



EMPLOYMENT TRIBUNALS

Claimant: Mrs Dawn Bodimeade

Respondent: British Airways Plc

Heard at: Reading

On: 3, 4, and 5 April 2024

Before: Employment Judge Gumbiti-Zimuto
Members: Mr N Boustred and Mr F Wright

Representation

Claimant: In person

Respondent: Mr Oliver Lawrence, counsel

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim form presented on the 14 September 2020 the claimant made complaints of unfair dismissal and discrimination on the grounds of disability. The respondent defends the claim. The claimant was an employee of the respondent from the 1 June 2007 initially as “Skyflyers Ground Escort” and at the time of her dismissal on 13 April 2020 as a Customer Service Agent.
2. The claimant’s complaint of unfair dismissal was dismissed by the Tribunal on the 27 January 2020 because the claim was presented outside the time for the presentation of claims. The time limit for the presentation of the claimant’s claim expired on the 12 July 2020.
3. The claimant met with Mr Russell Ball of the Unite Union on Friday 1 May 2020 when the claimant discussed the option of commencing proceedings in the Employment Tribunal. In a text message to Mr Ball on Monday 4 May 2020 it appears that the claimant had in her possession a copy of a form that she was trying to complete but it is not clear whether that was a claim form ET1 or the Trade Union application for support form. There is a gap until 11 May 2020 when the claimant explains to Mr Ball that she had difficulties

relating to the care of her aged father and “printing difficulties”. There is then a further delay until 2 July when the claimant completes the Trade Union form again explaining that she had difficulties relating to the care of her father. There is a further delay until 28 July when the claimant contacts Mr Ball by text: regrettably at this point Mr Ball is unwell and despite the claimant trying to contact him on several occasions the claimant and Mr Ball are not in contact until 10 August 2020. By this time the claimant is out of time. Mr Ball informs the claimant that she is out of time and states that he does not think that she has a case. There is then a further delay until 14 September 2020 when the claim is presented.

4. The position appears to be that in the period from the date of the claimant’s dismissal until the proceedings are commenced that the claimant wanted to bring proceedings against the respondent, this was clear from an early stage and is emphasised emphatically in an email dated 2 July 2020 in which the claimant speaks of wanting to “get an outcome for what BA have done to me”. The claimant did not present her claim because she had difficulties with the care of her father, she suffered due to her own mental health issues, she had limited technical facilities for printing documents and suchlike, and there was some disruption in her communication with the union.
5. We take into account that the extension of time is the exception and not the rule in claims under the Equality Act 2010. We recognise that it is necessary to have regard to all the circumstances of the case. We note the claimant has limited legal knowledge but also note that she did take some advice and made some personal research about time limits. We also take into account that at the time these events were taking place it was during the first lock down due to COVID epidemic. We also take note that other than having to defend the claim and all that entails, there is no significant prejudice to the respondent. Taking all matters into account as set out in the Judgment and reasons of Employment Judge Eeley promulgated following a hearing on 27 January 2022 we consider that it is just and equitable to extend time for the presentation of the claimant’s complaints to the 14 September 2020.
6. The claimant gave evidence in support of her own case, the respondent relied on the evidence of Mrs Nicola Harrington-Grey, Performance Development Manager who was also the claimant’s Absence Manager and responsible for dismissing the claimant. Both the witnesses gave evidence in chief by producing written witness statements. The Tribunal was also provided with a trial bundle containing 553 pages of documents. Much of the evidence we have heard was not contested.
7. The claimant had a consistently high level of sickness absence during most of her employment with the respondent and throughout that time was actively managed under the respondent’s absence management policy.

