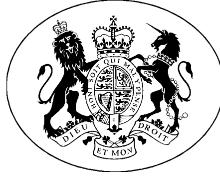

EMPLOYMENT TRIBUNALS

Claimant: Ms S Ford

Respondent: Lucksbridge Horticulture Limited

Heard at: Midlands East Tribunal via Cloud Video Platform

On: 11, 12 and 13 March 2024

Before: Employment Judge Brewer
Ms F French
Mr C Bhogaita

Representation

Claimant: In person
Respondent: Ms J Ball, Director

JUDGMENT

The unanimous judgment of the Tribunal is:

1. the claimant was disabled at the relevant times within the meaning of section 6 Equality Act 2010,

2. the claimant's claim for direct disability discrimination contrary to section 13 Equality Act 2010 is dismissed on withdrawal,

3. the claimant's claim for disability discrimination contrary to section 15 Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. This case came before a full Tribunal for a final hearing over three days. Evidence and submissions were concluded on the afternoon of day two following which the Tribunal deliberated, and we delivered our judgment on the afternoon of day three.

2. The claimant represented herself and gave evidence on her own behalf having provided a written witness statement. The respondent was represented by one of its directors Ms Joanne Ball, who also gave evidence and provided a written witness statement. For the respondent we also heard from Mr Simon Ball, Director, Ms Jessica Ball, who at the relevant time was the production supervisor, and Ms Claire Barker, a self-employed HR consultant who gives the respondent advice on HR matters and who conducted the claimant's dismissal appeal on their behalf. All those witnesses provided written witness statements. Along with the witness statements we had a bundle of documents running to some 118 pages.

3. At the end of the evidence, we heard submissions from both parties, and we have taken into account in reaching out decision all of the evidence and submissions.

Issues

4. The issues in this case were set out at a case management hearing which took place on 7 December 2022. At that stage the claimant was claiming direct disability discrimination and discrimination contrary to section 15 Equality Act 2010. However, during the hearing the claimant unequivocally withdrew her direct disability discrimination claim and the issues therefore we had to decide were as follows:

    4.1. at the date of termination of her employment (the relevant time in this case), was the claimant a disabled person within the meaning of section 6 Equality Act 2010, if so,

    4.2. did the respondent know, or could reasonably have been expected to know, that the claimant was disabled, if so,

    4.3. did the respondent treat the claimant unfavourably by dismissing her, if so,

    4.4. did the following things arise in consequences of the claimant's disability:

        4.4.1. some all of the claimant's sickness absence,

        4.4.2. any performance issues, and if so,

4.5. did the respondent dismiss the claimant for either or both of those things?

5. The respondent did not rely on a justification defence.

6. The claimant relies on bile acid malabsorption (BAM) as her disability. The respondent does not dispute that the claimant suffers from BAM but the respondent denies that the claimant met the definition of disabled within section 6 Equality Act 2010 at the relevant time.

Law

7. We set out here a brief summary of the law.

Disability

8. Section 6 of the Equality Act 2010 ("EqA") provides that a person has a disability if:

8.1. they have a physical or mental impairment, and

8.2. the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

9. The burden of proof is on the claimant to show that she satisfies this definition.

10. In **Chacón Navas v Eurest Colectividades SA** 2007 ICR 1, ECJ, the Court held that the concept of disability must be understood as

> *'referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.*

11. Subsequently, in **HK Danmark v Dansk almennyttigt Boligselskab and another** case 2013 ICR 851, ECJ, the Court held that persons with disabilities include

> *'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'*.

Time at which to assess disability

12. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act (**Cruickshank v VAW Motorcast Ltd** 2002 ICR 729, EAT). This is also the material time when determining whether the impairment has a long-term effect.

Approach to assessing diability

13. In **Goodwin v Patent Office** [1999] IRLR 4, the EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EqA) require a tribunal to look at the evidence by reference to four different questions (or ‘conditions’, as the EAT termed them):

    13.1. did the claimant have a mental and/or physical impairment? (the ‘impairment condition’),

    13.2. did the impairment affect the claimant’s ability to carry out normal day-today activities? (the ‘adverse effect condition’),

    13.3. was the adverse condition substantial? (the ‘substantial condition’), and

    13.4. was the adverse condition long term? (the ‘long-term condition’)?

