Neutral Citation Number: [2024] EAT 65

Case No: EA-2022-000042-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 1 May 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

MS N. BODIS	**Appellant**
- and -	
LINDFIELD CHRISTIAN CARE HOME LTD	**Respondent**

- -
- -

Rad Kohanzad (instructed by Harding Mitchell Solicitors) for the **Appellant**
Petar Starcevic (instructed by Irwin Mitchell LLP) for the **Respondent**

Hearing date: 4 April 2024

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JUDGMENT

SUMMARY

Disability Discrimination

The Employment Tribunal erred in law in concluding that treatment was not because of something arising in consequence of disability. However, because the Employment Tribunal also found that the treatment was a proportionate means of achieving a legitimate aim, and that determination was not appealed, the rejection of the section 15 claim was upheld. There was no error of law in the rejection of the claim of unfair dismissal.

HIS HONOUR JUDGE JAMES TAYLER

Introduction

1. This is an appeal against a Judgment of the Employment Tribunal sitting at London South, Employment Judge T R Smith, sitting with members, in December 2021. The Judgment is dated 8 December 2021.

2. The respondent operates Compton House care home. The claimant started working for the respondent as a domestic assistant on 1 July 2008. She was appointed as an activities coordinator on 1 December 2009. Compton house employs approximately 60 to 70 members of staff, the majority of whom are part-time. Mrs P. Craen, was the registered manager; Mrs S. Jones, deputy manager; Mr J. Nurse, trustee and investigating officer; Mr I Johnson, trustee and one of the two determining officers at the disciplinary hearing; Mrs K Taylor chair of trustees.

3. From October 2018, a number of unusual incidents started to occur at Compton House such as paper towels being stuck down the staff lavatories, displays being damaged or information removed. The incidents were so unusual and frequent that from 27 November 2018 the respondent started a log to record them.

4. On 3 December 2018, CQC reports kept in the quiet room were soaked in water. They were reprinted and twice the same thing happened.

5. On Christmas Day, Mrs Craen went into her office and noticed a pungent smell. Oil from a reed diffuser had been spilt on her desk, keyboard, laptop and radiator. The registered nurse in charge of the shift the previous day said that the claimant had entered the office saying that she needed to do some photocopying. The tablecloth for the Christmas lunch for the residents, name cards and the seating plan had been disturbed or removed.

6. On 31 December 2018, a poster for staff was found to have been vandalised. It originally read "Happy Christmas to all staff. Please make sure you collect your Christmas gift bags…" The poster had been altered to read "Happy Christmas to all staff from Aldi before from M&S now change Aldi". An arrow had been added pointing to Mrs Craen's name. The Employment Tribunal held that the

respondent was entitled to conclude that there was an implied criticism of Mrs Craen about the quality of Christmas bags.

7. In late December/early January a reed diffuser was found placed on a windowsill behind the staff folder cupboard.

8. On 19 January 2019, photographs of Mrs Craen and Mrs Jones were defaced by the addition of facial hair. Both Mrs Craen and Mrs Jones were upset. The photographs were replaced but on 22 January 2019 were found to have been defaced again.

9. On 23 January 2019, the maintenance technician discovered that the boiler had been turned off. The Employment Tribunal held that this could not have been done accidentally. There was a large staff notice next to the switch which said "Please do not touch or adjust the settings on this panel thank you". Staff were aware that they should not touch the heating controls. The best estimate of the maintenance technician was that the boiler had been switched off for between 30 to 45 minutes.

10. On 1 February 2019, a note was written on a paper towel "you can use this luxuries (sic) in your own home". The paper towel and a reed diffuser were found outside Mrs Craen's office in a plastic carrier bag.

11. Given the number of incidents and possibility that they were connected, Mrs Craen raised the matter with Mrs Taylor, the chair of trustees on 7 February 2019. Mrs Craen was upset by these incidents which were targeted against her. The Employment Tribunal held that Mrs Craen considered resigning.

12. After an investigation had been commenced there was a meeting with staff to discuss the incidents on 12 February 2019.

13. On 18 February 2019, the claimant's photograph was found to have been defaced. It was defaced in a different manner to those of Mrs Craen or Mrs Jones. A cat was drawn on the photograph. Ms Thomas thought it possible that the claimant had scribbled on it because she had been seen acting suspiciously around the table where the pictures were displayed. The lights were turned off, which was unusual given it was winter and dark. Ms Thomas said that the only person she had seen near the

photograph was the claimant.

