



EMPLOYMENT TRIBUNALS

Claimant: Mr J Galloway

Respondent: Rentokil Initial UK Limited

HELD AT: Hull **ON:**29 January 2024

BEFORE:
Employment Judge JM Wade
Mr D Wilks
Mr M Taj

APPEARANCES:
Claimant: in person,
Respondent: Mr J Monroe, counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

The claimant's Section 15 disability discrimination complaint is dismissed.

REASONS

Introduction and issues

1. The claimant worked for the respondent as a technician in its pest control business. He has type 1 diabetes. He was dismissed following an incident on 3 April 2023 at a customer's premises when he took and ate a chocolate bar which did not belong to him. At a case management hearing on 4 August 2023 his complaint was confirmed as a Section 15 allegation that he was dismissed because of something arising in connection with his disability, and this amounted to disability discrimination. Directions were given for case preparation but not for an amended defence.

2. Following those directions, the respondent accepted that the claimant was a disabled person and that it had knowledge of his disability. The case management orders included the respondent's defences, and set out the issues for this Tribunal. They were as follows: Issue 1 – the respondent did not accept the behaviour arose from diabetes; Issue 2 - if the behaviour did arise as a consequence of disability, dismissal was in pursuit of a legitimate aim – to ensure the respondent could have

confidence in its employees, including them not bringing the respondent into disrepute – and was a proportionate means of achieving that legitimate aim. This would include consideration of whether something less discriminatory could have been done instead, and how the needs of the respondent and claimant should be balanced.

3. By this hearing, issue 1 had fallen away. The two respondent witnesses were clear. Ms Maxwell, who dismissed the claimant said this: *I understood the implications of this very serious condition and that Mr Galloway did require immediate sugar in that incident*; Mr Hall, who maintained the dismissal on appeal: *I listened to Jason's reasoning regarding why he took the bar of chocolate and accepted he had a medical emergency which would have been a mitigating factor.*

The evidence and hearing

4. The Tribunal had a short hearing file and short statements. We heard oral evidence from the claimant and from the respondent witnesses. The claimant's case was discussed with the respondent witnesses by questions from the Tribunal, because the claimant had not prepared questions and did not wish to ask any. Our assessment of the respondent witnesses were that they were witnesses of truth. The claimant's evidence was clearly affected by his anger and upset about his dismissal and this required direction at times during the hearing; his broad case had been consistent throughout however, and there were no material conflicts of fact to resolve.

5. Given the respondent's concessions above, there was no need for the Tribunal to watch CCTV of the incident (although both parties wished us to), nor did we permit the respondent's representative to put to the claimant a case which was at odds with the respondent's evidence.

Findings of fact

6. The claimant started working for the respondent on or around 19 April 2022 as a trainee pest controller. He undertook a good deal of training including in marksmanship. He passed exams to progress to a level 2 Technician on or around March 2023 and as a result he was due to receive a pay rise.

7. By April 2022 the claimant had been managing his type 1 diabetes for around thirty years. He had an implant which connected to his mobile phone by which he could measure blood glucose levels. He was required to inject insulin. Levels could be affected by food, heat, stress, and exercise. A "hypo" event could occur when glucose levels dropped to low. The required treatment was 15 to 20 grams of a quick acting carbohydrate every 10 to 15 minutes until levels rise above 4 mmols, and then a snack. During a hypo event, the brain cannot function normally and people can appear aggressive or drunk and try to eat anything sweet near them; if untreated they can lose consciousness and require hospital admission.

8. The respondent's pest control business involves technicians working alone and unsupervised in business premises, homes and other sites. Each technician has a geographical "patch". As such, the respondent and its customers need to have trust in technicians.

9. The claimant's diabetes had not presented any need for adjustments in his early months with the respondent, but his start date had been delayed because he had reported a heart attack to the DVLA and his driving licence had been delayed.

10. In February 2023 he had started work an hour or so late and was asked to make sure he telephoned to let line management know. He had said he had experienced a bad night diabetically. The reason for line management requesting contact was "to discuss your illness, make sure you are okay and what we may be able to do to help". Line management had then offered a reduced workload but the claimant did not wish that; he had received a verbal warning in connection with absence from work meeting a "trigger point, and a written warning for not following quality assurance procedures.

