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Starling Bank employment tribunal

The outcome of the Employment Tribunal claim brought by Gulnaz Raja against Starling Bank Limited (1) (Starling), and Matthew Newman (2) was reported last month.

24 November 2022 Raymond Silverstein

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The outcome of the Employment Tribunal claim brought by Gulnaz Raja against Starling Bank Limited (1) (Starling), and Matthew Newman (2) was reported last month.

The Judgment which is available online should be of significant interest to employers, including regulated organisations, in relation to Covid and medical conditions in general. The case shows how an employer should treat a disabled employee to minimise legal risk by complying with applicable laws and good practice. It should also be of major interest and serve as a cautionary example to every employee who, like the second respondent, is subject to the Senior Managers and Certification Regime (SMCR), or the rules of a regulator such as the Solicitors Regulation Authority (SRA).

Miss Raja represented herself at the Employment Tribunal hearing. Both Respondents were represented by the same Queen's (now King's) Counsel.

The parties

Miss Raja was employed by Starling as Deputy Company Secretary.

Mr Newman, a solicitor, is Chief Administrative Officer, GC and Company Secretary of Starling. According to the Financial Services Register, he has been the bank's SMF24 (Chief Operations Officer) since 13 January 2020.

Case facts

Miss Raja began working for Starling in July 2019.

At the time of her employment Starling had about 1,000 employees.

From October 2019,Miss Raja was frequently absent or worked from home because of illness or medical appointments connected to her asthma.

In January 2020, Mr Newman, who was Miss Raja's manager, approached HR about terminating her employment for performance reasons.

On 6 March 2020, HR emailed all staff about the worsening pandemic, asking them to contact their manager if they had concerns.

On 9 March 2020, Miss Raja asked to speak to Mr Newman about the email. He invited her to a meeting 25 minutes later at which he dismissed Miss Raja on the grounds of her performance and because she was "not a Starling person".

Miss Raja's disability (asthma) and the Respondent's knowledge of that disability were not in issue.

The two complaints the Employment Tribunal upheld

1. Miss Raja was unfavourably treated by the Respondents because of something arising from disability when she was dismissed

contrary to section 15 of the Equality Act 2010; and

2. Miss Raja was subjected to a detriment contrary to section 44(1)(e) of the Employment Rights Act 1996 in the Respondents not holding a meeting to discuss her health and safety concerns and instantly dismissing her on 9 March 2020.

Factors the Employment Tribunal relied on to uphold the first complaint

- Mr Newman's attitude to ill health and working from home. The Tribunal did not fully accept Mr Newman's account that he trusted colleagues and was seeking not to pry into health issues. A total failure to respond to messages about ill health and the failure by a manager to express concern or support to a subordinate on a significant number of occasions, seemed to the Tribunal to be intended to discourage time off for ill health and working from home. The fact that Mr Newman allowed working from home tacitly by not objecting to the occasions Miss Raja worked from home to attend appointments did not change their impression that he was seeking to discourage the requests by not acknowledging them.
- The Tribunal considered that there was good evidence that Mr Newman valued employees working long hours in the office. He was critical of Miss Raja for leaving work at the end of her contractual hours. That attitude seemed to the Tribunal in the circumstances to align with an attitude of impatience with ill health absence.
- Mr Newman's credibility was to some extent impaired according to the Tribunal by what they describe in the Judgment as his improbable assertions about his memory. The Tribunal rejected Mr Newman's evidence about his notes of the dismissal meeting being almost verbatim and was troubled by his assertions that Mr Newman did not remember Miss Raja's references to asthma and an occasion when she said that she had to go home to work due to her cough as compared with his apparently detailed recall of work issues.
- The lack of documentation at the time as to the reasons for deciding to dismiss Miss Raja and/or the discussions about her dismissal.
- The fact that Miss Raja passed her probation and was awarded a salary increase and the fact that the documents evidencing those events make no reference to any problem with her performance, but in fact suggest her performance was good. What happened in the chronology after that was that Miss Raja began to have time off for ill health and began to request to work from home due to appointments.
- The total lack of any formal procedure in relation to the dismissal notwithstanding that Miss Raja had less than two years' employment.

Regarding the second complaint that the Tribunal upheld, they concluded that:

- Miss Raja took an appropriate step in circumstances of danger which she reasonably believed to be serious and imminent when she asked for a discussion with Mr Newman about her medical condition
- her dismissal was advanced in time because she took that step, and
- being dismissed earlier than she otherwise would have been dismissed was a detriment.

Disclosure

The Tribunal considered whether the Respondents' disclosure exercise had been unsatisfactory, as alleged, because that might have been a matter from which they drew relevant inferences.

It seemed to the Tribunal that Starling was not very good at documenting matters or keeping employee records, however they concluded that there was no good evidence before them that the Respondents had not done a through and conscientious search for documents as part of the disclosure exercise or that led them to consider that documents had been suppressed or concocted.

Disability, discrimination and regulatory issues

There are a number of regulatory rules which could mean that the Tribunal's decision is not the end of proceedings in relation to this matter. It remains to be seen what further action might ensue, and the extent to which any of the following consideration may yet have practical ramifications.

The SMCR has a carve out for GCs, but this is limited to the legal advice they provide to their employer. Conduct rules apply to virtually all employees at firms authorised by the Financial Conduct Authority (FCA) alone, or on a 'dual' basis with the Prudential Regulation Authority (PRA), with specific rules for senior managers, and more detailed considerations as to the regulatory requirements for their 'fitness and propriety'

The PRA and FCA have published extensively on the importance of equality, diversity and inclusion (EDI) as features of firms' cultures and of their various HR (eg recruitment, retention, and incentivisation) processes. Regulators have also made it clear that senior managers' approach to EDI issues is a material factor for firms and regulators to consider in ongoing assessments of managers' fitness and propriety.

For both private practice and 'in-house' solicitors, SRA Principle 1 requires conduct that upholds the constitutional principle of the rule of law, and the proper administration of justice. Principle 6 requires solicitors to act in a way that encourages EDI. Solicitors can report themselves to the SRA or it can decide to investigate them of its own accord or because a complaint has been made by a third party.

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