EMPLOYMENT TRIBUNALS

Claimant: **Mr Y Mohamed**

Respondent: **Abbatt Dual Management Limited**

Heard at: **East London Hearing Centre**

On: **9 December 2021**

Before: **Employment Judge Emery**

Representations:

For the Claimant: **In person**
For the Respondent: **Mr C Crow (Counsel)**

PRELIMINARY HEARING

JUDGMENT

1. All claims of race discrimination are dismissed on withdrawal by the claimant.

2. The claimant was a disabled person by virtue of migraines during his employment with the respondent.

REASONS

1. This preliminary hearing was ordered to consider the following issues:-

   a. Whether or not the claimant was a disabled person by virtue of the condition of migraines during his employment with the respondent

   b. Whether the claim form contains a pleaded claim of race discrimination; alternatively

   c. Whether the claimant should be given permission to amend his claim form to include a claim of race discrimination

   d. Whether any race claim has little or no reasonable prospect of success

2. The claimant was employed for 6 months as a security officer, He claims race and disability discrimination; the latter the claimant confirmed as claims of disability-related harassment and direct discrimination. He states that he was dismissed twice, the first time he was reinstated; the 2nd time he was dismissed for misconduct. The respondent says that the principle reason for his dismissal was his conduct and that he was not confirmed in post at the end of his probation.

Withdrawal of claim of race discrimination

3. During the Hearing, there was a discussion about the legal issues in a direct race discrimination claim. We discussed the requirement to show less favourable treatment than an actual or hypothetical comparator, and the legal test for direct discrimination. We discussed the three outstanding allegations of race discrimination.

4. Following this discussion, the claimant expressed doubts as to whether he wished to continue with this claim. I gave the claimant a break to consider his position on this claim. After a ½ hour break, the claimant accepted that his main claim was dismissal because of his disability. The claimant stated that he had decided to withdraw his race discrimination claim, and this claim is dismissed on withdrawal.

Was the claimant a disabled person during his employment?

5. The respondent accepts that the claimant has a long-term condition, that he suffers from migraine headaches. In determining that the claimant was disabled, I took into account that there is limited medical information (37-38, 41 & 44) and a short disability impact statement (91-2). I heard evidence from the claimant under oath.

6. The claimant's evidence was than whenever he suffers from a migraine he needs to lie down in a quiet room, he is unable to eat, he feels sick and he feels dizzy, he loses his sense of smell and he is unable to communicate. He has had migraines for over 10 years, and while some months are better than others, on a bad month he may have several migraines. His medical records state that the claimant told his GP his migraines can last from a few hours to a few days and require medication, that they 'restarted a few months ago" (as recorded in the GPs notes on 8 June 2020). The notes on 29 July 2020 they refer to sleep disturbance (including calls from his manager when he is sleeping during the day) causing migraines; that he is on medication for his migraines "which are working well".

7. The entries prior to this are before his employment commenced; in January 2019 the records refer to worsening migraines because of stress. In his evidence he described trying to manage his migraines by a good sleep pattern, exercise and cutting down on certain food. There are intermittent records back to 2011 referring to headaches once a month, both blurred vision and vomiting.

8. I accepted that the medical records show long gaps between events; the claimant's evidence is that he did not always attend his GP when he had attacks,

which I accepted. I also concluded that his migraines were not always severe enough for him to attend his GP.

9. The claimant described his migraines as "very random", and that they occur even when he is eating well and getting regular sleep. He stated that they were "… sometimes four times in a week or it might be for four days in a row or it could be every other week it just it's so unpredictable; I could have sometimes a month and a half of no migraines no issue but then the following month it can be the complete opposite". He stated that when he gets migraines the first symptom was his "eyes getting blurry … and I'm not able to look at my phone … it becomes very difficult to see and … I need to be in a dark room … my senses get heightened, smell becomes intense and normal food bothers me … noise lights all of it affects me and the only thing I can do is go into a darkroom and just wait for it to go away…".

10. Mr Crow argued that there is not evidence that migraines had a substantial adverse impact on his ability to undertake day to day activities; in addition they occur intermittently and, it appears, at times of particular or acute stress.

11. I accepted the claimant's evidence of the effect of his migraines on his day to day activities. I accepted that they were intermittent but unpredictable, that he claimant may go months without a migraine, but could also have several in a short space of time.

12. I concluded that the claimant has the intermittent but long-term condition of migraine, and that when suffering from this condition it has a substantial effect on his ability to undertake day to day activities.

Disclosure

13. During the hearing, the claimant produced what he said was a further medical letter dated 26 June 2021.

14. Mr Crow for the respondent said that no weight should be attached to this letter; in addition he raised concerns as to its validity, pointing out that it was a rtf. file, which would not be the usual format for a Doctor's letter and that the letterhead appears not to be the proper letterhead of the claimant's GP, also it is unsigned. Mr Crow sought specific disclosure of the GP record which relates to this letter, i.e. the consultation which led to this letter being written. I granted this order, set out below.

The hearing

1. The case has already been listed for a Hearing on 29-30 June and 1 July 2022.

2. The hearing will deal with liability only, i.e. whether the claimant's case succeeds or not. It will not deal with remedy, although the Tribunal may address matters such as contributory fault, if relevant. A remedy hearing will be listed on a later occasion, if the claim succeeds.

Timetable for the hearing

3. To ensure that the hearing, once begun, proceeds efficiently, it is necessary to set out a timetable. The parties will be expected to follow that timetable and may have their time cut short if they exceed it. The timetable ultimately adopted will be a matter for the Tribunal hearing the claim. Without seeking to limit the Tribunal's decision in that regard, and while recognising that the time allocated to the hearing may have to be reduced, the parties can expect the timetable to look something like this (and they should prepare accordingly):

    - ½ days for the tribunal to read the parties' witness statements and required) important documents from the bundle and then discuss matters arising with the parties;
    - 1½ days for evidence from witnesses and questions of those witnesses
    - 2 hours for the parties to present their closing submissions;
    - ½ day for the Tribunal to deliberate, prepare and (ideally) deliver an oral judgment with reasons.

4. The parties must inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or a significant risk of the case not being ready for the final hearing and/or if they reach a settlement of the case or believe such a settlement to be imminent.

The Issues

5. *EQA, section 13: direct discrimination because of disability*

    a. It is not in dispute that the respondent dismissed the claimant on two occasions (he was reinstated after the first dismissal):

    b. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

    c. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

6. *EQA, section 26: harassment related to disability*

    a. Did the respondent engage in conduct as follows:

    i. Dismiss the claimant

    b. If so, was that conduct unwanted?

    c. If so, did it relate to the protected characteristic of disability?

    d. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (Whether conduct has this effect involves taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

7. *Remedy*

If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

i. if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?

ii. Have regard to the Pensions Principles when deciding any orders relevant to the calculation of pension loss.

Sources of information and support

8. As the claimant/respondent is not legally represented, I take the opportunity to provide links to further information that may be of assistance:

a. At this link, https://www.gov.uk/courts-tribunals/employment-tribunal, the parties will find a copy of the Tribunal's Rules of Procedure.

b. Guidance has been prepared by the President of Employment Tribunals for England & Wales on managing cases generally, including preparing for a hearing, disclosure of documents and preparing and exchanging witness statements: https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf.

c. Judicial mediation and judicial assessments are explained in further detail here: https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-rule-3-adr-20180122.pdf.

d. Three short guides, produced by BPP Law School, about what to expect at an ET hearing, can be found here: https://www.youtube.com/playlist?list=PLWanRQtvOInjUFiP1JnK0wEyNKChpx0ys.

9. The Tribunal produces leaflets setting further information on sources of advice and support. Further copies are available on request.

Online publication of judgments and reasons

10. The tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions.

11. The tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If a party considers that a judgment or reasons should be anonymised in any way prior to publication, they need to apply to the tribunal for an order to that effect under Rule 50. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted.

Other matters

12. As the claimant is representing himself, I would recommend he watches (either in person or online) a Tribunal hearing, so he can get an idea of how a hearing proceeds. The claimant can contact the Tribunal and ask for information on how to do so.

13. The parties are reminded of Rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)…*". If, when writing to the Tribunal, the parties do not comply with this rule, the Tribunal may not consider what they have written.

14. The parties are reminded of their obligation, under Rule 2, to assist the Tribunal to further the "overriding objective" of the Rules, which is to deal with cases fairly and justly. It also means that the parties should co-operate with each other and with the Tribunal.

15. The following case management orders and directions were uncontentious and effectively made by consent.

Employment Judge Emery
Dated: 2 February 2022