



EMPLOYMENT TRIBUNALS

Claimant

Mr M Almeida

v

Respondent

Metroline Travel Limited

PRELIMINARY HEARING

Heard at: Watford

On: 23 June 2017

Before: Employment Judge Bartlett

Appearances:

For the Claimant: Mr R Owen, CAB

For the Respondent: Ms Norris, Solicitor

JUDGMENT

1. A preliminary hearing took place on 3 January 2017. This proceeded on a case management basis and set out the claims and issues to be determined at the final hearing. These are set out at pages 2 and 3 of the case management summary. The appellant's claims can be summarised as follows:
 - 1.1 Was the appellant unfairly dismissed?
 - 1.2 Disability discrimination – reasonable adjustments.
 - 1.3 Disability discrimination – s.19 disability arising in consequence of the disability.

The issues

2. The issues to decide at today's preliminary hearing are as follows:
 - 2.1 Whether any of the complaints or parts of them have no reasonable prospect of success and should be struck out; and/or
 - 2.2 Whether any of the allegations or arguments have little reasonable prospect of success, such that a deposit should be ordered as a condition of the claimant pursuing those allegations or arguments.

Strike out

The law

3. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 sets out the exhaustive grounds on which a claim or any part of it may be struck out. The respondent argues that there is no reasonable prospect of success in response to the three legal claims brought by the claimant.

Deposit Order

The law

4. Rule 39 of the Employment Tribunal Regulations 2013 sets out the basis on which Deposit Orders may be made. A Deposit Order may only be made in respect of an allegation or argument if a claim has little reasonable prospect of success. I must also give consideration to the ability of the paying party to pay.

Background

5. The claimant worked for the respondent as a service controller. It is not disputed that he was dismissed on 30 June 2016 by which time he had been an employee of the respondent in a number of capacities for over 16 years.
6. In November 2009 the claimant was diagnosed with early onset Parkinson's disease. It is not in dispute that following this diagnosis and the effects of the condition on the claimant he took numerous periods of sick leave and as time progressed some of the periods of leave became quite substantial. Between 1 October 2015 and 30 June 2016 he had been absent for 197 days. The appellant has been paid in accordance with the respondent's sick pay policy which provided for six months' full pay, following by a further six months at half pay. The appellant had exhausted the full pay entitlement and had only five weeks left to be paid under the half pay entitlement.
7. The claimant attended the respondent's occupational health on numerous occasions following his diagnosis. This includes, but is not limited to, seeing Dr Kahtan of the respondent's occupational health on 5 May 2015, 18 November 2015, 25 January 2016 and 25 May 2016.
8. The 25 May 2016 letter sets out the following:

“[The claimant] is off sick at the moment because the involuntary movement of his right arm have broken through the medication again and it is causing shoulder pain and fatigue. In addition, because the balance of chemicals is so unstable, he varies between stiff “off” periods and short “on” periods when he is more mobile but plagued by involuntary movements.

Current situation

[The claimant] is on the waiting list for a surgical procedure which will very likely treat his involuntary movements, allowing better adjustments of the medication for the other symptoms. He reports that he has had the initial tests and will be having further tests.

He has been informed that there are six or seven people ahead of him on the waiting list for this procedure, but that it will probably be available in nine to twelve months. It might be earlier...

[The claimant] is not currently fit for any type of work.

It is likely that he will be in a position to resume his normal contractual duties after he has had the surgical procedure.

At present there is no reasonable prospect of asking him to engage in regular work...

An early discussion of his options would be helpful. In my opinion [the claimant] would qualify for an augmented level of Employment Support Allowance and Personal Independence Payment – he can apply for a review of his PIP while employed but cannot apply for ESA. Options would, in my opinion, reasonably include a medical dismissal so he can have a long period in which to obtain treatment and then, hopefully, return to his normal contractual duties thereafter.”

Unfair dismissal claim

9. The respondent’s submission can be summarised very briefly as follows:
 - 9.1 There was no prospect of the claimant returning to work for the foreseeable future at the date of dismissal. The claimant’s acceptance for the surgery, the success of the surgery and any recovery period were not certain and the only time period that had been suggested to them was one of approximately six to twelve months. This did not include a rehabilitation period;
 - 9.2 The appellant was dismissed for capability which is a fair reason because he was unable to attend the workplace due to ill health;
 - 9.3 The respondent sought information from occupational health about the claimant’s position on a number of occasions and relied on these reports in coming to its decision to dismiss;
 - 9.4 The respondent followed a fair dismissal procedure;
 - 9.5 The respondent acted within the band of reasonable responses.
10. The reason put forward by the employer for the dismissal is capability which is a potentially fair reason. The tribunal must consider whether the dismissal for that reason was fair or unfair and decide whether the employer acted unreasonably or reasonably in accordance with s.98(4) ERA 1996. S.98(4) ERA 1996 sets out that all the circumstances must be considered including the size and administrative resources of the employer. This gives a wide discretion to tribunals in their decision making. However, tribunals must not substitute their own view for that of an employer. A tribunal must consider the question, did the employers actions fall within the band of reasonable responses open to an employer? This means that if a reasonable employer might have dismissed the claimant the dismissal will be fair. This test means that one employer might reasonably take one view and another might reasonably take a different view.

The test is not that all employers would have dismissed the claimant, it is simply what a reasonable employer would have done so.

11. In very brief summary the claimant's claim is that a reasonable employer would not have dismissed him and instead would have put him on unpaid leave of absence for 12 months.
12. The respondent raised various arguments as to why this was not a reasonable course of action. These included that some costs would occur in relation to the claimant's continued employment, such as holiday pay, and the cost of continuing to provide him with benefits. In addition, the respondent relied on information provided by Dr Kahtan that if the claimant was dismissed he would be able to claim Employment and Support Allowance which he was not able to claim while he was still employed.
13. The claimant argues that the respondent was incorrect in this belief but he did not raise this at any time prior to his dismissal or in his appeal.
14. The issue in unfair dismissal cases is not whether the respondent's beliefs were correct or not at the time they were made, it is whether they have been formed following a fair and reasonable procedure. The respondent's submission is that it was reasonable to refer the claimant to his occupational health service and rely on the information provided by it.
15. The claimant also submitted that the respondent did not follow a fair procedure because another meeting was expected after the 31 May 2016 dismissal meeting.
16. On 17 May 2016 the respondent sent a letter to the claimant inviting him to attend a medical capability hearing. It has not been argued that this letter did not comply with the ACAS Code or any statutory requirements. The respondent then held a meeting with the claimant on 31 May 2016. The claimant was dismissed on notice by a letter dated 7 July 2016. The claimant appealed on 14 July 2016. An appeal meeting was held on 2 August 2016 and a written response providing the outcome of that appeal was sent to the claimant on 4 August 2016. None of these dates or events have been disputed.
17. The respondent submits that a fair process was followed and that all statutory and ACAS Codes were complied with.
18. I have had regard to the high threshold that must be satisfied for a claim to be struck out under Rule 37. I do not consider that there is no reasonable prospect of success in respect of the unfair dismissal claim. This is because the range of reasonable responses test allows a wide discretion on the part of the tribunal. However, I consider that there is little reasonable prospect of success in respect of the unfair dismissal claim. This is because the tribunal must not substitute its own view for that of the employer. The employer is not required to act in a way that every other employer would have acted. Other employers may have acted differently and the respondent could still act reasonably and not have unfairly dismissed the claimant. When these tests were applied to the respondent's

conduct I consider that the claimant's unfair dismissal claim has little reasonable prospect of success.

