



EMPLOYMENT TRIBUNALS (SCOTLAND)
Case No: 6000108/2023

Held in Glasgow on 2, 3 and 4 September 2024

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**Employment Judge M Robison
Tribunal Member J Wallage
Tribunal Member S Singh**

10 **Mrs D Marlow**

**Claimant
Represented by:
Mr I Marlow -
Husband**

15 **SunWaves 5 Ltd**

**Respondent
Represented by:
Mr L Bandoni -
Operations Manager**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims for disability discrimination are not well-founded and are therefore dismissed.

REASONS

Introduction

25 1. The claimant lodged a claim with the Employment Tribunal on 16 January 2023, claiming disability discrimination following the termination of her employment with the respondent on 18 October 2022. The respondent resists the claims.

30 2. Following extensive case management, and several postponements, this case eventually called for a final hearing on 2 September 2024. Mr Marlow advised shortly before the commencement of the hearing that he was unwell and not able to attend that day but believed he would be well enough to proceed the next day. After consulting with Mr Bandoni, we agreed that two days should be sufficient to hear this case.

3. It was apparent in any event that the respondent had not, contrary to orders, produced any files of documents to be referred to. Mr Bandoni was therefore directed to produce the requisite number of paper files containing all the documents to be relied on for the start of the hearing the next day. The case was adjourned and then resumed the next morning, 3 September 2024. The claimant also lodged a file of documents at the commencement of the hearing.
4. The issues for determination were set out following a case management preliminary hearing which took place on 17 November 2023 presided over by EJ Sutherland. The respondent was not, given the paucity of medical information, able to concede disability status, which therefore remained to be determined. The respondent also asserted in any event that they had no knowledge that the claimant was a disabled person in terms of the Equality Act 2010 at the relevant time. The claimant alleged that she had been dismissed because of her disability or because of something arising in consequence of her disability. The respondent's position was that the claimant had resigned. The question whether the claimant was dismissed or resigned was a central question in this case. Assuming she could establish that she had been dismissed, the Tribunal then had to decide whether that amounted to disability discrimination contrary to the provisions of the Equality Act 2010.
5. At the hearing, we first heard evidence from the claimant, then from Mr Marlow. For the respondent, we heard evidence from Mr Bandoni, operations manager; Mrs M Paterson, area manager; and Mrs C Hutchison, shop manager and the claimant's line manager.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

Disability status

7. The claimant has experienced anxiety and depression since 2018. In the last six months of 2020, this became unmanageable and the claimant consulted her GP. The GP prescribed Sertraline and the claimant was signed off work

for a period of five months until the medication began to have a positive impact on her wellbeing. She continues to take that medication, although the dosage has been increased.

8. The severity of her anxiety and depression is influenced by outside factors such as her immediate environment or general sense of wellbeing. The difference can be substantial, when sometimes she can go out shopping and socialising without the support of her husband and family and on other occasions she cannot leave the house without a close family member's assistance. Her husband takes control of most of her personal affairs, for example booking routine doctor's appointments and managing utility bills, which can be overwhelming for her.
9. She is only able to function at this level with the assistance of medication. The claimant finds that working, having a routine and structure on set days of the week, has a positive impact on her.
10. Following a period of illness, from at least October 2021, the claimant was signed off as unfit for work by her GP due to anxiety and depression.

Employment with the respondent

11. On 8 March 2022, the claimant commenced employment with the respondent as a salon assistant. The respondent operates a tanning business, with five shops in and around the Glasgow/Paisley area. The owner/managing director is Mr Amjad Ismail.
12. A vacancy had become available in the Paisley shop. The claimant was recommended to the respondent by her sister who had worked for the business for over 18 years and who is one of their best employees. Contrary to the usual practice, she was not interviewed by the area manager, Mrs Paterson. Rather she commenced work at the Johnstone branch where her sister worked.
13. The claimant undertook her training under her sister's supervision, whereafter she worked at the Paisley shop. The claimant's line manager at the Paisley

shop was Mrs Catherine Hutchison. The claimant developed a good relationship with Mrs Hutchison, on a professional and personal level.

