



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Olcvele

**Respondent:** Ocho Steak House Limited

## REASONS

1. The Claimant is a single mother who lives with her son Dmitrijs Korcgins ("Jimmy"). He was born on **23 March 2012**. He was diagnosed as suffering from ADHD in **June 2019** and has special educational needs. The Claimant was employed by the Respondent in its restaurant in Southsea, Hampshire as a part-time waitress from **15 June 2018** until her employment was terminated by the Respondent on **17 May 2021**. The Claimant was contracted to work 16 hours during a four day week with those hours allocated to her by the Respondent by rota during each week. The Claimant's earnings were restricted to 16 hours a week to ensure that she suffered no loss of benefits for herself and her son.
2. The Claimant filed an ET1 on **16 August 2021** in which she pursued claims of unfair dismissal, wrongful dismissal and accrued holiday pay. At a Preliminary Hearing held on **24 April 2022** the Claimant was granted leave to amend her claim to include claims of discrimination arising from a disability, direct disability discrimination by association (referring to her son) and failure to make reasonable adjustments contrary to sections 13, 15 and 20 of Equality Act 2010.
3. The Respondent filed a Response in which it stated it was a small business with no more than ten employees and denied the claims being made against it. The Respondent's case is that the Claimant's work in her role had been unsatisfactory but it was unaware of her, and her son's, disability and that the Claimant had failed to return to work after a period of furlough leave during the lockdown.
4. The Tribunal fixed a final hearing to be held on 14, 15, 16 and 17 March and a Preliminary Hearing to be held on 5 October 2022 to determine whether the Claimant and her son were disabled at the relevant time. The Claimant provided impact statements and relevant medical records for herself and her son in accordance with directions given by the Tribunal.
5. This Preliminary Hearing was subsequently adjourned to enable the Respondent to consider further documentation provided by the Claimant. The Respondent was directed to notify the Claimant and the Tribunal by no later

than 19 October 2022 whether or not it accepted that the Claimant was disabled at the relevant time and if it did not accept that the Claimant was disabled to set out the reasons why it did not do so.

6. The Respondent did not comply with that direction and on 22 November 2022 the Employment Tribunal served the Respondent with notice of a strike out warning stating that the Respondent had not actively pursued its defence in the proceedings because it had failed to comply with Case Management Orders made by the Tribunal.
7. On 20 January 2023 it was ordered that because the Respondent had failed to comply with previous orders on two previous occasions that unless it notified the Tribunal that it accepted the Claimant was disabled, or if not, the reasons for not doing so, it would be debarred from defending the claims of disability discrimination at the final hearing. The Respondent failed to comply with that Order and has been debarred from defending the claims of disability discrimination pursued by the Claimant.
8. The Tribunal has been informed that a Creditor's Voluntary Liquidation of the Respondent is currently proceeding with the appointment of a liquidator. It has also been confirmed by the insolvency practitioners involved, Expedium Limited, that there would be no attendance on behalf of the Respondent at the Final Hearing.
9. The Claimant represented herself. She was supported by Mr Rockliffe, a Mental Health Supporter, at the hearing. The Tribunal commended the Claimant for the Bundle of Documents (which comprised 346 pages) which she had prepared with substantial diligence for the hearing (**Exhibit A1**). The Claimant's evidence comprised two witness statements (**Exhibits C2 and C3**). The Tribunal made the following findings of fact after considering the Claimant's evidence and the relevant documents submitted to it.
10. The GP records confirm that the Claimant attended on her GP on **15 March** and **29 August 2018** with symptoms of anxiety. When she attended on her GP on **28 December 2018** she confirmed that she had stopped taking the medication which had been prescribed for her anxiety. The next recorded attendance is on **16 October 2020** when the Claimant was diagnosed with anxiety disorder and prescribed Sertraline.
11. The Respondent's restaurant was forced to close by the Covid lockdown from **23 March** to a date in **July 2020** when the Claimant returned to work with her colleagues. On **1 December 2020** she informed her Manager, Ms Abiy, by text, that she was suffering from depression. She subsequently submitted a sick note completed by her GP on **9 December 2020**. This signed her off with depression and anxiety for one month from **2 December 2020** to **1 January 2021**.
12. The further national lockdown forced the restaurant to close again from **19 December 2020** to **17 May 2021**. There was no communication between the Claimant and Ms Abiy or anyone else at the Respondent's restaurant until an email which Ms Abiy sent to all the Respondent's employees on

