



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr H Miah

-v-

Kotak Communications Limited

FINAL MERITS HEARING

Heard: **at the Employment Tribunal sitting in Birmingham**

On: **24 to 26 April 2023**

Before: **Employment Judge Perry, Mrs I Fox & Mr MZ Khan**

Appearances

For the Claimant:

Mr R Robison, consultant

For the Respondent:

Mr J Franklin, counsel

REASONS

References in square brackets are to the page of the bundle. References in circular brackets are to a paragraph of these reasons.

- 1 Oral reasons were given to the parties at the conclusion of the hearing. A Judgment, the text of which for the assistance of the parties is repeated below was sent to the parties on 28 April 2023 :-
 1. *The respondent did not contravene part 5 of the Equality Act 2010. The claimant was not subjected to harassment or discrimination arising in consequence of his disability. Those complaints are dismissed.*
 2. *The claimant's complaint that he was unfairly dismissed is not well founded and is also dismissed.*
 3. *The claimant's remaining complaints are dismissed on withdrawal.*
 4. *All remaining hearings that are listed are vacated.*
- 2 The issues were set out in EJ Kelly's Case Management Summary [82-87] following a hearing chaired by her on 27 April 2022. There were a number of issues that remained as requiring clarification by both parties before us. That was addressed at the outset. That having been done and in order to ensure the claim progressed on the dates fixed, we allowed the parties to supplement



their evidence to address those points. Neither party, both were represented, objected to that course.

3 Following that clarification and at various points as the case progressed Mr Miah, having had chance to reflect and give instructions, withdrew his reasonable adjustments, victimisation and harassment on grounds of race complaints. The issues on others were narrowed. The sole remaining complaints at the conclusion of this claim were for

3.1 unfair dismissal,

3.2 a section 15 Equality Act 2010 (EqA) discrimination arising from disability complaint and

3.3 a section 26 EqA disability related harassment claim.

4 In relation to the unfair dismissal complaint the potentially fair reason relied on was capability, a section 98(4) Employment Rights Act 1996 (ERA) question of fairness arises, a Polkey issue is argued but contribution was not.

5 As to the section 15 complaint the sole question relates to a justification argument. The legitimate aim advanced by the respondent having been accepted as such.

6 For the section 15 discrimination because of something arising from disability and section 26 disability harassment complaints the sole remaining element of unwanted conduct was the dismissal of Mr Miah.

7 The disability complained of, psychotic illness and post-traumatic stress disorder, is accepted. The respondent, who we will refer to as KC, except that it knew that Mr Miah was a person with those disabilities from October 2020.



8 We address the way those remaining complaints were put by the conclusion of the hearing below.

9 We had before us a bundle albeit the pagination did not marry between the electronic (382 pages) and hardcopy (367 pages) forms of the bundle.

10 We heard from Mr Miah and Mr Kotak who was a director of the respondent and the dismissing officer.

11 Both parties were represented as set out above and we are extremely grateful to the way both representatives conducted matters, with regards to the sensitivity that was adopted to take into account Mr Miah's disabilities.

12 We clarified at the outset any adjustments that were required and these were made and adhered to as the hearing progressed.

Background

13 By the date of the termination of his employment Mr Miah was the manager of a Vodafone franchise in Sutton Coldfield. Due to various circumstances he never actually worked at that store. The background centres around the sale of one of its franchises by Vodafone to Kotak in October 2019. There is no dispute it was a TUPE transfer.

14 Kotak accepted in its response form that Mr Miah started working for Vodafone on 1 November 2003. Mr Miah told us that was actually 2013. Given what Mr Miah told us, we accept that was a typographical error given the latter date was also consistent with the notice pay paid to Mr Miah.

15 Initially Mr Miah worked at one of Vodafone's stores in London. He became a manager before moving to Birmingham in September 2018. He worked at its store at *The Fort* shopping centre, Birmingham.



