



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No:4106159/2022

Final Hearing
Held in Edinburgh
on 2 and 3 October 2023

Employment Judge A Jones
Tribunal Member N Elliot
Tribunal Member S Currie

Mr P Marmelo

**Claimant
Represented by
Mr Swan, solicitor**

Danielle Carr Limited

**First Respondent
Represented by:
Mr Ramsbottom,
Consultant**

Danielle Carr

**Second Respondent
Represented by :
Mr Ramsbottom,
Consultant.**

Judgment

It is the unanimous decision of the Tribunal that:

1. The claimant was not unfairly dismissed
2. The respondent was or ought reasonably to have been aware that the claimant was a disabled person by 3 September 2021.
3. The claimant was not discriminated against or harassed because of his disability.
4. The claimant was not victimised for having done a protected act.

The claimant's claims are therefore dismissed.

Introduction

- 5 1. The claimant raised a claim of unfair dismissal, disability discrimination, harassment and victimisation against the respondents. The claimant had made claims of unpaid wages and notice pay but these were withdrawn prior to the final hearing. While the respondents accepted that the claimant was a disabled person at the material time, they did not accept that they were or could reasonably have been aware of the claimant's disability status.
- 10 2. The second respondent gave evidence on her own behalf and evidence was also led from Emma Welsh and Jade Tainsh. The claimant gave evidence on his own behalf. Written witness statements formed the evidence in chief of each witness who was then cross examined. A joint bundle of documents was produced and both parties made submissions at the conclusion of the evidence. The claimant was assisted during his evidence by an interpreter. Having listened to the evidence, and submissions and considered the documents to which reference was made, the Tribunal made the following findings in fact.
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20 Findings in fact

3. The claimant commenced work with the first respondent ('R1') in July 2019 and was latterly employed as a Senior Creative Director.
- 25 4. R1 is a hairdressing business owned by the second respondent ('R2') with two salons in Edinburgh. The claimant worked across both salons latterly on a 3 day a week basis. His hourly rate was £12. R1 employed approximately 8 people across both salons including the claimant. The claimant was one of the most senior and experienced members of staff.
5. The claimant is originally from Portugal.
- 30 6. The claimant was absent from work between April and August 2021 due to anxiety. At the time the claimant was going through significant personal issues.

7. During the claimant's absence in 2021 R1 requested access to the claimant's medical records which he refused to provide in a message on 11 June 2021.
8. In August 2021 the claimant filled in a return to work form and suggested that it would assist him to work fewer hours. The respondents agreed to this suggestion and the claimant moved from full time working to working 3 days a week thereafter.
9. The claimant informed R2 in a message on 29 June 2021 that he was taking the medication setralin and zopiclone and had been taking Valium. He informed R2 that zopiclone was to aid sleep is sertalin was an antidepressant.
10. The claimant was in regular contact with R2 through whatsapp during his absence and after his return to work. The tone and content of the messages was friendly and supportive.
11. The claimant sent a message to R2 on 18 August 2021 raising concerns about his appointments in the salon being changed. R2 immediately apologised for this and said that she would ensure that he could manage his own appointments going forward.
12. On 3 September 2021 the claimant sent a message to R2 saying "I just don't feel myself since the last few years, I've lost all my friends and I'm a failure as a person which has contributed to this.....this was told by my psychologist I need an assessment whether I am or not dealing with autism since I was younger age as my parents never had thought about it."
13. R2 sent the claimant a link to a counselling service and offered to help the claimant financially in accessing psychological services.
14. R2 sent a message to all staff on 2 December 2021 highlighting the difficulties the business was facing and asking everyone to work hard. That message was not aimed at the claimant but all staff.
15. An issue arose on 24 March 2022 regarding a financial anomaly when R2 was closing the salon. R2 raised this with the claimant as it related to a client of his. Later that evening R2 messaged the claimant to say that she had now sorted the issue out and it was nothing to worry about. The claimant's disability played no part in how R2 dealt with this issue.

