



EMPLOYMENT TRIBUNALS

Claimant

Miss Keiley O'Driscoll

v

Respondent

Ms Maria Lewis

Heard at: Cambridge

On: 26, 27 and 28 June 2023

Before: Employment Judge M Ord

Members: Dr S Gamwell and Mr D Snashall

Appearances

For the Claimant: In Person

For the Respondent: Mr Munius

JUDGMENT

It is the unanimous decision of the Employment Tribunal that the Claimant's complaint that she was the victim of unlawful discrimination on the protected characteristic of disability when she was dismissed for the stated reason of redundancy, is not well founded and the claim is dismissed.

REASONS

Background

1. The Claimant was employed by Milton Keynes Q Academy Limited ("the Company") from 1 April 2017 until 13 February 2019, latterly as Bar Manager. Her employment ended on the stated ground of redundancy. The Claimant had been a Director and Shareholder of the Company during the latter part of her employment.
2. Following a period of Early Conciliation which began on 1 April 2019, the Claimant was issued with an Early Conciliation Certificate dated 8 May 2019 and presented her claim to the Employment Tribunal on 24 May 2019. The Early Conciliation Certificate named Ms Lewis as the potential Respondent and the Claim Form named Ms Lewis as the Respondent. The complaints were of unfair dismissal and disability discrimination.

3. At the “vetting” stage of the process, the Tribunal identified the Company as the correct Respondent, bearing in mind that the Company was the employer and the Claimant was seeking to bring a claim for unfair dismissal.
4. At a Preliminary Hearing on 14 May 2020 when the Respondent did not attend and was not represented, the Claimant confirmed that she also wished to pursue Ms Lewis as a Respondent because the Claimant felt that she was responsible for the Company’s treatment of her. Ms Lewis was given the opportunity to comment on the intention to join her as a Second Respondent and on 5 May 2022, Employment Judge Allott joined her as Respondent and dismissed the claim against the Company which had been dissolved on 13 October 2020.
5. Accordingly, the matter proceeded against Ms Lewis only and the claim for unfair dismissal was dismissed as there was no legal entity against which the claim could proceed.

The Issues

6. The issues were identified at the Preliminary Hearing before Employment Judge Tynan on 14 May 2020. The first question at that time was whether the Claimant was a disabled person in accordance with the Equality Act 2010 at the material time, because of the condition of fibromyalgia. That was subsequently determined at a Preliminary Hearing before Employment Judge King on 20 January 2023 and it was found that the Claimant was disabled at the material time due to the condition of fibromyalgia.
7. Quoting from Judge Tynan’s Case Management Summary, the remaining questions were these,

“It is not in dispute that the Respondent dismissed the Claimant for alleged redundancy. The Claimant alleges that she was dismissed the day after she was diagnosed with fibromyalgia.

Was that treatment “less favourable” treatment? i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances? The Claimant relies on a hypothetical comparator namely a colleague without a disability placed at risk of redundancy.

If so, was this because of the Claimant’s disability?”

8. The Claimant relied only on the condition of fibromyalgia for her claim.

The Hearing

9. This Hearing was due to start on 26 June 2023. A few days before the Hearing the Respondent’s then named Representative asked the Tribunal to convert the Hearing from an “in person” Hearing to either a hybrid or

CVP Hearing because he had suffered a back injury. He submitted a document being a General Practitioner's note of a telephone consultation which confirmed that the Claimant had an injury, but did not wish to be issued with a fit note saying that he was unfit for work. The Representative told the Tribunal that he was unable to travel (he was based on the Wirral) to the Hearing in Cambridge. On that basis the request was granted and the Hearing was converted to one to be conducted by CVP.

