



EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Baranowska

Respondent: (1) Newfee Limited t/a L'Ortolan
(2) Peter Newman

Heard at: Reading Employment Tribunal **On:** 15 March 2018

Before: Employment Judge George

Representation

Claimant: Mr L Werenowski, solicitor

Respondent: Mrs K Clay, solicitor

RESERVED JUDGMENT

1. The respondent's application for the claim to be struck out on grounds of non-compliance with orders of the tribunal, pursuant to r.37(1)(c) of the Employment Tribunals Rules of Procedure 2013, is dismissed.
2. Save for the allegation that the claimant's dismissal was an act of discrimination contrary to s.15 of the Equality Act 2010 (hereafter the EqA) the claimant's claim for discrimination arising in consequence of disability has no reasonable prospect of success and is dismissed.
3. The claim that the claimant's dismissal was an act of disability related harassment is struck out on the grounds that it has no reasonable prospect of success and is dismissed.
4. Save as set out in paragraph 2 and 3 above, the respondent's application for an order striking out the claims as having no reasonable prospects of success is dismissed.
5. The claims which presently continue to hearing are unfair dismissal, direct discrimination, disability related harassment, discrimination arising in consequence of disability based upon alleged unfavourable treatment of dismissal and breach of the duty to make reasonable adjustments.
6. The hearing remains listed for 5 days on 18 to 22 June 2018.

7. A separate order is sent in respect of the disability discrimination and disability related harassment complaints.
8. Case Management orders follow the reasons for the above judgment.

REASONS

1. The claim has been listed before me to determine the following preliminary issues and applications:
 - 1.1. That the claimant's claim should be struck out for non-compliance with case management orders, pursuant to r.37(1)(c) of the Employment Tribunal Rules of Procedure 2013;
 - 1.2. That the claimant's claim should be struck out as having no reasonable prospect of success, pursuant to r.37(1)(a) of the Rules of Procedure 2013; or
 - 1.3. That specific allegations or arguments which form part of the claimant's claim have little reasonable prospects of success and the claimant should be ordered to pay a deposit as a condition of being permitted to continue with those claims, pursuant to r.39(1) of the Rules of Procedure 2013.
2. I was provided with a joint bundle of documents for the preliminary hearing and page numbers in these reasons refer to that bundle. Within that bundle are written submissions on behalf of the respondent (page 62) and the claimant (page 66).
3. Rule 37 of the Rules of Procedure 2013 reads as follows:

“37 Striking out
(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”
4. Rule 39(1) to (5) of the Rules of Procedure 2013 reads as follows:

“39 Deposit orders
(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

- (2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
- (3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.
- (4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.
- (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
- (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
- (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.”
5. Rule 39 has the effect of creating a rebuttable presumption of unreasonable conduct where a party has paid a deposit, continued with the particular allegation in respect of which the deposit order was made and then it has been decided against them for substantially the reasons given in the deposit order (rule 39(5)(a)). This would mean that the party who had paid the deposit was at an increased risk of an adverse costs order should they continue with the specific allegation and lose on that point.
6. I can deal quite briefly with the respondent's argument that the claim should be struck out for non-compliance with case management orders. The grounds for the application were that it was not possible for there to be a fair trial because the non-compliance with case management orders meant that the respondent did not fully understand the case they had to meet: the claimant, despite being represented, had failed to set out the legal basis for her claim which meant that they were not in a position to respond fully.
7. I had sympathy with the respondent's argument that they could not understand the case they had to meet because the legal basis for the claim had not been set out. The claimant was dismissed on 7 February 2017. After early conciliation the claim was presented on 24 April 2017. By it the claimant claims unfair dismissal and disability discrimination. In the grounds attached to the ET1, the claimant set out a narrative of her version of events and claimed that, as a result, she developed depression in or around May 2016 (page 16 paragraph 31). She claims direct discrimination, discrimination arising from disability (contrary to s.15 EqA) and a failure to make reasonable adjustments (contrary to s.20 and s.21 EqA) as well as disability related harassment (see paragraphs 41 and 67 of the Grounds – page 17 & 20). However, the particulars of direct discrimination and discrimination arising from disability are not set out in the Grounds attached to the ET1, nor does the explanation of the breach of a duty to make reasonable adjustments set out how the duty is said to arise

or been broken and the claim of harassment does not make plain how it is said the legal test is met.

