



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs C Addison

v

YMCA Birmingham

PRELIMINARY HEARING

Heard at: Birmingham

On: 20 March 2017

Before: Employment Judge Flood

Appearance:

For the Claimant: Mrs C Vale (daughter and lay representative)

For the Respondent: Mr A Norman, Solicitor

JUDGMENT AND ORDERS ON A PRELIMINARY HEARING

1. The claimant's claim for a redundancy payment is dismissed upon withdrawal by the claimant.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that at least with respect to liability, the hearing in this claim would be completed within 3 days. A further day may be required on the issue of remedy but this will be listed, if required, at the conclusion of the hearing in the claim. It is therefore listed at Birmingham Employment Tribunal before a full panel from **19-21 June 2017**, to start at 10am or so soon thereafter as possible on 19 June. The parties are to attend by 9.30 am. This allocation is based on the on the claimant's intention to give evidence and the respondent's to call up to 3 witnesses. The time will be used as follows:-

- 1.1. Maximum 1.5 days for oral and other evidence on liability;
- 1.2. A maximum total of 2 hours (half each) for submissions on liability;
- 1.3. Approximately 5 hours for the Tribunal to determine the issues which it has to decide and reach its conclusions;
- 1.4. 1 hour for the Tribunal to give judgment, with reasons if possible;

A further hearing may be necessary for the Tribunal to identify issues relevant to remedy, hear further evidence if appropriate and reach its conclusions in respect thereof, if the claimant succeeds in whole or part. This will be listed (if required) at the conclusion of the hearing on liability.

2. The issue of whether to list a separate Open Preliminary Hearing to consider the issue of whether the claimant's back condition amounts to a disability was discussed. It was not anticipated that a separate hearing would necessarily be required but that this issue would be considered as part of the final hearing of the claim. If anything is disclosed further to the orders below which changes the parties' opinion on this matter, they must let the Tribunal know as soon as possible and make any appropriate applications.

The complaint(s)

3. By a claim form presented on 10 January 2017, the claimant brought complaints of unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments. The Claimant also ticked the box on the claim form to make a complaint for a redundancy payment, which was done in error. Accordingly, on discussion with the parties at the hearing, this claim for a redundancy payment was dismissed upon withdrawal by the claimant. The respondent defended the claims. In essence they arise out of the claimant's dismissal, which the claimant alleges was arising from her disability and respondent says was for some other substantial reason, and the alleged failure to make adjustments by failing to agree to the claimant's request for a job share and/or to reduce her hours to enable her to continue working.

The issues

4. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:
5. **Unfair dismissal claim**
 - 5.1. Has the respondent shown that the claimant's dismissal was for some other substantial reason (the need to make the claimant's role full time in view of the changing operational requirements of the business) which is a potentially fair reason for section 98(1) (b) Employment Rights Act 1996?
 - 5.2. Was the decision to dismiss a fair sanction, that is was it within the reasonable range of responses for a reasonable employer?
 - 5.3. Was the decision to dismiss procedurally fair?
 - 5.4. If not, does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?
6. **Disability**
 - 6.1. The disabilities claimed and relied upon by the Claimant are:

6.1.1. Benign Paroxysmal Positional Vertigo (BPPV); and

6.1.2. A back condition

6.2. The respondent accepts that the Claimant's BPPV as set out at paragraph 6.1.1 above is a disability within the meaning of section 6 of the Equality Act 2010. However the respondent does not concede all the alleged effects of the BPPV as averred by the claimant, in particular the inability of the claimant to travel on public transport.

6.3. Does the Claimant's alleged back condition set out at 6.1.2 above, amount a disability within the meaning of section 6 of the Equality Act 2010? In assessing this question the Tribunal will consider:

6.3.1. Did/does the claimant have a physical or mental impairment?

6.3.2. If so, did/does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

6.3.3. If so, is that effect long term? In particular, when did it start and:

6.3.3.1.1. has the impairment lasted for at least 12 months?

6.3.3.1.2. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

6.3.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

6.4. The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from February 2016.

7. Section 15: Discrimination arising from disability

7.1. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is that the claimant was dismissed.

7.2. The "something arising" which is alleged to be in consequence of the claimant's disability" is said to be the claimant's refusal to work full-time and/or her refusal of the part-time post at Aston – which the claimant says arose in consequence of her disabilities". No comparator is needed.

7.3. Does the claimant prove that the respondent treated the claimant as set out in paragraph 7.1 above?

7.4. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

7.5. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following: "the

genuine and necessary business need to make the claimant's role full time".

- 7.6. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

8. Reasonable adjustments: section 20 and section 21

- 8.1. Did the respondent apply the following provision, criteria and/or practice ("PCP") generally, namely:

8.1.1. a requirement for the claimant's role to be performed full time ("PCP1"); and/or

8.1.2. the requirement and/or offer of an alternative part time role in Aston ("PCP2").

