



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109913/2021

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Final hearing held in Edinburgh
on 16, 17 and 18 November 2022
and 18, 19 and 20 January 2023

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Employment Judge A Jones
Tribunal Member J Lindsay
Tribunal Member A Grant

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Mrs J Lubbers

Claimant
In person

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Wee Blue Coo Ltd

Respondent
Represented by
Mr Cunningham of counsel
Instructed by MBM
Commercial LLP

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The claimant was not discriminated against by the respondent in terms of the
Equality Act 2010 and the claimant's claims are dismissed.

REASONS

Introduction

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1. The claimant lodged a claim of disability discrimination on 10 June 2021. The
respondent denied that the claimant was a disabled person for the purposes
of the Equality Act 2010 ('EA'). A preliminary hearing took place on 23 March
2022 which determined that the claimant was a disabled person within the
meaning of section 6 EA at all material times by reason of the mental
impairment of depression. The respondent continued to deny that it knew or

could reasonably have known that the claimant was a disabled person at the material time.

2. A final hearing took place to consider the claimant's claim of disability discrimination. At the time of her dismissal, the claimant had less than two years' service. While the claimant's principal claim was that her dismissal was an act of direct discrimination in terms of section 13 EA, she also claimed that the respondent failed to take into account the claimant's disability and failed to make reasonable adjustments in that regard, in particular by referring her to occupational health; that the failure of the respondent to provide independent HR and requiring any HR matters to be dealt with by Mrs Kirkpatrick amounted to indirect discrimination and that she was harassed because of her disability.
3. A joint bundle of documents was produced. During the course of the hearing a number of documents were replaced when it became clear that these documents were not in their original form but had included comments from the respondent on them. The Tribunal heard evidence from the claimant and her husband and then for the respondent, Mr and Mrs Kirkpatrick who are directors of the respondent. Written submissions were provided on behalf of the respondent and the claimant made oral submissions. Having considered the evidence, the documents to which reference was made and submissions, the Tribunal made the following findings in fact.

Findings in fact

4. The claimant commenced work for the respondent as a Business Development Manager on 27 January 2020. Mrs Kirkpatrick ('JK') had initially met the claimant at her hairdressers where the claimant worked as a receptionist. Thereafter the claimant had provided make-up services for JK and following a meeting between the claimant, JK, Mr Kirkpatrick ('BK') and another individual who was director of the respondent at the time, a decision was made to offer the claimant employment.

5. The claimant's post was a new post, created for her in which the claimant was expected to deal with customer service issues, work on social media of the respondent and develop the marketing of the respondent's services. No written job description was provided to the claimant.
- 5 6. The respondent has an employee handbook which was available for staff to consider in the workplace.
7. The claimant did not inform JK or anyone else employed at the respondent that she was suffering from depression at the time of her appointment or subsequently. The claimant completed a medical questionnaire on 28
10 January 2020 indicating she was not taking prescribed medication although she was in fact taking anti-depressant medication at the time. In that questionnaire the claimant also indicated that she did not consider herself to have a disability or suffer from any condition which might impact on her ability to perform her duties.
- 15 8. The claimant was placed on furlough in March 2020 initially on a full time basis and then on a part time basis. The claimant and JK continued to be in contact discussing both personal and work issues throughout the period of her employment including furlough. Their contact was primarily through
20 WhatsApp and was on an almost daily basis. The tone of contact was generally friendly and the claimant and JK shared information about personal and family matters as well as discussing work issues.
9. The respondent issued a job satisfaction survey in January 2021. The claimant's response to the survey was wholly positive. The claimant did however indicate that she felt she should be entitled to a pay rise. She was
25 subsequently given a pay rise by the respondent with effect from March 2021.
10. The claimant informed JK on 18 February 2021 that she had been at a counselling session that day. She did not explain the purpose of the session and JK did not enquire what the purpose of the session had been.
11. On 5 April 2021 the claimant and JK had an exchange of emails regarding a
30 social media strategy. JK expressed unhappiness with the work the claimant

provided on that strategy. JK emailed the claimant indicating that they 'needed to have an in person chat next week to discuss your rote further/ The claimant responded indicating that JK's email had the impact of being 'very demoralising and upsetting; She went on to say that she had a doctor's appointment in half an hour. JK responded by indicating that she would mark the claimant off sick the following day and was aware that she was on holiday the following two days. She therefore suggested catching up the following week to discuss this further.

