



EMPLOYMENT TRIBUNALS

Claimant: Ms C Cooper

Respondent: Resource Management Solutions (North East) Ltd

Heard at: Teesside Justice Centre, Victoria Square, Middlesbrough, TS1 2AS

On: 20th, 21st, 22rd November 2023

Before: Employment Judge AEPitt
Mrs D Newey
Mrs S Don

Representation

Claimant: In person

Respondent: Mr A Willis, Solicitor

JUDGMENT having been sent to the parties on 7th December 2023 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. This is a claim by Mrs C. Cooper, date of birth 6th June 1982, in relation to her employment with the respondent between 31st October 2022 and 16th December 2022 as Marketing and Events Manager.
2. The claimant makes a claim for direct disability discrimination. The impairment upon which she relies is anxiety and depression.
3. The issues were set out by EJ Jeram at a Case Management hearing 30th May 2023 as follows:
 1. Did the claimant have a disability as defined in Section 6 Equality Act 2010 at the time the events the claim is about? The Tribunal will decide
 - a. Did she have a physical or mental impairment: anxiety and depression?
 - b. Did it have a substantial adverse effect on her ability to carry out day to day activities?

- c. If not did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
- d. Would the impairment have had a substantial adverse effect on her ability to carry out day to day activities without the treatment or other measures?
- e. Were the effects of the impairment long term? The Tribunal will decide.
 - i. Did they last 12 months, or were they likely to last at least 12 months?
 - ii. If not, were they likely to recur?

1. The respondent dismissed her.

2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

3. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

4. If so was it because of disability.

5. If the claimant was disabled was the respondent aware or ought it to have reasonably been aware of the claimant's disability.

4. At the commencement of the hearing the claimant indicated that she had further medical notes she wished to rely upon to support her argument that her impairment amounted to a disability. Having heard from both parties the Tribunal concluded it was not in accordance with the overriding objective to admit the notes.

5. In making our decision, we took account of the fact that the claimant is a litigant in person. The ET1 was presented on 13th March 2023, there was a PH on 30th May 2023 before EJ Jeram. At that hearing the claimant was ordered to provide a Disability Impact Statement and the relevant parts of her medical records as to whether she had a disability. On 4th July 2023 the respondent's solicitors wrote to the claimant in relation to the medical evidence. At this time the claimant had provided a letter and not the full records.

6. In the bundle the Tribunal has an email from the claimant dated 30th June 2023 which, amongst other matters deals with the Impact of the impairment. In addition, she provided the letter from her GP practice dated 23rd August 2021 and an excerpt of her records for the period 5th December 2022 to 24th May 2023 which does not cover the period of her employment.

7. The Tribunal concluded that the wording of EJ Jeram's order was clear, the claimant was asked by the respondent if she was providing the full records. None were received. If the records were admitted today, the respondent would be entitled to an adjournment to consider them, that would delay this hearing and incur costs. The Tribunal considered the prejudice to the claimant in denying the request was that she would be

limited to the evidence she had already produced. Although medical evidence is preferable to support a disability, much of the time this simply gives a label to a condition or impairment. The letter produced states the claimant has a history of anxiety and depression. The impact of impairment is discovered by examining the Impact Statement which we have before us and hearing evidence.

8. In addition to the issue of disability, the Tribunal also had to grapple with the issue of the respondent's knowledge. Therefore, even if disability were proven the hurdle of knowledge also had to be overcome
9. The Tribunal considered the balance of prejudice between the parties and concluded that in this case the prejudice to the respondent was greater.

The Facts

10. The Tribunal read witness statements and heard evidence from, the claimant, Nikki Butt Operations Director, Elly Leeds Commercial and Data Manager, James Rycroft Business Development Manager. We had before us a bundle of documents running to 163 pages, which included the pleadings, the claimant's contract of employment, various emails and a probation review outcome letter.
11. The respondent is a Recruitment Service working in Darlington and employing 21 people. In September 2022 it was seeking to appoint a New Marketing Manager. The claimant had indicated on her LinkedIn profile she was available for work. The claimant was interviewed by Ms Leeds and Mr Rycroft both by telephone and in person at the respondents offices. There was another candidate for the role. An offer of employment was made verbally on 16th September confirmed in writing 22nd September and accepted by the claimant on 26th September 2022. The scheduled start date was 31st Oct 2022.
12. On her start date the claimant signed a contract of employment which included various clauses relating to hours of work, annual leave, sick leave etc. Working hours were agreed 37.5 two days from home Wednesdays and Fridays. At clause 8 the contract reads 'This is a permanent position subject to the successful completion of a 6 month probationary period' Evidence on how the probationary was to be assessed and reviewed was vague, and it would be unclear to the claimant how she would be assessed.
13. The claimant completed a formal application form for the position on 23rd November 2023. This form required information as to employment history, criminal convictions, banking information and also health and disability. When asked 'Do you have any health issues or a disability relevant which may make it difficult for you to carry out functions which are essential for the role you seek'. In this section the claimant indicated 'No'. There was a second part to the question in relation to reasonable adjustments but the claimant, having not declared a disability did not have to complete this section. The claimant's explanation was that she is a private person and didn't want to disclose the information and that she 'Omitted it, by my own

admission not disabled', as she thought she may not get the job. The claimant accepted that the Respondent would not have known she had a disability.

14. The claimant was provided with a job description which incorporated the key responsibilities and experience required for the role. The role was to improve the respondent's brand and would include creating marketing material, developing partnerships with other organisations, analysis and evaluation of marketing campaigns.
15. Prior to commencing her employment Mr Rycroft invited the claimant for coffee for a chat and to get to know each other. This was arranged for 14th October 2022 and discussions included an upcoming Offshore Wind Industry event at which the respondent was participating. As this was to be within the first two of weeks of the claimant's employment Mr Rycroft sent the claimant an email on 19th October with the marketing agenda pg 61-62 to ensure she could get up to speed with it.
16. At the commencement of her employment there was an induction procedure to familiarise the claimant with the office and her role including introducing her to other teams. Although she was working under Mr Rycroft she did spend some time with the Operations Team to understand how the respondent operated. It is clear to the Tribunal that R very much works as a Team, working on projects together in a collaborative way, so that a marketing opportunity may be identified by anybody who can then The claimant was expected to work across the various Teams within the respondent.
17. For example a person who had been placed in a position by one of the respondent's agent, the person placed may make a comment about it and their agent. Such information may be utilized it by publishing it it, marketing is not just the sole resp of the marketing manager, it may be that ideas are passed to them for them to exploit.
18. Initially feedback appeared very good especially from on 9th 10th Nov at the Offshore Wind Industry event comments were made as to the claimant's professional and confident demeanor. In looking at the claimant's claim, the Tribunal has not made any findings as to whether the performance was of an acceptable standard, the question we asked ourselves was what was the respondent, in particular Nicki Butts, opinion the claimant's performance, that is to say what was in the mind of NB when she terminated the contract.
19. The Tribunal heard evidence from Mr Rycroft was that there were issues in relation to: concerns early on in crafting a basic LinkedIn article from a marketing perspective, he did not raise this with her directly but worked on it together, although he say 'I more or less dictated it to her'.
20. In addition she re posted in relation to Populus post of a local competitor, this was not preapproved or discussed and damaging to the respondent's business. The post was taken down but it does not appear to have been brought to the claimant's attention. Another issue was an article for Green

Power. This particular piece of work was a major issue because there was a deadline. Neither Ms Butt nor Mr Rycroft were happy with the content produced by the claimant. They were of the belief that the claimant had simply copied and pasted information given to her from Miss Butt and didn't fulfil the brief. This piece of work was outsourced to their former marketing manager, which incurred a cost for the respondent.

21. During her employment the respondent supported the claimant by permitting her to attend two training courses and it was flexible in relation to additional working from home when needed due to her illness of her children's illness.
22. Although Mr Rycroft was not direct in dealing with any of the claimant's perceived shortcomings for example he did give feedback for example in relation to the Green Power article 'we must be concise with our wording and every sentence should have impact'. From the claimant's reply 'Of Course', it may be assumed she had taken this on board. He also suggests that she 'Spend some time with the Team to pick up some ideas for posts.
23. At one point Ms Leeds was alerted to the fact that a member of staff felt pressurised to be involved in a post the claimant was developing. Ms Leeds cites this as an example of the claimant's failure to understand the sector.
24. A marketing strategy meeting was organised for 1st December 2022 to discuss marketing strategy and future tasks. The claimant was asked to bring three ideas along to the meeting. The Tribunal did not see any issues with the proposed meeting, as the respondent clearly works as a team and would 'chew the fat' on ideas. However, this way of working was new to the claimant.
25. The meeting was delayed and when the claimant attended the Managing Director was present, the claimant was unaware of this before the meeting. The way in which the respondent works in meetings is for documents to be shared on a screen for all to see. The claimant was unaware of this. The document shared from the claimant and neither the MD, Ms Leeds were happy with the it.
26. The claimant's evidence for the poor content was that she had compiled some ideas and created a document on her PC. When the meeting was delayed, she discovered she had lost the document. The Tribunal was not persuaded that in the time available after searching for the original document a second document of such length and content could be compiled. The claimant explained her position in the meeting, and Ms Leeds sympathises because she has done the same and there is an offer to reschedule the meeting. The claimant declines, which she describes as part of her nature wanting to get on with it.
27. Mr Rycroft was clearly concerned about the content and its potential impact. It was the view of all attending that the claimant did not fully understand the business model and services of the respondent. It is clear the claimant was put on the spot and asked some challenging questions.

28. There was discussion about the relevance of the information to the business, and it was suggested by Ms Butts, that the claimant may wish to spend more time with the Operations Team to understand the business better.
29. The claimant point blank refused, stating 'I've already done it and don't need to do it,' She didn't want to work with other teams as she was an experienced marketing manager. Ms Butts suggested that the claimant needed a better overview of the business, and offered more than one suggestion of how to support the claimant but the claimant was unwilling to take them up, in particular she didn't want to spend time with the Operations Team. Miss Butt pointed out this we how we work, and invited the claimant to take some time to reflect upon and whether this is the right company culture for her.
30. The meeting turned into something it was not intended to be, that is to say it became more about the claimant's ability and not the respondent's future marketing strategy This was supposed to be a run of the mill marketing meeting to discuss ideas, it was clear to those present that the claimant had not understood the business and had not brought forward any ideas or strategies they could use. The claimant becomes upset and tearful, this was because she was frustrated and embarrassed as she knew she had not produced her best piece of work.
31. Following the meeting, the claimant was visibly upset the tribunal did not accept that she vomited, because Mr Rycroft followed her from the meeting, shortly after she left, by the time he got back to the office there were no indications that the claimant had been so unwell. Mr Rycroft suggested she go home. The Tribunal concluded that if she had been as distressed as she said Mr Rycroft or one of the team would have made suitable arrangements to get her home safely.
32. Over the following days the claimant works from home. Mr Rycroft attempted to contact the claimant by phone and email. The claimant indicates she is going to see her GP as 'the pressure has been taking it's toll and the meeting made me feel very upset. I am now in a situation where I'm ill with stress'.
33. The respondent had in previous years been involved in an event held in conjunction with Darlington Borough Council; On 2nd December 2022 the claimant received an email concerning prizes. The claimant replied that the respondent may have to opt out. This was not authorised by the respondent and seems to be the final straw in relation to the respondent's view of the claimant's aptitude to carry out her role.
34. On 5th December 2022 the claimant was invited to a probationary meeting to include 'discussing her performance during her probationary review period.' The claimant declined to attend and submitted a sick note. Ms Butt responded by advising the claimant that the meeting could be held over Teams. The claimant was asked to complete a Probation Review Form. She was advised that one outcome could be the termination of her employment.

35. The claimant did not attend the meeting nor complete the Probation Review. The meeting went ahead in her absence, and she was dismissed. Her employment terminated on 16th December 2022.

The Medical Evidence

36. The claimant relies on the impairments of anxiety and depression. In considering the question of disability we have looked at the claimant's impact statement, a letter from her GP surgery dated 23rd August 2021 and a short extract from the claimant's medical notes dated between 5th December 2022- 24th May 2023.
37. The Tribunal is satisfied that the claimant suffers periodically from anxiety and depression, that much is clear from the letter from GP at page 57. The Tribunal is unable to make any finding of fact as to when the claimant's symptoms of any mental health disorder commenced. Although the claimant states she has experienced anxiety from the age of 11. The letter shows she has a past medical history of anxiety and depression, but the last episode appears to be in 2019 when she was prescribed medication. The letter is a referral to psychological services and relates to symptoms of 'emotional ability with mood swings' which may relate to her menstruation cycle. She had told her GP she was not depressed and refused medication but wanted an assessment in order to understand her mood swings. The claimant would not disclose what happened as a result of this referral.
38. The extract from the medical records indicates no active problems and no significant past. On 5th December 2022 the claimant referred herself to a Talking Therapy service. On reviewing the extract, it does not appear that the claimant had a consultation with GP, and she was not prescribed medication.
39. Turning to the issue of the impact of the impairment, the claimant's statements on this point concentrated on the impact at work or as a result of the meeting on 1st December. The claimant describes having a panic attack which lasted for two days during which time she was unable to leave her home. There were general comments of nerves, headaches and stomach aches and her sleep being impacted. Her evidence was that if she felt unwell, she might take a day off two off work but then return. She had had no substantial periods of absence from work prior to joining respondent.

The Law

40. Section 6 Equality Act 2010 Disability

A person (P) has a disability if-

- (a) P has a physical or a mental impairment and
- (b) The impairment has a substantial and long term adverse effect on P's ability to carry out day to day activities.

41. In order to be classed as disabled there are four elements to be considered; does the claimant have an impairment; does the impairment

have an adverse effect on their ability to carry out day to day activities; is the adverse effect substantial is the impairment long term. Goodwin v Patent Office 19999 ICR 302

42. Schedule 1 para 2 Equality Act 2010 sets out the definition of long term as; has the impairment lasted for at least 12 months or, is likely to last at least 12 months, or for the rest of the persons life. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day to day activities, it is to be treated as continuing to have that effect if it is likely to recur.
43. The question of medical evidence was addresses by the Northern Ireland Court of Appeal in Veitch v Red Sky Group Ltd 2010 NICA 39 where it was held that the claimant is not under a duty to produce medical evidence however a failure to do may impact their ability to prove a disability.
44. In J v DLA Piper UK LLP 2010 ICR 1052, EAT, is an important case when considering the issue of the impairment. The Tribunal need to alert to the difference between clinical depression and a reaction to adverse circumstances. Both have similar symptoms and to determine whether one is a disability will require the Tribunal to look at the long term effect of the impairment.
45. The Tribunal also had regard to the Guidance issued under the Equality Act in determining the issue of disability. which offers guidance in relation to each of the four steps.
46. Section 212 Equality Act 2010 requires the impairment to be more than a trivial or minor effect. The Guidance at B1 assists by defining 'substantial' as 'a limitation going beyond the normal differences in ability which may exist among people.'
47. Part C. assists in determining what is 'long term' in particular that the word 'likely' used in the Act means 'that it could well happen'.
48. In relation to recurrence the Tribunal should take all the circumstances of the case into account, including what steps a person might reasonably be expected to do to prevent the recurrence.
49. Once disability is established a claimant has to establish that they were subjected to less favourable treatment in one of the ways set out in the Act. This claimant is relying onher a dismissal as an act of direct discrimination which is defined in section 13 as:

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.

50. In order to prove this the claimant must show that she was treated less favourably, here because of the dismissal, which is conceded as being less favourable treatment.
51. However, the claimant must also show that she was treated less favourably than others. This requires the Tribunal to compare the claimant's situation with that of a non-disabled person. In this case the claimant has not pointed to a specific person, so the Tribunal has to compose an 'hypothetical comparator'. Such a person would be someone who had the same perceived failings as the claimant but was not disabled.

Knowledge

52. In order for the respondent to be liable under section 13, the phrase 'because of a protected characteristic' imports a requirement for knowledge or constructive knowledge of the disability.
53. In this case the claimant concedes that the respondent did know of her anxiety and depression and therefore must rely upon whether the respondent should reasonably be expected to know of the disability.
54. It is not sufficient that the respondent was aware of an impairment such as anxiety or depression, the respondent must reasonably be expected to know it was a disability. This is a question of fact for the Tribunal.
55. A Ltd v Z 2020 ICR 199, EAT. A failure by an employer to make enquiries into possible disability is not of itself sufficient to establish that an employer has constructive knowledge to an employer. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry.

Discussion and conclusions

Disability

56. As noted above the Tribunal considered all the evidence in relation to the issue of disability. It is satisfied that the claimant has an impairment of anxiety and associated depression. It is not possible to identify a time when these impairments started.

Long Term Substantial Adverse Effect

57. The claimant has an impairment which has a periodic impact upon her. This does not prohibit it from being a disability, however the Tribunal must consider whether the impact during each period had a substantial adverse effect.
58. The impact statement did not assist greatly on this point and in recalling her past ill health during an episode the claimant referred to nerves and a general feeling of being unwell. She might take two days leave from work. As a result of the meeting in December the claimant had a panic attack which was debilitating but only for two days.