11. On 3 April 2023 at around 5pm the claimant had been at a customer premises and had taken and eaten a chocolate bar from a fridge in a store room. The bar belonged to a member of staff – the outlet did not sell chocolate bars. The claimant had then bought a meal of noodles from the outlet. He had called line management to say he would not finish his calls that day, but he did not mention the chocolate bar. However he did realise he had done something that needed to be put right, that night.

12. The outlet management had reviewed CCTV and concluded the claimant had stolen the bar and reported it to the respondent as such.

13. On 6 April 2023 a manager called the claimant to suspend him on full pay, following an allegation of theft by a customer which was said to amount to gross misconduct, including bringing the company into disrepute. The claimant was told not to contact customers or employees. The CCTV was sent to the respondent for review.

14. After the suspension call the claimant visited the customer premises, taking with him two chocolate bars to replace that which he had taken, telling the customer's manager of his diabetes. The customer then notified the respondent and offered apologies, effectively withdrawing the complaint.

15. A meeting to investigate took place with the claimant and line management on 11 April. The claimant had been told the incident was recorded on CCTV and that was watched during the meeting and the claimant's diabetes was discussed, as well as the claimant's return to the premises to make amends.

16. The manager told the claimant the investigation was concluded and the claimant was then invited to a disciplinary hearing with Ms Maxwell, a local operations manager. This took place on 18 April, conducted by video call. Ms Maxwell has a close family member with Type 1 Diabetes and understands well the challenges of managing the condition. She had also worked both for the respondent and a competitor in previous years.

17. During the course of that meeting the claimant shouted and swore on occasions, when asked to explain various matters, and suggested he was being persecuted. Ms Maxwell said to him that the respondent was investigating why he took the bar, and that "theft is theft". She said that on two occasions, but also that the respondent could not justify theft. The claimant's response to that was, "yes but it has a valid reason, I did not chose to have a hypo, it was ok because it was justified".

18. Ms Maxwell also asked about why the claimant did not have something with him, and why he returned the chocolate after being suspended – rather than in the two or three days before suspension.

19. After an adjournment Ms Maxwell dismissed the claimant, saying: "you have had a verbal warning for absence, a written warning regarding QAs, whilst these are not directly related, they relate to company policies and procedures. One of our policies is that we do not tolerate theft. It is a gross misconduct offence, irrespective of previous warnings, this is serious enough to lead to dismissal. You had the opportunity but did not rectify this immediately after the incident occurring and you did not prepare correctly to avoid it occurring. You have admitted to theft and your actions have brought the company into disrepute. Throughout this hearing you have shown no remorse for your actions."

20. The claimant then reacted to that decision, saying the company wanted him out because of his diabetes and that there had been a witch hunt. Ms Maxwell confirmed her decision in a letter, which recited her findings, including the claimant's health challenges at the time of the incident, but concluding that there was sufficient evidence to support the allegation and that the claimant's explanation was not satisfactory. The allegations recited in the letter were theft or unauthorised possession of property, and bringing the company into disrepute.

21. The claimant appealed that decision and a meeting took place on 3 May 2023 with Mr Hall, Operations Manager. Mr Hall read the claimant's appeal letter, and repeated its contents in his decision. The letter included that the claimant was to receive an insulin pump, that he resented being labelled a thief for suffering a Hypoglycemic Medical Episode, that he had not (implicitly) conducted the disciplinary hearing well, but that the loss of his job was unfair, unnecessarily harsh and that he was devastated. He said, "I will sincerely apologise ...for this entire incident, but I must insist, as conclusions go, this was the wrong decision and unfairly adjudicated".

22. Mr Hall adjourned the hearing and investigated some points made by the claimant with the investigating manager and Ms Maxwell and the respondent's records. He wrote to the claimant on 19 May 2023 maintaining the dismissal decision because, in short: the claimant had not informed managers on the day of the incident, had not replaced the chocolate the next day, or the day after, notwithstanding he was in the vicinity of the customer, and had not followed the suspension instructions. Mr Hall considered that if the claimant had done these things, there would have been no complaint from the customer, and no reputational damage.

23. The claimant considered this decision uneducated (about Type 1 diabetes) and unprofessional.

The Law

24. Section 39 (2)(c) of the Equality Act 2010 prohibits discrimination by dismissal. Section 15 relevantly 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....

