



EMPLOYMENT TRIBUNALS

Claimant: Usman Rashid

Respondent: Lloyds Bank plc

Heard at: Manchester Employment Tribunal

On: 22-25th May 2023

Before: Employment Judge Rhodes
Ms J Williamson
Ms A Berkeley-Hill

Representation

Claimant: In person
Respondent: Mr T Welch (counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of direct disability discrimination is not well founded and is dismissed.
3. The complaint of discrimination because of something arising in consequence of disability is not well founded and is dismissed.
4. The complaint of disability-related harassment is not well founded and is dismissed.

REASONS

1. The claimant brought complaints of unfair dismissal, direct disability discrimination, discrimination because of something arising from disability and harassment related to disability.
2. The issues had been agreed at a preliminary hearing before EJ Allen on 2nd August 2021 and were set out in a list at pages 77 to 79 of the bundle.

3. We heard evidence from the claimant and from the following on behalf of the respondent: Kim Whitworth; Joanne Cassidy; Karen Delaney; Nicola Webster; Sean Brennan and Nicola Quin.
4. We were referred to an agreed bundle comprising 707 pages and references below to pages numbers are to references to page numbers in the bundle.
5. Both parties provided us with written and oral submissions.

The law

Unfair dismissal

6. The dismissal of an employee for a reason which "relates to the conduct of the employee" is potentially fair (s98(2)(b), Employment Rights Act 1996 ("ERA")).
7. The statutory test of fairness is set out in s98(4) ERA and case law has established a four-stage approach to this test in misconduct cases:
 - a. Did the employer genuinely believe the employee to be guilty of misconduct?
 - b. Did the employer have reasonable grounds for that belief?
 - c. If so, was that belief based on a reasonable investigation?
 - d. Was dismissal was within the range of reasonable responses open to a reasonable employer?
8. The first three stages derive from the test ***in British Home Stores Ltd v Burchell [1978] IRLR 379*** and the fourth stage derives from ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.
9. Tribunals must avoid the 'substitution mindset'. In other words, it should not substitute its own decision for that of the employer. It is irrelevant whether or not the tribunal would have dismissed the employee if it had found itself in the employer's place. The relevant question is whether the employer took a decision which was within the range of reasonable responses open to a reasonable employer. The tribunal must also base its decision on what the employer believed at the time and whether it had reasonable grounds for that belief based on a reasonable investigation, not on the tribunal's own findings of fact (***Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82***).
10. The key features of a procedurally fair disciplinary process are that the employee should:
 - a. know the case against them;
 - b. know that they are at risk of dismissal;
 - c. be allowed to make representations;
 - d. be given a right of appeal;

11. Tribunals should also take into account the Acas Code of Practice on Disciplinary and Grievance Procedures ("the Acas Code") and the respondent's own disciplinary procedure.

Direct discrimination

12. 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 (s13 Equality Act 1996 ("EqA")).
13. The circumstances of a comparator must be the same as those of the claimant, or not materially different (s23 EqA). The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison (**Hewage v Grampian Health Board [2012] UKSC 37**).
14. Tribunals should focus first on the reason for the alleged less favourable treatment (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285**). The crucial question in every direct discrimination case is: what is the reason why the claimant was treated as he/she was? Was it because of the protected characteristic? Or was it wholly for other reasons (in which case, the case would fail)?

Discrimination because of something arising from disability

15. A person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim (s15 EqA).
16. There are two questions to be answered by tribunals in determining whether discrimination arising from disability has occurred:
 - a. did the claimant's disability cause, have the consequence of, or result in, "something"?
 - b. did the employer treat the claimant unfavourably because of that "something"?
17. It does not matter in which order these questions are addressed (**Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14**).
18. The approach to answering these questions was summarised in **Pnaiser v NHS England and another [2016] IRLR 170**:
 - a. Was the claimant treated unfavourably and, if so, by whom?
 - b. What caused that treatment?
 - c. Whether the reason was "something arising in consequence of" the claimant's disability?

Harassment

19. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant characteristic, in circumstances where that conduct has the

purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B (s26 EqA).

