



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000361/2023

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Held in Glasgow on 27, 28 and 29 November 2023

Employment Judge L Wiseman

Members D McAllister and D McFarlane

10 **Mr Dale Higgins**

**Claimant
In Person**

The Scottish Ministers

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**Respondent
Represented by:
Mr C McCracken -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous decision of the tribunal was to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 19 July 2023 alleging he had been discriminated against because of disability and that he had been dismissed/subjected to detriment for having made a protected disclosure.
2. The respondent entered a response in which it accepted the claimant had been dismissed for reasons of capability. The respondent denied all other allegations.
3. The claimant, following a case management hearing, withdrew the complaint regarding the making of a protected disclosure. Accordingly the issues for this tribunal to determine were:

a. Direct discrimination (section 13 Equality Act)

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- i. was the claimant treated less favourably when he was asked by the respondent to change the day he attended the office, rather than the person about whom the claimant had complained being asked to change the day she attended the office and
 - ii. if so, was the reason for the less favourable treatment because of disability.

b. Discrimination arising from disability (section 15 Equality Act)

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- i. was the claimant treated unfavourably when he was dismissed;
 - ii. was the dismissal for something arising in consequence of his disability and
 - iii. if so, was the dismissal a proportionate means of achieving a legitimate aim of the respondent.

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4. The respondent, following provision of information by the claimant, conceded the claimant was a disabled person in terms of section 6 of the Equality Act. The claimant is HIV+ and also has anxiety and depression.

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5. The tribunal heard evidence from Ms Kirsteen Main, Team Manager, who had been the claimant's line manager; Ms Claire McArthur, People, Advice and Support Advisor, who had taken the decision to dismiss the claimant; Ms Deborah Smith, (former) Deputy Director in the People Directorate, who heard the claimant's appeal against dismissal; Mr James Gracie, Manager in the People Advice team who line managed Ms Lorn Pearson who heard the claimant's grievance, and the claimant.

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6. Ms Pearson was unfit to attend the hearing to give her evidence. Mr Gracie attended to give evidence regarding his discussions with Ms Pearson at the time she was dealing with the grievance. A document (page 489) was also presented which reflected the questions Mr Gracie had asked Ms Pearson and her responses.

7. The tribunal was referred to a jointly produced folder of documents for the hearing.
8. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

5 **Findings of fact**

9. The claimant worked for Social Security Scotland which is an executive agency of the Scottish Government, responsible for administering the Scottish social security system.
10. The claimant commenced employment with Social Security Scotland on the 6 July 2022. The conditional offer of permanent employment was produced at page 136 and made clear the claimant would be on probation for 9 months and that his appointment would be confirmed at the end of this period if he had shown he could meet the normal requirements of the job to an effective standard, and that his attendance and conduct had been satisfactory.
- 15 11. The claimant was employed as a Client Advisor and he was part of the Local Delivery Bookings team. The claimant was line managed by Ms Kirsteen Main, Team Manager, when his line manager was on a period of sickness absence. The claimant subsequently transferred to Ms Main's team in early 2023.
- 20 12. The claimant is HIV+ and has anxiety and depression. He is a disabled person in terms of section 6 of the Equality Act because of those conditions.
13. The claimant commenced a period of sickness absence on the 10 October 2022. The Fit Note confirmed the claimant was not fit for work, and noted the reason for absence was anxiety.
- 25 14. Ms Main contacted People, Advice and Support for advice on the 31 October, after the claimant had been off work for approximately 3 weeks. Ms Claire McArthur, People, Advice and Support Advisor, advised the claimant should be given details of the sources of support available (Employee Assistance

Programme, Wellbeing Partners, the Thrive app and an Employee Passport) and also referred to Occupational Health.

