



EMPLOYMENT TRIBUNALS

Claimant

Mrs Heidi Setchfield

v

Respondent

North West Anglia
NHS Foundation Trust

Heard at: Norwich **On:** 30 & 31 July 2018 and 1 August 2018

Before: Employment Judge Postle

Members: Mrs M Prettyman and Mrs L Gaywood.

Appearances

For the Claimant: In person.

For the Respondent: Mr J Feeny, Counsel.

JUDGMENT

1. The claimant was not constructively dismissed.
2. The claimant's claim under s.13 of the Equality Act 2010 of direct associative discrimination is not well founded.

REASONS

1. The claimant brings two main claims to the Tribunal, a claim for constructive dismissal and a claim for direct discrimination by association under s.13 of the Equality Act 2010. In particular, her son has Attention Deficit Hyperactivity Disorder (ADHD). The respondent concedes under s.6 of the Equality Act 2010 that condition meets the definition. What the respondent's do not concede is that they knew or ought reasonably to have known of the claimant's son's disability.
2. The specific issues relating to the claim are to be found at pages 46-49 of the bundle.

3. In this Tribunal we have heard evidence from the claimant and Ms Kirstie Thwaites-Loe a self-employed counsellor both giving their evidence through prepared witness statements.
4. For the respondent we heard evidence from Miss S Lowther, HR advisor; Miss E Morley, HR business partner; Miss J Hitchborn, assistant general manager for cancer diagnostic clinical support service, again all giving their evidence through prepared witness statements. The Tribunal also had the benefit of bundle of documents consisting of 199 pages.

The facts

5. The claimant was employed full time, 37.5 hours per week – 9am-5pm Monday to Friday as contracts support officer from April 2015, having commenced her employment with the respondent in 2008. The role requires the claimant to support Miss Hitchborn providing PA support and contract support to the directorate including monitoring of the service level agreements and cost improvement plan delivery. The claimant's line manager was Miss Hitchborn.
6. Within the directorate during the months prior to the claimant's resignation there were two other members of staff who performed similar roles to the claimant, Martin Bainbridge, the business support manager who left the Trust in July 2016 to commence an external secondment with a local NHS clinical commissioning group. He left permanently in December 2016. The other staff member was Mandy Howick, who held the role of Business Development Manager from approximately July 2016 to March 2017. Her substantive role was contracts manager in the finance department and she was seconded on a temporary basis to this directorate between July 2016 and March 2017. The directorate had required an extension to her secondment but the finance department would not agree to this. That left the claimant as the only contract support officer leaving that directorate extremely stretched.
7. Throughout Miss Hitchborn's line management of the claimant she was aware the claimant's son had behavioural issues. There were a number of conversations with the claimant in relation to her son, particularly that he had a penchant for fire, he was aggressive towards the claimant and stealing money. She allowed the claimant time off work to attend parenting classes in January 2016.
8. The claimant was absent from work due to sickness (stress due to problems at home) between 5 October to 30 November 2016. The claimant commenced a further period of sickness absence on 3 January to 6 January 2017 (related to stress at home). The claimant requested by email of 6 January 2017 to Miss Hitchborn reduced hours the following week, 10.30am-4pm Monday to Friday and provided the reason being her son had been excluded from school and he was required to attend an alternative school between 10am-4.30pm (page 119).

9. Miss Hitchborn responded to the claimant's request for reduced hours by email, offering two options which would allow her to work the hours she proposed or if she wanted to put forward alternatives (page 120).
10. The claimant responded on 13 January 2017 suggesting that the best option was to reduce her working week to 16.25 hours for two weeks working 8.30-11.45am and the claimant requested 27 January 2017 as annual leave.
11. The claimant also indicated that she would like to reduce her hours so that from Monday 30 January 2017 she would work from 8.30am-3.30pm reducing her hours from 37.5 hours to 35 hours per week (page 121a).
12. The claimant commenced a further period of sickness absence from the 11 January to 30 January 2017 relating to stress at home.
13. In the following period after the claimant returned from sickness absence the claimant and Miss Hitchborn had a number of meetings in which they discussed issues with the claimant's son; his escalating behaviour and the need for flexibility the claimant required within her hours to manage the situation with her son.
14. The claimant acknowledges the support she had received in the last few months to Miss Hitchborn in an email in January noting, "there are not many employers that would have supported me as you have done and for that I am grateful" (page 121).
15. On 25 January 2017 the claimant emailed Miss Hitchborn advising, due to an issue with her son's school she needed to further reduce her hours so that she finished at 2.30pm (30 hour week). Miss Hitchborn responded the same day (page 124):

"In principle I'm happy to support this temporary change to your working pattern/hours but I am aware when we have discussed this previously it has been for a few weeks only while the issue of K's schooling is resolved and it will be useful for me to understand timescales around this request please in line with Trust policy. You will need to complete a request for flexible working, ensure guidelines are adhered to but I am sure that we can discuss on your return ..."
16. On 30 January 2017 the claimant submitted a formal request for flexible working along the lines indicated in her email to Miss Hitchborn on 25 January 2017 (page 125a). Annexed to that application was a report dated 4 January 2017 by a clinical psychologist regarding K's condition and ADHD symptoms (pages 125c-f). There was however no positive diagnosis of ADHD in that report.
17. Miss Hitchborn grants the application for flexible working on the 30 January 2017 (page 125b): "Agreed but will monitor impact on service on a monthly basis".

18. At the same time there were ongoing consultations on the proposed merger of the respondent's Trust and Hinchingsbrooke HealthCare NHS Trust which would have an impact on the directorate, jobs and managers.
19. On 9 February 2017 the claimant was asked to attend a stage 1 formal attendance meeting with Miss Hitchborn under the respondent's sickness absence and attendance policy, that was as a result of the claimant triggering a number of days absence under the policy. However, Miss Hitchborn decided that notwithstanding the claimant's absence decided against issuing any form of caution or warning.
20. The claimant emailed Miss Hitchborn on 6 March 2017 (page 129) to advise that she would not be in work the next day due to further problems with K. Miss Hitchborn responded:

“Good news about Matt's daughter. So sorry to hear about K. Absolutely fine about tomorrow. Let's catch up on Wednesday.”

There was a further email from Miss Hitchborn:

“No problem Heidi take care and let me know if there is anything I can do to help” (page 129).

The above emails from the claimant's line manager is clear evidence of a very supportive line manager and indeed a caring line manager.

21. The claimant was again absent on sick leave on 16 and 17 March 2017 due to chest problems.
22. In late March the claimant requested further annual leave on Monday 27 March to Thursday 30 March 2017 inclusive to look after her son. Miss Hitchborn agreed and allowed the claimant to bring forward five days annual leave from the following annual leave year (page 131d).
23. On 31 March 2017 (page 134) the claimant by email to Miss Hitchborn requested yet a further 1 week leave to look after her son.
24. On the same day (page 133) Miss Hitchborn responded by saying:

“Whilst I am sympathetic to the situation that you find yourself in, I would find it difficult to be able to agree to another full week of annual leave due to the impact on the service and especially as Mandy will be returning to her substantive role on Monday ...”
25. At this time, Miss Hitchborn and what was left of the directorate were also having to deal with the merger of the respondent's Trust and Hinchingsbrooke HealthCare NHS Trust, formally merging around the 1 April 2017.

26. On 31 March 2017 the claimant further emails Miss Hitchborn accepting her position and acknowledging the impact on the service her request for further leave would have on the directorate. She does nevertheless request Monday off being 3 April 2017. Miss Hitchborn approves that request and asks the claimant to call in to discuss the situation.
27. On 5 April 2017 a meeting is convened between Miss Hitchborn, Miss Leighton-Davies general manager, Miss C Wallace of HR to discuss the claimant's current situation with her son as he had now been excluded permanently from school. There is a file note of this meeting which had been prepared by Miss Hitchborn at page 135, it is accepted the claimant did not see the file note at the time. At this meeting the claimant indicated that she would like to take a career break the claimant was advised of the policy (the work life balance policy) at page 74N and the relevant page, 87 deals with career breaks and 97 deals with short term unpaid leave. The claimant that was advised her work with an organisation known as the 'Body Shop' which she did on a self-employed basis would not be allowed by the Trust. It was discussed that the claimant could undertake charity and voluntary work and should attend the gym in order for the claimant to get out of the home environment. The meeting was left with the claimant to put forward proposals as to the way she wanted to proceed.
28. The claimant on 7 April 2017 put forward various options of particular note the claimant acknowledging that if she were to take a career break the Trust's stance ie not working for the Body Shop. Nevertheless, the claimant specifically requested that she be allowed to continue working for the Body Shop (page 136-137).
29. Miss Hitchborn responds on 7 April 2017 (page 136) and suggests proceeding with option 2 until 26 April 2017, that is two days a week working and then review.
30. There was a further meeting on 20 April 2017 attended by the claimant, Miss Hitchborn, Miss Leighton-Davies and again there is a file note prepared by Miss Hitchborn at page 139, and again the Tribunal accepts that the claimant did not see this at the time. The purpose of that meeting was to review the claimant's work patterns. The claimant updated the parties regarding her son, particularly that his behaviour was escalating. The claimant then put forward three options; reduce hours further, work from home or a career break. The career break was explored as working from home or reduced hours were not considered viable options due to the type of work the claimant was involved with particularly the need to attend meetings and face-to-face discussions with colleagues.
31. Miss Hitchborn questioned if three months were granted, in reality how much capacity the claimant would still have given the school holiday would then start. The claimant was unable to offer any assurance. At that meeting it was agreed no decision until the claimant had discussed the situation with a charity called 'Kids' which helps families in need about the claimant's situation.

32. There was a further meeting arranged for 24 April 2017 attended by the claimant and Miss Hitchborn. Again, there is a file note of the minutes of that meeting prepared by Miss Hitchborn at page 140, and again it is accepted that the claimant did not see that note at the time. The purpose of the meeting was for the claimant to provide an update on her son's situation. Miss Hitchborn indicated that with the current situation within the Trust (the merger) and the potential impact on jobs she could only offer the claimant a career break/unpaid leave of nine weeks until the end of June 2017, but the condition would be that the claimant would not be allowed to continue her self-employed work with the Body Shop. The claimant was unhappy at the Trust's stance about not being able to continue her work with the Body Shop. The handover and the detail was discussed. The following day the claimant was absent. It is important to note that the claimant had not in accordance with the policy made her application whether for a career break or unpaid leave in writing. Had she done so she would have made it clear at that stage that it was for her disabled child (page 101). Previously the claimant had not stated to the respondent that 'K' (her son) was disabled, merely behavioural problems.
33. The career break makes it clear, no outside work other than charitable or voluntary work and although not explicit about no outside working in the policy which deals with special unpaid leave, it must be implied that an employee taking such leave should not then use it to undertake outside work whether employed or self-employed. Were it not, it would defeat the aim behind such leave. The policies are also discretionary as to whether in the first place any leave is granted. The claimant following the meeting on 24 April emails Miss Hitchborn and copied to other relevant personnel questions the "restrictions the Trust wished to place on me whilst I'm on a career break and therefore feel that I have no option but to resign".
34. It was noted by the Tribunal that although the policy contains provision (the work life balance dealing with career break/unpaid leave), for an appeal the claimant did not appeal Miss Hitchborn's decision to refuse the claimant's application for a three-month career break, granting only two months and that is at page 74Q.

The Tribunal's conclusions

Constructive dismissal

35. S.95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as constructive dismissal.
36. In the leading case on the subject, Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA, the Court of Appeal ruled that the employer's conduct which give rise to a constructive dismissal must involve a repudiatory breach of contract as Lord Denning, Master of the Roles put it:

“If the employer is guilty of conduct which is a significant breach going to the root of contract of employment or which shows that the employer no longer intends to bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.

Therefore, in order to claim constructive dismissal, the employee must establish there was a fundamental breach of contract on the part of the employer, that the employer’s breach caused the employee to resign, that the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.”

Put in summary form, has the respondent without reasonable and proper cause conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

37. The claimant asserts the respondent breached section 6.23 of the respondent’s Work Life Balance Policy which is to be found at page 46 of the bundle. In particular by refusing the claimant’s request for a three-month career break and only offering two months. The first minor point to note was that the claimant in the first place did not herself comply with the policy or procedure, because she did not complete any application form as required which would then have put the respondent’s on notice the claimant was requesting leave for her disabled child because it asks that question (page 101).
38. Secondly, career breaks are not to be seen as an automatic entitlement (each request will be considered on its own merits), it is a discretion therefore if the respondent had refused outright that would not have been a fundamental breach. Furthermore, in balancing the needs of the respondent giving that the merger was taking place at the time which was clearly in the mind of Miss Hitchborn, she sought to reach a compromise with the claimant by offering nine weeks. Whether it be special leave or a career break, semantics matters not, that was a reasonable decision. Furthermore, the respondent whether career break or special leave were entitled to make it a condition of that leave that the claimant did not undertake outside work whether employed or self-employed. That itself would not be a fundamental breach as clearly to allow outside work other than charitable or voluntary work would defeat the whole process and purpose of a career break or special leave and send out the wrong signals to other employees in the Trust (page 74).
39. The policies also provide that if the claimant was dis-satisfied with Miss Hitchborn’s decision to grant nine weeks leave other than three months was of course to appeal that decision rather than resign. The claimant did not appeal that decision.

