



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Alicia Burton

v

Ridgebrook Hospitality Limited

Heard at: Reading

On: 15 & 16 May 2023

Before: Employment Judge S Moore
Mrs Hancock
Mrs F Betts

Appearances

For the Claimant:

Ms D Kingdon, lay representative

For the Respondent:

Mr A Jonah, director

JUDGMENT

- (1) The claim for unpaid holiday pay is dismissed on withdrawal by the Claimant;**
- (2) The claim for notice pay (breach of contract) is dismissed on withdrawal by the Claimant;**
- (3) The claim of discrimination arising from disability is dismissed.**

REASONS

INTRODUCTION

1. This is a complaint of unpaid holiday pay in the sum of £118.93, unpaid notice pay in the sum of £112.50 and discrimination arising from disability pursuant to s. 15 Equality Act 2010. The Respondent accepted liability in respect of the claims for holiday and notice pay and paid the sums due prior to the start of the hearing, however it contested the claim for disability discrimination which is based on the Claimant's dismissal with immediate effect on 7 January 2022.

2. The issues for the Tribunal to decide were therefore as follows:
 - (i) At the time of her employment, namely 7 September 2021 until 7 January 2022, was the Claimant a disabled person within the meaning of s.6 Equality Act 2010? The disability relied upon is a mental health impairment of anxiety and depression.
 - (ii) If so, did the Respondent know, or could it reasonably have been expected to know that the Claimant had that disability?
 - (iii) Did the Respondent dismiss the Claimant because of something arising in consequence of the Claimant's disability?
 - (iv) If so, has the Respondent shown the treatment was a proportionate means of achieving a legitimate aim?
3. For the Claimant we heard evidence from herself and from Ms Kingdon, (the Claimant's grandmother).
4. For the Respondent we heard evidence from Mr Jonah (Managing Director), Ms Claudia Jorge (Head Chef between 16 October 2020 and 15 October 2021) and Ms Szandra Kettler, (General Manager/Front of House from April 2021 until early 2023).
5. We were also referred to a bundle of documents submitted by the Claimant and a separate bundle of documents submitted by the Respondent.
6. The Claimant, Ms Kingdon, and Mr Jonah had not prepared witness statements, however they gave evidence by answering questions from the Tribunal on the relevant facts and matters before being subject to cross-examination by the other party. Ms Jorge and Ms Kettler had prepared witness statements which stood as their evidence in chief (in the normal way).
7. The following is a summary of that evidence insofar as it is relevant to the issues in the case:

EVIDENCE

8. The Respondent is a small company that operates a pub and restaurant called The Rowbarge, in Woking. On 3 September 2021 the Claimant, whose date of birth is 8 April 2003, was interviewed by the Respondent for a front of house role. She was given a trial shift on 6 September 2021 but during the trial had an argument with one of the customers. However, Mr Jonah wanted to give her a second chance and so offered her a role as a trainee chef, starting on 7 September 2021 at the minimum wage of £7.50 an hour. The Claimant's average contracted hours were a minimum of 15 hours per week, although these were to vary from fortnight to fortnight, depending on the needs of the business. The first three months of employment were stated as being a probation period.

9. The Claimant worked shifts which she was given the preceding week by Mr Jonah, most of which were afternoon shifts as the Claimant said she preferred to wake up later.
10. The evidence of Ms Jorge and Ms Kettler (neither of whom now work for the Respondent) was that for the first week or two all went well, but after that there began to be problems with the Claimant being late for shifts, not turning up for her shifts, and taking unauthorised breaks to go outside to smoke or use her phone.
11. Between 23 and 30 September 2021 the Claimant was signed off sick from work by reason of an ankle injury she sustained in a shopping centre.
12. Shortly after her return to work, in the presence of Ms Jorge, Mr Jonah had a conversation with the Claimant about her absence and the fact he was unhappy with the Claimant being late and unreliable.
13. Between 8 and 13 October 2021 the Claimant was off sick from work because she suspected she had Covid.
14. Between 20 October 2021 and 1 November 2021 the Claimant was signed off sick from work by reason of a contagious skin rash.
15. On about 19 November 2021 the Claimant didn't receive her usual monthly payment from Universal Credit. It transpired her payments had been stopped because HMRC was under the impression the Claimant had earned £1,011.10 in the preceding month, which was not correct. The reason for HMRC's misunderstanding may well have been that while the Claimant's payslips dated 30 September 2021 and 30 October 2021 had the correct pay dates, the payslip dated 30 September 2021 referred to the October pay period and the payslip dated 30 October 2021 referred to the September pay period. Unfortunately, this error was not picked up at the time by either the Respondent or the Claimant and indeed was not spotted until the middle of the hearing.
16. On 21 November 2021 Mr Jonah asked the Claimant how many shifts she would like for the coming week and she said she wanted four, rather than three, shifts.
17. On 22 November 2021 at 17.50 the Claimant sent a WhatsApp message to Mr Jonah saying she would be "a tiny bit late" for work. She sent a further WhatsApp at 18.03 saying "maybe 4 days was bit much this week I don't think I can come in tonight".
18. On 24 November 2021 the Claimant sent a message to Mr Jonah at 16.59 saying "I will be in tonight. I am sorry for the other night." However, she never arrived.
19. On 27 November 2021 she sent a message to Mr Jonah at 11.11 saying "I'm really sorry Fred. My mental health at the moment is really bad barely left my bed...".

20. On 1 December 2021 the Claimant provided a sick note covering the period 22 November 2021 until 24 December 2021 stating the Claimant was not fit to work on grounds of "mental health". The sick note contained no further information.
21. A couple of days later, Ms Kingdon, the Claimant's grandmother, came to the pub and spoke to Mr Jonah. She told Mr Jonah that the Claimant had a history of mental health issues, that she was living in supported housing, and was very distressed her benefits had been stopped, and that she didn't even have enough money for food. She also asked Mr Jonah why he had not paid the Claimant her November pay (which had been due at the end of November). Mr Jonah said he wanted to see some medical evidence from a consultant to support the sick note that the Claimant was off sick on mental health grounds. Mr Jonah said in evidence that he hadn't paid the Claimant at the end of November because on 22 November 2021 she had just stopped coming into work and that he was initially suspicious of the mental health sick note dated 1 December 2021, given the Claimant had already been off sick for an ankle injury, suspected Covid and a skin rash since September. However, in the course of his conversation with Ms Kingdon he agreed he would pay the Claimant her November pay. He also told Ms Kingdon that if the Claimant didn't have enough money for food she could come and eat in the pub. Mr Jonah said that at the time of his conversation with Ms Kingdon he thought that if the Claimant had an issue with her mental health he was prepared to help and sort it out.
22. Mr Jonah paid the Claimant her November wages a few days later on 6 December 2021. This date also marked the end of the Claimant's 3-month probationary period and Mr Jonah's evidence was that he decided the Claimant had not passed her probation and that he would dismiss her. He said his decision was based on her performance during the 11 weeks up until 22 November 2021 and not on her absence for mental health. The Claimant had had 3 periods of significant absence in a short space of time and had not been a reliable or consistent member of the team. If she had worked just her minimum contracted hours during those 11 weeks, she would have worked 165 hours, however in fact she had only worked 101.8 hours, which also didn't take account of the times she had been late. They were a small team of only 5 staff and the Claimant's absence had had an effect on business and there had been times he had been unable to open. However, Mr Jonah also said that he decided not to tell the Claimant his decision while she was on sick leave with mental health issues.
23. The Claimant's sick note expired on 24 December 2021. No further sick note was provided and in fact there was no contact between the Claimant and Mr Jonah until the first week of January 2022 when the Claimant contacted him to ask about sick pay and the issue with HMRC and the fact her Universal Credit had been stopped.
24. As regards the latter issue, Mr Jonah had previously tried to send the Claimant her payslips by email but she (or Ms Kingdon) had given him the wrong email address so she hadn't received them. Mr Jonah printed out

copies of the payslips for the Claimant and also sent her by WhatsApp a photo of her payslip history. Mr Jonah also informed the Claimant that when he had tried to process her sick pay he had been informed by HMRC that she wasn't entitled to it because her average weekly earnings were too low.

25. Although the Claimant said in evidence that by then she was feeling well enough to come back to work she didn't say that to Mr Jonah in her messages to him. She said in evidence she had been planning to have a separate conversation with him about that.
26. On 6 January 2022 the Claimant messaged Mr Jonah to say that her keyworker, Universal Credit and HMRC had emailed him, and that they were waiting for him to confirm what she had been paid (as she was still trying to sort out the issue with Universal Credit).
27. Mr Jonah replied the same day stating he had replied to the emails and tried to call HMRC but they hadn't answered.
28. On 7 January 2022 Mr Jonah messaged the Claimant again to say he had now spoken to HMRC and confirmed the Claimant's pay so that he believed they should now sort out the errors. The message continues "On another note, you haven't passed your probation period so I'll be terminating your contract here. Feel free to come and speak to me when you're able to."

