Case Number: 2300338/2023

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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr M Lovett		**Master Butchers Epsom Limited**

Held at London South (By video) **On 15 16 and 17 May 2024 16 August 2024 and 2 October 2024**

BEFORE: Employment Judge Siddall
Mr M Marenda
Mr P Morcom

Representation

For the Claimant: **In person**

For the Respondent: **Mr J Turpin**

RESERVED JUDGMENT ON CLAIMS FOR DISABILITY DISCRIMINATION

The decision of the tribunal is that:

1. The application by the Respondent to strike out the disability discrimination claims is refused.
2. The claim for failure to make adjustments under section 20 of the Equality Act 2010 is not well founded and does not succeed.
3. The claim for harassment under section 26 of the Equality Act is not well founded and does not succeed.

REASONS

1. The Claimant claims a failure to make reasonable adjustments and disability-related harassment.

2. He also claimed that unlawful deductions were made from his final salary payments, and that the Respondent did not provide him with written terms that complied with section 1 of the Employment Rights Act 1996. We were able to give judgment on these claims, both of which succeeded, at the conclusion of the hearing in May 2024 and we awarded the Claimant the total sum of £1913.70.

3. We heard evidence from the Claimant and from Mr Stephen Pawson, owner of the Respondent, and his daughter Ms Natasha Darko-Pawson.

Progress of the hearing

4. Although the hearing had been listed for three days commencing on 15 May 2024, we were not able to start the evidence on the first day. The Claimant had requested a video hearing due to his depression and anxiety. This application had been granted. At the start of the hearing on 15 May it transpired that although the Respondent had provided him with an electronic copy of the file of documents, they had not also provided him with a hard copy. This was a breach of the case management directions. The Claimant only had one device which he was using to log in to the video hearing and he was not able to access the file at the same time. We discussed various ways of overcoming this issue with the parties. Eventually Mr Turpin made the kind offer to travel to the Claimant's home and deliver a paper file of the documents on the afternoon of 15 May. We therefore adjourned the hearing until 10am on 16 May at which point the Claimant had received the file. As one of the three allocated days listed for hearing the claim was wasted, we reserved our position in relation to costs.

5. A further complication had arisen by that point.

6. At a hearing on 23 April 2024 Judge Rice-Birchall had found that the Claimant was a disabled person at all relevant times as defined by section 6 of the Equality Act 2010 because of depression and anxiety.

7. During the evening of 15 May 2024 (the end of the first day listed for hearing, although before evidence had commenced) the Respondent made an application for reconsideration of that decision. That application was just within the time limit. The tribunal read the application on the morning of 16 May 2024 – the second day of hearing. The application had not been mentioned at the start of the hearing on 15 May. Further delay was caused as a result.

8. The tribunal considered how to proceed at that point and sought the submissions of the parties. We considered adjourning the entire case pending reconsideration of the decision on disability. We concluded however that this was not in the interests of justice. The Claimant's employment ended in 2022. If the case was adjourned, it would be many months before it could be relisted. Both parties were ready to proceed with the evidence. The eventual decision of the tribunal was that we should hear all the evidence in the case. Having heard evidence and submissions, the tribunal was able to deliver a judgment on the money claims. We reserved our decision in relation to the disability discrimination claim pending reconsideration of the earlier decision that the Claimant was a disabled person.

9. The outcome of the reconsideration decision, which confirmed the finding that the Claimant was at all material times a person with a disability, was issued to the parties on 16 September 2024.

Facts and Conclusions

10. The facts we have found and the conclusions we have drawn from the evidence of both parties is as follows.

11. The Respondent is in business as a butcher's shop. The Claimant is an experienced butcher/manager.

12. It is not in dispute that around September 2022 the Claimant and Mr Pawson met on two occasions to discuss offering the Claimant a role as butcher/manager at the shop.

13. It is agreed that the two of them discussed terms. It is however the Claimant's case (as set out in his verbal evidence but not his witness statement) that during this conversation Mr Pawson spoke about one of his children who has a disability. The Claimant says that he made a comment that he understood the situation as he had struggled with lifelong depression.