20. Section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect. The steps are:
- a. Did the claimant genuinely perceive the conduct as having that effect?
 - b. In all the circumstances, was that perception reasonable?

(Pemberton v Inwood [2018] EWCA Civ 564)

Findings

21. The claimant began work for the respondent in June 2011 as a Personal Banking Manager at its Ashton branch. At the time of the events in the claim, he was working as a Personal Relationship Manager ("PRM") in private banking at the respondent's Manchester Spring Gardens office.
22. The claimant has asthma and stress, anxiety and depression. The respondent accepts that, at the relevant times, the claimant was a disabled person within the meaning of s6 EqA. The respondent also accepts that coughing is a symptom of the claimant's asthma. The respondent does not, however, accept that the claimant suffers from panic attacks.
23. The claimant relied on a letter from Dr Bokhari dated 9th June 2020 (pages 644 to 646) as evidence in support of paragraph 85 of his witness statement in which he states that his "*medications have a significant impact on [his] mood, ability to act and react in different situations, made [him] sleepy, shaky and panic.*" However, the letter at pages 644 to 646 does not support that. The relevant part of the letter says:
- "Mr Rashid feels that some of his medication side effects can contribute towards his memory issues, anxiety, depression, mood swings and the ability to react in different situations."*
24. Dr Bokhari does not use the expression 'panic attacks', or even the word 'panic'. Moreover, Dr Bokhari is recounting what the claimant feels about the effects of his medication. There was therefore no medical evidence before us to support the claimant's contention that he suffers from panic attacks and we do not find that he does. Even if we are wrong about that, we do not accept that the claimant had a panic attack on 14th April 2020, when questioned by Joanne Cassidy, or that he had lied to her because he was having a panic attack. We address the events of 14th April 2020 in more detail below.
25. By early March 2020, the Covid pandemic had reached the United Kingdom. There was a considerable amount of anxiety among the general public about the spread of the virus and the seriousness of its potential consequences, in part fueled by news reports from places like Italy which had started to feel the impact of the pandemic before the United Kingdom.

26. This sense of anxiety was shared by some of the claimant's colleagues. Sean Brennan, for example, had been personally affected by the impact of Covid, as his best friend's mother had died from the disease.
27. On 18th March 2020, the claimant and Karen Delaney exchanged a series of WhatsApp messages (pages 146 to 159) which began with the claimant forwarding a message speculating about the sort of lockdown measures which might be about to be imposed. The conversation then moved on to the claimant complaining about having been stabbed in the back by colleagues at work. This appeared to be in reference to a recent complaint which had been made against him after he had found underwear which a female colleague had accidentally dropped after she had changed into her cycling kit to cycle home after work and which he had then hung on a coat stand near her desk.
28. During this exchange of messages, the claimant said:
- I hope I don't have to see Lloyds bank again in my life and that I die with this corona virus and what I have put through by others in work.
And I hope God also punish really hard to the ones who have put me through all this. (page 150)*
29. Throughout this exchange of messages, Karen Delaney was sympathetic and supportive.
30. At some point around the same time – none of the witnesses could be specific about the date other than it was a date in March before the first 'lockdown' (ie before 23rd March 2020) – the claimant is alleged to have made a comment to Karen Delaney, which was overheard by Sean Brennan, to the effect that he wished someone in the team would get COVID and die from it. This shocked them both. The claimant denied making this comment but we find that he did for the following reasons.
31. First, we found the claimant to be a wholly unreliable witness. He was evasive and his answers to questions frequently contradicted evidence that he had previously given to the Tribunal or that which he had been recorded in the bundle as having given at various stages of the internal process (and much of that evidence also contradicted itself). We give specific examples below where relevant to our findings. By contrast, we found the respondent's witnesses to be honest and credible.
32. The comment wishing harm on his colleagues was consistent with the claimant's message to Karen Delaney on 18th March 2020 at page 150 ("*And I hope God also punish really hard to the ones who have put me through all this*"). That message is indicative of the claimant's feelings towards his colleagues in March 2020 and it is entirely plausible that the claimant would have expressed the same sentiment orally to Karen Delaney that he conveyed in his WhatsApp message to her at around the same time.
33. We also accept that that was a comment which Karen Delaney and Sean Brennan would have found shocking in the context of the unfolding pandemic.

