



EMPLOYMENT TRIBUNALS

Claimant: Mr G Plummer

Respondent: Education for the 21st Century

Heard on: 10th, 11th, 12th and 13th May 2021
and in chambers on 1st June 2021

Before: Employment Judge Pritchard

Members: Ms N Beeston
Ms Y Walsh

Representation

Claimant: In person, assisted by Ms G Taylor, a friend

Respondent: Mr A Griffiths, counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1. The Claimant's direct disability discrimination claim is dismissed.
2. The Claimant's claim of harassment related to disability is dismissed.
3. The Claimant's claim that he was "automatically" unfairly dismissed because he made a protected disclosure is dismissed.
4. The Claimant's claim for unpaid wages is dismissed.
5. The Respondent agrees to pay to the Claimant the sum of £130.50 net in full and final settlement of his holiday pay claim which is accordingly dismissed upon withdrawal (credit to be given for any sums already paid in respect of this sum).

REASONS

1. The Claimant claimed disability discrimination (he claimed he was a disabled person by reason of his anxiety), public interest disclosure (automatic unfair dismissal), holiday pay and unpaid wages. The Respondent resisted the claims
2. The Tribunal heard evidence from the Claimant on his own behalf and from the Respondent's witnesses: Geoffrey Bruce (Site Manager for the Ravensbourne

School); Samantha Moorey (Business Manager); Cathy Whiting (Chief Executive Officer); and Emily Codling (Headteacher). The Tribunal was provided with a bundle of documents to which the parties variously referred together with a further bundle containing clearer copies of some of the documents. At the conclusion of the hearing the parties made oral submissions.

Issues

3. Notwithstanding the fact that preliminary hearings had been held in this case and case management orders issued, the Tribunal had been provided with no agreed list of issues and detail of the Claimant's claim remained unclear. The Tribunal used the first day of the hearing to read the witness statements and relevant documents in the hearing bundle. At the commencement of the second day of the hearing the Tribunal discussed the claims and issues with the parties. Upon the Claimant's clarification of the claims he was making, the parties were required to liaise with each other and to prepare an agreed list of issues. This was put before the Tribunal at 2:00 pm on the second day of the hearing before the Tribunal heard evidence in the case. The Claimant confirmed to the Tribunal that the list was agreed and that it included the matters of which he was complaining.
4. With slight modifications to the list put forward by the parties, and as agreed with them, it reads as follows:

Disability

- 4.1. Did the Claimant have a mental impairment at the material time?
- 4.2. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 4.3. If so, was that effect long term? In particular, when did it start and:
 - 4.3.1. Has it lasted for at least 12 months?
 - 4.3.2. Is or was the impairment likely to have lasted at least 12 months or the rest of the Claimant's life, if less than 12 months?
- 4.4. Were any measures taken to treat or correct the impairment? But for these measures would the impairment have been likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 4.5. The Tribunal also notes here that if the Tribunal were to determine that the Claimant was a disabled person, the Respondent would deny it had knowledge of that disability.

Direct Discrimination on the grounds of disability

- 4.6. Did the Respondent subject the Claimant to any of the following treatment falling within Section 39 of the Equality Act 2010, namely -

Dismissing the Claimant on 19 September 2019?

- 4.7. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated a hypothetical comparator?
- 4.8. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Harassment related to disability

- 4.9. Did the Respondent engage in unwanted conduct related to the Claimant's disability as follows:
 - 4.9.1. 'Bullying' the Claimant leading to his dismissal;
 - 4.9.2. Providing the Claimant's mobile number to third parties while he was on holiday;
 - 4.9.3. Requiring the Claimant to do work of which he had no knowledge;
 - 4.9.4. Asking the Claimant to fix an alarm?
- 4.10. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? If not, did the conduct have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 4.11. In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

PIDA – Whistleblowing

- 4.12. The Claimant claims that he made the following protected disclosures:
 - 4.12.1. An oral disclosure to Geoff (Ravensbourne Site Manager) on an unknown date stating to Geoff that he was "*on the fiddle*"; and
 - 4.12.2. An oral disclosure to Sam Moorey (Business Manager) on an unknown date that the quotes for suppliers only cost £1,000 or £424 "*so the rest of the money is going elsewhere*".
- 4.13. Were these alleged oral statements made?
- 4.14. In any or all of these, was information disclosed?
- 4.15. Was any such disclosed information based upon the Claimant's reasonable belief that it tended to show that:
 - 4.15.1. A criminal offence had been committed relating to "*fraud by inflation of contracts by staff to gain money*"?
- 4.16. If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

- 4.17. If so, was that disclosure made to the employer?
- 4.18. Was the making of any proven protected disclosure the principal reason for the dismissal?
- 4.19. The Claimant had less than two years of continuous employment and therefore the burden is on the Claimant to show that the reason, or if more than one, the principal reason for dismissal was the protected disclosure(s).

Whistleblowing – Remedy

- 4.20. If the protected disclosure was not made in good faith, is it just and equitable in all the circumstances to reduce any award by up to 25%

Unlawful Deduction of Wages / Breach of Contract/ Holiday Pay

- 4.21. The Claimant's holiday pay claim was settled by agreement.
- 4.22. Was the Claimant entitled to 2 hours pay per day between other pay between 14th to 30th August 2019 in reference to being "interrupted on holiday at night and making and receiving calls when my [his] personal number was given out to distant contractors" in the Claimant's Schedule of Loss?
- 4.23. The Respondent denies this claim and claims that the Claimant himself gave out his personal number and the Respondent did not request him to do so.
- 4.24. What clause of the employment contract does the Claimant rely upon for any payment for work done in this respect?

Findings of fact

5. From 2014, the Claimant regularly consulted his GP because of chronic anxiety with features of obsessive compulsive disorder and intrusive thought. In 2016, the Claimant was first diagnosed by his GP as suffering from severe anxiety. At various times he was treated with antidepressants, challenged to reduce his alcohol consumption and prescribed diazepam. He was also prescribed medication to help him sleep.
6. The Tribunal was shown a letter dated 3 August 2019 from Talk Together Bromley in which it is stated that the Claimant's symptoms indicated severe symptoms of anxiety.
7. The Claimant had been ordered to provide an impact statement setting out details of the impairment he relied on but failed to do so. In his ET1 claim form he stated: "I was able to go about my daily tasks before I started the job". In the further information provided pursuant to a case management order it is stated on his behalf: "It does not affect his ability to do everyday tasks, which he is capable of..." but "when stressed he finds that his condition will affect his ability to perform everyday tasks".

8. The Tribunal gave the Claimant the opportunity to explain the effects of his anxiety have on his ability to carry out day to day activities. The Tribunal accepts that the Claimant experienced the following effects:
 - 8.1. When suffering from stress and anxiety he becomes confused;
 - 8.2. In going about his daily tasks, he prefers to keep busy;
 - 8.3. He suffers from insomnia, his ability to sleep affected by the anxiety and worry;
 - 8.4. His anxiety has caused him to have panic attacks.
9. Before applying for employment with the Respondent, the Claimant had stopped taking all medication.
10. The Claimant was one of a number of applicants for the position of Site Manager at a new school, Eden Park High School. He attended an interview with Geoff Bruce and Samantha Moorey for the new position. The Claimant arrived a little late and flustered because he had mistakenly attended the wrong school for interview.
11. The Tribunal heard conflicting evidence as to whether or not the Claimant informed Miss Moorey and Mr Bruce of his anxiety condition at interview. The Tribunal was shown the contemporaneous manuscript notes made by Miss Moorey and Mr Bruce. Under the prepared question "Do you have any mental or physical disabilities that may affect your ability to carry out this role?", Mr Bruce wrote "OK". Miss Moorey wrote "No". Miss Moorey told the Tribunal that the Respondent employs a number of people with disabilities of one kind or another and, had the Claimant disclosed his condition at interview, further questions would have been asked as to how the Respondent could provide support and the Claimant's answers would have been noted. The Tribunal prefers that the Respondent's evidence in this regard, particularly that of Miss Moorey who gave clear and unequivocal evidence to the Tribunal throughout. On the balance of probabilities, the Tribunal finds that the Claimant did not disclose his condition to the Respondent at interview as he asserts.
12. The Claimant's application for employment with the Respondent was successful and he commenced employment with the Respondent on 24 June 2019.
13. The Claimant's contract of employment included, among other things:

Duration of employment

This is a permanent contract.

Your employment with the company is subject to a probation period of one academic year during which time you will be required to demonstrate, to the company's satisfaction, your suitability for the position in which you are employed. This may be extended at the discretion of the company and it is without prejudice to the company's right to terminate your employment before the expiry of the probation period.

Nature of post

You are employed as manager. Your duties are set out in your formal job description. The Company has the right, under the terms of this contract, to require you to perform such other duties for the Company which the Company may reasonably require you to undertake.

You are required to perform at the appropriate level of responsibility, whether specifically contained in your formal job description or not, which is consistent with your grade and is reasonable in all the circumstances having regard to your length of service, your experience, abilities and aptitudes and all other relevant matters.

Hours of work

Your normal hours of work will be 36 hours per week on Sunday to Saturday for 52.14 weeks of the year and such additional hours as are necessary for the proper performance of your duties. The times and dates of your attendance will be determined by the company's CEO having regard to the term dates and the needs of the school.

Flexibility

It is a term of your employment that you may be required to undertake such other duties and/or hours of work, between 6:00 am and 10:00 pm, as may reasonably be required of you commensurate with your grade and general level of responsibility within the company, this may include attendance at the specified number of twilight inset sessions (3:30 pm and 5:00 pm) in lieu of potential whole inset days, which may then be designated as additional holiday.

Salary

...

You acknowledge and understand that you shall not receive further remuneration in respect of such additional hours unless agreed in advance with your line manager.

You may be offered overtime in addition to your normal hours of work if instructed to do so by a SLT member on a reasonable notice or if necessary for the proper performance of your duties. The company does not guarantee that overtime will be available to you. Any overtime worked must receive prior authorization from the CEO or the COO and, where so authorised, shall be paid at your normal rate ...

You acknowledge and understand that you shall not receive further remuneration in respect of such additional hours unless agreed in advance with your line manager.

14. Eden Park High School had been commissioned by the Department for Education, project managed by MACE, and built by Bowmer and Kirkland. Pending completion of the construction project, and hand over to the

Respondent, the Claimant worked at The Ravensbourne School within the Respondent's Academy Trust. The Claimant underwent an induction process. He was allocated a buddy, Geoff Bruce, Site Manager at The Ravensbourne School, whom he worked alongside during this period. The Claimant was provided with a hot-desk and a computer. His duties included procurement of supplies for Eden Park High School.

