EMPLOYMENT TRIBUNALS

Claimant: **Mr K Vieru**

Respondent: **Oxford Economics Ltd**

Heard: **via CVP** **On: 2/12/2020 to 4/12/2020**

Before: **Employment Judge Wright**
Ms P Barratt
Ms N Styles

Representation:
Claimant: **In person**

Respondent: **Ms E Misra - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims fail and are dismissed

REASONS

Introduction

1. The claimant presented a claim form on 19/2/2020 following a period of early conciliation between 14/1/2019 and 22/1/2019. The claimant's employment as an editor at the respondent commenced on 22/5/2017 and

ended on 14/2/2019. The claims were identified at a case management hearing on 28/8/2019 as:

> s. 104C Employment Rights Act 1996 (ERA), automatic unfair dismissal as a result of making (or proposing to make) an application for flexible working under s. 80F; and
>
> unlawful discrimination contrary to s. 13 of the Equality Act 2010 (EQA), based upon the associated protected characteristic of the claimant's father's cancer. The complaint is dismissal under s. 39(2)(c) EQA.

2. The respondent is a leading economics consultancy firm and it employs over 180 staff in the UK. It has offices in Frankfurt, New York, Singapore and Sydney.

3. The hearing was conducted by CVP and the evidence and submissions completed on the morning of day three, leaving the Tribunal deliberation time.

4. The Tribunal heard evidence from the claimant and from Clare Latham (the claimant's line manager and dismissing officer) and Stephanie Marnell (HR Manager). The Tribunal had an agreed bundle of approximately 300-pages. Both parties provided written submissions which they supplemented orally.

Findings of fact

5. The claimant and his then line manager Gabi Thesing were employed in a departure from previous editors in that they did not have an economics background or expertise (although they clearly had knowledge of the subject). The respondent had decided to bring in editors from a journalistic background. This caused friction and Ms Thesing left in August 2018 and Ms Latham took over as the claimant's line manager. Ms Latham then terminated the claimant's contract in December 2018.

6. Ms Latham resigned on 26/11/2018 and her last day was 14/12/2018. Ms Latham had been speaking to HR about the claimant's future in the organisation since October 2018. Ms Latham discussed the claimant's future with the CEO during the week of her resignation. She did not want to leave any outstanding issues after she left and she had decided that the claimant's style did not fit with the culture of the respondent. In addition, the claimant had clashed with three out of four heads of department.

7. Ms Latham was aware that termination of his employment would be a shock for the claimant. Not least because there had been no discussions

about the perceived failings of the claimant. There was no process (formal or informal) followed by the respondent. The reason being that the claimant could be terminated without the need for a fair reason to be provided and he did not have qualifying service to bring a claim for unfair dismissal under s.94 ERA. The Tribunal is concerned at the complete disregard for due process in respect of the claimant and the fact he was not told of any concerns and not given any chance to change or to amend his style. The fact the claimant was not able to challenge the respondent's decision at all, may well have led to him pursuing this claim so as to seek some form of redress.

8. The Tribunal finds the decision to terminate the claimant's employment was taken in late November 2018 and pre-dated the events in December 2018. This was predicated by Ms Thesing's departure, the friction between the editors and the economists and Ms Latham's own departure.

9. The claimant emailed Ms Latham on 3/12/2018 (page 120). He said:

> 'Just to let you know, yesterday I found out that my father, who lives in Finland, will soon have to start undergoing treatment for an aggressive form of prostate cancer. He's due to find out this week what his treatment plan will be and when things will start. He recently had surgery, so I'm not sure how soon they can start the cancer treatment. When the treatment does start, my two sisters (who also live in London) and I will have to take turns being with him in Helsinki to take him to appointments.
>
> At this stage, as we don't yet know what his treatment plan is, it's hard for me stay how this will affect my availability over the next month or two. It may be that I'll have to take some time off or work from Helsinki for a few weeks at a time. Maybe we can have a chat with HR to discuss some flexible working arrangements.'

10. The claimant relies upon this message as a *proposal* to make an application under s. 80F ERA.

11. Clearly the claimant has not *made* an application under s. 80F ERA. His own case was that he did not have enough information at that stage to make a formal application and that he wanted to discuss taking leave or working remotely from Finland while caring for his father.

12. The respondent's policy, which the claimant read upon hearing of his father's diagnosis, refers to two different types of flexible working:

> 'Flexible working
>
> Employees may request flexible working arrangements under the statutory right to request flexible working. This may lead to a permanent change to your contract of employment. HR can advise you further regarding this process.

> If you require flexible working arrangements on a temporary basis you should discuss this informally with your line manager in the first instance. Occasional working from home can be requested in accordance with the Company's Working from Home Policy which can be found on Sharepoint'

13. The claimant was not seeking a permanent change and was looking for a temporary arrangement to care for his father. He also said he wished to discuss the matter informally with Ms Latham (although that conversation never took place). The Tribunal finds the claimant was not proposing a permanent change to his working arrangements so as to engage the statutory right. The claimant was seeking a temporary change under the respondent's temporary change to working arrangements policy. The result was this did not engage his statutory right and he was not therefore proposing to make an application under s. 80F ERA.

14. In the alternative, the Tribunal finds that the claimant's reference to flexible working was not the reason or principal reason for the claimant's dismissal. The decision to dismiss the claimant predated the claimant's reference to a flexible working arrangement.

15. The claimant's comparator for the claim of direct discrimination is Carlos de Souza. He did not rely upon a hypothetical comparator, although in submissions he said that he had not correctly understood the position when he identified Mr de Souza and he referenced a hypothetical comparator. Ms Misra had pre-empted that and dealt with it in her written submissions.

16. Mr de Souza was an economist employed by the respondent. His wife had taken a job in Switzerland and he wished to relocate with her, however, he wished to continue to work for the respondent. He had discussions with Ms Latham, which resulted in her sending an email to HR on 11/10/2018 (page 223). The outcome was that Mr de Souza's contract of employment was terminated and he was engaged as a consultant for the respondent once he moved to Switzerland. The situation was to be reviewed in six months.

17. The less favourable treatment was the claimant being informed of the termination of his employment in a meeting on 11/12/2018. The protected characteristic is the association with the claimant's father, who had cancer.

18. The Tribunal has already found the decision to terminate the claimant's employment pre-dated him informing the respondent of his father's illness on 3/12/2018. That non-discriminatory explanation is accepted.

The Law

19. The ERA provides:

104C Flexible working

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) made (or proposed to make) an application under section 80F,

80F Statutory right to request contract variation

(1) A qualifying employee may apply to his employer for a change in his terms and conditions of employment if—

(a) the change relates to—

(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work, or

(iv) such other aspect of his terms and conditions of employment as the Secretary of State may specify by regulations,

20. The EQA provides:

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

39 Employees and applicants

…

(2) An employer (A) must not discriminate against an employee of A's (B)—

…

(c) by dismissing B;

21. The respondent referred to Coleman v Attridge Law [2008] ICR 1128 and EBR Attridge LLP v Coleman [2010] ICR 242 and to paragraph 3.19 of the EHRC Employment Statutory Code of Practice:

> 3.19 Discrimination by association can occur in various ways – for example, where the worker has a relationship of parent, son or daughter, partner, carer or friend of someone with a protected characteristic. The association with the other person need not be a permanent one.
>
> Example: A lone father caring for a disabled son has to take time off work whenever his son is sick or has medical appointments. The employer appears to resent the fact that the worker needs to care for his son and eventually dismisses him. The dismissal may amount to direct disability discrimination against the worker by association with his son.

Conclusions

22. The decision to dismiss the claimant pre-dated his reference to 'a chat with HR to discuss some flexible working arrangements' in respect of caring for his father.

23. The principal reason for dismissal was Ms Thesing's departure, friction between the claimant and the economists, Ms Latham's decision to terminate the claimant's contract prior to her departure.

24. It is accepted the claimant is able to rely upon his father's disability (cancer being a deemed disability) as s.13 refers to *a* protected characteristic, not a protected characteristic *of his* or *his* protected characteristic. The treatment or complaint is dismissal. S. 13 EQA requires a comparative exercise and the claimant has to show he was treated less favourably than his comparator.

25. Mr de Souza was not in a comparable situation to the claimant. He was permanently relocating to Switzerland, rather then wanting a temporary adjustment. His employment terminated and he became a contractor. Mr de Souza's motivation for the permanent change to his contractual terms was his wife taking a job in Switzerland; he was not caring for an ill relative.

26. Even if the claimant were to craft a hypothetical comparator, the Tribunal finds that the respondent was open to temporary flexible working arrangements and it had a policy which provided for the same. There was also the possibility of paid or unpaid compassionate leave, or annual leave. Indeed, Ms Lathan in an email to the CEO on 11/12/2018 (page 131) said:

> '… he earlier told me he may need to take more time off in the new year, paid or unpaid, to deal with a family issue.'

27. Ms Latham had not had any discussion with the claimant about his father's situation at that point (and she never did discuss it with the result the claimant felt Ms Latham lacked empathy), however, in her email to the CEO she was clearly open to him taking time off to look after his father.

28. There is no reason to find that had the claimant made an informal application for flexible working, particularly in view of the nature of his job, that the respondent would not have accommodated that for him or for any other employee.

29. The claimant was not dismissed because of his father's cancer. The respondent was not concerned that the claimant would wish to take time off to care for his father and Ms Latham had indicated that any leave would be accommodated.

30. Furthermore, the respondent's non-discriminatory explanation is accepted, that the decision to dismiss the claimant pre-dated him informing Ms Latham of his father's diagnosis.

Observations

31. The Tribunal wishes to make some observations regarding the claim and the claimant's motivation in pursuing it.

32. The Tribunal finds this was really a claim of unfair dismissal by the claimant, despite the fact he did not have qualifying service to present such a claim under s. 94 ERA.

33. The Tribunal can understand why the claimant feels so aggrieved and he was not treated compassionately. There were no issues with the claimant's editing abilities and at best, the respondent was dissatisfied with how he interacted with his colleagues and that he 'over-edited' and terminated the contract as a result of that. At the meeting on 11/12/2018 and in the dismissal letter, the respondent was disingenuous in referring to the claimant's capabilities and performance.

34. The respondent followed no process whatsoever. It did not put the claimant on notice that it was dissatisfied with his relationship with his colleagues. It was put to the claimant he had 'fallen out' with three of four heads of regions and he agreed; yet this was never brought to his attention as an issue or raised so that he could change his approach. Ms Latham made vague references to the claimant's relationship with his colleagues but did no more than that, he was poorly managed. Ms Latham did not directly inform the claimant she was dissatisfied and state that he needed to improve those relationships. The claimant did not

receive a pay rise, however he did receive two bonuses. It seemed to be the respondent's case that the claimant should have read into this that it was not happy with him. The claimant cannot have been expected to reach such a conclusion by not receiving a pay rise but having received two bonuses. The respondent's disciplinary process, which includes performance issues applied to all employees (page 275). The respondent did not follow its own process. The claimant is entitled to feel aggrieved that it did not do so.

35. The respondent's management of the claimant was inadequate. Had the respondent given the claimant notice of its discontent, he would have then had the opportunity to alter his approach. He may have then performed to the respondent's satisfaction, or he may not have done so; but at least he would have been afforded the opportunity to change. He was not given that opportunity and the result is this claim. There was no natural justice in play, no communication, the claimant was not given notice of anything at all, he was not allowed to be accompanied to the meeting and he was not given the right of appeal; all of which is contrary to the respondent's own policy.

36. The management of the claimant's termination of employment was muddled and confused. He was given several different termination dates. He was offered a two-month notice period, instead of the contractual four weeks, however the date given reflected an eight-week notice period. The claimant never accepted the offer of an extended notice period and the respondent did not follow that up. It is fair to say that the claimant could have questioned what was expected of him once he started his leave over the Christmas period and went to visit his father in Finland; however, by that time, Ms Latham had left and the claimant had no confidence in Ms Marnell. Equally the respondent could have been more proactive and Ms Marnell, who knew of the claimant's father's diagnosis and the fact it was expected he would undergo some treatment in January 2019 did not once enquire about the claimant's or his father's well-being. It seems that once the claimant had been told his employment was terminating, that the respondent ignored its duty of care to the claimant. When asked why for example the claimant was not told his line manager was leaving within a few days, the response was that it was irrelevant. It was not irrelevant, and the claimant remained the respondent's employee until his employment terminated.

37. The respondent has taken the approach that as the claimant did not have the two-year qualifying period that it did not need to treat him humanely; whereas of course, morally at least, it should have done so.

38. This is not a small employer, it employs over 180 people and has an internal HR function. There is no reason why the respondent could not

have better managed the claimant and have treated him reasonably. Had it done so and had the result been that the claimant's relationships with his colleagues did not improve, then if the respondent went onto terminate the contract, the claimant may well have accepted that. Particularly as the role was something of an experiment, being the first time a non-economist editor had been employed. By not communicating with the claimant, he was left to feel that he had to challenge the reasons given for the termination of his contract in the Tribunal, as he had been given no other opportunity to do so. The legislation provides that an employer can terminate the contract of an employee with less than two years' service and not face an unfair dismissal claim. There are however many other claims over which the employment tribunal has jurisdiction which are not dependent upon the two-year qualifying period. If an employer ignores natural justice and Acas codes or guidance, although it may not face a claim of unfair dismissal under s. 94 ERA it may well, as in this case, face other claims. An employer should not therefore disregard the need to treat all staff properly and fairly, irrespective of their length of service.

Employment Judge Wright
7 December 2020