14. These four questions should be posed sequentially and not together (**Wigginton v Cowie and ors t/a Baxter International (A Partnership)** EAT 0322/09).

Substantial adverse effect

15. In determining whether an adverse effect is substantial, the Tribunal must compare the claimant’s ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this because the Guidance and the EHRC Employment Code both appear to imply that the comparison should be with what is considered to be a ‘normal’ range of ability in the population at large. Appendix 1 to the EHRC Employment Code states:

    ‘*The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people’* — para 8.

16. In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered (see paras B1– B17). These include the time taken by the person to carry out an activity (para B2) and the way in which he or she carries it out (para B3). A comparison is to be made with the time or manner that might be expected if the person did not have the impairment.

17. When determining whether a person meets the definition of disability under the EqA the Guidance emphasises that it is important to focus on what an individual *cannot* do, or *can only do with difficulty*, rather than on the things that he or she can do (see para B9).

Normal day to day activities

18. Appendix 1 to the EHRC Employment Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis. The Code says:

    'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition'

19. The Guidance thus emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (see para D4).

20. The EAT in **Paterson v Commissioner of Police of the Metropolis** 2007 ICR 1522, EAT, concluded that 'normal day-to-day activities' must be interpreted as including activities relevant to professional life.

Long term

21. Under para 2(1) of Schedule 1 to the EqA, the effect of an impairment is long term if it:

    21.1. has lasted for at least 12 months,

    21.2. is likely to last for at least 12 months, or

    21.3. is likely to last for the rest of the life of the person affected.

Section 15 EqA

22. Section 15 EqA, which is headed 'Discrimination arising from disability', provides that a person (A) discriminates against a disabled person (B) if:

    22.1. A treats B unfavourably because of something arising in consequence of B's disability, and

    22.2. A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

23. In **Secretary of State for Justice and anor v Dunn** EAT 0234/16 the EAT identified the following four elements that must be made out in order for the claimant to succeed in a S.15 claim:

    23.1. there must be unfavourable treatment,

23.2. there must be something that arises in consequence of the claimant's disability,

23.3. the unfavourable treatment must be because of (i.e. caused by) the something that arises in consequence of the disability, and

23.4. the alleged discriminator cannot show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

24. The EHRC Employment Code indicates that unfavourable treatment should be construed synonymously with 'disadvantage'. It states:

    'Often, the disadvantage will be obvious, and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably' — para 5.7.

25. In **Pnaiser v NHS England and anor** 2016 IRLR 170, EAT, Mrs Justice Simler considered the authorities, and summarised the proper approach to establishing causation under S.15. First, the tribunal has to identify whether the claimant was treated unfavourably and by whom. It then has to determine what caused that treatment — focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

26. The distinction between conscious/unconscious thought processes (which are relevant to a Tribunal's enquiry on a S.15 claim) and the employer's motives for subjecting the claimant to unfavourable treatment (which are not) was described by Simler J in **Secretary of State for Justice and anor v Dunn** EAT 0234/16 in the following terms:

    '[Counsel for the claimant asserts] that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a Tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an

examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary'.

27. The enquiry into such thought processes is required to ascertain whether the 'something' that is identified as having arisen as a consequence of that claimant's disability formed any part of the reason why the unfavourable treatment was meted out.

28. In **Hall v Chief Constable of West Yorkshire Police** 2015 IRLR 893, EAT, the EAT clarified that a claimant needs only to establish some kind of connection between the claimant's disability and the unfavourable treatment.

Knowledge of disability

29. An employer has a defence to a claim under S.15 EqA if it did not know that the claimant had a disability — S.15(2). This stipulates that subsection (1) does not apply if the employer shows that it 'did not know and could not reasonably have been expected to know', of the employee's disability.

30. However, the employer cannot simply ignore evidence of disability. While the EqA stops short of imposing an explicit duty to enquire about a person's possible or suspected disability, the Equality and Human Rights Commission's Code of Practice on Employment (2011) ('the EHRC Employment Code') states that.