14. The claimant was engaged to work 16 to 20 hours each week. This included a requirement to work week-end shifts. Due to being short staffed, the claimant was required to work additional shifts.
15. The claimant was absent from work with Covid from 25 April 2022 to 2 May 2022. The claimant was not absent on sick leave on any other days during her employment with the respondent.
16. Efforts were made to recruit additional staff, and a number who were taken on were unsuitable. Eventually a third member of staff, Ms Jordan Spence, was taken on in the Paisley shop.
17. A certain animosity developed between the claimant and Ms Spence. The claimant believed that Ms Spence was not "pulling her weight". For example, the claimant was concerned that Ms Spence was not meeting the correct standards when it came to cleaning sunbeds after they had been used by clients. In particular, when the claimant would arrive for a Sunday shift, she found that she had to clean the sunbeds which she believed had not been cleaned to the correct level of cleanliness by Ms Spence after her shift on the Saturday.
18. She raised this concern with Mrs Hutchison, who said she would have a word with Ms Spence about standards. Mrs Hutchison also intended to undertake spot checks to ascertain whether these concerns were valid. Mrs Paterson was made aware of these concerns.
19. In or around week beginning 9 October 2022, the claimant had a conversation with Mrs Hutchison regarding a forthcoming medical procedure which she was due to have and which was causing her stress. She told her in confidence about some of the background. Mrs Hutchison offered to cover her shift on the day after the procedure. Covering or swapping shifts was a normal practice for staff, which did not require senior management approval.

Changes to cleaning protocols

20. On or around 17 October 2022, Mrs Paterson had a discussion with Mr Bandoni and Mr Ismail regarding compliance with certain regulations which had been introduced or tightened up by councils. The tanning business is a highly regulated, licensed business and both the Scottish Government and local government were concerned to ensure compliance with standards, which had been tightened up since the pandemic. Given concerns about the onset of winter and increasing numbers of cases of Covid, Mrs Paterson believed that it was important to ensure that standards were being adhered to. One council in particular had introduced new requirements relating to solutions for tanning. These requirements had to be communicated to staff.
21. Although staff had a Whatsapp group, and often staffing issues would be communicated through that route, Mrs Paterson decided that this matter was too important to communicate that way, because she could not be sure that staff had actually read the communication. Often Mrs Paterson would advise shop managers of any new procedures or regulations to be cascaded to their staff. However, in regard to this change, she considered that it was sufficiently important that she needed to speak to each member of staff directly.
22. She compiled a list of staff to contact. On the morning of 18 October 2022, when the claimant was on a rest day, she confirmed in response to a text from Mrs Paterson that she could take a call that day.
23. Mrs Paterson first spoke to the manager of the Barrhead shop, and then tried to get in contact with other staff on her list. The claimant was the second member of staff to whom she spoke about this issue.
24. Later that morning, while she was in the salon at Nitshill, which is the respondent's main office, Mrs Paterson telephoned the claimant. She asked the claimant how she was feeling, because she was aware that she had undertaken a medical procedure, and had swapped shifts to recover that day. However, she ended the call after only a minute or so because the line was not clear and in any event she had to go to the bank.

25. Some five minutes later, she telephoned the claimant again. By this time she was in her car and due to drive to the bank with the intention of discussing the matter with the claimant while driving. She put the telephone on loudspeaker through a bluetooth connection. On this occasion, she advised the claimant that Mr Bandoni was in the car with her and he said hello. Otherwise, Mr Bandoni took no part in the conversation.
26. Mrs Paterson then explained that she was telephoning to go over the cleaning protocols, and in particular the new requirements relating to the dilution ratio of the sanitizer solutions.
27. Although this discussion was about standards and operating practices generally, the claimant took this to be a rebuke about her own standards. She took umbrage at being spoken to about standards of cleanliness when she was of the view that it was Ms Spence who should be spoken to in relation to her cleaning practices.
28. At this point in the call, the claimant's tone of voice changed and she "turned into a totally different person" whom Mrs Paterson "had not seen before". She started to shout and swear and said words to the effect that she was "not having this" and would "not be treated like this", including expletives.
29. Mrs Paterson tried to diffuse the situation and to calm the claimant down. However, the claimant got angrier, and eventually said words to the effect that she could "shove your job up your arse". She went on to demand that her wages got paid and to make threats that they were "going to be sorry" that they had treated her this way.
30. Towards the end of the call, the claimant's husband came into the room where the claimant was on the phone and took the phone and spoke to Mrs Paterson. She said she could not discuss the circumstances with him due to privacy laws.
31. After the end of the call, Mrs Paterson and Mr Bandoni went into the office to have a discussion with Mr Ismail about what to do. His position was that they

should accept the resignation because of the threats and pay the claimant what she was due.

