she drove away from the site.
39. Miss. Edwards told Mr. Parker that the claimant had resigned. Mr. Parker did not check with the claimant if this was correct. The claimant did not attend work on Friday. She had three days holiday.
40. On the evening of 9 September 2021 the claimant contacted Mrs. Parker by text message stating "*..sorry to bother you at home. I couldn't wait earlier to speak to you I tried but I couldn't stay there any longer. My nerves are shot. Never in my whole life have I ever been made to feel like this..*"
41. The Tribunal found that this text message indicated that the claimant was unable to stay at work that day due to her anxious state. Neither Mrs. Parker

nor Mr. Parker contacted the claimant to clarify whether the claimant had resigned her employment.

42. Mr. and Mrs. Parker were absent from the office for one week on holiday and they did not contact the claimant. They relied upon the interpretation of Miss. Edwards as to events of 9 September namely that the claimant had resigned her employment.
43. On 10 September 2021 the claimant contacted the respondent to state she was going to submit a sick note. The claimant was not asked by the respondent if she had resigned. The intention to submit a sick note, the Tribunal found to be inconsistent with an employee resigning their employment. Mrs. Parker told the claimant that Mr. Parker was dealing with the issue.
44. It was alleged by the respondent in evidence that the claimant was threatening another employee at work called Leah but the Tribunal was not satisfied that this occurred. This allegation was not pleaded nor was it contained within the witness statements of the respondent. The best evidence the Tribunal heard was from the claimant who denied that this was the case.
45. The claimant contacted the respondent to request a meeting. A meeting took place between the claimant and Mr. and Mrs. Parker on 21 September 2021. The claimant apologised for leaving work and requested that she return to work. Mr. Parker stated that he and Mrs. Parker believed that the claimant had actually resigned her employment. There is a dispute of fact as to what was said in this meeting. The Tribunal determined on the balance of probabilities that Mr. Parker informed the claimant it would cause problems to take her back and this was in reference to the argument between the claimant and her colleague Sam who the respondent had now taken back. The claimant submitted a sick note to the respondent dated 10 September 2021. The note stated that the claimant was unfit for work by reason of "stress and anxiety" for a period from 10 September to 24 September 2021. The Tribunal found that the submission of a sick note by an employee was an act clearly incompatible with an employee who had resigned their employment. Mr. Parker asked for an adjournment for 2 days to further consider the matter.
46. On 23 September 2021 a further meeting took place between the claimant and the Parkers. Mr. Parker stated that nothing significant had changed or occurred which would change the situation/working arrangements. The respondent stated that the claimant had resigned her employment and the claimant would not be allowing the claimant to return to work. The claimant was given a letter by Mr. Parker which stated that *"Following you walking out of the factory on Thursday 9 September 2021 the company has made the decision not to allow you to return. This in effect ends your employment with Razzle Dazzle Dance Costumes Limited. On Wednesday 8 September 2021 at a meeting you requested with Ken and myself you made us both aware that you would be resigning from the company. On Thursday 9 September 2021 around 12.45p.m. you handed your factory keys to Keri Edwards Sales Manager and told her you were done. After exchanging pleasantries with her you left the company. We accept that you did not put your resignation in writing but your intention were very clear. I also point out the fact that over time we have had several*

employees walk out of the factory never to return? The end date for your period of employment with Razzle Dazzle Dance Costumes Limited will be 24 September 2021. Once the payroll has been run I will forward all associated documents to you.”

47. The claimant responded to this letter on 25 September 2021. The claimant stated

“After receiving a letter stating that my employment has ended I would like to clarify a few things in writing. During my work day on the 9 September I experienced a medical emergency whilst working and tried to continue after going to the bathroom however the same issue occurred again and the embarrassment alongside with the stress and anxiety I felt due to tension made me feel overwhelmed. I also told not to speak to Lorna so she could remain impartial. I was not comfortable sharing this with a male due to how personal of a problem this was. To clarify I did say the day before I felt like resigning from your company due to accusations between employees and how this had not been dealt with in a proper way. There was never a meeting between me and the accuser which caused me great anxiety, paranoia and made me feel like I was working on eggshells which was not a nice feeling to be working with. With these feelings along with my personal problems I telephoned my doctors sharing any worries and problems and was given a sick note stating I could not work for two weeks. As you are aware resignation is meant to be in writing and my mere thoughts spoken out loud did not constitute resignation and I still wish to continue to work for Razzle Dazzle. I have not resigned therefore if you wish to terminate my employment this would require you to write me a letter stating you are terminating my employment. As Razzle Dazzle accepted my sick note this is clear evidence I had not planned to resign or therefore it would have been a letter of resignation. I simply needed time to recover for all of the reasons stated above. I can not pass comment on other employees walking out and not return as each person is individual and impartial from another and has no bearing on what another person may do or may not do. Their actions are not mine and I have good reason backed up with medical evidence as to need to leave so suddenly. Clarification as to whether I can continue to work for Razzle Dazzle or a letter sacking me should not be issued following this letter.”

48. By letter dated 4 October 2021 the respondent stated that the claimant had walked out of the company on 9 September 2021 clearly stating that she was finished with the company. It was not until Monday 20 September 2021 when the claimant finally contacted the company for a meeting. By 21 September 2021 the company had already decided not to allow the claimant to return to work.

49. The respondent denied in answer to the Tribunal's questions that it had ever been said that the respondent wanted her to leave because she may need further time off work. The respondent referred to the meetings with the claimant in early September when it persuaded her to stay at work. The respondent did accept that the claimant was likely to create ongoing issues; nothing had changed and the claimant's return at the end of September would have meant she was straight back into a heated position.

Submissions

50. The respondent submitted that the claimant had failed to provide evidence as to the impact of her bowel issue on everyday activities and could not establish that she was a disabled person pursuant to section 6 of the Equality Act 2010.
51. Further the respondent submitted that the claimant clearly resigned her employment when she made clear she “was done” and did a hand gesture she was finished and hugged a colleague. The respondent reasonably interpreted the claimant’s words and actions to mean she had resigned her employment. The respondent relied upon the text to Mrs. Parker on 9 September 2021. Alternatively, the respondent’s reason for dismissal was the absence without leave on 9 September 2021. There was a 100% prospect that the respondent could have fairly dismissed the claimant for this. The claimant was provided with a cooling off period by Keri Edwards on 9 September.
52. The claimant submitted that she was discriminated against. When she went to hospital for her stoma bag operation her job was removed. She was absent from work for up to 8 weeks. The claimant felt she was not really wanted by the respondent. The respondent knew she wanted to have a reversal operation and would require further time off work. They took back Sam who resigned but not the claimant.

Conclusions

53. The Tribunal takes into account that a resignation can be oral or by conduct. It does not need to be written. No reasonable employer could have considered that the claimant’s actions on 9 September 2021 were an act of unambiguous resignation. The claimant at no time said she had resigned her employment. Her words and her conduct were ambiguous. The Tribunal determined that the fact that the claimant said she was done in a highly anxious state when she was visibly upset; handed her keys (which she had done before when going on holiday) and hugged a colleague did not indicate unambiguous resignation. The Tribunal considers that the context here must be considered.
54. The Tribunal has already found that the claimant did not say she would resign at the meeting on 8 September 2021. The claimant stated that she may have to resign if the situation with her colleague continued.
55. On 9 September 2021 there is no dispute that the claimant was visibly upset and the Tribunal finds she was in a highly anxious state. In this context no reasonable employer could have concluded that when the claimant said she was “done” having tried unsuccessfully to make contact with Mrs. Parker on three occasions that day that she wished to end her employment. Even taking into account the actions of handing in her keys which she had done before and she had some time off booked could not have indicated that she intended to resign her employment. The hand gesture finished added nothing to the words spoken by this anxious claimant in the heat of the moment.
56. The Tribunal was not persuaded that Keri Edwards allowed the claimant a cooling off period. The hug between the claimant and Miss. Edwards was not a hug goodbye but empathetic action shown to the claimant for her upset.

57. Mr. and Mrs. Parker relied upon Keri Parker's interpretation that the claimant had resigned and failed to check with the claimant themselves. The text from the claimant to Mrs. Parker that day was by way of explanation as to why she had left the workplace that day.
58. The fact that the claimant left the workplace in an upset state was insufficient for the employer to determine that the claimant had resigned. The next day the claimant had contacted the respondent to inform them she intended to submit a sick note. This was inconsistent with an employee who had resigned their employment. During the ten days that the claimant was away from the workplace the respondent did not take the simple step of clarifying the situation.
59. On the balance of probabilities, the Tribunal determined that the respondent took the opportunity to dispense with the claimant; the claimant's dispute with her colleague Sam was a troublesome situation for the employer. They grasped the opportunity to determine that the claimant had resigned because Sam Riddell was to be kept on and managing both employees at work was a difficulty for the respondent. The Tribunal has already found that at the meeting with the claimant on 21 September 2021 Mr. Parker informed the claimant it would cause problems to take her back.
60. The claimant compared herself to Sam who gave written notice of resignation but was given permission by the respondent to retract this. The claimant alleges that she was dismissed by reason of disability related leave. Her case is that the respondent knew she would require further time off work to seek a reversal of her operation and it was therefore convenient for the employer to consider the claimant had resigned.
61. There can be no dispute that the claimant would require further time off work in the near future to undergo reversal surgery. However, the respondent had been supportive of the claimant's absence from work previously. This is demonstrated by the sympathetic and supportive stance of Mrs. Parker in evidenced text exchanges with the claimant and herself whilst the claimant was in hospital. The claimant was allowed time off work for appointments. Mrs. Parker herself has a long-term ill health condition. Save for failing to provide a bin in the toilets which the claimant requested, the Tribunal found Mrs. Parker to be empathetic to the claimant's situation.
62. Both the claimant and Sam were valued by the business. Sam resigned on notice and in writing but was persuaded by the respondent to return to the workplace. By 9 September 2021 when the claimant left the workplace, the claimant had demanded a number of meetings with Mr. and Mrs. Parker about Sam and resolving the issue between them. The claimant's dispute with her colleague Sam was considered to be a troublesome situation for the employer. They grasped the opportunity to determine that the claimant had resigned because Sam Riddell was back in the workplace and managing both at work was a perceived difficulty for the respondent.

63. The Tribunal rejects that the respondent dismissed the claimant because she would require further absences from the workplace due to her disability.
64. The Tribunal determined that the claimant was dismissed by the respondent on 24 September 2021. There was no admissible reason advanced by the respondent in evidence. The respondent's evidence before the Tribunal was that the claimant resigned. The respondent unfairly dismissed the claimant. Furthermore, the claimant was dismissed without notice. The claimant left the workplace on 9 September 2021 by reason of her anxious state. The Tribunal does not consider that this amounted to gross misconduct; the sick note evidences that this claimant was unwell. The claimant is therefore entitled to notice of dismissal and the wrongful dismissal claim succeeds.
65. The Tribunal did not determine that the claimant was guilty of culpable conduct. The claimant was very anxious on 9 September and was unwell as evidenced by her sick note. The Tribunal determined that the claimant's need to remove herself from the workplace and remain away from the workplace when she was unwell (and supported by medical evidence) could not amount to blameworthy conduct.
66. Furthermore, that a reasonable employer would not have considered this grounds to dismiss the claimant. The Tribunal did not hear sufficient evidence as to the background or context of the dispute between the claimant and Sam to be able to determine whether the respondent would have fairly dismissed the claimant at this time or at a later period for allegations of bullying. The claimant's evidence to the Tribunal is that the matter was not adequately dealt with by the respondent at the time so that the Tribunal does not consider it has sufficient material facts to determine whether the respondent could have fairly dismissed the claimant in the future.

Remedy

67. The respondent accepted the claimant's calculations of a basic award of £2,880; loss of statutory rights of £500; notice pay of £1,920 and loss of earnings of £2,148.96 gross. The Tribunal made these awards at the end of the hearing.

Employment Judge Wedderspoon

30 December 2022

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