



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Hassan

v

Tesco Stores Limited

Heard at:

Reading

On: 15 and 16 January 2024

Before:

Employment Judge Hawksworth

Members:

Mrs AE Brown

Ms HT Edwards

Appearances

the claimant:

represented himself

for the respondent:

Mr A Bryant (counsel)

RESERVED JUDGMENT

The unanimous decision of the tribunal is that:

1. The claimant's complaint of failure to make reasonable adjustments is struck out because of non-compliance with tribunal orders;
2. The claimant's complaint of discrimination arising from disability fails and is dismissed.

REASONS

Claim, hearings and evidence

1. Mr Hassan was employed by the respondent for over 29 years. His last role was as a team leader. He was dismissed on 21 February 2021.
2. Mr Hassan started his tribunal claim on 6 September 2021 after Acas early conciliation from 30 June 2021 to 9 August 2021. He brought claims for unfair dismissal, age discrimination and disability discrimination.
3. The respondent presented its response on 28 October 2022. The respondent defends the claim.
4. Employment Judge Anstis made an order on 9 December 2022 about the unfair dismissal and age discrimination complaints. Judge Anstis said that

the unfair dismissal complaint had been started after the time limit for bringing those claims, and there was nothing in the claim form from which the tribunal could conclude that more time should be allowed. He said there was nothing in the claim form from which a complaint of age discrimination could be understood. Mr Hassan did not reply to this order and these complaints were 'struck out' (that means not allowed to proceed).

5. On 21 June 2023 there was a preliminary hearing with Employment Judge Bartlett at which there was a discussion to clarify the complaints. Complaints of discrimination arising from disability and failure to make reasonable adjustments were identified and recorded in a list of issues. Judge Bartlett also reminded the parties of the orders explaining the steps the parties had to take to prepare the case for the final hearing, including disclosing documents and preparing witness statements.
6. The final hearing took place on 15 and 16 January 2024 in person at Reading Tribunals. There was a bundle with 346 pages. Mr Hassan had not brought a copy of the bundle (or witness statements) so the tribunal gave him one of their copies (the judge used electronic versions).
7. At the start of the hearing, Mr Byrant said Mr Hassan's claim should not be allowed to go ahead and should be 'struck out'. This was because Mr Hassan had not complied with any of the tribunal's orders to prepare the case for this final hearing. He had not provided any disclosure or witness statement.
8. For reasons we explained at the hearing, we decided that the complaint of failure to make reasonable adjustments should not be allowed to go ahead. We decided that Mr Hassan's failure to comply with the tribunal's orders meant that the basis of this complaint was not clear to the respondent. There was not enough information from Mr Hassan for the respondent to understand this complaint and it was not fair to expect the respondent to defend the claim without understanding what it was about.
9. In contrast, we felt that there was enough information for the respondent to understand the complaint of discrimination arising from disability, and therefore that complaint could go ahead. We decided that Mr Hassan's ET1 claim form, his disability impact statement and his email of 8 January 2024 should be treated as his witness statement.
10. While in the waiting room, Mr Hassan said to the tribunal clerk that he might ask for an interpreter. He did not raise this with us but we asked him about it. He said he had trouble reading and understanding things sometimes because he felt his brain was freezing and this was part of his illness. He said it was not about the English language and not a problem with reading in general. We said in that case we would not postpone the hearing to arrange for an interpreter but we told Mr Hassan that if he was struggling to read or understand he could ask for a break whenever he wanted, and he could ask the judge to explain anything he did not understand. Mr Hassan said that he would do that.

11. After we had dealt with these matters, it was 3.30pm. We asked Mr Hassan whether he would like to get started on his evidence or whether he would prefer to wait until the next morning. He said he would prefer to wait so we did that.
12. Before the hearing ended on the first day, we explained to Mr Hassan what would happen the next day. We told him that after he was asked questions he would have the opportunity to ask Tesco's witnesses questions. We suggested that he could take the witness statements home and prepare a list of questions for them based on the points in the statements he did not agree with. Mr Hassan said he would not be able to do that as it was too difficult and stressful. The judge said it was up to Mr Hassan, but he might also find it difficult to think of what questions to ask the next day. She suggested he have a think about it overnight if he could.
13. On the second day, we heard witness evidence from Mr Hassan. When giving evidence, Mr Hassan found it difficult to find and follow pages in the bundle, so we asked Mr Bryant to help Mr Hassan find the pages he was asking about, and then to read out those parts of the documents he was looking at, which he did. We then heard from the respondent's witnesses Miss Ford, Mr Jenkins and Mr Lingard. Mr Hassan asked Tesco's witnesses a few questions and the tribunal also asked them some questions.
14. Both parties made oral closing comments at the end of the hearing.
15. By the end of evidence and closing comments, there was not enough time for us to make our decision and explain it to the parties, so we told the parties we would send them our decision in writing.