Evidence in respect of disability

29. The Claimant provided a submission in response to Case Management Orders made on 15 December 2022.
30. The impairment replied upon in that submission is said to be her "mental health" which she stated she had, had for 5 years.
31. As regards the question, what were/are the effects of the impairment on your ability to do day-to-day activities, the Claimant stated:

"Normally none, except at times of stress leading to anxiety and depression when she needed support. When feeling unwell she would sometimes experience difficulty in sleeping and this would cause her to oversleep on occasion and to feel more stressed. She had previously had to leave her family home and was living at the time in supported housing provided by Transform Housing Association."
32. As regards dates when the impairments started and stopped, the statement provides:

"She has suffered from mental health problems of anxiety and stress which was first diagnosed when she was 14 years and she attended appointments which a consultant psychiatrist until she was 17 years. She has since had an appointment at CAHMS (child's mental health agency) and counselling sessions as well as visits to her GP."

33. As regards whether the Claimant had had medical treatment, including medication, the statement provides:

“She was prescribed anti-depressants but has preferred to receive counselling. She originally had counselling sessions for several years at The Royal Surrey hospital and has been getting help and attending counselling sessions in Camberley and Walton-on Thames since November 2021.”

34. As regards the question, what would the effect of the impairment have been without any treatment or other measures, the statement provides:

“A complete mental breakdown”.

35. In her evidence to the Tribunal the Claimant said she first began to have problems with her mental health about 5 or 6 years ago, when she was in year 8 or 9 at school and aged about thirteen. She experienced outbursts of emotion, being angry or breaking down in tears. She went to her GP and was referred for counselling to Dr Anderson at the Children’s Unit of the Royal Surrey hospital. The Claimant said she saw Dr Anderson between 8 and 10 times, until shortly after she turned sixteen on 8 April 2019. During this time she had kept attending school but had been given a diagnosis of anxiety and depression and had also tried to get a diagnosis of ADHD. She said she had a lot of self-hate as a teenager and “beat herself up about a lot of things”. At some point during this period (she didn’t remember when) the Claimant said she was put on antidepressants for a month or two but on one occasion she overdosed on them and had to spend a night in hospital. She hadn’t used medication since.

36. The Claimant didn’t appear sure whether or not she had been referred to adult services. She thought she had but said in any event she had wanted to take a break from counselling and after seeing Dr Anderson didn’t have any more counselling until December 2021. She said she thought she had then attended two appointments – one before and one after Christmas 2021 – at a clinic in Camberley. However, she couldn’t remember who she saw or anything about the counselling in Camberley except that she (or he) was a doctor. She hadn’t seen them since and wasn’t having counselling at the present time.

37. As regards the period between from 7 September to 21 November 2021 she had sometimes got anxious and was “battling her own brain” and on one occasion had been made to feel really embarrassed about not knowing the differences between different types of pizzas by Ms Kettler, who she thought did not like her. She also had sleeping issues which was sometimes the reason why she had been late for a shift, although she accepted that only some of her shifts had been morning shifts.

38. The Claimant further said she had a really difficult time after her Universal Credit stopped because she didn’t have any money and it was very traumatic for her. She couldn’t control her emotions and felt very

depressed. That was why she was signed off work between 22 November and 24 December 2021.

39. Ms Kingdon said she was the Claimant's grandmother. She was very aware of the problems the Claimant had had as a teenager and had driven the Claimant to her appointments with Dr Anderson. The Claimant was relying on Universal Credit for paying the bulk of her rent and it had been a very difficult time for her when the payments had stopped. She felt the Respondent was responsible for what happened with Universal Credit, and now she had spotted the mistake on the payslip she was even more convinced of that. She believed the Claimant had attended two sessions of counselling in Camberley around Christmas 2021, but she didn't know much about the sessions because the Claimant had travelled to them on her own by bus. Ms Kingdon hadn't seen the Claimant a great deal during that period, but she had talked to her and the Claimant had sounded "anxious, a bit tearful, down, and difficult to make laugh". She had the impression the Claimant was not going out much and sleeping a lot. She was getting support from a friend/boyfriend who was living in the same accommodation.
40. The actual medical evidence in respect of the Claimant's mental health is very limited and comprises only the following three documents:
41. First, a letter from Dr Anderson of the Children's Unit of Royal Surrey County Hospital dated 2 January 2019 stating the Claimant had missed her appointment on 20 December 2018 and that a further appointment would be rescheduled for 23 January 2019. The letter lists the Claimant's problems as being "headaches, depression, anxiety and anger management problems".
42. Secondly, the sick note of 1 December 2021 from Hillview Medical Centre in Woking stating the Claimant was not fit for work between 22 November and 24 December 2021 on grounds of "mental health". There are no other comments on the form.
43. Thirdly, a report dated 20 July 2022 from Dr Nikul Patel of Hillview Medical Centre in Woking which states:

"I have been a doctor at the surgery speaking to Alicia regarding her mental health since the end of 2021. She has a longstanding history of mental health concerns, mainly speaking anxiety and depression. She has been known to the child and adolescent services for mental health since before she was 18... She has spoken to myself and other colleagues at the surgery with regards to being signed off sick with stress on occasions...She doesn't currently take any form of medication for her mental health but I hope this letter can be of assistance to her claim."
44. Mr Jonah said that during her employment the Claimant had never shown signs of, or mentioned, being stressed or anxious or having issues with her mental health.

CONCLUSIONS

45. Turning first to the issue of disability, the question is not whether the Claimant has, or has ever had, problems with her mental health but whether she has shown that she satisfied the statutory definition of being a disabled person within the meaning of the Equality Act 2010 at any point during her employment with the Respondent between 7 September 2021 and 7 January 2022.
46. Section 6 of the Equality Act 2010 provides:
- (1) 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."
47. In this case the impairment relied upon for the purposes of section 6(1)(a) is a mental impairment of anxiety and depression.
48. Section 6(1)(b) provides that a mental or physical impairment amounts to a disability if it has both a substantial and a long-term adverse effect on a person's ability to carry out normal day-to-day activities.
49. As to the meaning of substantial, section 212(1) of the Equality Act 2010 and paragraph B1 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011 ("the Guidance"), state that the requirement that an adverse effect on normal day-to-day activities should be a substantial effect reflects the general understanding of disability as a limitation going beyond normal differences in ability which may exist among people and that a substantial effect is one that is more than a minor or trivial effect.
50. As to the meaning of long-term, paragraph 2 of schedule 1 of the Equality Act says:
- "(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 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."
51. The Claimant's case is that she became a disabled person by reason of anxiety and depression approximately 5 or 6 years ago and has since remained a disabled person so that she was a disabled person during the entirety of her employment.

52. Although the only medical evidence we have regarding the Claimant's mental health during the period she received counselling from Dr Anderson is the letter of 2 January 2019, in relation to the missed appointment on 20 December 2018, we are prepared to accept that during that period the Claimant had a mental impairment which had a substantial adverse effect on her ability to carry out normal day-to-day activities for the purposes of section 6(1) of the Equality Act 2010. In this respect it is plain the Claimant was referred to the Children's Unit of Royal Surrey County Hospital for counselling and the letter from Dr Anderson refers to the Claimant having problems of "headaches, depression, anxiety and anger management".
53. However, there is no evidence that that substantial adverse effect continued beyond April 2019, which, according to the Claimant, was the last time she saw Dr Anderson. During the two and half years between April 2019 and September 2021 (when the Claimant commenced employment with the Respondent) she wasn't receiving counselling or taking medication, and there is no evidence of her presenting to her GP because of problems with her mental health or stress or requiring any support. Further the Claimant's own impact statement states her impairment normally had no effect on her ability to do day-to-day activities, except at times of stress leading to anxiety and depression when she needed support, and that when feeling unwell she would sometimes experience difficulties sleeping. Even assuming the Claimant continued to sometimes have trouble sleeping during the period between April 2019 and September 2021 we do not consider this amounted to a substantial adverse effect or a limitation going beyond normal differences which exist among people.
54. We therefore find that the Claimant's mental impairment ceased to have a substantial adverse effect on her ability to carry out normal day-to-day activities in or about April 2019.
55. We note that paragraph 2(2) of schedule 1 to the Equality Act 2010 provides that "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". In this respect likely means, "could well happen" (Guidance at paragraph C3).
56. Here, however, there is no medical evidence to indicate that as at April 2019 the substantial adverse effects the Claimant had been experiencing were likely recur as she got older, and we cannot simply assume they were likely to do so. In this respect, while, sadly, it is not uncommon for teenagers to suffer from mental health problems, they do not necessarily carry those same problems through into adulthood.
57. It therefore follows that in our judgment the Claimant ceased to be a disabled person within the meaning of the Equality Act 2010 in about April 2019 and it further follows that she was not a disabled person when she started employment with the Respondent on 7 September 2021.

58. The next question is whether the Claimant became a disabled person by reason of the mental impairment of anxiety and depression at some point between 22 November 2021 and 7 January 2022, (having been signed off sick on 1 December 2021 with retrospective effect from 22 November 2021).
59. In this respect it is necessary to bear in mind the distinction between a normal stress reaction to adverse life circumstances, which, may produce symptoms of low mood and anxiety but is not a mental impairment for the purposes of the Equality Act 2010, and a mental impairment of anxiety and/or depression (which over time may be triggered or exacerbated by stress) (**J v DLA Piper UK LLP 2010 ICR 1052, EAT, Igweik v TSB Bank plc 2020 IRLR 267**).
60. Here, the sick note dated 1 December 2021 simply signs the Claimant off work on grounds of “mental health” for four weeks and makes no specific reference to anxiety and/or depression. Further we do not have any GP records to add context to that note or any evidence from the counsellor the Claimant says she saw on two occasions around Christmas 2021. The Claimant did not try to obtain a second sick note on the expiry of the first note (24 December 2021) and nor does she appear to have attended the surgery after Christmas. Moreover, the only reference to that period in the report from Dr Patel (dated 20 July 2022) appears to be the reference to the Claimant speaking to Dr Patel and others with regards to being “signed off sick with stress”.
61. Overall, therefore, we are not satisfied that the Claimant has established she was suffering from a mental impairment of anxiety and/or depression within the meaning of the Equality Act 2010 at any time between 22 November 2021 and 7 January 2022. We find rather that she was experiencing a stress reaction to a difficult life event, namely finding out her Universal Credit payments had been stopped in circumstances where she was living away from home and depended on the benefit to pay her rent.
62. Further and in any event, even if the Claimant was suffering from a mental impairment at this time, we are not satisfied the evidence establishes that any such impairment had a substantial adverse effect on her ability to carry out normal day to day activities. Although Ms Kingdon said she had the impression the Claimant was going out less than normal and sleeping a lot, we note the Claimant’s evidence that she was able to travel independently by bus to see a counsellor on two occasions and we note the Claimant continued to live independently throughout the period, albeit that her mood was low. We also note the Claimant’s evidence that by the end of the first week of January 2022 she was feeling well enough to want to return to work.
63. We would add that if we are wrong about disability, and the Claimant was a disabled person within the meaning of the Equality Act 2010 when Mr Jonah took the decision to dismiss her on or about 7 December 2021

and/or when he communicated that decision to her on 7 January 2022, we are satisfied the Respondent knew, or could reasonably have been expected to know, that she had that disability because of Mr Jonah's conversation with Ms Kingdon in early December when Ms Kingdon spoke to him about the Claimant's mental health.

64. However, we are also satisfied the Respondent did not dismiss the Claimant because of something arising in consequence of her disability.
65. In this respect we accept the evidence of Mr Jonah that he dismissed the Claimant because of her performance during her probation period up until 21 November 2021 and not because of her absence on mental health grounds from 22 November 2022. Indeed, we consider that Mr Jonah's conversation with Ms Kingdon gave him pause for thought and made him hesitate before dismissing the Claimant, rather than motivating him to do so.
66. Furthermore, and for the avoidance of doubt, we do not consider the problems with the Claimant's performance were matters that arose in consequence of her mental health (even assuming, in this scenario, she was a disabled person within the meaning of the Equality Act 2010 by reason of her mental health prior to 22 November 2021). In this respect the Claimant had, had three substantial periods of absence in a short period of time for matters unconnected with her mental health and had been late for afternoon/evening shifts as well as morning shifts. We accept Mr Jonah's evidence that he terminated her contract because of her poor work attendance and his view that she wasn't a reliable member of the team.
67. It follows from the above that the claim for disability discrimination is dismissed.

Employment Judge S Moore

Date: 22 May 2023

Sent to the parties on: 11 June 2023

GDJ
For the Tribunal Office