The duty to make reasonable adjustments

19. The PCP has been put forward in slightly different ways to me today rather than that set out in the Case Management Summary of 3 January 2017. I note that the claimant was represented by his wife at that hearing but there is evidence before me that even prior to his dismissal he was receiving some assistance from the CAB. I do not consider that it is in accordance with the overriding objective to amend the PCP and it remains as set out in the 3 January 2017 Orders.
20. In very brief summary the respondent submits that its policy is to dismiss employees after 12 weeks' continuous absence where there is no reasonably foreseeable return to work date. The respondent did not apply that as a PCP to the claimant. In addition the respondent agreed to consider reinstating or re-engaging the claimant under its re-engagement policy. This policy is normally only applicable to drivers and therefore reasonable adjustments were made in applying it to the claimant and a further adjustment was made to consider extending the period during which reinstatement/re-engagement would be considered beyond the 12 month period set out in the policy and to recognise seniority or what could be termed contractual continuity.
21. The respondent also submits that dismissing the claimant did not place him at a disadvantage because he received three months' notice pay paid at full pay. If he had remained employed he would have exhausted sick pay and received no pay. I note that this ignores the issue of paid holiday pay.
22. The claimant submits that he should have been allowed a long period of unpaid leave and the disadvantage suffered was dismissal.
23. Again, having regard to the tests identified above I find that there is no reasonable prospect of success of this claim. Mr Owen submitted that the claimant should have been permitted a period of unpaid leave for 12 months and then dismissal could have taken place if it was required. I consider that the claim has no reasonable prospects of success because the facts which the claimant relies on in relation to this claim are more properly and coherently covered by the s.15, something arising in consequence of disability, claim. The reasonable adjustments claim as set out is basically a claim that the dismissal should not have taken place when it did. I do not consider that this can properly be argued with a reasonable adjustments claim. There is a temptation to try to bring claims under numerous categories identified in the Equalities Act 2010. This does not increase the claimant's chances of success. This part of the claim will be struck out.

Disability discrimination – something arising in consequence of the disability

24. The respondent accepts that the claimant was dismissed because of something arising in consequence of his disability but it submits that it had two legitimate aims. These are:

- 25.1 Having employees who can attend work; and
- 25.2 It had been told and believed that ESA would only be payable if the claimant was dismissed.
25. The respondent submitted that the dismissal was proportionate because the claimant had effectively been off sick for a long period and was offered the right to return subject to conditions.
26. I do not consider that the claimant's claim in this respect has no reasonable prospects of success or little prospect of success. The issues about proportionality and legitimate aim are arguable. These are issues which need consideration by a full tribunal. There is a contested issue about ESA payments and I note that the respondent relied on the advice of occupational health rather than seeking specialist advice about this issue.
27. I recognise the importance of discrimination claims proceeding to a full hearing. I consider that the claimant will be able to bring his claim for disability discrimination as a result of this s.15 claim proceeding and this has been a consideration in my decision to strike out the reasonable adjustments claim.
28. In relation to the Deposit Order, I sought information on the appellant's financial circumstances and was provided with a comprehensive list setting out the claimant's and his wife's income, their monthly outgoings and their savings. The monthly outgoings were approximately £2,232 and their total monthly income £4,900 with savings of £52,000 which were earmarked for home improvements.
29. Giving consideration to the appellant's financial circumstances I have decided to make a Deposit Order in the amount of £200 in respect of the claim for unfair dismissal only.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. The hearing in this claim will be completed within **three days**. It has been listed at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP to start at 10.00am or so soon thereafter as possible on 29, 30 and 31 January 2018. The first day will be 29 January 2018 and the parties are to attend by 9.30am. The hearing may go short, but this allocation is based on the claimant's intention to give evidence and the respondent's intention to call three witnesses.

The issues

2. I now record that the issues between the parties which fall to be determined by the tribunal are as follows:

3. Unfair dismissal

- 3.1 What was the reason for the dismissal? The respondent says that it was capability, which is a potentially fair reason.
- 3.2 Did the respondent act reasonably in treating the claimant's capability as a sufficient reason to dismiss under s.98(4) ERA? In other words, was dismissal within the band of reasonable responses? The claimant's case is that the respondent should have allowed a period of unpaid leave of up to a year to ascertain whether he would be able to return to work.
- 3.3 Did the respondent follow a fair procedure? The claimant's case is that he expected another meeting after 31 May 2016 meeting before dismissal was decided. If the respondent did not follow a fair procedure, what is the likelihood that the claimant would have been dismissed in any event but for the defect (i.e. a Polkey scenario)?
- 3.4 To what remedy, if any, would the claimant be entitled if he succeeded? The respondent states that his sick pay was exhausted and accordingly states that his losses as a result of the dismissal would be nil at best (in fact though he is better off as once unemployed he can access benefits).

4. Disability discrimination – something arising in consequence of the disability

- 4.1 The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within s.15 of the Equality Act 2010 is the respondent's decision to dismiss the claimant.
- 4.2 Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability, namely because he was unable to work?
- 4.3 If so, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent says that the legitimate aim was to have employees who can provide reliable and regular service and to enable the claimant to act as a benefit. The proportionate means were that the claimant had effectively been off sick from the beginning of October until the end of June and was offered the right to return if he recovered his health sufficiently, provided the other conditions in the policy were also met.

5. Remedy

- 5.1 To what remedy, if any, is the claimant entitled?
- 5.2 Into what band should any award of injury to feelings fall?

Other matters

6. I made the following case management orders for the preliminary hearing by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1 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 **25 August 2017**.
- 1.2 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.
- 1.3 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, those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.
- 1.4 The claimant is ordered to disclose by **25 August 2017** any medical evidence relevant to remedy. This includes medical records held by the claimant's GP or letters or reports from his hospital consultant.

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 **25 August 2017**, a properly itemised statement of the remedy sought and a schedule of loss.
- 2.2 The claimant is ordered to include information relevant to the receipt of any state benefits.

3. Bundle of documents

- 3.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 3.2 To this end, the claimant is ordered to notify the respondent on or before **25 August 2017** of the documents to be included in the bundle at their request. These must be documents to which they intend to refer, either by

evidence in chief or by cross-examining the respondent's witnesses, during the course of the hearing.

- 3.3 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **15 September 2017**.
- 3.4 The respondent is ordered to bring sufficient copies (at least five) to the tribunal for use at the hearing, by 9.30am on the morning of the hearing.

4. **Witness statements**

- 4.1 It is ordered that evidence in chief will be given by means of typed witness statements from parties and witnesses.
- 4.2 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.
- 4.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 4.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 4.5 It is ordered that witness statements are exchanged so as to arrive on or before **29 September 2017**.
- 4.6 The claimant is to provide and updated schedule of loss for the hearing on **29 January 2018** and to bring this document to the hearing on that date.

5. **Other matters**

- 5.1 An Order is made for the following witness to appear on 29 and 30 January 2018 at the Watford Employment Tribunal in respect of this claim.
- 5.2 Mr Fitzgerald, c/o Metroline Travel Limited, 3rd Flr., Comfort Delgro House, 329 Edgware Road, Cricklewood, London NW2 6JP is hereby ordered to attend the hearing as a witness for the respondent on **29 and 30 January 2018**.
- 5.3 It is ordered that Mr Fitzgerald provides notes he took at the hearing on 31 May 2016 in respect of the claimant's dismissal meeting with the respondent. These notes must be disclosed to the respondent by **25 August 2017** and they will further be disclosed by the respondent pursuant to its duties of disclosure.
- 5.4 The claimant is ordered to write to the respondent and the tribunal on or before 25 August 2017 to identify what, if any, parts of the notes of the 31 May 2016 meeting are in dispute.

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 Bartlett

Date: 18 August 2017

Sent to the parties on:

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For the Tribunal:

.....18/08/17.....