



EMPLOYMENT TRIBUNALS

Claimant: Mr. Mario Franciamore

Respondent: Criterion Hospitality Limited

Heard at: London South via CVP

On: 2 and 3 March 2023 (hearing)
And 23 March 2023 (deliberations)

Before: Employment Judge D. Wright
Ms. S. Khawaja
Ms. A. Rodney

Representation

Claimant: In person

Respondent: Mr. J. Cook, counsel

JUDGMENT ON LIABILITY

1. The Respondent discriminated against the Claimant on grounds of disability by selecting him for redundancy.
2. Any award for loss of earnings will be limited to a maximum end date of 31 July 2020.
3. The matter to be listed for a remedy hearing at 10.00 on 24 April 2023 with a time estimate of one day.

REASONS

The hearing

1. The matter was listed for a two day hearing, and it was agreed at the outset that we would only be able to deal with liability. If necessary a separate hearing would be arranged to deal with remedy.
2. The Claimant represented himself. He relied on his own oral testimony and the written statements of Jay Balra and Melissa Harris, neither of whom were present to be cross examined.
3. The Respondent was represented by Mr. Cook, of counsel, and relied upon the oral evidence of Mr. M Sandfort, along with documents produced by various individuals, none of whom were present to be cross examined.

The Claim

4. The Claimant brings claims of discrimination under section 15 Equality Act 2010. He claimed that the following things arose from his disability:
 - 4.1. Difficulty in working from the office as opposed to working at home.
 - 4.2. His absences from work.
5. The sole allegation of unfavourable treatment is the Claimant's dismissal, which he says was the result of a campaign to build a case against him.
6. The Respondent accepts that the Claimant was a disabled person for the purposes of s6 Equality Act 2010 and that they had knowledge of the disability. They also accept that the dismissal was unfavourable treatment.
7. However, they do not accept that the Claimant had difficulty working from the office. They put the Claimant to proof that any difficulties arose from his disabilities. Likewise, the Respondent puts the Claimant to proof as to whether his absences were linked to his disability.
8. The Respondent disputes that any of these things which the Claimant says arose in consequence were a substantial (or more than minor) influence on the decision to dismiss the Claimant.
9. The Respondent says that the reason for the dismissal was a genuine redundancy situation, and that the Claimant was selected due to his skill set overlapping with the team manager, whereas the other team member had a skill set which the Claimant did not possess. Initially the Respondent advanced the argument that this was not redundancy but rather was a "releasing from his contract". However, they corrected that point before the hearing and explained that they were differentiating between a redundancy process which required consultation and one which did not.
10. The Respondent further advances an argument in line with *Chagger v Abbey National plc* [2009] EWCA Civ 1202 CA, that even if the Tribunal finds that the dismissal was an act of discrimination then he would have been dismissed fairly at an earlier stage than the Claimant suggests and therefore any loss of earnings award should be limited.

Neutral Chronology

11. The Respondent is a company which manages a number of hotels. The Claimant was employed as a Digital Marketing Manager on 22 July 2019. Around this time he completed a medical declaration form, informing the Respondent that he suffers from Chron's disease and Behcet's disease.
12. He had a six-week probation meeting on 5 September 2019 and a 12 week probation meeting on 22 October 2019, receiving positive feedback on both occasions.
13. The Claimant was absent from work with flu type symptoms from 3 to 7 February 2020, and then again from 24 February to 4 March 2020 with acute abdominal problems.

14. On 9 March 2020 the Respondent's cancellation report was published showing significant cancellations of bookings at the hotels managed by the Respondent.
15. Between 9 and 13 March 2020 the Claimant was absent from work with stomach pain.
16. During this time, on 12 March 2020 the Respondent implemented a cost reduction plan.
17. On 15 March 2020 the Respondent began planning for the closure of two of the four hotels it operated.
18. On 16 March 2020 the Government announced that individuals with weakened immune systems and/or certain medical conditions should shield due to the risk of Covid-19.
19. On 17 March 2020 the Claimant was dismissed on grounds of redundancy. Four other members of staff were dismissed by way of redundancy at or around the same time.
20. Over the next few weeks, the Respondent began closing their hotels.
21. On 26 March 2020 the Government introduced the first national lockdown.
22. In April 2020 the remaining management team agreed to 40% pay cuts.
23. The Claimant issued a grievance/appeal regarding his dismissal on 6 May 2020 leading to an email dialogue.
24. The Claimant submitted an ET1 on 9 July 2020. The same month eighteen further employees were made redundant, including the Remi Gutteridge, the other member of the Claimant's team who reported to Mr. McCormack.