14. Mr Nurse conducted a careful and detailed investigation. Mr Nurse considered documentation including the management log and the daily staff sign-in and sign-out sheets. Mr Nurse noted that there was no direct eyewitness evidence and concluded that he would have to make an initial assessment based on the circumstantial evidence. The Employment Tribunal held that Mr Nurse concluded, on reasonable grounds, that it was likely that a staff member or members were involved because of restricted access to some of the locations (e.g. Mrs Craen's office), the defacing of staff photographs and the apparent criticism of management. The claimant conceded during the hearing that it was not unreasonable for Mr Nurse to confine his enquiries to staff.

15. Mr Nurse compared the dates of the incidents and the staff log to identify which members of staff were present. The claimant was the only person on duty when all of the incidents occurred.

16. Mr Nurse looked at samples of handwriting of members of staff who had been identified from the sign-in and sign-out sheets. Although Mr Nurse is not a handwriting expert he concluded that the samples of the claimant's handwriting was similar to the handwriting on the Christmas gift poster and paper towel.

17. Mr Nurse considered the possibility that there was more than one perpetrator but concluded that was unlikely.

18. Mr Nurse decided that there was a case for the claimant to answer. His "working hypothesis" was that the claimant was the perpetrator, although he could not identify any motive.

19. Mr Nurse invited a number of staff members to investigation meetings.

20. The claimant was disabled with anxiety and depression at the material times. Mr Nurse did not know this.

21. Under the respondent's disciplinary procedure an employee attending an investigative meeting did not have the right to be accompanied. Staff were not offered the option of being represented or given advance notice of the topic to be discussed.

22. The claimant did not ask for details of what was to be discussed or to be accompanied before,

or at, the interview. The claimant did not say during the interview that she was not able to give a full account of herself because of her medical condition. The Employment Tribunal recorded that:

> "Mr Nurse accepted that had he been told that the claimant was suffering from a mental health challenge he would not have taken the fact that her answers were sometimes brief and not to the point, as part of his reasoning as to why it was appropriate to proceed to a disciplinary proceedings".

23. On 27 February 2019, Mr Nurse, following a discussion with Ms Taylor, concluded that the claimant was the likely perpetrator of several, if not all, of the incidents. When looking at the handwriting they particularly noted the way the claimant wrote the letters A and F, the use of black Biro, and constant use of exclamation marks, which was consistent with both the claimant's application form and the documents that had been defaced. On 4 March 2019, Mr Nurse and Ms Taylor suspended the claimant to face allegations of gross misconduct at a disciplinary hearing.

24. The disciplinary hearing was held on 22 March 2019. The meeting was chaired by Mr Johnson and Mrs Cowdy. The claimant did not ask for the hearing to be adjourned. She was asked at the start of the hearing if she was fit to continue and said that she was. The claimant had twice been advised in writing that the respondent would consider an adjournment if she provided a letter from a medical practitioner stating that she was unfit to attend and indicating when she would be fit.

25. The claimant did not offer any alternative explanation for the strange events, other than denying that she was the culprit.

26. Having analysed the evidence and considered all of the incidents in detail the panel found on the balance of probabilities that the claimant was guilty of disrupting the running of Compton House and harassing Mrs Craen and Mrs Jones. When considering the appropriate penalty the panel noted the claimant's clean disciplinary record and length of service. However, the panel considered that the claimant's behaviour was inappropriate, the manager and deputy manager were very upset by the incidents and the employment relationship had totally broken down.

27. The claimant was summarily dismissed on 30 March 2019.

28. The claimant was advised of her right of appeal in the letter of dismissal. She chose not to appeal.

29. The Employment Tribunal noted that no further similar incidents occurred following the claimant's dismissal.

30. The Employment Tribunal rejected the majority of the complaints brought by the claimant. So far as is relevant to this appeal, the Employment Tribunal rejected a claim of unfair dismissal, holding that the respondent had reasonably concluded after a reasonable investigation that the claimant was guilty of the misconduct alleged against her and that dismissal fell within the band of reasonable responses. The Employment Tribunal rejected a complaint of wrongful dismissal, holding that the respondent had demonstrated, on the balance of probabilities, that the claimant had committed gross misconduct.

31. The Employment Tribunal upheld two allegations of failure to make reasonable adjustments, concluding that the claimant should have been given advance notice of what was to be discussed at the investigation meeting conducted by Mr Nurse and should have been given the opportunity to be represented.

