

EMPLOYMENT TRIBUNALS

Claimant: Ms H Holdsworth

Respondent: West and North Yorkshire Chamber of Commerce and Industry

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Leeds

On: 21, 22 and 23 September 2020

Deliberations: 16 October 2020

Before: Employment Judge Shepherd

Members:

Mr M Taj

Mr G Harker

Appearances:

For the claimant: In person

For the respondent: Mr Azman

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claims of Disability Discrimination are not well founded and are dismissed.
2. The claims of unauthorised deduction from wages and breach of contract are dismissed upon withdrawal.

REASONS

This hearing took place partially by CVP video link. The parties and their witnesses joined by video link. The Employment Judge and Mr Taj attended in person and Mr Harker attended by video link. There were technical difficulties which meant that the claimant attended the Tribunal hearing in person from the afternoon of 22 September 2020. There were substantial delays and this meant that the hearing could not be

completed in the three days that had been listed. The hearing of the evidence was completed. The parties proposed and agreed to provide written submissions and a further day for deliberations by the Tribunal was arranged.

1. The claimant represented herself and the respondent was represented by Mr Azman.

2. The Tribunal heard evidence from:

Heidi Holdsworth, the claimant;
Paul Tansey, Lead Business Advisor;
Natasha Hudson, HR Manager;
Carolyn Townsley, Business Services Manager.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 104. The Tribunal considered those documents to which it was referred by the parties.

4. The issues to be determined by the Tribunal were discussed at the commencement of the hearing. They had been identified at a Preliminary Hearing before Employment Judge Bright on 15 April 2020 as follows:

Direct discrimination because of disability (section 13 Equality Act 2010 (EQA))

4.1. Was the termination of the claimant's employment "less favourable treatment, i.e. did the respondent treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances?

4.2. If so, was this because of the claimant's association with her disabled father?

4.3. Or, to put it another way, what was the reason the respondent terminated the claimant's employment? Did the claimant's association with her disabled father form any part of that reason?

Discrimination arising from disability (section 15 EQA)

4.4. Did the claimant's working from home arise in consequence of her father's disability?

4.5. Did the respondent treat the claimant unfavourably by terminating her employment because she worked from home?

4.6. If so, does the wording of section 15(1)(a) EQA that 'A treats B unfavourably because of something arising in consequence of **B's disability**' (Employment Judge Bright's emphasis) defeat the claimant's claim or can it be read in accordance with European law so as to permit a claim on an 'associative' basis?

4.7. If so, has the respondent shown that terminating the claimant's employment was a proportionate means of achieving a legitimate aim?

Unauthorised deductions

4.8. Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted?

Breach of contract

4.9. To how much was the claimant entitled in reimbursement of expenses?

5. It was agreed that those were the issues to be determined by the Tribunal at this hearing. The claims of unauthorised deductions from wages and breach of contract had been resolved and the claimant withdrew those claims.

6. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions. Where the Tribunal heard evidence on matters for which it makes no finding or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its conclusions in an attempt to avoid unnecessary repetition and some of the conclusions are set out in the findings of fact.

6.1. The claimant commenced employment with the respondent on 30 September 2019. She was employed in the role of Business Advisor. She was provided with induction training.

6.2. The claimant's father was seriously ill and it was conceded by the respondent that he was a disabled person within the meaning of section 6 of the Equality Act 2010 and that the respondent was aware of his disability.

6.3. A 1-2-1 meeting took place with Paul Tansey, the claimant's line manager on 8 November 2019. This was a review of the claimant's performance in the October 2019 period. The claimant had taken 11 days pre-arranged holiday and had not been in a position to perform her role for over three weeks. The 1-2-1 was largely positive but Paul Tansey did have some concerns and provided some guidance to the claimant.

6.4. A second 1-2-1 took place on 10 December 2019. This was a review of the claimant's performance during November 2019. Paul Tansey said that, although there were some good signs about the claimant's performance, they were insignificant and he could not pass her probation. Rather than ending the claimant's employment, he decided to extend the claimant's probationary period by a further three months to allow her more time to improve.