Correspondence relating to termination of employment

5 32. On 18 October 2022 at 14.06, the claimant wrote an email, addressed to Mr Ismail, headed “notice of employment termination”, as follows:

“Following on from my conversation with Michelle earlier on today around my employment with Sunwaves being terminated!

10 As [a] matter of urgency, could you please confirm clearly the reasons for my termination as it wasn’t made clear enough on the phone, despite asking for clarification a few times. I believe that this is [a] decision taken by yourself Amjad.

15 I will be expecting annual leave payment of 55.3 hours per the 55.3 hours holiday pay as per the guidelines from www.gov.uk plus the 1 week’s notice period along with the hours worked for the month of October 2022.

20 During the call Michelle asked me to drop off the keys in to the shop. As I no longer have employment and no money to travel into the shop, you will need to make arrangements to collect keys from myself. I can see no documentation stating that I have to travel to return the keys after you have ended my employment.

I await your reply on the reasons as to why my contract of employment has been terminated”.

25 33. By e-mail dated 18 October 2022 at 14.12, Mr Ismail wrote to the respondent’s accountants asking for a pay slip and P45 for the claimant, on the basis that the last day she worked was 16 October 2022, setting out hours worked and holiday hours due. At 14.24 that day, the accountant forwarded the requested documents to Mr Ismail. Payment was made into the claimant’s bank account at 14.42.

34. The claimant wrote a further e-mail to the respondent on 18 October 2022 at 22.09, as follows:

“having thought about the telephone conversation with Michelle earlier on today 18th October 2022 and the reason she gave me on the phone about my health being the reason for my employment ending and other things, which I have no idea what this is supposed to mean. Yes I do have some health issues, which are covered under the equality act 2010 and these do not need to be declared to my employer.

Anything that I have told my line manager regarding my health was told in confidence. I have never once called in sick apart from the time where I had COVID-19 and the government’s guidelines was to stay home.

At no point during my time was my performance or ability to carry out my role raised. No formal meeting has ever taken place. I’ve not been spoken to regarding my probation and how my performance is aligned to the company standards other than us all bring praised by Michelle via WhatsApp in the Paisley Group chat, only last week.

We were told via the group chat that the shops would be getting spot checks and that the Paisley shop had nothing to worry about, again all staff members were praised.....

I’ve noticed that my payslip was processed on Sunday the 16th October 2022, two days before my telephone conversation with Michelle 18th October 2022. I was only messaged this morning asking if I was free to chat.

This has caused me no end of stress and has and will have a detrimental effect on my mental well-being.

Having taken all of the above into account, I have no choice but to raise a formal grievance against Sunwaves via an employment tribunal for unfair dismissal.

Can all correspondents now be kept via email so I have a paper trail. As the [way] I have been treated leads me to question the company's morals surrounding this matter".

35. On 21 October 2022 at 9.31, Mr Ismail e-mailed the claimant with the subject heading "Donna complaint", which includes the following:

5 "The subject of the email "notice of employment termination" is misleading as Sun Waves did not terminate your employment, we accepted your verbal resignation by telephone during the conversation with our group manager Michelle and development manager Lee, although we waited 48 hours before
10 responding back to you in the hope of a change of heart from you.

During the call with Michelle and Lee you voluntarily provided information about your health. It was made very clear that we were fully committed to making sure that we work with you to have a happy, positive and safe employment experience, above and beyond what's required by law, we
15 offered to provide additional support as part of our commitment to our team.

It should be noted that, although unaware of any medical conditions we were happy to meet your request for shift cancellation and changes at very short notice and have a full record of all your shift change request being granted.