- 16 Following a disciplinary hearing on 13 May 2019 Mr Miah was given a Final Written Warning and was to be moved to Vodafone's Sutton Coldfield store. The outcome letter was dated 20 May 2019 [202-203]. That sanction followed an altercation with a colleague whom we shall refer to as SP about whom Mr Miah raised a grievance. KC accepts that Vodafone addressed that as follows:-
- 16.1 SP was disciplined for verbally abusing Mr Miah but not as Mr Miah alleged physically abusing him, and
- 16.2 SP was issued First Written Warning.
- 17 The day Mr Miah was due to move to Vodafone's Sutton Coldfield store (17 May 2019) the he went off sick and did not return prior to his eventual dismissal. As a result of the need to have someone overseeing Sutton Coldfield store in Mr Miah's absence, SP was moved to the store as acting manager.
- 18 From July 2019 Mr Miah was in care of Sandwell Early Intervention (a mental health) Service [170] and latterly under the care of a psychiatrist.
- 19 On or about 1 October 2019 Vodafone's Sutton Coldfield store was the subject of a TUPE transfer to KC. At the same time we were told Vodafone's store at *The Fort* closed.
- 20 From 1 October 2019 until 1 February 2020 KC operated 2 stores in Banbury and Sutton Coldfield. From 1 February 2020 KC took over another store in Tamworth. It later (1 February 2023) took over another store in Loughborough. It currently employs 6 staff each in Sutton Coldfield and Banbury and 4 in Tamworth. KC engages a company to provide HR support; RBS mentor.
- 21 Mr Miah had been hoping to return to work in early October. He told us having been told that both he and SP were being moved to Sutton Coldfield and if he returned he would be working with SP that put back his recovery. He was



issued a further sick note on 2 October. On 9 October he was visited at home in relation to his absence and consulted about the transfer.

22 Various meetings concerning his absence were arranged; 24 October 2019 (unable to attend), 5 November 2019 (email for consent), 15 November 2019, 6 December 2019, 7 February 2020, 23 March 2020 and finally on 8 June 2020.

23 Various points stem from those meetings:-

23.1 Mr Miah was assisted throughout by his union and/or his wife.

23.2 Various advices were provided from medical practitioners concerning Mr Miah's condition prior to his dismissal:

23.2.1 22 October 2019 – From Sandwell Early Intervention Service [120 & 160]

23.2.2 30 January 2020 - From Sandwell Early Intervention Service [158 & 307]

23.2.3 24 February 2020 – from Mr Miah's GP Practice [136]

and one after the event

23.2.4 22 February 2021 – from Mr Miah's GP Practice [155]

23.3 Having obtained an authority from Mr Miah in November 2019 to provide an advice Mr Miah's GP sought a hard copy of the signed authority bearing his signature. That caused a delay. We did not have a copy of the referral to Mr Miah's GP. There was a dispute if KC had sought an advice from Mr Miah's GP. We accept Mr Miah did seek one directly, but given the documents suggest the GP sent at least the advice of 24 February 2020 direct to KC, that it did so too.



- 23.4 No later than the meeting on 7 February [135] Mr Miah was warned he was at risk of dismissal.
- 24 A final meeting was held on 8 June 2020. Mr Miah was accompanied by his union representative. The meeting was minuted [151-154].
- 25 Mr Miah was notified by telephone he was dismissed on 9 June 2020 [147]. That was confirmed in writing same day [148-150] albeit incorrectly dated. He was paid for 7 weeks notice (although only entitled to 6).
- 26 No appeal against dismissal was lodged.
- 27 This claim was lodged with the Tribunal on 24 August 2020 following early conciliation starting on 19 July and ending on 20 July 2020. Whilst timing issues thus arose in relation to events prior to 24 May 2020 they fall away following the withdrawal of the reasonable adjustments, victimisation and some of the harassment complaints.

Discrimination because of something arising from disability

- 28 KC accepts that :-
- 28.1 Mr Miah was absent (the “something”) in consequence of his disability between 17 May 2019 and 9 June 2020,
- 28.2 that it dismissed, Mr Miah and
- 28.3 that this was because of his absence.
- 29 It was agreed the sole question for us to determine with respect to this complaint was if KC has shown that dismissing Mr Miah was a proportionate means of achieving a legitimate aim?