6.5. On 12 and 13 December 2019 the claimant sent two emails to Paul Tansey. The first email was sent at 21:39 on 12 December 2019 and stated among other things:

“I don't know if you are aware, but a member of staff which unfortunately Paul spent some time in close proximity to while offering support was sent home with suspected Norovirus. This is very concerning for me due to my dad. I had planned to go into the office tomorrow to take Ted's claim in and complete admin. I would prefer to work from home but this puts me in an uncomfortable position in the light of our meeting this week. Please could you confirm if it is acceptable for me to work from home or you would prefer me to go in.”

6.6. The claimant said that she had attempted to send this email much earlier, shortly after 18:10 but, due to her broadband connection difficulties, it was not actually sent until 21:39. The claimant said that it was accepted that she could work from home when she wished to do so. She did not need to seek permission and that was why she did not follow this email up. In addition, she had checked Paul Tansey's diary and he was attending a Christmas event on 13 December 2019 and she did not wish to disturb him.

6.7. The Tribunal finds that the claimant was seeking permission to work from home on 13 December 2019. She asked her line manager to confirm that it was acceptable. She had worked from home in the past without seeking permission but the email was sent following the 1-2-1 on 10 December 2019 when she had been asked to be more visible in the Bradford office.

6.8. Paul Tansey's evidence was that he agreed that the Business Advisers could work from home and the claimant did not need to seek his permission. Notwithstanding this he had made it clear that he expected her to have a higher profile and be more visible in Bradford.

6.9. On 13 December 2019 at 01:13 the claimant sent a further lengthy email to Paul Tansey which a number of issues were raised and it was stated:

“I really need to respond to my recent 1.2.1.

I was very shocked and disappointed and did not really comment in the 1.2.1. The main reason I am so shocked, is it was completely unexpected compared with my last 1.2.1. Which was positive....

I know we have discussed the issues around the targets set but in light of this week. I would like to let you know I feel that these are unachievable without having some existing clients that have hours already against them...

I do understand the extension of the probation but only based on the time I have been in the role, as it is only a matter of weeks, I do have an issue around the reasons why. I feel I have been given a difficult area

with two current advisers still working with their client base and at a quiet time of year and this has put me at an unfair disadvantage.

I do need to make you aware of the effect the 1.2.1 has had on me this week. I haven't slept very well, and my colleagues around me are aware that I am not myself. I do not wish to discuss this with them but it is especially challenging when there is so much banter in the office. I have found the last few days hard to take, as my integrity has been challenged around my commitment to this role, whilst people are on the wind down for the Christmas period.

The reason for this long email is because I am passionate about my job and I really do love supporting businesses and even after two days I am still heartbroken.”

Once again, the claimant told the Tribunal that she had attempted to send this email earlier in the evening.

6.8. Paul Tansey said that he did not see the first email until late afternoon on 13 December 2019 and that for the whole day he did not know where the claimant had been working. The claimant had failed to follow up that email and that demonstrated a failure to understand and follow the absence and sickness reporting procedures.

6.9. On 13 December 2019 at 16:45 Paul Tansey sent an email to Carolyn Townsley stating:

“I didn't know someone has Norovirus – please see below. Heidi's father suffers from incurable leukaemia, has been in hospital recently and she thought he might be close to death. However, he recovered sufficiently to be allowed home (he was either sent home or being sent when I last asked her about him). I know, because my father has the same condition, that it can remove the patient's immune defences from time to time and that is when they are up most risk of contracting something. I feel I'm in a difficult position with this and can't win whatever I say. I did see this email this morning (received last night at 9:40) but because of her other lengthy email (and the Wakefield complaint) I have only just got round to dealing with it. I don't know where she worked from today.

I'd like some guidance please, not just about this instance but also about any future requests I get from Heidi about working from home when people in the office are ill. She hasn't asked before.”

6.10. Paul Tansey said that the second email changed his opinion of the claimant. He had thought that she was capable of doing the job required of her to the correct standard but, following the second email, he thought she was not capable of doing the job because she was not grasping what was required of her and she was not understanding why she was being given the feedback she was. He thought there would be little to no improvement in the claimant's performance and that it would be better to end her employment at that time

rather than waiting until the end of the extended probation period. He said that both of the emails 'spoke to him' about her unprofessionalism and led him to believe that she did not grasp the points he raised regarding improvement.