15. Ms Main made weekly wellbeing telephone calls to the claimant to see how he was, whether there was anything the respondent could do to assist in a return to work and whether there was any prospect of a return to work.
16. The first report from Occupational Health was provided on the 14 November 2022 (page 157). The report noted the claimant advised he had initially been off with food poisoning but then began to experience symptoms of anxiety, stress and depression although he had been unable to identify a trigger for the symptoms. The clinical opinion was that the claimant was not fit for work and there were no adjustments which could facilitate a return to work.
17. The second report from Occupational Health was provided on the 5 December 2022 (page 161). The report confirmed the claimant was experiencing symptoms of moderate anxiety and depression. He had been prescribed medication but it was yet to become effective. The report recommended a re-referral in 6 weeks or when a return to work was being considered by the claimant's GP. The report noted the claimant's preference for home working.
18. The claimant informed the respondent on the 12 January that he wanted to return to work. Ms Main confirmed a further referral would be made to Occupational Health, and she also asked the claimant to confirm what adjustments he wished to be in place for his return to work. The claimant responded (page 465) to confirm he wished to work 8am to 4pm because of fatigue; he wished to work from home and to only focus on referrals on his system.
19. A phased return to work was put in place for the claimant (page 467) which involved him returning to work on the 24 January and working half days for the first week and working from home.
20. The claimant, at the return to work meeting with Ms Main, made her aware he wished to pursue a grievance. The claimant submitted a grievance (page 165) on the 26 January. The grievance concerned a Whatsapp message where a

5 colleague had noted that someone who was HIV+ had made an application for benefits, but when completing the form which asked questions about the impact the condition had on their life, the person had responded it had “no impact” to each question. The colleague commented that the application was going to get rejected and that it felt like a waste of time phoning for identification and vetting.

21. The claimant noted in his grievance that he had been “deeply offended” by the comments made which he considered were “ignorant [and] uneducated”. The claimant was also aggrieved that appointment bookers had access to all of the information on the application form and he raised an issue regarding data access.

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22. The claimant commenced a further period of sickness absence on the 31 January 2023. He submitted Fit Notes from then until the end of his employment with the reason for his unfitness for work being depression.

15 23. The claimant attended the third meeting with Occupational Health on the 6 February 2023 and the report was produced at page 192. The report confirmed the claimant was not fit for work and that it could take 4 – 6 weeks for the medications to have a therapeutic effect. The completion of a stress risk assessment when the claimant returned to work was recommended.

20 24. The claimant was, by letter of the 20 March 2023 (page 297) invited to attend a Probation Review Meeting. The letter advised the claimant that the issue of concern to be discussed at the meeting was his absence in circumstances where he had had 125 days of absence. The trigger for absence management when on probation is 7 days.

25 25. The meeting had to be re-arranged and ultimately took place on the 30 March. The invite to this meeting (page 306) made clear that one of the outcomes to the meeting could be termination of employment. The claimant did not attend the meeting but submitted a written statement (page 308) to be considered. The claimant argued that he should not be dismissed, but instead his period of probation should be extended because the reason for his absence was due to the comments made by the work colleague.

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26. Ms McArthur advised the claimant by letter of the 12 April (page 332) of her decision to terminate his employment with effect from the 12 April 2023, with 5 weeks' pay in lieu of notice. Ms McArthur, in reaching the decision, had regard to the respondent's absence policy, the probation policy, the three occupational health reports, the fit notes and the claimant's statement. Ms McArthur noted the claimant had had 148 days absence and had not met the standards of attendance expected of a probationer. The Fit Notes indicated the claimant was unfit for work and there was no indication of any return to work. The claimant had not, in his statement, referred to any likely return to work or any adjustments that may assist with that.
27. Ms McArthur did not consider an extension to the probationary period to be appropriate in circumstances where there was not going to be a return to work within a reasonable timeframe.
28. The Attendance Management policy was produced at page 85. The purpose of the policy is to maximise the well-being and performance of every employee. The absence of an employee creates an additional burden on the other members of the team who are required to cover the work of the absent employee. The organisation is not permitted to "back-fill" the roles of employees off on sickness absence. The team of which the claimant was a member deals with vulnerable people and delays in dealing with their applications or enquiries can cause great stress.
29. The claimant appealed against the decision to dismiss him (page 339). The appeal was heard by Ms Deborah Smith who, at that time, was Deputy Director in the People Directorate. Ms Smith considered all of the documents before meeting with the claimant, and understood that the main points of appeal were that he considered the dismissal unfair because his absence had been caused by another employee; he complained about the way in which his grievance had been handled and that he felt the organisation wanted to silence him because he had raised an issue regarding data access.
30. The dismissal appeal hearing took place on the 17 May and notes of that meeting were produced at page 400. Ms Smith decided not to uphold the

5 appeal. She reached that decision because the claimant had had 148 days
absence; she found no breaches of policy or procedure; there was no
evidence of the organisation trying to silence him; he had been supported
throughout his period of absence and there was no evidence the claimant
would return to work. Ms Smith acknowledged the claimant stated he had
wanted to return to work in May (at the end of the last Fit Note) but he had
been dismissed. Ms Smith noted there was no evidence to support the
claimant's statement regarding a return to work and she considered a return
unlikely given the complexity of the claimant's conditions and there being no
10 indication anything had changed.

31. Ms Smith confirmed her decision in a letter dated 30 May (page 414).

32. The claimant's grievance was dealt with by Ms Lorn Pearson from the People
Advice team. The claimant's complaint regarding the comments made by his
colleague were accepted and the colleague was dealt with under the
15 Disciplinary Procedure and given a written warning. Ms Pearson had a
discussion with the claimant regarding any anxiety he may feel regarding
returning to the office and seeing his colleague. Ms Pearson discussed with
the claimant techniques for raising issues with the manager and there was
also the possibility of a facilitated discussion to try to find a resolution.

20 33. The claimant accepted his issues regarding data access which had been
raised in the grievance had been addressed.

34. The claimant accepted he had not been asked to change the day he attended
the office. The claimant assumed that he would have to do this in
circumstances where Ms Main was not the team manager of his colleague
25 and therefore could not ask her to change the day. The claimant further
accepted that he was not required to attend the office at the time because he
was either working at home or unfit to work.

35. The claimant has not been fit for work since dismissal. He is in receipt of Adult
Disability Payment and Universal Credit.

30 **Claimant's submissions**

36. The claimant referred to Ms Main's evidence that she would not have been comfortable asking the colleague (who was not in the team she managed) to change the day she attended the office. This meant the claimant would have had to change the day he attended the office.
- 5 37. The claimant described HIV as being like a "hidden" disability. The respondent had accepted this was a disability in terms of the Act, but had not initially accepted anxiety and depression were also a disability. The claimant considered that if anxiety and depression had been considered a disability then adjustments would have been made for a return to work and probation would have been extended.
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38. The claimant submitted that the quality of his work had been very good and this should have been taken into account.
39. The claimant challenged the legitimate aim of the respondent because the evidence had been general rather than specific.
- 15 40. The claimant spoke of the impact this had had on him which had been significant and was ongoing.

Respondent's submissions

41. Mr McCracken provided a written submission to the tribunal. The arguments presented in that submission are dealt with below. In summary Mr McCracken invited the tribunal to dismiss the complaint of direct discrimination because the claimant accepted he had not been asked to change the day he attended the office. Further, and in any event, the situation had never arisen where he was required to attend the office on the same day as his colleague and he had never been required to change his office day. The respondent accepted, with regards to the complaint of discrimination arising from disability, that dismissal was unfavourable treatment because it arose as a consequence of the disability. However, it was submitted that dismissal was a proportionate means of achieving a legitimate aim.
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Discussion and Decision