40. On the facts and circumstances before this Tribunal there was no fundamental breach on the part of the employer which entitled or caused the employee to resign.

The Law

S.13 discrimination claim

41. S.13 of the Equality Act 2010 makes no reference to the protected characteristic of any particular person.
42. The less favourable treatment because of a protected characteristic of someone other than the claimant is commonly called and accepted as discrimination by association.
43. Here the claimant must show that the protected characteristic of disability was the reason for the treatment.
44. It also requires a comparator whether actual or hypothetical and that test requires asking someone without the claimant's protected characteristic whether they would have been treated the same way as the claimant. The Equality Act further stipulates there must be no material difference between the circumstances relating to each case when determining that the claimant has been treated less favourably than a comparator. In other words, for the comparison to be valid, it must be like for like. Furthermore, the respondent must have constructive knowledge of the claimant's son's disability. In other words, could the respondent reasonably be expected to know or ought to have known of the claimant's son's disability?

Conclusion

45. The claimant relies on her son's disability Attention Deficit Hyperactivity Disorder (ADHD) which apparently, he has suffered from since 2013. The respondent concedes the disability, but do not accept they knew or ought reasonably to have known. The claimant says her line manager Miss Hitchborn must have been aware of her son's diagnosis having told her there were issues at home and school. Miss Hitchborn was aware that her son was aggressive, prone to lighting fires, stealing telephone and texting inappropriate messages on occasions excluded from school. Furthermore, the claimant asserts that because she was given time off by Miss Hitchborn to attend a parenting classes, and the clinical psychologists report and her requests for flexible working in January which had annexed a report on her son mentioning ADHD symptoms. The respondents should have known her son was disabled. The report nevertheless does not give a positive diagnosis of ADHD.

46. Furthermore, it is agreed the claimant never actually informed the respondent, particularly Miss Hitchborn her son was disabled. The claimant said in her closing address to the Tribunal "I do not have to tell them my son was disabled". What we have then is Miss Hitchborn being aware of the claimant needing time off for her son who had behavioural issues, the claimant going on a parenting course, and was aggressive towards the claimant and on occasions was excluded from school, stole and sent inappropriate text messages.
47. In those circumstances would the respondent know or ought to have reasonably known the claimant's son was disabled. The Tribunal concludes there is a big leap from those facts of Miss Hitchborn's knowledge of the claimant's son to the respondent concluding that the claimant's son was disabled or ought reasonably to have known he was disabled.
48. Therefore, the claim would fail at that point.
49. However, even if a Tribunal was wrong on this point, looking at what happened, and all the surrounding facts, what was the less favourable treatment as against the actual comparators relied on by the claimant or indeed if the Tribunal were to construct a hypothetical comparator?
50. The claimant requested verbally special leave/a career break. Whether it was special unpaid leave or career break it matters not, it was considered after various support was given to the claimant and options considered. Working from home and reduced hours were not considered viable given the work that the claimant did. Notwithstanding this, Miss Hitchborn granted the claimant's request for a career break or special leave of nine weeks balancing the need of the respondent's Trust given at the time on the 1 April a merger was taking place or had taken place with Hinchingsbrooke HealthCare NHS Trust and there were concerns for the future of the directorate, the loss of Mandy Howick who had been on secondment to the department and that had now ended. That nine weeks was on balance all that could be offered in those circumstances, again balancing the claimant's needs with that of the Trust. It was a discretion in any event, and the decision to refuse the claimant's request for three months leave was not because of the claimant's son's disability.
51. The comparators in any event relied upon by the claimant their circumstances were all materially different from that of the claimant in that they were not on career breaks or unpaid special leave, they were all on secondments in the event working within Trusts. Furthermore, we have no direct evidence as to whether they all have children with or without disabilities.
52. Finally, if the Tribunal were to construct a hypothetical comparator for example a son or daughter wishing time off to look after a non-disabled relative the Tribunal have no doubt that Miss Hitchborn's decision would have been exactly the same in the circumstances.

53. In the circumstances there is no less favourable treatment and the claimant's claim fails.

Employment Judge Postle

Date: 21 August 2018

Sent to the parties on:

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For the Tribunal Office