12. On Friday 9 April, JK discovered that the claimant had removed any reference to working for the respondent from her personal social media accounts. There had been no contractual requirement for the claimant to have made reference to the respondent in her social media accounts. JK also discovered that the claimant had blocked her from contacting her on social media. JK's reaction to this was to remove the claimant's access to the respondent's email and social media accounts. JK then sent the claimant an email at 22.05 on 9 April requiring her to attend a meeting at JK's home on Tuesday 13th April.
13. The claimant responded to the respondents email of Friday night on Saturday morning and asked if the meeting could take place remotely and asked for further explanation on what the review of her rote would entail. The respondent did not respond to that email.
14. Over the course of Saturday and Sunday 10th and 11th April, JK and BK reviewed the claimants email and timesheets and compiled a report on their investigations. Much of the investigations involved guessing and supposition in relation to the number of hours spent by the claimant carrying out work related tasks. At no stage was the claimant invited to comment on the investigation, contribute to it or review its findings.
15. The investigation report which was produced was entirely one-sided, inaccurate and misleading in places and sought to paint the claimant in the worst possible light. It alleged falsification of timesheets without giving the claimant any opportunity to comment or explain what she had been doing while at work. It suggested that the claimant had breached various provisions

within the respondent's handbook, without evidence to support many of the allegations. The report was produced in such a way as to justify the dismissal of the claimant, a decision which had already been taken by the respondent

- 5 16. The respondent decided to dismiss the claimant once JK discovered that she had been blocked on social media by the claimant. JK was upset at the claimant's actions in this regard, and while she may have had some concerns at the claimant's performance, it was the claimant's actions in blocking JK on social media and removing reference to the respondent on her personal social media which precipitated the decision to dismiss the claimant.
- 10 17. The respondent then wrote to the claimant by letter dated 12 April advising her that she was to be dismissed. The claimant was not given any right to appeal against the decision. The claimant was paid in respect of her notice pay.
- 15 18. Arrangements were made for BK to uplift the respondent's laptop from the claimant's home. At that time there was some discussion of the possibility of settlement of any claim the claimant may have against the respondent.

Observations on the evidence

- 20 19. The Tribunal found the claimant to be a credible witness with one exception. While the claimant may genuinely have thought that she had made JK aware that she had mental health issues, the Tribunal could not find any evidence to substantiate that. While it was clear that the tone of messaging between the claimant and JK was friendly and informal on the whole, even when discussing work issues, the Tribunal did not find any evidence to suggest that
- 25 the claimant had explicitly told JK or BK that she had mental health issues or suffered from depression. It appeared to the Tribunal that the claimant and JK had developed a somewhat dysfunctional relationship where JK was of the view that they were both friends, but the claimant felt under an obligation to be as friendly as possible to JK even though she was clearly experiencing
- 30 issues both in terms of her mental health and managing the expectations of JK in relation to her workload.

20. The Tribunal found BK to be a somewhat unsatisfactory witness. He prevaricated and did not answer questions directly and changed his evidence on a number of occasions. For instance in relation to the writing of the investigation report, his evidence was variously that he made contributions to it, he had written some of it and JK had written all of it and he reviewed it. In the event, the Tribunal accepted JK's evidence that she had written it after putting together notes made by both her and BK. Further, BK made unnecessary comment regarding the claimant's husband and presented as hostile to the claimant in his answers to cross examination. While the Tribunal understood that relationships had broken down between the parties, nonetheless the Tribunal would have expected BK to have conducted himself in a professional manner when giving evidence.

21. The Tribunal found JK to be a credible witness. She made concessions where appropriate and while she made various unnecessary comments regarding the claimant, which were clearly intended to damage the claimant's reputation before the Tribunal, the Tribunal accepted that JK was very upset at the claimant's conduct in blocking her on social media. The Tribunal accepted that JK was not aware that the claimant suffered from depression.

Issues to determine and relevant law

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22. The Tribunal was required to determine the following issues:

- L Did the respondent know, or should the respondent have reasonably have known that the claimant was a disabled person for the purposes of section 6 EA at the material times.
- 25 ii. Did the respondent treat the claimant less favourably because of her disability than it would have treated another person who did not have the protected characteristic of disability?
- iii. Was the respondent under a duty to make reasonable adjustments in respect of the claimant and if so, did it fail in that duty.

iv. Did the absence of an HR department put those with a disability at a particular disadvantage; did it put the claimant at a disadvantage and if so, was it objectively justified.

v. Did the respondent harass the claimant for a reason related to her disability?

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23. Section 13 EA provides that direct discrimination will occur where a person is treated unfavourably because of a protected characteristic than a person without that protected characteristic was or would be treated.

24. Section 15 provides that discrimination arising from disability will arise where someone is treated unfavourably because of something arising in consequence of a person's disability and such treatment cannot be justified, although it is a complete defence to such a claim if the employer did not and could not reasonably have known that the person was disabled.

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25. Section 21 sets out when an employer is under a duty to make reasonable adjustments in respect of a person with a disability and what such a duty entails.

26. Section 26 sets out the circumstances in which a person will be subjected to harassment related to a protected characteristic.

Submissions

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27. The claimant made oral submissions indicating that the documentary and oral evidence supported her allegations of discrimination. She said that JK was aware of her mental health issues from their early meeting and that this was the cause of her dismissal. She said that the investigation was manufactured in order to cover the real reason for her dismissal and that she was bullied because of her disability. She said she should have been referred to occupational health.

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28. The respondent's position was that the claimant's claims were not supported by the evidence and that the respondent had no knowledge of the claimant's depression. It was said that even if the respondent was aware of the

claimant's disability there was no evidence to establish a causal link between the two.

