



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Davies

v

Anthony Betts & Company Ltd

Heard at: Watford (by CVP)

On: 29-31 January 2024

Before: Employment Judge S Moore
Ms A Crosby
Ms F Betts

Appearances

For the Claimant: In person

For the Respondent: Mr G. Jones, consultant.

JUDGMENT

The claims of direct disability discrimination and discrimination arising from disability, pursuant, respectively, to sections 13 and 15 of the Equality Act 2010 are dismissed.

REASONS

Introduction

1. The Respondent is a Car Dealership. The Claimant began employment with the Respondent as a Sales Executive on 18 October 2016 and was dismissed for gross misconduct on 4 November 2021. He has brought claims of direct discrimination on grounds of disability (s. 13 Equality Act 2010) and of discrimination arising from disability (s.15 Equality Act 2010).
2. The Respondent accepts that the Claimant is a disabled person within the meaning of s. 6 Equality Act 2010 by reason of a hip condition called "Slipped Upper Femoral Epiphysis".

3. We heard evidence from the Claimant and for the Respondent we heard evidence from Anthony Betts (AB), owner, sole director and Managing Director of the Respondent, Simon Jelfs (SJ), Group Sales Manager, Grant Forbes (GF), Sales Executive, and Chris Stansfield, Sales Executive.
4. The issues were identified at a Preliminary Hearing on 6 February 2023 although the Claimant was subsequently given permission to amend his claim.
5. Accordingly, at the outset of the hearing the core issues were agreed as being as follows:

Direct Discrimination

1. Did R:
 - i. pay C sick pay rather than full pay during a period of self-isolation in July 2021?
 - ii. Not permit C to return to work from self-isolation in July 2021?
 - iii. Not permit C to work from home during this period?
2. If so, was this because of C's disability?

Discrimination Arising from Disability

3. Did R:
 - i. On a date between June - October 2020 tell C he was a liability?
 - ii. Between June - October 2020 exclude C from work banter in morning meetings?
 - iii. Between June – October 2020 move C's desk to a corner of the showroom?
 - iv. In April 2021 fail to conduct a return to work assessment?
 - v. On a date between 12 April 2021 and 29 May 2021 tell C he was like an old man when he struggled to get out of his chair due to hip pain?
 - vi. On a date between 12 April 2021 and 29 May 2021 tell C he was the weakest link in the sales team?
 - vii. Deny C commission in respect of 3 sales completed on 29 May 2021?
 - viii. Ask C to attend a disciplinary meeting on 5 June 2021 for absence and poor attitude?

- ix. Ask C to hand in his keys to the show room?
 - x. Pay C sick pay rather than full pay during a period of self-isolation?
 - xi. Refuse to allow C to return to work from self-isolation?
 - xii. Refuse to allow C to work from home during self-isolation?
 - xiii. Indicate to C (through SJ) that it was not interested in C's concerns?
4. Did those matters (or any of them) amount to unfavourable treatment?
5. If so, was the unfavourable treatment because of something arising in consequence of C's disability? C relies on:
- i. Needing to take time off work to undergo and recover from a surgical procedure; and/or
 - ii. Taking time off work because of his hip condition;
 - iii. Difficulty getting out of chair because of hip pain.
6. If so, was R's treatment of C a proportionate means of achieving a legitimate aim?
6. Notably the Claimant does not allege that his dismissal was unfair or an act or discrimination but relies on alleged acts of discrimination prior to his dismissal.

The Facts

7. On the basis of the witness evidence and the bundle of documents to which we were referred, we make the following findings of fact.
8. The Claimant told AB about his hip condition at interview in 2016.
9. In early January 2020 he informed AB that his hip was causing him pain and had a day off for a medical appointment on 9 March 2020.
10. As a result of the national lockdown in the face of the Covid 19 Pandemic the business closed on 24 March 2020.
11. Certain aspects of the business were opened in May 2020 and further opening occurred in June 2020, subject to government guidelines regarding social distancing which included, in the case of the Respondent, spacing out and doubling up the sales desks to maintain social distancing.
12. The Claimant returned to work on 1 June 2020. By the date of his return the desks in the showroom had already been spaced out. The Claimant's desk was located close to the door of the showroom, beside a large window but further away from the desks of the other two sales executives.