10. However, the Respondent's Representative who came before us (Mr Monroe) was not the person who had requested conversion to CVP to accommodate their injury and the Tribunal was told that that Representative had passed the file to Mr Monroe on the Thursday before the Hearing (22 June 2023) and that the original Representative was conducting another case. Enquiries are being made as to how this state of affairs has come about, not only because arrangements had to be made at short notice to convert the Hearing to CVP, not only because the original Representative did not tell the Tribunal that he was no longer dealing with the Hearing which could have begun as an in person Hearing as intended, but also because on 26 June 2023 there was considerable difficulty with the video technology. The Claimant could be heard but not seen and from time to time other individuals could not be heard or could not hear.
11. Accordingly, the matter was adjourned to resume in person on 27 June 2023.
12. It is of note that the case was only converted to CVP on Friday 23 June 2023, after the original Representative had passed this case to Mr Monroe.
13. At the Hearing, the Claimant gave evidence and was cross examined. A statement was submitted from Mr O'Sheill but the Claimant was not clear as to whether she should call him to give evidence. Mr Monroe helpfully indicated that he had no questions for that witness so that his statement was taken as read. On behalf of the Respondent Ms Lewis gave evidence, as did Emma Cunningham. Both Ms Lewis and Ms Cunningham were Directors of the Company at the relevant time. Reference was made to a substantial Bundle of documents.

The Facts

14. Based on the evidence we have heard, we have made the following findings of fact.
15. The Claimant began work for the Company in April 2017 and was promoted to Bar Manager in October of that year. In May 2018, one of the then Directors of the Company decided he wished to exit the Company and sold his shares to the Claimant who was then appointed also as Director. The Claimant held 40% of the equity in the Company, Ms Lewis held 30%, Ms Cunningham 20% and Mr Douglas 10%.

16. The corporate arrangements of the Company was somewhat loose and much of the communication between Directors was on a group WhatsApp chat. There was no indication of any Directors meetings.
17. The Claimant has a long term condition of endometriosis. She had surgery for this in July of 2017.
18. During the period when the Claimant was working, the business of the Company was not immediately profitable, so that each of the Directors carried out some unpaid work and the Claimant also carried out paid work in her role as Bar Manager. Staff turnover was also a problem and in October 2018, according to the unchallenged evidence of Ms Lewis, advertisements were placed for staff. As well as the work the Claimant was doing, the other Directors would help out with additional (unpaid) hours when they had time to do so as they all had other full time work.
19. In a message of 29 October 2018, the Claimant stated her hours to be Monday to Friday 10am to 2.30pm (22.5 hours in total although she maintained she was working 30 hours per week). The Claimant said this time included the hours she spent on banking, ordering stock and preparing wages. But the other Directors believed the 30 hours should be spent on sight working as Bar Manager with that other work being unpaid input as a Director. There was clearly frustration among the Board of Directors and in the view of the other three Directors, the Claimant was failing to differentiate between her position as an employee of the Company and her position as a Director.
20. There had been an issue over a cancelled Insurance Policy in October 2018 and it appeared that some banking was not being done on time, payslips were not always issued and daily accounts were not being fully maintained.
21. Accordingly a Board Meeting was held on 17 January 2019. The Board Minutes have been produced as part of the Bundle in this case. The Claimant has said in cross examination that she does not agree with the contents of the Board Minutes but she has not set this out in her statement, nor have we seen any evidence that she raised this issue previously. We are therefore bound to accept them as being reasonably accurate, particularly as the Claimant has not indicate where and how the Minutes are not a true reflection of the meeting.
22. Ms Lewis was elected by the other Board Members as Chair of the meeting and took the Directors through an analysis of their duties as Directors of a limited company. Ms Lewis suggested that responsibilities / tasks should be assigned to individual Directors in order to have working processes in place and that all such work would be unpaid as there was no money in the business of the Company to allow them to take remuneration at that stage.
23. Discussion then followed regarding having a Supervisor rather than a Manager to oversee the Bar / Club on a day to day basis and that this

should be someone other than a Director. There was comment that too much of the workload was currently being placed on the Claimant.

24. The Board considered three proposals. The first, that the Claimant should work as the Club paid Supervisor; secondly, that she should work as a paid member of staff with separate Director's duties with a Supervisor appointed; and thirdly, that she did not paid work within the Club but continued as a Director.
25. The Claimant did not vote on these proposals and nor did Ms Lewis as Chairman. But the other two Directors voted for the second option, so that a Bar Supervisor should be employed, that the Claimant would continue to carry out hourly paid bar work, but she would not have managerial responsibility for the Bar. At the same time she would remain a Director and Shareholder.
26. The first option was rejected as it would simply maintain the status quo with a change of title and the third was rejected as the Claimant at that stage said she wished to continue to carry out work at the Company.
27. Following the meeting, Ms Lewis, who had been nominated to undertake the roles relating to Human Resources and as Treasurer, asked the Claimant for the wages software. The Claimant complained on 25 January 2019 that she believed that they were her responsibility as Manager. When in reply another Director commented that things had to change and that was what the earlier meeting had been about. The Claimant accepted that she had not disagreed with the proposal at the meeting because she would be staying as a paid member of staff, but after thinking about it she considered it unfair and suggested selling her shares.
28. On 25 January 2019, the Claimant said in the WhatsApp group, as regards working under a Supervisor,