14. Mr Pawson said that he could not recall the Claimant telling him this. If he had been told, he would have made a note of it as he would take such a matter seriously due to his own family situation. He agreed that one of his children does have a disability. He said that he recalled making a note of this discussion but he had not disclosed it as part of the tribunal proceedings, and did not now know where it was.

15. We have today seen an extract from Mr Pawson's daybook which refers to his meeting with the Claimant and records the terms discussed but makes no reference to him having depression.

16. The Claimant makes no reference to having a disability in his 'letter before action' to the Respondents which we have seen at page 55 of the bundle. He did not provide an account of this alleged conversation with Mr Pawson in his witness statement.

17. On balance we prefer the evidence of Mr Pawson, who states clearly in his witness statement that he was not aware that the Claimant had a disability. The Claimant made no mention of the alleged conversation in the coffee shop in his witness statement, nor was it referred to in his ET1. We place weight upon Mr Pawson's verbal evidence that if the Claimant's depression had been disclosed to him, he would have remembered this as he has a child with a

disability. Despite the very late disclosure we also note the record of his first meeting which makes no mention of the Claimant having a long-term health condition.

18. On 25 September 2022 the Respondent sent the Claimant an offer of employment which included some terms as to his role, hours and pay but did not comply with the requirement to give written particulars under section 1 of the Employment Rights Act 1996. The Claimant says that he was never given a full statement of his employment terms. The Respondent has not demonstrated that he was provided with one.

19. The Respondent's verbal evidence was that they have a company handbook which contains policies relating to sick pay, internet use and other matters. We were showing an extract from this handbook. There is no mention of a policy there relating to use of the internet. The Claimant says that he did not see any handbook until the extract was disclosed as part of these proceedings. The Respondent did not produce any evidence to show that a copy of any handbook was given to the Claimant, or that he was shown where it could be found. We find it more likely than not that the Claimant was not given a copy of the handbook nor directed to one prior to the termination of his employment.

20. The Claimant commenced employment as a butcher/manager on 3 October 2022. We find that he had overall responsibility for the day to day running of the shop and management of staff.

21. The Claimant's working arrangements were somewhat unclear. It was not in dispute that he worked in the shop from Tuesday to Saturday. His evidence was that after a few weeks a decision was made to close the shop on Mondays, and that he worked from home on this day, contacting clients to discuss potential catering orders. Mr Pawson said that the shop was not formally open to the public on Mondays after a trial of this in Mid-November but that the Claimant often attended the shop on this day as he used the time to provide training to the apprentice. The door could either be locked or open and a member of the public would be able to see that the lights were on in the shop and could go in to purchase something if needed and staff were available. We

find that the Respondent's evidence on whether the Claimant was required to attend the shop on Mondays was very unclear.

22. It is the Respondent's evidence that they asked the Claimant a number of times to carry out a stock-take, especially in the run up to the Christmas period. Their case is that on or around the 23 November 2022 the Claimant was advised that he must carry out a stock-take before ordering any further food, but that after this he placed a further order for around £600. We have seen the invoice for this order which is dated 29 November 2022.

23. The Claimant's evidence is that he was told to do a stock-take and agreed to carry it out the following Wednesday 30 November but was not told that he could not order any food before that had taken place.

24. On 29 November Ms Darko-Pawson messaged the Claimant and expressed her unhappiness about the food order. He replied that he had agreed to do the stock-take by the following Wednesday and was not aware of any instruction not to order any more meat until then.

25. Having noted this email, we find on balance that the Respondent has not demonstrated that the Claimant was instructed not to place any further orders. The documentary evidence does not support such a conclusion.

26. On the 25 November 2022 the Claimant sent a letter of resignation, suggesting that he felt that it would be better if he sought work elsewhere. He gave one week's notice to end on 2 December 2022.

27. The Claimant would usually have worked on Saturday 26 November 2022. Despite some confusion as to dates, having considered the evidence we accept that whether or not he worked, he was paid for that day.

28. In parts of the witness statement the Respondent asserted that the Claimant had not attended work on Monday 28 November due to a train strike. They later clarified that the train strike had been on 7 November, but that the Claimant was not at work on 28 November for an unspecified reason. It appears that the Claimant was paid for that day.

29. On 29 November 2022 the Claimant notified the Respondent around 6.45am that he would not be in work as his partner was very unwell. On this same day, Ms Darko-Pawson messaged him about the stock-take.