To clarify, the accusation that we terminated your employment is completely
20 false and misleading. I am aware that during the call, and as confirmed by both Michelle and Lee, you became very aggressive, swearing and shouting, making threats of a disturbing nature leaving both Michelle and Lee feeling alarmed and distressed.

...Similarly, the branch manager was subjected to aggressive swearing and
25 shouting by you in a telephone conversation with you two days prior to this incident. Since then an allegation of bullying against you has come to my attention...

As you mentioned in your email we informed everyone that we would be introducing new spot checks to make sure we maintain a high-quality and safe
30 experience for our staff and customers. As you are aware, the tanning industry

is highly regulated and is a licensed activity supervised by the local authority. Because of the guidelines issues by the Scottish Government and as part of the terms of our licence we need to make sure our COVID-19 cleaning schedules are completely up to date and strictly enforced. With us now
5 entering the winter season and with the NHS advising of the dramatic escalation of cases of COVID, we advised each store and staff member that guidelines must be followed and should they have any concerns, we are more than happy to retrain or provide additional assistance as required.

The payslip you mentioned in your email was not processed until after you
10 handed in your notice, the date of the 16th was the last shift you worked. If you would like any additional clarification on this we are happy to provide you with our accountant's details who will confirm they issued the final payslip after you left the business as they process all our payroll and have records of when everything was actioned.

15 After reviewing the information provided, and as a gesture of goodwill I have asked our accountants to provide you with an additional 8.8 hours salary as this seems to be the difference between our calculations and yours although we believe ours to be correct. Hopefully, this matches your expectations in relation to your final payment.

20 During the call, I understand your husband entered the room and demanded Michelle and Lee answer questions about your employment. We want to make it very clear that any discussion with a nominated representative would require written confirmation to comply with privacy laws.

I have waited 48 hours before responding back to you in the hope of you might
25 have changed your mind about leaving your employment but unfortunately, this does not seem to be the case."

36. The claimant replied at 21 October 2022 at 12.34, including the following:

"Thank you for your e-mail. I would like to point out that the version of events you have outlined in your e-mail are false and misleading!

I for one did not resign from Sunwaves, Michelle called to say that my contract of employment was ended and that this was your decision and Michelle tried to talk you round but was unable to convince you 'this time' I'm not sure what that referred too. Why would I resign from a job that I enjoyed and to have no other employment or income during the cost-of-living crisis? If I was to resign from Sunwaves why did Michelle mention these points about trying to convince you this time? Again, if I was to resign then these points would have been irrelevant. Michelle called me on Tuesday [to] tell me that my employment was ending. If I was to resign, why would Michelle call me for me to tell her that I was leaving, what was the purpose of Michelle phone call on Tuesday other than to tell me that my employment was ended.

During the call at no point during did Michelle state that Lee was on the call.... If I was to resign from Sunwaves why would I be aggressive on the phone. I was angry on the phone yes because I was told that my contract was being terminated by Michelle but in no way was I threatening aggressive or causing fear, during the call I was not told I have been aggressive to Cathy my line manager either, surely that would have warranted to call to express behaviour earlier than Tuesday! I was upset naturally, bewildered, to be told that I was losing a job that I enjoyed with no valid reason apart from my health, which is a breach of the equality act 2010!... Cathy knows about my health and wants me back to full health.

Its alarming to me that given the person and character that Michelle and Lee and my line manager have of me that you would be willing to give me 48 hours to reconsider my resignation, again something that I didn't do!...

My husband did enter the room as he works from home and could hear that I was upset and crying not angry or threatening on the phone, my husband asked to speak to Michelle as the reason was unclear to me and to see if he could understand the reasons behind it. The conversation with Michelle and my husband lasted no more than 10 seconds. At no point was I told that I had 48 hours to reconsider my resignation as I did not resign from Sunwaves my contract was terminated by Michelle on the orders of yourself!

I am shocked and concerned to hear that a supposed allegation of bullying has since come to light, this again is a complete lie. I pride myself on my open, honest and friendly nature!

5 If I resigned from Sunwaves my notice period is one week, which would have seen my employment with Sunwaves end on Tuesday the 25th October and not the 16th October, this again highlights the fact that my contract was ended by Sunwaves due to the timescales on my payslip and P45...

