EMPLOYMENT TRIBUNALS

Claimant: Mrs Kate Ashcroft

Respondent: Sandfields Pharma Ltd

Heard at: Cardiff **On:** 11 & 12 July 2024

Before: Employment Judge S Jenkins
Mrs J Beard
Mr P Collier

Representation:
Claimant: In Person
Respondent: Mr A Leonhardt (Counsel)

JUDGMENT having been sent to the parties on 12 July 2024, and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the reasons are as follows:

LIABILITY REASONS

Background

1. The hearing was to consider the Claimant's complaint of discrimination arising from disability, pursuant to section 15 of the Equality Act 2010, brought by way of a claim form issued on 19 September 2023, following early conciliation with ACAS between 16 August 2023 and 19 September 2023. The Claimant had originally also brought a complaint of unfair dismissal, but that was struck out on 19 December 2023, due to the Claimant not having been employed for the required continuous two-year period.

2. We heard evidence from the Claimant on her own behalf, and from Anthony Edwards and Matthew Hussain, both directors, on behalf of the Respondent. We were also provided with a written witness statement on behalf of a third witness for the Respondent, Julie Owen, pharmacy

assistant, but she was not present to be cross-examined, and her evidence was only really relevant to remedy in any event, which ultimately we did not need to consider.

Issues

3. The issues we had to determine, in addition to remedy which we did not ultimately have to decide, had been set out at pages 48-49 of the bundle, as follows:

1. Disability

1.1 Is the Claimant disabled?

2. Discrimination arising from disability s.15 EqA '10.

2.1 Did the Respondent treat the Claimant unfavourably by dismissing her?

2.2 Did the Claimant's sickness absence arise in consequence of her disability?

2.3 Was the unfavourable treatment because of that? Did the Respondent dismiss the Claimant because of her sickness absence?

2.4 If yes, was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aims were:

2.4.1 due to the business efficacy and/or ensuring the longevity of the Respondent's business by reducing costs.

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the Claimant and the Respondent be balanced?

2.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

3. The first issue, whether the Claimant was disabled at the relevant times, had been resolved in her favour following an early preliminary hearing before Employment Judge Brace on 11 April 2024.

Law

4. Section 15(1) of the Equality Act 2010 ("EqA"), which is headed, "*Discrimination arising from disability*", provides that:

   "*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."

   Section 15(2) goes on to say that section 15(1), "*does not apply if A shows that it did not know, and could not reasonably have been expected to know, that B had the disability."*

5. In relation to knowledge and constructive knowledge, the Equality and Human Rights Commission Code of Practice on Employment notes that an employer must do all that it can reasonably be expected to do to find out whether a person has a disability. However, the Employment Appeal Tribunal ("EAT"), in A Ltd v Z [2020] ICR 199, noted that any failure to enquire into a possible disability is not, by itself, sufficient to vest an employer with constructive knowledge. It is also necessary to establish what the employer might reasonably have been expected to know had it made such an enquiry.

6. The EAT also noted, in Gallagher v Abellio Scotrail (UKEAT/0027/19), that, whilst the respondent in that case had had some information about the claimant's condition, it had none of the detail required as to any substantial disadvantage the claimant had suffered by reason of her disability, its effects on her day-to-day activities, or the longevity of those effects, and therefore could not be fixed with constructive knowledge of disability.

7. With regard to the question of causation, the EAT in Pnaiser v NHS England and another [2016] IRLR 170, summarised the approach to be taken. First, the Tribunal must identify whether the claimant was treated unfavourably and by whom. It must then determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of 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 establish 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.

Findings

8. Our findings of fact, reached on the balance of probability where there was any dispute, are set out below. There was, in fact, little dispute over the events that took place.

9. The Respondent is a company which owns and operates two pharmacies. It was set up by four pharmacists in December 2022, initially to purchase a pharmacy business, the one in which the Claimant worked, in Sandfields, Port Talbot, run by Lloyds Pharmacy. The acquisition, subject to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), was completed on 1 April 2023.

10. The Claimant was employed at the pharmacy at the point of transfer, and then transferred to the employment of the Respondent. She was one of six or seven employees at the pharmacy, of whom three or four would be present at any one time. Her role was that of branch manager, with her focus being on administration and compliance. Whilst the Claimant had undergone some training with Lloyds, she had no specific NVQ or other qualifications relating to pharmacy services.

