



EMPLOYMENT TRIBUNALS

Claimant: Miss Amrita Samra

Respondents: E.ON Energy UK plc T/A E.ON Energy UK

Record of an attended Full Hearing at the Employment Tribunal

Heard at: Nottingham

Heard on: 6, 7, 8 March 2023

In Chambers: 9 March 2023

Before: Employment Judge M Butler (sitting alone)

Members: S Connor
L Lowe

Representation

Claimant: In person

Respondent: Ms R Kight, Counsel

RESERVED JUDGMENT

1. The unanimous Judgment of the Tribunal is that the claims of unfavourable treatment in consequence of something arising from disability, harassment and failure to make reasonable adjustments are not well-founded are dismissed.

RESERVED REASONS

THE CLAIMS

1. By a claim form submitted to the Tribunal on 8 June 2021, the Claimant brought claims of:

- i) Unfavourable treatment in consequence of something arising from disability under section 15 of the Equality Act 2010 (EqA);
- ii) Harassment under section 26 EqA and;
- iii) Failure to make reasonable adjustments under section 21 EqA.

The Claimant was employed by the Respondent, a large energy supplier employing around 10,000 people, as an Ombudsman Liaison Officer from 1 February 2016. Her employment terminated by reason of redundancy in January 2022. The Respondent resists the claims and did not concede the Claimant was disabled. However, on an Open Preliminary Hearing on 17 March 2021, Employment Judge Britton found that the Claimant was disabled by reason of anxiety.

THE ISSUES

2. There was no agreed list of issues prior to the commencement of the hearing. The Claimant is a litigant in person and the Employment Judge spent some time at the commencement of the hearing explaining the procedure and answering any questions she had. She was advised that breaks would be offered to her whenever she needed them. She often became emotional during the hearing and the lack of agreement over the list of issues was at least in part due to her distrust of the Respondent and also her lack of legal knowledge. However, Ms Kight had prepared a list of issues which were adopted by the Tribunal and which are set out below. The Claimant did not object to this course of action and engaged with the list by suggesting an amendment which was adopted by the Tribunal.

3. LIST OF ISSUES

Section 15

1. *Was the Claimant (C) subjected to the following unfavourable treatment:*

- a. *18.01.21 Mrs J Hewitt (JH) relied on an Occupational Health (OH) report and insisted C return to work or take holiday or she would be classed as AWOL*
- b. *01.02.21 JH repeated the above*
- c. *JH included sensitive personal information about C in the OH referral that*

C did not consent to being included.

- d. *Her grievance was not handled properly in that:*
- i. *Findings were made that JH had done things wrong, but nothing was done/the grievance was not upheld.*
 - ii. *One of the grievance meetings was adjourned.*
 - iii. *R did not follow its bullying and harassment policy and suspend JH when C made allegations of harassment.*

2. *If so, did that treatment arise because she was off sick with her disability?*

3. *If so, was R's treatment of C a proportionate means of achieving a legitimate aim, i.e. the aim of managing attendance.*

Section 26 – harassment

4. *Was C subjected to the following unwanted conduct:*

- a. *18.01.21 contact from JH*
- b. *01.02.21 contact from JH*
- c. *11.02.21 attempted contact from JH*
- d. *JH sent Teams' prompts to C to join Wellbeing calls followings C's return to work.*
- e. *The Respondents (R) failure to consider C was on sick leave due to her disability.*

5. *If so, was that conduct related to disability?*

6. *If so, did it have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for C?*

7. *If looking at the effect of the conduct, was it reasonable for the conduct to have had such effect?*

Section 21 – failure to make reasonable adjustments

8. *Did R apply a PCP of reducing sick pay to 50% when an employee had been off sick for a certain period?*

9. *Did that PCP put employees with C's disability to a substantial disadvantage as compared to employees without C's disability?*

10. Did that PCP put C to the disadvantage?

11. Did R take such steps as were reasonable to minimise that disadvantage

THE EVIDENCE

4. The Tribunal heard evidence from the Claimant and for the Respondent from Mrs Joanne Hewitt, formerly Customer Disputes People Lead and the Claimant's Line Manager; Ms Jennifer Williams, Senior People Lead; Mr Aaron Smith, Residential People Lead; Ms Lisa Shepherd, Planning and Performance Business Partner; and Mr Andrew Mitchell, Head of Residential Collections. All of the witnesses provided witness statements and were cross-examined.
5. There was a bundle of documents consisting of 325 pages and references to page numbers in this Judgment are to page numbers in the bundle.