10 ...I do not wish to keep raising my concerns as to why my employment ended as you are not being truthful. I asked Michelle on Tuesday if you could call me to explain your reason for terminating my contact of employment and she told me that you wouldn't call me, and she only acts on your orders. If you had in fact called me on Tuesday, we would both be of a better understanding as to why I was told that I was no longer employed by Sunwaves. It seems very strange to me, that as you have stated you were giving me 48 hours to
15 reconsider my decision (which I never made) but my pay was in processed on the 16th and deposited into my account. Shortly after my call with Michelle ended, I was then sent an e-mail from Payroll with my payslip and you have stated to me when I supposedly handed in my notice that you were given 48 hours to reconsider, this statement is at the top of your e-mail to me. So why
20 were the monies deposited into my account if I have 48 hour window to reconsider you have stated...

25 ...There is no resolution here as I enjoyed my job I wanted my job, but Sunwaves ended my employment not the other way around, for someone who you value as a member of staff it's not clear to why you ended my employment. The only way I feel like I can get the truth and closure to this ordeal is make a claim for unfair dismissal via an employment tribunal as I feel that this is what Sunwaves have done."

37. Mr Ismail responded on 25 October 2022 at 18.21 to advise that he had
30 forwarded the claimant's request regarding notice to their accountants. He stated that they would make the required 19 hours adjustment and reissue

the payslip. He asked for her to confirm that payment was in full and final of monies owed.

38. The claimant responded that same day at 18.32 stating that she was legally entitled to the money owed for notice and that she was not accepting the unfair dismissal.

39. This incident had a negative impact on the claimant who did not look for work following the termination of her employment. Some 11 months later, on 26 September 2023, the claimant commenced employment with a previous employer, earning around the same as she had earned with the respondent.

10 **Tribunal's deliberations and decision**

40. This is a claim solely for disability discrimination. The claimant does not have sufficient service to claim "ordinary" unfair dismissal. She does however argue that her dismissal amounts to disability discrimination. In particular, she claims direct discrimination and/or discrimination arising in consequence of disability.

15 41. Disability was not conceded. Accordingly, we had to first determine whether the claimant was disabled for the purposes of the Equality Act 2010. The respondent also denied knowledge of any disability. Given that knowledge is essentially a prerequisite for direct discrimination and for discrimination arising from disability, we required next to consider that question, before
20 turning, if appropriate, to consider whether the claimant had been discriminated against because of or for reasons related to disability.

Disability status

42. Section 6 of the Equality Act 2010 states that "A person has a disability if (a) they have a physical or mental impairment and the impairment has a
25 substantial and long-term adverse effect on P's ability to carry out day to day activities".

43. Since *Goodwin v Patent Office* 1999 ICR 302 the EAT and Court of Appeal have repeated on numerous occasions the need for Tribunals to consider four separate questions. Those questions are:

- (i) Did the claimant have a mental and/or physical impairment?
- (ii) Did the impairment affect the claimant's ability to carry out normal day-to-day activities?
- (iii) Was the adverse effect substantial?
- (iv) Was the adverse effect long term?

44. Schedule 1 of the Equality Act 2010 includes supplementary provisions relating to disability and part 1 to the determination of disability, the following provisions being of particular relevance:

- (i) Paragraph 2(1) states that the effect is long-term if a) it has lasted for at least 12 months, or b) it is likely to last for at least 12 months or c) it is likely to last for the rest of the life of the person affected.
- (ii) Paragraph 2(2) states that if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
- (iii) Paragraph 5(1) states that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if (a) measures are being taken to treat or correct it; and (b) but for that, it would be likely to have that effect".

45. In regard to the requirement to prove disability the burden of proof is on the claimant. The Tribunal must consider the four questions set out above, which we considered in turn.

Did the claimant have a physical or mental impairment?

46. The claimant relies on the impairment of anxiety and depression. Despite extensive correspondence relating to the matter, and confirmation that the claimant should lodge all medical records relating to the year prior to the termination of employment, the claimant did not lodge a GP report confirming her condition. She did however lodge several "fitness to work" certificates which confirmed that she was absent from work due to "anxiety and

depression” from at least October 2021 onwards. She lodged extracts of her medical records which confirmed that she was prescribed Setraline from at least 1 November 2021.