- 30 KC relies on the following legitimate aim(s): it required a manager working in its store. We address the detail behind that below. Mr Miah accepted that is a reasonable aim but considers that KC did not act proportionately.
- 31 For justification the relevant legal principles are not in dispute; as summarised thus ¹:

“(1) The burden of proof is on the respondent to establish justification: see Starmer v British Airways [2005] IRLR 863 at [31].

(2) The classic test was set out in Bilka-Kaufhaus GmbH v Weber Von Hartz (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must ‘correspond to a real need ... are appropriate with a view to achieving the objectives pursued and are necessary to that end’ (para 36). This involves the application of the proportionality principle, which is the language used in regulation 3 itself. It has subsequently been emphasised that the reference to ‘necessary’ means ‘reasonably necessary’: see Rainey v Greater Glasgow Health Board (HL) [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: Hardys & Hansons plc v Lax [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter. There is no ‘range of reasonable response’ test in this context: Hardys & Hansons plc v Lax [2005] IRLR 726, CA.”

¹ [MacCulloch v Imperial Chemical Industries plc](#) [2008] ICR 1334 EAT [10]



- 32 Prior to the final meeting on 8 June 2020 at which Mr Miah was dismissed, Mr Miah's GP had advised there was no prospect of him returning to work in the "*next few months*" and whilst that advice was given on 24 February 2020 [136] it was accepted by Mr Miah there had been no change since that advice. That was because by June Mr Miah had only recently started a course of treatment and that was due to last several months. The advice was clear until that concluded there was no prospect of a change.
- 33 The context of the GP advice can be seen from the advice dated 19 December 2019 [159]. At that earlier point the advice stated it was not possible to give a prognosis for Mr Miah, but whilst it was not uncommon for people to recover, it was by no means certain he would be in a position to return in any event.
- 34 Thus having met Mr Miah in November KC's note of that meeting sent on 18 November [122] stated it would review the position with occupational health if and when there was a prospect of Mr Miah's return.
- 35 Thus, by the date of his dismissal that position had remained the same – there was no immediate prospect of a return, Mr Miah had only just started course of treatment and that was due to last several months. He confirmed at the meeting on 8 June 2020 [151] having been asked if he could return in the near future he couldn't say and when asked if anything else could be done replied no.
- 36 Those matters being so we find that KC was entitled to conclude a further occupational health/medical report or GP advice could not help further.
- 37 KC had checked at the various meetings if there was anything that could be done to facilitate Mr Miah's return. An issue Mr Miah now raises, the lack of an occupational health/medical report or GP advice was an issue preventing his was not something he raised with KC at the time.



- 38 There was also an issue if Mr Miah could work with SP. Before us even mention of SPs name caused him palpable anxiety. KC went so far as to discuss alternatives with SP. SP's personal circumstances were such that him moving branches very difficult, he lived very close to the Sutton Coldfield store, couldn't easily get to Tamworth, and even if he could it would cause him childcare issues. That in any event was an option that would only arise if there was a prospect of Mr Miah's return; at least whilst Mr Miah remained off work KC needed SP to manage the Sutton Coldfield store.
- 39 That indicated to us that KC was trying to consider all available options with Mr Miah.
- 40 A move to Banbury was not something Mr Miah states he could have agreed to. It was well beyond normal travelling distance from his home. Whilst Mr Miah accepts a move to Tamworth was canvassed that was rejected by him. Neither party led evidence in detail on that issue, both told us it was a lower role. Whilst Mr Miah disputes this, KC assert that Mr Miah's pay would have been protected.
- 41 We find KC has shown there was a clear impact on its business arising out of Mr Miah's long term absence, 2 members of staff were acting up long term, 4 temporary members of staff had come and gone, it was a relatively new business and it and its staff had a need for certainty and to be able to plan for the future. That was not possible while SP and his colleagues were acting up. The number of temporary staff that had come and gone and that Mr Miah's absence lasted over a year in total and for 8 months since KC had taken over provide direct evidence of those difficulties..
- 42 Absent any prospect of Mr Miah being able to return in the short term we find an occupational health/medical report or GP advice would have added little if anything to the state of knowledge. The chance Mr Miah would have been able