"I am not going to do hours in the Club under supervision of someone else. That's insane."
29. The unchallenged evidence of Ms Lewis was that she and the other two Directors took this as the Claimant's position regarding hours to be worked as a paid employee following the appointment of a Supervisor which the Board had asked her to consider at the 17 January 2019 meeting. They concluded that the Claimant would not work under a Supervisor as that was she was very clearly saying.
30. In those circumstances, Ms Lewis contacted Human Resources advisors and, according to her still unchallenged evidence, with the agreement of the other two Directors, prepared a letter to the Claimant regarding the Manager's position becoming redundant and setting out the Claimant's financial entitlements including notice pay and holiday pay.
31. That letter confirmed that the business was being restructured so that a number of the roles and responsibilities currently carried out by the Bar

Manager would be undertaken, unpaid, by the Directors and there was no longer a requirement for the position of Bar Manager. There was a requirement for day to day supervision of the Bar and staff and it was the intention of the Company to employ a Supervisor so that the Claimant's position as Manager was redundant.

32. When the Claimant put it to Ms Lewis that the letter made no mention of any future work, she confirmed that that was the case because the Claimant had made a number of comments about not working under a Supervisor, including the comment noted above on 25 January 2019.
33. A further Board Meeting was to be held on 13 February 2019. Ms Lewis' intention was to hand the letter to the Claimant that day at the Meeting. But on 12 February 2019, the Claimant said she would not be attending the Meeting and would put her points across in writing, although we have not seen any such comments.
34. On the same day, 12 February 2019, the Claimant had attended a Clinic at Milton Keynes' University Hospital where Dr Banerjee advised the Claimant that she had fibromyalgia. The Doctor gave the Claimant written information on the condition and made suggestions regarding medication and possible therapy.
35. The Claimant says that she told Ms Kelly about the diagnosis on the same day, 12 February 2019. She said that she had spoken to her father and that they had decided to take a holiday so she rang Ms Kelly to tell her that and she also told her, she said, of her diagnosis during that telephone call. Ms Kelly denied that any such telephone call had taken place, but we accept the Claimant's evidence in this area which we have found to be clear and credible.
36. The Claimant said in cross examination that when she made the telephone call, Ms Kelly had already posted the letter to her and did not mention it, but that was not the case. The letter had been prepared but was not posted until the following day once the Claimant had confirmed that she would not be attending the Meeting. The letter was posted during working hours because it was posted with tracking and to be signed for.
37. The Claimant says that she did not open the letter until 16 February 2019. If it was relevant that would then become the effective date of termination, if the Claimant's evidence on this point was accepted.
38. The Claimant appealed against the dismissal but the appeal was rejected. It is against that factual background that the Claimant brings the complaint.

The Law

39. Under s.13 of the Equality Act 2010, a person discriminates against another if they treat that person less favourably than they treat or would treat others because of a protected characteristic. In the case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UK HL 11, the

House of Lords set out that the role of the Tribunal in considering a claim of direct discrimination is first to identify any treatment which was less favourable treatment than would have been afforded to others and then to ask whether that conduct was because of a protected characteristic. In this case the Claimant relies on her condition of fibromyalgia and complains only of the act of dismissal. She relies on a hypothetical comparator, i.e. someone in circumstances which are not materially different but who is not disabled.

Conclusions

40. Applying the facts found to the relevant Law, we have reached the following conclusions.
41. At the time of the Board Meeting on 17 January 2019 the Directors of the Company came to the conclusion, as they were entitled to as the owners of the business, that there was insufficient separation of duties between the Claimant as a paid employee and the Claimant as Director and that there were tasks which should be shared by the Directors for which they would not be paid.
42. This we unanimously find was a reasonable decision for a business to take in circumstances where profits were not materialising. As part of that decision the Respondent considered a number of options including the Claimant adopting the role of Bar Supervisor, which was rejected by the Board because it would simply maintain the status quo which was not working effectively. The decision was taken to remove the position of Bar Manager, employ a Supervisor and – provided she wished to do so – allow the Claimant to carry on working on an hourly paid basis.
43. The Claimant was given time to consider this and subsequently confirmed that she would not work under a Supervisor. In particular on 25 January 2019, she wrote in a WhatsApp group to the other Directors,

“I am not going to do hours in the Club under supervision of someone else. That’s insane.”
44. On that basis the Claimant’s role as Manager was redundant and she had rejected the option of working under a Supervisor by her clear words. The Company and in particular the Respondent Ms Lewis, reasonably took that to be a rejection of the proposal of her carrying out hourly paid work.
45. In those circumstances advice was taken and a letter drafted ready to be given to the Claimant at the next Board Meeting on 13 February 2019 which confirmed that her position as Manager was redundant. Her position as Director or Shareholder was, of course, not affected.
46. That letter was in place prior to the Claimant advising Ms Lewis that she would not be attending the Meeting on 13 February 2019 which she did the day before. On advice, Ms Lewis posted the letter to the Claimant, tracked and to be signed for, the following morning 13 February 2019.

47. Whilst the Claimant had advised Ms Lewis on 12 February 2019 of her diagnosis of fibromyalgia, the decision to dismiss the Claimant as redundant had already been taken and was the inevitable consequence of her position as Bar Manager being removed to be replaced by a Supervisor under whom she refused to work. The decision was not motivated by the Claimant's condition of fibromyalgia because at the time the decision was taken, about 7 February 2019 when Ms Lewis was drafting a letter with the assistance of external advisors and with the knowledge of the other Directors, the condition was unknown to Ms Lewis and indeed undiagnosed as far as the Claimant was concerned.
48. Although much criticism could be placed at the door of the Company as to how they have conducted this matter, no purpose would be served in doing so, nor in analysing the fairness or unfairness of the way they dealt with the Claimant's employment. The Claimant does not have sufficient qualifying service to bring a claim of unfair dismissal and she only brings a complaint of direct disability discrimination.
49. We are satisfied that a non-disabled Manager who was also a Director and in the same circumstances as the Claimant, would not have been treated differently to the way the Claimant was. Had such a non-disabled Manager refused to work under a Supervisor once the Company had determined to make the role of Manager redundant, then they too would have been dismissed.
50. Accordingly, there is in this case no less favourable treatment.
51. Further, the treatment that the Claimant did receive was not on the grounds of disability. The Company was restructuring and at the time the decision was taken to dismiss the Claimant as redundant, the Company and Ms Lewis were not only unaware that the Claimant suffered from fibromyalgia (as indeed was the Claimant) but the reason why the decision was taken related solely to the decision to separate the roles of Director and employee, to employ a Bar Supervisor instead of a Bar Manager thus making the Manager's role redundant and the Claimant's decision not to work under a Supervisor. Her decision was not taken because of any physical or mental impairment from which the Claimant suffered, but rather because of the need to separate the roles of Director from the roles of employee, reorganise the distribution of tasks between the various Directors and the Claimant's refusal to work under a Supervisor.
52. The claim proceeds against Ms Lewis and Ms Lewis alone. The Claimant confirmed that this is because Ms Lewis had written the letter of dismissal and was in her view the controlling person in the Company.
53. We are satisfied, however, that the decision to employ a Bar Supervisor and remove the role of Bar Manager was a corporate decision made by the Board of Directors and not Ms Lewis alone. When the Claimant refused to work under a Supervisor, her position disappeared and therefore redundancy was the inevitable outcome.

54. We accept that one Director was apparently unaware that the Claimant was no longer working at all for the Company, but the reason why she was not carrying out paid work was because she had refused to work under a Supervisor. That decision was hers and not one made by Ms Lewis.
55. Accordingly, the Claimant's complaint that she was the victim of unlawful discrimination does not succeed. There was no less favourable treatment compared to the hypothetical comparator, the treatment the Claimant did receive was not because of disability and the named Respondent Ms Lewis, was simply putting into effect a corporate decision made by the Board of Directors of the Company.
56. For those reasons the Claimant's complaint is dismissed.

22 August 2023

Employment Judge M Ord

Date:

Sent to the parties on: .29 August 2023.

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For the Tribunal Office.