



EMPLOYMENT TRIBUNALS

Claimant: Miss J Earle

Respondent: Wykenham-Hurford Sheppard & Son Limited

HELD AT: Croydon (remotely by video) **ON:** 29-31 January 2024

BEFORE: Judge C Cowx sitting as a panel with
Ms H Bharadia & Ms S Moores

REPRESENTATION:

Claimant: Miss J Earle represented herself

Respondent: Ms E Saunters (the respondent's practice manager)
represented the respondent

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. The claimant brought claims of direct disability discrimination contrary to Section 13 of the Equality Act 2010, discrimination arising out of disability contrary to Section 15 of the Equality Act 2010, failure by the respondent to make reasonable adjustments for disability contrary to Sections 20 and 21 of the Equality Act 2010, and three claims of harassment related to disability contrary to Section 26 of the Equality Act 2010.
2. At a preliminary hearing on 12 December 2023 the claimant's claim of unfair dismissal was withdrawn by Miss Earle and formally dismissed by EJ McCann. EJ McCann also struck out three of an original six claims of disability related harassment.
3. The panel heard from the claimant. For the respondent Mrs Reeve, the firm's director, gave evidence, as did one of its employees, Mr Gareth Hughes.

FACTS

4. I panel found the following facts.

5. Miss Earle was a contract worker placed by an employment agency called *Job Finders* with the respondent, which is a firm of solicitors. This was a temporary position limited to 3-months. The role Miss Earle was required to fill was as a Receptionist Administrator. The job description for that role was provided in the hearing bundle.

6. Miss Earle began work in the respondent's Chislehurst office on the morning of 15 June 2022. The member of staff she was replacing, Elizabeth Omoseyin, was tasked with carrying out a job handover and according to Miss Earle this took about 2-days.

7. On 23 June 2022 the respondent terminated Miss Earle's placement with the firm. The respondent's case was that Miss Earle could not perform the role to the required standard. Miss Earle claimed that she performed her role competently and that the real reason her contract was terminated stemmed from her disability. That disability being back, shoulder and neck pain.

8. Miss Earle was asked to arrive on her first day at Chislehurst at 0930 but turned up early at 0900. She was met by Mrs Reeve. Shortly after her arrival Miss Earle noticed leaves on the office floor that had blown in from the road outside. She took it upon herself to tidy up the leaves even though Mrs Reeve told her not to worry about the leaves and to leave them because the firm had a cleaner.

9. Miss Earle accepted she was not asked to tidy up the leaves, but she rejected Mrs Reeve's assertion that she (Mrs Reeve) specifically told her there was no need for her to do so. The panel preferred Mrs Reeve's evidence on this point because overall, the panel considered Miss Earle to be the less credible of the witnesses, at times exaggerating and embellishing her evidence, and adopting positions on certain points which were evidently unreasonable or counterintuitive. As an example, the panel found it was more likely than not that Mrs Reeve, as the person in charge, welcoming a new temporary member of staff, would be naturally inclined to dissuade that person from immediately turning their attention to cleaning the office floor, which was not what she was employed to do.

10. Despite being told there was no need to clean up the leaves, Miss Earle went ahead and cleaned them up on her own initiative and insistence. She found a Henry Hoover in the kitchen which did not have a pole attachment. This meant that Miss Earle had to bend down to collect the leaves.

11. Although Miss Earle's evidence to the Tribunal was that bending over in such a way caused her back pain, it was not her evidence that she said anything about it to Mrs Reeve at the time and the panel found she did not. The panel also found there was no mention at that time that Miss Earle suffered with back, neck or shoulder problems.

12. Despite accepting she was not asked to tidy up the leaves in the office, Miss Earle was insistent that Mrs Reeve and the respondent were at fault for not having a working Hoover in the office. The panel accepted Mrs Reeve's evidence on this point which was that the firm employed a cleaner who came in weekly and brought her own Hoover with her. Miss Earle's challenge to that evidence carried very limited weight because she only worked for the respondent for 7 days and would therefore have known very little about such arrangements.

13. The panel found there were no grounds for Miss Earle's criticism of Mrs Reeve in regard to the faulty Hoover. This was a small office, and a cleaner was employed to clean and tidy. It was not within Miss Earle's job description to clean and tidy the office. It was commendable that she wished to do so but it was not required of her, and it was therefore unjust of Miss Earle to be critical of the respondent in this way after the event.