THE FACTUAL BACKGROUND

6. The Tribunal had difficulty in accepting the credibility of some of the Claimant's evidence. It was very clear that she had been given advice by Mr Robin Tetley, her Union representative, which was unhelpful, ill informed and had its origins in his agenda to discredit Mrs Hewitt for apparently historical reasons. An example of this is the Claimant's refusal at times to speak to Mrs Hewitt and insist everything was put in writing. It was also Mr Tetley who was the driving force behind the Claimant's insistence that Mrs Hewitt be suspended for bullying solely on the Claimant's say so and without any corroborating evidence.
7. The Claimant's evidence frequently lacked any corroboration or credibility. For example, in her evidence she said the Respondent did not take her grievance seriously and when questioned on this by the Employment Judge she replied, that this was because they did not uphold her grievance. Similarly, in her first and second stage grievance Appeals, she said they did not agree with her so did not take it seriously. Further, whilst accepting Mr Smith was giving her options in her grievance outcome, she claimed that by doing so he was treating her unfavourably (page 176).
8. The Claimant also confirmed in evidence that the OH report said she should share the report with her GP but she did not do this. We were not convinced by her subsequent comment that she had, "*a brief conversation*" with her GP about the report but nothing more.
9. The Claimant was also prone to putting her own illogical interpretation on to documents. For example, at page 70, she emailed Mrs Hewitt asking, "*Do I need to be at the meeting with OCC Health and HR?*". She maintained this was "*very similar*" to saying she wanted to be there and this justified her evidence that she was excluded from the meeting. She said this was, "*a matter of interpretation*". She also accused the Respondent of unfavourable treatment when Mr Smith adjourned a grievance meeting after Mr Tetley became unnecessarily argumentative such that

Mr Smith could not continue (having raised Mr Tetley's conduct with him on more than one occasion previously in the same meeting).

10. We also had difficulty in accepting the Claimant's evidence about the emails sent to her team by Mrs Hewitt. These emails were about the Wellbeing Wednesday initiative where the team (of about 65 people), or some of them, would meet for a discussion, some "down time" or prefer to simply relax at their desks or go for a walk. The Claimant said the fact that she was included in the circulation list whilst off sick amounted to harassment even though she ignored the emails.
11. In contrast, the Respondent's witnesses gave their evidence in a straightforward manner which was in the main corroborated by documents in the bundle. Mrs Hewitt became upset on several occasions whilst giving evidence and we accepted this was because she had been a friend of the Claimant with whom she met up socially prior to the Pandemic lockdown in 2020.
12. Accordingly, where there was a dispute on the evidence for the interpretation of documents, we preferred the evidence of the Respondent's witnesses.

FINDINGS OF FACT

13. In relation to the issues, we find the following facts:

- 13.1. The Claimant commenced work for the Respondent on 1 February 2016 and was an Ombudsman Liaison Officer. She performed well in her role and formed friendships with colleagues which included socialising with them outside work. This group included the Claimant's Line Manager, Mrs Hewitt. The Claimant's attendance record was very good.
- 13.2. It is not in dispute that the Claimant had some family issues which led to stress related symptoms about which she first consulted her GP in 2010. She suffered further stress related issues in 2011, 2012, 2014, 2015 and then 2019. In 2020 she experienced further issues in her personal life, not the least being her mother's serious illness.
- 13.3. On 24 November 2020, the Claimant began a long period of sickness absence as a result of anxiety arising from her various personal problems. On 10 December 2020, Mrs Hewitt referred the Claimant to the Respondent's OH service in accordance with its attendance management policy which provides that in relation to long term absence (over 28 days) inter alia:
 - The Line Manager is responsible for managing each case and will make appropriate arrangements with the employer for staying in touch on a non-intrusive basis.
 - Occupational Health should be consulted in all cases to provide (where appropriate) medical advice, support recovery/rehabilitation

and assist managers in preparing return to work plans and adjustments if required.

