



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE J HARGROVE
MEMBERS: Ms S LANSLEY
Mr P MILLS

BETWEEN:

Claimant

MRS S SIVAPRASADAN

AND

Respondent

(1) HARESH AND COMPANY LIMITED
(2) SOTHINATHAN ANPALAGAN

ON: Wednesday, 21 August 2019
Thursday, 22 August 2019
& Friday, 23 August 2019

APPEARANCES:

For the Claimant: Ms Sarah Forsyth, Employment Case Worker

For the Respondent: Ms Patricia Hall, Counsel

JUDGMENT

The unanimous Judgment of the Employment Tribunal is as follows:-

1. The Claimant's complaint of unfair constructive dismissal is well founded against the first Respondent.
2. The Claimant's claims of victimisation are dismissed upon withdrawal by the Claimant.

3. The Claimant's complaints of discrimination on the protected characteristics of disability contrary to section 13 and 15 are not well founded.
4. The Claimant's complaints of unlawful deduction from wages in respect of statutory sick pay are well founded.
5. All claims against the second Respondent are dismissed.
6. By consent the Respondent is ordered to pay to the Claimant the sum of £7,500 in respect of the above Tribunal proceedings. Payments will be made in four equal instalments of £1,875 on the tenth day of each month commencing in September 2019. Payments will be made to the client account of South West London Law Centres.

REASONS

1. By an ET1 received on 13 August 2018 the claimant made claims for constructive dismissal and direct disability discrimination and discrimination arising from disability contrary to sections 13 and 15 of the Equality Act and of an unlawful deduction of wages from sick pay.
2. She had been employed as a cashier at a BP franchise garage at Chipstead Valley Road, Coulsdon for twelve years commencing on 3 October 2005 and had transferred from one franchise to another under the terms of the Transfer of Undertakings protection of employment Regulations until 9 January 2018 when the first Respondent took up the franchise. At that time the first Respondent also had the franchise for several other garages. In addition to selling fuel there was a convenience store selling household items including food, cigarettes and alcohol. As cashier, the Claimant had to be shown to be trained, in particular, in regulations relating to the delivery and sale of fuel and in the sale of alcohol and tobacco to potentially under-age customers. She had taken these tests on a regular basis throughout her employment when the regulations were enforced.
3. The Claimant worked part-time shifts on Mondays and Tuesdays between 7.00am and 3.00pm. Her contract of employment dated 3 October 2005 specified like hours on three days per week including Wednesdays but it is likely that the Claimant reduced her days to two days per week when her mother was subject of a doctor's report which we will refer to later. The Claimant was the sole carer for her mother. The Claimant had another job while working for the Respondent at Tesco working 55-60 hours per four weeks, also as a cashier. She still has that job. The Claimant resigned from her employment with the Respondent by letter dated 4 April 2018 in which she raised various complaints concerning her treatment which formed the basis of her claims of constructive unfair

dismissal and discrimination.