8. However, it seemed to me that the situation was remediable. Employment Judge Vowles had case managed the claim at a preliminary hearing on 28 July 2017 at which it was set down for a 5 day full merits hearing in June 2018. He ordered further and better particulars to be provided by 25 August 2017 which, had they been followed carefully, would have led the claimant or her representatives to set out the legal basis for the claim in a transparent way. The order was not complied with within the time stipulated by EJ Vowles and the respondent's solicitor applied for an unless order on 11 September 2017. Further particulars were served and the respondent's criticism of these are set out in their email of 20 September 2017 (page 38) and 5 January 2018 (page 55). Following this, the claimant supplied additional information about her claim (page 57).
9. Prior to the preliminary hearing before me, the claimant had therefore had had three attempts to set out the basis of her disability discrimination claim but those attempts had not resulted in the legal basis of all parts of the claim being apparent. While the claim could not fairly be tried without further clarification, my conclusion was that, provided that could be achieved, a fair trial was still possible.
10. I spent some time clarifying the issues with the claimant's representative. The results of that clarification are set out in the following Case Management Summary and in the sections of this judgment concerning the allegations which are said to have no reasonable prospects of success. Although there has been delay in this case, the factual background to the claim involves events which took place from May 2016 to February 2017. That is not yet so long ago that memories will have faded. There is no specific allegation by the respondent that it is prejudiced in its preparation for trial because evidence is no longer available, for example. There is a hearing listed in June 2018. The respondent accepts that there is an unfair dismissal claim of which it does not argue there are little or no reasonable prospects of success.
11. In those circumstances, I do not think that it is just and equitable to strike out the claim for non-performance of case management orders. However, the claimant should understand that, where there has been delay in a claim, future periods of shorter delay may be regarded as inexcusable. The tribunal orders are there to be complied with in order to seek to ensure that claims can be tried within a reasonable period of time. Delay can affect whether the issues can be fairly tried. Both sides must know the case they have to meet. It inconveniences the parties, the tribunal and other tribunal users alike if case management orders are not complied with and that jeopardizes the hearing.
12. The respondent argued that the disability discrimination claim had little or no reasonable prospects of success. I explained to Mr Werenowski what the tribunal's expectations are in terms of the claimant setting out the basis of each strand of her case. This had clearly also been done by EJ Vowles, given the carefully articulated terms of his order for

further and better particulars. I then gave Mr Werenowski time to consider how, in particular, the claimant put her case under s.15 EqA and ss.20/21 EqA.

13. The power to strike out a claim on the ground that it has no reasonable prospect of success is to be exercised sparingly, particularly where there are allegations of discrimination. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof and so at this stage the question is whether the claimant has no reasonable prospect of establishing facts from which a tribunal at a final hearing might, in the absence of an explanation, infer that the reason he was not offered employment services was discriminatory.
14. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail.
15. Following clarification of the allegations, as set out below, the following points stand out from Mr Werenowski's explanation of the claim:
 - 15.1. He was not able to put forward a date by which the claimant contends she was disabled by reason of depression within the meaning of s.6 of the EqA. She was signed off work on 17 November 2016 and it was argued that she had become disabled some time before then.
 - 15.2. It was alleged that dismissal was an act of disability related harassment when dismissal itself cannot be harassment save for resignation in response to harassment can be a constructive dismissal. That did not occur in this case.
 - 15.3. There is substantial overlap between the direct discrimination claim and the harassment claim. Clearly the same act cannot be both direct discrimination and harassment. The two causes of action are mutually exclusive although they can be claimed in the alternative.
16. The respondent argues that the claimant has no reasonable prospect of succeeding in an argument that she is disabled based upon the impact statement (page 70) and letter from her GP which was

provided at the suggestion of EJ Vowles. He did not direct that the claimant should provide her medical records although, if this is the only treatment which she has been receiving for depression (and I have not been told to the contrary) then the form that the evidence has taken has the benefit of keeping any irrelevant details of other health issues confidential. Nevertheless, it is for the claimant to prove that she satisfies the statutory test of disability.