11. The Respondent was not provided with any contract of employment for the Claimant by Lloyds, and the only information it received about her was as part of the employee liability information that Lloyds was obliged to provide pursuant to the TUPE Regulations. That included basic information about the Claimant concerning her start date, hours, holidays, pay and benefits. It provided no information relating to the Claimant's health or her absences from work, other than noting a question of, "*Is the employee registered disabled?*", to which the answer "*Not Captured*" was provided.

12. At the time that the business was acquired by the Respondent, 1 April 2023, the Claimant was absent due to sickness, and she had been absent for a few weeks. She sent a message to one of the Respondent's directors on 29 March 2023, and in that she confirmed that she had been signed off due to sickness for the following 28 days. She noted that she was going through a divorce, which had been nightmarish and had really floored her, that her anxiety had been through the roof, but that she was feeling much better and that the medication she was taking was making a difference.

13. In a subsequent message that day, the Claimant noted that, once she was back at work her personal life would stay at home, and would not affect her

work life at all. She then concluded by saying that she would be back in 28 days and could not wait.

14. A welfare meeting took place between the Claimant and Mr Edwards on 28 April 2023. No notes of that meeting were taken, but the Claimant sent Mr Edwards a message on that day saying, "*Thank you for today*". Mr Edwards, in his witness statement, noted that the Claimant appeared to have been in a positive frame of mind during the meeting and the Claimant did not challenge that evidence.

15. The Claimant then sent a further message to Mr Edwards a day later, 21 April 2023, noting that her doctor was reluctant to sign her off, i.e. as fit for work, until she had completed her sessions with a counsellor, but that the doctor would "*100%*" sign her off in four weeks' time. The Claimant was then covered by Fit Notes lasting for a month in each case, covering the periods between 27 March 2023 to 27 April 2023 and then from 28 April 2023 onwards, both stating "*stress related problem*".

16. Soon after the Respondent took over the running of the business, it became apparent to its directors that, as pharmacists and directors were on duty at all times, they could undertake the duties previously undertaken by the Claimant as branch manager. The Respondent was also looking to develop other pharmacy services, and to introduce an Accredited Checking Technician ("ACT") or an NVQ 2 qualified checker to take on some of the duties undertaken by the pharmacists.

17. Mr Edwards then wrote to the Claimant on 26 April 2023, noting that, as at least one of the directors was present at the pharmacy on a daily basis, there was significant duplication between the role of director and branch manager, such that the branch manager role was potentially redundant.

18. Mr Edwards met with the Claimant on 26 April 2023 to discuss the potential redundancy, with a second meeting taking place on 3 May 2023. Mr Edwards described the Claimant as being very professional and pleasant during these meetings, which the Claimant did not challenge. Mr Edwards and the Claimant discussed other roles the Claimant could possibly do, with Mr Edwards confirming that any recruitment would be at ACT or NVQ 3 level, for which the Claimant would not be qualified. He confirmed that in an email to the Claimant on 6 May 2023.

19. On 13 May 2023, Mr Edwards then wrote to the Claimant, noting that no suitable role had been identified for her, and therefore, as things stood, her last day of work would be 31 May 2023, with the Claimant being paid in lieu of three months' notice and receiving pay in respect of any outstanding holidays. A letter confirming dismissal was then sent to the Claimant on 31 May 2023.

20. In relation to the ACT or NVQ 3 recruitment, Mr Hussain had attempted to recruit a person known to him, but she turned down the offered position on 14 June 2023. A broader search was then undertaken, and an NVQ 2 level person was appointed on 14 August 2023.

Conclusions

21. Applying our findings of fact and the applicable legal principles to the issues we had to decide, our conclusions were as follows.

22. We first looked at the question of knowledge or constructive knowledge of disability, as a claim under section 15 EqA cannot arise if the Respondent did not have knowledge or could not reasonably have been expected to have had knowledge that the claimant had a disability at the relevant time.

23. There was nothing to suggest that the Respondent, in the form of Mr Edwards, the decision maker, had knowledge that the Claimant was disabled at that time. The Claimant had been absent for a few weeks by the time the Respondent acquired the business on 1 April 2023, and then remained absent due to sickness, through to the termination of her employment on 31 May 2023. However, the Claimant had messaged one of the Respondent's directors at the end of March to put her illness down to her divorce, and to note that she was feeling better, and that medication she was taking was making a difference, and that she would be back in 28 days and could not wait to be back.

24. The Claimant then indicated to Mr Edwards on 21 April 2023 that, whilst she was due to be signed off by her GP for a further four weeks, as the GP was reluctant to certify her as fit for work before completing her counselling sessions, she would, as she described it, 100% be certified as fit for work in four weeks' time i.e. towards the end of May.

