



EMPLOYMENT TRIBUNALS

Claimant

Mr S Joyce

Respondent

Leicestershire County Council

v

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: Leicester

On: Wednesday 2 December 2020

Before: Employment Judge P Britton (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Ms K Sherratt, Solicitor

JUDGMENT

1. The claim based upon sex discrimination is dismissed upon withdrawal.
2. The claims of constructive unfair dismissal and disability discrimination remain.
3. Orders as to directions for the same are hereinafter set out.

CASE MANAGEMENT SUMMARY

Introduction

1. This case did have a case management discussion before Employment Judge Blackwell on 5 November 2020, it then being understood that the parties were willing to undertake Judicial Mediation, which was therefore listed for today. As it is, it would appear that the Respondent did not appreciate that it had so agreed and with the change of solicitor at Leicestershire County Council (namely Ms Skerratt) that was made plain and therefore the matter was converted to a case management discussion today to take matters further forward.

2. However, going back to the case management discussion before Employment Judge Blackwell, of particular importance is that first the Claimant confirmed that he was no longer pursuing a claim based upon sex discrimination. Accordingly, I will make a judgment today formally dismissing it upon withdrawal.

3. The claims that were to go forward were based upon constructive unfair dismissal pursuant to Section 95 of the Employment Rights Act 1996 and a claim based upon disability discrimination pursuant to the Equality Act 2010. For reasons which I agree with, by its original response Leicestershire County Council have made plain that in order to meaningfully plead to the same it would need further particularisation and in particular structure as to the engagement of the Equality Act. Also, it had originally made plain it did not concede at present without sight of medical records and an impact statement, and then further consideration, that the Claimant was at the material time a disabled person pursuant to Section 6 and Schedule 1 of the Equality Act 2010.

4. Thus, it follows that I am going to deal with those issues for the purposes of today.

Disability

5. I discussed matters at length with Mr Joyce; and although he will now provide an impact statement, suffice it to say that I ascertained that he has had problems on and off over the years with such as work related stress; but that it became much worse commencing on 31 October 2019 with his first absence from his work as a member of the social work team for the Respondents in adult mental health. He was then to only have relatively short periods back at work; the last period of sickness was to be from 3 June 2020 onwards.

6. He explained to me how as a result of the deterioration in his mental health he was receiving from 31 October onwards via his GPs various forms of antidepressants; and having had side effects from the first two drugs prescribed he was then placed on Citalopram. He has remained on the same more or less ever since because when he has tried to stop taking it he has gone downhill. So, I learnt today that he remains on Citalopram at a high dosage. He has also been referred to Wellbeing although has yet to be offered CBT. What he described to me in terms of when his depression is at its highest, namely low mood, not wanting to take his young daughter to school or play with her; neglecting himself and feeling unable to get out of bed and motivate himself, are all in my considerable experience as an Employment Judge in these matters symptomatic of probably depression. Of very recent time he has sent a letter from his GP, although I was not able to read the same it seems he sent it by way of a photograph because he cannot scan documents. That report is now being sent in by post.

7. But, prima facie from what I heard today he is likely to be a disabled person within the definition of the Equality Act and to have been so during the material period and at the end of the same, given he is still receiving medication and help. Thus he is likely to have been a disabled person by way of the depression for at least 12 months. But that is only a provisional assessment, and of course the Respondent is entitled to see the medical notes and I am going to order these from the year 2000 because I gather that mental health issues, ie stress, began to surface in. Of course, they are to include such as prescription records, any side notes and letters from specialists. He is also going to provide an impact statement. I have explained to him what is needed.

8. Second, at present there is an issue about the longevity of his employment with the Respondent. The Claimant has stated that his employment should be treated as having started on 2 June 2003, and that is because in his particulars to his claim he

set out how he had originally worked for the Leicester City Council from that date in social work and then via reorganisation was transferred over to the Leicestershire County Council. Conversely, currently the Respondent pleads that the employment would have started on 18 April 2016. But Ms Sherratt, who has only very recently taken over this case will look further into the matter. If the Claimant was transferred as a result of reorganisation, this could have a significant impact on such as his current pension entitlement and the extent of the basic award.

9. The Claimant is aged 60 at present.

The Equality Act

10. The Claimant has no knowledge of employment law. That explains why although he has set out the narrative to what he says occurred to him, which summarised would be failure to provide support post his first return to work and being unfairly treated in that context and in an oppressive manner by his new line manager Ms Willem. He told me this is why he went off sick again. He then tried a further return to work but met the same attitude of Ms Willem: hence the final period off sick. And thence, because his grievance had not been dealt with and his health had deteriorated, he resigned from the employment with immediate effect on 9 July 2020.

11. I therefore explained to Mr Joyce where on that scenario the Equality Act was likely to engage. I pointed out that the utilisation of Section 13 of the Equality Act could be problematic. This is because he was placed under the capability management process. The "last straw" triggering decision to resign was when he was written to asking him to attend a stage 3 capability meeting to take place on 9 July. A stage 3 could mean that he would have been dismissed. The point however is that if a non disabled person would have been taken down the same route under the capability process, and there is no evidence before me that they would not have been, then Section 13 is unlikely to assist the Claimant.

12. Thus, I focussed first on Section 15. I read the definition to Mr Joyce. It is as follows:-

"(1) A person (A) discriminates against a disabled person (B) if:-

(a) A treats B unfavourably because of something arising in consequence of B's disability and;

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection 1 does not apply if A shows that A did not know and could not reasonably have been expected to know that B had the disability."

13. Taking the pleaded scenario in the claim at its highest, it would demonstrate if proven that the Claimant was required to take time off work commencing with that first period of absence because his mental health had significantly worsened. Thence there is the history of being prescribed antidepressants with an increasing dosage and there is occupational health recommending such as a phased return and reduced work load on each return to work. Stopping there, however, the occupational health reports as quoted from in the ET3 did not conclude that the Claimant could be treated as disabled and because "episode of stress unlikely to be viewed as disability".

14. But I learnt today from the Claimant that he never told them the extent of his depression and because of “the shame”. That is not necessarily unusual. If the corroborate what the Claimant is saying then he was suffering from mental illness, depression, by the time of the return to work and thereafter which meant he was vulnerable to workplace stresses, would therefore need in terms of a phased return to have the level of work he was required to do monitored and obviously a sensitive approach.

15. Thus, if as alleged Ms Willem did not do that, then prima facie that would be unfavourable treatment because the need to so approach matters with the Claimant arises out of his disability. Thus of course if that failure causes the second absence and then following a repeat failure, the third, and then that he is subjected to the pressure of going down the capability management route, then prima facie that could be unfavourable treatment because of something arising in consequence of his disability. This would then culminate in the decision of the Claimant to resign on the basis that the requirement he attend a stage 3 meeting was the final act of discrimination under that section and in the context, would entitle him to treat himself as dismissed by way of constructive dismissal as it applies to the Equality Act hence the resignation. So, we are agreed that the Claimant is bringing that claim.

16. That brings me to Sections 20-22 and the requirement to consider and if applicable implement reasonable adjustments:-

“(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.”

17. The other subsections are not engaged here.

18. The provision, criterion or practice as explained to me by the Claimant and perhaps being self-evident from the current pleadings, would be the requirement to sustain effective performance, including attendance, and be resilient to the undoubted stresses of working as a social worker. His medical condition prima facie, and no more than that for the purposes of today, as explained by Mr Joyce, would mean that he would be at a particular disadvantage in comparison with people not so disabled in undertaking the work. Thus, there would be a need to make further reasonable adjustment for him. The Claimant has set out to some extent why there was not. So, he agrees that this is his second claim.

19. That then led me to read out to Mr Joyce the definition of harassment. Thus :-

“Section 26 - Harassment

(1) A person (A) harasses another (B) if:-

(a) *A engages in unwanted conduct related to a relevant protected characteristic, and*

(b) *the conduct has the purpose or effect of:-*

(i) *violating B's dignity, or*

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:-*

(a) *the perception of B;*

(b) *the other circumstances of the case;*

(c) *whether it is reasonable for the conduct to have that effect.*

(5) *The relevant protected characteristics are:-*

- *Disability..."*

20. Again, on the scenario as described by the Claimant in his pleadings to date, if Ms Willem did behave to him in the way that he has described, then prima facie it would come within that definition. The Claimant made plain to me that that is what he contends.

21. So, it follows that is the third limb of his Equality Act claim. I am therefore ordering he now gives the structured particularisation as outlined above.

Constructive unfair dismissal

22. What the Claimant has to show, with the burden of proof being upon him, is that the employer by way of an act or a series of acts culminating in a last straw, fundamentally undermined without reasonable and proper cause the implied term of trust and confidence.