14. When asked why she felt it was so imperative to tidy up the leaves, Miss Earle said that they were a health and safety hazard, in particular they created a trip and fall risk. In her complaint email to Debbie Lock at *Job Finders* on 24 June 2022, she complained of Mrs Reeve telling her not to tidy an "unsafe work area". Clearly there is no such risk from what were agreed to be a few dry leaves on the floor. This was an example of Miss Earle's willingness to exaggerate and embellish her account of events in an attempt to manufacture a weightier claim.

15. On Miss Earle's own oral evidence, she did not mention her back problem at the time she insisted on picking up the leaves, therefore Mrs Reeve and others employed by the respondent could not have been aware of any such problem. Miss Earle admitted that she did not inform Job Finders of her back problem and so the respondent could not have learned of it from that source.

16. Miss Earle said she was asked to move boxes of photocopying paper on her first day or second day in the office. Mrs Reeve was emphatic in her denial that she or anyone else told Miss Earle to move the boxes. She said it was Miss Earle who insisted on moving them. Miss Earle said it was at this point that she told Mrs Reeve that she had a bad back. Mrs Reeve denied being told at that time or at any time during Miss Earle's employment with the respondent that she had a back problem. The panel found Mrs Reeve to be the more persuasive witness on both of the above points. If Miss Earle had the back problems claimed it struck the panel as being implausible that she would have been as keen as she was to volunteer to move boxes of photocopying paper when this was not required.

17. Miss Earle had already shown a predilection for tidying up her working environment even when it was not required of her. Mrs Reeve, whose office it is, was not concerned about the boxes of paper being piled next the photocopier. It was more likely than not therefore that it was Miss Earle's idea to move the paper and not Mrs Reeve's. Mrs Reeve did recall Miss Earle asking if there was a trolley which could be used for moving the paper and she told her there was not and advised Miss Earle to leave the boxes because Gareth Hughes, the firm's legal cashier, would move them on his next visit to the office. Miss Earle then went on to move the boxes, using her office chair, again of her own volition.

18. Miss Earle said it was at this time, prior to moving the boxes, that she told Mrs Reeve about her back problem. Again, Mrs Reeve was adamant that she was not so informed then or at all. Mrs Reeve was consistent throughout her evidence, and her account of events was the more plausible in the circumstances, starting with her attempts to dissuade Miss Earle from tidying up the leaves then telling her there was no need to move the photocopying paper. The panel found therefore that Miss Earle did not disclose any problems with her back, neck or shoulder.

19. Much of Miss Earle's evidence focused on how she felt she had performed her role for the respondent, contesting the respondent's assertions that she lacked competence. Whilst this was not a primary issue for the panel to determine, it provided an insight into Miss Earle's state of mind which was directly relevant to credibility and addressed the respondent's counter-narrative which was that Miss Earle's contract was terminated on performance grounds.

20. Mrs Reeve gave numerous examples of why Miss Earle fell short of the job requirements. It is not necessary to repeat all of them. But one of Miss Earle's main tasks as a receptionist was to field incoming calls from clients. As part of her handover training, she was provided with a copy of a one-page document which showed the firm's personnel structure. This had the name of each fee earner in a left-hand column and their support staff member(s) next to them in a right-hand column. Although the document produced was the latest version, an extant version was given to Miss Earle when she started working for the respondent, which was not denied.

21. When clients called the firm, Miss Earle was required to enquire with the caller the nature of the call and then put the caller through to the relevant member of the support team. Instead, Miss Earle repeatedly put calls or attempted to put calls through to Mrs Reeve or other fee earners directly, thereby interrupting them from their work. The practice described by Mrs Reeve, of receptionists being transferred to a fee-earner's secretary is the commonly understood practice in law firms as it is in many other hierarchical organisations. Yet Miss Earle refused to accept this was the case. She described the suggestion that clients should not be put through to the fee-earner directly as "unprofessional" and she referred to her past experience of working in law centre. That of course was not a helpful comparison given that such law centres are generally non-profit organisations which do not enjoy the luxury of secretaries or personal assistants. The panel was not persuaded that Miss Earle genuinely did not understand the difference between working in a law centre and working in a firm of solicitors. This was an example of Miss Earle manufacturing untruthful evidence, as she went along, to bolster her claim.