Evidence and Findings

Working From Home

25. The Claimant accepts in his evidence that he never asked to work from home. He says that this was because he sensed that the Respondent would be hostile to such a request. He has not provided any evidence to support this assertion. Furthermore, on his own evidence, when he returned to the office on 16 March 2020 the Respondent was preparing people's laptops with software to allow them to work remotely. Therefore, we find that the Claimant was not subjected to unfavourable treatment in relation to any potential future need to work remotely.

Absences From Work

26. The Claimant was absent from work between 3 and 7 February 2020 with flu like symptoms. He accepted in cross examination that this was probably not linked to his disability and therefore we find that it was not.
27. The absence between 24 February and 4 March 2020 were noted on the fit note to be related to "acute abdominal" issues which were still under investigation. Mr. Cook suggests that this means it cannot be linked to the

disability because the doctor would have explicitly said this on the note, rather than saying it needed further investigation. With respect the Tribunal disagrees, we find on the balance of probabilities that acute abdominal pain was likely to be linked to one of the Claimant's disabilities.

28. Likewise, the absence from 9 to 13 March 2020, which were noted to be linked to his stomach. There is no documentary evidence for this sickness, but we accept, on the balance of probabilities, that it was linked to his disability.
29. The Claimant advanced the case that there was a concerted effort by the Respondent to remove him from their employ. Although he was clear that he was not suggesting there was a conspiracy, we found that many of his arguments strayed close to alleging a wide-ranging conspiracy.
30. The Claimant's case is that he when he first started his employment, he met Marc Sandfort (who he had previously worked with), but he ignored the claimant.
31. After completing his medical form he says he was taken into a meeting room by his line manager, Craig McCormack and another member of staff. In that meeting he alleges that he was told that the company doesn't pay employees for absence relating to sickness and that taking days off was frowned upon by the owner.
32. In cross examination it was put to him that his contract said that he was entitled to SSP and the Claimant accepted that. We find that the discussion was reminding the Claimant that the Respondent did not pay full pay for time off sick.
33. Furthermore, it was put to the Claimant that there couldn't be a culture of frowning upon sick leave as the Claimant accepts he was told to go home by Craig McCormack when he was ill. The Claimant did not accept this, he says that the decision to send him home was part of the attempts to build a case against him as other members of staff with similar flu-like symptoms were not sent home.
34. We find that there was a mention in the initial meeting that taking sick leave was frowned upon but find this was more along the lines of the Respondent wanting to be sure that people were genuinely ill, and not using sick leave as an excuse when feeling a little run down. We note that the team was relatively small, and note that only SSP was paid, which suggests that, at the very least, the Respondent was not the most supportive employer when it came to sick leave. This does not necessarily mean that they did not comply with their statutory obligations.
35. The Claimant relies on a "witness statement" from Jay Balra. This consists of an email to the Claimant dated 28 February 2021, almost a year after the dismissal and does not contain a statement of truth. We also remind ourselves that she was not present for cross examination. Ms. Balra says that she believes the Claimant's employment was ended due to sickness, as she heard management making comments about his time off sick.
36. We find that this email contains scant details of the comments heard,

whether they were disparaging or simply factual information being passed on. There is no indication as to which managers were involved in the discussion and no real context given. We also note that it was made after Ms. Balra was herself dismissed by the Respondent. Noting the rules on hearsay evidence, and the limited information contained in the email we find that we can give very little weight to this evidence when considering whether the Respondent was trying to dismiss the Claimant for his sickness absences.