32. The Employment Tribunal dismissed complaints that the decision to refer the claimant to a disciplinary hearing and the decision to dismiss the claimant were unfavourable treatment because of something arising in consequence of disability ("s15 discrimination"). The unfavourable treatment was specifically identified in the issues at the beginning of the judgment as "Subjecting the claimant to a disciplinary process in 2019" and "Dismissing the claimant on 29 March 2019".

33. The grounds of appeal that were permitted to proceed challenge the dismissal of the complaints of s15 discrimination and unfair dismissal.

34. In respect of the S15 claim it is asserted that the Employment Tribunal erred in law in its approach to "causative triviality", the burden of proof and failed to take account of evidence that demonstrated the considerable extent to which the respondent took account of the manner in which the claimant answered questions in the investigatory hearing in deciding to refer her to a disciplinary hearing and when making the decision to dismiss and/or reached a perverse decision.

35. In respect of the unfair dismissal claim it is asserted that the Employment Tribunal erred in

law in failing to consider whether the failure to make the reasonable adjustments of informing the claimant of the purpose of the investigatory meeting and allowing her to be accompanied and taking account of the manner in which the claimant answered questions in the investigatory interview rendered the dismissal unfair.

S15 Discrimination

36. The Employment Tribunal accepted that the manner in which the claimant answered questions in the investigation meeting was something that arose in consequence of disability. The Employment Tribunal held that Mr Nurse had taken some account of the manner in which the claimant answered questions in the investigatory interview in deciding to refer her to a disciplinary hearing. The Employment Tribunal held it was only to a trivial extent and had not infected the decision of the disciplinary panel to dismiss the claimant. In the alternative, the Employment Tribunal held that the referral to a disciplinary hearing and dismissal were proportionate means of achieving the legitimate aim of upholding disciplinary standards in circumstances in which there had been a break down in relations.

37. The Employment Tribunal explained the extent to which the manner in which the claimant answered questions in the investigatory meeting was taken into account in a number of different ways. In the findings of fact at paragraph 123 the Employment Tribunal held that:

> Mr Nurse accepted that had he been told that the claimant was suffering from a mental health challenge he would not have taken the fact that her answers were sometimes brief and not to the point, as part of his reasoning as to why it was appropriate to proceed to a disciplinary proceedings.

38. When considering the unfair dismissal complaint the Employment Tribunal held:

> 276. The tribunal did not accept that Mr Nurse could reasonably rely on the claimant's demeanour at her investigative interview to support, in part, his recommendation for disciplinary proceedings. However that error did not infect the disciplinary hearing because Mr Nurse's report was not simply rubberstamped. The panel applied its own judgement and rejected some of the matters pursued by Mr Nurse. The contemporaneous documents setting out what was in the panel's mind, the dismissal letter, make no reference to the claimant's demeanour having any bearing whatsoever on the panel's determination. Nor did the claimant's demeanour at the disciplinary hearing have any influence on the disciplinary panel.

39. The Employment Tribunal dealt with the issue differently when considering the complaint of disability because of something arising in consequence of disability, holding;

> 348. The something relied upon is the manner in which the claimant answered questions at the investigative meeting. The tribunal is satisfied that, that something arose in consequence of the claimant's disability. Mr Nurse was on notice that the claimant might have a health problem given the inappropriate laughing and smiling when answering questions.
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> 349. In the conclusion section to Mr Nurse's report he concentrated upon handwriting and opportunity coupled also with the fact the claimant was seen acting suspiciously in the vicinity where her photo was vandalised. He also however, in his observation section, recorded the claimant answered questions very briefly was somewhat evasively.
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> 350. The tribunal considered therefore the claimant's demeanour was a factor that he took into account in determining to refer the matter to a disciplinary hearing but it was not a substantial matter. It was trivial. It was not the effective cause. The other factors were the most important. 351.The tribunal then turned to the disciplinary hearing itself.
>
> 352. The tribunal is satisfied that the manner in which the claimant answered questions at the investigative meeting did not play any significant part in the decision to dismiss, or put differently, its influence was less than trivial on the decision makers.

40. The Employment Tribunal went on to hold in the alternative that the treatment was "justified":

> 366. The tribunal considered that having regard to the nature of the allegations, which cumulatively were serious, it was proportionate to utilise a disciplinary process and refer those allegations to a disciplinary panel given Mrs Craen, the registered manager who obtained an outstanding grade from CQC was so affected that she was considering resigning and the fact that other staff were affected by the atmosphere caused by the allegations such that it was said they were walking "on egg shells". It was reasonably necessary to determine those serious allegations by means of a disciplinary hearing to test the truth or falsity of the allegations. It was not in the interests of the smooth running of Compton House and the continued staff unease to postpone the resolution of the disciplinary proceedings for indefinite period.
>
> 367. Given the total breakdown of trust and confidence no lesser measure would have achieved the respondent's legitimate aim.

