



EMPLOYMENT TRIBUNALS

Claimant: Mrs G Connolly

Respondent Bullen Healthcare Group Limited

HELD AT: Liverpool

ON: 11 December 2017

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: Mr R Lassey, Counsel

For the Respondent: Ms J Connolly, Counsel

RESERVED JUDGMENT ON A PRELIMINARY HEARING

The judgment of the tribunal is that:

1. the claimant does not have the necessary 2 years' service required to claim unfair dismissal and the unfair dismissal claim is therefore dismissed;
2. the claimant has the protected characteristic of disability pursuant to section 6 of the Equality Act 2010 by reason of depression; and
3. the claimant's claim of disability discrimination has reasonable prospects of success and shall proceed.

REASONS

1. This Judgment is given with reasons because, although the preliminary hearing was listed for a day, the oral evidence and parties' submissions were completed only at the very end of the hearing day. As there was insufficient time for the tribunal to reach its decision on the same day, the tribunal reserved its judgment.

Background

2. On 7 June 2017, the claimant presented claims of unfair dismissal and disability discrimination. In the claim form, the claimant stated that her employment commenced on 26 January 2015 and ended on 27 January 2017. The claimant also contended that she was at the material times disabled by reason of diagnoses of cancer and of depression.
3. In its response, the respondent contended that the claimant commenced employment on 16 February 2015 and that her employment ended on 27 January 2017 and therefore disputed that the claimant had the requisite qualifying service to claim unfair dismissal. In relation to the claim of disability discrimination, the respondent requested full particulars of the impairment relied upon.
4. A case management preliminary hearing was held on 15 August 2017. As a result of the discussion at that hearing, the claimant was ordered to file further particulars of her claim including in relation to the jurisdiction issue as to how long she had been employed and to serve supporting documentation on the point. The claimant was also ordered to serve a section 6 impact statement relating to her disability together with supporting medical documentation. The respondent was then ordered to reply by serving an amended ET3 and relevant documentation in relation to the jurisdiction issue, including the claimant's personnel file.
5. This open preliminary hearing was listed by the case management preliminary hearing to deal with the jurisdictional and disability issues in dispute between the parties.

Issues to be determined

6. The Employment Judge who conducted the case management preliminary hearing determined that this preliminary hearing shall deal with the following issues:

- 6.1 Whether the claimant has been employed by the respondent for the required period of 2 years;
- 6.2 Whether the claimant is disabled within the meaning of section 6 of the Equality Act 2010;
- 6.3 Whether the claimant's claims as perfected have a reasonable prospect of success; and
- 6.4 Whether the claimant's claims have little reasonable prospect of success and, if so, what deposit or deposits should be attached to each claim or claims?

Evidence

7. The Tribunal has been provided with an agreed joint bundle of documents relevant to the issues to be determined in accordance with the case management Orders.
8. Each party called witnesses to give evidence from written witness statements: The claimant gave evidence herself; the respondent called Mr Paul Bullen, its managing director (who also tendered a supplemental statement), and Mr Kevin Jones, its assistant call-centre manager. All witnesses were subject to cross-examination. In addition, the respondent tendered a statement from Ms Laura Fruin, who did not attend the hearing to give oral evidence or be cross-examined and therefore the tribunal paid no regard to her statement.

Findings of fact

9. The tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. Insofar as there was a conflict between the claimant's evidence and that of the respondent, the tribunal preferred the evidence of the respondent's witnesses.
10. The findings of fact relevant to the issues which have been determined are as follows.
11. In early January 2015, the claimant was interviewed by Mr Paul Bullen and others. On 15 January 2015, the claimant was offered the job of 'Head of HR and Operations' which she accepted. The offer states "Start date dependent on notice period".

12. The claimant was bound to give notice to her previous employer before joining the respondent. Her notice period expired on Friday 13 February 2015. This meant that she could not start work for the respondent until Monday 16 February 2015.
13. The previous incumbent of the role of Head of HR at the respondent was due to leave the respondent's employment at the end of January 2015. Mr Bullen therefore contacted the claimant to see whether she would be able to bring forward her final working date with her previous employers, in order to start working for the respondent prior to her predecessor's departure, with the aim of a face-to-face handover.
14. The claimant spoke to her employers but they were not agreeable to releasing her early. As an alternative, they agreed that the claimant could take a week's unpaid leave, for the week of 26 - 30 January 2015, in order to facilitate the requested face-to-face handover prior to her predecessor's departure.
15. On 23 January 2015, the respondent sent an announcement to its staff that the claimant's official start date would be 16 February 2015 but that she would be spending a week in the office to complete a handover, in the week commencing 26 January 2015.
16. The claimant attended the respondent's offices for the week of 26 – 30 January 2015. The week was used to brief the claimant on all aspects of the respondent's business including current projects and for her to observe staff interviews. Documents identified as useful were stored in a folder called "For Gail" on the IT system, in anticipation of being transferred to the claimant's computer once she started work in February 2015 and was set up on the system.
17. In the period between the handover week and the claimant's official start date of 16 February 2015, the respondent's personnel sent or copied the claimant into occasional emails for information and the claimant at one point thanked them for keeping her "in the loop". On 6 February 2015, the claimant emailed the respondent saying that her "... main aim in the first few weeks is to ..." and she outlined her priorities and expected timeframe, saying also that she was "... very much looking forward to working with you".
18. On or about 4 February 2015, the claimant telephoned a prospective employee to discuss her interest in the respondent.
19. On Monday 16 February 2017, the claimant commenced employment with the respondent.

20. The respondent gave the claimant a contract of employment on 16 February 2015, which stated that the terms and condition of employment will apply effective from the claimant's start date of 16 February 2015, that her continuous employment will begin on the start date and that no period of employment with any previous employer counts as part of her period of continuous employment with the respondent. The claimant signed the contract on 18 February 2015 without raising any issue about the terms.
21. The respondent's HR forms including an application for BUPA healthcare were completed and in each case the claimant's start date was stated to be 16 February 2015. The claimant took no issue with such information at the time.
22. On 24 February 2015, the claimant sent an email to the respondent detailing what she had undertaken in "Week1" by reference to the previous week, 16 – 20 February 2015.
23. Shortly after the claimant had started working for the respondent in February 2015, she asked if she could be paid for the week of 26 – 30 January 2015 which she had taken, unpaid, from her previous job. The respondent agreed to pay her for the week as compensation for her losses.
24. On 27 February 2015, the claimant was paid pro-rata for February 2015, from 16 February onwards. Her February pay also included an amount for her attendance during the week of 26 – 30 January 2015 and a further day's pay for attending on or about 9 January 2015.
25. In September 2015, the claimant was diagnosed with renal cancer and the respondent was informed. The claimant subsequently developed depression and had significant time off sick as a result of her health issues. In late 2016, the respondent offered and paid for the claimant to receive counselling.
26. On 27 January 2017, the claimant was dismissed with immediate effect by letter from the respondent. She was paid in lieu of her contractual 3 months' notice entitlement.

The Law

27. A concise statement of the applicable law is as follows.

Continuous service

28. To qualify to claim unfair dismissal, section 108(1) of the Employment Rights Act 1996 ("ERA") requires employees to show that they have been continuously employed for at least 2 years.

29. Section 211 ERA provides that the period of continuous employment begins with the day on which the employee starts work and, for the purposes of an unfair dismissal claim, section 97(1) ERA provides that continuous employment ends on the effective date of termination of employment.
30. The tribunal also considered a number of cases to which it was referred by the parties in submissions on this issue. Those cases are:

Koenig-v- The Mind Gym Limited [2013] UKEAT 0021/12
Smith-v- The International Development Co plc [2002] UKEAT 1422/01

The tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

Disability

31. The Equality Act 2010 contains the following provisions:

Section 6 Disability

- (1) *A person (P) has a disability if-*
(a) *P has a physical or mental impairment, and*
(b) *the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*

- (2) *A reference to a disabled person is to a person who has a disability*

...

- (6) *Schedule 1 (disability: supplementary provision) has effect*

Schedule 1, Part 1, Determination of Disability

2. Long term effects

- (1) *The effect of an impairment is long-term if-*
(a) *it has lasted for at least 12 months,*
(b) *it is likely to last for at least 12 months, or*
(c) *it is likely to last for the rest of the life of the person affected.*

- (2) *If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.*

5. Effect of medical treatment

- (1) *An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if –*
 - (a) *measures are being taken to treat or correct it, and*
 - (b) *but for that, it would be likely to have that effect.*
- (2) *“Measures” includes, in particular, medical treatment and the use of a prosthesis or other aid.*

6. *Certain medical conditions*

- (1) *Cancer, HIV infection and multiple sclerosis are each a disability.*

32. The word “likely” in paragraph 2 of Schedule 1 of the Equality Act 2010 means “could well happen” rather than “probable” or “more likely than not”: SCA Packaging Ltd v Equality and Human Rights Commission [2009] IRLR 746, and paragraph C3 of the ‘Guidance on matters to be taken into account in determining questions relating to the definition of disability’ 2011.
33. Guidance is given on the meaning of normal day-to-day activities in section D of the 2011 Guidance and paragraph D3 says:
34. *“In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.”*