30. In the meantime, another issue had arisen. An external contractor who was installing a new till system contacted the Respondent in a Whatsapp message to say 'I hope Neil is not the joker who was typing "donkey porn" on the laptop part way through the checks I was doing last week". Neil was the apprentice in the business.

31. Ms Darko-Pawson made enquiries into this matter. She spoke to the contractor and to Neil and accessed the CCTV in the shop. She formed a view that the Claimant had been involved in viewing animal porn on the laptop.

32. At 3.09pm on 29 November Ms Darko-Pawson emailed the Claimant for a second time. He was called to a disciplinary hearing on 30 November at 9.30am. The enclosed letter refers only to the allegation that the Claimant had participated in accessing porn through a company laptop.

33. The letter states that the disciplinary procedure was enclosed but this was not in the tribunal bundle and has never been shown to us. We were told however and accept that the Respondent operates on the basis that staff should be given at least 24 hours' notice of a disciplinary hearing. Such notice was not provided in this communication.

34. In his email sent at 17.27 on the 29 November 2022 the Claimant objected to this saying he had insufficient time to prepare for the hearing. He stated that the Company were aware that he had a disability and raised a grievance. He said that he was suffering with depression, stress and anxiety and was going off sick that day.

35. The Respondent agreed to move the hearing to 3pm on the afternoon of 30 November 2022. The Claimant did not attend.

36. The Claimant has not provided a sickness certificate in relation to his absence from work nor in relation to the period immediately following the termination of his employment. We note from the GP records that are in the bundle that he did not consult his doctor between June 2022 and June 2023.

37. On 1 December Ms Darko-Pawson advised the Claimant that the disciplinary hearing had taken place and that the allegations against the Claimant had been substantiated. However, the Respondent would take no further action as the Claimant had already resigned. She went on to say that they would be 'reviewing the overspend in the business' and therefore the Claimant's December pay was under investigation, but he would be paid for November as normal.

38. The Claimant's employment ended on 2 December 2022.

The Claimant's new employment

39. During questioning by the Respondent, the Claimant accepted that prior to handing in his notice he had reached a verbal agreement to start working for another company, Classic Fine Foods Limited. He says that after his employment with the Respondent ended, he had a couple of weeks off as he was feeling unwell due to the matters referred to below. He worked for this company under a fixed term contract for around a year on a salary of £40,000. When asked about documentation relating to this position, he says that he had none. He says that he regularly deletes emails that are three months old. The offer was a verbal one, he was not given any written terms and he had destroyed or not kept all his payslips.

40. The Respondent suggested that the Claimant may in fact have started work for Classic Fine Foods Limited prior to the date when his employment with the Respondent terminated. We were not showing any evidence of this. Nevertheless, we considered that the Claimant should have disclosed details of his new employment for inclusion in the file of documents. Such information was relevant to any claim for loss of earnings (which the Claimant later confirmed he was not pursuing) and for injury to feelings (as the Claimant was

asserting that he was not well enough to commence his new job for around two weeks).

41. At the end of the hearing on 17 May 2024 we therefore made an order that the Claimant should disclose information about all wages received by him from Classic Fine Foods Limited, plus any forms P45 and P60 related to this employment. The Claimant applied to vary this order arguing that it unnecessary, but that application was rejected by Judge Perry on 19 June 2024. We have today seen a copy of a payslip provided by the Claimant which he says shows that during his first month of employment with Classic Fine Foods Ltd he only received a proportion of his monthly salary. He says that this supports his case that he did not start work for them on or before 1 December 2022. The Claimant has provided none of the other information ordered by the tribunal including his forms P45 and P60.

The Disability Claims

42. As stated above, it had previously been decided that the Claimant was at all material times a person with a disability under the Equality Act 2020.

43. Judge Rice-Birchall noted that the Claimant had experienced intermittent depressive episodes going back to at least 2005 and concluded that:

> *'The claimant's condition is a recurring condition which has a substantial adverse effect during depressive episodes and those episodes are likely to recur, as they have over a number of years.'*

44. We turn to the specific claims made by the Claimant.

Failure to make reasonable adjustments.

45. The Claimant alleges that the Respondent failed to make reasonable adjustments in relation to calling him to a disciplinary hearing on 30 November 2022.