- 8.2. Did the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that she alleges she could not work full time or travel to Aston?

- 8.3. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

8.3.1. Creating a job share for the full time role in Northfield;

8.3.2. Allowing the claimant to reduce her hours to enable the claimant to work alongside the new role in Northfield

- 8.4. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

9. Remedies

- 9.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

- 9.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

Judicial mediation

10. The parties have confirmed that they are not both interested in judicial mediation at this time. If the position changes, the parties are to notify the Tribunal immediately.

Other matters

11. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

12. At this stage, I determined that a joint medical expert's report is not required. This matter can be dealt with by the medical evidence to be provided and by the Claimant's evidence at the hearing (including but not limited to her disability impact statement to be disclosed).
13. I suggested that if the parties were unfamiliar with the tribunal procedures, they may wish to sit in on another case in advance, I made it clear to them of the need to disclose evidence and to provide witness statement(s) incorporating all matters they wished to rely upon.
14. I made the following case management orders by consent. Insofar as they are not made by consent, reasons were given at the time and are not now recorded.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disability

- 1.1. The claimant has confirmed that the disabilities she relies upon in her claim are:
 - 1.1.1. Benign Paroxysmal Positional Vertigo (BPPV); and
 - 1.1.2. A back condition
- 1.2. The respondent accepts that BPPV is a disability within the meaning of section 6 of the Equality Act 2010. However the respondent does not concede the alleged effects of the BPPV as averred by the claimant.
- 1.3. The claimant is to set out in a witness statement the details of her disability including:
 - 1.3.1. The details of the back condition from which she suffers;
 - 1.3.2. When the back condition started.
 - 1.3.3. How long the back condition has lasted or is likely to last
 - 1.3.4. What is the effect of both her back condition and the BPPV on her ability to perform day to day activities and what the effect would be if measures that are being taken to treat the conditions or its symptoms were not taken.
- 1.4. The witness statement shall be served on the respondent by 10 April 2017 2017.
- 1.5. The claimant is ordered to disclose by list and copy so as to arrive with the respondent by 10 April 2017 all medical records held by the claimant's GP and/or any other treating professional, in relation to her back condition for the period during which she avers he was disabled, including notes, whether manual or on computer, of attendances by the claimant, referrals to other medical or related experts, reports back from such experts, copies of test results or other examinations and so on. If the claimant has any difficulties obtaining such information from third parties by this date, she is instructed to let the Tribunal know as soon as possible so that the Tribunal can consider whether the date for compliance can be amended to a later

date or if further steps are required to try to assist in the provision of this information (e.g third party orders for disclosure).

- 1.6. The respondent is ordered by 24 April 2017 (or within 14 days of receiving the information at paragraph 1.5 above, if it is later pursuant to the consent of the Tribunal) to notify the claimant and the Tribunal whether, having considered the claimant's witness statement and medical records, it concedes that the claimant is or was at the material time a disabled person, identifying the disability and the period and/or the extent of any remaining dispute on these issues.

2. Statement of remedy/schedule of loss

- 2.1. The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before 10 April 2017, a properly itemised statement of the remedy sought (also called a schedule of loss). A pro forma is attached to this Order.
- 2.2. If the claimant seeks compensation for injury to feelings the schedule shall quantify the compensation by reference to the band of awards in Vento v West Yorkshire Police [2003] IRLR 102 CA as increased by Da'Bell v NSPCC [2009] IRLR 19 EAT.
- 2.3. The claimant is ordered to include information relevant to the receipt of any state benefits.

3. Disclosure of documents

- 3.1. The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before 15 May 2017. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 3.2. Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 3.3. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 3.4. The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure

4. Bundle of documents

- 4.1. It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 4.2. The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before 22 May 2016.

- 4.3. The respondent is ordered to bring sufficient copies (at least five) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

5. **Witness statements**

- 5.1. It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
 - 5.2. The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
 - 5.3. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
 - 5.4. If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
 - 5.5. It is ordered that witness statements are exchanged so as to arrive on or before 5 June 2016.
6. The above orders and dates for compliance were explained to the parties at the hearing and they confirmed they understood and the same. Each order must be (or, if applicable, must have been) complied with even if this written record of the hearing is received after the date for complying with that particular order has passed.
 7. Any applications should be made on receipt of this Order or as soon as possible. The parties are reminded that except for an application under rule 32 when writing to the tribunal it is required by rule 92 to send a copy to all other parties and to state that it has done so (by use of "cc" or otherwise). The Tribunal may depart from that rule where it considers it in the interests of justice to do so but if parties do not comply with this rule, the tribunal may thus decide not to consider the same.
 8. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
 9. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which includes the disclosure of documents, the preparation witness statements and the different types of remedy that can be awarded, and can be found at:-

<http://www.justice.gov.uk/downloads/tribunals/employment/rules-legislation/presidential-guidance-general-case-management.pdf>

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be

struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Flood

21 March 2016

Sent to the parties on:

28 March 2017