- 13.4. The OH report dated 10 December 2020 concluded, *"It is my opinion that as long as symptoms are manageable, Amrita should be fit to return to work within a time frame of 1 to 2 weeks"*. The report also suggested a phased return to work (page 50-52). It further noted, *"It is recommended that Amrita shares a copy of this report with their GP"*. The Claimant did not do so.
- 13.5. Mrs Hewitt saw this report on her return from holiday on 31 December 2020 and, noting that the Claimant's fit note anticipated the return to work in early 2021, contacted the Claimant to see how she was feeling. She was, however, concerned as a result of this conversation that the Claimant was not going to be fit to return to work and decided not to discuss this with the Claimant in that call.
- 13.6. After the New Year Bank Holiday when Mrs Hewitt returned to work, she telephoned the Claimant to see how she was and with a view to discussing her return to work. The Claimant said she was not in the right frame of mind to return and Mrs Hewitt asked her if she was happy to talk to OH again which she was. They then discussed what information Mrs Hewitt proposed to give to Occupational Health in the referral and the Claimant, with full knowledge of that information, agreed. We note at this point that throughout the Claimant's absence and prior to raising her grievance against Mrs Hewitt, their telephone calls were recorded on the Respondent's system by Mrs Hewitt and are found in the bundle from page 321.
- 13.7. The Claimant was then referred to Occupational Health on 11 January 2021 (page 53-57) and a report was received on 13 January 2021 (page 58-59). The report supported additional time off from the Claimant's main work but suggested the time should be used for preparing her to return to work. A stress risk assessment was also recommended. However, OH declined a more detailed assessment of the Claimant at this time as it was considered there had been no material change of circumstances.
- 13.8. On 18 January 2021, Mrs Hewitt called the Claimant to advise her of OH's opinion. On 3 February 2021, Mrs Hewitt emailed the Claimant with suggestions to help the Claimant's mental health including techniques and practical measures she could use and take to aid her recovery (page 60-62). Mrs Hewitt also specifically addressed the Claimant's holidays, saying, *"Another option is for you to take some of your holiday that you have outstanding. Currently you have just over 230 hours to use. A high majority of this can be carried over to next year; however, if you want to take some from next Tuesday, I am happy to arrange this"*.
- 13.9. On 8 February 2021, the Claimant's fit note was extended once more by her GP notwithstanding the view of OH that she was fit to return to work on 9 February 2021.

- 13.10. In one call to the Claimant on a date unknown but probably early February 2021, Mrs Hewitt did explain to the Claimant that the Respondent might consider her to be AWOL if she did not return to work when OH said she was fit to do so. This comment was an explanation of the Respondents policy and in no way a threat to the Claimant.
- 13.11. On 8 February 2021, the Claimant emailed Mrs Hewitt to advise her that she would not be returning to work on 9 February as her GP did not feel she was ready. She asked Mrs Hewitt to liaise by email as the calls were making her stress and anxiety worse (page 62). Mrs Hewitt replied to confirm she was arranging a meeting with HR and OH and would report back to the Claimant after the meeting (page 63). The Claimant replied asking, *“Do I need to be at the meeting with OCC and HR?”* (page 70). Mrs Hewitt replied saying, *“No need for you to be at today’s meeting”*.
- 13.12. After her meeting with OH and HR, Mrs Hewitt emailed the Claimant on 10 February 2021 to say she would call her the next day with an update from the meeting (page 72). The Claimant replied the following day asking for a summary to be emailed instead as she was not *“feeling great”*. Mrs Hewitt persisted by replying saying it was important she spoke to the Claimant (page 74) and the Claimant again asked if Mrs Hewitt could communicate by email (page 75). Mrs Hewitt then attempted to call the Claimant 2 or 3 times but when she did not answer emailed a summary of the meeting as requested (page 78).
- 13.13. Throughout the Claimant’s absence from work she, along with around 65 other employees received Mrs Hewitt’s Wellbeing Wednesday emails. She did not open them knowing what they were.
- 13.14. On 12 February 2021, the Claimant submitted a grievance against Mrs Hewitt (page 80-81). She claimed Mrs Hewitt was bullying her back to work, said she would override her GP’s fit note, harassed the Claimant, contacted her outside her usual working hours, tried to call her 3 times after being asked to communicate by email, did not show her the referral form sent to OH and advised the Claimant she did not need to attend *“when I have asked”*. Further, she alleged Mrs Hewitt told her she had no choice but to return to work regardless of her GP’s advice and if she got another fit note she would be classed as AWOL as OH deemed her fit to work.
- 13.15. The Claimant attended a grievance meeting on 23 February 2021 and was accompanied by Mr Tetley. Mr Smith was the interviewer and the minutes are at page 84-90. Mr Tetley said repeatedly in the meeting that Mrs Hewitt should be suspended under the Respondent’s bullying and harassment policies. He pursued this throughout the meeting and it is clear that he also asked for an adjournment at several meetings in the grievance process in order to advise the Claimant of what to say about Mrs Hewitt. Mr Tetley was a disruptive influence in the meetings.