47. Despite the limited medical evidence, we were prepared to accept based on these productions and the claimant’s evidence that she suffered from a mental impairment related to anxiety and depression.

Did the impairment affect the claimant’s ability to carry out normal day-to day activities?

48. The claimant had produced a disability impact statement, and she relied on that statement as her evidence during the hearing. Her evidence, which we accepted, was that her condition could on occasion have a severe impact on her ability to carry out day to day activities, such that for example she could not leave the house without support.

49. We therefore accepted, based on the claimant’s own evidence and to a lesser extent on the medical evidence, that the impairments had an adverse effect of the claimant’s ability to carry out day to day activities.

Was the adverse effect substantial?

50. It is not enough however for the claimant to establish that there was such an adverse effect, because the claimant also requires to show that the effect was “substantial”. For the purposes of this question, the term is defined as “more than minor or trivial”.

51. The claimant’s evidence was that the impact of her conditions fluctuated, in that sometimes she could carry out day to day activities without support, and other times she was unable to do so. She said that she relied on her husband for day to day administrative tasks.

52. Consideration is to be given to the effects on the claimant without medication. The claimant advised that she had been prescribed Setraline and that she took that medication for several months before it had a positive impact such that she was able to go back to work. She takes that medication to this day,

and she made it clear in evidence that she would not be able to function but for the medication.

53. We therefore accepted that, absent the medication, the adverse effect of her condition on her day to day activities was substantial, that is more than minor or trivial.

Was the adverse effect long term?

54. The claimant said in evidence that she had suffered symptoms since 2018, and that she had consulted her GP regarding her condition in 2020. While there was no medical evidence to support that, the claimant had lodged documentation relating to the period from October 2021 to suggest that she had suffered from her condition since at least that time. She relied on those documents to support the argument that the adverse effect of her condition on her day to day activities was long term.

55. We were prepared in the circumstances to accept the fit notes and the medical records which indicated that she had suffered anxiety and depression for over a year before the termination of her employment, and thus that the effect was long term.

56. Although we did find that the evidence in this case could have been more comprehensive, we were prepared to accept on the evidence which was presented, that the claimant was disabled in terms of the relevant provisions of the Equality Act 2010.

Knowledge of disability

57. The respondent asserted that they did not know that the claimant was disabled.
58. The claimant claims that she was dismissed because of her disability (s. 13 Equality Act 2010, direct discrimination) or that she was dismissed because of something related to her disability (s. 15, Equality Act 2010, discrimination arising from, that is in consequence of, disability).

59. It is perhaps self-evident that in order to treat someone less favourably *because of* disability, the person who discriminates must know that the claimant is disabled. Thus, knowledge is needed to establish direct discrimination.
- 5 60. In regard to the section 15 claim of discrimination arising from disability, the discrimination will not be established if the respondent shows that they did not know, and could not reasonably have been expected to know, that the claimant has the disability. The burden of proof in this regard is thus on the respondent.
- 10 61. The EHRC Code of Practice on Employment includes the following paragraphs in relation to knowledge of disability:
- “5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. 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’.
- 15
- 5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially....
- 20
- 5.17 If an employer’s agent or employee (such as an occupational health adviser or a HR officer) knows, in that capacity, of a worker’s or applicant’s or potential applicant’s disability, the employer will not usually be able to claim that they do not know of the disability, and that they cannot therefore have subjected a disabled person to discrimination arising from disability.
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- 30
- 5.18 Therefore, where information about disabled people may come through different channels, employers need to ensure that there is a

means – suitably confidential and subject to the disabled person’s consent – for bringing that information together to make it easier for the employer to fulfil their duties under the Act”.