**4 May 2021.** Ms Abiy's email stated as follows:

*"Hi everybody, hope your well. We back on th 17th of may finally yay. We need a major preparation before that so please get back to me if your coming back to work to be kept on the rota, and moving forward how many days you wanting to work and what days you can't work, so I know if we need to hire more people. Cheers".*

13. The Claimant replied to Ms Abiy on **10 May 2021** as follows:

*"Hi Mariam. It's Alina. I had a chat with my doctor and at present I can't return to work yet. Just had medication dose increase and adaptation period is hell. By the end of May hope will be okay, I will keep you updated. Let me know what you want to do, furlough or SSP. Sorry for any inconvenience. Thank you".*

14. Ms Abiy replied as follows:

*"We won't be doing both*

*Will send u p45 soonest thank you".*

15. The Claimant told the Tribunal that she had intended to return to work for the Respondent when she sent her text to Ms Abiy on **10 May** and had expected to be able to do so at some time in June. The Claimant had been paid by way of furlough payments during the two lockdowns of the Respondent's restaurant. She considered that she was being dismissed for being unable to return to work because she was sick.

16. The continuing correspondence available to the Tribunal establishes that Ms Abiy considered that the Claimant had turned down the opportunity of returning to work and that the Respondent was under no obligation to continue making furlough payments to her or SSP because she did not intend to return to work. Ms Abiy's position appears to have been that there was no obligation to make any sick payments to the Claimant because she had turned down the opportunity of returning to work.

17. The Tribunal have concluded that that the Claimant was unfairly and wrongfully dismissed by the Respondent on **17 May 2021**. This was a summary dismissal by text. On **18 May 2021** the Claimant's GP issued a sick note which confirmed that the Claimant was not fit for work and signed her off from work for the period from **17 May** to **16 July 2021**.

18. She was contractually entitled to two weeks' notice pay and had also accrued holiday pay for the period from **1 January** to **17 May 2021**. The Respondent made no payment of notice or accrued holiday pay to the Claimant. The Claimant subsequently made a written request to be provided with written reasons for her dismissal. The Respondent failed to provide those written reasons contrary to s.92 Employment Rights Act 1996 and the Claimant is entitled to compensation for its failure to do so.

19. The Claimant told the Tribunal that she gave no indication to those she worked with that she was encountering difficulties in undertaking her job because she undertook all the work satisfactorily and had no issues to raise. Furthermore, she had never considered that she was disabled during the course of her employment.
20. She informed Ms Abiy that she was suffering from depression on **1 December 2020**. She had not previously discussed her health with Ms Abiy or any of her work colleagues. Her medication for her depression was increased during the period from **January to May 2021** but during that period she had no contact with either Ms Abiy or any of her work colleagues because the restaurant was closed. She and the other employees were all on furlough. She did not discuss her medical position with anyone during that period. Ms Abiy decided to dismiss the Claimant after receipt of her text on **10 May 2021**. She informed her of that in her text in reply on the same day.
21. The Claimant is a single mother supporting her son, Jimmy, who is disabled by a number of mental health difficulties the challenges of which are very clear from the documentation which the Claimant has included in the Bundle of Documents which she prepared for this hearing. The Tribunal accept that Ms Abiy and her colleagues would have been well aware of the challenges which the Appellant faced in looking after Jimmy but the Tribunal are satisfied that his disability was not the effective cause of her dismissal. The exchange of texts referred to above provides the reason for her dismissal and the context of it.
22. A person has a disability if he or she has a physical or mental impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. The burden of proof is on a claimant to show that he or she satisfies this definition.
23. The Equality Act 2010 states that, for the purpose of deciding whether a person is disabled a long-term effect of an impairment is one which has lasted at least 12 months; or where the total period for which it lasts, from the time of the first onset, is likely to be 12 months; or which is likely to last for the rest of the life of the person affected. The issue of how long an impairment is likely to last has to be determined by the Tribunal from the information that was available at the date of the discriminatory act, which in this case was **17 May 2021**.
24. The Tribunal has to take account of circumstances at the time the alleged discrimination took place in assessing the likelihood of an effect lasting 12 months or more. This means that anything that occurs after that time will not be relevant to the Tribunal's assessment of the likelihood of an effect lasting 12 months or more. "Likely" is interpreted as meaning that it "could well happen". It may also be necessary for a Tribunal to determine whether or not a respondent knew that a claimant was suffering from a disability at the relevant time, or whether it ought, or could reasonably have been expected to know that a claimant had a disability at the relevant time.