Case No: 2415698/2020

34. On 10th April 2020 and again on 13th April 2020, the claimant worked voluntary overtime at the respondent's Manchester Spring Gardens office. On each occasion, the claimant was a lone worker. This directly contravened an instruction not to lone-work contained in an email from Joanne Cassidy to all PRMs working in Manchester dated 28th February 2020 (page 144). The subject of that email was "*Working in SG [Spring Gardens] out of hours*". The contents of the email read as follows:

Hi All,

There has been a couple of instances in the last week when PRM's have been doing overtime in the office alone.

As this is a huge risk to the business if it happens again we will have no option but to cancel overtime for all colleagues.

If anyone needs further clarification please let us know.

35. In the Tribunal's view, the meaning of that email is clear: nobody was permitted to work alone in Spring Gardens out of hours. The claimant had received that email. When cross-examined about the email, the claimant refused to accept that that was the meaning of it, despite that it being entirely clear and obvious, but did not give any coherent alternative interpretation of it. However, when questioned by the Judge, the claimant conceded that he knew that, by undertaking overtime alone, he was running the risk that future overtime would be cancelled.
36. The respondent also sought to rely on a lone working policy but this post-dated the period in question and was a red herring in any event: the 28th February 2020 was a clear enough instruction not work overtime alone in Spring Gardens.
37. As an aside, the Tribunal finds that the respondent's approach to the policing of lone working at Spring Gardens at the relevant time was unsatisfactory. The claimant had volunteered for the overtime and this had been accepted. It was not entirely clear to the Tribunal how the claimant would or should have known that he would be the only person in the building until he got there. There ought to have been some oversight on the respondent's part to prevent offers of overtime from being accepted in circumstances where the person working it would be the only person on the premises. That said, this is no excuse for the claimant subsequently lying to Joanne Cassidy about where he had carried out that overtime (which we come back to below).
38. On 11th April 2020, the claimant and Kim Whitworth passed each other as they were walking in opposite directions across the office. To maintain social distancing, they passed on either side of a pillar. As Kim Whitworth emerged from her side of the pillar, the claimant leaned towards her and deliberately coughed towards her. Under any circumstances, this would have been unpleasant. In the context of the early days of the COVID pandemic, it was a particularly nasty thing to have done. This was nothing that arose from the claimant's asthma. Whilst his condition may cause him to cough, it does not make him cough deliberately towards someone.

39. Although the claimant denied this incident, we preferred Kim Whitworth's evidence on the point. The account of the incident that she gave to the Tribunal was consistent with that which she had given during the respondent's internal investigation. The claimant's account, on the other hand, kept changing over time.
40. When initially questioned about the incident in his investigation meeting, he said "I can't recall any of it" (page 213). He suggested that Kim Whitworth might have been lying and that "maybe she has been told to say it".
41. At the disciplinary hearing, the claimant said that Kim Whitworth "said something to me but I cannot recall this" (page 321) and that he had coughed but not deliberately at her.
42. At the appeal hearing, he went into further detail and said "I was coming through the corridor in the opposite direction" (page 466).
43. By the time of the tribunal hearing, his case was confused and contradictory: the complaint was that he had been treated unfavourably because of something (ie coughing) which arose from his disability, whilst continuing to accuse Kim Whitworth of lying about it. As Mr Welch pointed out in his submissions, the claimant cannot have it both ways: if he claims he did not cough, his case becomes that he was treated unfavourably because of *nothing* arising from his disability.
44. For these reasons, therefore, we prefer Kim Whitworth's evidence and find, on the balance of probabilities, that the incident happened as she described. To cough deliberately at someone is unpleasant at the best of times; to do so during a pandemic is reckless.
45. On the evening of the same day (11th April 2020), the claimant had a barbecue at his home. He had told both Kim Whitworth and Sean Brennan that it was for family and friends which caused both of them to be alarmed given that strict rules against socialising were in force at that time. Later, he shared photographs of the barbecue on the 'Magnificent Seven' WhatsApp group comprising colleagues who had joined the respondent at the same time as the claimant (pages 163, 203 and 203a).
46. The photographs showed several people enjoying a barbecue. The recipients of the photographs did not know who they were. In one of the WhatsApp responses to the photographs, the claimant is asked "who's that on the right?". He replied "my friend" and went on to joke about not keeping two metres apart from him. His later evidence was that it was his lodger (whom he also regarded as a friend) who was a member of his household and it was therefore permissible for them to socialise together. He said that the only other people present at the barbecue were his wife and children and that therefore no rules had been broken. The claimant's evidence missed the point entirely.
47. The concern aroused by the photographs was that the claimant was breaking lockdown rules. The claimant did not disabuse his colleagues of that impression at the time. On the contrary, he again came across as someone who was reckless as to the risk posed by the pandemic. When