8. The claimant was managed under EG300 Absence Management Policy which is a contractual policy. Section 3 is used to manage intermittent/persistent absence and Section 4 operates for longer term absences or where the absence is caused by an underlying health condition.
9. The claimant was referred to British Airways Health Services (BAHS - it's internal OH department) on a high number of occasions. The respondent states that this was because the respondent was keen to support her as much as it could to enable her to return to work when absent and / or continue to stay in work when not absent.
10. On occasions during her periods of absence, her manager and/or BAHS were unable to make contact with the claimant when she did not answer calls.
11. The claimant was absent in April 2018 during which time her absence was managed under Section 4 EG300.
12. There were difficulties in the respondent and BAHS contacting the claimant and the claimant did not attend meetings which had been scheduled (see for example p291 referral made on 20 September 2018). Eventually an absence meeting was arranged for 25 October 2018. However, on 23 October 2018 the claimant said she could not attend because there was no union representative available. This meeting was rescheduled for 31 October 2018.
13. The claimant attended this meeting and the final outcome was that as the respondent was unable to sustain the claimant's current level of absence, and as the claimant was currently unable to return to her contractual role for the foreseeable future, that her employment would be terminated on 23 January 2019 unless the claimant's health improved during that time. The meeting and discussions were summarised in a letter sent to the claimant on 12 November 2018 (p314).
14. The claimant did not appeal this decision.
15. In the meeting on 31 October 2018, it was agreed that another BAHS referral was to be made closer to the claimant's termination date to assess her medical capability to return to work. This referral was made on 9 January 2019. The report was returned the same day and stated that the claimant was fit for a phased return to work with suggested adjustments.
16. An absence review meeting was held on 10 January 2019 to review the claimant's health and whether it was appropriate to confirm or revoke the notice of dismissal or to extend the termination date. At this meeting the Mrs Harrington-Gray explained what reasonable adjustments were to be put in place to support the claimant's return to work: additional training was also arranged. It was agreed that the claimant's termination date would be

extended to 13 February 2019 to allow her the best possible opportunity to return to her full contractual duties.

17. The claimant began her phased returned to work rehabilitation plan with reasonable adjustments on 12 January 2019. The reasonable adjustments in place (as recommended by BAHS) were specific 6 hour shifts, additional shadowing and training, sitting duties and then alternative sitting and walking duties. About a month later a further review meeting took place on 8 February 2019. During this meeting the claimant said she was making progress and “*every week gets better*”. It was agreed to extend her termination of employment date to 12 June 2019 and that the respondent would continue to support, monitor and review her progress as necessary.
18. A review meeting took place on 2 May 2019, it appeared the claimant was doing well she had been completing her full contractual duties since 3 April 2019 with minimal health concerns. The extended notice of termination was rescinded and a further review meeting was arranged for 6 June 2019.
19. The claimant had a further period of absence due to a virus, this resulted in the claimant being managed under Section 3 of EG300. The claimant was placed on an improvement plan which was to last for a total of 12 months and is split between a six month improvement plan followed by a further six month maintenance period.
20. A review meeting took place on 31 July 2019 and taking in to account the claimant’s positive return to work albeit with one sickness absence during May it was decided that a three month review would take place on 18 October 2019 with a view to exiting EG300 – Section 4.
21. However, on 30 September 2019 the claimant reported sick due to depression caused by a number of issues arising in her private life. She was to remain absent from work from this date until her employment terminated in April 2020.
22. The claimant did not attend a meeting scheduled for 18 October 2019 because she was unwell. The meeting was rearranged to 2 December 2019 and again the claimant did not attend. The meeting was rearranged for a third time to 11 December 2019. The claimant said she was unable to attend this meeting as she was in ‘*a terrible way*’ and her home was being repossessed.
23. The respondent referred the claimant to BAHS and despite numerous attempts BAHS was unable to make contact with the claimant (p385).
24. An absence review meeting took place on 20 January 2020 conducted by Mrs Harrington-Grey at which the claimant said she was still struggling due to her ongoing personal issues. A further BAHS referral was made the same day to

see how best the respondent could support the claimant's return to work. (p390) The BAHS report that was produced stated that the claimant was not fit to return to work in any capacity and no definitive timescale for a return could be provided. Due to the claimant's medical incapacity, she was unable to return to work in the foreseeable future so Mrs Harrington-Grey issued a termination of employment date for 13 April 2020. The dismissal date in April was to allow the claimant the time and opportunity to return to work should her health condition improve. This decision was confirmed in a letter dated 29 January 2020 from Mrs Harrington-Grey the letter also explained the claimant's right to appeal against the decision to set a termination date. The claimant did not appeal. (p393)

25. The claimant and respondent were now to follow the same process they had been through in 2018/2019 when a termination date had been set. An absence review meeting was scheduled for 24 February 2020 and the claimant was to have face to face consultation with BAHS.
26. The claimant sent a text message to Mrs Harrington-Grey on the day of 24 February 2020 to say she could not attend either her review meeting or consultation with BAHS because she had *'just had panic attack'* and *'can't get in the car'*. (p397/398) Both meetings were rearranged for 16 March 2020.
27. Mrs Harrington-Grey did not respond to the claimant's text of the 24 February 2020 or a further text sent by the claimant on 25 February 2020. In her evidence Mrs Harrington-Grey stated that she could not remember whether she did respond to the text messages or if she did not, she stated that her usual practice would have been to respond possibly by telephoning the claimant.
28. On the morning of 16 March 2020, the claimant sent a text to Mrs Harrington-Grey stating she could not attend the meeting because she had to care for her aged father who had an infected leg.
29. Mrs Harrington-Grey again did not respond to the claimant's message sent on the 16 March and in her evidence was unable to say whether she did or did not and if not did not know why that was. Mrs Harrington-Grey was then shortly after this, on 23 March, away from work on a period of leave until 30 March 2020.
30. On the 30 March 2020 Mrs Harrington-Grey saw the claimant's fit note which stated that the claimant was unfit to work and signed off until 30 April 2020.
31. Mrs Harrington-Grey formed the view that despite implementing the reasonable adjustments, as advised by BAHS and the continued support provided to the claimant she was unable to sustain any consistent level of attendance to her contractual duties. The respondent had been proactively