25. There was nothing therefore, that we saw that we felt could lead us to conclude that the Respondent, in the form of Mr Edwards, knew that the Claimant had a disability at the time.

26. With regard to constructive knowledge, we formed the same view. The indications provided to the Respondent by the Claimant were that her absence was going to be short term, and was referable to her particular domestic circumstances. In our view, there was nothing in the communications between the Respondent and the Claimant, whether in messages or in person, which would have put the Respondent on notice that the Claimant was potentially suffering from a condition which was likely to have a substantial, long-term, adverse effect on her ability to carry out day-to-day activities.

27. There was also nothing, in our view, that should have caused the Respondent to enquire further about the Claimant's health, and, even if the Respondent had enquired further, we doubted that the Claimant would have provided any further information which would have led the Respondent to consider that she was disabled. All the information provided by the Claimant at the time indicated that she would be returning to work in a short period and would then be fully fit. She also then presented, in a perfectly coherent and professional manner, in her meetings with Mr Edwards.

28. As knowledge of disability is a prerequisite for a section 15 EqA claim, our conclusion on the issue of disability meant that the Claimant's claim failed.

29. For completeness however, we nevertheless continued to consider whether, in any event, the Claimant's dismissal would have amounted to discrimination arising from disability, and we concluded that it would not.

30. Considering the constituent elements of section 15(1) and (2) EqA, the Respondent accepted that dismissal would be an act of unfavourable treatment. The Respondent also accepted that the Claimant's sickness absence was something which arose from her disability. The focus would therefore be on the question of causation; was the dismissal because of the Claimant's sickness absence?

31. We were not assessing the dismissal by reference to the standards required for an unfair dismissal claim, but, had we needed to do so, we would have concluded that the Respondent had established redundancy as the reason for dismissal. Its rationale for considering that it no longer needed the Claimant's branch manager role, in circumstances where one of the directors was always present, something that did not arise under Lloyds' ownership, was a compelling one. We could readily see why the owners of the business could have concluded that the administrative and managerial duties undertaken by the Claimant could have been undertaken by the pharmacist directors when present at the premises.

32. Whilst again stressing that we were not dealing with an unfair dismissal claim, we would also have concluded that the dismissal of the Claimant by reason of redundancy was fair. The Respondent had, as we have noted, demonstrated that a redundancy situation existed. It had reasonably concluded that the Claimant was in a pool of one as far as selection was concerned, and it had consulted with the Claimant over the redundancy and any alternatives to it.

33. With regard to alternative employment, the Respondent was initially looking for a qualified person to assist with the dispensing work, and it was only when the proposed recruit decided not to join, some weeks after the

Claimant's employment ended, that the search broadened for a more junior employee. Whilst the Respondent might have got back in touch with the Claimant at that stage, there was no obligation on it to do so in the circumstances, and it had also understood that the Claimant had other work to go to.

34. Overall, therefore, we would, had we needed to consider it in that context, have concluded that the Respondent's dismissal of the Claimant by reason of redundancy was fair. However, as we have noted, we were not looking at the Claimant's claim in that context, we were only looking at the question of whether the dismissal had been because of the Claimant's sickness absence. We saw no evidence that it was, and the Claimant's case, at its highest, was only that she felt that it had been.

35. Ultimately, therefore, had we concluded that the Respondent knew, or could reasonably have been expected to know that the Claimant was disabled at the time, we would nevertheless have concluded that the dismissal was not by reason of the Claimant's sickness absence such that her claim would have failed in any event.

COSTS REASONS

36. Subsequent to the delivery of our judgment on liability, the Respondent made an application for costs, which we decided in its favour. Our reasons in respect of that decision were as follows:

Background

37. The basis of the application was that the Claimant had acted unreasonably in pursuing the proceedings, falling within Rule 76(1)(a) of the Employment Tribunal Rules of Procedure. That unreasonableness was based on the fact that a deposit order had been made in this case, by Employment Judge Brace at a preliminary hearing on 11 April 2024, following her conclusion that the Claimant's argument that the Respondent knew, or could reasonably have been expected to know that she had a disability, had little reasonable prospect of success.

38. Rule 39(5) of the Employment Tribunal Rules then provides that if a Tribunal, following the making of a deposit order, decides the specific argument against the paying party, for substantially the reasons given in the deposit order, then the paying party shall be treated as having acted unreasonably in pursuing that specific allegation unless the contrary is shown.