Direct Discrimination

42. The tribunal firstly had regard to the terms of section 13 of the Equality Act which sets out the definition of direct discrimination, which occurs where a person is treated less favourably than others were or would be, and the reason for the less favourable treatment is disability.
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43. The claimant argued that he had been treated less favourably when he was asked to change the day he attended the office. The claimant compared his treatment to that of the colleague about whom he had complained, because she attended the office on the same day as the claimant's team but had not been asked to change the day she attended.
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44. The first point to be determined by the tribunal is whether the treatment alleged by the claimant occurred: was he asked to change the day he attended the office? This question was directly put to the claimant, and he accepted that he had not in fact been asked to change the day he attended the office: this was an assumption he had made.
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45. The tribunal noted that the members of Ms Main's team (including the claimant) worked on a hybrid basis involving 4 days working at home and 1 day in the office. Ms Main and the members of her team attended the office on the same day. The colleague who had made the comments about which the claimant had complained, was not a member of the claimant's team. She reported to a team manager based in Dundee, but she attended the Glasgow office on the same day as the claimant's team.
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46. The claimant suggested to Ms Main in cross examination that she had told him she did not feel comfortable asking the colleague to change the day she came to the office, because she was not in Ms Main's team. Ms Main denied this. We accepted Ms Main's evidence that she could not simply change the day the colleague attended the office, because she was not in Ms Main's team. The claimant took from this that he would have to change the day he attended the office, notwithstanding the fact this had not been discussed with Ms Main (or indeed anyone) and notwithstanding the fact Ms Main attached importance to her team attending the office on the same day.
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47. The tribunal concluded from the above, and the acceptance by the claimant that he was not asked to change the day he attended the office, that the less favourable treatment alleged by the claimant did not occur. The claimant was not asked to change the day he attended the office and in fact, the issue of going into the office never arose because the claimant had not returned to work. There was a brief period of a week in January 2023 when the claimant did return to work, but his request to work from home during that period was granted and accordingly he did not have to attend at the office at any time.
48. The claimant made an assumption about what would happen when he did return to work and that was the basis of the claim. The assumption was no more than speculation in circumstances where there was no indication when the claimant would be fit to return to work and no indication what adjustments may be required to facilitate that return.
49. The claimant has not been able to show the alleged less favourable treatment did occur and for this reason his complaint of direct discrimination must fail. We decided to dismiss the complaint of direct discrimination.

Discrimination arising from disability

50. The tribunal had regard to the terms of section 15 of the Equality Act which provides that discrimination arising from disability occurs where an individual is treated unfavourably because of something arising in consequence of disability, and the employer cannot show that the treatment is a proportionate means of achieving a legitimate aim.
51. The tribunal noted that to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so. The tribunal must balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee. Further, when determining whether or not a measure was proportionate it is relevant for the tribunal to consider whether or not a lesser measure could have achieved the employer's legitimate aim.

52. The complaint brought by the claimant was that his dismissal was unfavourable treatment and that the dismissal arose because of something (absence) which arose in consequence of his disability. The respondent accepted the claimant's dismissal arose because of his inability to achieve effective attendance levels and that this arose in consequence of his disability. The issue for the tribunal, therefore, was to determine whether the respondent's action of dismissal was a proportionate means of achieving a legitimate aim.

53. The respondent argued that dismissal was a proportionate means of achieving a legitimate aim and those aims were:

- incentivising all employees to maintain regular and effective service;
- ensuring staff achieve required levels of attendance in order to meet the needs of its customers;
- ensuring operational efficiency in the service it provides to customers;
- ensuring that the respondent is able to meet targets for service delivery set by the Scottish Government;
- ensuring the respondent is able to effectively manage employee absence;
- ensuring consistent and continued delivery of vital services to customers and
- ensuring the management of workload and wellbeing of the respondent's other employees.

54. The tribunal had regard to the Attendance Management policy (page 85) which sets out that the purpose of the policy is to maximise the well-being and performance of every employee. The main aim of the policy is to provide support to staff and to make clear the level of attendance expected and what may happen if this cannot be achieved.

55. Ms Main and Ms McArthur spoke of the impact an employee's absence may have on the service. Ms Main noted the job of those in her team was to assist customers with their applications, and the absence of an employee may slow this down and impact on other team members. There is a high volume of work which has to be processed as quickly as possible because many of those making an application for benefit will be vulnerable. The claimant's absence led to a higher workload for the other members of staff in his team, which in turn led to a slow-down in the processing of work and an increase in stress for customers. The organisation is not permitted to "back-fill" the post of an absent employee: the team has to absorb the work.
56. Ms McArthur spoke to the importance of employees providing "regular and effective" service. She referred to customers being vulnerable and the fact waiting times on the phone were already considerable, without being further impacted. Ms McArthur also spoke of the impact absence can have on other team members because of the increased workload.
57. The claimant did not seek to challenge the legitimate aims of the organisation. The tribunal accepted the aim of incentivising and supporting employees to maintain regular and effective service was a legitimate aim, as was ensuring operational efficiency in terms of the service provided and delivering that for customers.
58. The claimant did challenge the evidence of Ms Main and Ms McArthur because it was general in nature and no specific evidence had been brought regarding the impact of his absence on the team. The tribunal acknowledged no specific evidence had been produced but we did not consider this necessary in circumstances where the evidence of Ms Main and Ms McArthur was credible and reliable and reflected business norms. By this we mean that it is self-evident that a team of 12 members will be put under pressure if one of those members is absent and the other team members require to cover the additional work. The reality is that the team manager must support the team to deal with that pressure, but that is not a situation which can be sustained long term.