Analysis and conclusions (including where appropriate any additional findings of fact)

35. The tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Issue 1 – Jurisdiction for unfair dismissal

36. There was no dispute between the parties that the claimant’s employment terminated on 27 January 2017. The issue related only to the effective

- start date. The claimant contended that her employment commenced on 26 January 2015 whilst the respondent contended that the claimant commenced employment on 16 February 2015.
37. The claimant gave evidence that she believed that she had annotated her contract to say that she had started work for the respondent on 26 January 2015 and that the phrase "Start Date" was not defined in the contract. However, the contractual documentation did not support this contention, which the tribunal rejected, noting that the claimant's Start Date is in fact clearly set out in the first paragraph of the contract, as 16 February 2015, and repeated in other all documents.
 38. The tribunal considered that the claimant's attendance at the respondent's offices in the week of 26 – 30 January 2015 was arranged for convenience, to effect a handover before the respondent's previous Head of HR departed. The claimant had spoken to her employers at the time about an early release from her contract with them and they had refused this. The claimant therefore remained under contract to her previous employer and her position was such that she was unable to start work for the respondent whilst she served out her notice with her previous employers.
 39. There was therefore no suggestion, or any understanding by either party at the relevant time, that the claimant was nevertheless commencing her employment with the respondent when she attended on 26 January 2015. The parties did not have it in mind that they had agreed that work under the contract would begin on 26 January 2015. The claimant was not obliged or compelled to attend that week; however, the week would be of benefit to the extent that it would assist the claimant's understanding of the respondent's business and processes if she had the opportunity to meet with the outgoing Head of HR before he left. The claimant was fortunate to be able to secure time off during her notice period to facilitate such. However, it was not a condition of her employment to attend, nor did the respondent require such.
 40. The question then arises as to what the claimant did during that week amounted to working for the respondent under her contract of employment. It is to be noted that whilst an offer of employment had been accepted, the written contract of employment was not issued to the claimant until 16 February 2015 when she officially started her employment.
 41. The claimant undertook a handover in that she was informed of the respondent's operations and projects, and she observed staff interviews. The claimant, in evidence, made much of her activities during the week and the fact that she attended full-time, for the full week. She was no doubt keen to make a good impression and she found the week useful.

However, the tribunal was satisfied from the evidence, on a balance of probabilities, that the claimant took no active part in the respondent's operations. She shadowed the Head of HR and observed interviews and was not a party to any operational decisions. The information given to her and the activities she observed were understood to be of use for when she started work in February 2015. In the circumstances, the tribunal considered that the claimant's role during the week was merely that of a passive observer and she was held out only as a future employee. The previous Head of HR was then still in post, at work, and he took the lead in all matters, as was appropriate. The activities undertaken by the claimant could, at best, be classified as preparatory to her employment and not work under her contract which commenced on 16 February 2015.

42. Although the claimant was eventually paid for the week of 26 – 30 January 2015, there was no discussion about payment until after the claimant had officially started with the respondent on 16 February 2015. The claimant then asked for payment as a goodwill gesture, because she had lost a week's salary from her previous job. She did not contend that she should be paid from 26 January as an employee or continuously – she was in any event still under contract to her previous employers in the interim, working her notice and being paid by them from 31 January until 13 February 2015.
43. The claimant received a week's pay therefore to compensate for her loss of pay in her previous job, caused by her attendance on 26 – 30 January 2015 and also a day's pay for another attendance on 9 January 2015, which was before she had been offered a job by the respondent. The claimant has not contended that her employment started on 9 January 2015. At no point did the claimant ask for payment for the telephone interview that she undertook on or about 4 February 2015.
44. The tribunal considered the cases of Koenig-v- The Mind Gym Limited [2013] UKEAT 0021/12 and Smith-v- The International Development Co plc [2002] UKEAT 1422/01. The start of a period of continuous employment is a statutory construct. Work outside of a contract of employment, though it may have some relationship to it, cannot count. In this case, the tribunal concluded that the claimant did not carry out work under her contract of employment, nor as an employee of the respondent, when she attended the respondent's offices from 26 – 30 January 2015. Her contract of employment for the purpose of computing continuous service began on 16 February 2015.

