



EMPLOYMENT TRIBUNALS

Claimant: Ms K Zborowska

Respondent: P&M resources Ltd

Heard at: Manchester Employment Tribunal (by CVP)

On: 12 and 13 December 2022

Before: EJ Mark Butler
Mrs A Booth
Mr M Stemp

Representation

Claimant: Mr B Culshaw (Solicitor)

Respondent: Mr L Fakunle (Consultant)

JUDGMENT

This is the unanimous decision of the tribunal:

1. The complaints of victimisation and direct sex discrimination do not succeed and are dismissed.
2. The complaint of harassment related to disability, harassment related to sex and discrimination arising from disability succeed. An award of £12,000 for injury to feelings and interest of £1,136.22 is made (totaling £13,136.22).
3. The complaint of unpaid holiday pay outstanding on termination succeeds. The claimant is awarded the gross figure of £336.74 for unpaid holiday leave (this is 3.9 days @ £84.61 per day).
4. The claimant is awarded 4 weeks' gross pay for a failure by the respondent to provide the claimant with a written statement of particulars. The claimant is awarded £1692.

REASONS

These are the written reasons as requested by Mr Fakunle on behalf of the respondent.

INTRODUCTION

Case No: 2414471/2021

5. This case was brought through a claim form that was presented on 11 November 2021. In that claim form, the claimant brought several different complaints, namely: disability discrimination, sex discrimination and a claim for outstanding holiday pay on termination of her contract.
6. This case went before Employment Judge Doyle at Case Management Preliminary Hearing on 31 August 2022. At that hearing, the claimant was legally represented by Mr Culshaw, whilst the respondent was represented by Mr Adam Peruta, who is a director of the respondent. At that hearing:
 - a. It was recorded that the respondent intended on calling 3 witnesses.
 - b. Time was extended to accept the respondent's ET3, in circumstances where it was presented late but an acceptable explanation was provided.
 - c. The respondent accepted that the claimant had a disability by reason of anxiety.
 - d. The respondent accepted that it was unlikely that the claimant had been provided with a statutory statement of employment particulars.
 - e. Directions to prepare the case for final hearing were made, including for disclosure of documents by both parties and for witness statement exchange.
 - f. A date for the final hearing was provided to the parties.
7. There appears to have been some delay in presenting the final hearing bundle and the claimant's witness statements to tribunal, such that they were provided closer to the hearing than directed. Mr Culshaw, in an email to the tribunal on 07 December 2022, explained that this was primarily due to the respondent not replying to requests by the claimant to explain as to whether it was intending on disclosing any documents to be added to the bundle or whether it intended to rely on any witness statements.
8. I had sight of an email in advance of the hearing that was sent to the tribunal on behalf of Peninsula Legal Services at 08.48 on the morning of the first day of the final hearing. This explained that the respondent had 'just appointed' Peninsula Legal Services to represent it.
9. There was no application to postpone this hearing in advance of it starting.
10. There was a delayed start to the proceedings as the respondent's legal representative was late to the hearing.
11. Mr Fakunle at the beginning of the hearing made an oral application to postpone the hearing. Mr Culshaw objected to the application, and made an application for the response to be struck out, on the grounds that the respondent has failed to comply with directions of the tribunal and/or a failure to comply with the Employment Tribunal Rules of Procedure. In short, for the purpose of this introduction, both applications were refused (this is developed in further detail below). And the hearing proceeded to be heard and determined.
12. The tribunal benefitted from having a 54-page evidence file to be considered at the hearing. Mr Fakunle also produced a short bundle of documents, that largely repeated the documents contained in the claimant's bundle. These were only sent to the tribunal (and to Mr Culshaw, who raised no objections to the documents being before the tribunal) on the morning of the hearing.
13. The tribunal heard evidence from the claimant. The tribunal heard no evidence from any other witness. There was no application made on behalf of the respondent to rely on any witness statement not yet served on the claimant, nor to adduce oral evidence.

14. Mr Fakunle was reminded that as his client had not presented any evidence then he would be permitted to test the claimant's evidence but would not be able to put forward a positive case on behalf of the respondent. As to do so would see Fakunle effectively putting forward his version of events, rather than that from a witness of fact.