59. The medical records reveal that there are no active problems or any significant past. The only note is under minor past and does not relate to the claimant's impairment.
60. The Tribunal concluded that the impairment may have an impact on the claimant, but it was not such as could be described as substantial.
61. Turning to the issue of 'long term' this must either be 12 months at the point of discrimination or likely to last 12 months at the time of discrimination or be a cumulative period of 12 months if it is a recurring condition.
62. This claimant would have to be disabled at the point she was dismissed, that is 7th December 2022. At this time the claimant was absent from work for a short period. She supplied a sick note for a two week period, 5th -18th December 2022. On the basis of this the GP appears to consider ill health will not last for longer than that period. In any event the GP uses the phrase 'stress at work' there is no evidence how this connects to the impairments of anxiety and depression. Between that date and 24th May 2023 there are no other records of consultations save for 'Pip form completed and posted'. The Tribunal cannot be satisfied that this period of ill health was likely to last at least 12 months.
63. The Tribunal also considered the claimant's past history in relation to the impairment in order to determine if she is disabled by virtue of having a recurring disability. Although she had previously received medication for anxiety and depression, there is no evidence as to how long these were taken. Certainly by 2021 the claimant had not received medication or other intervention since 2019. There is no mention of a mental health condition in relation to her past history in her GP notes. From the evidence we heard that she was likely to take two days sick leave from work indeed, she said there were no substantial periods of absence from any previous job, the Tribunal was unable to conclude that in any previous period when there was an effect upon her, the effect was substantial.
64. The claimant was in effect in the days after the meeting having an adverse reaction to the pressures brought to bear because of her new position. That is to say the Tribunal concluded that anxiety and depression is a reaction to adverse life events.
65. The Tribunal therefore concluded that the claimant was not disabled for the purpose of section 6 Equality Act 2010.

Knowledge.

66. An employer may have actual knowledge of a disability or may be treated as having such knowledge.
67. The claimant accepts in this case that the respondent could not have actual knowledge of any disability. The simple reason being that she did not tell them even when given the opportunity to do so in her application form.

68. Is it possible to infer knowledge? The claimant asks to consider that her reaction, i.e. her distress, to the meeting on 1st December 2022 is sufficient for the respondent to be on notice of a disability.
69. The Tribunal disagrees. It was a difficult meeting for the claimant, the Tribunal is satisfied she was already under some pressure because of the lost document. The Tribunal is satisfied that her reaction to the meeting, whilst it may be unusual, would not alert an employer to the fact the employee had a disability, rather this was someone who was sensitive and required careful management.
70. The Tribunal concluded that she failed to disclose her impairment because she is a 'private person' and kept her professional life separate from her private life. The claimant would know the importance of answering this question.
71. In determining the issue of knowledge, the Tribunal looked at the procedure used by the respondent, in particular the sick note sent in by the claimant.
72. The Tribunal considered whether the respondent should have made further enquiry and or adjourned any hearing until the claimant was fit for work and if such enquiry would give them the requisite knowledge.
73. The Tribunal considered the fit note provided by the claimant which simply stated, 'stress at work'. There were no previous incidents of ill health which may have alerted Ms Butt to any on going problems for the claimant. Although the Tribunal did take account of claimant's reaction to the meeting on 1st December 2022. Taken together these would not have alerted Ms Butt to a deeper underlying problem. In addition, the reason for the absence was stress at work, which might be considered to be a reaction to the meeting and not a disability. Having looked at the medical evidence provided it is highly unlikely that further enquiry would have put Ms Butt on notice of an impairment which amounted to a disability.
74. In looking at the reason for not postponing the meeting, Ms Butt stated there was some urgency in resolving the issue of the claimant's probation review because of the issues which had been identified. The Tribunal disagrees, the meeting could have been postponed until after the claimant returned to work.
75. However, the Tribunal is satisfied that the respondent did not have, nor could it reasonably be expected to have the requisite knowledge in relation to any impairment or disability.
76. Finally, the Tribunal looked at the question as to why the claimant was dismissed. Ms Butt dismissed the claimant because of failings in her standard of work and not because of a disability.
77. The claim is dismissed.

Case No: 2500472/2023

Employment Judge AE Pitt

Employment Judge AE Pitt

Date 15th May 2024