to return would only have been able to be assessed once Mr Miah had completed his course of treatment which was due to last several months. Given the impact his absence was having on its business we find the appointment of staff on a permanent basis and the ability to plan as a result were a real need for KC and viewed in context the outcome, dismissal was one that was no more than necessary to achieve that aim, the alternatives having been considered.

- 43 KC has shown that it adopted a proportionate means of achieving a legitimate aim and the discrimination because of something arising from disability fails.

Harassment

- 44 Mr Miah initially alleged KC should have transferred him to a different store which it was practicable for him to get to. Mr Miah later accepted initially there was no such other store until February 2020 when KC opened the Tamworth Store. It was accepted that KC did offer Mr Miah a store transfer. As we say above there was a dispute over what that entailed.

- 45 By the conclusion of the evidence the sole remaining way this complaint was argued concerned Mr Miah's dismissal.

- 46 The question for us is therefore did the conduct, the dismissal, have the purpose or the effect of violating Mr Miah's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Mr Miah? In considering those matters we have to take into account Mr Miah's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

- 47 No words or behaviour were complained of as the basis for this complaint solely the act of dismissal itself. We canvassed with the parties that being so, how without more that constituted harassment. If so any dismissal could on that logic would constitute harassment, and any absence based dismissal where



disability was the reason for the absence, disability related harassment. The way this was put was that Mr Miah was not dismissed because of his disability but consequences of it, and KC's failure to do that was therefore unwanted.

48 We are mindful of the reminder:-

*“... not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”*²

49 Langstaff P subsequently endorsed that view :-

*“12. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.”*³

50 Elias LJ in [Grant v HM Land Registry](#)⁴ said this:-

“13 ... When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.

...

² [Richmond Pharmacology v Dhaliwal](#) [2009] UKEAT/0458/08, [2009] IRLR 336 at [22]

³ [Betsi Cadwaladr University Health Board v Hughes](#) [2014] UKEAT/0179/13

⁴ [2011] IRLR 748 CA



47 ... Tribunals must not cheapen the significance of these words [“violating dignity”, “intimidating, hostile, degrading, humiliating, offensive”]. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”

51 Whilst we accept in the circumstances here Mr Miah may have considered his dismissal had the purpose and/or effect he alleges, viewed objectively, absent any words or actions that created the types of circumstances the examples above give, objectively they did not. That complaint also fails.

Unfair Dismissal

52 The reason advanced for Mr Miah’s dismissal was capability. Having clarified how this claim was put the only argument raised by Mr Miah was a procedural failure, namely the failure to obtain an occupational health/medical report or GP advice on Mr Miah’s medical condition.

53 Mr Miah accepted his dismissal would have happened in any event. For the reasons we give above (32-35) we find in any event KC has shown that was so.

54 The issue before us centres on whether KC acted within the band of reasonable responses. Whilst one employer might have sought that advice we accept KC decided not to do so for the reasons we give above (32-36). We find that was a view a reasonable employer could have come to. We have addressed the reason for dismissal above, taking into account the various meetings, that Mr Miah was aware dismissal was being considered and the medical evidence before KC we find the decision reached was both substantively and procedurally fair. It was within the band of reasonable responses. Accordingly, the unfair dismissal claim is not well founded and is dismissed.

Polkey



55 Given what we say at (53) the only issue was when the dismissal would occur. Mr Miah argues an occupational health/medical report or GP advice should have been sought. We found one was not required for the reasons we give above but if we are wrong on that we envisage depending on the provider that could have been obtained and a meeting held to consider it such that a 2 to 4 week delay to the date of dismissal would have arisen.

signed electronically by me

Employment Judge Perry

Dated: 14 June 2023