41. Section 15 of the Equality Act 2010 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.

42. In **Pnasier v NHS England** [2016] IRLR170 Simler J, as she then was, set out the approach to be adopted to a S15 **EQA** claim:

> (a) A Tribunal must first identify whether there was unfavourable treatment and by whom: in other words it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
>
> (b) The Tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so to, there may be more than one reason in a section 15 case. The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial influence on the unfavourable treatment), and so amount to an effective reason for or cause of it.
>
> (c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant.
>
> (d) The Tribunal must determine whether the reason/cause or, if more than one, a reason or cause is "something arising in consequence of B's disability". That expression "arising in consequence of" could describe a range of causal links. Having regards to the legislative history of section 15 of the act…,the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it may be a question of fact arising robustly in each case where something can properly be said to arise in consequence of disability.
>
> (e)…the more links in the chain there are between disability and the reason for the impugned treatment, the harder it is likely to establish the requisite connection as matter of fact.
>
> (f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator. [emphasis added]

43. The causation required to establish discrimination was considered by the House of Lords in **Nagarajan v London Regional Transport** [2000] 1 A.C. 501 in which Lord Nicholls famously said:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the

> decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. Read in context, that was the industrial tribunal's finding in the present case. The tribunal found that the interviewers were "consciously or subconsciously influenced by the fact that the applicant had previously brought tribunal proceedings against L.R.T.

44. The statutory test is that of whether the unfavourable treatment was **because** of something arising in consequence of disability; there is no statutory concept of "causal triviality"; nor do I consider it assists in analysing the statutory provisions. To introduce a concept of causal triviality ignores the injunction of Lord Nicholls that "subtle distinctions, are better avoided so far as possible". The last thing that is needed is another statutory paraphrase. The key question is whether the unfavourable treatment is because of the something arising in consequence of disability, which the authorities clearly establish does not require that the treatment be solely or principally because of the something, but only that the something is of sufficient causal significance that the unfavourable treatment can be said to be because of it. I do not consider that much of assistance can be added to the analysis of Lord Nicholls.

45. It was this analysis that Simler J relied on in **Pnasier** when she held "The "something" that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it". In this passage Simler J was restating the long established principle that causation requires a significant influence so as to amount to an effective cause. The term in parenthesis "more than trivial" was used to ensure that too high a standard is not applied to the word "significant" because all that is required is that it is "more than trivial".

46. I consider that great care should be taken before concluding that something that was consciously taken into account by a decision maker was only taken into account to a trivial extent so that liability is not established, nor do I consider that **Pnasier** suggests a concept of trivial causation

is helpful.

47. The authorities make it clear that to establish liability the something can be a minor component of the reason for the treatment provided it is "significant" so as to be an "effective cause".

48. The unattractive nature of finding that something was consciously taken into account but only to a trivial extent is emphasise by taking an example of a decision maker who accepts that he took some account of a protected characteristic such as race or disability in deciding to dismiss, but only to a trivial extent.

49. I consider that it is clear that the Employment Tribunal treated the word trivial as meaning minor. The Employment Tribunal found as a fact that Mr Nurse took account of "the fact that her answers were sometimes brief and not to the point" as part of his reason for proceeding to a disciplinary hearing. In analysing the unfair dismissal claim the Employment Tribunal held that it "did not accept that Mr Nurse could reasonably rely on the claimant's demeanour at her investigative interview to support, in part, his recommendation for disciplinary proceedings" but held "that error did not infect the disciplinary hearing". The term "error" must refer to Mr Nurse relying on the claimant's demeanour "in part": i.e. it was part of his reason for referring her to a disciplinary hearing, albeit a subsidiary part. When dismissing the S15 claim the Employment Tribunal held "the claimant's demeanour was a factor that he took into account in determining to refer the matter to a disciplinary hearing but it was not a substantial matter. It was trivial. It was not the effective cause. The other factors were the most important". The Employment Tribunal referred to the claimant's demeanour not being "the" effective cause, whereas it need only have been "an" effective cause and contrasted this with the other factors that were "the most important". The Employment Tribunal used the word trivial to connotate a reason that was not the primary reason but one that was of minor significance. To the limited extent, if any, to which the word trivial assists, it is because it refers to something that is causally irrelevant.

50. I consider that the Employment Tribunal erred in holding that the decision to refer the claimant to a disciplinary hearing was not because of her demeanour in the investigatory interview because on

its own findings of fact it was a contributing factor in the decision, albeit a minor one.