16. On 24 June 2022 the claimant was due to attend work. He had informed R2 the previous day that he was having difficulties with his teeth. The claimant sent Ms Welsh, who managed the salon in which he was due to work that day a text message to say that he couldn't come into work as he had an appointment to get a tooth out. Ms Welsh responded that she needed the claimant to come to work as he had a client first thing and asked him to rearrange the dental appointment for the afternoon or when he was off. The claimant did not respond to that message.
17. Ms Welsh then contacted R2 to inform her what had happened. R2 phoned the claimant to speak to him about going into work. The conversation became heated and the claimant suggested to R2 that she believed that he was faking his health. R2 did not suggest to the claimant at any time that he was faking his health, whether in relation to dental issues or any other condition.
18. The claimant did not attend work that day and attended the dental appointment. The claimant never returned to work.
19. The claimant contacted ACAS around 24 June and raised a grievance regarding the conduct of R2 and Ms Welsh in relation to the dental appointment. He stated 'I also need to address that at 8.45am when Danielle called my mobile number pressurizing and intimidating me to go to work regardless and that I was faking my health state, which I really didn't understand the way she meant it, if was just regarding today or my general health overall'. The claimant went on to refer to suffering from autism and section 6 Equality Act 2010.
20. A grievance hearing was conducted by Jade Tainsh, who did not uphold the claimant's grievance.
21. The claimant appealed against that decision and the appeal was dealt with by Face2face a service offered by Peninsula who were engaged as advisors to R1.
22. The appeal hearing was recorded visually and on audio. The claimant was given the opportunity to raise any issues he wished during that hearing. The hearing was conducted professionally and the claimant was not interrupted or spoken over.

23. While the claimant's appeal was not upheld recommendations were made including that mediation should be considered and that an occupational health assessment would be of assistance.
24. The claimant travelled to Portugal for a pre-planned holiday between 16 August and 1 September.
25. R2 sent a message to the claimant on 17 August asking if a welfare meeting could be arranged when he returned from leave. The claimant did not reply to that message.
26. R2 sent a message to the claimant on 1 September saying that she hoped he had enjoyed his holiday and asking whether he could let her know when he'd be available for a welfare meeting. The claimant responded by saying that he was not well enough for a welfare meeting and gave no timescale or indication when he would be able to meet.
27. The claimant then sent a further fit note from 12 September for a month and said that he was doing a few mental assessments and would contact R2 again once they were finalised. He did not provide any timescale.
28. R2 messaged the claimant on 13 September saying that she had not received the fit note and asked whether there was any indication how long the assessments would take and when he might be able to return to work. She also asked the claimant to give consent to a medical report being obtained.
29. The claimant replied by saying he was too unwell but that he would contact her again when he was feeling better. He also provided his fit note which stated that he was unfit for work until 6 October. He did not answer the questions which had been asked of him.
30. R2 replied on 15 September by indicating the claimant's absence was having a detrimental impact on the operation of the business. The claimant was asked again if he would consent to a medical report. The claimant was advised that the respondent may need to proceed with a medical capability meeting without the benefit of medical advice if he did not provide consent.
31. On 26 September R2 sent the claimant a letter asking him to attend a medical capability meeting on 29 September. The claimant responded on 28 September saying he was not well enough to attend and asked for the meeting to be rearranged for 'when he was well enough/in a few weeks' time'.

32. R2 then messaged the claimant asking if there were any adjustments which would allow him to take part in the meeting, or whether he could provide written submissions. The claimant did not attend the meeting and so it did not happen. The claimant sent a further fit note on 5 October indicating he was
5 unfit to work for a further 15 days.

33. R2 then messaged the claimant on 7 October asking for any representations he might wish to make by 5pm on 11 October failing which she would continue with the internal procedures.

34. The claimant messaged R2 on 10 October saying she was putting him under
10 further pressure. He gave no indication as to when he might return to work, whether he would provide consent for a medical report or any information regarding his condition. R2 responded by asking if the claimant could confirm a timescale she could consider before the meeting was rearranged. The claimant did not respond.

35. R2 then messaged the claimant on 17 October explaining that as she had
15 heard nothing from him, she expected his written submissions no later than 5pm on 18 October or his attendance at a medical capability hearing on 19th October. The claimant did not respond to that message. He did not attend the meeting.

36. The claimant was dismissed by letter dated 20 October. The claimant was
20 offered a right of appeal which he did not pursue.