RESPONDENT'S POSTPONEMENT APPLICATION AND CLAIMANT'S STRIKE OUT APPLICATION

15. Mr Fakunle made an application to postpone this hearing on the basis that he had received late instruction. He explained that a decision had been made by the insurers that they were not going to continue to provide the respondent with representation, and that this was contained in a document dated 05 December 2022, which he had read. Mr Fakunle explained that Mr Peruta struggled to deal with the case himself. He explained that Mr Peruta had instructed Peninsula since Friday 09 December 2022, and that he still had limited information. Mr Fakunle also raised that there were documents in the bundle that were in Polish, without any translation, and that this presents a difficulty.
16. Mr Fakunle submitted that the respondent had genuinely tried to get legal representation, and that it did try in that regard. He submitted that the respondent had a good defence to the claims, and that it would be in the interests of justice to allow the postponement as it would ensure that the parties were on an equal footing. I note here that Mr Fakunle did not provide any documentation in support of any of the submissions he was making, including the document he says was dated 05 December 2022. The only documentation before the tribunal that was relevant to any of those submissions was the email from Peninsula to the tribunal that morning (noted above).
17. In response, Mr Culshaw submitted the following on behalf of the claimant in opposition to the application for postponement:
- a. Mr Fakunle had been instructed since the Friday before this hearing, and yet it is only this morning that he makes this application.
 - b. This claim was presented more than a year ago. The respondent has had more than a year to prepare for this hearing. And further, the respondent (and Mr Peruta) was present at the Preliminary Hearing on 31 August 2021.
 - c. The claimant was desperate for the case to go ahead today and be determined. As it was causing her great anxiety and distress. I note here that anxiety is the disability in this case.
 - d. That even if we were to continue today, Mr Fakunle does not appear to be suggesting (as he made no submissions to this effect) that Mr Peruta gives evidence.
 - e. That both parties were asked whether there was a need for a translator. This was not required. And that the issue of translation has only been raised as an issue in Mr Fakunle's submissions. That was the first reference to this being an issue. The claimant was confident that she could demonstrate her claim without the need for translation.
18. Postponements are provided for by Rule 30A of the Employment Tribunals Rules of Procedure:
- (1) An application by a party for the postponement of a hearing shall be presented to the Tribunal and communicated to the other parties as soon as possible after the need for a postponement becomes known.
 - (2) Where a party makes an application for a postponement of a hearing less than 7 days before the date on which the hearing begins, the Tribunal may only order the postponement where—

- (a) all other parties' consent to the postponement and—
 - (i) it is practicable and appropriate for the purposes of giving the parties the opportunity to resolve their disputes by agreement; or
 - (ii) it is otherwise in accordance with the overriding objective;
- (b) the application was necessitated by an act or omission of another party or the Tribunal; or
- (c) there are exceptional circumstances.

(4) For the purposes of this rule-

- (b) "exceptional circumstances" may include ill health relating to an existing long term health condition or disability.]

19. The application for postponement was refused. The respondent had knowledge of the claim for at least 12 months, and knowledge of the date of final hearing for some three and a half months before this hearing. At the Preliminary Hearing on 31 August 2022, Mr Peruta represented the respondent. There was no indication that Mr Peruta was seeking any legal representation, and therefore it is presumed that at that point Mr Peruta was representing the respondent at final hearing. The respondent's have produced no supporting documents that show that the respondent had sought legal advice, when that was sought, and that its insurers had decided not to provide representation late in the day, which was apparently explained in a document on 05 December 2012. Mr Fakunle, despite submitting that he had seen this document, did not present it before tribunal. There was no attempt to explain why an application to postpone was not made earlier, either on 05 December 2022, when Mr Peruta is said to know of issues in representation, or on 09 December 2022, when Peninsula were instructed. This application was not made as soon as possible, according to the respondent's own timeline. Even if it had, it does not then fall into Rule 30A(2)(a) or (2)(b). Nor has the respondent established that there are exceptional circumstances to justify a postponement. The hearing was to proceed as listed.

20. Mr Culshaw made an application to strike out the response, for a failure to comply with directions and/or ET rules of procedure. In short, this was refused. The tribunal considered that this was not a necessary step in the circumstances. The case was ready to be heard so far as the tribunal was concerned. There was no submission by Mr Fakunle that Mr Peruta, or anybody from the respondent was going to give evidence. In those circumstances, the application was refused.

LIST OF ISSUES

21. The list of issues was recorded by Employment Judge Doyle in his Case Management Orders that were completed following a Preliminary Hearing in this case on 31 August 2022. The record of this hearing was contained at pages 23-32 of the evidence file, with the list of issues being recorded from para 12 on page 24 of the file. The issues were confirmed by the parties as being the list of issue sin this case at the outset of this hearing.