23. Well, again looking at the scenario as pleaded by the Claimant against the background of the alleged treatment of him by Ms Willem, the Claimant raised a grievance on 26 March 2020. He pleads, and has given further information today to the effect that it was never dealt with at all; and it is only when he resigned, that a senior member of the Respondent telephoned him asking him to consider retracting whilst matters were looked into. That person also spoke to his wife who also works in the social services department of the Respondent to get details of the Claimant's mental health condition. The reason why the Claimant says that he did not retract his resignation put simply is that it was too late. The last straw was the invitation to the stage 3 capability meeting with the letter warning him that he might be dismissed and when the Respondent had not investigated his grievance at all.

24. Again, I am ordering that the Claimant provide further and better particularisation in a structured way confirming all of.

Schedule of loss

25. The Claimant in his claim (ET1) was claiming well over £300,000 based upon the loss of his career and thus earnings up to his intended retirement at 67 and also the consequent pension loss. He was also claiming that his wife had been affected by matters and that there was a breach of the Data Protection Act. My colleague Employment Judge Blackwell has already pointed to the Claimant that we have no jurisdiction to deal with matters engaging the DPA, and he has accepted that.

26. What the compensation claim did not spell out was how he was structuring his loss of earnings claim. He made no mention of a basic award. He told me today he did not know what that was. As to compensation injury to feelings he was unaware of what is known as the Vento bands until I explained this to him today.

27. So, my having explained to him that a basic award would be something he could claim for if he won on the constructive unfair dismissal claim pursuant to the ERA, and as to how to set out his claim for loss of earnings and that given that he had a short period of temporary employment from 10 August to 14 November in the NHS but at a lower salary that he still needs to offset that income against the loss of earnings claim.. He also needs to consider the Vento guidelines and thence set out what it is he is claiming for injury to feelings and why and where it comes within one of those 3 bands. There is a hyperlink below which the Claimant can go to in order to further decide where to claim within the Vento band.

<https://www.judiciary.uk/wp-content/uploads/2015/03/vento-bands-presidential-guidance-20170905.pdf>

Judicial Mediation

28. This is not necessarily off the agenda. The Respondent will reconsider its position once all the orders that I have made have been complied with.

29. The hearing of this matter is currently scheduled for January 2022 and with a 3 day time estimate. I have no doubt whatsoever that if this case went the distance that is not sufficient. As it is, I have decided that I will **stay all current directions** until after compliance with my orders at which stage I am ordering there be a further case management discussion at which the way forward can be further considered.

30. Against that background I make the following orders.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant will provide his impact statement as to the disability to the Respondent by **Friday 18 December 2020**. He will provide his GP notes and any reports to the Respondent for the period from 2000 until today's date by **Friday 15 January 2021**.

2. On the disability front, the Respondent will then reply by **Friday 26 February 2021** confirming whether or not it continues to dispute that the Claimant is a disabled person. If it does, it will suggest proposed directions.

Further and better particularisation

3. The Claimant will now in structured format provide further and better particularisation of the following:-

- 3.1 As to how Section 15 Equality Act, unfavourable treatment is engaged.
- 3.2 As to how failure to make reasonable adjustment pursuant to Section 20-22 is engaged and setting out what is the provision, criteria or practice engaged.
- 3.3 How constructive unfair dismissal is engaged including the last straw.

4. For the avoidance of doubt, in terms of all this particularisation it needs to be in numbered paragraphs, chronological and identifying each act of the Respondents relied upon. All of that he will again do by **Friday 15 January 2021**.

6. The Respondent will reply to the further and better particulars by **Friday 26 February 2021**.

Schedule of loss

7. The Claimant will redraft his schedule of loss along the lines that I have explained to him and serve it upon the Respondent again by **Friday 18 December 2020**. If the Respondent wishes to, it can reply by **26 February 2021**.

The next hearing

8. I hereby order a resumed case management discussion before me to take place on **Thursday 26 March 2021 with a time estimate of 2 hours to commence at 2:00 pm**.

To take part **you should telephone 0333 300 1440 on time** and, **when prompted, enter the access code 279415#**

[Please note that if you intend to dial into the telephone hearing from a mobile phone, higher rates apply and you may wish to check the call rate with your service provider first.]

9. All current directions are stayed for the time being.

NOTES

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.
- (ii) 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.

- (iii) 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.
- (iv) 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. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:
<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf>
- (v) 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). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*” If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge P Britton

Date: 14 December 2020

Sent to the parties on:

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For the Tribunal:

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