15. The Claimant was line-managed by Samantha Moorey with whom he had regular line management meetings. Samantha Moorey completed notes of probation meetings she held with the Claimant.
16. At a meeting in June 2019, Ms Moorey questioned the Claimant about a reference she had received from his former employer. The Tribunal accepts Ms Moorey's clear evidence that the Claimant disclosed that he had previously suffered from depression but no longer did so.
17. The Tribunal also accepts Ms Codling's clear evidence that the Claimant did not tell her at a meeting in July 2019 that he did not like big groups or audiences.
18. Similarly, the Tribunal prefers Ms Moorey's evidence that the Claimant did not ask if, because of his anxiety, he could ask shorter questions when interviewing for a new team member.
19. At one of the line management meetings, the Claimant informed Ms Moorey that he had suffered from depression in the past but that it no longer affected him. When discussing holiday dates, the Claimant told Ms Moorey that he became anxious when flying and had to take Valium. The Claimant's holiday dates were adjusted to make sure the effects of the drug were no longer in his system when returning to work.
20. One of the Claimant's tasks before moving to the new school was to negotiate a contract for the provision and servicing of a number of sanitary bins. In his previous employment, the Claimant had dealings with the contractor Initial and he approached them with a view to obtaining a quotation. For the provision of 72 bins, Initial provided a quotation of in the region of £1,000. This was considerably less than what the Respondent was paying the contractor PHS for sanitary bins at The Ravensbourne School.
21. The Tribunal heard conflicting evidence as to whether Geoff Bruce told the Claimant aggressively that the Respondent would only contract with PHS and that was the supplier that must be used. The Tribunal also heard conflicting evidence as to whether the Claimant accused Geoff Bruce of being "on the fiddle" and told Samantha Moorey that "the rest of the money is going elsewhere".
22. Geoff Bruce was unable to remember exactly what was said to him but told the Tribunal that if the Claimant had told him he was on the fiddle he would have thought it was a joke. The Tribunal accepts this as a likely explanation, not least because Geoff Bruce had not negotiated the contract with PHS but inherited it from a predecessor.
23. Samantha Moorey's evidence was clear and consistent. She denied that the Claimant alleged wrongdoing during discussions about the contract prices. The Tribunal notes that the PHS contract was already in place when Samantha

Moorey's employment commenced. In contrast, the Claimant's description of this alleged whistleblowing disclosure was muddled and conflicting. In particular, he was unable to set out a rational chronological sequence of events. The Tribunal prefers the Respondent's evidence that the Claimant did not make the alleged disclosure to Ms Moorey.

24. The Claimant spent time at Eden Park School prior to its handover to the Respondent on or about 12 August 2019. This was in order to familiarise himself with the layout of the building and to undertake a structured three day training session in relation to the building's control systems, including the alarm system.
25. On the day of the handover, the Claimant had difficulty setting the alarm systems and refused to close the fire doors as instructed by Cathy Whiting who had firm words with him. There was no credible evidence to suggest that the Claimant was required to "fix" the alarm as alleged.
26. The Claimant went on holiday on 14 August 2019. While away, he received telephone calls on his personal mobile telephone from a table tennis supplier and about the alarm. The Tribunal accepts Ms Moorey's evidence that she did not provide the Claimant's telephone number for use while he was on holiday. This conclusion is supported by the email of 12 August 2019 from Ms Moorey to the Claimant saying there was no problem with the Claimant giving a supplier her number while he was on holiday. This conclusion is also supported by an email of 12 August 2019 from the Claimant to PHS in which he provides his telephone number for contact purposes when away on holiday.
27. The new school formally opened to students while the Claimant was away on holiday.
28. Upon his return from holiday, the Claimant line managed two team members at Eden Park School, one commencing employment shortly before the Claimant went on holiday, the other commencing employment while the Claimant was away on holiday.
29. On 16 September 2019, the Claimant was certificated as unfit for work for one month by his GP as suffering from anxiety and stress. The Claimant nevertheless continued to attend work. He did not submit his medical certificate or disclose his illness to the Respondent.
30. On the same day, the Claimant emailed Emily Codling asking for a meeting to discuss a number of matters. He complained that he was finding obstacles put in his way and that his rota had been changed.
31. On 16 September 2019, one of the Claimant's direct reports emailed Cathy Whiting complaining of a number of matters concerning the Claimant.
32. Samantha Moorey's composite notes of the probation meetings about the Claimant's performance noted a number of areas of concern. These included:
 - The Claimant was not prepared for handover day; the alarms had not been tested and could not be set.

- The Claimant was rude and dismissive of the help given by the CEO.
- The Claimant left the building saying “see you later you bastards, good luck with that shit”.
- The Claimant failed to comply with Samantha Moorey’s request for handover notes prior to departure on holiday.
- The only compliance document completed was a fire risk document.
- The Claimant had failed to provide his team members staff induction.
- Site staff did not feel they had direction or support and felt that the Claimant was not forthcoming with the truth.
- The Claimant, who had been trained, failed to set off the alarm in the correct manner during a fire evacuation.
- The Claimant failed to provide the cleaning staff with induction or guidance.
- The Claimant had shown a lack of professionalism when dealing with members of staff and outside companies.
- Staff had received text messages from the Claimant which they described as abusive.
- The Claimant had trained staff to leave the alarm and just lock the building instead which was a breach of health and safety regulations and which invalidated insurance.

33. On 24 September 2019, the Claimant was required to attend a probation meeting with Emily Codling. Samantha Moorey was in attendance to present the probation document. Ms Codling decided that the Claimant’s employment should be terminated. At the end of the meeting, after Ms Codling had communicated her decision to him, the Claimant emptied the contents of his pockets in order to hand over his keys and Valium tablets fell out at the same time. The Claimant told Ms Codling that he suffered from anxiety. Geoff Bruce escorted the Claimant from the building.

34. Ms Codling’s decision was confirmed in a letter to the Claimant of the same date. The reasons for the dismissal are stated as:

- You have failed to evidence your suitability for the role of site manager notwithstanding the support, training and assistance provided during the probation period; and
- Concerns regarding your conduct and behaviour during the probation period.

35. After his dismissal, the Claimant submitted his sick certificate to the Respondent. He appealed against the decision to dismiss by email dated 30 September 2019. The appeal hearing took place on 12 November 2019 and

was chaired by Tom Beaumont, School Governor. Having interviewed a number of staff members, including making detailed enquiries of Samantha Moorey, Mr Beaumont informed the Claimant that his appeal had been unsuccessful and the reasons why as set out in a letter dated 18 December 2019.

Applicable law

Disability

36. Section 6 of the Equality Act 2010 provides that a person has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out day-to-day activities. Section 212 provides that substantial means more than minor or trivial. Schedule 1 of the Act provides that the effect of an impairment is long-term if it has lasted for at least 12 months, it is likely to last for at least 12 months, or it is likely to last for the rest of the life of the person affected.
37. When considering whether a Claimant is disabled within the meaning of the Equality Act 2010, the Tribunal must take into account the Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011) issued by the Secretary of State which appears to it to be relevant.
38. 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 correct it and but for that it would be likely to have that effect.
39. When considering whether the effect of an impairment has had a long term substantial adverse effect on a person's ability to carry out day to day activities, but that effect ceases, the substantial effect is treated as continuing if it is likely to recur.
40. The relevant point in time to be looked at by the Tribunal when evaluating whether a person is disabled under section 6 is not the date of the hearing but the time of the alleged discriminatory act: see Cruickshank v Vaw Motorcast Ltd [2002] ICR 729.
41. In J v DLA Piper UK LLP UKEAT/0263/09 the Employment Appeal Tribunal stated that the Tribunal should make separate findings as to both the impairment and the adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it). However, Tribunals need not proceed by rigid consecutive stages. Specifically, where there may be a dispute about the existence of an impairment, it will make sense to start by making findings about whether the Claimant's ability to carry out day to day activities is adversely affected (on a long-term basis), and to consider the question of impairment in light of those findings.

Direct discrimination

42. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, dismissing him.
43. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination: A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Causation

44. The House of Lords has considered the test to be applied when determining whether a person discriminated “because of” a protected characteristic. If the act is not inherently discriminatory, as in this case, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason. This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

Comparators

45. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person’s abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

Harassment

46. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:
- (a) A engages in unwanted conduct related to a protected characteristic [disability in this case]; and
 - (b) the conduct has the purpose or effect of : -
 - (i) violating B’s dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
47. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:

- (a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

48. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment? Third, was that conduct related to the Claimant's protected characteristic?

49. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 relied upon the judgments of the House of Lords in James and Nagarajan and held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

50. As Mrs Justice Slade stated in Bakkali v Greater Manchester Buses (South) Ltd [2018] UKEAT/0176/17

Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant. It was said that without such evidence the ET should have found the complaint of harassment established. However, such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place.

The burden of proof which applies in cases decided under the Equality Act

51. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

52. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent

has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

53. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.
54. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".
55. If the Claimant does not prove such facts, his or her claim will fail.
56. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, then unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."
57. In Laing v Manchester City Council [2006] ICR 1519 (a case concerned with the protected characteristic of race, but applicable to all direct discrimination cases), the EAT stated, among other things, that:

"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case... An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in

Shamoon ... it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. ... The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"

Public interest disclosure and automatic unfair dismissal

58. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections of 43C to 43H. Section 43C provides, among other things, that a qualifying disclosure is a disclosure made by a worker to his employer.
59. Section 43B(1)(a) of the Act provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that a criminal offence has been committed, is being committed or is likely to be committed.
60. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B(1) and, secondly, decide objectively, whether or not that belief is reasonable; see: Babula v Waltham Forest College [2007] IRLR 346 CA. Also see Chesterton Global Limited v Nurmohamed [2018] ICR 731 CA.
61. In Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 the Employment Appeal Tribunal held that a protected disclosure must be a disclosure of information and not merely an allegation. The ordinary meaning of giving information is conveying facts. In Kilraine v London Borough of Wandsworth [2018] IRLR 846, the Court of Appeal held that the concept of "information" used in section 43B(1) is capable of covering statements which might also be characterised as allegations and that there is no rigid dichotomy between the two. Whether an identified statement or disclosure in any particular case does not meet the standard of being "information" is a matter of evaluative judgment by the Tribunal in light of all the facts.
62. Section 103A of the Act provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.
63. The causation test is not legal but factual. A Tribunal should ask why the alleged discriminator, the decision maker in this case, acted as he did, consciously or unconsciously; see West Yorkshire Police v Khan 2001 ICR 1065 HL. That was a race discrimination case but it was cited with approval on this point in a section 103A case in Trustees of Mama East Africa Women's Group v Dobson EAT 0219-20/05. The connection between the making of the protected disclosure and the detrimental treatment is established if the

disclosure had a material influence on the detrimental treatment, in the sense of being more than a trivial influence: Fecitt v NHS Manchester [2012] ICR 372.

64. In Jhuti v Royal Mail 2019 UKSC 55, the Supreme Court held that if a false case is created in response to whistleblowing by a manager leading another person to take the decision to dismiss the employee (in other words, where the real reason is hidden by an invented reason) the real reason for the dismissal will be that of the manager, not the reason of the decision maker.
65. Where an employee brings a whistleblowing claim but does not have sufficient continuity of service to bring an ordinary unfair dismissal claim under section 98 of the Employment Rights Act 1996, and the legislation placing no burden on the employer to show the reason for the dismissal, the burden of proof is on the employee to show on the balance of probabilities that he was dismissed for an automatically unfair reason; see Smith v Hayle Town Council 1978 996 CA; Tedeschi v Hosiden Besson Ltd EAT 959/95; and Ross v Eddie Stobart Ltd EAT 0068/13.

Deductions from wages (including unpaid wages)

66. Section 13 of the Employment Rights Act 1996 provides that an employer must not make a deduction from a worker's wages employed by him unless the deduction is required by statute, under a relevant provision in a worker's contract, or the worker has previously signified her written agreement or consent to the making of the deduction. A deficiency in the payment of wages properly payable is a deduction for the purposes of this section.
67. Where the total amount of wages paid on any occasion by an employer to a worker is less than the total amount of wages properly payable to the worker on that occasion, the amount of the deficiency shall be treated as a deduction made by the employer from the worker's wages on that occasion. In New Century Cleaning Co Ltd v Church 2000 IRLR 27 CA it was said that the phrase "properly payable" means some legal, but not necessarily contractual, entitlement to the sum in question.

Conclusion

Disability

68. Having regard to the Claimant's medical history, and in particular the letter from Talk Together Bromley, the Tribunal concludes that the Claimant was suffering from a mental impairment at relevant times, namely severe symptoms of anxiety.
69. The Tribunal has set out above the adverse effects of that impairment on the Claimant's ability to carry out day to day activities. The adverse effects were more than minor or trivial. It is tolerably clear that the adverse effects were long term.
70. The Tribunal concludes that the Claimant was a disabled person at relevant times.

Knowledge of disability

71. Although the Claimant disclosed that he had suffered from depression in the past, he told Ms Moorey that he no longer did so. The Claimant explained that he suffered from anxiety when flying but this would not lead a reasonable person to conclude that he thereby suffered from a disability. The Tribunal takes judicial notice that many people suffer from anxiety when flying, and that such anxiety, when experienced, is short term. It is clear that both Ms Codling and Ms Moorey were surprised when the Claimant pulled Valium tablets from his pocket at the conclusion of final probation meeting after Ms Codling's decision had been communicated to him. The Tribunal is satisfied that the Respondent did not know at relevant times that the Claimant was a disabled person by reason of anxiety.

Direct Discrimination

72. In accordance with the guidance in Lainig, the Tribunal considers the reason for the Claimant's dismissal. As stated in that case, this approach gives the Claimant the benefit of the doubt at this stage of the Tribunal's reasoning.

73. The Tribunal concludes that the Claimant was dismissed for the reasons stated by Ms Codling in evidence and set out in her letter confirming her decision. The Tribunal accepts Ms Codling's clear and credible evidence that she had reached the conclusion that the Claimant was not prepared for handover day, had incompetently handled a fire alarm practice with 700 students to evacuate, had held gruff conversations with other staff, shown an inability to manage his team, had not inducted the cleaning staff, had failed to prepare notes for holiday handover, used inappropriate language in front of administrative staff, sent inappropriate text messages to team members, and failed to update or complete defect lists for the building contractors. These reasons had nothing whatsoever to do with the Claimant's disability of which the Respondent was unaware. These reasons do not show conscious or unconscious disability discrimination.

74. The Claimant was not dismissed because of his disability.

Harassment related to disability

75. The Tribunal has been unable to identify any "bullying" of the Claimant as alleged. The Tribunal prefers the Respondent's evidence, for the reasons stated above, that the Respondent did not provide the Claimant's mobile number to third parties while he was on holiday; in the Tribunal's view, it is more likely that the Claimant himself provided the number. The Claimant adduced insufficient evidence to show that he was asked to do work of which he had no knowledge or that he was required to "fix" the alarm. The Claimant has failed to show the unwanted conduct alleged. Even if the Claimant had been subject to such unwanted conduct, there was no credible evidence to suggest that it was related to his disability. The context and circumstances of the case would not support such a conclusion.

Whistleblowing/Automatic unfair dismissal

76. The Tribunal is satisfied that Geoff Bruce played no part whatsoever in the decision to dismiss the Claimant. The question as to whether or not any disclosure made by the Claimant to Geoff Bruce was a protected disclosure does not, therefore, fall for consideration.

77. Having concluded that the Claimant did not make the alleged disclosure of information to Sam Moorey, even having regard to the ruling in Jhuti, it cannot be said that the Claimant was dismissed because of any such disclosure.
78. The Claimant has not shown that he was dismissed because he had “blown the whistle”.

Unlawful Deduction of Wages / Breach of Contract/ Holiday Pay

79. The Claimant’s holiday pay claim was settled by agreement.
80. The Claimant has failed to show any legal entitlement to two hours’ pay per day while he was on holiday as he claims. On the contrary, the provisions of the Claimant’s contract of employment, set out above, show that he was not entitled to be paid for additional hours unless agreed in advance with his line manager and that any overtime had to be authorised. Further, he contractually acknowledged his understanding that he would not receive further remuneration in respect of such additional hours unless agreed in advance with his line manager.
81. Accordingly, the Claimant’s claim for unpaid wages does not succeed.

Employment Judge Pritchard
Date: 1 June 2021

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.