37. Likewise, the Claimant relies on a “witness statement” from Melissa Harris. This is contained in an email to the Claimant dated 1 August 2022, over two years after the events, and after Ms. Harris was dismissed. Again, there is no statement of truth and she was not present to be cross examined.
38. Ms. Harris says that she had been off sick in the week of 6 March 2020 and on her return, she heard Sandra (the HR manager) speaking to “I think, Craig” about trying to fire the Claimant as he had been off sick a lot. She was worried and asked Craig McCormack whether she was also at risk due to her history of sickness and was reassured that she was safe and they wanted to fire the Claimant as he had been off sick a lot and had done the same in a previous job.
39. There is a little more context and information here than in Ms. Balra’s statement but there are still plenty of areas where we would have expected cross-examination, or questions from the Tribunal, to expand or clarify points. As such we find that we can give little weight to the evidence.
40. This is not the only place, however, where the Claimant relies on his sickness levels at a previous employer.
41. The Claimant says that a former manager, Neil Braude arranged a meeting with him through LinkedIn. After a few postponements this took place in January 2020 (before the Claimant had any time off sick). On the face of it, the meeting appeared to be a catch up between former colleagues who shared a common disability. However, the Claimant suggested that Mr. Braude was acting oddly during the meeting and feels that he may have passed information from the meeting back to the management team at the Respondent. It was also suggested that the impetus for Mr. Braude reaching out may well have come from the Respondent. We find that there is no evidence to suggest that Mr. Braude passed information on the Claimant back to the Respondent. We also find this would be unlikely as he would be helping to dismiss someone on grounds of a disability which he also had.
42. We find it to be more likely that if anyone passed on information regarding the Claimant’s previous sickness levels it would be more likely to be Mr. Sandfort who was employed by the Respondent and had previously worked at another employer with the Claimant. However, there remains insufficient evidence to make a finding that this did happen.
43. The Claimant also relies on a discussion with Zac Pearce in December 2019. Mr. Pearce was in charge of the opening of Zedwell hotel, which was due in or around February 2020. The Claimant says that he was warned that some jobs would be lost after the opening. He also says that he was warned that Mr. Pearce would be leaning on Mr. McCormack in the coming

months and in turn Mr. McCormack was likely to lean on the Claimant. He says that he was warned to keep his head down. The Claimant says that this is evidence that there was a concerted campaign, known amongst management, to get rid of him.

44. We note that this discussion took place before the Claimant took any time off sick and therefore any warnings contained in it were unlikely to be linked to his disability. Whilst we find that a conversation did take place, we find that it was more general in its terms. It is not unusual for companies to make redundancies when a project (such as opening a hotel) is completed as those skill sets may no longer be needed. Furthermore, the warnings about keeping his head down, we find were more likely to have been “heads up” that a significant amount of work was coming to the team shortly and stress levels may be high.
45. The Claimant also relies on his being locked out of the Google Analytics for Zedwell when it opened in February 2020. There is no evidence that this was a deliberate act and we do not find that it amounted to discrimination on the basis of his disability.
46. The Claimant returned to work on 16 March 2020. That day people in the office were having software added to their laptops to enable them to work from home, the Claimant did not. However, we find that this would make sense if the decision had already been made to let him go, although not communicated to him at this point.
47. On 17 March 2020 the Claimant had a meeting with a client and Craig McCormack joined the call. This was unusual and the Claimant feels that it was an indication that he was going to be dismissed on grounds of disability, even though he had not yet been informed. The Respondent suggests that this was because the decision had been made and they wanted to ensure Mr. McCormack was up to speed on work he would be taking over.
48. The dismissal was communicated to the Claimant later that day. There was some dispute as to the reason given, but we find that it was clear that the reason given was that the Respondent needed to make cuts due to the burgeoning pandemic and the impact it was having on the Respondent’s finances.
49. We accept the Respondent’s evidence that four other members of staff, from different departments, were also made redundant on or around this date.
50. Notwithstanding the limited weight we attach to the witness statements above, and our finding that the meetings with Mr. Pearse and Mr. Braude were not evidence of a conspiracy style attempt to build a case against the Claimant we find that the Claimant has done enough to shift the burden in this matter to the Respondent. We have found that the Respondent was not the most sympathetic when it came to sickness leave and note that the decision to make the Claimant redundant, rather than his colleague in the team, Remi Gutteridge, came after a series of absences, the majority of which were linked to his disability. The dismissal was the day after his last period of sickness ended. We further note that the Respondent was unable

to say whether Ms. Gutteridge has a disability or not.

