



EMPLOYMENT TRIBUNALS

Claimant
Ms S Sharma

Respondent
**v Guys and St Thomas' NHS Foundation
Trust**

PRELIMINARY HEARING

Heard at: London South Employment Tribunal
On: 25 May 2017

Before: EJ Webster

Appearances

For the Claimant: Mr E Casey (Trade Union Rep)

For the Respondent: Mr D Panesar (Counsel)

JUDGMENT

1. The claimant's application for amendments to her claim is allowed.
2. The respondent's applications for the Claimant's claims to be struck out because they had no prospects of success were refused.
3. The respondent's applications for the Claimant to pay a deposit order in respect of the Claimant's claims were refused.
4. The Claimant withdraws her claims for Equal pay and Sex Discrimination in their entirety.
5. The Claimant withdraws her claims for unlawful deduction from wages save for that which relates to the deductions made from her notice pay.
6. The claims which presently continue to hearing are unfair dismissal, disability discrimination and unlawful deduction from wages.
7. The hearing is listed for **9 April 2018** for 6 days as further detailed below.

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.]

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within 6 days. It has been listed at London South Employment Tribunal, to start at 10am or so soon thereafter as possible on **9 April**. The parties are to attend by 9.30 am. The hearing may go short, but this is based on the on the claimant's intention to give evidence and call 1 witness and the respondent's to call 2-6 witnesses.
2. The claimant originally brought complaints of unfair dismissal, disability discrimination (failure to make reasonable adjustments) and unlawful deduction from wages. She served Further and Better Particulars of claim and was then ordered to further particularise her claim. She applied to amend her claim and sent an amended ET1 to the tribunal. At today's hearing she withdrew several of the substantive additional claims set out in that amended ET1 as well as part of her unlawful deductions from wages claim in respect of two time periods. The respondent defended the claims and has brought a counter claim for breach of contract. In essence they arise out of the claimant's dismissal due to capability following long sickness absences from work.

The issues

3. Unfair dismissal claim

- 3.1 What was the reason for dismissal? The respondent relies upon Capability with Some Other Substantial Reason in the alternative as set out at paragraph 45 of the ET3 which are potentially fair reasons under s 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
- 3.2 Did the respondent hold the belief that the claimant was no longer capable of doing the job or SOSR on reasonable grounds? The claimant challenges it in accordance with paragraph 11 of the dismissal.
- 3.3 Was the decision to dismiss a fair sanction i.e. was it within the range of reasonable responses for an employer in all the circumstances?
- 3.4 If the dismissal was unfair did the claimant contribute to the dismissal by her conduct?

4. Disability Discrimination

- 4.1. Does the claimant have a physical or mental impairment, namely stress and anxiety?
- 4.2. If so, does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- 4.3. If so, is that effect long term? In particular, when did it start and:
 - 4.3.1. has the impairment lasted for at least 12 months?
 - 4.3.2. 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?
- 4.4. 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?

5. Failure to make reasonable adjustments

- 5.1 Did the respondent impose the Provision Criteria or Practice ('PCP') at paragraph 18 of the amended particulars of claim?
- 5.2 Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled ?
- 5.3 Was the respondent aware or ought reasonably to be aware of the claimant's disability?
- 5.4 Was the respondent aware or ought reasonable to be aware of the extent of the claimant's condition?
- 5.5 The reasonable adjustments relied upon are:
 - 5.5.1 A stress risk assessment
 - 5.5.2 A case conference
 - 5.5.3 Mediation
 - 5.5.4 A phased return to work
 - 5.5.5 A consideration of (temporary or permanent) redeployment.
- 5.6 Are these matters relied upon capable of being adjustments? The respondent rely upon the reasoning in Tarbuck v Sainsburys to establish that they are not.
- 5.7 Were the claimant's adjustments reasonable adjustments?
- 5.8 Did the respondent fail to make reasonable adjustments?

6. Unlawful deduction from wages

6.1 Was there an overpayment to the claimant of £7,308.74 gross in respect of contractual sickness absence pay?

6.2 Was the respondent entitled to deduct £4,546.23 from the claimant's pay?

7. Respondent's counter claim for breach of contract

7.1. Does the respondent have jurisdiction to make the counter claim for breach of contract? The claimant asserts that she has made an unlawful deduction from wages claim.

7.2. If yes, did the claimant breach her contract of employment in failing to return the sums received in overpayment of sick pay?

7.3. Has the respondent suffered loss as a result of that breach of contract? The respondent asserts that its losses are £3,585.

8. Remedy

8.1 How much compensation for injury to feelings is C entitled to recover?

8.2 How much compensation for loss of remuneration is c entitled to recover?

8.3 How much compensation for unlawful deduction from wages is C entitled to recover?

8.4 Is the claimant entitled to an award in respect of statutory rights?

8.5 Is the claimant entitled to the basic award?

8.6 Has she taken all reasonable steps to mitigate her losses?

8.7 Is she entitled to a declaration?

8.8 Is it just and equitable to reduce the claimant's compensation for the reasons at paragraph 49 at the ET3.

8.9 Does the respondent proved that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event?

8.10 Has R suffered any losses as a result of the alleged breach of contract?

8.11 Is R entitled to set off against any award made regarding unlawful deductions in respect of the over payment wages?

9. Other issues

9.1 Is the respondent entitled to costs in respect of attendance, preparation and responding to the claims withdrawn by the claimant at today's hearing 25 May 2017.

ORDERS

1. The claimant's claims for sex discrimination and equal pay are dismissed following withdrawal by the claimant.
2. The claimant's claims for unlawful deductions insofar as they relate to any deductions save for those made from her notice pay are dismissed following withdrawal by the claimant.

3. Amended claim and response

- 3.1 The parties are ordered to present amended particulars of claim and response to reflect the amendments and withdrawals made at today's hearing on or before, marked for my attention, so as to arrive with the Tribunal and the claimant on or before 8 June.

4. Disclosure of documents

- 4.1 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 13 July. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 4.2 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.
- 4.3 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.
- 4.4 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.

5. Statement of remedy/schedule of loss

- 5.1 The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before 8 June 2017, a properly itemised statement of the remedy sought (also called a schedule of loss).
- 5.2 The claimant is ordered to include information relevant to the receipt of any state benefits.

6. Bundle of documents

- 6.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the Hearing.
- 6.2 To this end, the parties are ordered to agree a bundle index on or before 18 January 2018.
- 6.3 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before 31 January 2018.
- 6.4 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.

7. Witness statements

- 7.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 7.2 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.
- 7.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 7.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 7.5 It is ordered that witness statements are exchanged so as to arrive on or before 9 March 2018.

8. Other matters

- 8.1 The claimant is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.
- 8.2 The claimant is ordered to prepare a short, neutral chronology to be sent to the respondent on or before 23 February. That document to be agreed by the parties on or before 2 March 2018.

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 Webster

Date: 26 May 2017