6.11. Paul Tansey said that the decision to end the claimant's employment only one week after the claimant was told her probation was being extended was made as a result of the two emails that had been sent to him.

6.12. The claimant attended a meeting with Carolyn Townsley, Business Services Manager and Natasha Hudson, HR Manager on 17 December 2019. In that meeting the claimant was informed that it had been decided that her employment was coming to an end due to poor performance and standards not being met.

6.13. On 17 December 2019 Natasha Hudson wrote to the claimant stating as follows:

"We refer to your offer of appointment letter and your contract of employment dated 30 September 2019, both of which specify that your employment was subject to a three-month probationary period, which was extended for a further three months.

We have carefully monitored your performance and conduct during your probationary period and we are now writing to advise you that, unfortunately, the Company has taken the decision to terminate your employment for the following reasons:

- not reaching performance standards required.

You are entitled to receive 1 weeks notice of termination of your employment. You not required to work out your notice period. We therefore confirm that your date of termination will be 24 December 2019.

You will receive your P45 in due course and you will be paid the following:

- Your normal salary at the date of the termination of your employment
- a payment in lieu of your notice period since we do not require you to work out this period
- a sum in respect of accrued but untaken annual leave entitlement

Please note that in accordance with your contract of employment, the Company reserves the right to deduct from your final termination payment a sum in respect of any annual leave taken in excess of your accrued entitlement as at your termination date."

6.14. On 2 January 2020 the claimant sent an email to the respondent requesting a reconsideration of the decision. She raised a number of issues including her belief that the issues arose after she had informed Paul Tansey

that her father was terminally ill and the request that she could work from home because of her father's condition.

6.15. Natasha Hudson wrote to the claimant on 13 January 2020 confirming that she had investigated the issues raised. It was indicated that there was no evidence of discrimination, the claimant had been supported in her need to have time off during the first two weeks of employment and throughout her employment. It was indicated that the reason for not confirming the claimant's appointment was due to poor performance.

7. The Law

Direct discrimination

Section 13 of the Equality Act 2010 states:

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

8. In **Islington Borough Council v Ladele** [2009] ICR 387 Mr Justice Elias explained the essence of direct discrimination as follows:

“The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic.”

advertise their prejudices: indeed, they may not even be aware of them”

9. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome.

10. Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong** [2005] ICR 931 and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

“The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer... then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination.”

11. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar** [1998] ICR 120.

12. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

13. Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the Tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why.

As Lord Nicholls said in **Nagarajan v London Transport**,

“Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision.”

14. Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

15. **Discrimination arising from Disability**

Section 15 of the Equality Act 2010 states:

Section 15

- (1) A person (A) discriminates against a disabled person (B) if –

- (a) A treats B unfavourably because of something arises in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Sub-Section (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
16. Under section 15 there is no requirement for a claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.
17. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?
18. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.
19. **Associative discrimination**
- Associative discrimination occurs when someone who does not have a protected characteristic themselves is discriminated against because of someone else's protected characteristic.
20. The wording of the definition of direct discrimination in the Equality Act is wide enough to cover associative discrimination as opposed to section 15 in which it is provided that the discrimination is unfavourable treatment "because of something arising in consequence of B's disability". The broader wording in section 13 of the need to consider whether the claimant's protected characteristic was the reason for the treatment complained of means that associative discrimination is covered.
21. It is generally thought that associative discrimination is limited to direct discrimination and harassment. Two cases **CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia CJEU Case C- 83/14 [2015]** and **Thompson v London Central Bus Company limited UK EAT/0108/15** suggest it may also apply to cases of indirect discrimination.
22. Those cases merely provide a suggestion that associative discrimination

may extend to indirect discrimination and victimisation the CJEU case is a reference to the height of fixed electricity meters in a Bulgarian town which was inhabited mainly by persons of Roma origin...

The Thompson case was in respect of victimisation of an employee for a protected act done by a member of the same trade union as the claimant in the EAT, HHJ Richardson held that no particular form of association was required. Indeed "association" is not as such the essence at all. The issue is what the reason for the treatment was and if it is a protected act, no matter who did it then the treatment is unlawful.