4. She initially brought claims only against the first Respondent but on day one we allowed an application by way of amendment to add the second Respondent who we are referring to as 'SA' in this Judgment. SA together with his wife are the sole directors of the first Respondent. We gave reasons for allowing the application on sole Selkent Principles. Only the day before the hearing Ms Hall, very properly, had disclosed to the Claimant's representative that the Respondent had lost the franchises and were likely to be put into liquidation. It had occurred only the day before that although on three months' notice. Notwithstanding the lateness of the application made outside the three months' time limit we found it just and equitable that SA should be joined. However, in order to balance any prejudice to the second Respondent we allowed SA to call Siva, the branch manager of the franchise where the Claimant worked. Although SA's witness statement had been prepared on the basis of information from Siva and referred to Siva as 'I' in various paragraphs, it had not originally been intended to call Siva as a witness. He had ceased to be employed earlier this week when the franchise was lost.
5. The issues were identified at a case management hearing on 20 November 2018. These were 1. Disability – Was the Claimant disabled in respect of Glaucoma and a back condition, Scoliosis? Was the Claimant's mother for whom the Claimant was the principal carer disabled at the material time?
6. It is conceded by the Respondent that the Claimant was disabled in respect of the back condition. It is not conceded that the Claimant is or was disabled in respect of her condition of Glaucoma. Nor is it conceded that the Claimant's mother is or was disabled. Section 6 of the Equality Act provides that a person has a disability if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on normal day to day activities.
7. The definition is further contained in schedule 1 of the Equality Act which contains the deduced effect principle concerning the effect of medical treatment and its relevance. 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 measures are being taken to treat or correct it and, but for that, it would be likely to have that effect.
8. These are our conclusions on the disability issues not including the issues of knowledge. We are not satisfied that the Claimant's condition of Glaucoma constituted in her case a disability at the material time. There is little if any evidence as to any adverse effects upon her vision. She has had an operation for the condition but there is no evidence that it was unsuccessful. The deduced effect principle does not apply in respect of past treatment and we had to consider what the Claimant's condition was

after the operation. Although she continues to take medication there is no evidence as to what the adverse effects would be on her normal day to day activities in the medical notes if it were removed and there is no evidence at all of a medical nature as to what would happen were she to stop taking the medication. The only evidence we have heard is that after fifteen hours she gets headaches and has some difficulty in opening or keeping open her eyes. There are normal day to day activities which she is capable of doing without any adverse effects at all which include shopping, coping for her mother, travelling to and from work and doing at least normal shifts both at this employer and at Tesco. Notwithstanding that finding, we decided that we would consider what the position would be as to her discrimination claims if we had been satisfied that she did satisfy the test in relation to Glaucoma.

9. So far as the Claimant's mother is concerned, we are satisfied that she must have satisfied the test of disability and it is necessary only to refer to the doctor's note at page 109 to which we were not actually specifically referred during the hearing. This is a note dated February '14. She suffered from Chronic Psychotic Reactive Depression, Essential Hypertension, mobility problems and Arthritis of the knees. There is then a long list of medications. She has great difficulty in walking and going up the stairs. We need not go further than that and it makes no difference that some of these impairments may be the result of old age. Most people when they get to a certain age will probably satisfy the test of disability and it makes no difference that old age may be cause of any of impairments.
10. It is not in dispute that the Claimant's back condition of Scoliosis does constitute and did constitute a disability at the material time although that condition was only made clear at a late stage in the Tribunal proceedings.
11. Issue 2 There are, as indicated, also issues as to the Respondent's knowledge of the Claimant's disability and of the knowledge of the mother's disability. Knowledge is an essential element of a direct discrimination case. An employer cannot directly discriminate against an employee if he has no knowledge or no deemed knowledge that that person has any disability.
12. So far as the section 15 claim is concerned, the section does not apply discrimination arising from disability if the employer shows that the employer did not know and could not reasonably have been expected to know that the employee had the disability. An associative disability discrimination claim only applies in respect of a third party's disability in relation to a section 13 claim; it does not apply to a section 15 claim.
13. Issue 3. As to direct discrimination, section 13 of the Act provides that a person discriminates against another if, because of a protected characteristic, A treats B less favourable than A treats or would treat others. In that connection it is or may be necessary for a Claimant to