- 13.16. The grievance was thoroughly investigated by Ms Williams who interviewed a number of relevant witnesses including Mrs Hewitt. Mr Smith considered the relevant witness notes and on 23 April 2021 sent his grievance outcome letter to the Claimant (page 172-177). The grievance was not upheld although Mr Smith recorded that Mrs Hewitt should not have emailed the Claimant outside normal office hours although he accepted she did this after she had caught up on her day's work.
- 13.17. On 9 June 2021, the Claimant appealed this outcome (page 180-181) and the Appeal was heard by Ms Shepherd. During the Appeal meeting it is fair to say that once more Mr Tetley attempted to pursue his demand to have Mrs Hewitt disciplined. Ms Shepherd dismissed the Appeal by letter dated 14 June 2021 (page 196-198).
- 13.18. On 1 July 2021, the Claimant submitted a second stage Appeal against the grievance Appeal outcome (page 211-213). This was heard by Mr Mitchell on 16 July 2021. Mr Mitchell sent his outcome letter to the Claimant on 4 August 2021 (page 225-228). He did not uphold the Appeal.

THE LAW

14. Section 15 EqA provides:

“Discrimination arising from disability

(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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

15. Section 20 (1-3) EqA provides:

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Section 21 EQA provides:

“Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.”

16. Section 136(2) EqA provides:

“Burden of proof

(1)

(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.”

17. We were referred to the following Case Law:

- ***Igen Limited v Wong [2005] IRLR 258, CA***
- ***Pnaiser v NHS England and Coventry City Council [2016] IRLR 170***
- ***Meikle v Nottinghamshire County Council [2004] IRLR 703, CA***
- ***O’Hanlon v The Commissioner for HM Revenue and Customs [2007] EWCA Civ 283***

SUBMISSIONS

18. Both parties made oral submissions which we do not rehearse here but confirm that we took careful note of those submissions in reaching our conclusions.

DISCUSSION AND CONCLUSIONS

19. We consider our conclusions by reference to the issues agreed between the parties.

20. In relation to the claim for less favourable treatment arising from her disability the Claimant alleges that on 18 January and 1 February 2021 Mrs Hewitt relied on an

OH report which the Claimant disagreed with and insisted that the Claimant must return to work or be classed as AWOL. Both Mrs Hewitt's witness statement and her contemporaneous notes of these conversations (page 323) show that, far from insisting the Claimant return to work, Mrs Hewitt was merely explaining that OH could override a fit note from an employee's GP if they thought the employee was able to return to work. Further, in the conversation, Mrs Hewitt advises the Claimant that she could take holiday and be paid her normal salary if she so wished, and after that was explained in detail again in an email to the Claimant on 3 February 2021 (page 62).

21. The Claimant also alleges that Mrs Hewitt included sensitive personal information about the Claimant in an OH referral that the Claimant did not consent to being disclosed. We have, however, found that the Claimant was advised of the information disclosed to OH by Mrs Hewitt and agreed to it. She was also advised by Mrs Hewitt that the information was being disclosed so that OH would conduct a further review as they were reluctant to do this considering there had not been a material change in the Claimant's circumstances.
22. The Claimant also complains that she was treated unfavourably in that her grievance was not handled properly. This was because Mrs Hewitt was found to have acted wrongly, one of the grievance meetings was adjourned and Mrs Hewitt was not suspended for bullying. However, putting these matters into context, in her evidence the Claimant complained that the grievance was not handled properly because it was not upheld. In relation to Mrs Hewitt, there was some criticism that she continued to try to call the Claimant when the Claimant wanted further communication to be by email, but it was accepted that she genuinely thought the information she wished to give to the Claimant would be more appropriately given verbally and this was based partly on their previous good friendship. It did occur to the Tribunal that the Claimant was acting under the influence of Mr Tetley in asking for everything to be put in writing and his conduct, as evidenced by the unchallenged minutes of the various meetings, left much to be desired. Indeed, Mr Smith adjourned one meeting because of that conduct when Mr Tetley became quite aggressive and was more intent on having Mrs Hewitt suspended than accompanying the Claimant in an appropriate manner. Mrs Hewitt's conduct was investigated and found not to amount to bullying and this is clearly supported by her emails and notes of her conversations with the Claimant.
23. Bearing in mind Section 136(2) EqA and the Judgment in Igen, the burden of proof only shifts to the Respondent if we find facts from which we could conclude there has been less favourable treatment. Our strong conclusion is that there is no evidence at all to support the Claimant's allegations and so the Section 15 EqA claim falls at the first hurdle.
24. The Claimant's claim under Section 26 EqA relies on the telephone contact from Mrs Hewitt on 18 January and 1 February 2021 and attempted contact from her on 11 February 2021. The first two calls are recorded in Mrs Hewitt's notes beginning at page 321. Since they were uploaded to the Respondent's system very soon after