## Conclusions

25. The Tribunal explained to the Claimant that although the Respondent had been debarred from defending her claims of disability discrimination it was still necessary for the Tribunal to determine whether or not on the information available to the parties on the date of her dismissal it was likely that her depression and anxiety would have a long-term effect on her ability to carry out day-to-day activities without continuing medication, that is whether her depression and anxiety and the impairments caused by it was likely to last at least 12 months.
26. The Claimant provided detailed and comprehensive documentation as to what had been an unforeseen and unfortunate substantial deterioration in her mental health in the months after her dismissal. Unfortunately, she was diagnosed with Attention-Deficit Hyperactivity Disorder (ADHD) on **27 January 2022** and then Autism Spectrum Disorder (ADS) on **4 May 2022**. These are lifelong adverse conditions which will present substantial challenges to the Claimant and, to date, have prevented the Claimant making any applications for employment. Her difficulties are accepted by the DWP and she continues to receive Universal Credit to support her and her son for that reason. She also continues to receive support, therapy and counselling. She hopes that this will lead to a sufficient improvement in her position to allow her to seek employment in the near future.
27. The Claimant's position is that she has been advised that although many disorders can arise as a result of ADHD the most common are depression and anxiety. It was on this basis that the Claimant submitted to the Tribunal that the diagnosis she received in **January 2022** establishes that because she was suffering from depression and anxiety at the point at which she was dismissed it establishes that she was disabled at that time, that is, suffering from ADHD.
28. The Claimant understandably relies on the deterioration in her mental health since her dismissal and the eventual unfortunate diagnosis of lifelong mental health disorders. Such developments have to be disregarded by the Tribunal for the reasons it has explained in Paragraph 25 above.
29. The Claimant anticipated a return to work when she replied to Ms Abiy. **Her previous anxiety issues** had been resolved by her GP. She did not herself foresee the developments that would lead to the further diagnosis made in **January** and **May 2022**. The opening of the restaurant occurred after a long period of furlough in which the Respondent had continued to make payments to the Claimant under the furlough scheme. The Claimant had given no indication of further difficulties to the Respondent and accepted that it had not been necessary for either her to contact Ms Abiy or for Ms Abiy to contact her during the second lockdown. The sick note from her GP providing for an extended period of sick leave was received by the Respondent after the dismissal.
30. It is after taking into account these matters that the Tribunal has after anxious scrutiny concluded that the Claimant was not disabled at the date of her

dismissal because it was then not likely that the depression and anxiety with which she was suffering would have a long-term effect on her ability to carry out day-to-day activities. Therefore, the Tribunal must dismiss the Claimant's claims of disability discrimination.

31. The Tribunal established that the Claimant was entitled to be paid the National Living Wage during the course of her employment. It ascertained that this was £8.91 per hour at the relevant time. This enabled the Tribunal to calculate the awards which it made to her which are set out in its Judgment.
32. The Claimant was also awarded a basic award for her unfair dismissal by the Respondent.
33. The Claimant has been unable to work since **17 May 2021** and has made no applications for employment since then. Her extremely difficult circumstances are recognized by the DWP and she is reliant on benefits to support herself and Jimmy and has been placed under no pressure to seek further employment by the DWP. The Tribunal concluded that it could make no compensatory award for loss of earnings in these circumstances except for the loss of the Claimant's statutory rights. This is because the Claimant would not have been able to return to work for the Respondent which is about to enter a liquidation.

Employment Judge Craft  
Date: 6 October 2023

Reasons sent to the Parties: 26 October 2023

FOR THE TRIBUNAL OFFICE