Issues to determine

37. The Tribunal was required to determine the following issues:
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- i. Was the claimant unfairly dismissed?
- ii. Were the respondents aware or ought they reasonably to have been aware that the claimant was a disabled person at the material time and if so, from what date?
- 30 iii. Was the claimant subjected to any discriminatory treatment arising from a disability ?
- iv. Was the claimant harassed because of his disability?

- v. Was the claimant dismissal arising in consequence of his disability and if so, was it a proportionate means of achieving a legitimate aim?
- vi. Did the claimant do a protected act and if so was he subjected to a detriment as a result?

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Was the claimant unfairly dismissed?

38. The respondents' position was that the claimant was dismissed for a potentially fair reason being capability. It was also said that the respondents acted reasonably in that regard, having regard to its size and administrative resources. It was noted that the respondents had the benefit of the support from Peninsula in relation to employment matters.

39. Capability is a potentially fair reason for dismissal. Whether the respondent acted reasonably in dismissing the claimant for that reason requires consideration of a number of factors. The Tribunal accepted that the claimant's ongoing absence was causing it operational difficulties. The claimant was a senior member of staff for whose services clients paid a higher rate. He had brought a number of clients with him when he started work with the respondent. The Tribunal did not accept the suggestion made on behalf of the claimant that a temporary replacement could have been recruited. The Tribunal accepted the evidence of R2 that the claimant's clients were deserting her business and going elsewhere because the claimant was not there to provide a service to them. The Tribunal also thought particularly relevant that the respondent's operations were small. While there were two salons, there were only around eight staff in total across both salons, and the claimant had been one of the most experienced.

40. The Tribunal also took into account that the claimant simply did not engage in providing the respondents with any information in relation to his health and when he might return to work. He did not give consent to a medical report. It was suggested on behalf of the claimant that there was a contractual entitlement for the respondent to obtain such a report. However, in practical terms it could not do so without the claimant's co-operation. For reasons which were never explained to the respondents or the Tribunal, he was not

5 willing to provide that co-operation. The Tribunal also accepted that the respondents had suffered difficulties during the COVID pandemic and that it was taking time to recover. It was the lead up to the Christmas period and the respondent was not able to make any bookings for the claimant when it had no prospect of the claimant returning to work or any information regarding the basis on which he might be able to return.

10 41. The claimant was given a number of opportunities to provide information to the respondents in relation to his condition and when he might return, but did not do so. The Tribunal was drawn to the conclusion that the claimant had no intention of returning to work after the lodging of his grievance. It is notable that the claimant has not returned to work as yet and is now undertaking further education.

15 42. In all of these circumstances, the Tribunal was satisfied that the claimant was dismissed for a potentially fair reason, being capability and that the respondent acted reasonably in dismissing the claimant. While another employer may have been willing to wait for a further period, the question of reasonableness is answered by considering whether in the particular circumstances of the case, an employer acted in a manner in which no reasonable employer would act. The Tribunal was satisfied that the respondent had acted reasonably and had given the claimant a number of opportunities to engage in a process which may have avoid or delayed his dismissal, but did not do so. His claim in that regard is therefore dismissed.

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Knowledge of disability

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43. The Tribunal then went on to consider whether the respondents were aware that the claimant was a disabled person at the material time. The tribunal had little hesitation in concluding that if the respondents were not aware, (which the Tribunal found difficult to accept), they ought reasonably to have been so aware.

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44. The Tribunal concluded that at least from 3 September 2021, the respondents ought to have been aware that the claimant was a disabled person. In particular by that date, the claimant had disclosed the medication he was

taking, he had a previous substantial absence in relation to mental health issues, and he raised the issue of autism. The claimant had made reference to having had a panic attack and the respondents had made adjustments to the claimant's working hours and arrangements in order to assist him in his return to work.

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45. The Tribunal did not accept the claimant's submission that as the respondents had made reasonable adjustments, they must have been aware that the claimant was a disabled person. Reasonable adjustments can be made simply because an employer wishes to be accommodating whatever the underlying reason for the accommodations. However, in the particular circumstances of this case, the Tribunal was satisfied, that having been made aware of the various medications being taken by the claimant, details of the difficulties he was experiencing and even according to the evidence of R2 that the claimant was 'very very sad' after the lockdown caused by COVID, that they ought to have been aware that he was a disabled person by reason of his autism and/or anxiety by September 2021 at the latest.

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Was the claimant's dismissal discrimination arising from his disability?

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46. The Tribunal was satisfied that the claimant's dismissal was unfavourable treatment. It was also satisfied that he was dismissed for something arising from his disability, that is his absence from work. However, the Tribunal was then required to determine whether dismissal was a proportionate means of achieving a legitimate aim.

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47. The respondents' position was that the claimant was dismissed in order to maintain business operations by having someone in the claimant's role who was available to attend the workplace and carry out his duties. The Tribunal was mindful that this was a different test to that of determining whether the claimant's dismissal fair or unfair. That said, some of the same factors were relevant in this determination.

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48. The Tribunal was satisfied that this was a legitimate aim of the respondent. It needed someone in a role similar to the claimant as part of its business model. There was no indication from the claimant when he might be able to

return to work. The Tribunal was satisfied that the respondents genuinely wanted the claimant to return to work. They valued his services and were of the view that he was good at what he did.

5 49. The Tribunal considered whether dismissal was proportionate in the circumstances and whether there was a less draconian approach which would have been open to the respondents. However, the claimant was not engaging with the respondents. It was suggested that mediation would have assisted. However, that could not be arranged unless the claimant engaged with the respondents in some way and he appeared simply unwilling or
10 unable to do so. Efforts were made to encourage him to have a welfare meeting, which he declined, to meet by teams or put submissions in writing. He declined all of these opportunities and did not provide any medical evidence to suggest that he was not capable of doing so. The respondents operated a small business. The claimant was important to that business and
15 they could not do without him indefinitely. The claimant had been absent for a significant period in the past. He had failed to provide consent to obtaining a medical report. There was no indication when he might return to work.

20 50. In all of these circumstances, the Tribunal was satisfied that dismissal was a proportionate means of achieving a legitimate aim.

Did the respondents fail to make reasonable adjustments?

25 51. It was suggested that the respondents ought to have made an adjustment by giving more time to the claimant to return to work or to respond to requests for information. It was also suggested that a temporary member of staff could have been recruited. It was also suggested that mediation would have been a reasonable adjustment.

30 52. As outlined above, the Tribunal concluded that the respondent could not make arrangements for mediation because the claimant would not engage with them at all. There was therefore no failure on the part of the respondents in this regard.

53. Moreover, the Tribunal was of the view that recruiting a temporary member of staff would not be a reasonable adjustment. It would not allow the claimant

to return to work. Even if it could be said that this amounted to a reasonable adjustment it was not reasonable in the particular circumstances.

54. It seemed to the Tribunal that there was nothing the respondents could have done to encourage the claimant back to work. They had already reduced his hours and agreed that he could manage his own appointments.

Was the claimant harassed because of his disability?

55. The Tribunal noted that there was little evidence in this regard beyond what was said in the claimant's witness statement. The respondent's witnesses were not cross examined on any of the allegations which were said to amount to harassment. The Tribunal has found as a matter of fact that it was the claimant who raised the suggestion that the respondents thought he was faking his health and this was not raised by the respondents.

56. There was no evidence that the claimant was spoken over at the grievance appeal, never mind that this could have been related to his disability. The claimant gave no examples of any respects in which he was spoken over and the Tribunal formed the view that this allegation arose out of the claimant in retrospect having wished he had raised certain matters, rather than having sought to raise them and been cut off.

57. Neither was there any evidence to suggest that the timescales imposed on the claimant in relation to meetings and submissions were in any way related to his disability. The Tribunal accepted that these were an effort by the respondents to resolve matters, and were not in any way related to the claimant's disability.

Victimisation

58. Even if the Tribunal accepted that the claimant's grievance amounted to a protected act, and the Tribunal had significant reservations in this regard, there was simply no evidence that the claimant was dismissed because he had raised a grievance. The claimant raised the grievance around 23 June and was not dismissed for a further four months. There was no evidence that

the two were in any way related, other than the Tribunal's conclusion that having raised the grievance the claimant may have already decided he would not return to work.

5 59. In all of these circumstances, the claimant's claims are dismissed.

Employment Judge: A Jones
Date of Judgment: 12 October 2023
Entered in register: 12 October 2023
and copied to parties