46. Under section 20 of the Equality Act 2010 an employer may have a duty to make reasonable adjustments where a 'provision, criterion or practice [PCP]…puts a disabled person at a substantial disadvantage in relation to a 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'.

47. Having considered the evidence provided by the Respondent we find that they operated a provision criterion or practice of requiring staff to attend a disciplinary hearing upon 24 hours' notice if there were allegations of misconduct against them.

48. We have considered whether the invitation to attend placed the Claimant at substantial disadvantage in comparison with others who did not have his disabilities.

49. It is likely that anyone called to a disciplinary hearing to answer allegations that they had accessed obscene and pornographic material whilst at work might feel anxious and stressed. We accept however that a person with a history of depression and anxiety might experience greater adverse effects than someone who did not have a similar mental illness. We accept that it is possible that the effects would have been greater if a person was given only a short time to prepare for the hearing. In the case of the Claimant, his medical history makes it clear that he had experienced depressive episodes during periods of stress. We find it more likely than not that being called to a disciplinary hearing to face a serious allegation at short notice risked triggering a depressive episode such as the Claimant had experienced in the past (although we have been provided with no information about the symptoms, severity or duration of this episode). In all the circumstances we find that this requirement placed him at a substantial disadvantage.

50. Under paragraph 20 of Schedule 8 of the Equality Act 2010 no duty to make reasonable adjustments arises if the employer did not know and could not reasonably be expected to know that a person a) has a disability and b) 'is likely to be placed at the disadvantage' referred to in section 20(3) of the Act.

51. It is the Respondent's case that they were not aware and could not have been aware that the Claimant had a disability.

52. We have considered the question of knowledge. For the reasons set out above we have concluded that the Claimant has not demonstrated that he told the Respondent that he had long term depression prior to the start of his employment. The Respondent was therefore not aware of the Claimant's condition prior to sending out the invitation to attend a disciplinary hearing on 29 November 2022.

53. The Claimant did not have any sickness absence related to his depression prior to the end of November 2022. Nor is there any other evidence of matters that might have suggested to the Respondent that he had an underlying and long-term mental illness.

54. We therefore conclude that the only evidence that any information concerning the Claimant's depression was communicated to the Respondent is in the email he sent them on 29 November 2022 in reply to that invitation.

55. In that email the Claimant stated that the Respondent was 'aware' that he suffered from 'clinical depression and anxiety'. As set out above we find that this email was the first occasion when the Respondent was made aware of this.

56. He goes on to say that 'Consequently I am now suffering with depression, stress and anxiety'.

57. We draw two inferences from this. First, we find that the Claimant was putting the Respondent on notice that he had a mental impairment. Second, we place weight on the phrase 'I am now suffering…'. This suggests that immediately prior to the notice of the disciplinary hearing, the Claimant had not been experiencing symptoms. He was however informing the Respondent that receipt of notice had triggered an episode of depression and anxiety. This is consistent with the finding of Judge Rice-Birchall about the nature of the illness he suffers from and its intermittent but nevertheless recurring effects.

58. We have considered this evidence carefully in light of paragraph 20 of Schedule 8. We have taken into account the guidance set out in **Seccombe v Reed in Partnership Limited** and **Gallop v Newport City Council**.

59. We conclude that although it is more likely than not that the invitation to attend a discplinary hearing did indeed trigger symptoms of anxiety for the Claimant, his email dated 29 November was simply not sufficient to put the Respondent on notice that he had a disability. The effect of the email dated 29 November was to notify the Respondent that the Claimant had suffered from mental illness in the past and that the invitation letter had made him unwell again. At this point the Respondent had no information about how long the condition had lasted, how often he had been unwell, the effects of the condition nor its severity. He did not provide any medical evidence.

60. Further, there had been no prior indications that the Claimant would be particularly vulnerable if required to attend a disciplinary hearing nor that a hearing at short notice would be particularly difficult for him.

61. Although in other circumstances an employer might have been expected to make further enquiries at this point, we find that in this case the Respondent could not reasonably be expected to do so. We note that they are a small business with limited resources. It is also crucial to note that the Claimant had already resigned, and his employment was due to end just three days later. It was not reasonable to expect the Respondent to have sought more detailed information about the Claimant's condition at this point.

62. We therefore find that the Respondent did not know and could not be expected to know, as at 29 November, that the Claimant had a disability and that calling him to a hearing at short notice would place him at a substantial disadvantage. They lacked the requisite level of knowledge for the duty to make adjustments to apply.

63. If we are wrong on our interpretation of the email of 29 November, and if i) the Respondent was made aware that the Claimant had a condition that amounted

to a disability and that ii) calling the Claimant to a disciplinary hearing at short notice did place him at a substantial disadvantage, what finding would we make in relation to the claim that there was a failure to make adjustments?

64. First, we find that it was reasonable for the Respondent to call the Claimant to a disciplinary hearing in relation to the allegation made by their contractor. At this point they were not aware of his depression and anxiety. However once made aware of a disability, if they had realised that calling him to a hearing at short notice would be very difficult for him, are there steps that it would have been reasonable for them to take to alleviate any disadvantage caused to him?

65. It was not reasonable to expect them to cancel the disciplinary process as there were legitimate concerns that required investigation. However, we have asked ourselves whether it would have been reasonable for the hearing to be postponed for a longer period.

66. We find that giving 24 hours' notice or less of a disciplinary hearing to face allegations of gross misconduct is short notice that would often be considered unreasonable under the ACAS Code of Practice. The Claimant was well within his rights in requesting a longer period. The Respondent's concession in moving the hearing back by six hours was minimal and did little to mitigate any adverse effects.

67. However, we remind ourselves that in considering whether it is reasonable to make an adjustment we must also consider whether it would be effective in removing any disadvantage.

68. Paragraph 6.28 of the Equality and Human Rights Commission Code of Practice on Employment, under the heading of reasonable adjustments, states that one of the factors that might be taken into account in deciding if an adjustment would be reasonable is: 'whether taking any particular steps would be effective in preventing the substantial disadvantage'.

69. The Claimant had resigned, and his employment was due to end two days after the date scheduled for the hearing. He was understandably stressed and

anxious about the hearing, but we find that it would not have been reasonable for the Respondent to cancel the hearing or move the hearing to a date after his employment had ended, at which point he would have had no duty to co-operate whatsoever.

70. We draw an adverse inference from the fact that the Claimant has failed to provide full documentary evidence about the dates of his employment with Classic Fine Foods Limited. His allegation that he was unwell for a couple of weeks after his employment ended as a result of a recurrence of his symptoms of depression and anxiety is unsupported by any medical evidence and we take into account that he has failed to comply with a specific order to provide further information about this including his forms P45 and P60. Although there is no evidence to suggest that he started his new job prior to 3 December, in light of this failure we find it more likely than not that he started work shortly after his employment with the Respondent had ended. The payslip produced today indicates that he was working for Classic Fine Foods for much of December. We find that the Claimant had little incentive to attend a hearing prior to 2 December, and none after that date. Even if the hearing date had been moved by a couple of days, it is more likely than not that the Claimant would not have attended, and the outcome would have been the same.

71. We also find that the Claimant failed to demonstrate that he suffered continuing ill-health symptoms after his employment ended which delayed him taking up his new role.

72. To conclude: even if made aware by the email of 29 November 2022 that the Claimant was a person with a disability who had been placed at a substantial disadvantage by the decision to call him to a disciplinary hearing at short notice, any steps taken to delay the hearing would not have removed that disadvantage. The Respondent did not therefore fail to take any reasonable steps and the claim under section 20 fails.

Disability-related harassment

73. The Claimant alleges that the threat to withhold his salary violated his dignity and created an intimidating environment related to his disability contrary to section 26 of the Equality Act 2010.

74. This claim does not succeed. We note that the Respondent threatened to review the December salary, but this was not in any way related to the Claimant's stress and depression, which the Respondent became aware of on 29 November 2022. As the Claimant himself said a number of times, he believed that the Respondent was retaliating against him because he had resigned. He did not assert in his evidence that the Respondent's actions were related to his depression. There is nothing to link the email of 1 December to the Claimant's mental health. The case has not been made out.

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Employment Judge Siddall
Date: 2 October 2024

Judgment sent to the parties and entered in the Register on: 26 November 2024 : :

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For the Tribunal Office:

P Wing