



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss S Brade-Weekes

v

**One Housing Group Limited &
Others**

Heard at: Watford ET

On: 21st July 2017

Before: Employment Judge R Lewis

Appearances

For the Claimant: In Person

For the Respondents: Ms L Fairchild, Solicitor.

JUDGMENT

1. The claimant was at the material time not a person to whom Section 6 of the Equality Act 2010 applied, and her claims of disability discrimination are struck out.

REASONS

1. These reasons are given by the tribunal of its own initiative in the interests of justice, neither party having made a formal request in accordance with Rule 62 when Judgment was given.
2. At a preliminary hearing on 3rd April 2017, orders sent 6th May 2017, Employment Judge Henry directed that there be a preliminary hearing to determine the above question.
3. Employment Judge Henry made an order for disclosure relevant to the preliminary issues, and, I take it, drawing on what was said to him, recorded at paragraph 2.4 that “the parties do not seek to reply on expert medical evidence aside from the claimant’s GP records and other consultant’s reports as already exist”.

4. Employment Judge Henry also ordered exchange of witness statements for the preliminary hearing.
5. The parties presented a bundle for this hearing which was in excess of 300 pages.
6. The claimant's case on disability was set out in a document which she had served in January (41 to 45) and largely replicated in the first pages of a witness statement which she prepared for this hearing. (I draw to the claimant's attention, for the purposes of the future conduct of the case, paragraph 5.3 of Employment Judge Henry's order, and remind her that witness statements are to be prepared in numbered paragraphs and on numbered pages. That makes items a great deal easier to refer to at a hearing.)
7. The medical information which was before me was clearly a selection, spread over many years. It appeared diffuse, plainly incomplete, and left many matters unclear.
8. At the start of the hearing, Ms Fairchild and then the claimant identified from the bundle a number of key pages which they asked me to read in advance. I adjourned and did so. The claimant gave evidence for about an hour. Ms Fairchild gave closing submissions, after which I offered the claimant the opportunity of an adjournment in which to prepare her response. The claimant asked for a short adjournment, and then replied briefly.
9. At the start of the hearing, and before the claimant gave evidence, Ms Fairchild helpfully clarified that the respondent did not dispute that the claimant suffered from an impairment, which had been defined as Irritable Bowel Syndrome (IBS). The respondent disputed whether the impairment had a substantial and adverse effect on day to day activities.
10. I quote an extract from the claimant's witness statement, in which she summarised her evidence on this matter.

"My IBS generally fluctuates from moderate to severe. I experience IBS every day of my life and it is re-occurring. IBS has a severe impact on my every day life. I suffer symptoms such as severe abdominal cramping, back ache, diarrhoea, blood in stools, bloating, swelling, excessive wind, nausea, vomiting, urgent on the spot need to go to the toilet, incontinence, tiredness/fatigue, loss of concentration, sudden change in bowel habits, sweating and dizziness. I experience some symptoms on a daily basis such as abdominal cramps, diarrhoea, nausea, fatigue, loss of concentration however I experience all symptoms when my IBS is at its most severe.

IBS impacts on my ability to carry out my every day tasks, i.e. dropping my daughter to school, and service user visits in the community, for example my disability impacts on my ability to travel far distances due to toilet access, if I had eaten within 15 to 20 minutes of taking public transport I would need to be able to have immediate access to toilet facilities due to lack of bowel control, whereas if I am in my car I can access a public toilet quickly ...

On a daily basis I have to eat at specific intervals and small amounts as I will experience abdominal pain and an on the spot urgency to clear bowels if I eat a full meal in one go. This occurs every day. This occurs generally once I have eaten, also if I have not eaten at the specified times, I will begin to feel nausea, fatigue, abdominal pain which is followed by diarrhoea, and a feeling of not being able to both control my bowels or end my bowel movements ...

On some occasions I am unable to eat due to various symptoms, which then impact on my digestive system, and my ability to function, i.e cook, clean, carry out general every days tasks due to the pain and other symptoms which present themselves.”

11. The claimant described the medication which she took, some prescribed and some non prescribed, and stated in evidence that she took Loperamide (also known as Imodium) at least five times a day and had done so every day for the last eight years.
12. I preface my findings with a number of general observations. I accept that the claimant was dealing here with matters which were legally technical. I also accept that they were emotive, both inherently in the events which she described, and in the context, which appeared to be a large number of points of conflict on a wide range of topics which had arisen in the workplace. I also accept that the matters described by the claimant were intimate and personal, although she gave evidence without embarrassment.
13. In preparing for this hearing, I note that the claimant appears not to have been well advised or well prepared, and that her understanding of the law and procedure have fallen short of what would enable her to do justice to her case. I take great care with those observations, which are a common place of the work of the tribunal, and of course do not have an impact on the merits of a case. They reflect the difficulties experienced by many litigants in person.
14. It is in the context of the claimant's account, which describes a pervasive recurrent condition, which affects her daily life in a visible way on a daily basis, in ways which are at times dramatic, that I approach this matter without a conventional chronological fact find. If I were to set out my findings of fact in a conventional chronological format, this Judgment would be disproportionately long and diffuse. It would also not be helpful.

I prefer to approach the manner thematically. That reflects the approach which leads me to my conclusion. I preface my conclusions then with an overarching observation. Given the height to which the claimant pitched her own evidence, the absence of corroboration in the documentation, or medical evidence, or other oral evidence, is both inherently surprising, and undermines the validity of her primary evidence, such as to lead me to find that the claimant has not discharged the burden of proof.

15. The background setting is that the claimant was employed from 2006 to 2016 by the first respondent. Her employment was marked by conflicts. She was a claimant (apparently with colleagues) in tribunal proceedings some years ago. The relevance of this point is that it indicates that the claimant was able to articulate concerns and complaints.
16. The claimant worked part time, providing support to vulnerable adults in the community. Her work therefore involved travel to service users in their homes, working from an office base.
17. As I understood it, the claimant had little or no complaint of line management style and relationships so long as Mr Taylor was her Line Manager. She had a good relationship with him. Mr Taylor left his employment in late 2015. It appears that there was then a vacancy of some time in the claimant's immediate line management. There were however layers of management above the vacant post. It appeared that the claimant did not report to them, and that there was a period during 2016 when she considered that her formal line of contact with management was through the HR function. That belief (which in many cases is mistaken) was not corrected by management.
18. The claimant has been registered with the same GP practice since 2002, and appeared to have had a good relationship with the doctors, and to have no difficulty in communicating with them.
19. In October 2005 and March 2006 (69 and 70) Dr Van Someren, Consultant Physician, wrote respectively "She probably has the irritable bowel syndrome but inflammation is possible. I have arranged a colonoscopy;" and "Her colonoscopy and biopsies were normal. Her symptoms do fit with the irritable bowel syndrome. I have given her a small supply of Codeine Phosphate to take before she goes out for meals etc, I have left her with an open clinic appointment." I do not take that as evidence of any level of severity.
20. The bundle contained few further indications of the diagnosis of IBS. Her GP wrote on 25th September 2013 to East London University, in support of an extension for course work, that "the claimant is currently under considerable pressure at work This has affected her ability to cope and she's having trouble completing her assignments on time. Physically she has developed IBS." (87)

21. During the time with which I was concerned the claimant had considerable absences from work. I understand that three periods were attributable to miscarriages. The bundle contained a number of forms MED3, of which only one, that of 29 July 2016, referred to IBS as the diagnosis, and in context stated as the diagnosis "Stress at work IBS" (243).
22. In a letter written on 12th April 2017 (i.e. many months after termination of employment) the claimant's GP wrote "She has suffered from irritable bowel syndrome since 2008. This means that she often requires to use the toilet quite frequently." The same letter also referred to miscarriages, her perception of being bullied and the use of the psychological services (312).
23. I noted the following. There was no evidence of any hospital referral or follow up since 2006, despite the extreme symptoms described by the claimant. The language used both by Dr Van Someren and the GP over the years was limited and moderate, and gave no indication of the severity of the symptoms described by the claimant.
24. The bundle contained at page 291 what appeared to be a single page from the GP records print out, dated 19th December 2016. It appeared to describe medication prescribed to the claimant between 2007 and 2014. The only repeat medication which it described were two items for asthma. In a section headed "Problems" it referred to treatment for essential hypertension. There was then a reference dated "7th August 2008 irritable bowel syndrome" but no record of medication attached. The most recent dated item on the document was 22nd October 2015.
25. Apart from a fairly casual reference to codeine therefore in the document of 2006, there appeared in the evidence before me no verification of any medication provided to the claimant, whether prescribed or non-prescribed. I appreciate that the condition of IBS as a matter of common sense will often be dealt with by self medication, and that the patient will often be trusted, with the knowledge of her own experience, to chose between different types of medication with which she has become familiar over the years. There was however no record of this; and no verification at all of the claimant's assertion to have taken multiple doses of Imodium every day for years, seemingly without medical referral or intervention or advice.
26. In cases where a medical issue arises for the tribunal, it is often the case that the tribunal is given a printout of attendances at the GP with the usual summary of the presenting issue and the treatment. It is the common experience of the tribunal that these documents should be redacted, so that irrelevant intimate information is not disclosed to a respondent or placed in the public arena at a trial.
27. Certainly in the case of a recurrent condition, with a dramatic daily effect, and requiring significant medication every day, it might be helpful to know

the recorded attendances at the surgery, and the advice given. No document of this type was in the bundle or available.

28. The nature of the condition described by the claimant, and in particular its unpredictability, and instability, might be expected to lead to absences from work. Whatever the claimant's attendance record, there was in the bundle only one medical reference to IBS as the reason for absence from work (quoted above, 29th July 2016, 243) although for the sake of completeness I note page 80, at which a MED3 on 13th December 2010 stated that the reason for non attendance at work was "diarrhoea" which of course could be attributable to IBS, but was not said to be.
29. Other than the diagnoses and reports of 2005 and 2006, the bundle contained no advice or report from an external practitioner or specialist, physician, dietician, or from any other medical or paramedical discipline.
30. The claimant's account of the effect of IBS indicated a significant abridgement of her ability to take part in every day social activities. In some cases assertions of that type are supported by the witness statement of a family member, friend, neighbour, social worker or the like. I comment that there was no such evidence. However, I attach limited weight to that absence, because I appreciate that a claimant in person might not have thought of obtaining it.
31. As stated the claimant was in the employment of the first respondent throughout the period with which I was concerned. As stated, there was a clear history of her ability to articulate issues which concerned her (a report at page 208 to 209, if accurate, showed the striking extent to which this might be so). She was a Trade Union member for many years. She still spoke warmly of her working relationship with the previous line manager, Mr Taylor. As stated, her job involved providing a service to vulnerable people, including travelling to them. Whatever the claimant's health needs, the organisation's priority was at all times to provide a service to those in need.
32. The bundle contained a selection of emails, notes, return to work records and the like. I appreciate that the selection is not complete, but it was not suggested to me that there were critical documents which had been omitted.
33. In light of the claimant's evidence and account, I would, over the years, expect in the respondent's management documentation to have found at least some of the following:-
 - (1) Management attempts to obtain medical advice, which might include occupational health referrals and correspondence with the GP and / or treating consultant;
 - (2) Reports of her condition, its treatment and management;

- (3) Discussion of its effect on her work record and attendance;
- (4) Discussion of the necessity for adjustments to working methods and patterns;
- (5) Reference to individual events, or episodes with individual clients, upon which the claimant's health had had an impact;
- (6) Possibly, records of some Trade Union intervention on her behalf.

34. I was not referred to, or told of, any such documents. On the contrary, Ms Fairchild skilfully in cross examination referred the claimant to correspondence, email trails and return to work records where that discussion might have been expected, but was absent.

35. The claimant countered by stating that management had deliberately omitted to record references to her IBS. I do not accept that. First, managers tasked with managing the claimant over the years would have no reason to do that, not least because they cannot have foreseen a dispute in which a tribunal would have to decide whether the claimant was disabled as a result of IBS. Secondly, managers responsible for managing risks to the employee, the organisation and service users would not find it in their own personal interests to fail to record a potentially material health condition.

36. Drawing these matters together, the position on which I concluded the point was that the claimant's assertions about the effect of IBS upon her were of an extent and nature that I would have expected them to be corroborated in at least some of the respects referred to above. The absence of such corroboration leads me not to accept the claimant's bare assertions.

37. I have considered, in the alternative, and without being asked to do so, whether, even if she has not proved the case described in her witness statement, I can find that the claimant has made out a lesser case which still brings her within the statutory definition. The only such evidence is the limited statement given in the GP's letter of April 2017 (para 22 above). I find that she has not.

38. I conclude that the claimant has not made good the burden of proof of showing that the impairment of IBS had a substantial effect on day to day activities. I therefore find that the claimant has not brought herself within the s.6 definition, and accordingly all claims of disability discrimination are dismissed.

Employment Judge R Lewis

Date:8/9/17.....

Sent to the parties on:8/9/17.....

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For the Tribunal Office