



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Ms Ifueko Osaghae

v

Mountain Healthcare Limited

**Heard at:** Bury St Edmunds

**On:** 5 September 2023  
and in chambers 19 September 2023

**Before:** Employment Judge S Moore  
Ms J Buck  
Mr S Holford

**Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr Rhodes, Counsel

## RESERVED JUDGMENT

**The claim of disability discrimination (discrimination arising from disability and failure to make reasonable adjustments) is dismissed.**

## REASONS

### Introduction

1. This is a claim for discrimination arising from disability under s. 15 Equality Act 2010 (EqA) and for failure to make reasonable adjustments (s.20 & s. 21 EqA). The claim form was lodged on 9 September 2022 following a period of ACAS Early Conciliation between 19 July and 11 August 2022.

2. The Respondent accepts the Claimant is and was at the material time a disabled person within the meaning of s. 6 EqA by reason of Rheumatoid Arthritis.
3. We heard evidence from the Claimant and, for the Respondent, from Mr Terry Lewis (TL), Senior HR Business Partner, and from Ms Natasha Green (NG), Head of HR Operations. We were also referred to a bundle of documents. On the basis of that evidence, we make the following findings of fact.

### **The Facts**

4. The Claimant was employed by the Respondent as a Human Resources Advisor between 31 January 2022 and 15 July 2022.
5. As part of her induction process, she was required to complete a “New Starter Form” which included the question, “Do you consider yourself to have a disability?” The Claimant answered “no”. The Claimant primarily worked from home and completed a Display Screen Equipment Checklist and she did not refer to any reasonable adjustments needed in order to undertake her role.
6. The first six months of her employment was expressly stated in her contract to be a probationary period.
7. TL was the Claimant’s line manager and throughout the probationary period he regularly conducted one-to-one meetings with the Claimant. The Claimant never mentioned that she suffers from Rheumatoid Arthritis at any of those meetings or that she had any physical difficulties doing her work.
8. On 30 April 2022 TL conducted a formal three-month probationary review with the Claimant. For the purposes of that meeting TL completed a probationary review form. The form has sections dealing with objectives, development, competencies, and a summary of performance and progress. TL concluded that the Claimant’s performance was satisfactory to good against the key criteria and set the Claimant two key objectives (i) to develop the advisory side of her role and (ii) to take more of a lead in HR supported processes. In the summary box he stated, “In conjunction with the above comments, a solid start into the role but so far we have been in the learning phase and this has been predominantly admin based processes. This was partly by design to ensure familiarity with systems but now needs to move quickly to an advice delivery part of the role to ensure that the full position is being delivered and the business has multiple points of contact for ER related issues.”
9. Unfortunately, during the course of the fourth and fifth month of her employment TL did not consider that the Claimant’s performance progressed as he expected or required. In particular he was concerned that she continued to make mistakes in the administrative side of her role and that she was not developing or fulfilling the advisory side of her role.

10. At some point during the week commencing 20 June 2024, TL asked the Claimant to attend a probationary review meeting at 9.30am on 27 June 2022. He intended the meeting to be the Claimant's final probationary review (although she had only completed five, rather than six, months of her probation). The meeting was scheduled in an Outlook diary, with the comment "I will be conducting a probationary review with you at this time when we meet in Stevenage" and the Claimant accepted the invitation to that meeting.
11. In preparation for that meeting TL prepared a further probationary review form. It contains his previous comments, written for the purposes of the meeting on 30 April 2022, typed in black and underneath them his comments written for the purposes of the meeting on 27 June 2022 typed in red. The red comments are generally negative, stating that the objectives set at the previous review had (in the main) not been achieved and identifying various concerns and criticisms. In particular the comments note that the advice part of the role was still missing. At the end of the form there is a box with the question "Is the employee's appointment to be confirmed?". For the purposes of the review on 30 April 2022, TL had written "n/a", however for the purposes of the review on 27 June 2022, TL wrote "no". And in respect of the question, "Is the employee's probationary period to be extended?" he also wrote "no".
12. The red comments are predicated with the date 27/6. TL says, that save for one comment regarding the Claimant's communication while absent from work, he filled in the review form on 24 June 2022, and that the date 27/6 referred to the date of the scheduled meeting. We accept that evidence, however in the event, for the reasons set out below, little turns on whether the comments were written on 24 or 27 June 2022.
13. On 27 June 2022, the Claimant emailed TL at 08.39 to say she wouldn't be able to work that day as she was feeling very unwell. She did not provide any further details of her illness. TL replied at 09.27 to say he was sorry to hear that and to call him later to update him on the likelihood of her being in work the following day.
14. On 28 June 2022, the Claimant emailed TL at 07.54 to say she was still unwell. In a reply of the same date TL asked her what was wrong.
15. On 29 June 2022 the Claimant emailed TL at 07.00 to say, "I am having a really bad rheumatoid arthritis symptom flare up – all my joints are very inflamed, stiff and swollen which is causing me extreme discomfort and pain."
16. This was the first occasion that the Respondent knew or could reasonably have known that the Claimant suffers from the disability of Rheumatoid Arthritis (or any disability).
17. The Claimant returned to work on 7 July 2022, which was the same day that TL went on annual leave (until 18 July 2022).

18. On 11 July 2022 NG conducted a back to work interview with the Claimant. She asked the Claimant if she required additional support and the Claimant responded, "Not really that I can think of at the moment".
19. On 15 July 2022 NG conducted the Claimant's six-month probationary review meeting and informed her of TL's feedback and the decision that she had not passed the probationary period and was being dismissed.
20. On 16 July 2002 the Claimant submitted a grievance by email, alleging that she had been dismissed because it had recently been brought to the Respondent's attention that she suffers from Rheumatoid Arthritis and making complaints about TL as a manager, alleging lack of training, lack of support, bullying and racism.

## **Conclusions**

### *Discrimination arising from Disability*

21. Section 15 EqA provides:

"(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."

22. In the list of issues agreed at a Preliminary Hearing on 10 February 2023, the unfavourable treatment relied upon is stated to be (a) dismissal in relation to the Claimant not meeting the required standard of work expected of her role by the Respondent during the 6-month probationary period; and (b) having fewer weeks to improve between her quarterly and biannual review because of her sickness absence.
23. As regards the unfavourable treatment of dismissal, the Claimant says she was dismissed because of her sickness absence, or at least her sickness absence was a significant influence in respect of the decision to dismiss her, and that her sickness absence was something that arose in consequence of her disability.
24. We accept the Claimant's sickness absence arose in consequence of her disability however we do not accept that that sickness absence played a part in the decision to dismiss her.
25. As stated above, we accept that TL completed the probationary review form on 24 June 2022, before the Claimant emailed on the morning of 27 June 2022 to say she was ill. Since 24 June 2022 was a Friday and 27

June 2022 was a Monday (and the meeting scheduled for 9.30am) it is logical that TL would have completed the form on the Friday in advance of the meeting on Monday morning.

26. Furthermore, even if TL completed the form on the Monday morning, immediately prior to the scheduled meeting, we consider it highly unlikely that the fact the Claimant emailed at 08.39 to say she was ill and couldn't come to work influenced his decision that she had not met the required standard to pass her probation. Moreover, he could not reasonably have known that the Claimant has the disability of Rheumatoid Arthritis and that this was the reason for her absence from work until he received the Claimant's email on 29 June 2022, two days later.
27. The Claimant's case requires the following course of events to have happened: that having become aware on 29 June 2022 that the Claimant suffers from Rheumatoid Arthritis, TL changed whatever comments he had previously written on the probationary review form, replacing them with negative ones and changing the outcome to that of dismissal, and we do not accept this version of events.
28. While it is true that at the 3-month review TL had concluded that the Claimant's performance was satisfactory-to-good, the probationary review form clearly records the necessity for the Claimant to move quickly to the advice delivery part of the role. Further, there is evidence in the bundle that during the fourth and fifth month of her employment, TL criticised the Claimant for making errors (that he characterised as basic mistakes), for not prioritising typing up certain meeting notes, and for not fulfilling the advisory side of her role. We are therefore satisfied that the decision to dismiss the Claimant was based on TL's assessment that she was not fulfilling the requirements of the role and that the decision had been taken before she commenced her sickness absence on 27 June 2022 and certainly before the Respondent could reasonably have been aware that she has a disability.
29. As regards the alleged unfavourable treatment of the Claimant having fewer weeks to improve between her quarterly and biannual review because of her sickness absence, we understand the claim to be the Claimant had fewer weeks to improve between 30 April 2022 (the date of her 3-month probationary review) and the review meeting on 15 July 2022 (when she was dismissed) because of her sickness absence.
30. However, this simple fact of chronology does not amount to treatment of the Claimant by the Respondent. Further and in any event, we have found the dismissal decision was made on 24 June 2022 (or at the latest on 27 June 2022), by which date she had not had any sickness absence at all.
31. Even if the claim were to be reframed so that the unfavourable treatment was regarded as being TL's decision to bring forward the date of the Claimant final probationary review so that it took place after five, rather than six months, we do not consider this advances the Claimant's case.

32. First, the early termination was in accordance with paragraph 5.5. of the Claimant's Contract of Employment which provided that: "If it is clear that you will not be able to reach the required standard either during the probationary period or any extension, the Company will terminate this Contract of Employment with no notice during the first month and with 1 weeks' notice thereafter".
33. Secondly, at the time TL took the decision the Claimant would not be able to reach the required standard (and should be dismissed) there is no evidence her disability had had any effect on her failure to meet that standard (see further below). It therefore cannot be said that TL's decision to bring forward the Claimant's final probationary review from 6 months to 5 months was unfavourable treatment because of something arising in consequence of her disability.
34. It follows that the claim of discrimination arising from disability is dismissed.

*Reasonable adjustments*

35. Where an employer's provision, criterion, or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, section 20(3) EqA imposes a duty on that employer to take such steps as it is reasonable to have to take to avoid the disadvantage.
36. Further, paragraph 20 of Part 3 of Schedule 8 to the EqA provides that an employer is not subject to a duty to make reasonable adjustments if he does not know and could not reasonably be expected to know that a person has a disability and is likely to be placed at the disadvantage in question.
37. In this case the PCP relied upon by the Claimant is requiring employees to show adequate improvement during their probationary period, and the Respondent accepts it applied this PCP.
38. In this respect in the claim form at paragraph 21, the Claimant says this placed her at a substantial disadvantage "because she needed more time off work, owing to her disability, and therefore had less time to improve. Furthermore, the Claimant's dexterity slowed her down, owing to her condition".
39. However, the Claimant's witness statement makes no reference to her condition affecting her dexterity (or her abilities at all), except during the time when she was experiencing a flare up of her condition.
40. At paragraph 5 of her statement she states, "When completing [my Display Screen Equipment Checklist] I was not experiencing a flare-up with RD and therefore did not require any reasonable adjustments to be made at that time". Further at paragraphs 30 and 31 she states: "The Respondent could also be reasonably expected to know the above PCP would place

me at a disadvantage, as compared to employees that did not suffer with my disability, as I was unable to attend work, had very limited mobility and had to take time off work. As a result of my disability related illness, I was required to take an extra week off work which resulted in the unfavourable treatment from the Respondent by refusing a further extension with my quarterly and bi-annual review relating to my probation”.

41. Accordingly, because TL decided the Claimant had not passed her probation prior to her experiencing a flare-up of her Rheumatoid Arthritis (and needing to take sick leave) and because there is no evidence that her Rheumatoid Arthritis affected her ability to work during the period when she was not experiencing a flare up, there is no evidence that the PCP put the Claimant at a substantial disadvantage compared to persons who do not suffer from Rheumatoid Arthritis.
42. Further, and in any event, even if the Claimant had been placed at such a substantial disadvantage the Respondent couldn't reasonably have been expected to know that. The Claimant never suggested in any of her one-one meetings with TL, or in her back to work meeting on 11 July 2022 with NG, or in her review meeting on 15 July 2022 with NG, or in her grievance email dated 16 July 2022, that her condition had affected her ability to meet the required standard during the period prior to her flare-up and consequent sick leave.
43. It follows that the complaint of failure to make reasonable adjustments is dismissed.
44. In the light of the above the claim is dismissed in its entirety.

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Employment Judge S Moore

Date: ...20 September 2023.....

Sent to the parties on:13 October 2023

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For the Tribunal Office