    'an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that. employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14.

Burden of proof

31. Section 136 EqA provides that, once there are facts from which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

32. In order to establish a *prima facie* case of discrimination under S.15 a claimant must prove that he or she has a disability within the meaning of S.6 and has been treated unfavourably by the employer. It is also for the claimant to show that 'something' arose as a consequence of his or her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

Findings of fact

33. We make the following findings of fact. References are to pages in the bundle.

34. The claimant suffers from Bile Acid Malabsorption (BAM). This was formally diagnosed in May 2021, but the claimant had been suffering from the condition for some 18 months prior to the formal diagnosis. We are satisfied that at the date of the decision to dismiss the claimant, 15 June 2022, the BAM had lasted for at least 12 months and therefore met the definition of long-term in s.6 EqA.

35. The effect of the BAM is that the claimant requires frequent toilet breaks and can never be too far from appropriate toilet facilities. This inevitably has an impact on how she organises her working and non-working life.

36. The respondent runs a plant nursery.

37. The claimant began working for the respondent on 11 April 2022. She had told the respondent that she had previous experience at a senior level undertaking similar work.

38. The claimant completed a new starter form when she commenced employment with the respondent and under the heading "relevant medical conditions" the claimant stated, "bile acid malabsorption" [65].

39. This document was dealt with by Joanne Ball, Director, and Jessica Ball, then production supervisor, was made aware of the claimant's condition before the claimant started her employment and she was told that the claimant might need to use the toilet more frequently than others.

40. The claimant was employed as a general nursery worker and her duties included propagation, potting-on, labelling, putting down, watering in, picking and cleaning plants for sale, care carding, pre-pricing plants ready for dispatch, dumping product and cleaning beds.

41. The respondent markets itself as providing excellence which enables it to charge slightly higher prices than its competitors and therefore the efficient performance of the staff is critical to its success.

42. The first six months of the claimant's employment was a probationary period during which the claimant's performance and suitability for employment would be continually monitored [56 *et seq*].

43. By 25 April 2022 management staff began having discussions with the claimant about her performance [66]. Issues included timeliness of order picking, speed and cleaning quality of certain plants, incorrect picking, chatter and work output and poor hanging basket quality. These concerns were dealt with in a manner that might be called informal, through face-to-face discussion between members of management and the claimant.

44. Discussions about the claimant's performance took place on at least seven occasions between 25 April 2022 and 24 May 2022 [66].

45. On 30 May 2022 the claimant went on holiday until 3 June 2022. The claimant was off sick from 6 June 2022 until 16 June 2022. That period of sickness related to an injury to her ankle and was unrelated to the BAM [69].

In fact, during her employment with the respondent the claimant had no sickness absence related to BAM.

46. The respondent's management met on a regular basis and discussed all staff issues. At a meeting on 15 June 2022 the management team express concern that the claimant was making too many mistakes. The concerns were set out in a note of the meeting as follows:

    "bad job done on baskets, too many mistakes, seems overly confident in own ability and doesn't seem to take on board of the comments from Kate re cleaning plants and quality/speed of picking. Mistakes made in picking wrong plants. Kate's opinion, it's easier when she has time off as we don't have to redo things!"

    [70/71]

47. Mr Simon Ball took responsibility for the decision to dismiss the claimant and drafted the dismissal letter which was handed to the claimant's mother (who also worked for the respondent) to give to the claimant. The dismissal letter is dated 16 June 2022 and is in the following terms:

    "We regret to inform you that the decision has been made to terminate your employment with [the respondent]. Whilst we appreciate that you have had some health issues, we feel that your contribution whilst on site has been less than we had expected. In line with your contract, your last day of employment will be Friday 15 July 2022. We would like to take this opportunity to thank you and wish you well for the future."

    [72]

48. In response the claimant sent the letter to Joanne and Simon Ball which appears at [73].

49. In that letter the claimant says that she was very open about her disabilities when she started her employment with the respondent, that at no point during her employment had any issues been brought to her attention about the quality of her work and that it was unfair to issue her with notice during a period of sickness absence. The claimant asserted that the justification for dismissing her was her "*health and disability grounds*" which she stated was a breach of the Equality Act 2010 specifically sections 13 and 15. The claimant said that she wanted to appeal against the decision to dismiss her.