- identify an actual or a hypothetical comparator who does not have the particular disability.
14. Issue 4. Discrimination arising from disability. Section 15 of the Act states that a person discriminates against a disabled person if the employer treats the disabled person unfavourably because of something arising in consequence of B's disability and he cannot show that the treatment is a proportionate means of achieving a legitimate aim. To give an obvious example of the difference between section 13 and section 15 claims: – if a postman loses a leg and is fitted with a prosthesis and is subsequently dismissed by his employer, it will be direct discrimination if the employer dismisses him because it will not countenance employing someone who has the particular disability that the Claimant has and does not want to employ someone who is one-legged and lame. Perhaps they are concerned about what the general public would think. It would be discrimination arising from disability if he is dismissed because the postman takes longer to do his runs because of the effects of the disability upon him. That would place a burden on an employer to show that he did not know and could not be expected to know of the disability, or to justify the dismissal. If the employer cannot justify the dismissal as pursuing a legitimate aim, the breach of section 15 will be well founded.
 15. There are special provisions about the burden of proof in discrimination cases contained in section 136 of the act. In short, an initial burden lies on the Claimant to establish facts from which a Tribunal could reasonably conclude that he or she had been treated badly because of their disability or other protected characteristics. They may do that by adducing evidence themselves or by cross-examination of the Respondent's witnesses or by relying upon any other documentary evidence or other evidence which is available. If that initial burden is overcome the burden then shifts to the Respondent to prove that the reason for any treatment had nothing whatsoever to do with the protected characteristic.
 16. Reference should also be made to section 39 of the Equality Act which is the section which incorporates the duty not to discriminate in respect of employment. Section 39(2) provides that an employer must not discriminate against an employee by dismissing the employee or by subjecting the employee to any other detriment. Dismissal for this purpose includes constructive dismissal, see section 39(7). It includes a reference to the termination of the Claimant's employment by an act of the Respondents such as that the employee is entitled because of the Respondent's conduct to terminate the employment without notice.
 17. Next, we turn to constructive dismissal. The definition of constructive dismissal contained in section 95(1)(c) of the Employment Rights Act provides that the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

18. The Claimant has the burden of establishing that there was a breach of contract which is so fundamental as to justify the Claimant resigning and claiming that they have been constructively dismissed. The breach of contract must be fundamental. The breach of contract may be a breach of an express term, or a breach of an implied term of the contract. In this particular case, the breaches relied upon are a breach of the implied breach of trust and confidence, and an express term as to the payment of wages.
19. There is implied in all contracts of employment a term that neither party will act in such a way to be calculated or likely to cause a breakdown in trust or confidence of the other. Calculated implies deliberate conduct on the part of the employer. However, even if the employer does not intend to destroy trust and confidence, trust and confidence may be destroyed if, looked at objectively, the conduct of the employer is such as to have that effect. There is also an express term in this contract of employment that the Claimant will be paid wages and there is a statutory provision incorporated in the contract of employment requiring the First Respondent in appropriate circumstances to pay statutory sick pay and it is that term which, in particular, the Claimant relies upon.
20. There are various acts which the Claimant identified and which were identified at the case management hearing which took place on the 20 November 2018 which are relied upon by the Claimant as constituting breaches of section 13 and 15 of the Equality Act.
21. We now summarise our conclusions. Issue 1 is whether the Claimant was required to take the Health and Safety test which she took on 5 February, in bad faith. There are other aspects to this with which we will deal later but our conclusions are these.
22. The Respondent acted reasonably in requiring the Claimant to take the test. We note that the Respondent required other employees to take the test at or about the same time and it was reasonable for it to be requested at that time as the Respondent had recently taken over the franchise and were under a legal obligation to ensure the various regulations described were capable were being complied with by the employees.
23. Issue 2 is was she treated differently from others in respect of the taking of the test? Her case in this respect was that she was handed the notice of the test and required to take it while she was working at the same time behind the till.
24. There is no evidence that anyone else at that time was asked to take the test in precisely those circumstances but we accept that one other employee who was not working behind the till on this particular day was asked to take the test and at short notice. We do not consider that this of itself is capable of constituting a breach of the term of trust and confidence