Discussion and decision

5 Did the respondent know that the claimant was disabled?

29. The Tribunal had already determined that the claimant was a disabled person for the purposes of EA by reason of her depression. However, the Tribunal was also satisfied that the respondent did not and could not reasonably have
10 known that the claimant suffered from depression.

30. While the Tribunal accepted that the claimant may genuinely have thought that JK would realise that she had mental health issues, there was no evidence before the Tribunal to suggest that she had informed JK or BK either orally, in writing or on social media that she was suffering from mental health
15 issues. While the claimant gave some evidence regarding conversations with JK, no specifics were put to JK in cross examination and the Tribunal accepted JK's denial that she had been informed of the claimant's depression.

31. While the claimant did inform JK in a WhatsApp message that she had been at a counselling session and that this had drained her, she did not indicate
22 what the session had been for. The Tribunal was surprised that JK did not explore this further with the claimant and ask her about it and did not accept that JK had assumed it was for marriage guidance counselling. It would have expected JK to have asked the claimant whether she needed any help, particularly given the very open and friendly exchanges they had daily on
25 WhatsApp. However this of itself was not sufficient for the respondent to have reasonably known that the claimant had mental health issues, particularly when taken together with the medical questionnaire and the staff survey. Rather, the Tribunal concluded that this was indicative of the relationship between JK and the claimant being somewhat superficial and the lines
30 between friendship and professionalism having been entirely blurred. It appeared to the Tribunal that the relationship was somewhat dysfunctional and that both parties had different expectations of the other.

Did the Respondent treat the claimant less favourably because of her disability?

5 32. The Tribunal accepted that the removal from the respondent's email and social media systems and the claimant's dismissal amounted to unfavourable treatment. However, there was no evidence to suggest that the reason for the treatment or any operative cause of the treatment was the claimant's disability. The Tribunal concluded that the reason the claimant was removed from the respondent's systems was that she had blocked JK on her social
10 media and had removed reference to the respondent on her own social media. Moreover, the Tribunal concluded that this had been the operative reason for the claimant's dismissal. While the respondent may have had some concerns regarding the claimant's performance in the week or so leading up to her dismissal, it came to the view that it was the reaction of JK towards the
15 claimants amendments to her social media accounts that had caused the respondent to dismiss the claimant.

20 33. The Tribunal concluded on the balance of probability that the decision to dismiss was taken before any further investigations were carried out into the claimant's activities and that the investigation was more in the way of an ex post facto justification for the decision. While the investigation was in no respects fair, balanced or reasonable and was certainly not the sort of investigation which would be considered to be within the band of reasonable responses, the claimant could not claim that she had been unfairly dismissed because she did not have the requisite length of service. The Tribunal found
25 it difficult to reconcile the respondent's position that they did not need to carry out any procedure in relation to the claimant's position because she had less than two years' service and the investigation report which was subsequently produced by them. It appeared to the Tribunal that the respondent was aware that it was acting unreasonably and that it wished to provide a justification for
30 its actions.

34. However, simply acting unreasonably does not without more demonstrate that the respondent's actions amounted to direct discrimination because of a

disability. The Tribunal could not find any causal link between the unfavourable treatment and the claimant's disability and was not satisfied that an adverse inference could be drawn from the unreasonableness of the respondent's conduct such that the real reason was related in any way to the claimant's disability.

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35. Having found that the respondent was not aware of the claimant's disability, any claim in terms of section 15 falls away.

Was the respondent under a duty to make reasonable adjustments or subject the claimant to indirect discrimination?

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36. While the Tribunal was satisfied that the claimant had some concerns regarding the expectations of her in her role, this fell well short of amounting to a provision, criterion or practice which put the claimant at a disadvantage. In those circumstances the respondent was not under a duty to make reasonable adjustments in relation to the claimant.

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37. The Tribunal then went on to consider whether the absence of an HR function beyond JK herself could amount to indirect discrimination. There was simply no evidence to suggest that this could result in people with disabilities being disadvantaged. Even in so far as it could be said that people with disabilities could be disadvantaged, the respondent is a small company and it would be unrealistic to expect it to employ an HR advisor. Indeed it was not clear what the claimant expected of the respondent in this regard. Therefore any claim of indirect discrimination is bound to fail

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Was the claimant harassed because of her disability?

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38. There was no evidence that the claimant was harassed for any reason related to her disability. While the Tribunal accepted that the claimant's reaction to her treatment by the respondent was no doubt exacerbated by her underlying mental health condition, this is not the same as amounting to the cause of the treatment. The Tribunal was satisfied that the claimant was treated in the same way as any other employee in similar circumstances who did not have

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a disability would have been treated and that while BK may well have been overbearing and even threatening (when he made reference to how the respondent would utilise its legal resources) when he attended the claimant's house to pick up the respondent's laptop, this had nothing to do with the claimant's disability. Therefore the claimant's claim of harassment must also fail.

39. In all of these circumstances, while the Tribunal readily accepted that some of the respondent's treatment of the claimant was unreasonable, unfair and unjustified, it did not amount to discriminatory treatment and therefore the claim fails to be dismissed.

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Employment Judge:	A Jones
Date of Judgment:	31 January 2023
Entered in register:	01 February 2023
and copied to parties	