the claimant was told in a further WhatsApp message that he should not "invite people round", he replied "it's alright, everyone has to die".

48. This incident, when combined with his comments described at paragraphs 38 to 43 above and the coughing incident, portray the claimant as being someone who was deliberately (or, at least, recklessly) provoking fear and alarm in his colleagues. He could easily have put minds at rest by reassuring the 'Magnificent Seven' that he was mixing only with his own household and that no rules were broken but he did not. It was entirely reasonable for his colleagues to have formed the impression that he had broken lockdown rules and for them to have been nervous about working in the same office as him.
49. On 13th April 2020, the claimant again did an overtime shift in Spring Gardens when he was a lone worker.
50. The following day (14th April 2020), Joanne Cassidy asked the claimant where he had worked his overtime on 10th and 13th April 2020. He replied "Speke" (the respondent's office in Liverpool). This was untrue but Joanne Cassidy did not realise it was untrue until she cross-checked later.
51. The claimant's case before the Tribunal on this point was not credible and also at odds with various accounts he had given during the internal investigation. His evidence to the Tribunal (paragraph 84 of his witness statement) was that Joanne Cassidy had twice called out his name while he was on the phone to a customer and that this caused him to have a panic attack and say "Speke". The claimant does not even say in this account that Joanne Cassidy asked him about where he had done his overtime. His evidence appears to be that he blurted out the word "Speke", without any context, in response to his name being called.
52. When first asked about the allegation of lying to Joanne Cassidy during his initial investigation meeting, the claimant accepted that he had lied. His explanation for doing so was that Joanne Cassidy would be "mad" with him (page 211), which explanation makes sense in the context of the prohibition on lone working contained in the email at page 144.
53. During the disciplinary hearing, the claimant accepted that he had "intended to lie" and that Joanne Cassidy would be "angry" with him. Although he also said "depression had me not thinking" (page 325), he did not say at this point that he had had a panic attack.
54. In his grounds of appeal, the claimant changed tack and sought to underplay the risk of lone working and argue that a contravention of the instruction at page 144 was not a misconduct offence (page 388), thereby missing the point that lying about where he had worked the overtime plainly was a misconduct matter.
55. At the appeal hearing, the claimant said "I didn't lie.. I was having a panic attack so I said I was in Speke" (pages 473 and 474). This was first account in which he mentioned having a panic attack.
56. We prefer Joanne Cassidy's account, namely that she had asked him where he had carried out his overtime and he replied "Speke".