Law

39. The provisions relating to costs are set out in Rule 76 of the Employment Tribunal Rules of Procedure, which provides that a Tribunal "*may make a costs order … and shall consider whether to do so, where it considers that a party … has acted … unreasonably in the bringing of the proceedings*".

40. The EAT, in Millan v Capstick Solicitors LLP and others (UKEAT/0093/14) described the approach to be taken by a Tribunal in considering costs as a three-stage exercise.

    1. Has the paying party behaved in a manner proscribed by the Rules?

    2. If so, the Tribunal must then exercise its discretion as to whether or not it is appropriate to make a costs order. It may take into account ability to pay in making that decision.

    3. If the Tribunal decides that a costs order should be made, it must decide what amount should be paid. Again, the Tribunal may take into account the paying party's ability to pay.

41. With regard to the amount of costs, the EAT, in Raggett v John Lewis PLC (UKEAT/0082/12), confirmed that if the receiving party can claim back the VAT element of any costs incurred, then those costs should be calculated net of VAT, because the receiver would otherwise receive a windfall.

The application

42. The Respondent sought an order covering two elements. One was counsel's fee for this hearing of £2,100.00 excluding VAT. The other was an element in respect of the Respondent's solicitors' costs. It was confirmed the Respondent has had to pay a fixed fee of £5000.00 plus VAT in that regard.

43. The Respondent was not able to accurately divide that payment in relation to the periods before and after the deposit order, and contended that much of the work regarding disclosure, preparation of witness statements, and preparation for this final hearing took place after the deposit order was made. It was however, prepared to accept payment of one half of the fixed fee i.e. £2,500.00 exclusive of VAT. That left a total amount being pursued by way of costs of £4,600.00.

Conclusions

44. Applying the three-stage approach suggested by the EAT in Millan, we readily concluded that the threshold for considering a costs order had

been met. As noted, Rule 39(5) provides that there is a presumption that a claim has been pursued unreasonably where the argument pursued fails for substantially the reasons given in the deposit order. That happened in this case, as the Claimant's claim failed because we were not satisfied that the Respondent knew, or could reasonably have been expected to know that the Claimant was disabled; the reason Judge Brace gave in her deposit order for making it in the first place.

45. We then moved to consider whether we should exercise our discretion to order costs to be paid. We noted that the Claimant was well aware of the consequences of paying the required deposit and continuing with her claim, as that had been spelled out by Judge Brace in the deposit order. All she could say in response was that all she had read suggested that costs were not usually ordered by Tribunals, and that an indication that her claim had little reasonable prospect of success was better than having no reasonable prospect of success.

46. The Claimant's comment that all she had read suggested costs were not usually ordered by Tribunals is broadly accurate, as there is no presumption that costs should be paid in tribunal proceedings. However, there is, nevertheless, a regime by which costs can be ordered pursuant to Rule 76, as we have set out, impacted, again as we have noted, by Rule 39(5). In our view, it was therefore appropriate to explore the ordering of costs in these circumstances.

47. As we have noted, the implications of the deposit order had been made very clear to the Claimant by Judge Brace. The Respondent had also sent a subsequent costs warning letter to the Claimant on 18 June 2024. In our view, the Claimant cannot have been under any illusion other than that if she continued with her claim, she could face a costs order.

48. By contrast, the Respondent has had to defend a claim, and to pay for that defence, which it has known, since April 2024 at least, had little reasonable prospect of success. Overall, therefore, we were satisfied that we should exercise our discretion and to order costs to be paid.

49. With regard to the amount of the order, we considered that the amount of costs being pursued was not unreasonable, both in terms of counsel's fee and solicitors' costs.

50. We also considered the Claimant's means. In that regard, we were satisfied that she has no capital assets, but the information she provided regarding her income and outgoings indicated that she would be capable, albeit potentially incrementally over a fairly long period of time, to meet an order that she pay costs of the magnitude pursued by the Respondent.

51. In the circumstances we considered that it would be appropriate to order the Claimant to pay the Respondent's costs in the sum claimed, i.e. £4,600.00. As noted by the EAT in the Raggett case, no account should be taken of VAT, as the Respondent will be able to recover any VAT it pays on the costs incurred. The cost order therefore was that the Claimant was ordered to pay the Respondent's costs in the sum of £4,600.00. It is entirely a matter for the Respondent, in discussion with the Claimant or otherwise, as to how it goes about enforcing that order.

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Employment Judge S Jenkins
Dated: 13 August 2024

JUDGMENT SENT TO THE PARTIES ON 21 August 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS