



# EMPLOYMENT TRIBUNALS

**Claimant:** Darren Owen

**Respondent:** Galliford Try Employment Ltd

**Heard at:** Exeter **On:** 01 - 02 July 2019

**Before:** Employment Judge Housego  
Mr MT Smaldon and  
Mr TJ McAuliffe

## Representation

**Claimant:** In person

**Respondent:** Mr T Sheppard of Counsel instructed by CMS Cameron McKenna Nabarro Olswang LLP

## JUDGMENT

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The claim is dismissed

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## REASONS

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### Background

1. The respondent is a housebuilder. The claimant was employed as an on-site salesman on a zero hours contract. He could take or reject work as he wished and the respondent was not obliged to offer any work. On 25 July 2018 the claimant declined to go to Barnstaple the following day, saying his blood sugars were "*all over the place*" (he is Type 1 diabetic). He was dismissed less than 2 hours later, he says as a direct result. The respondent says that the dismissal was decided upon before that email was sent, and because of the way the claimant interacted with others, which they found unacceptable. They accept that he is disabled with Type 1 diabetes but say they did not know that before he was dismissed. They

say that the reference to blood sugars did not alert them to the possibility that Mr Owen had diabetes.

## **Law**

2. The claimant claims disability discrimination<sup>1</sup>. The Tribunal must be satisfied that in no sense whatsoever was the dismissal tainted by such discrimination. For the discrimination claim, it is for the claimant to show reason why there might be discrimination<sup>2</sup>, and if he does so then it is for the employer to show that there was not.

## **Evidence**

3. The Tribunal heard oral evidence from the claimant, and for the respondent from his manager Beverly Rickard, who dismissed the claimant, and from Ashton Tame, who works in human resources and who advised Ms Rickard. There was a bundle of documents, augmented during the hearing.

## **Submissions**

4. I made a typed record of proceedings and the submissions are there recorded in full.

## **Facts**

5. Mr Owen's husband worked for the respondent. Mr Owen was interested in working for them. His husband effected an introduction to Ms Rickard. They had an informal discussion, and Ms Rickard agreed to take Mr Owen on. Mr Owen was to work in sales primarily at one of four sites managed by Ms Rickard. He lives in a house on one of the other sites, he and his husband having purchased one.
6. The initial discussion between Ms Rickard and Mr Owen was lengthy informal and friendly and covered a diverse range of subjects. Mr Owen has had Type I diabetes for very many years (since the age of 12). He makes no secret of it. He says he told her of it. Ms Rickard says that she had no idea that Mr Owen had Type I diabetes at any time before April 2019.
7. Mr Owen was taken on as an employee on a zero hours basis. He was never given a letter of offer or a contract of employment. There is supposed to be a health questionnaire, but the respondent did not attend to that either.
8. We prefer the evidence of Mr Owen on the question of the respondent's knowledge of his disability. There is every reason for him to have mentioned it in the initial wide ranging chat between him and Ms Rickard, and there is no reason not to have done so. We find that they deny knowledge of diabetes because of the circumstances of the dismissal. Mr

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<sup>1</sup> S13 and 15 of the Equality Act 2010

<sup>2</sup> Igen v Wong [2005] ICR 931, Madarassy v Nomura International plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] I.C.R. 159, and most recently Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913

Owen's colleagues all knew of his diabetes, and although there is no oral evidence from them, he had produced screen shots of text messages to him from those colleagues, the authenticity of which is not challenged. These state that they knew, that it was common knowledge, and that they were sure that Ms Rickard did also. We have taken full account of the fact that these text messages were not prepared with litigation in mind, and that their authors may not know of their use in this Tribunal and so cannot augment or correct what is said. We have also noted that not all the messages are in complete sequences so the message being answered is not always displayed. Nevertheless they have some evidential weight.

9. We do not find credible the assertion by Ms Rickard that she made notes in her diary but is unable to produce them because she destroys her diaries for one year in early January the next year: she would then have no record for something only a few weeks back. Still less credible is Ms Rickard's evidence that she did not know of this Tribunal case (filed on 20 October 2018) until April 2019. Both she and Ms Tame said that they worked closely together in a relationship of trust. It is inconceivable that upon receipt of an Employment Tribunal claim asserting that Ms Rickard had discriminated against Mr Owen on the basis of disability she (Ms Tame) would not have discussed this with Ms Rickard, even if only to ensure that the preparation of the ET3 (done by Ms Tame and filed on 23 November 2018) was accurate.
10. On the balance of probabilities we find that at all material times Ms Rickard knew that Mr Owen has diabetes. It is not determinative of this claim for the reasons that follow.
11. It is agreed that Mr Owen was taken on as a zero hours worker. In practice he usually worked Tuesdays and Wednesdays at one particular site. It is agreed that he was able to accept or reject offers of work, and agreed that there was no obligation on the respondent to offer him any level of work.
12. Mr Owen started work on 01 June 2018. On 26 June 2018 Ms Rickard emailed Antoinette Rogers (in human resources at head office) asking her to move Mr Owen from a zero hours contract to a permanent employee two days a week at the Tithe Barn site (86). She said she needed a part-time worker because someone called Lindsey was leaving. For extra hours he would complete a timesheet.
13. On 29 June 2018 at 09:45 by telephone Mr Owen was asked by Ms Rickard to deliver keys to a house in East Ogwell to the purchaser. He was based in Paignton, and the keys were in Exeter with the build manager (Mr Owen's witness statement paragraph 12). The reason the keys were not in the right place was that this had not been properly organised, and Mr Owen blamed Ms Rickard for this. Mr Owen lived only 2 miles from that site, and he could have just dropped off the keys on the way to work, had it been arranged the day before.
14. Mr Owen has not lived in Devon very long. He got lost. In the narrow lanes he scratched his car on the way. It was very hot and he became flustered. He rang the office for directions, and he was quite rude to the people in the office in doing so. He was disparaging of Ms Rickard in that

conversation or conversations. The build manager did not give him the keys until 11:00. Ms Rickard got to hear of it. She was not happy. Mr Owen apologised to her and to his colleagues (113). There was nothing in writing about this.

15. On 29 June at 12:30 she emailed Antoinette Rogers (page 90) to ask her to hold off from putting Mr Owen on a two-day contract, and asking that he be left on a zero hours contract, which is what happened. Mr Owen apologised to Ms Rickard, and to the colleagues to whom he had spoken on the telephone (113).
16. On 12 or 13 July 2018 there was a sales meeting attended by about a dozen sales staff, held by Ms Rickard's husband. Ms Rickard was there also. Mr Owen raised issues about his own house, in a way that he accepted in his oral evidence was inappropriate, both in terms of content and approach.
17. On 16 July 2019 Ms Rickard emailed Mr Owen (100) telling him not to go to another site to log his expenses. This followed an occasion when Mr Owen went to the office on the site where he lives to log his expenses, and, to use the vernacular, turfed a colleague off the computer to do so. Mr Owen denies this occurred: on the balance of probabilities we find that it did, for there is no accounting for the email otherwise, and because Mr Owen did not challenge it. If it did not happen on the day Ms Rickard said, it happened on another date a few days before the email.
18. Ms Rickard says there were a series of matters involving customers or colleagues, where they were unhappy with Mr Owen's approach to his work. She was herself unhappy at his attitude, she said, and things like the showroom lights not being turned on, and plants being allowed to die because, she said, Mr Owen said that it was not his job to water them caused her great concern. She did not raise the overall concern she had with him.
19. Mr Owen denies that he let plants die, and points out, correctly, that there is no specific allegation put by Ms Rickard, that there is no independent verification of any complaint by anyone, and no formal procedure of any sort was ever started in connection with his employment or any complaint about him.
20. Mr Owen's entirely understandable belief that he was dismissed by reason of diabetes is because of events on 25 July 2018. At 12:03 that day Mr Owen emailed Ms Rickard "*please call me*". She did not do so and at 13:30 he emailed her again "*The main reason I was trying to speak to you earlier was to talk about Montbray [in Barnstaple], the way of the heat is currently has been playing havoc with my blood sugars and they have been bouncing all over the place and I really do not think that an hour and a half drive is going to be possible with the temperature rising higher. I am sorry to drop this on you but thought it best to raise my concerns and let you know to give you chance to get cover.*"
21. Within 2 hours Ms Rickard had gone to Mr Owen's workplace, at Kingsgate, and told him that his contract was terminated with immediate effect.

22. Mr Owen also points to 2 emails, at 13:35 (104) to Antoinette Rogers, and at 13:51 (105) to her husband Stephen Rickard, also a manager at the respondent, copying that email to them. To Antoinette Rogers she wrote simply "*I rest my case*", and to her husband and 13:51 "*please see below!!!*".
23. Mr Owen points to the proximity of these matters and invites us to conclude that the dismissal was because of the email, which said that he could not go to Barnstaple because of the effect of his diabetes of which he says they knew.

### Further findings of fact and conclusions

24. The matters put forward require an answer. The burden of proof shifts to the respondent.
25. The respondent says that the decision was made before the email was sent by the claimant at 13:30 on 25 July 2018. The Tribunal finds this is so, for the following reasons.
26. There was a course for all salespeople to attend. It was on 21/22 August 2018. On 02 July 2018 Mr Owen was booked on it by Ms Rickard (93)
27. At 09:49 on 25 July 2018 Mr Owen texted Ms Rickard (83): "*brv (sic) am I still on the course in August?*". Why he was unsure about this was not made clear, but it indicates some uncertainty about his future. Ms Rickard texted back at 11:57 "*No*". At 12:11 that day she emailed the training provider (102): "*Hi Ally, I am not sure if I have booked Darren Owen onto the above course but if I have please remove him as I will not be sending him on his course.*"
28. The reason for this terse text and that email was that Ms Rickard had already decided to dismiss Mr Owen. There was no other possible reason she should have cancelled his attendance at that course. Nor did Mr Owen ask why he was not going to the course.
29. The email sent by Ms Rickard immediately after receipt of the "*blood sugars*" email to Ms Rogers indicated that the decision had already been made. The phrase "*I rest my case*" is technically something that would be said to a decision maker before a decision is made. In this case, it was Ms Rickard that made the decision: it is clear that she and Ms Rogers had discussed dismissing Mr Owen (quite how is not apparent, because the oral evidence of Ms Rickard and Ms Tame was that they had discussed it). This is feedback from Ms Rickard after she and Ms Rogers had discussed the dismissal saying, in effect, look – you can see I have made the right decision, because he is messing me about. Coupled with the text and the email about cancelling Mr Owen's attendance on the course it is clear that the decision was made in advance of the blood sugars email.
30. It is also relevant to the assessment of the reason for dismissal (which we remind ourselves must "*in no sense whatsoever*" be tainted by discrimination) that there had been no issue arising from the diabetes of Mr Owen before this. More importantly there had been, in a very short

employment (6½ weeks) the incident of 29 June 2018, that of 12 or 13 July 2018 (where Mr Owen's actions were at a meeting led by Ms Rickard's husband), and the matter of a colleague complaining about being turfed off his computer by Mr Owen, on 16 July 2019, and the fact that Ms Rickard told Mr Owen of complaints of others when dismissing him. She simply did not want him working for her. She had countermanded her instruction to make Mr Owen permanent, and when at 12:28 on 05 July 2018 Mr Owen texted Ms Rickard *"hi bev just wondered if you had sorted or started the process of my perm contract yet? Thanks"*, Ms Rickard replied the same day at 17:16 very shortly *"Not at the minute"*. Then further things happened and she dismissed him summarily as he had no employment rights.

31. Mr Owen rightly points out that this dismissal did not comply with the ACAS code, did not comply with the company's own policies, and was not based on any formal complaint or process at all. Ms Rickard does not have the authority to hire and fire (as she confirmed in her oral evidence), but nevertheless did both in Mr Owen's case. There is no evidence of anything that can specifically be labelled gross misconduct, yet that was the reason given for dismissal. If it was a gross misconduct dismissal the decision to pay Mr Owen notice pay, of one week, conflicted with their own policy, which is that a gross misconduct dismissal *"will not"* involve notice pay. The policy also states that any matter which is not gross misconduct will involve a warning and an opportunity to improve. Mr Owen correctly points to the fact that the 29 June 2018 matter involved no warning or anything written at all, and nor was any complaint or concern ever raised with him.
32. Ms Tame, the human resources adviser, made no notes of any conversations, and there is nothing negative in the human resources file about Mr Owen. The evidence of the human resources professional Ms Tame and Ms Rickard were 180° divergent about whose decision it was to dismiss. We have noted that Ms Rickard told Ms Rogers that she had dismissed Mr Owen so that it was Ms Rogers who told Ms Tame (15:32 on 25 July 2018, 106). Ms Tame needed to be told by Ms Rogers. This is not well structured management.
33. There is no letter of dismissal, although Mr Owen specifically asked for one (by text 16:32 on 25 July 2018, 129). The nearest is an email of 26 July 2018 at 17:06 (127) and a letter dated 13 August 2018 from Paul Smith, head of HR. The email says only *"I clearly explained yesterday to you that you were not the right person for the job and I would not be taking you further on a Zero Contract basis"* and the letter only that *"We write to confirm that your employment ended on Wednesday 25 July 2018"* and, curiously, *"Finally, on behalf of Linden South West, I would like to thank you for your contribution to the company's activities and wish you every success for the future."*
34. However it is clear that when dismissing him Ms Rickard told Mr Owen there had been complaints (unspecified) from customers and staff, because Mr Owen put this in an text to his colleague Sharon on 28 July 2018, at 08:44 (133).

35. It has to be said that the respondent (which is a large company employing 5,000 people according to the ET3) has failed to comply with the most basic standards of professionalism in how to commence, manage and terminate someone's employment. However Mr Owen cannot claim unfair dismissal because he did not have two years' service (and earlier his unfair dismissal claim was dismissed for that reason). The Tribunal finds that Ms Rickard was unhappy with Mr Owen and terminated his employment for that reason, and for no other. The reason this claim is brought is because they did so in such a shambolic manner that entirely understandably Mr Owen felt that the reason was his diabetes.

Employment Judge Housego

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Date 02 July 2019