- even taken into conjunction with other matters. We note that even if the claimant was required to serve customers at the time, a time limit was not imposed. We note that the other person who was asked to take the test on that day, someone called Vethani, spoke limited English and was assisted in that respect by Siva.
25. Issue 3 is whether the Claimant did, in fact, fail the test. The evidence that she did fail is unsatisfactory as the actual test document was not disclosed and Siva did not explain why she failed in detail, although he offered to do so in cross-examination. Nobody asked the question. It is not up to the Tribunal to ask questions.
 26. This left us in some doubt about whether technically speaking she failed the test. However it is not in doubt is that Siva did offer the Claimant re-training and a further test by text on 6 February at 18.08 (page 54 of the bundle) and the offer was repeated by letter from SA at page 69. The content of that particular letter is important to our conclusions. We conclude that the text at 18.08 ('I have tried to call you and send text message. No response so until your training completely done by and signed off by DPS that relates to Siva's post, I want to be able to let you work on the tills so call me and arrange date and time before your next shift'.) indicated a genuine intention that she be assisted in retaking the test. That is not consistent with a faked failure to pass the test.
 27. We are satisfied that that text was sent before the telephone call which it is established as taking place at 17.53 on that day for twelve plus minutes. The likelihood is that or other of the times was one hour out. The telephone call is important to the outcome of the case. The content of the call is heavily disputed.
 28. The first point we make is that we do not accept that SA was in the office when the call was made. We accept that Siva mentioned to the Claimant that the Claimant could do alternative shop floor work at different shift times. We do not accept that he said that she could not re-take the test. The text indicates that he was expecting her to re-take the test before her next shift which was on Monday, the 12th, six days later although he did not make clear what she would be required to do after she returned if she had not passed the test. We do not accept that he said that she would be required to do work outside normal shift times, notwithstanding that she said that she had had caring responsibilities and referred to her mother. We are also satisfied that he said that she would not be paid for retraining time outside her normal hours.
 29. It is largely for these reasons that we do not accept that there was a breach of sections 13 or 15 of the Equality Act. The Claimant was not in this respect subjected to a detriment. In addition, we do not accept that the Claimant specifically said that she had Glaucoma. She did say that she had caring responsibilities for her mother which in our view put the

- Respondent on notice which they did not follow up, but in respect of the section 13 claim, that would only have been a disadvantage to the Claimant if she had been told categorically that she would be required to do work outside her agreed shift times.
30. We have paid particular attention to the letter at page 69, which is dated 12 February, in the meantime the Claimant had complained about that telephone call. We have taken that into account and we accept that she felt under stress as a result of it even though we have not accepted that it amounted to discrimination.
31. The Claimant then submitted sick notes and she was absent from work up to and including the date of her resignation which was on 4 April 2018. Disputes of fact arise after this phone call. The first relates to the letter of 14 February 2018. There is no doubt that the letter was prepared by her legal advisers or the agency which was assisting her. The letter is at page 71, the metadata produced indicates that it was composed at that time.
32. The Respondent's evidence about receipt of letters is unsatisfactory as they have also denied receiving other letters in their witness evidence and their pleadings. They claim not to have received the letter at page 71 and 72 which sets out specifically the Claimant's conditions including Glaucoma.
33. However, the acts which are said to constitute discrimination which we do not accept essentially are supposed to have occurred during the telephone call on 6 February and we have rejected that claim. The letter on 12 February is written in terms which are incontrovertible. It states

'I am writing regarding the above assessment, Haresh and Co Limited, (this refers to the Alcohol and Health and Safety awareness refresher assessment) maintains high standards of Health and Safety requirements to protect our customers and staff within our workplace. It is a mandatory requirement for all employees working at the till have required occupational standard in terms of selling alcohol, cigarette and Health and Safety.

As you aware, you have not met the required standards to work in your current role in the recent assessment. As the result of this, we would not be able to allow you to continue working at the till until you have met the required standard. We would like to find opportunity to work within our company in an alternative role; currently we have job role to cover shop front which includes stock control, shop filling and taking deliveries. We would also provide you training and support by senior staff member to enable you to achieve the required standard.

We are aware that you are currently off sick, however if you are healthy and able to return to work, please see (Siva) who will be able to set you up on your tasks for the first week and provide necessary support to meet the requirement in Alcohol and Health and Safety Awareness Refresher Assessment.