13. Shortly after his return to work the Claimant was given the medical advice that he required an operation on his hip and he informed AB of that fact. The operation was scheduled for October 2020.
14. About the same time the Claimant also informed AB that he was being prosecuted for his involvement in a road traffic accident. At the time he told AB that he was being prosecuted for drink driving but AB found out after the conclusion of the proceedings that the Claimant had been found guilty of being "in charge of a vehicle when unfit through drugs". The Claimant informed AB there was a risk he would lose his licence.
15. AB informed the Claimant they would continue as normal until they knew the outcome of the prosecution and that if the outcome was not favourable, he would explore an alternative role for the Claimant which didn't involve driving. The Claimant asked if he could use a company car as his was undrivable from the accident and his insurers were refusing to pay for the repairs, but AB declined.
16. In August 2020 the Claimant went on holiday to a location which at the time was a red flag country. When, on the Claimant's return, the Respondent learned where the Claimant had been he was required to isolate before coming back to work. The Claimant took some of this extra leave as unpaid leave and some as additional holiday.
17. The Claimant's absence for his hip operation in October 2020 was followed by a further period of lockdown, which resulted in him and others being placed on furlough until the business reopened in April 2021.
18. The Claimant returned to work on 12 April 2021. Prior to him returning AB texted the Claimant to ask how he was. The Claimant said he was "good" and "finally starting to get bored". AB then asked if he was fully recovered. The Claimant replied "I couldn't play rugby yet but definitely getting there. Are we still set for the 12th for returning?"
19. On reopening, and because of the extra cleaning required by Covid precautions, AB decided to outsource the cleaning of the premises and asked the Claimant for his keys to the show room to give the cleaners.
20. On Friday 28 May 2021 the Claimant attended court in relation for the plea hearing in respect of the prosecution of his driving offence.
21. On Saturday 29 May 2021 he texted in sick which meant that his colleague CS had to deal with the Claimant's three customer appointments that day, which involved the handover of three cars. At the hearing the Claimant could not remember the nature of his illness but did not suggest it was related to his hip.
22. On Sunday 30 May 2021 the Claimant reported on social media he was at the beach and texted in sick again the following week. The Claimant said he had sustained a bite to his foot while at the beach.

23. The Claimant subsequently discovered that AB had given CS the commission in respect of the car sales that had been concluded on 29 May 2021.
24. On 5 June 2021 AB had a meeting with the Claimant to discuss his absence and attitude to his work. The evidence before us was that by this date the Claimant had had a number of days' absence and that he would text to say he was sick and not coming into work, rather than telephone in accordance with the company procedure. There was no evidence that any of the Claimant's absences were related to his hip. The evidence was that those absences which were not related to his foot injury were due to the stress of the court proceedings and his fear he might lose his driving licence.
25. At the meeting on 5 June 2021 AB also confirmed to the Claimant that he would not get the commission on the 3 car sales that CS had concluded on 29 May 2021. The evidence was that while the sales team helped each other out on occasion by doing the handover of each other's cars, without taking the commission earned by those sales, on that day there had been three handovers which had occupied CS for most of the day and had deprived him of the opportunity of generating potential new sales of his own. Further the Claimant's absence that day had caused particular stress because GF was on holiday, leaving only CS and AB at work.
26. On 4 July 2021 the Claimant texted AB to say his mum had tested positive for Covid and he was advised to isolate for 10 days as per the guidelines.
27. On 13 July 2021 AB asked the Claimant for an update and the Claimant texted to say he now also had Covid but would be back on 15 July 2021. He did not respond to AB's request for clarification as to when he had contracted Covid.
28. On 15 July 2021 the Claimant returned to work. He said he hadn't had a PCR test and couldn't say when he had first become ill with Covid. AB considered the Claimant didn't look well. The Claimant was on leave on 16 July 2021 and on 17 July 2021 he texted in sick with a temperature and sickness.
29. AB told the Claimant he must isolate and get a PCR test before he came back to work or isolate for a further ten days. The Claimant said he couldn't get a PCR test because the answers he gave on the NHS website meant he wasn't entitled to one. AB insisted that since he couldn't be sure when the Claimant had first contracted Covid the Claimant must isolate for a further ten days before coming back to work.
30. On 30 July 2021 the Claimant emailed AB a letter of conditional resignation, alleging he was being constructively dismissed, and that he had been made a scape-goat and discriminated against because of his hip disability. He requested termination of his contract in exchange for an ex-gratia payment of £15,000.