51. The Respondent's position is that it was in significant financial difficulty and needed to make reductions in staffing. Mr. Sandfort gave clear evidence on this point, making use of the reports in the bundle to support the assertion. The Claimant spent the bulk of his cross-examination arguing that there was no financial difficulty that could be drawn from the evidence provided. We find that it is abundantly clear that the Respondent was struggling financially as a result of the pandemic which led to fewer bookings and more cancellations of pre-booked stays.
52. We therefore find that there was a genuine redundancy situation across the business.
53. Mr. Sandfort gave evidence that initially they tried to spread to job cuts across all teams in head office and we accept that this would have been a reasonable way to make the cuts. Therefore, there was a genuine redundancy situation in the Claimant's team.
54. The Respondent says that the reason they chose the Claimant, rather than Ms. Gutteridge or Mr. McCormack is that:
 - 54.1. Mr. McCormack, as manager had other responsibilities which the Claimant could not carry out.
 - 54.2. Mr. McCormack's skill set matched the Claimant's and therefore he could cover the Claimant's role.
 - 54.3. Mr. McCormack's skill set did not match Ms. Gutteridge's.
55. Therefore, on the face of it there appears to be an arguable justification for this, provided that the Respondent can evidence this claim.
56. The Claimant says that he could have done Ms. Gutteridge's role, having done it previously. He has not provided any evidence of having done her role before, but we accept that he may have been able to do her work. We also find that he had not carried out this role for the Respondent.
57. The Claimant also says that he could have covered Mr. McCormack's role. He points out that his salary was much lower than Mr. McCormack's and only slightly higher than Ms. Gutteridge. Therefore, the Respondent could have made them both redundant and kept him to cover all the work for a lower total salary.
58. We find that Mr. McCormack, being a manager, is not an appropriate comparator, although Ms. Gutteridge is.
59. It is accepted that no discussions took place with the Claimant or Ms. Gutteridge relating to their skill sets. Strictly speaking this was not required due to the number of people being made redundant at this point, but it would have helped to evidence the Respondent's position.
60. It is further accepted that there were no minutes kept of the meeting where the Claimant was dismissed. No minutes were provided of any meetings where the criteria for dismissal were discussed.

61. The only evidence we have is an email from Mr. McCormack from around the 27 March, following the complaint raised by the Claimant, explaining the reason.
62. Mr. McCormack did not attend to give evidence on this point and Mr. Sandfort accepted that he was not directly involved in the decision to select the Claimant. The account from Mr. McCormack is much closer in time to the events but does not have a statement of truth and was prepared to respond to a complaint in support of his then employer. Therefore, we have to treat it with caution when determining the weight to give the evidence.
63. We also note that the Claimant was going through the grievance process when the national furlough scheme was announced. It would have been open to the Respondent to reinstate him and place him on furlough, but they did not do so. They had kept Ms. Gutteridge on initially and then placed her on furlough when that became an option, only dismissing her when the scheme drew to an end.
64. We find that the principle reason for the Claimant's dismissal was redundancy. However, we have to consider whether his disability played more than a trivial role in the decision to select him over Ms. Gutteridge.
65. Coming so soon after his disability related absences, and in the light of no contemporaneous notes regarding the selection criteria (the only record coming after the dismissal), we find, on the balance of probabilities, that the Claimant's sickness absences played more than a trivial role in the decision to select him for redundancy over Ms. Gutteridge. As such the dismissal does amount to an act of discrimination.

Chagger

66. The Respondent argues that where we have found that the dismissal was an act of discrimination then we should consider whether the Claimant would have been dismissed anyway had a fair process been followed.
67. The Respondent first argues that he would have still been dismissed at the same time due to the difference in skill sets. However, there is limited evidence before the Tribunal to determine what the exact skills sets of the Claimant and Ms. Gutteridge were.
68. The alternative date that the Respondent puts forward is 31 July 2020. This is the date that eighteen members of staff were made redundant, including Ms. Gutteridge. The Respondent argues that at this point it was clear that neither the Claimant nor Ms. Gutteridge's services were required and he would have been dismissed by way of redundancy then.
69. The Claimant argues that he could have carried on and taken Mr. McCormack's position at a lower rate of pay. He notes that Mr. McCormack was not dismissed but left the Respondent's employment of his own accord at a later date. Therefore, he could have remained working there indefinitely.
70. We have already found that the correct comparator in this case would be Ms. Gutteridge, as she was at a closer level to the Claimant, rather than Mr. McCormack who was their line manager. As such we accept the

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Respondent's argument that the Claimant would, on the balance of probabilities, have been dismissed fairly in any event on 31 July 2020. Accordingly, any loss of earnings claim would be limited to this date.

ACAS Code of Practice on Disciplinary and Grievance Procedures

71. This does not apply to dismissals on grounds of redundancy and therefore does not apply to this case.

Remedy

72. The case will be listed for a remedy hearing at a later date, notice of which will be sent to the parties in due course.

Employment Judge **D Wright**

Date: 23 March 2023