17. The period over which she claims to have been disabled is May 2016 to February 2017 (the date of the last act complained of). However Mr Werenowski, without committing himself to a date, suggests that she would be unlikely to have become disabled until the end of that period. The difficulty for the claimant is that the evidence so far produced does not directly evidence that, by the time of the dismissal on 7 February 2017, she had been suffering from her symptoms for 12 months nor does it provide an opinion as to the likely duration of the symptoms from which it might be inferred that at some point between May 2016 and 2 February 2017 it could be said that the symptoms were likely to last for twelve months. The GP diagnosed anxiety and depression on 23 November 2016 and the anti-depressants seem to have ameliorated her symptoms. Her last visit to her GP was on 17 January 2017 when he provided her with her third and final sick note which was due to expire on 17 February 2017. All of the sick notes were for "stress related problem". In January 2017 she reported insomnia and the GP reports an effect upon her concentration.
18. The claimant reports being prescribed Zopiclone but the gist of paragraph 3 of her impact statement (page 70) suggests that this was during her employment which cannot, therefore, have been the prescription made to her on her last visit to the GP since she only worked one day after that appointment. The claimant reports lost interest in food (paragraph 4) and lost interest in social situations (paragraph 7), suicidal idealization (paragraph 8), lost interest in personal hygiene (paragraph 9), became withdrawn and tearful. She does not attempt to date when she started to suffer these symptoms. She says in paragraph 14 (page 72) that she slowly began to recover after she saw her GP although this is likely to have been with the help of treatment which must be ignored for the purposes of considering the prospects that the claimant will satisfy the statutory test. The claimant lists various day to day activities which she alleges were affected by her impairment.
19. This, and the linked question of knowledge of disability, are prime examples of issues which are essentially fact sensitive. The claimant will have to demonstrate that the condition of depression, which she was diagnosed with in November 2016 was long term and, on the basis of presently available information, it is not apparent how she would do that. However, her impact statement does not cover, for example, whether she had visited any other GP or whether the prescriptions are repeat prescriptions. Has she stopped taking anti-depressants? She will need to provide evidence that as at November 2016, when the second disciplinary letter was given to her, for example, the condition from which she was suffering had a substantial adverse impact upon her ability to carry out day to day activities and

was more likely than not to for at least 12 months. Without hearing evidence it would be wrong, in my opinion, to make a definitive judgment that she has no reasonable prospect of showing that the statutory test applies to her situation.

20. The acts which the claimant relies upon as being unlawful acts of disability discrimination are as follows:
- i. Mr Wood, the head porter and the claimant's line manager, laughing at the claimant, even though it was apparent that she was in considerable distress;
 - ii. The claimant's break times were reduced by 50% in comparison with other staff;
 - iii. Mr Wood deliberately left dirty plates and crockery to be cleaned by the claimant just prior to the end of her shift;
 - iv. Workloads were increase with Mr Wood continually adding tasks for the claimant to undertake, including cleaning the inside of large industrial fridges;
 - v. Mark Aspley frequently checked the claimant's work and this did not happen to other staff;
 - vi. the claimant was closely scrutinised and observed by Mr Aspley and Mr Wood;
 - vii. Mr Wood yelled at the claimant in front of all kitchen staff, and berated her disproportionately for failing to clean one dish;
 - viii. failing to give the claimant customers' tips;
 - ix. failing to pay bonus payments that have been paid in previous years;
 - x. ignoring the claimant's request in the summer of 2016 for her travel costs to be reimbursed;
 - xi. on 21 October 2016, Mr Wood, Mr Clarke and Mr Aspley laughed at the claimant when she was on her knees cleaning the floors;
 - xii. Requiring the claimant to clean Mr Wood's workstation;
 - xiii. Mr Wood requiring the claimant to work both sides of the house and delegating to the claimant tasks which he should have been expected to do himself;
 - xiv. Mr Aspley shouting at the claimant on 16 November 2016 when she refused to work on two stations;
 - xv. sending the claimant a disciplinary letter on 17 November 2016 making the untrue allegation that she had clocked out 14 minutes later than she had in fact stopped work;
 - xvi. subjecting the claimant to disciplinary action when she raised a grievance on 25 November 2016, such action making new, unfounded and unparticularised allegations;
 - xvii. requiring the claimant to return to work prior to the end of the period for which her GP had certified that she was unfit to work;
 - xviii. summarily dismissing the claimant on 7 February 2017.