51. The claimant's argument is less compelling in relation to the decision to dismiss because the challenge to the conclusion that the disciplinary panel took no account of the claimant's demeanour at the investigatory meeting is a perversity challenge, although I can see that the evidence before the Employment Tribunal strongly supported a conclusion that the claimant's demeanour was taken into account to a minor extent by the disciplinary panel, and the conclusion that it was not taken into account may have been founded on a misconception of the word trivial as used in **Pnasier**.

52. However, there is a fundamental problem for the appeal against the S15 complaint because the Employment Tribunal reasoned in the alternative that the treatment was a proportionate means of achieving a legitimate aim. This finding of "justification" was fatal to the complaint. There is no appeal against the justification finding. Although this point was not raised in the response to the appeal it is not possible to overlook that the appeal does not amount to an effective challenge to the S15 determination.

53. I raised this point at the outset of the hearing. Mr Starcevic, for the respondent, stated that he had appreciated the point when preparing for the appeal and had raised it with Mr Kohanzad, who represented the claimant. I also offered Mr Kohanzad some extra time to consider the point which he declined.

54. Mr Kohanzad argued that the treatment should be analysed as being Mr Nurse taking some account of the claimant's manner of answering questions in the investigatory meeting in deciding to refer her to a disciplinary hearing. I do not accept his argument because the unfavourable treatment was clearly identified in the issues section at the start of the judgment as being the referral to a disciplinary hearing and dismissal. Mr Kohanzad asserted that both parties addressed the Employment Tribunal about the fact that Mr Nurse took account of the claimant's demeanour. However, I consider that was because it was part of the chain of causation between the something arising in consequence of disability and the asserted unfavourable treatment, the referral to a disciplinary hearing,

55. Mr Kohanzad also asserted that the decision on justification was undermined by the fact that

the Employment Tribunal found there was no discriminatory conduct so could not have weighed the discriminatory impact of the treatment against the legitimate requirements of the respondent. That does not alter the fact that the justification decision has not been appealed, which is fatal. Furthermore, the justification argument was made on the basis that Mr Nurse had taken the claimant's demeanour into account to a minor extent (which it characterised as trivial) and it clearly concluded that the treatment was a legitimate means of achieving the legitimate aim of maintaining disciplinary standards. Accordingly, the S15 appeal fails.

Unfair Dismissal

56. The claimant asserts that the Employment Tribunal erred in law in rejecting the complaint of unfair dismissal because it did not expressly take account of the failure to inform the claimant of the matters to be discussed at the investigatory meeting, did not allow the claimant to be accompanied and had some regard to the claimant's demeanour in the investigatory meeting.

57. At the outset of the hearing, in identifying the issues, the Employment Tribunal asked the claimant's Counsel to identify the grounds upon which it was asserted that the dismissal was unfair. The grounds relied on were that:

> In particular the claimant alleged the dismissal was unfair because: –
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> - The respondent concluded that the claimant was guilty at the outset of the investigation which influenced the manner in which the investigation was conducted.
>
> - The methodology adopted during the investigation in determining that the claimant was guilty rendered the investigation outside the range of reasonable investigations, in particular in respect of identifying the handwriting, identifying who was present and drawing inferences from the manner of the claimant's investigative interview.
>
> - The conclusion that the claimant was guilty of the events alleged was a conclusion outside the range of reasonable conclusions. In part because it was based on an assumption that should have been a conclusion rather than a premise and a faulty investigation.
>
> - The respondent failed to properly take into account the claimant's long service.

58. The failure to inform the claimant of the matters to be discussed at the investigatory meeting

and the failure to offer the opportunity for representation were not asserted to be reasons why the dismissal was unfair. I do not consider that the Employment Tribunal can properly be criticised for not referring to them specifically. In any event, the test for unfair dismissal is different to that for failure to make reasonable adjustments. The Employment Tribunal clearly has some regard to these factors as it noted they were not provided for in the respondent's policies or requested by the claimant. The Employment Tribunal was not required to refer specifically to every factor that it considered in reaching its conclusion. I consider that it is clear that the Employment Tribunal considered the action of the respondent in great detail and did not hold back from finding fault. The Employment Tribunal had regard to the minor extent to which the claimant's demeanour in the investigatory interview was taken into account and it can only be inferred that it did not consider that it rendered the dismissal unfair. I do not consider there is any proper basis to conclude that the Employment Tribunal did not take account of all the relevant factors in concluding that the dismissal was fair.