they occurred and we accept Mrs Hewitt's evidence in relation to them, they show no element of harassment on her part. Following the Judgment in HM Land Registry, we have to consider whether Mrs Hewitt's conduct had the necessary effect pursuant to section 26 EqA bearing in mind the conduct has to be serious and not minor or trivial. We must also ask whether it was reasonable for the conduct to have had that effect. The evidence before us leads to the strong conclusion that it was not reasonable for the Claimant to consider the content of the calls amounted to harassment. Indeed, in our view, they were not even trivial or minor.

25. We are conscious of considering, not how conduct was intended, but how it was perceived by the recipient. This gives the Claimant more potential to maintain the attempted calls from Mrs Hewitt amounted to harassment in that the Claimant had told her she wanted an email summary rather than a telephone conversation. Thereafter, the Claimant simply did not answer the calls and Mrs Hewitt did give her a summary by email. But we bear in mind, firstly, that up to 11 February 2021 Mrs Hewitt had called the Claimant on numerous occasions and the evidence shows she did so to check on the Claimant's welfare and to explain matters relating to such things as her return to work and holidays. In our view, it was not reasonable for the Claimant to consider the attempted calls to amount to harassment and at most it was minor or trivial especially given the fact that the Claimant did not answer the calls.
26. The same conclusion applies to the invitations to join the Wellbeing Wednesday meetings and the prompts sent to the Claimant when she did not respond. These emails were in the main sent to over 60 people and the prompts were automatically generated by the Respondent's system if there was no reply from each individual. The Claimant ignored them. She was in no way singled out or treated less favourably than any other employee. We conclude this conduct does not reach the trivial or minor level.
27. The Claimant amended the list of issues to include in her Section 26 claim an allegation that the Respondent failed to consider she was on sickness absence due to her disability. This is something of a catch all allegation since it applies to all of the allegations made under Section 26. We conclude, however, that the Respondent duly considered the Claimant's illness being the reason for her absence. The calls and emails from Mrs Hewitt illustrate genuine concern for the Claimant's welfare and a desire to explain the implications of the Respondent's Sickness Absence Policy. Accordingly, there is no substance to the Claimant's argument in this regard.
28. If we understand the Claimant's claim to make reasonable adjustments, this relates to the Respondent's PCP of reducing sick pay to 50% of salary after a certain period of absence. However, following the Judgment of the Court of Appeal in O'Hanlon, as the Claimant's entitlement to full pay whilst on sickness absence had been exhausted (and, indeed, extended by two weeks), the Respondent's failure to pay her full pay thereafter was neither a failure to make reasonable adjustments

nor disability related discrimination.

29. The Claimant also relies on the Respondent's failure to conduct a stress risk assessment when she returned to work. She does not elaborate on this point by explaining what adjustments would have been made as a result of such an assessment or what PCP was engaged. We do not criticise the Claimant for this failure but she gave no information from which we could understand her argument. Accordingly, this aspect of her claim must also fail.
30. This hearing was a difficult exercise for the Claimant. She was clearly upset on numerous occasions during it. Both the Tribunal, Ms Kight and the Respondents witnesses engaged with the Claimant in a sensitive and sympathetic manner. Unfortunately, however, the evidence of the Respondent's witnesses and the documentary evidence before us did not support any of the Claimant's claims and we have dismissed them.

Employment Judge M Butler

Date: 9 May 2023

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