21. It is argued by the respondent that there is nothing from which any of these alleged acts, if proved, could be inferred to have been because of disability even if she proves herself to fall within the statutory test for a disabled person. The claimant positively states that the reason she relies upon a hypothetical comparator is that “Wood treated all Kitchen Porters badly” (page 17 paragraph 42). This means that the claimant’s pleaded case is that there was no less favourable treatment. However, it is put rather differently in the further and better particulars and additional information where it is said that the claimant was targeted. Nevertheless, there is inconsistency in how the claimant explains the claim.
22. There is merit in the respondent’s submission. However, in this case, the claimant seems to be arguing that her mental ill health should have been known to the alleged perpetrators and therefore it could be inferred that the reason for their actions was to increase that ill health. Particularly given the occasions when she alleges that they laughed at her distress, which she says was a consequence of her impairment. Given the public interest in deciding claims of discrimination on their merits, I have concluded that it would not be right to strike the claim out.
23. In relation to the s.15 EqA claim, the respondent argued that, even though the claimant was not apparently making a claim for sexual harassment, the allegation that Mr Wood’s treatment was because of the claimant’s rejection of his previous advances was inconsistent with a claim that his motivation was, in fact, in order to force her to resign. This is potentially true although, for the purposes of a strike out application it is not impossible that Mr Wood might have had more than one reason for his actions.
24. More to the point, all of the allegations of s.15 discrimination bar that based upon dismissal are completely circular and add nothing to the direct discrimination claim. The allegedly unlawful acts are:
 - i. Overworking the claimant and requiring her to do additional tasks which she did not have to do earlier;
 - ii. Giving her work at the end of her shift including pot cleaning and like work;
 - iii. Monitoring her only and not the other employees in the kitchen;
 - iv. Failing to follow the ACAS disciplinary guidance when raising the disciplinary complaint that she had clocked out 14 minutes later than she stopped work.
 - v. Ignoring her grievance letter of 25 November 2016;

- vi. Not allowing the claimant to leave early to see her GP and to pay in a cheque on 7 February 2017;
 - vii. Summarily dismissing the claimant on 7 February 2017.
25. All bar that of dismissing the claimant are said to arise in consequence of disability because the actor was motivated by a desire to force a disabled employee to resign. It is said by the claimant that the “something” which was the reason for the action was based upon an allegation that the reason for the unfavourable treatment was in order to force her to resign and that this arose in consequence of disability because the respondent was aware that she was disabled and wanted to force her to resign. It seems to me that this amounts to an allegation that the respondent acted in a way which was calculated to have the effect of forcing her to resign because she was a disabled person with depression. It is therefore exactly the same as her s.13 EqA claim. What was articulated by Mr Werenowski was not a claim under s.15 EqA at all. Given the many opportunities which the claimant has had to articulate a viable claim this failure and inability to do so points to there being no s.15 claim which has reasonable prospects of success.
26. However the claim that the act of summary dismissal arose in consequence of disability is articulated differently, at least as it was explained orally before me. At the preliminary hearing before me it was alleged that part of the reason for dismissal was the request by the claimant to leave work early which was, in part, because she needed to see her GP for what she argues to have been disability related sickness. Her GP does not state that she had an appointment on that day but perhaps that point can be explained. The claimant’s primary case on dismissal is that she was dismissed at 1 pm on 7 February 2017 by the second respondent when she refused to agree to a change in working hours which would have meant that she had to return home in the dark late at night when it was unsafe for her to do so (paragraphs 53 to 56 of the ET1 at page 18). Although the further and better particulars argue that she was dismissed for disability related reasons (paragraph 35 at page 52) they are not explained beyond that assertion and the articulation in paragraph 10.3 of the additional information (pages 60 & 61) suggests a different reason for dismissal again, namely the allocation of unpleasant jobs and excessive work.
27. It can be seen when working through the various documents that, although a claim that the dismissal arose in consequence of dismissal because it was because of a request to leave early in order to seek medical treatment is logically unassailable, it is inconsistent with other elements of the claimant’s pleaded case which must cast doubt on its prospects of success. Nevertheless, it alone of the s.15 claims appears to me to have sufficient prospects that it does not fall foul of the test of having no reasonable prospects of success.
28. As to the claimant’s claim of disability related harassment, the respondent argues that there are insufficient particulars of the acts

relied upon in terms of dates, times and locations. More to the point there, nothing is put forward which relates the conduct to disability. The gist of the claimant's case is that she was mistreated in a way which caused her to develop depression and, from a time when it was or ought to have been apparent to the respondent that she was suffering from depression and was therefore disabled, Messrs Wood, Aspley, Clarke and Newman treated her in a way which was designed to increase her distress and therefore related to her disability. My conclusion is that, for the purposes of the high test which applies in an application for an order striking out the claim, that is sufficient and that it cannot be said that such a claim has no reasonable prospects of success.

