



EMPLOYMENT TRIBUNALS

Claimant

Cheryl Nicholson

Respondent

Desire Cakes and Shakes Ltd

v

HEARING

Heard at: Leeds by telephone

On: 26 July 2021

Before: Employment Judge O'Neill

Appearance:

For the Claimant: In person

For the Respondent: Mr Abdullah Khalid (brother of Director Asad Khalid)

JUDGMENT

1. The claim of direct discrimination succeeds
2. The claimant is awarded compensation of £7343.00, calculated as follows
3. Calculation of compensation

Total Calculation

- Financial losses to 1 May 2021 £700
- Injury to feelings £5000
- ACAS uplift £1425
- Interest £218
- Total £7343

4. The above figures have been corrected by the Judge from the calculation made at the Hearing.

REASONS

Claims

1. The claim is for discrimination by reason of disability, the detriment is dismissal.

Evidence

2. The claimant gave evidence on affirmation. I considered the email of the respondent dated 22 July 2021. Mr Khalid had no first-hand evidence having had no involvement in the business at the time of the dismissal. The respondent produced no other witnesses or witness statement. I gave Mr Khalid an opportunity of making a verbal submission.

Law

3. The relevant sections of the Equality Act 2010 are as follows
 - section 83 employment status
 - section 6 disability
 - section 13 direct discrimination
 - section 124, compensation

Procedural Matters

4. The claimant was dismissed on 28 February 2021. ACAS early conciliation began on 9 March 2021 and ended on 22 March 2021. The ET1 form was lodged on 30 March 2021. The claim is in time.
5. The respondent has lodged no ET3. The respondent has made no application for a late submission of its response. On 27 May 2021 the respondent was notified that judgement may be entered under rule 21, and that the matter would be listed for a full hearing today.
6. I considered the respondent email of 22 July 2021 and Mr Khalid answered my questions and I invited him to make a closing submission which he declined. Otherwise, the respondent was not permitted to participate.

Findings

7. The respondent business is the desert shop, selling milkshakes and puddings for delivery and eating in. Mr Asad Khalid is the director but he is currently not available. It has two branches, one in Mexborough and one in Parkgate.
8. The claimant was employed within the business from 9 December 2020 until 28 February 2021 as a store operator, serving customers and preparing the products. She was paid £150 per week, which is approximately national minimum wage. The position was advertised on Facebook, the claimant does not have the advertisement, but recalls that it said in terms store operator required at busy desert shop, 5 PM to 11, Monday to Sunday, Parkgate and Mexborough.
9. Louise Pearce was the overall manager and the claimant worked under her instructions. The manager set the hours of work, the claimant had to attend as required, the claimant had no power to delegate.
10. The respondent has not issued particulars of employment or wage slips that the claimant pressed the respondent to put her on the books and pay tax and National Insurance and to issue particulars of employment. She did not agree to work cash in hand and evade her responsibilities for tax and National

- Insurance. The director, Mr Asad Khalid promised her that this would be sorted out as soon as possible through his solicitors and accountants, but the matter had been delayed because of Covid.
11. In the circumstances I find that the claimant was an employee within the meaning of section 83 equality act 2010.
 12. I find that the claimant has a disability within the meaning of section 6 of the Equality Act 2010. She was diagnosed as diabetic about 10 years ago. At the date of her dismissal she was at stage B renal failure. Her treatment includes in daily insulin injections. But for such injections she would suffer a hypoglycaemic episode and fall into a coma.
 13. I find that the claimant was dismissed by the manager Louise Pearce by a text to the claimant on 28 February 2021. The claimant read out the body of the text which said as follows '*Cheryl I am sorry I can't offer you any more shifts , I tried to call you and so did Asad. Due to you needing to leave early, leaving staff alone to clean and making other staff uncomfortable. I think you need to find a job more suitable to your health requirements.*'
 14. This was followed up by a further text on 1 March 2021. The claimant read out the body of the text as follows '*Cheryl I am sorry I can't offer you any more shifts. I tried to call you and so has Asad due to you leaving needing to leave early, leaving staff alone to clean you need to find a job more suitable to your health*'.
 15. Shortly before the text of 28 February 2021 there had been an issue at work on 27 February 2021. Because of her condition the claimant has to be at home by midnight, in order to take the necessary insulin injection. The claimant is unable to take this injection before leaving work because the insulin has to be kept at a particular and steady temperature in hygienic conditions and there is nowhere suitable in the workplace for her to store the insulin. The director Asad Khalid had assured the claimant that she would be taken home by a delivery driver in time for her injection. On 27 February 2021 this arrangement broke down and the claimant ended up in hospital. She returned to work on 28 February 2021, but there were transport problems on that date as well.
 16. The claimant had received no previous complaints whatsoever about her work, her behaviour, the productivity or any other matter to suggest that she was not a satisfactory employee.
 17. In the circumstances I find that the only plausible explanation for her dismissal was the fact of her disability and requirements to take insulin at a particular time, as indicated by the manager Ms Pearce in the texts which both refer to the claimant's health.
 18. In her employment the claimant received £120 per week. She has done all that she can to find alternative work and secured quite quickly about three weeks work cleaning at Morrisons. Unfortunately, the claimant has had to give up work altogether as of the beginning of May because of a serious health condition not related to the dismissal or the diabetes.
 19. The claimant was distressed and embarrassed to be sacked in this way, having had an exemplary record throughout her working life and she worried that she would never get a job again. She blamed the loss of employment on her disability and felt completely worthless and limited because of her disability.

She went to her GP who prescribed antidepressants which she took a short period.

Conclusions

20. The claimant was an employee within the meaning of section 83 of the Equality Act 2020.
21. The claimant has a disability within the meaning of section 6 of the Equality Act 2010, namely diabetes. Her disability had lasted over 12 months, she is dependent on an instant daily insulin injection and but for the medication he would fall into a coma.
22. The claimant's employment was brought to an end by the manager Louise Pearce in a text of 28 February 2021 and the dismissal constitutes less favourable treatment.
23. The words of the text and the subsequent text on 1 March 2021 indicate that the real reason for the dismissal was the claimant's health ie her diabetes and thus her disability. There was no other plausible reason for the claimant's dismissal.
24. The claimant has taken all reasonable steps to mitigate her loss finding cleaning work with Morrisons and short-term consultancy work in the business of a friend. Unfortunately her capacity to work has been curtailed as a consequence of another health condition unrelated to the dismissal.

Calculation

25. The claimant has been directly discriminated against and is entitled to compensation. The claimant has less than two years service and would not otherwise be entitled to a basic and compensatory award for unfair dismissal. Having found the reason for dismissal to be disability she is entitled to compensation under section 124 of the Equality Act 2010. I make an award of compensation, calculated as follows.
26. Loss of wages from 1 March 2020 to 1 May 2020
8 weeks loss of wages - $\pounds 150 \times 8 = \pounds 1200$
Less $\pounds 400$ from Morrisons cleaning ($15 \times 8.91 \times 3$)
Less income from other consultancy work $\pounds 100$
Total loss of wages $\pounds 700$
27. injury to feelings. The claimant had less than three months service but having had a long and exemplary employment record with other businesses before joining the respondent was very upset at the loss of her employment and felt worthless and afraid that she would never find a job again. This caused her to seek help from her GP who prescribed antidepressants. However, the claimant was able to pick yourself up and secure other work very quickly and is now unable to continue working for a reason entirely unrelated to the dismissal. In the circumstances I award $\pounds 5000$ for injury to feelings being at about the midpoint of the lower Vento scale.
28. ACAS uplift there was absolutely no attempt to follow the ACAS Code of Practice in respect of the dismissal, and I uplift the award by 25% - $\pounds 5700 = \pounds 1425$
29. Interest on injury to feelings from 28 February 2021 to 26 July 2021, five months

Injury to feelings 5000+ uplift on Injury to feelings of $1250 \times 8\% \times 5/12 = \text{£}208$

Interest on the financial loss calculation at the midpoint = $\text{£}10$

$700 \times 8\% \times 2.5/12 = \text{£}10$

30. Total Calculation

- Financial losses to 1 May 2021 $\text{£}700$
- Injury to feelings $\text{£}5000$
- ACAS uplift $\text{£}1425$
- Interest $\text{£}218$
- Total $\text{£}7343$

Employment Judge O'Neill

26 July 2021