supporting and managing the claimant's sickness absences for years, and now was faced with the claimant, having been absent from work due to her medical condition since September 2019 and she was unable to return to work in her contractual role as a Customer Service Agent in the foreseeable future. This was against the background of consistently high levels of sickness absence over an extended period of time. Mrs Harrington-Grey on behalf of the respondent confirmed the claimant's termination date of 13 April 2020 in a letter dated 31 March 2020. (p404)

32. The Claimant did not appeal against the decision to terminate her employment in accordance with the appeal procedure set out in EG300. The claimant did however send an email to Mel Birch and Ragbir Pattar, these people were not involved in the management of the claimant's absence or the decision to dismiss her. Mrs Harrington-Grey was unaware of this email until the preparation for these employment tribunal proceedings.
33. The issues that the tribunal has had to consider were set out in the further information provided by the claimant. The claimant lists the complaints that she makes in section 2 (p80)

Direct disability discrimination

34. In section 16 of the list of issues the claimant deals with the complaint of direct discrimination because of disability in breach of section 13 of EqA.
- (a) On or around 24 February 2020 Ms Harrington-Gray ignored/did not acknowledge nor respond to the Claimant's text message or make any enquires as to her health and wellbeing;*
- (b) On or around 25 February 2020 Ms Harrington-Gray ignored/did not acknowledge nor respond to the Claimant's text message or make any enquires as to her health and wellbeing despite being placed on notice she had suffered a personal tragedy and was under stress due to divorce court proceedings;*
- (c) On or around 16 March 2020 Ms Harrington-Gray ignored/did not acknowledge nor respond to the Claimant's text message or make any enquires as to her health wellbeing despite being placed on notice she was having to care for her vulnerable father.*
34. The Tribunal accept the evidence which was given Mrs Harrington-Grey that she did not remember whether she responded to the claimant or not and if she did not why she did not. We have not been able to conclude that there was any animus towards the claimant which arose as a result of her disability. We have also not been able to conclude, as no evidence has been produced, of any treatment of any comparator that suggests that the claimant was treated less favourably. The conclusion of the Tribunal in any event is that we accept the evidence of Mrs Harrington-Grey when she denies that the reason for failing to respond to the claimant was because of disability. We note that

the evidence showed that the claimant was the one who was likely to go silent and in respect of whom there had been problems in making contact. We have seen no evidence of any contemporaneous complaints that the claimant is being ignored or that there have been no responses to her which she would have expected.

(d) On or around 16 March – 30 March 2020 Ms Harrington-Gray took the decision not to rearrange the BAHS meeting hence removing any opportunity for the Claimant to return to work and predetermining her dismissal;

(f) On or around 16 March – 30 March 2020 Ms Harrington-Gray decided to terminate the Claimant's employment effective 13 April 2020

35. The claimant was still off work in March 2020 and there was no foreseeable date of return to work. The claimant had been off work since September 2019. On 18 March 2020 the claimant produced a fit note that signed her off work until 30 April 2020, a date beyond the dismissal date of 13 April and some 6 months or so after the claimant had been off work. The latest information from BAHS had stated that there was no foreseeable return to work. The Tribunal note that the claimant has sought to go behind the medical evidence which she provided to the respondent and Mrs Harrington-Grey. Even if the claimant is right when she says that in fact she was fit to return to work when the fit note of 18 March 2020, which said the opposite, was provided to the respondent and Mrs Harrington-Grey we cannot see how that information could possibly have been known by Mrs Harrington-Grey or the respondent. They did not seek to go behind the information that had been provided and we can conceive of no reason why on the facts as they appeared to be in this case they should have done so. The reason for dismissing the claimant in our view was clear, it related to the claimant's continuing absence and was because the respondent did not believe that the claimant was likely to be able to return to work in the foreseeable future.