29. My conclusions in relation to the alleged breach of a duty to make reasonable adjustments, now that those have been clarified, are very much the same. It seems to me to be arguable that the claimant, if she proves that she was disabled, was put to the substantial disadvantage alleged by a requirement that she carry out all the tasks of the other porter, Manny. However, it should be noted that the respondent denies that Manny was not replaced and argues to the contrary. Furthermore, the claimant only worked one day following being declared unfit to work in November 2016.

CASE MANAGEMENT SUMMARY

Listing the hearing

30. The claim remains listed for a 5 day full merits hearing before a full Tribunal on **18 to 22 June 2018**. The claimant will give evidence through an interpreter in the Polish language.

The Issues

31. Subject to the consequences of the separate order made in relation to the balance of the disability discrimination claim, the issues to be determined at the full merits hearing are:
32. **Unfair Dismissal**
- a. What was the reason for the dismissal? The claimant alleges that she was dismissed for refusing to agree to a change in her working hours. The respondent alleges that the claimant was dismissed for refusing to do the jobs that all the other kitchen porters had to do and because she would not take orders from her managers.
- b. Was the decision to dismiss the claimant fair or unfair in all the circumstances? The issues to be considered here will depend upon whether the tribunal accepts the claimant's or the respondent's reason for dismissal. However, they include that the claimant alleges that there were repeated breaches of the ACAS Code of Practice in relation to disciplinary matters or the associated

guidance in relation to disciplinary letters sent during 2016 and investigation of the allegations against her.

33. Disability

- a. Did/does the claimant have a physical or mental impairment, namely depression? The claimant alleges that she developed depression in about May 2016.
- b. If so, did/does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- c. If so, is that effect long term? In particular, when did it start and:
 - i. has the impairment lasted for at least 12 months?
 - ii. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

- d. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- e. The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is May 2016 to February 2017.

34. Section 26: Harassment related to disability

- a. Did the respondent engage in unwanted conduct as follows:
 - i. Giving the claimant too much work to do and work that Mr Wood should have done;
 - ii. Giving the claimant dirty and smelly work that she could not stand;
 - iii. Mr Wood, Mr Astley and Mr Clarke laughing at the claimant when she sought to work earnestly and properly and when she was upset and crying;
 - iv. Sending the claimant disciplinary letters in breach of the ACAS guidelines;
 - v. Discarding the use of rotas and making the claimant do unpleasant tasks permanently;
 - vi. ignoring a written grievance.
- b. Was the conduct related to the claimant's protected characteristic?
- c. 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?

- d. If not, 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?
- e. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
- f. In the light of comments made in paragraph 9.1 of the claimant's additional information dated 23 February 2018 to the effect that the treatment complained of happened after the claimant had rejected Mr Wood's amorous advances I asked Mr Werenowski whether the claimant intended to make an application to amend her claim to allege harassment contrary to s.26(3) of the EqA. He confirmed that no allegation of sexual harassment or less favourable treatment because of rejection of the harasser's advances was being made within these proceedings. This was simply context.

35. Section 13: Direct discrimination because of disability

- a. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act (taken from the claimant's further and better particulars of 18 September 2017, namely:
 - i. Mr Wood, the head porter and the claimant's line manager, laughing at the claimant, even though it was apparent that she was in considerable distress;
 - ii. The claimant's break times were reduced by 50% in comparison with other staff;
 - iii. Mr Wood deliberately left dirty plates and crockery to be cleaned by the claimant just prior to the end of her shift;
 - iv. Workloads were increase with Mr Wood continually adding tasks for the claimant to undertake, including cleaning the inside of large industrial fridges;
 - v. Mark Aspley frequently checked the claimant's work and this did not happen to other staff;
 - vi. the claimant was closely scrutinised and observed by Mr Aspley and Mr Wood;
 - vii. Mr Wood yelled at the claimant in front of all kitchen staff, and berated her disproportionately for failing to clean one dish;
 - viii. failing to give the claimant customers' tips;
 - ix. failing to pay bonus payments that have been paid in previous years;
 - x. ignoring the claimant's request in the summer of 2016 for her travel costs to be reimbursed;
 - xi. on 21 October 2016, Mr Wood, Mr Clarke and Mr Aspley laughed at the claimant when she was on her knees cleaning the floors;

- xii. Requiring the claimant to Mr Wood's workstation;
 - xiii. Mr Wood requiring the claimant to work both sides of the house and delegating to the claimant tasks which he should have been expected to do himself;
 - xiv. Mr Aspley shouting at the claimant on 16 November 2016 when she refused to work on two stations;
 - xv. sending the claimant a disciplinary letter on 17 November 2016 making the untrue allegation that she had clocked out 14 minutes later than she had in fact stopped work;
 - xvi. subjecting the claimant to disciplinary action when she raised a grievance on 25 November 2016, such action making new, unfounded and particular rise allegations;
 - xvii. requiring the claimant to return to work prior to the end of the period for which her GP had certified that she was unfit to work;
 - xviii. summarily dismissing the claimant on 7 February 2017.
- b. Mr Werenowski confirmed that the other particulars set out in paragraph 23 of the claimant's further and better particulars and paragraph 9.1 of the additional information dated 27 February 2018 were not relied upon as allegedly unlawful acts but as background.
 - c. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.
 - d. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
 - e. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

36. Section 15: Discrimination arising from disability

- a. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is
 - i. Summarily dismissing the claimant on 7 February 2017.
- b. Does the claimant prove that the respondent treated the claimant as set out in paragraph 36.a. above?
- c. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability? The claimant alleges that part of the reason for her dismissal was her request to leave work early to see her GP for disability related sickness and that arose in consequence of her disability of depression.
- d. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- e. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

37. Reasonable adjustments: section 20 and section 21

- a. Did the respondent apply the following provision, criteria and/or practice ('the provision') generally, namely a requirement that the claimant undertake additional work when her co-worker, Manny left the respondent's employment in the summer of 2016;
- b. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that the mental health of the claimant, as a person disabled by reason of depression, substantially worsened when she was required to assume Manny's tasks to the point where she was signed off work due to depression;
- c. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:
 - i. Recruit a replacement for Manny;
 - ii. Continue with or put in place a rota whereby work was shared equally in the kitchen;
 - iii. Replace the broken dishwasher;
 - iv. Mr Newman, the second respondent, to have overseen those changes.
- d. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

38. Time/limitation issues

- a. The claim form was presented on 24 April 2017. Accordingly and bearing in mind the effects of ACAS early conciliation, any act or omission which took place before 7 February 2017 is potentially out of time, so that the tribunal may not have jurisdiction.
- b. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- c. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Amended response

- 1.1 The respondent is ordered to present a draft amended response, marked for my attention, so as to arrive with the Tribunal and the claimant on or before **13 April 2018**. The amended response will set out the respondent's factual assertions in connection with the claim as now understood and leave will be granted if it does this.

2. Disclosure of documents

- 2.1 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list on or before **20 April 2018**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 2.2 Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 2.3 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.
- 2.4 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, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.
- 2.5 The parties are ordered to provide to each other, on request, copies of the disclosed documentation by **27 April 2018**.
- 2.6 The claimant is ordered to disclose by list and copy so as to arrive with the respondent by **11 May 2018** all medical records held by the claimant's GP for the period from **1 May 2016 to date**, including notes, whether manual or on computer, of attendances by the claimant, referrals to other medical or related experts, reports back from such experts, copies of X rays, test results or other examinations and so on.
- 2.7 The claimant is reminded that it is for her to prove that she is disabled within the meaning of s.6 of the EqA. If she wishes to adduce evidence which has not specifically been directed to be provided by the tribunal then it is for her to identify the need for it and apply for any necessary case management orders.

3. Statement of remedy/schedule of loss

- 3.1 The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before **11 May 2018**, a properly itemised updated statement of the remedy sought (also called a schedule of loss).
- 3.2 The claimant is ordered to include information relevant to the receipt of any state benefits.
- 3.3 Since the preliminary hearing, the employment judge has noted that, in her existing schedule of loss, the claimant has included a claim for

wrongful dismissal. There is presently no claim for wrongful dismissal in the ET1 or Grounds attached to it. The claimant will need to apply to amend her claim in order to advance such a case if she intends to rely upon one.

4. Bundle of documents

- 4.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the Hearing.
- 4.2 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **11 May 2018**.
- 4.3 The respondent is ordered to bring sufficient copies (at least five/three) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

5. Witness statements

- 5.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 5.2 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.
- 5.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 5.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 5.5 It is ordered that witness statements are exchanged so as to arrive on or before **29 May 2018**. From the claimant, this should include evidence of the impact of depression upon her ability to carry out day to day activities during the material period.

6. Other matters

- 6.1 The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.
- 6.2 The claimant is ordered to prepare a short, neutral chronology for use at the hearing.
- 6.3 These documents should be agreed if possible.

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 George

23 March 2018

Date

RESERVED JUDGMENT & REASONS SENT TO
THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS