



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Lyddall

Respondent: The Wooldridge Partnership Limited

Heard at: Reading **On: 12 and 13 December 2022**

Before: Employment Judge Gumbiti-Zimuto
Members: Ms M Thorne and Mr F Wright

Appearances

For the Claimant: In person

For the Respondent: Ms S Berry, counsel for respondent

JUDGMENT

1. The claimant's claim of disability discrimination is well founded and succeeds.
2. A remedy shall take place on the **28 March 2023**, commencing at 10am, the parties must be ready to proceed at 9:30am on the Court Video Platform (CVP).
3. By 4pm on **27 January 2023** the parties must send to each other a list and copies of all documents relevant to remedy.
4. By 4pm on **27 January 2023** the claimant must send to the respondent a schedule of loss claimed.
5. By 4pm on **10 March 2023** the respondent must send to the claimant a counter-schedule of loss.
6. By 4pm on **10 March 2023** the parties must send to each other the signed statements of all witnesses on whom they intend to rely at the remedy hearing, this includes the claimant. Oral evidence will not be permitted at the remedy hearing from a witness whose statement has not been provided in accordance with this order or has been served late, except with permission from the Tribunal.

REASONS

1. In a claim form presented on the 24 August 2021 the claimant made a complaint of disability discrimination. The claimant's complaint was that her dismissal by the respondent was direct discrimination on the grounds of her disability. The respondent denied the claimant's complaint and stated that the claimant was dismissed because of concerns about the claimant's performance and conduct.
2. The claimant is a disabled person within the meaning of section 6 Equality Act 2010.
3. The claimant gave evidence in support of her own case. The respondent relied on the evidence of Mr Costas Constantinou and Mr Charlie Wooldridge. All the witnesses produced statements which were taken as their evidence in chief. The parties also produced a trial bundle containing 152 pages of documents. From these sources we made the following findings of fact.
4. The claimant was employed by the respondent on 30 March 2021 as Marketing Manager. The claimant's employment came to an end on 2 August 2021 when she was dismissed.
5. The respondent consists of a small portfolio of businesses in the retail, hospitality and leisure industries.
6. Mr Constantinou was a consultant who specialised in hospitality, he provided consultancy services to the respondent from February 2020. Mr Constantinou was involved in selecting the claimant for employment and during her employment was her line manager.
7. The claimant's employment was subject to a 6 month probation period, during which the claimant could be dismissed with a week's notice. Without a dedicated work station the claimant often worked from home.
8. The parties have not provided us with a person specification or job description for the claimant's role among the documents. There is no document in the Trial Bundle which sets out what if any induction training was provided to the claimant at the start of her employment. These matters were not addressed in the claimant's statement or the statements of the respondent's witnesses.
9. The claimant's contract provided that she was employed as Marketing Manager, but she could be required to undertake other duties. The claimant was employed to work part-time, 25 hours a week. The parties agree that the claimant was employed to create and implement marketing strategies for Lavershot Barns, Seasons Farm Shop and Restaurants, and Lavershot Oaks Golf Club.
10. The claimant states: *"The problem arose when more and more work came my way, some jobs that were not in my toolkit of experience and should really have had a site manager to see to, and the fact that I had not more*

time to do anything. I brought his up with Costas Constantinou on more than one occasion, he said we would talk about it but nothing came of it."

11. The claimant arranged meetings with *"key team members to update the strategy...it was also a time for feedback and suggestions. Unfortunately it became apparent after two meetings that the key players were not at all interested in joining anymore meetings, and I did not have time to chase them... I relied on my team leaders to let me know when there was something new and exciting happening but there was very little communication regarding this."*
12. Mr Constantinou worked closely with the claimant and enjoyed a good relationship with her. Mr Constantinou states that there were concerns about the quality of the claimant's work. The claimant on the other hand states that *"At no time did anyone talk to me about my performance. In fact all I received was positive reinforcement."*
13. Mr Constantinou refers to a number of examples of the claimant's alleged poor performance. The claimant essentially denies the allegation that her work was poor and her performance unsatisfactory. She denies specific allegations about poor work on the website. The claimant takes issue with what is said about her social media posts. In his evidence Mr Constantinou said that the claimant "failed to engage with the directors and stake holders", the claimant "failed to deliver" and did not develop a brand identity. The claimant took issue with all these criticisms.
14. The claimant points out that there is no documented criticism of her at all. Further we note that the respondent accepts that issues were not raised with the claimant directly as issues of performance. Mr Constantinou stated that he had "conversations with Lucy [the claimant] about her interactions with others". Mr Constantinou was asked why he did not go down the route of a performance improvement process with the claimant his response was that "I do not think that is the right approach". When speaking about the claimant's failure "to deliver" Mr Constantinou stated that "Rather than bringing it to you directly I found it difficult to see what you are delivering." We understood this comment to be an acceptance that he did not directly question the claimant's performance by stating that she was not performing to the required standard.
15. Mr Wooldridge addressed the failure to confront the claimant directly about the respondent's view that she was failing in her performance. When questioned about the absence of any document suggesting a failure to perform Mr Wooldridge stated the following:
16. "In terms of communication why there is no email trail before you went off you were only there 6-8 weeks so in terms of a probation period, none of us felt it fair or right to be emailing you negative feedback within that period of time."
17. Mr Wooldridge directly links the claimant's absence for medical reasons

connected with her disability with the failure of the respondent to address directly with the claimant any concerns that they may have had about the claimant's performance.

18. Mr Wooldridge continued: "The communication between each head of department started slowly fading away and it seemed through what I was hearing that there was only one common denominator and unfortunately that was you." Mr Wooldridge went on to say. "Around the time that this was being considered is about the time you told us the news and that you were going off and so obviously that is not really the time to be sending you emails of negative feedback from within the team so obviously it was the decision made that we should not put you on any more stress with the feedback." Mr Wooldridge openly linked the claimant's disability with the reasons why the respondent did not mention to the claimant that they had concerns about her performance.
19. It is significant in our view that not only was there no communication between the respondent and the claimant, but there was no written communication between the Mr Constantinou and Mr Wooldridge about the claimant's poor performance or any documented feed back about the claimant's performance from other "stakeholders"
20. There were some clear and obvious failings by the claimant in her performance, an issue about signage and a filing in respect of a Surry Butcher's concession. The claimant accepts that these were serious faults or errors. The claimant does not accept that they were of such a serious nature as to justify termination of her employment. The respondent does not suggest that they were.
21. The claimant also accepts that there were occasions when she spoke with Mr Constantinou and he expressed a view that differed to hers or stated that he was not happy about things. The claimant's evidence in respect of these matters however suggested that these exchanges with Mr Constantinou were not any form of counselling or expressions of criticism of the claimant's performance. Rather the claimant considered these exchanges to be in the nature of Mr Constantinou's input of his views and opinions about the claimant's work, matters she could take on board or ignore as she thought fit, but not an indication that the claimant's performance was failing.
22. On 26 May 2021 the claimant was informed that she required medical treatment in respect of her disability. The claimant returned to work after a period of sickness absence during which she was paid her contractual pay. It is noted that the respondent paid the claimant her full contractual pay notwithstanding that she did not have such a contractual entitlement, contractually she was only entitled to statutory sick pay.
23. In July the claimant informed the respondent that she would need further treatment related to her disability and that she would need time off work. Also in July the claimant took some time off work to get married.

24. On the claimant's return to work the claimant was informed by Mr Constantinou that she was being "let go". The reason that the claimant was given was that "your vision is not their vision".
25. The effect of section 13 Equality Act 2010 (EA) is that an employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment. An employer discriminates against an employee if because of her disability they treat the employee less favourably than they treat or would treat others.
26. The burden of proof set out in section 136 EA provides that if there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.
27. We have considered the guidance in Igen -v- Wong [2005] EWCA civ 142. We have approached this case by considering, having regard to all the evidence, whether the claimant has proved facts from which we could conclude in the absence of an adequate explanation that the respondent has dismissed the claimant because of her disability. If she has, we proceed to the second stage, which only comes into effect if the claimant has proved those facts, that requires the respondent to prove that it did not or is not to be treated as having dismissed the claimant because of disability.
28. We bear in mind that the burden of proof does not shift to the respondent simply on the claimant establishing a difference in treatment and a difference in status, something more is required. The respondent has reminded us that whether there has been less favourable treatment cannot be inferred simply from the fact that the respondent has behaved unreasonably.

Conclusions

29. What was the reason for the claimant's dismissal? The Tribunal has concluded that the reason for the claimant's dismissal was in part her disability.
30. The claimant and Mr Constantinou did discuss the claimant's work. The way that Mr Constantinou communicated matters to the claimant led her to believe that she was being provided with his input views and opinions on her work. It was not expressed in a way that made it clear and obvious to her that her performance was below an acceptable standard. The claimant considered, and the Tribunal are of the view that it was reasonable for her to conclude, that overall, his comments were positive reinforcement of the work she was doing. She could not have reasonably concluded that he considered she was failing.

31. We have considered the evidence that was given by Mr Constantinou in which he stated to us that he spoke to the claimant about her performance and in doing so he made it clear that her performance was not at an acceptable level. We do not consider that Mr Constantinou did make it clear to the claimant in this way.
32. We have gone on to consider whether the claimant's performance was in fact the reason that the claimant was dismissed. We note that the claimant's performance is not noted in any contemporary documentary form as below standard. We also note that the claimant was in her probation period and that part of the purpose of the probation period is to assess the suitability of an employee for a role. We would have expected to see an engagement between the claimant and her line manager directly addressing her performance if it was falling short. We note that there were errors made by the claimant and they were discussed by the claimant and Mr Constantinou. They are not stated to be so serious as to have a terminal effect on employment. It was not communicated to the claimant that the cumulative effect of such errors was terminal to her employment. We have concluded that any concerns about the claimant's performance were not so serious as to justify termination of the claimant's employment for a performance short fall.
33. We have also concluded that the claimant's disability was a factor in the decision to dismiss the claimant. The claimant was off work for hospital treatment and the respondent acted with generosity in paying her contractual pay in circumstances where she was not contractually entitled to it. However, we also note that Mr Wooldridge, whose decision we understand it was to finally direct the dismissal of the claimant had her disability in mind when he stated that one reason for not referring the claimant to negative feedback was her disability and the medical treatment, she was either about to undergo or had undergone.
34. We also note that the claimant told the respondent of her need for further treatment and time off work because of her disability shortly before the claimant left to get married. On her return to work the claimant was dismissed by the respondent with a week notice. There was no signposting that this was in the offing for the claimant, nothing to warn her that her dismissal might be imminent or was likely if her performance did not improve.
35. Taking all these matters together we are of the view that the claimant has proved facts from which we could conclude that the claimant was dismissed on the grounds of her disability.
36. We have then gone on to consider whether the respondent has shown that there is no discrimination whatsoever in the decision to dismiss the claimant and we have concluded that they have not. The respondent relied on the claimant's performance as the sole reason for her dismissal we are not satisfied on a balance of probability that this was the case.

37. The claimant's complaint of disability discrimination is well founded and succeeds.

Employment Judge Gumbiti-Zimuto

Date: 19 December 2022

Sent to the parties on: 26/1/2023

NG
For the Tribunals Office

Public access to employment tribunal decisions:

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.