57. We find that the claimant did lie to Joanne Cassidy about where he had worked the overtime and that the reason for doing so was to avoid getting into trouble. We do not find that the claimant had a panic attack, in any medical sense. Insofar as the claimant panicked at all, it was for fear of being found out, not because of any medical issue.
58. All the above led the respondent to commence disciplinary action against the claimant in relation to four matters:
- a. the coughing incident of 11th April 2020
 - b. causing concern amongst his colleagues by sharing the barbecue photographs together with his comments suggesting that lockdown rules had been broken;
 - c. contravening the restriction on lone working and then lying about it to Joanne Cassidy;
 - d. saying to Karen Delaney that he hoped someone in the office caught COVID and died from it.
59. The respondent characterized the first three of those allegations as gross misconduct and the fourth as misconduct.
60. The allegations were investigated by Sharron McCann. She interviewed Kim Whitworth, Sean Brennan and Karen Delaney. The claimant was also given two opportunities to give his own account of events.
61. Nicola Webster chaired the disciplinary hearing. In advance of it, she wrote to the claimant on 12th May 2020 setting out the allegations in detail (pages 302 to 308). She enclosed with that letter the respondent's Disciplinary and Colleague Conduct policies together with the investigation report (pages 284 to 294), the investigation meeting minutes (pages 205 to 237 and 266 to 279), the email at page 144, screenshots of the relevant WhatsApp messages and the statements taken from Kim Whitworth, Sean Brennan and Karen Delaney (pages 241 to 244, 248 to 251 and 257 to 261).
62. The claimant chose to attend unaccompanied. Detailed notes of the hearing are at pages 311 to 331. The claimant was given the opportunity to respond to each of the allegations in turn and various extracts of the evidence he gave have been summarised above.
63. Nicola Webster weighed up the evidence following the hearing and set out her rationale contemporaneously in the document at page 336 to 345. She found that, on the balance of probability, each of the allegations was made out. She determined that summary dismissal was the appropriate sanction and confirmed this in a letter to the claimant dated 28th May 2020 (pages 346 to 353). His dismissal took effect from 1st June 2020.
64. The claimant appealed against dismissal on 4th June 2020 (page 379). He was invited to an appeal hearing to take place on 26th June 2020 and asked to provide his grounds of appeal by 22nd June (pages 405 to 406). He submitted those grounds (pages 380 to 398) together with a grievance (pages 408 to 413) on or around 22nd June 2020. Given that the grievance was linked to the allegations which ultimately led to the claimant's dismissal,

the respondent concluded that it would be reasonable for both the grievance and the appeal to be dealt with by the same manager, Nicola Quin.

65. Nicola Quin heard and investigated the grievance first. She interviewed Joanne Cassidy (pages 506 to 517), Jay Kemp (pages 521 to 523), Oliver Yates (pages 524 to 526) and Saleem Raza (pages 524 to 536). Based on the evidence she had gathered, Nicola Quin did not uphold the claimant's grievance. She found nothing to suggest that he had been managed or supported inappropriately or insufficiently or that that he had been the victim of hatred, jealousy, unprofessionalism or bullying.
66. The appeal hearing took place on 3rd August 2020. Again, the claimant chose to attend unaccompanied. The claimant addressed each of the disciplinary allegations in turn and extracts of the evidence he gave to the appeal, which differed in several material respects from that which he had given at earlier stages of the hearing, have been referred to above.
67. Following the hearing, Nicola Quin interviewed Sean Brennan (pages 537 to 528) and then weighed up all the evidence in coming to a decision. She recorded her rationale in a document which appears at pages 545 to 558. For the reasons summarised in that document, she decided not to uphold the claimant's appeal.
68. She informed the claimant of her decisions in respect of both the grievance and the appeal in a letter dated 26th August 2020 (pages 562 to 572).

Conclusions

Was the claimant dismissed for a potentially fair reason?

69. Yes, the claimant was dismissed by reason of conduct which is a potentially fair reason by virtue of s98(2)(b) ERA.

Did the respondent genuinely believe that the claimant committed the misconduct?

70. Yes. Nicola Webster's contemporaneous rationale document (pages 339 to 343), outcome letter (pages 346 to 353) and witness statement (paragraphs 33 to 48) address this. It is noteworthy that the claimant did not challenge Nicola Webster on reasonable belief during cross-examination. His questions were largely directed at procedural issues, such as whether he had received the disciplinary hearing notes.

Did the respondent have reasonable grounds for holding that belief?

71. Yes. The relevant witnesses had been interviewed and screenshots of the relevant WhatsApp messages obtained. The claimant had been interviewed twice. A detailed investigation report had been prepared.