59. The claimant also challenged that the legitimate aims of the organisation could have been met by extending his probationary period. The extension of the probationary period was something considered by Ms McArthur when she carried out her review. Ms McArthur decided it was not appropriate to extend the claimant's probationary period because he was not fit to return to work and would not be so within a reasonable timeframe.
60. The tribunal acknowledged the claimant argued at appeal that he had wanted to return to work upon the expiry of the Fit Note in May. Ms Smith could not accept this was likely to happen in circumstances where the claimant's desire was not supported by medical evidence from the claimant's GP or from occupational health. All of the evidence pointed to the fact the claimant was not fit for work, there were no adjustments which could be made to facilitate a return to work and there was nothing to suggest when he may be fit to return to work. We considered that in those circumstances the decision of Ms Smith was reasonable.
61. The tribunal could not accept the claimant's argument that extending the probationary period was a lesser measure which would have achieved the respondent's legitimate aims. We say that because the claimant was not fit to return to work and therefore any extension of the probationary period would simply have continued the situation for the respondent and not addressed their concerns or aims.
62. The claimant argued that it had not been fair to dismiss him in circumstances where his absence had been caused by the actions of a fellow employee. The fairness or otherwise of the claimant's dismissal is not an issue for this tribunal to determine because the claimant does not have the necessary period of service to complain of unfair dismissal. Furthermore, even if the claimant had been able to pursue a claim of unfair dismissal the key issue bearing on fairness would have been the fact the claimant was not fit for work and there was nothing to suggest he would be fit to return to work within a reasonable timeframe. (The tribunal noted it was not accepted by the respondent that the comments had caused the claimant's absence in circumstances where the

claimant's disabilities are complex and where the diagnosis of HIV had had a significant impact on him and the way he perceived the comments).

5 63. The tribunal must balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee. The tribunal, in carrying out this exercise, noted the claimant had been supported throughout his period of absence. He had weekly contact with Ms Main, he had been referred to various resources, he had been referred to occupational health and a phased return to work had been put in place for the claimant's return to work in January 2023. The claimant had requested a number of adjustments be put in place for his return to work and this was done. Ms Main emphasised to the claimant that the return to work would be very gentle and was all about easing him back in.

15 64. The tribunal noted that the Fit Notes from the claimant's GP confirmed he was unfit for work and made no reference to any adjustments which could be made to facilitate a return to work. The occupational health reports were the same. The fundamental issue in this case was that there was no evidence to suggest the claimant was likely to return to work in the foreseeable future.

20 65. The tribunal reminded itself the claimant was on a probationary period, the purpose of which was to allow the respondent to assess the claimant's suitability for the role. The trigger for attendance management when on a probationary period is 7 days: the claimant had had 148 days absence. There were no adjustments which could be made which would have allowed the claimant to return to work, and extending the probationary period (by between 1 – 3 months) would have made no difference to the situation.

25 66. The tribunal concluded, having had regard to the above points and having balanced the reasonable needs of the business against the effect of the employer's actions on the employee, that dismissal in the circumstances of this case was a proportionate means of achieving the legitimate aims of the organisation. We decided to dismiss this complaint.

30 *The claimant's grievance*

67. The claimant complained that the respondent had failed to properly deal with his grievance. The tribunal acknowledged this was an issue for the claimant, but no legal claim was made regarding this matter and accordingly there is no issue for the tribunal to determine regarding this matter.

5 **Conclusion**

68. The tribunal decided to dismiss the claim.

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LWiseman

Employment Judge

08/01/2024

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Date

12/01/2024

Date sent to parties

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