- 5 62. Based on the evidence heard, we conclude that the respondent has shown that they did not know, and could not reasonably be expected to know, that the claimant was disabled. We came to that conclusion for the following reasons.
63. We accepted Mrs Paterson’s evidence that she did not know that the claimant
10 had any health issues.
64. Although the respondent stated that they kept certain personal information, collected at the commencement of employment, relating to staff, for example whether they had allergies, they had no record of anything of that kind on file for the claimant. That is not surprising because the claimant’s evidence is that
15 she did not raise the matter with the respondent.
65. The claimant did however suggest in evidence that she had raised certain issues relating to her health and other conditions with Mrs Paterson towards the beginning of her employment, but we did not accept that. The claimant’s evidence was that she raised this towards the start of her employment when
20 she was asked to work week-end shifts in addition to shifts through the week. There is no indication of that arrangement in the claimant’s contract of employment which was lodged and the evidence was that all members of staff had to work week-end shifts.
66. The claimant’s evidence was that she had told Mrs Hutchison, who was her
25 line manager, about her health issues. Mr Marlow appeared to argue that it was incumbent on the claimant’s line manager to have raised the claimant’s concerns with management. Had the claimant raised this formally with Mrs Hutchison, we would have accepted that. However, it was clear from the claimant’s own evidence that she did not expect Mrs Hutchison to refer the
30 matter to management. She considered her health issues to be a private matter that did not impinge on her ability to do the job.

67. The claimant's evidence was that she had told Mrs Hutchison about her circumstances in confidence, that she had shared details because she considered her to be a friend.
68. Mrs Hutchison's evidence was also clear. While the claimant had told her certain matters about her health and medical procedures, she had done so in confidence. She had kept that confidence and she had not told management. There was otherwise no reason for her to tell management, because the claimant's circumstances had not impacted on her work, and Mrs Hutchison confirmed that the claimant was a good worker.
69. There was nothing which would suggest to Mrs Hutchison that she should raise any concerns with management; and otherwise nothing that came to the attention of management that would suggest that the claimant had any health issues, any issues with her work, or that she was in any way disabled due to her mental health.
70. The claimant was not absent from work at all relating to her health issues; and in so far as she needed time off to attend appointments, she would swap shifts with colleagues. This was normal practice and not brought to the attention of management.
71. The claimant not having told management about her condition, there were no other indications whatsoever which would suggest that the respondent ought to have known, or should have taken steps to find out about her condition.
72. We were fortified in our view by the fact that during the course of evidence the claimant became upset because she did not want to share issues about her health with the Tribunal. We heard that Mr and Mrs Marlow have only shared such issues with very close family. We entirely respect the claimant's position in that regard, but where the claimant decides to pursue a claim in the Employment Tribunal, she must share information with the Tribunal in order to establish her case.
73. During the hearing, Mr Marlow stressed that the claimant was under no obligation under the Equality Act 2010 to tell the respondent of her condition.

While that is no doubt right, if she does not, and there are no visible signs of her condition, then she cannot also rely on the Equality Act to establish discrimination.

Discrimination

- 5 74. Although we have found that the respondent did not know that the claimant was disabled, we decided that, having considered the evidence, it was appropriate to explain our rationale for making the findings in fact that we did. This would have been relevant to any decision that might have been required had we found that the respondent did know that the claimant was disabled.
- 10 75. We thus went on to consider the question of whether we would have concluded that the claimant was discriminated against if it had been established that the respondent knew (or should have known) of her disability.
76. Although we had no hesitation in concluding that the respondent did not know about the claimant's disability, other aspects of this case were much less clear cut, and in particular, whether the claimant had resigned or was dismissed.
- 15
77. Rarely do we have such diametrically opposing evidence as in this case. Although we did not need to decide the matter, we have made findings in fact which relate to this question, the evidence having been heard. As will be clear from those findings in fact, we eventually came to the view, on the balance of probabilities, that it was more likely than not that the claimant resigned and was not dismissed.
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78. We find that we preferred the evidence of Mrs Paterson in particular, who gave her evidence in a clear and straightforward manner, without hesitation or prevarication. While Mr Bandoni gave evidence in a less confident way, we found on reflection that his evidence corroborated that of Mrs Paterson's.
- 25
79. While the claimant's position was made clear in evidence, and we noted that she had send an e-mail which to some extent supported her version of events just over one hour after the end of the telephone call, we accepted the respondent's position.