72. In respect of arguably the most serious allegation, lying to his manager, the claimant's evidence at the time of the dismissal hearing was that he had lied and had intended to do so.

Did the respondent carry out a reasonable investigation?

73. Yes, as noted above, the relevant witnesses had been interviewed and screenshots of the relevant WhatsApp messages obtained. The claimant had been interviewed twice. A detailed investigation report had been prepared.

Did the respondent carry out a reasonable and fair process?

74. Yes. Three different managers had respectively investigated the allegations, chaired the disciplinary hearing and chaired the appeal hearing. The claimant had five opportunities to respond to the allegations (two investigation meetings, the disciplinary hearing, his grounds of appeal and the appeal hearing). All relevant witnesses were interviewed and documentary evidence gathered. Each stage of the process is well documented and there are contemporaneous records setting out the rationale for each decision.

75. The only procedural criticism that the claimant pursued at the hearing was in relation to the notes of the disciplinary hearing which he said he did not receive when they were initially sent to him. Insofar as this was a flaw in the process, the respondent cured it by sending him those notes before his appeal hearing. The claimant accepted that he had received them on that occasion but that he did not read them.

Was dismissal within the range of reasonable responses?

76. Yes. In arriving at the this conclusion, we have judged the respondent on the basis of what it believed at the relevant time and not on the basis of our own findings and it is helpful that the respondent kept a detailed record of its rationale at each stage. We have reminded ourselves not to fall into the 'substitution mindset'.

77. The respondent relied upon each of the first three allegations as amounting to gross misconduct.

78. In April 2020, the pandemic was still in its early stages. There was a great deal of anxiety about the impact it would have and the death toll was rising. There was no vaccination and no known cure. Lockdown measures were at their most restrictive.

79. It was reasonable for the respondent to treat with the utmost seriousness the claimant's apparent lack of disregard for social distancing and the cough that he directed at Kim Whitworth. This disregard should also be viewed in the light of the fourth allegation about wishing harm on his colleagues.

80. As for the allegation of lying, dishonesty goes to the heart of the employment relationship and the claimant had accepted that not only had he lied, he had done so intentionally.

81. It was reasonable for the respondent to conclude that his behaviour had so undermined its confidence in him that it could no longer continue his employment. The claimant lacked any genuine remorse during the internal process and his disdain for the process increased as it went on, as evidenced by the changing of his position at each stage of the process.

Was the claimant's dismissal fair?

82. Yes, for the reasons stated above.

Did the respondent directly discriminate against the claimant on the ground of disability?

83. No. The claimant's colleagues made allegations against him because they had witnessed misconduct. These were not false allegations. The respondent dismissed the claimant because of this misconduct, not because he is disabled. The respondent did not treat the claimant less favourably than it would have treated another employee in materially the same circumstances but who did not suffer with asthma and anxiety.

Did the respondent discriminate against the claimant because of something arising from disability?

84. No. Although the claimant's dismissal was unfavourable treatment, it was not because of something arising from his disability. The claimant's asthma did not cause him to cough deliberately at people and the relevant allegation was that he had coughed deliberately at Kim Whitworth. The claimant lied to Joanne Cassidy not because he was having a panic attack but because he did not want her to be mad with him for contravening her instruction. In any event, for the reasons previously stated, we do not find that the claimant suffered with panic attacks in any medical sense.

Did the respondent harass the claimant?

85. No. Joanne Cassidy did not shout at the claimant on 14th April 2020. She asked him where he had carried out his overtime. He lied to her in response. Although not specifically an issue before the Tribunal, we add for the sake of completeness, that we find that there was an incident the following day (15th April 2020) which the claimant appears to have conflated with the 14th April 2020. On 15th April 2020, Joanne Cassidy found the claimant asleep at his desk with his headset and had to raise her voice to wake him up whilst maintaining social distancing. This was not harassment and it was not related to his disability; it related to his being asleep with his headset on.

Employment Judge Rhodes
26 June 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

4 July 2023

.....
FOR EMPLOYMENT TRIBUNALS