22. The issues were recorded as follows:

- (12) The claimant says that on about three occasions when she was in a visibly good mood in a work video call the respondent's director, Mr Peruta, said to the claimant in the presence of her colleague – "You must have taken your happy pill" and that he wanted "some of them pills myself". This is said to amount to disability harassment contrary to section 26 of the Equality Act 2010.
- (13) The claimant also says that in the first month of employment Mr Peruta told her to use her woman's "assets" to get bookings, and he ordered her to "flirt" with clients. The claimant did not agree, but Mr Peruta insisted that this was the best way to get clients' "attention". This is said to amount to sexual harassment contrary to section 26 of the Equality Act 2010.
- (14) The claimant further says that Mr Peruta's wife asked the claimant to send a picture of herself to add to the claimant's email signature. All three female workers in the company had a picture on their email signature. The one male – Mr Peruta – did not. This is said to amount to direct sex discrimination contrary to section 13 of the Equality Act 2010.
- (15) The claimant says that she was then absent from work on a number of separate days from 20 September 2021 due to her anxiety. She says that on the morning of 7 October 2021 she received an email from Mr Peruta informing her of her summary dismissal and that she would receive pay in lieu of one week's notice. This is said to amount to disability discrimination contrary to section 15 of the Equality Act 2010.
- (16) The claimant also states that on 15 October 2021 she submitted a "grievance" by email about the above matters. The claimant received no response. This is said to amount to post-employment victimisation contrary to section 27 of the Equality Act 2010.
- (17) The claimant also complains that she has not been paid accrued holiday pay and that she did not receive a statutory statement of employment particulars.
- (18) The respondent company accepts that it knew of the claimant's anxiety and it accepts that she has a disability as a result. It does not accept the allegations of discrimination or harassment, and it disputes the claimant's account. It does accept that it dismissed the claimant, but its position is that she was dismissed because she was unable to confirm when she would be able to return to work in circumstances where the company was busy and needed some certainty.

LAW

23. Protection against direct discrimination is provided for at s.13 of the Equality Act 2010:

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

24. Protection against harassment is provided for at s.26 of the Equality Act 2010:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

25. Protection against discrimination arising from disability is contained at section 15 of the Equality Act 2010.

(1) A person (A) discriminates against a disabled person (B) if—

- (a) A treats B unfavourably because of something arising in consequence of B's disability, and
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

26. Victimisation protection is provided for at s.27 of the Equality Act 2010.

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

27. We reminded ourselves of the burden of proof in discrimination cases, with reference to section 136 of the Equality Act 2010:

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

28. Pursuant to Regulation 30 of the Working Time Regulations 1998, a worker can complain to a tribunal for a failure to make a payment in lieu of untaken holiday leave upon termination of employment. That right being provided for at Regulation 14 (2) of the Working Time Regulations.
29. A failure to provide a written statement of particulars in accordance with s.1 of the employment Rights Act 1996, can be brought before the tribunal pursuant to section 38 of the Employment Act 2002.

CLOSING SUBMISSIONS

30. The tribunal benefitted from hearing oral closing submissions from both Mr Fakunle, on behalf of the respondent, and Mr Culshaw, on behalf of the claimant. Although these submissions are not recorded here, they were considered when determining the issues in this case.

FINDINGS ON EACH HEAD OF CLAIM

Holiday pay claim

31. The claimant had worked for 52 days for the respondent at the point of termination. Her gross pay was £22,000.
32. The claimant took no holiday leave during her employment with the respondent.
33. The claimant on the date when she was terminated was owed 3.98 days,
34. The claimant is awarded the gross figure of £336.74 (3.98 days x £84.61 per day) for outstanding holiday pay on termination.

Written Statement of employment particulars

35. The claimant did not receive a written statement of her employment particulars during her employment with the respondent.
36. The claimant is awarded 4 weeks' pay, pursuant to s.38 of the Employment Act 2002. The award is in the sum of £1,692 (22000/52 x 4).

Victimisation

37. This was the more complex of the complaints being brought by the claimant.
38. The tribunal were provided with a copy of the respondent's staff handbook at the beginning of the hearing by Mr Fakunle. This had not been disclosed to the claimant in advance of today, but Mr Culshaw raised no concerns with his being admitted into evidence.
39. The handbook itself, in its introduction is referring to procedures concerning employment, and we take this into account.
40. We also consider that at the point of raising the grievance, the claimant's employment had come to an end. We have considered the general wording of the

grievance provisions in the handbook.

41. This tribunal concluded that this particular complaint does not succeed. The claimant has not satisfied the tribunal that Mr Peruta not responding to her grievance reaches the level of a prima facie detriment. We consider that it would not be reasonable for a worker to perceive not replying to the grievance in these circumstances reaches the level of a detriment. And further, we were not satisfied that the claimant satisfied the burden in respect of establishing that this was caused by her having raised the grievance in the first place. The claimant provided no evidence from which the tribunal could conclude that there was a causal link between the act (if that had been found to be a detriment) and the protected act itself.
42. The victimisation claim therefore fails and is dismissed.