31. AB responded by letter dated 30 July 2021 stating he was surprised and concerned by the Claimant's allegations and inviting him to a Grievance Meeting on 2 August 2021. The meeting was then postponed to 3 August 2021 at the Claimant's request because his witness, CS, had decided not to participate.
32. The Grievance Meeting took place on 3 August 2021 and was recorded.
33. Following that meeting, AB emailed the Claimant a letter on 12 August 2021 stating that the Respondent had been aware of the Claimant's problem with his hip since before he was offered the job and it had never made any difference to the way he had been treated. That the Claimant had been a good performing sales executive but he (AB) had spoken to him informally in June about his attendance as this was putting additional stress on his colleagues. Further that at that meeting the Claimant had said his absence was due to stress from the court proceedings and there was no mention of his hip being a contributing factor. AB further stated he thought it was fair that CS had been paid for the deals concluded on 29 May 2021 and that while he and the Claimant had a difference of opinion regarding testing for Covid, the Government guidance was clear that you should get a PCR test if you show Covid symptoms and the business had a duty of care to protect all employees and customers. The letter concluded by stating the Respondent would not be offering the Claimant payment to terminate his employment and that he was a valued employee who AB would much prefer remained in the business for some time to come.
34. The Claimant continued to work up to and including 21 August 2021 when he emailed AB after work to say his doctor had issued a Statement of Fitness for Work on 20 August 2021, signing him off work on grounds of stress and anxiety and he remained signed off work until his dismissal.
35. In October 2021 the Respondent discovered the Claimant had started up his own business in May 2021 in competition with the Respondent.
36. On 26 October 2021 the Claimant was invited to a disciplinary meeting on 3 November 2021 to discuss that allegation. The Claimant did not attend the meeting or provide any written evidence or submissions.
37. A decision dismissing the Claimant with immediate effect was sent to him on 4 November 2021.
38. He did not appeal that decision and he does not challenge the dismissal in these proceedings.

Findings

39. We will consider the allegations in chronological order.
40. As regards the Claimant being asked to move into a corner of the showroom, we accept that when the sales team returned to work in June

2020 after the first Covid lockdown his desk was in the corner of the show room. However, we find this was entirely unrelated to the Claimant's disability. The desks had been moved to comply with social distancing and to locations where there were telephone points. Indeed, when the Respondent had employed four sales executives, one of the desks had been positioned in that same location. Further, it was the location closest to the entrance and with a full, clear view of the forecourt and potential customers. In addition, the desks had been moved prior to the Claimant returning to work and before AB even knew the Claimant required surgery.

41. As regards the allegation the Claimant was excluded from work banter in morning sales meetings, we heard no evidence to support this particular allegation. The Claimant gave evidence that he felt excluded from banter in the showroom because of the position of his desk, however the likelihood is that because of social distancing and the requirement to wear masks there was less banter on the sales floor than previously. Notably, however GF gave evidence of his friendship with the Claimant, the fact the sales team would regularly socialise together and that he regularly went to the gym with the Claimant. We are satisfied the Claimant was not excluded from banter because of something arising in consequence of his hip disability or for any other reason.
42. As regards the allegation that the Claimant was told he was a liability sometime between June 2020 and October 2020, the Claimant's evidence on this point was very vague and was not corroborated by any other evidence we heard. We did hear evidence, however, that the Claimant held strong views about Covid and was reluctant to comply with the rules around social distancing and mask wearing. We also heard evidence that during this period the Claimant had gone on holiday to a red flag country and (in the UK) had been involved in a car accident that could result in the loss of his driving licence. We are not satisfied the Claimant was told he was a liability between June and October 2020, but if such a comment was made, we consider it would have been because of his opinion in respect of the Covid rules or because of his car accident and not because of his hip disability.
43. As regards the allegation the Respondent did not conduct a back to work assessment in April 2021, we accept that no such assessment was conducted. However, the Claimant's operation had taken place six months' previously and the reason he had not returned to work after the planned 9 weeks' recuperation period was because of the second Covid lockdown. Further, prior to the Claimant coming back AB asked him if had recovered from his operation and the Claimant's response indicated he was fully fit to work and did not suggest he needed any adjustments. Indeed, the Claimant has never suggested that any adjustments were needed. We are therefore not satisfied that the fact the Respondent did not conduct a back to work assessment in April 2021 amounted to unfavourable treatment for the purposes of s. 15 Equality Act 2010 (even if it could be said to be treatment because of something arising in consequence of the Claimant's hip disability).

44. As regards the allegation the Claimant was asked to hand in his keys to the showroom, we accept that he was asked to do so. However, this was entirely unrelated to the Claimant's hip disability and rather because the cleaning had been outsourced and the new cleaners needed a set of keys; the Claimant happened to be the person to hand when AB was showing the cleaners around and realised that they needed a set of keys. Further we heard evidence that the sales team regularly shared keys amongst themselves and there was no evidence the Claimant's access to the showroom was ever restricted because he did not have his own set of keys.
45. As regards the allegation that AB told the Claimant he was like an old man when he struggled to get out of a chair, the Claimant said in evidence that this comment was made one morning in a sales meeting as he struggled to get out of a chair at the end of the meeting.
46. We heard evidence that there was banter in the daily sales meetings and that the banter tended to focus on sales performance and who was selling the most cars. The evidence of GF and CS (the other members of the sales team) was that the banter didn't relate to the Claimant's hip disability and there is no evidence of the Claimant ever complaining to GF (with whom he was particularly friendly) about inappropriate banter and, notably, he does not complain about inappropriate banter in his letter to AB of 29 July 2021. That said, we can believe that AB may have said the alleged comment in the circumstances the Claimant described. However even if the comment was made, given the context in which it was made, namely a friendly workplace with regular banter, we don't consider the comment to be sufficiently offensive to amount to unfavourable treatment. For the sake of completeness, we also add that we don't consider such a comment amounts to harassment for the purpose of section 26 Equality Act 2010 (had such a claim been brought) as we don't consider it would have had the purpose or effect set out in section 26(1)(b).
47. As regards the allegations that the Claimant was denied commission on the three sales that were concluded on 29 May 2021 and that he was called in for a disciplinary meeting on 5 June 2021, we accept the Claimant was denied the commission in question and that AB asked to speak to him on 5 June 2021 to discuss his recent absences and attitude to work. However, neither of those matters were in any way related to the Claimant's hip disability. While the Claimant felt very aggrieved that he had been deprived of the commission and could point to times when the sales team had done the handover of cars for absent colleagues without taking commission, AB was reasonably entitled to give CS the commission for the sales on 29 May 2021 because CS had had to do three handovers for the Claimant, which had taken him most of the day. In any event, whether or not AB's decision was reasonable or fair is not the relevant question; the relevant question is whether he took that decision because of something arising in consequence of the Claimant's hip disability and it is plain that he did not. While AB's decision may well have been influenced by the Claimant's sick absence on 29 May 2021 and his further sick

absences the following week, the evidence is those sick absences were not because of the Claimant's hip disability but because he was suffering stress and anxiety due to his court case and because of a bite to his foot that he sustained at the beach.

48. As regards the allegation that at the meeting the Claimant was told he was the weakest link in the sales team, we record that at the outset of the hearing the Claimant made an application to admit several very short recordings of the Grievance Meeting, which on the evidence lasted about 1 & ½ hrs. The Claimant said he couldn't submit a recording of the full meeting because he had only recorded the times when AB had said something relevant. We did not consider that explanation credible (as the Claimant would not have known when AB was about to say something the Claimant wished to record) but in any event we refused the application on the basis that very short, cherry-picked extracts of such a long meeting would not have fairly reflected the discussion.
49. Accordingly, on the evidence before us we are not satisfied any such comment was made. However, if even such a comment was made, we are satisfied it would have been unrelated to the Claimant's hip disability and would rather have reflected AB's concern at the Claimant's absences and the court proceedings which threatened the Claimant's driving licence. There is no reason why AB would have felt the Claimant's hip disability to be problematic given there is no evidence it affected the Claimant's attendance or standard of work.
50. As regards the allegations that the Claimant was not allowed to return from work following self-isolation and was paid sick pay rather than full-pay during self-isolation, we accept the Claimant was required to undergo a further period of self-isolation having contracted Covid after he had previously undergone a period self-isolation when his mother had Covid. We are also satisfied the Claimant was paid sick pay rather than full pay during this period. However, again we are satisfied that AB's decisions in relation to these matters were not because of the Claimant's hip disability or because of anything arising in consequence of his hip disability. Since the Claimant hadn't taken a PCR test, he couldn't establish when he had first contracted Covid and he had then come into work when it appeared he was still ill with Covid and exhibiting symptoms. Given these factors, together with the Claimant's known views about the Covid rules, regardless of the approach AB may have taken with other member of staff, we are satisfied AB's decision with respect to the Claimant was because of his sense of responsibility towards other members of staff and members of the public.
51. As regards the allegation that the Claimant was not allowed to work from home during his period of self-isolation, we note he never requested to work from home during that period. We accept that AB did not suggest to the Claimant that he work from home, however we are satisfied that that was not because of the Claimant's hip disability or because of anything arising in consequence of the Claimant's hip disability. We heard evidence that the only work the sales executives could do from home was using a

retention tool programme called P360 which the Claimant had not been trained on or had ever used.

52. As regards the allegation that the Claimant raised his concerns with his manager SJ but SJ was not interested in them, the only evidence on this point was that the Claimant asked SJ about having use of a company car and that SJ told the Claimant there was nothing he could do as the Claimant had gone over his head and already asked AB, who had refused the request. SJ's response did not amount to unfavourable treatment and in any event was not because of something arising in consequence of the Claimant's hip disability.
53. As regards the allegation that AB persuaded CS not to be a witness at the grievance meeting on 3 August 2021, we are not satisfied this happened as alleged. CS's evidence (who no longer works for the Respondent) was that he simply changed his mind and decided he didn't want to be there. He said he did see AB on the morning of 2 August 2021 but only to tell him he wasn't going to attend the grievance hearing, although AB in fact reassured him it wouldn't make any difference to their relationship.
54. As regards the allegation that the Respondent recorded the Grievance Meeting, we accept that this happened. The Respondent points to the Company Handbook which states "We reserve the right to record any formal meeting whether conducted by us or a third party, a copy of the recording can be made available on request".
55. We are therefore not satisfied this amounted to unfavourable treatment or was because of something arising in consequence of the Claimant's hip disability.

Conclusion

56. In the light of the above we are not satisfied the Claimant was treated less favourably because of his disability or that he was treated unfavourably because of something arising in consequence of his disability.
57. It follows that the claim is dismissed.

Employment Judge S Moore

Date: 2 February 2024

Sent to the parties on: 21 February 2024

For the Tribunal Office