If you have any further questions regarding any of this please get in touch.'

34. There was no response to the letter which was composed on 14 February, but sent sometime after 14 February, and certainly received before the 26 February letter which states:

'I refer to your letter, 12 February 2018. I do not accept that you were entitled to stop me working as a cashier. I was not given a proper opportunity to deal with the questionnaire and I am well and able to comply with all health and safety requirements. I am therefore entitled to continue to do that work.

However, without prejudice to my rights, I am willing to undergo some training and to do some shop-front work, but only provided it does not entail any heavy lifting or difficult physical work, as I have a bad back.

I am signed off work until 28 February and will return to work on 5 March. Please confirm when the training will take place that day and what it will entail and set out what duties I will be required to carry out on the shop floor. Please also confirm that I will continue to be paid at my current rate of pay and I will receive SSP in relation to the time or work.'

35. There was no response to that letter either although the Claimant remained on the sick and submitted further sick notes thereafter.
36. There is a further letter which the Claimant sent some time towards the end of March. It is unclear precisely when. That is at page 78. This raises again the issues about SSP and asserts for the first time that the Respondent was in fundamental breach of her contract.
37. Finally, there is the letter of 4 April 2018 which is the resignation letter which sets out in a series of paragraphs why she claims to have been forced to leave the employment raising, amongst other topics, the issues of the statutory sick pay and other matters about which we have made some findings of fact.
38. We also have to also state our conclusions relevant to the SSP findings about the document at pages 64 to 66. This is the document which was filled in, with the intention that it be used to convey to the Claimant that she was not entitled to statutory sick pay. Putting it shortly there are three possible conclusions about this letter.
39. The first, which is the Respondent's case, that the document was created, probably early March, and it was put in an envelope with the February payslip, and was collected by the Claimant having been made available or handed to her by Siva.
40. The second possibility was that the document was created at that time but was not given to the Claimant or collected by her, probably because it was not in the envelope.

41. The third possibility is the one canvassed by the Claimant that the document was not created until a much later date possibly after the Tribunal claim form was submitted in which the claim was made for statutory sick pay.
 42. We have considered this carefully and the conclusion we have reached is that the document was in fact created at some time in the beginning of March and signed by SA, although parts of it were completed in Siva's handwriting. We have accepted that. We have accepted that parts of it were in fact completed by Siva. We do not accept that it was collected for whatever reason by the Claimant.
 43. The Claimant throughout the period of her sickness was raising by text issues about non-receipt of pay including statutory sick pay and also raised it in letters.
 44. As to the statutory sick pay, it now appears to be accepted that the Claimant's average earnings over a period of eight to ten weeks and including holiday pay leading up to 7 February exceeded the threshold above which the Claimant was contractually and, as a matter of statute, entitled to be paid statutory sick pay.
 45. Whether or not the Respondent was deliberately or otherwise at fault, whether or not the Respondent had had advice from the accountant which was wrong, which appears to be the case, the fact is that the Claimant, for a substantial period of weeks, was not in receipt of pay or statutory sick pay.
 46. It matters not that it was, or was not, a deliberate fault on the part of the employer; a failure to pay wages or sick pay is almost always a fundamental breach of the contract of employment and it was in this case even though the Claimant had other sources of income and was able to make up some of the short-fall, or all.
 47. That was itself a fundamental breach of contract which entitled the Claimant to resign but there was more because we find that the Respondent's failure to respond in writing to requests for information was itself, when taken in conjunction with the failure to pay sick pay, repudiatory conduct and it is for these reasons that we find that the claim of unfair dismissal is well founded.
 48. However, we do not accept that the Claimant was directly discriminated against in the way that she claims because of her or her Mother's disability, or that she was treated less favourably for a reason arising from something to do with her disability.
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Case Number: 2303019/2018

Employment Judge Hargrove

Date: 5 September 2019

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