50. Mr Ball responded on 17 June 2022 [74] stating that her letter would be forwarded to the respondent's HR consultant, but he ended his response saying, "*I do not see any change in direction*".

51. The respondent's HR consultant, Claire Baker, wrote to the claimant on 22 June 2022 [75] setting out what she understood were the claimant's grounds of appeal and arranging an appeal hearing to take place online for Thursday 23 June 2022.

52. That appeal hearing duly took place and the notes of it are in the bundle from [80].

53. The appeal notes are unremarkable in that there is a discussion of the claimant's grounds of appeal. During the appeal hearing the claimant said as follows:

> *"I am led to believe that the fact they mentioned health issues in my letter is why they've terminated my contract"*
>
> [82]

54. Miss Baker delivered her conclusion on the appeal by letter dated 24 June 2022 [84]. She rejected the claimant's appeal.

55. The claimant commenced early conciliation on 19 July 2022. The early conciliation certificate was issued on 8 August 2022 and the claimant presented her claim to the Tribunal on 29 August 2022.

Discussion and conclusions

56. We set out below our decisions on the various matters we have to decide.

The disability issue

57. We remind ourselves of the four questions we have to deal with in answering this question as follows,

    57.1. did the claimant have a mental and/or physical impairment? (the 'impairment condition'),

    57.2. did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition'),

    57.3. was the adverse condition substantial? (the 'substantial condition'), and

    57.4. was the adverse condition long term? (the 'long-term condition')?

58. The impairment condition is met. The claimant was suffering and continues to suffer from BAM. That has never been a matter of dispute in this case.

59. It is also not in dispute that the long-term condition is met.

60. What is in dispute is whether the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities.

61. The claimant was ordered to provide a disability impact statement at the preliminary hearing of this matter, and she did so [38 – 40]. Unfortunately, it is less than clear as to which normal day-to-day activities she says were substantially adversely affected by her condition. She states that the

condition can affect her mobility as well as her ability to concentrate but goes no further than that.

62. During the hearing however the claimant explained that given the number of times and the urgency with which she needed to use the toilet during a day, she was restricted, in the most general sense, to only participating in work and social life in circumstances where toilet facilities were sufficiently close. Inevitably this means that the claimant is unable to undertake any work or take part in any social event where she cannot be certain that reasonably proximate toilet facilities will be available, which fact is clearly very limiting. Even a lengthy shopping trip causes the claimant difficulty because no doubt even if toilet facilities are theoretically available, the claimant cannot be sure that they will in fact be available as and when she needs them. We consider as a minimum that the claimant's mobility is substantially limited by her impairment.

63. The definition of a substantial adverse effect is an effect which is more than trivial. To put it another way, if we find that there are adverse effects which are not trivial, we are bound to find that they are substantial, and in the Tribunal's judgment it is clear that the claimant's impairment does and did have a more than trivial adverse effect on her ability to carry out normal day-to-day activities and that therefore, at the relevant time, the claimant was a disabled person for the purpose of section 6 Equality Act 2010.

Respondent's knowledge of disability

64. We do not consider that this issue Is particularly complex. The respondent denies knowledge of the claimant's disability but accepts that it was aware that she suffered the impairment, BAM.

65. The respondent took steps to make what it calls adaptations to assist the claimant such as putting her to work in the despatch department because that was nearer to the toilets. It might be argued that these adaptations were of course reasonable adjustments. We do not see how, given the facts and circumstances, the respondent can credibly argue they either did not know or ought not reasonably to have known that the claimant was disabled.

66. We accept of course that for reasons which follow, it was not strictly necessary for the respondent to investigate whether the claimant's poor performance arose from her impairment, but we do find that the respondent ought reasonably to have known that the claimant was a disabled person within the meaning of the EqA.

Did the respondent discriminate against the claimant?

67. The claimant's case is predicated solely on her belief that the reason for her dismissal was the respondent's concerns about her health issues. She has interpreted the dismissal letter as meaning that she was dismissed for those health reasons.