25. "Because of" means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about. It does not matter whether the putative employer has knowledge that the something arose in consequence of disability, provided there is knowledge of the disability itself - City of York v Grosset [2016] ICR 1492 CA. See also the full guidance in Pnaiser v NHS England [2016] IRLR 710 EAT at 31. A Tribunal may ask why A treated the claimant in the unfavourable way alleged....alternatively it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment".

26. The "justification" defence in section 15(2) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence, including an assessment of the discriminatory effect on the claimant and the reasonable needs of the respondent.

Discussion and conclusion

27. Applying the law to the facts in this case, it is clear that the claimant's conduct in taking the chocolate operated on the mind of Ms Maxwell in dismissing him - it was an operative cause. It is also clear from her evidence that she accepted that this was something arising from his diabetes "in that moment". (To the extent that the claimant's appeal letter suggested he believed the reason for his dismissal was his diabetes and the need to manage it, or, which was the tone of some of his evidence, that his pay progression was a reason for dismissal, we reject those suggestions.)

28. There were a number of facts and beliefs known to Ms Maxwell which caused the claimant's dismissal: the taking of the chocolate (about which she accepted his explanation and his need to do so in the moment as mitigation); his failure to have any snack with him to avoid the need to take something belonging to someone else; his failure to make amends immediately and only after he was suspended; in doing so his failure to comply with the instruction given not to contact customers.

29. The discriminatory effect of being dismissed, including for something arising in connection with disability, was considerable and the claimant's mental health suffered as a result. Stability in income and work was terribly important to him. Equally, given

the nature of the respondent's business, having confidence that its staff would do the right things and act appropriately when lone working, was critical, as was protecting its reputation in a competitive market. It has established its legitimate aims - to ensure the respondent could have confidence in its employees, including in them not bringing the respondent into disrepute.

30. The impact on reputation from the 3 April incident was limited – the customer had accepted the claimant's explanation. There may have been unknown residual impact - the customer's staff member may not have been so satisfied, but that too was likely to be limited.

31. The far more significant concern of the respondent, and in this we accept the evidence of both Ms Maxwell and Mr Hall, was the future: would the claimant act appropriately as a lone worker in the future, should a similar situation arise. In this he gave no assurances at all, save to suggest that the new insulin pump would address matters. He certainly did not accept that he ought to have done anything differently, nor did he give any reassurance that he would do so if the situation arose again. In short he could not see why the respondent considered the matter serious at all and he considered his diabetes a complete exoneration from criticism.

32. The Tribunal's assessment is of whether the dismissal of the claimant was appropriate and necessary, as a means of achieving the respondent's aims, bearing in mind the very substantial impact upon him. The Tribunal took into account, in its assessment of whether dismissal was appropriate, the whole disciplinary process, including the appeal, which was reasonable and fair. We were satisfied that the claimant had two opportunities to reassure the respondent about the future, and he did not do so. We also took into account that less discriminatory means, namely securing a commitment from the claimant to do the right things in the future, perhaps with a warning, was ruled out by Ms Maxwell because of the way the claimant conducted the disciplinary hearing.

33. We also accepted Mr Hall's evidence, which was also the claimant's impression, that he would have considered alternatives. Ultimately though, he did not consider less discriminatory measures appropriate because the claimant did not give him confidence that he would behave differently should a matter arise in the future, even if other measures were in place, and the risk to reputation in the future was too great. The claimant had not observed the direction not to visit customers post suspension, and the impression he gave was that he would likely behave as he felt best, regardless of direction.

34. This is not a case where the only reason for dismissal is the "something arising from disability", but that is often the case and the Tribunal has to consider all the relevant circumstances in order to reach its own conclusion.

35. Having done so, our unanimous assessment is that dismissal of the claimant was appropriate and necessary - a proportionate means of achieving the respondent's legitimate aims and was justified. The consequence of that conclusion is that the claimant's claim is dismissed.

36. If we are wrong in our conclusion that the claimant's dismissal was because of something arising in consequence of disability, and we confuse context and causation, it will be apparent from the facts above that in the alternative we would conclude that it was not the taking of the chocolate bar - the something arising from disability - which was an operative cause of dismissal. Rather it was the claimant's failure to report it to management, failure to return the bar promptly, and failure to comply with a suspension direction, which caused dismissal, none of which were matters arising from disability. On that conclusion, the claimant's complaint would also fail.

Employment Judge JM Wade
30 January 2024

RESERVED JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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The Tribunal's practice direction concerning recording can be found here:
<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>