(e) On or around 16 – 30 March 2020 Ms Harrington-Gray decided not to furlough the Claimant

36. The decision to furlough or not furlough was not one made by Mrs Harrington-Grey. We have had no evidence of any reason why the decision to not furlough the claimant is discriminatory. The reason was because the claimant was dismissed.

(g) On or around 5 April 2020 Ms Birch and Mr Pattar ignored/did not acknowledge nor respond to the Claimant's email in which she pleaded for her job and for the decision to dismiss to be overturned.

37. Ms Birch and Mr Pattar were not involved in the decision to dismiss the claimant at all. There is no evidence that Birch and Pattar had any role that they could play in overturning the decision made to dismiss the claimant. The claimant's course was to appeal. She did not appeal.

Harassment

38. The claimant relies on section 26 Equality Act 2020 and seeks to complain of harassment related to disability. The claimant relies on the following matters:
- (a) On or around 24 February 2020 Ms Harrington-Gray ignored/did not acknowledge nor respond to the Claimant's text message or make any enquires as to her health and wellbeing;*
 - (b) On or around 25 February 2020 Ms Harrington-Gray ignored/did not acknowledge nor respond to the Claimant's text message or make any enquires as to her health and wellbeing despite being placed on notice she had suffered a personal tragedy and was under stress due to divorce court proceedings;*
 - (c) On or around 16 March 2020 Ms Harrington-Gray ignored/did not acknowledge nor respond to the Claimant's text message or make any enquires as to her health despite being placed on notice she was having to care for her vulnerable father;*
 - (d) On or around 16 – 30 March 2020 Ms Harrington-Gray decided not to furlough the Claimant;*
 - (e) On or around 16 March – 30 March 2020 Ms Harrington-Gray decided to terminate the Claimant's employment effective 13 April 2020;*
 - (f) On or around 5 April 2020 Ms Birch and Mr Pattar ignored/did not acknowledge nor respond to the Claimant's email in which she pleaded for her job and for the decision to dismiss to be overturned;*
39. To the extent that the stated matters occurred we have no basis whatsoever for concluding that these were instances of harassment related to the claimant's disability. Indeed, it seems to us that having regard to some of the matters the claimant complains about that it is not likely that at the time that she considered that they were in any sense harassment. We refer here to the failure to respond to the claimant's text messages on 16, 24, and 25 March 2020. The decision not to furlough the claimant was not harassment and the decision to terminate the claimant was made for proper reasons. There is no evidence that the failure to respond to the email sent to Birch and Pattar was harassment, and certainly not by Mrs Harrington-Grey who was ignorant of the email until these proceedings.

Section 15 Discrimination arising from disability

40. The Tribunal is satisfied that the dismissal of the claimant was because of something arising in consequence of her disability. The Tribunal consider that the claimant's failure to attend the BAHS meeting on 24 February was because of her disability.
41. The Tribunal do not accept that the claimant's failure to attend BAHS meeting on the 16 March 2020 was something arising in consequence of disability. The claimant did not attend because she was dealing with matters relating to her father.

42. The decisions to not furlough the claimant and to dismiss the claimant were for the reasons set out above. The claimant's dismissal was a proportionate means of achieving a legitimate aim. The reasons for the claimant's dismissal were explained by Mrs Harrington-Grey and we have accepted that explanation there was not discrimination arising from disability in that respect. The decision not to furlough the claimant was in our view proportionate once the decision to dismiss the claimant was made. In any event there is no evidence that the decision to not furlough the claimant was in any sense due to her disability.
43. The Tribunal have considered section 4 of the respondent's policy EG300 and we are satisfied that the respondent has followed the policy in the way that the respondent dealt with the claimant.

Reasonable adjustments and Indirect discrimination

44. The claimant states that there was a failure to make reasonable adjustments and relies on the PCPS:
- (a) the requirement that employees attend BAHS meetings face to face;*
- (b) The practice of not furloughing employees undergoing attendance management.*
45. The Tribunal conclude that neither of these alleged PCP's existed. The evidence showed that the question of how a consultation with BAHS took place was a matter determined by the OH Consultant and that the employer from time to time made requests that the consultation take place in person or face to face. There were however instances in the claimant's case which show that there was no PCP that BAHS meetings were face to face.
46. There is no evidence that the respondent had a PCP of not furloughing employees undergoing attendance management.
47. The claimant's complaints of direct discrimination. Discrimination arising from disability, breach of the duty to make reasonable adjustment and indirect discrimination are not well founded and are dismissed.
48. The claimant's claim is dismissed.

Employment Judge Gumbiti-Zimuto

Date: 23 April 2024

Sent to the parties on: 7/5/2024

For the Tribunals Office – N Gotecha