Direct sex discrimination

43. The claimant in her oral evidence before this tribunal explained that this was her second period of employment with the respondent. And that during her first period of employment in 2019 that all employees were required to have sent a photo of themselves to the respondent, to be attached to their emails. This was the norm to inform clients of who they were conversing with.
44. The claimant did not take any issue with the request in 2019.
45. The claimant accepted that the photograph being attached to the email was so that the respondent's client was aware of who the email came from.
46. The claimant did not herself consider this request, at the time, to be detrimental treatment of her. In making his finding we rely on the claimant's witness statement, which does not give evidence that this was how the claimant viewed the request for her photo.
47. The photograph of the claimant is no more than a professional photograph (see pp41-42).
48. Considering that the claimant did not give evidence that she considered this request to provide a photograph to be attached to her emails as being a detriment. And considering the other relevant circumstances, which support that the request was for professional purposes. This request, in the judgment of this tribunal, is found not be detrimental treatment of the claimant, nor is found to be because of the claimant's sex. The claim of direct sex discrimination therefore does not succeed.
49. Although we do not consider it necessary to take this any further, we do comment that Mr Peruta, although named by the claimant as a suitable comparator, was not a suitable comparator within s.23 of the Equality Act 2010. Mr Peruta was the Managing Director of the respondent, whilst the claimant was a Sales Account Manager. They are in materially different circumstances.

Harassment related to disability

50. We accept the claimant's evidence in respect of the 3 occasions when Mr Peruta said to her that "you must have taken your happy pill" on a video call in front of others.
51. The purpose of this comment was to try to humiliate the claimant. This made the claimant feel shocked and scared.

52. These comments have affected the claimant's confidence, her self-esteem and her enjoyment of life.
53. These comments are unwanted conduct by the claimant that had the purpose and effect of creating a harassing environment. The claimant perceived these comments in this way, and it was reasonable in the circumstances for her to do so. This treatment does reach the level of being disability related harassment in the judgment of this tribunal.

Harassment related to sex

54. Mr Peruta told the claimant to both use her women's assets to get bookings, and also ordered her to flirt with clients as he insisted that this was 'the best way to get a clients attention'.
55. The comments made the claimant feel like Mr Peruta was using her as some sort of sex object. She felt objective and degraded. This made the claimant feel that Mr Peruta viewed her value as being in her physical assets.
56. This was unwanted conduct related to sex that had both the purpose and effect of creating a harassing environment. The claimant perceived these comments in this way, and it was reasonable in the circumstances for her to do so. This treatment is sex related harassment in the judgment of this tribunal.

Discrimination arising from disability

57. The claimant was absent for an illness related to her disability from 04 October 2021 until her dismissal on 07 October 2021.
58. The claimant was dismissed for that absence.
59. The dismissal is unfavourable treatment. And she was subject to that treatment for an illness that arose in consequence of her disability.
60. The respondent has adduced no evidence as to a legitimate aim for the purpose of justifying that treatment. The claimant's complaint of discrimination arising from disability therefore succeeds.

LIABILITY CONCLUSIONS

61. The claim of direct sex discrimination does not succeed in this case. However, the claims of harassment related to disability, harassment related to sex, discrimination arising out of disability and unpaid holiday pay on termination of the contract. The respondent has also been found not have provided the claimant with a written statement of particulars during her employment with the respondent.

REMEDY

62. The claimant only seeks an injury to feelings award in respect of her discrimination complaints. There is no claim for loss of earnings or other pecuniary losses.
63. We have considered the evidence of the claimant, which was largely unchallenged by the respondent. We take account that the discrimination we have found to have taken place was by the head of the company, Mr Peruta, the Managing Director. This was, at least in respect of the disability harassment, in front of colleagues and so there is a public aspect to it.

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64. We note the effect this has had on the claimant. Including that she was very distressed by what Mr Peruta had done to her and that she remained upset until now. That the discriminatory treatment had knocked the claimant's confidence and trust and that she has become more suspicious of people in her daily life. The treatment has affected her sleep and she has withdrawn socially. We take account that the discrimination was not a one-off event, but a series of events. And we do take account that the respondent has simply ignored the claimant's grievance.
65. Having weighed up all the relevant factors and circumstances in this case, we consider that an award at the lower end of the middle band of Vento is appropriate. We award a figure of £12,000 for injury to feelings. This is a global award, as the tribunal did not consider it appropriate to make separate awards given the overlap between the discrimination and their effects on the claimant.
66. We have calculated interest from the date of dismissal. We consider that to be where the real impact on injury to feelings lies. And we consider that to be an appropriate date to take from which interest should be awarded. There are 432 days between then and today. We apply the statutory rate of 8% to that figure. And award for interest of £1,136.22 is made.
67. The claimant is awarded: £12,000 for injury to feelings, + £1,136.22 interest, £336.74 holiday pay and £1,692 for failure to provide written statement of particulars.

Employment Judge Mark Butler

Date: 17 February 2023

JUDGMENT SENT TO THE PARTIES ON

20 February 2023

FOR THE TRIBUNAL OFFICE

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