The issues

16. As explained above, the issues for us to decide were clarified at a preliminary hearing on 21 June 2023 and recorded in a list by Judge Bartlett.
17. At the hearing in January 2024 the judge updated the list in light of the strike out of the reasonable adjustments complaint, and to clarify which of the issues the respondent was not disputing, as this was set out in a number of different communications. We gave the parties a copy of the updated list of issues at the start of the second day and they agreed it was correct. Therefore the issues for us to decide are as follows (keeping the original numbering from the list):
 1. Time limit
 - 1.1. Mr Hassan was dismissed on 21 February 2021. He notified Acas on 30 June 2021. The Acas certificate was issued on 9 August 2021. Mr Hassan started his claim on 6 September 2021.

1.2. Would it be just and equitable for the Tribunal to hear the claim when the dismissal happened more than 3 months before Mr Hassan notified Acas and started his claim?

2. Disability

2.1. Tesco agrees that Mr Hassan was disabled at the relevant times by anxiety, depression and epilepsy.

3. Discrimination arising from disability

3.1. Tesco agrees that it had knowledge of Mr Hassan's disabilities.

3.2. Tesco agrees that Mr Hassan's sickness absence from January 2020 to February 2021 arose in consequence of his disabilities (in other words, it was disability related sickness absence).

3.3. Did Tesco treat Mr Hassan unfavourably by dismissing him?

3.4. If so, did Tesco dismiss Mr Hassan because of his disability related sickness absence?

3.5. If so, was the dismissal a proportionate means of achieving a legitimate aim? Tesco says its aim was ensuring that absence was effectively managed within the respondent's business. The tribunal will decide:

3.5.1. was the treatment an appropriate and reasonably necessary way to achieve the aim?

3.5.2. could something less discriminatory have been done instead?

3.5.3. how should the needs of Mr Hassan and Tesco be balanced?

Findings of fact

18. We set out in this section a summary of what happened. Where there is a dispute between the parties about what happened, we decide what we think is most likely to have happened.

Introduction

19. Mr Hassan worked for Tesco Stores Limited, his last role was as a Team Leader. He worked for Tesco for about 29 years. Mr Hassan has a history of mental health issues. In November 2019 he raised concerns with his GP about stress at work.

20. On 24 December 2019 Mr Hassan was involved in an incident at work where he was stabbed in the left hand by a shoplifter. He had to attend hospital and received stitches. He returned to work on 26 December and

was threatened again by the same customer. He describes the incident as the main trigger for work related stress and the development of severe depression.

Mr Hassan's sickness absence

21. Mr Hassan was absent from work from 15 January 2020 and did not return to work again before being dismissed on 21 February 2021.
22. Laura Ford, a people partner, conducted a wellness meeting with Mr Hassan on 11 February 2020. After that, she conducted five formal long-term absence meetings with Mr Hassan, on 22 June 2020, 15 July 2020, 10 November 2020, 14 December 2020 and 18 January 2021. At the time of each of these meetings Mr Hassan was unfit to return to work and unable to give any indication of when that situation might be likely to change. Miss Ford referred Mr Hassan to the Employee Assistance Programme.
23. Tesco took account of the fact that an incident at work had played a part in Mr Hassan's sickness absence; Miss Ford made allowances for this in terms of time frames.
24. In the course of the long-term absence management process the respondent referred Mr Hassan to Occupational Health on three occasions. Reports were produced on 27 April 2020, 18 November 2020 and 27 January 2021. Each of the reports advised that Mr Hassan was unable to return to work, and said the advisor could not suggest any adjustments to facilitate his return to work nor could they foresee a return in the future. The report on 27 January 2021 advised that Mr Hassan was likely to be unfit for work in the longer term.

Final formal absence meetings

25. On 18 January 2021, in the fifth formal long-term absence meeting with Miss Ford, Miss Ford recorded that a mediation meeting between Mr Hassan and his manager had not improved things and he continued to be unwell with depression, low moods, and anxiety.
26. Miss Ford made some suggestions to try and get Mr Hassan back to work. She suggested he could return as shift leader in another group, or to another store to start afresh, or have a phased return to work with amended duties. Mr Hassan declined these suggestions saying his health was not stable enough to allow him to return.
27. Miss Ford decided that, as Mr Hassan did not have a foreseeable return to work date, and had been absent for over a year, the next step was to arrange a final long-term absence meeting.
28. The final formal absence meeting took place on 19 February 2021 with Paul Jenkins, an operations support partner. At the meeting, Mr Hassan told Mr Jenkins that he was unfit to return to work. Mr Jenkins asked whether there was anything he could do to help Mr Hassan get back to work. Mr Hassan

said he was too damaged to come back to work. Mr Jenkins decided that Mr Hassan should be dismissed. Dismissal took effect on 19 February 2021.

Appeal

29. Mr Hassan appealed the dismissal. James Lingard, head of communications, was the appeal manager. The appeal hearing took place on 1 June 2021 (earlier dates had to be rescheduled after a bereavement and to allow a representative to attend with Mr Hassan). At the appeal hearing on 1 June 2021 Mr Hassan was accompanied by his union representative.
30. At the appeal hearing on 1 June Mr Hassan told Mr Lingard about the incident on 24 December. Mr Lingard decided that it would be prudent for him to investigate that further, and adjourned the hearing to do so.
31. The appeal hearing reconvened on 11 June 2021. Mr Lingard had investigated the incident on 24 December. He decided that:
 - 31.1 Mr Hassan had been given plenty of support from management through the long-term sickness process during an absence of over 13 months;
 - 31.2 a range of alternatives and adjustments had been suggested to get Mr Hassan back to work;
 - 31.3 Miss Ford had considered the possibility of alternative vacancies.
32. When asked when he would be fit to return to work, Mr Hassan said he would need at least six months more to recover. That would mean an absence of almost two years in all. Mr Lingard decided that Mr Jenkins' decision to dismiss was fair when the occupational Health advice was indicating that a return to work was not foreseeable and that Mr Hassan's conditions were not improving. He decided that Mr Hassan's absence could not continue to be supported. The continued absence of a person in a leadership position put strain on the business. He decided that the decision to dismiss was correct, fair, and proportionate.

Confirmation of appeal outcome and the appeal rationale

33. Mr Lingard wrote to Mr Hassan on 11 June 2021 to confirm that the decision to dismiss him was upheld. Mr Lingard also wrote an appeal rationale explaining his decision.
34. Unfortunately, when Mr Lingard's letter was sent to Mr Hassan, the wrong rationale document was enclosed. It was a rationale document from an entirely different case involving a dismissal for misconduct. Mr Hassan understood from this that the reason for his dismissal had changed from capability to misconduct. Understandably, he was very upset by this.
35. The respondent did not become aware of the error with the paperwork until very shortly before the hearing before us. Mr Bryant and Mr Lingard both apologised to Mr Hassan for the error. They made clear that there had

never been any question of misconduct as a reason for Mr Hassan's dismissal. The only reason Tesco had ever relied on for Mr Hassan's dismissal was incapacity because of ill health. We accept that the wrong document was sent and that the reference to misconduct was a mistake. The circumstances referenced in the document were entirely different to Mr Hassan's.

The law

Discrimination arising from disability

36. Disability is a protected characteristic under sections 4 and 6 of the Equality Act 2010.
37. Section 15(1) of the Equality Act 2010 provides that 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.”*
38. Section 15(2) says that:
 - “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.”*
39. There are four elements to section 15(1), as explained by the EAT in Secretary of State for Justice and another v Dunn EAT 0234/16:
 - 39.1 there must be unfavourable treatment;
 - 39.2 there must be something that arises in consequence of the claimant's disability;
 - 39.3 the unfavourable treatment must be because of the something that arises in consequence of the disability; and
 - 39.4 the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.
40. In Pnaiser v NHS England and anor 2016 IRLR 170, the EAT summarised the approach to be taken under section 15. The tribunal must identify whether there was unfavourable treatment and by whom. It must determine the cause of or reason for the treatment, focusing on the conscious or unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the treatment and, as in a direct discrimination case, the 'something' need not be the main or sole reason for the treatment but it must have at least a significant (more than trivial) influence so as to amount to an effective reason for or cause of it. If an effective reason or cause is 'something arising in consequence of' the claimant's disability, the tribunal will consider whether the respondent can

show that the treatment is a proportionate means of achieving a legitimate aim.

41. When considering whether treatment meets that test, the tribunal must carry out a critical evaluation, weighing the needs of the employer against the discriminatory impact on the employee. The tribunal must carry out its own assessment on this matter, as opposed to asking whether the employer acted reasonably.
42. Business needs and economic efficiency may be legitimate aims, but the EHRC Employment Code says that an employer solely aiming to reduce costs cannot expect to satisfy the test (paragraph 4.29).
43. In paragraph 4.31, the Code gives guidance on the meaning of proportionality, referring to decisions of the CJEU which view treatment as proportionate if it is 'appropriate and necessary'. The Code explains that 'necessary' does not mean that the measure adopted by the employer is the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means.