Issue 2 – Disability

45. The respondent accepts that cancer is to be treated as a disability pursuant to paragraph 6 of schedule 1 of the Equality Act 2010 at the point

of diagnosis. However, the respondent disputes that the claimant's diagnosis of depression amounts to a disability.

46. On the question of the claimant's depression amounting to a disability, the tribunal considered the claimant's impact statement, and heard evidence from the claimant about her depression and its adverse effects. The tribunal took account of the Equality Act 2010, Section 6 and Schedule 1 which sets out the tests of a disability and also took account of the Equality Act 2010 Guidance, expressly the guidance on matters to be taken into account in determining questions relating to the definition of disability
47. The claimant was clearly affected by her cancer diagnosis in 2015. The claimant contended that the cancer diagnosis, its treatment and the resulting surgery, with complications, followed by her back problems, all made her depressed and led to her being prescribed anti-depressants over years. The claimant's disability impact statement confirms that the claimant has suffered from depression for many years, which is supported by her medical records for the period of her employment with the respondent. The tribunal noted that the claimant has a history of suffering from depression which pre-dates her employment with the respondent. In those circumstances, and in light of the timescales involved, the tribunal accepted that the claimant's depression is an impairment which is long-term.
48. The documentary evidence suggested that the claimant was suffering emotionally in January 2017 despite taking anti-depressants. The notes of a meeting on 12 January 2017 record Mr Bullen referring to emotional outbursts and tears at every meeting. That being the case, it is apparent that the respondent was aware of the claimant being unwell, and likely depressed, and that her symptoms were exhibited on an almost daily basis. In addition, in late 2016, the respondent had paid for the claimant to receive counselling due to its concerns about her behaviour at work.
49. The tribunal therefore considered that the claimant's depression has a substantial effect, one that is more than trivial, on day-to-day activities and had that effect during the claimant's employment with the respondent. The tribunal considered what the claimant was able to do during a depressive episode and it is clear from the impact statement that she is effectively able to do very little. Her work-related activities were substantially affected by her depression.
50. The claimant's depression is recurring, in that the claimant does have good days and bad days. However, it is also clear that her depressive episodes are likely to recur. Paragraph 2(2) of Schedule 1 to the Equality Act provides that if an impairment ceases to have a substantial adverse

effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur.

51. From the evidence before it, the tribunal concluded that the claimant's depression has and had, in late 2016 and early 2017, a substantial adverse effect on her ability to carry out day-to-day activities, including her ability to work and to fulfil the functions, duties and activities of her job with the respondent. Therefore the tribunal finds that the claimant is a disabled person by reason of her depression, for the purposes of her claim of discrimination under the Equality Act 2010.

Issues 3 and 4 – Prospects of success

52. The claimant's remaining claim is of disability discrimination. The tribunal is asked to decide whether it considers the claimant's claim has reasonable prospects of success.
53. The claimant claims discrimination arising from disability in that she contends that her dismissal was an act of unfavourable treatment in response to her emotional behaviour and/or her disability-related sickness absences, and also a failure to make reasonable adjustments.
54. The tribunal was concerned firstly that discrimination claims are fact-sensitive and therefore a tribunal should only strike them out at a preliminary hearing in extreme cases. The tribunal was also concerned in this case that, on the face of it, the respondent has a potentially non-discriminatory reason for the claimant's dismissal but, nevertheless, the claimant was summarily dismissed when she was unwell and without the respondent making enquiries before proceeding with disciplinary action. The respondent contends there was no causal link between the claimant's disability and her dismissal. It is not for the claimant to prove that at this hearing but the tribunal considered the fact of disability-related absence and concerns about what the respondent says were the reasons for dismissal, coupled with its timing, lead to the possibility that there is some other reason at work here. The claimant was dismissed when she was ill - an illness which was a disability. The obligation is on the respondent to make reasonable adjustments but it does not appear to have been live to that duty. In all the circumstances, the tribunal considers that the disability discrimination claim had prospects of success on its own and in light of the issues raised about the dismissal.
55. The tribunal noted that the discrimination claim presents a number of conflicts of fact and evidence between the parties which will need to be resolved after oral evidence has been heard and determination is made as to the credibility of witnesses. These aspects are of particular importance in discrimination cases and therefore the tribunal determined that it would

Case Number 2403079/2017

not strike the disability discrimination claim out nor order a deposit(s) and it shall proceed to a hearing.

Employment Judge Batten

Date: 5 January 2018

JUDGMENT SENT TO THE PARTIES ON:

10 January 2018

FOR THE TRIBUNAL OFFICE