68. We remind ourselves that at the case management hearing the claimant raised two matters as rising from her disability which she says caused

dismissal. The first of those things was sickness absence, but as we now know none of the claimant's sickness absence was related to her disability and therefore her sickness absence cannot be something which arose from her disability.

69. The second 'something arising' was said to be 'any performance issues'. However, during the course of the claimant's evidence, it became clear that the only performance issue which she says was potentially affected by her disability was the speed of her work and even that is put in a way which indicates a misunderstanding by the claimant of the respondent's decision.

70. There is no doubt that the respondent was concerned about the speed with which the claimant worked, but they were only concerned about the speed with which she worked when she was working. They were expressly not concerned with the overall amount of time the claimant spent doing her work during her working day, in other words they were not concerned with the fact that she needed to go to the toilet more often than other members of staff. The respondent accepted that position. They simply said that when the claimant was, for example, picking plants for clients, she needed to do so more quickly. Simon Ball explained his position when cross-examined by the claimant. He said that as the claimant was experienced, she was expected to be able to work at the required pace and that his reference to 'health issues' in the dismissal letter was his way of indicating that the amount of time the claimant had off from work (whether as sick leave or to go to the toilet) was being ignored in the decision to dismiss. As Mr Ball put it during cross-examination, "*speed means speed when doing the work, time to go to the toilet was irrelevant…we didn't dismiss you for going to the toilet. When you worked you were slow and the quality of the end product did not meet our standards…".*

71. The claimant's argument in relation to the speed of her work was that she would have had to go to the toilet and this would have adversely affected the speed at which for example she picked plants for clients. The difficulty with this argument is that there was no evidence that that was in fact the case. The claimant did not raise this as a ground for her appeal against dismissal, she does not appear to have raised it during the appeal and she had not raised it with any of the members of management when they were talking to her about the speed with which she was working. Further, it was not particularised as an issue at the preliminary hearing of this matter. In short, as we have said, at no point in her evidence did the claimant give any examples or bring forward any evidence that when asked to do a particular picking job she was interrupted by the need to go to the toilet which explains why she was slow.

72. We accept the evidence of Simon Ball that the respondent's concern in relation to speed was solely with the claimant's slow rate of work when she was working not, as it were, the amount of work she did during the day in a general sense. We also accept Mr Ball's evidence that the reference in his dismissal letter to health issues was not to indicate that the claimant's health issues had been taken into account in the decision to dismiss but rather that account had been taken of them in the claimant's favour and that they were

being discounted, notwithstanding which the claimant's performance was still considerably substandard.

73. Turning to the questions we have to determine (ignoring the justification question because it is not relied on by the respondent) these are:

    73.1. was there unfavourable treatment,

    73.2. was there something that arises in consequence of the claimant’s disability,

    73.3. was the unfavourable treatment because of (i.e. caused or substantially caused by) the something that arises in consequence of the disability,

74. In our judgment the claimant was unfavourably treated by being dismissed. That much is self-evident.

75. However, the claimant has failed to prove that there was something that arises in consequence of her disability. Of the two matters pleaded as the matters arising, neither the sickness absence nor the claimant’s ability to do her job to the standard required by the respondent (the performance issues) arose from the disability. Speed of work was one factor in the overall assessment of the claimant’s performance and there is no evidence that the speed at which she worked was in fact adversely impacted by her disability.

76. In our judgment the claimant has failed to prove facts from which we could decide that she had suffered unlawful discrimination and thus she has failed to shift the burden of proof to the respondent. For that reason alone her claim fails.

77. Even if we are wrong about that, and we do not consider that we are, we are of the unanimous view that the reason the respondent dismissed the claimant was her poor performance overall and her poor performance, including the speed of her work, was not something which arose from her disability and therefore the claimant’s claim fails for that reason in any event.

78. For those reasons the claimant’s claim that she was discriminated against contrary to s.15 EqA fails and is dismissed.

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Employment Judge Brewer

Date: 13 March 2024

JUDGMENT SENT TO THE PARTIES ON
28th March 2024

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FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/