Conclusions

44. We have considered issues in a different order to the list of issues, starting with the complaint of discrimination arising from disability rather than the time limit questions.

Disability

45. Tesco agreed that Mr Hassan was disabled at the relevant times by anxiety, depression and epilepsy.

Complaint of discrimination arising from disability

46. Tesco agrees that it had knowledge of Mr Hassan's disabilities at the relevant time, and that Mr Hassan's sickness absence from January 2020 to February 2021 arose in consequence of his disabilities (in other words, it was disability related sickness absence).
47. There was an issue for us as to whether dismissal was unfavourable treatment in these circumstances. Mr Bryant said that as Mr Hassan was not fit for work and plainly did not want to return to work, dismissal did not amount to unfavourable treatment. We do not accept that analysis.
48. The dismissal was unfavourable treatment because it left Mr Hassan with no possibility of returning to work in the future if his medical position changed. Mr Hassan would have preferred to have been treated differently. He would have preferred not to have been dismissed and for Tesco to have waited for six months to see if his health had improved, as he said in the appeal hearing. Dismissing him amounted to unfavourable treatment.
49. There was also an issue as to whether Tesco dismissed Mr Hassan because of his disability related sickness absence. Mr Bryant said Mr

Hassan was dismissed because of his inability to return to work, not his disability-related sickness absence. We accept that if Mr Hassan had been able to return to work at the time of his final absence meeting or appeal, he might not have been dismissed. Therefore inability to return to work was part of the reason for the dismissal.

50. However, the 'something arising' need not be the main or sole reason for the treatment (Pnaiser), and Mr Hassan's long term absence was also a reason for the dismissal. If Mr Hassan's case had been considered at a formal meeting when he had only a short period of absence, the outcome might have been different, even if he was unable to return to work at that time. It was only not the inability to return to work which caused the dismissal, it was the inability to return to work against a background of long-term sickness absence. Both the inability to return and the long-term absence were effective causes of Mr Jenkins' decision to dismiss and of Mr Lingard's decision to uphold that decision.
51. We have therefore found that Mr Hassan was subjected to unfavourable treatment by being dismissed, and that the unfavourable treatment was because of something arising from disability, namely his long-term sickness absence from January 2020 to February 2021.
52. This means that we look to the respondent to show that dismissing Mr Hassan was a proportionate means of achieving a legitimate aim.
53. Tesco says its aim was ensuring that absence was effectively managed within the respondent's business. We accept that is a legitimate reason relating to business and operational needs. Tesco needs staff to be at work to provide its services to its customers. Sickness absence has a significant impact on its ability to do that.
54. Was the dismissal an appropriate and reasonably necessary way to achieve that aim? Mr Hassan's continued absence was not allowing Tesco to meet its aim of effectively managing absence. The store where Mr Hassan worked was under strain because of the reduced staff numbers, and a leadership role was more difficult to cover on a temporary basis. Mr Hassan had been absent for about 13 months by the time of the dismissal, and about 17 months by the time of the appeal. That was a significant absence, especially for someone in a team leader role.
55. Tesco had taken account of the fact that Mr Hassan had been injured at work in terms of the time frames. Tesco had offered Mr Hassan a number of alternatives including a change of store, a change of role and a phased return. Mr Hassan did not accept any of these suggestions.
56. Therefore, the only other action Tesco could have taken would have been to allow Mr Hassan to remain on sick leave to see if he would be well enough to return in future. That would have been a less discriminatory course of action. However, in circumstances where Mr Hassan had said that he would need at least another six months absence, it was not proportionate for Tesco to take that step.

57. Tesco's need to effectively manage absence and meet its business and operational needs outweighed the need of Mr Hassan to remain employed on sickness absence with the prospect of being able to return to work after six months.
58. We understand that it was very upsetting for Mr Hassan to be sent the wrong appeal rationale and that he thought Tesco was saying that he had been dismissed for misconduct. Tesco has confirmed that was not the case at all, and we have accepted that the reference to misconduct was a mistake. That mistake, while regrettable, did not make the dismissal unlawful or discriminatory.
59. We conclude that Tesco's dismissal of Mr Hassan was a proportionate means of meeting a legitimate aim. This means that the complaint of discrimination arising from disability fails.

Time limit

60. As we have found that the complaint of discrimination arising from disability does not succeed, we do not need to consider whether we should extend the normal three month time limit. Even if we decided that Mr Hassan should be allowed more time to bring his claim, the claim would not succeed.
61. For these reasons, Mr Hassan's claim fails and is dismissed.

Employment Judge Hawksworth

Date: 13 February 2024

Sent to the parties on: 16 February 2024

For the Tribunal Office