22. Another performance or competence example was Miss Earle's inability to say the firm's name when answering the phone to clients. She put it to Mrs Reeve that it was a difficult name to repeat over the phone. The name Wykeham-Hurford Sheppard & Son is certainly something of a mouthful, but the panel did not agree that it was a difficult or unreasonable task for a receptionist to perform. A new member of staff could have overcome the problem by practice or having the name to hand, in writing, when answering the phone, but for whatever reason Miss Earle was unable answer the phone to the respondent's satisfaction. It was the manner in

which Miss Earle refused to accept her own obvious shortcomings which further undermined her credibility.

23. The panel considered the evidence in deciding whether or not Miss Earle was disabled in accordance with the definition laid down by S.6 of the EqA 2010. Miss Earle gave written details of her back problems but did not add to this in her oral evidence. Her written evidence was that her problems go back to 2015. She said she suffers pain most days from two slipped discs and the pain is severe when aggravated. When the pain is severe, she is unable to do most everyday tasks without the aid of a walking stick and she requires an adjustable chair.

24. The panel agreed that Miss Earle has suffered and continues to suffer from some sort of back pain. Miss Earle relied upon a letter dated 23 April 2015 from a physiotherapist which makes reference to lower back pain and the result of an MRI scan which revealed a bulge in her spine at L5-S1. However, the letter shows that Miss Earle was physically active at that time and was maintaining a good level of exercise with regular Pilates and yoga. Symptoms were being managed by paracetamol. This piece of evidence from 2015 did not satisfy the Tribunal that any physical impairment suffered by Miss Earle in 2015 was having a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities at that time.

25. Miss Earle also relied upon two documents from 2022 which indicated that she was seeking or undergoing physiotherapy. The first was an email dated 8 April 2022 from the administration team in the physiotherapy department at the Lewisham and Greenwich NHS Trust. That letter suggested that Miss Earle was seeking advice on how to address neck and shoulder pain. It also suggested she was finding the exercises already advised to be too easy.

26. The second document was a physiotherapy referral form from the same NHS trust dated 10 May 2022. The only relevant information on the form is that Miss Earle had experienced symptoms for 4 years, was not off work because of her condition, and it was not keeping her awake at night.

27. Miss Earle's evidence barely touched upon the effect her back, shoulder and neck problems have on her ability to carry out day to day activities. She said that she cannot perform day to day tasks when the pain is severe, but if that was the case one would expect to see this supported by medical evidence. No medical evidence was produced by Miss Earle in support of her claim. When asked about this by me Miss Earle referred me to a document in the bundle. This was an image of part of a letter dated 12 March 2022 from the DWP in regard to a Personal Independence Payment (PIP). In essence Miss Earle contended that such a letter proves she is disabled because such payments are made to people who have a disability.

28. However, it is a matter of law for the Tribunal to determine whether a claimant is disabled, having considered all of the evidence produced on the issue. The fact someone may be or have been in receipt of a PIP is not determinative of the issue of disability. In this instance the letter from the DWP was of very limited assistance evidentially. Miss Earle was very selective in terms of how much of the letter was

exposed to the Tribunal. Very little of the body of the letter was produced and the panel drew the inference that this was done intentionally, probably because there was something in the letter which harms or does not assist Miss Earle's claims. It is evident from what was produced that Miss Earle was not content with the DWP's PIP decision which appeared to adverse to her. Miss Earle requested a reconsideration. The result of that reconsideration was not made known to the panel.

29. Unsolicited, Miss Earle told the panel that she has caring responsibilities for her mother. She did not elaborate on those responsibilities, and she did not say that her back problems interfered with them. As at April 2015 Miss Earle's back problem did not interfere with her ability to do Pilates and yoga and in April 2022 the physiotherapy department was suggesting she could introduce weights into her exercises because she was finding them to be too easy.

30. The panel also considered the evidence relevant to Miss Earle's claims of harassment. Miss Saunters was accused of harassment on the basis of her asking Miss Earle about her physical activities including walking. Miss Saunter's did not give evidence and so her witness statement was unchallenged by Miss Earle. Miss Saunters did not know about Miss Earle's back condition and any mention of walking or other physical activities were in the context of ordinary workplace conversation in the panel's judgement.

31. Gareth Hughes was also unaware of Miss Earle's back condition. Mr Hughes was only in the Chislehurst office on one occasion when Miss Earle worked there. In his witness statement Mr Hughes denied kicking Miss Earle's chair, which was another element of the harassment claims. This was not pursued by Miss Earle at the hearing because she did not put this allegation to Mr Hughes.