23. The Tribunal finds that the authorities referred to do not establish that a complaint of associative discrimination can be brought under section 15. That section specifically states that the disability must be the claimant's disability. It does not extend to associative discrimination. The Tribunal is satisfied that the only claim that can be brought is one of direct associative discrimination.

24. **Burden of Proof**

Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

25. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** and approved again in **Madarassy v Normura International plc [2007] EWCA 33**.

26. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against her. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the

burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

27. Mr Azman, on behalf of the respondent, provided written submissions to the Tribunal and the claimant also chose to provide written submissions to the Tribunal. They also provided responses to the other party's submissions. These submissions were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made even where no specific reference is made to them.

28. **Conclusions**

29. The Tribunal has considered the issues that have been identified and agreed and its conclusions in respect of those issues are set out as follows.

30. Direct discrimination

Was the termination of the claimant's employment 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances?

If so, was this because of the claimant's association with her disabled father?

Or, to put it another way, what was the reason the respondent terminated the claimant's employment? Did the claimant's association with her disabled father form any part of that reason?

31. The Tribunal is satisfied that the reason for the claimant's dismissal was not established to be because of the claimant's association with her disabled father. The Tribunal has considerable sympathy with the claimant. She was dismissed following an emotional reaction to a performance review and the extension of her probation period without any discussion or attempt to reconcile matters. She was harshly treated. Had this been an unfair dismissal case it is likely that there would be a finding that there was no warning, no discussion and no opportunity for the claimant to answer the charges against her. The dismissal would probably have been found to be substantively and procedurally unfair. However, this is not an unfair dismissal claim and the Tribunal must reach its conclusions on the discrimination claims and the issues that had been identified.

32. *Discrimination arising from disability (section 15 EQA)*

Did the claimant's working from home arise in consequence of her father's disability?

33. The Tribunal is satisfied that the claimant's working from home on 13 December 2019 was in consequence of her father's disability.
34. *Did the respondent treat the claimant unfavourably by terminating her employment because she worked from home?*
35. The reasons set out in these conclusions, the Tribunal is not satisfied that the claimant's employment was terminated because she worked from home.
36. *If so, does the wording of section 15(1)(a) EQA that 'A treats B unfavourably because of something arising consequence of **B's disability**' (Employment Judge Bright's emphasis) defeat the claimant's claim or can it be read in accordance with European law so as to permit a claim on an 'associative' basis?*
37. The wording of section 15 of the Equality Act and the relevant authorities do not permit a claim of associative discrimination because of something arising in consequence of disability.
38. *If so, has the respondent shown that terminating the claimant's employment was a proportionate means of achieving a legitimate aim?*
39. The Tribunal is satisfied that the reason for the claimant's dismissal was not shown to be because she worked from home and was not by reason of associative discrimination. The claimant has not established facts from which it could be concluded that her dismissal was because of her association with her disabled father.
40. The Tribunal finds that the respondent took the view that the email was unprofessional. Carolyn Townsley referred to the inappropriateness of sending emails in the early hours of the morning and she reached the conclusion that the working relationship between the claimant and Paul Tansey had broken down and could not be fixed. There was no credible evidence from which the Tribunal could conclude that it was because of the claimant's father's terminal illness.
41. In these circumstances, the burden of proof has not shifted to the respondent. If it had, the Tribunal is satisfied that the respondent has shown that the reason for dismissal was not because of the claimant's father's terminal illness. The respondent has established that the reason for the dismissal was its perception of the claimant's performance and conduct and the breakdown of the working relationship with her line manager.
42. Carolyn Townsley said she concluded that the working relationship between the claimant and Paul Tansey had broken down and could not be repaired if the claimant continued to work for the respondent.

43. Carolyn Townsley said that the claimant's father's medical condition never crossed her mind when deciding to end the claimant's employment. She referred to:

“The lack of ownership by Heidi for her performance shortcomings, her failure to improve, her lack of understanding and the breakdown in the relationship between Heidi and Paul were the reasons why her employment ended”

The Tribunal is satisfied that the respondent has established that this was the reason for the claimant's dismissal and that the claimant's association with her disabled father did not form any part of that reason.

44. In the circumstances, the unanimous judgment of the Tribunal is that the claims of disability discrimination are not well-founded and are dismissed

Employment Judge Shepherd

22 October 2020