80. In terms of the reason which the claimant said she was given for being dismissed, the claimant said that it was because of her health. She also said that Mrs Paterson did not want to dismiss her but that Mr Ismail had decided that she should be dismissed. Although we did not hear from Mr Ismail, given
5 Mrs Paterson did not know about the claimant's health, she could not have passed on any information about it to him.
81. The claimant did not act in a way which would otherwise have brought her health to the attention of Mrs Paterson or Mr Ismail. She had not been absent from work (apart from Covid). She was considered by all to be a good
10 performer. She had swapped shifts but we heard that was normal practice and would not necessarily come to the attention of management.
82. We could not think of a rational explanation why the respondent would dismiss the claimant, not least because they did not know about her disability, or indeed any health issues, but also because all respondent's witnesses gave
15 evidence that the claimant performed well in her job (and it seemed from the evidence that the respondent had some difficulty in getting good staff). While we heard that the contretemps with Ms Spence had been raised with Mrs Paterson, we understood it to be a relatively minor matter. Indeed Mrs
20 Hutchison in evidence said that she had no concerns about the claimant's cleaning practices, whereas she did have some concerns about those of Ms Spence. We heard that she was intending to undertake spot checks to verify the position.
83. The respondent was well disposed to the claimant because of her family connections and the fact that her sister had been a long-standing employee
25 and held in high regard.
84. We were concerned however about the alacrity with which the respondent accepted the claimant's resignation. On reflection, we came to the view, and this was supported by the evidence of Mrs Paterson, that they decided to accept the claimant's resignation without following that up at the time because
30 of the threats that she had made during the telephone conversation.

85. We were alive to the apparent contradiction that the respondent suggested that they waited 48 hours before e-mailing in case the claimant changed her mind, and/or to give her a period of grace, when they acted very quickly to pay her last wage and send her P45. However, Mrs Paterson explained that their practice was to pay staff who were leaving quickly, because many were on benefits and needed the money. This was corroborated by Mr Bandoni who confirmed their practice was based on previous experience, and he gave the example of “boyfriends” coming into shops and demanding wages.
86. Given the background factual matrix, we could not accept that there was any rationale or logic to the claimant’s position that she had been dismissed because of her health.
87. With regard to the claims made by Mr Marlow of “fraud” which he said supported the contention that the decision was to dismiss was premeditated, we did not accept that. While we accept that the respondent acted quickly, and perhaps in the circumstances too quickly, we did not accept that the time line suggested fraud. We noted that Mr Ismail contacted his accountant at 14.12 on 18 October and asked her to make up the pay slip. According to documents lodged, she did so at 14.24 that day, and the money was in the claimant’s bank by 14.42. Although the pay slip lodged has a process date of 16 October, that was the last date the claimant worked. According to the screen shot lodged, this was created on 18 October at 14.25. Mr Bandoni’s evidence was that so long as the correct information is input into a database, a calculation and a payslip can be produced in minutes, if not seconds.
88. Although as noted above the respondent was very quick indeed to accept the claimant’s resignation, not only requesting the pay slip but also issuing the P45, we do not accept that the evidence supports the claimant’s contention that a decision had already been made.
89. However, even if we have reached the wrong conclusion on the evidence about what happened during the telephone call, and even if the claimant was dismissed, given that we have found that the respondent did not know that

the claimant was disabled, it could not be said that the reason for her dismissal was disability.

90. We believe it is appropriate to record here that we were concerned that we had not heard evidence from Mr Ismail. As noted above, this final hearing had been postponed a number of times for various reasons, including the health of either the claimant or a respondent's witness. The respondent did not advise that Mr Ismail would not be available (because he was on a cruise) in the date listing period until after the hearing had been listed. The respondent was then advised that calling or otherwise of a witness was a matter for them. No application for a postponement was made, although this is a case which had already been postponed multiple times. Notwithstanding, we accepted that the evidence of Mrs Paterson, and the documentary evidence, was sufficient to allow us to come to the conclusions that we did.

Conclusion

91. Although we have found that the claimant was disabled at the relevant time for the purposes of the Equality Act 2010, we have concluded that the respondent did not know that the claimant was disabled. Given that conclusion alone, the claimant could not then establish that she had been discriminated against because of her disability. Accordingly, her claims under the Equality Act 2010 are not well-founded and must be dismissed.

M Robison

Employment Judge

25 September 2024

Date

Date sent to parties

26 September 2024