32. The panel found Mr Hughes to be a very mild-mannered individual with no reason to kick the chair of a new colleague he had just met for the first time. The panel found this did not happen as alleged.

33. The panel did not accept that Mr Hughes stood over Miss Earle in the manner she alleged and which she said caused her neck and back pain. The panel was satisfied on the evidence of Mrs Reeve and Ms Saunters that Miss Earle struggled to complete computer tasks and therefore needed desk side assistance. On her own admission Miss Earle felt the need to call IT support, suggesting she did need assistance. Mrs Reeve and Mr Hughes most likely did go to Miss Earle's desk, but only to assist her when she had difficulty with the firm's computer system and with the intention of helping her.

34. Photographs showed that Miss Earl had a conventional office chair on wheels which would have allowed her to move away from her desk when she was given assistance by Mrs Reeve or Ms Saunters, and it was unlikely that her back or neck problems would have been aggravated in the way alleged because of her ability to position herself as she saw fit.

35. Miss Earle also alleged that Mrs Reeve adjusted Miss Earle's chair, which she did not ask her to do because Miss Earle had set it to a position which met her needs. However, Miss Earle did not maintain this allegation at the hearing as she

did not put it to Mrs Reeve in cross examination. In any event, the panel was not persuaded that the Director of the firm would interfere with a receptionist's chair if she had not been asked to assist with it.

The Law

36. The relevant law is contained in the Equality Act 2010 in the following sections.

37. **Section 13 Direct Discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

38. **Section 15 Discrimination arising from disability**

(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.

(2) 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. **Section 6 Disability**

(1) A person (P) has a disability if—

(a) P has a **physical or mental impairment**, and

(b) the impairment has a **substantial and long-term** adverse effect on P's ability to carry out **normal day-to-day activities**...

40. **Section 20 Duty to make adjustments**

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation

to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

39. Section 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

40. Section 26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Applying the law to the facts

41. On the evidence before the Tribunal, the panel was not satisfied any physical impairment suffered by Miss Earle has or had a substantial impact on her day-to-day activities. Therefore, she did not meet the statutory definition of disability.

42. Because Miss Earle did not meet the statutory definition of disability, her claims of direct disability discrimination, discrimination arising from a disability, an alleged failure to make reasonable adjustments and disability related harassment must fail.

43. If the panel was wrong about Miss Earle not meeting the statutory definition of disability, the above claims also failed because she did not make the respondent aware of a disability.

44. Her claims also failed on the basis that she was not discriminated against in the manner she alleged. She was not told to clean the office and she was not told to move the boxes of paper.

45. Miss Earle was also not subjected to the unwanted conduct alleged which she said amounted to harassment. Miss Earle alleged harassment by Ms Saunters who asked her about her physical activities and about walking. Ms Saunters did not know about Miss Earle's back condition and any such questions from Ms Saunters were part of ordinary workplace conversation. This did not constitute harassment because such ordinary conversation would not, in the circumstances, violate Miss Earle's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment for Miss Earle.

46. Mr Hughes was also unaware of Miss Earle's back condition. He did not harass Miss Earle by kicking her chair because that kicking did not happen as alleged.

47. The panel also rejected the allegation that Mr Hughes and Mrs Reeve harassed Miss Earle by leaning over her desk. If this happened at all, it was done to provide genuine and needed assistance.

48. The panel also found that Mrs Reeve did not adjust Miss Earle's chair and did not harass her in that alleged manner.

49. All of the claims failed for the above reasons.

50. At the preliminary hearing on 12 December 2023 EJ McCann made deposit orders in regard to four of Miss Earle's claims on grounds that there was little reasonable prospect of them succeeding. Miss Earle was ordered to pay the sum of £10 each for the three disability related harassment claims and the factual claim that Mrs Reeve instructed Miss Earle to clean the front office without provision of a working vacuum cleaner. All of those claims failed and failed for substantially the reasons given by EJ McCann when making the deposit orders at paragraphs 10 and 11 of the order.

51. In accordance with Rule 39(5) I ordered that the deposits totalling £40 to be paid to the respondent because the claimant acted unreasonably in pursuing those specific allegations and I was not persuaded to the contrary by Miss Earle.

Judge C J Cowx
5 May 2024

REASONS SENT TO THE PARTIES ON
10 May 2024

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FOR THE TRIBUNAL OFFICE