EMPLOYMENT TRIBUNALS

Claimant: **Miss S Akhtar**

Respondents: **(R1) University of Nottingham**
(R2) Ms N Gibson
(R3) Mr N Coulson

Heard at: **Nottingham** **On:** **Tuesday 3 April 2018**

Before: **Employment Judge P Britton (sitting alone)**

Representatives

Claimant: **In Person**
Respondents: **Ms K Jeram of Counsel**
Mrs K Gallager, Solicitor

JUDGMENT

1. The claim of indirect discrimination pursuant to Section 19 of the Equality Act 2010 (the EQA) is dismissed it having no reasonable prospect of success.

2. The claim of victimisation pursuant to Section 27 of the EQA is likewise dismissed as having no reasonable prospect of success.

3. The claim of harassment pursuant to Section 26 of the EQA is dismissed upon withdrawal.

4. The following claims pursuant to the provisions of the EQA will now proceed to a full hearing before a Tribunal namely Section 15 unfavourable treatment and Section 20-21 failure to make reasonable adjustment.

5. Directions are set out hereinafter.

REASONS

Introduction

1. At the end of my lengthy second Preliminary Hearing on 1 December I made directions and which were sent to the parties on 24 January 2018 albeit I stressed to the parties that they should not wait on their publication as there could be typing delays. As then made plain the first issues on my agenda at this resumed hearing today would be to consider whether the claims of harassment,

victimisation and indirect discrimination should be struck out as having no reasonable prospect of success or a deposit ordered payable as having only little reasonable prospect of success. As it is the Claimant has abandoned the claim of harassment and so I formally dismiss that upon withdrawal. I have before me a bundle of documents and I have heard at length submissions.

The indirect claim

2. Section 19 of the EqA provides:

"A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if _

> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts or would put B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim"*

The protected characteristic relied upon is the Claimant's disability: namely as pleaded depression; migraines and whiplash.

3. Suffice it to say that after an explanation of the Claimant's case I have concluded as follows, namely that there is no evidence whatsoever that there is a wider pool of people employed by the Respondent who would be adversely affected by reason of disability as a consequence of the process that the Claimant was taken through. All the evidence is clear namely that this was a specific situation relating to the Claimant which led rightly or wrongly to the employer to put her through a disciplinary process and resulted in her dismissal and therefore I am in particular influenced by the judgment of their Lordships in **Eweida v British Airways Plc** [2010] IRLR 322 CA and as followed in that respect by Lady Hale in **Essop and others v Home Office 2017 UKSC 27**. The PCP relied upon by her is subjecting her to the disciplinary process. But Prima facie there is nothing about the actual process itself that shows any signs whatsoever of indirect discrimination. Furthermore as to the PCP there is no evidence of any other persons being subjected to that process in circumstances such as those appertaining to the Claimant. There is thus no evidence of a group of those so subjected being disabled per se. The crucial issue is the reason why the Claimant was taken through the disciplinary process and dismissed the employment. This essentially was because the Claimant was failing to undertake with due diligence the work she had been engaged to do and follow reasonable instruction. But says the Claimant this was because of her disability namely principally depression and possibly migraine. So what this is about is a solitary disadvantage rather than a collective disadvantage to an identifiable group with a shared protected characteristic. Thus I am with Ms Jeram that reliance on s19 is

misconceived at law. Furthermore reliance upon it is unnecessary as the Claimant can avail herself of 20-21 failure to make reasonable adjustment: a provision specifically applicable only to the disabled employee. Thus I dismiss it as head of claim.

Victimisation

4. Section 27 states:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because-*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*
>
> *(2) Each of the following is a protected act-*
>
> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*
>
> *(d) making any allegation (whether or not express) that A or another person has contravened this Act."*

4. The grounds of the victimisation claim are set out in the further and better particulars (Bp88-91). It is as follows:

"I believe I was subjected to unlawful victimisation because following my dismissal, I, and my then representative, raised complaints of disability discrimination relating to the period prior to the decision to dismiss me, however respondent 1 stated that I had no recourse to the grievance procedure. I believe she acted in bad faith to try and prevent me from raising complaints about the discriminatory way in which I was treated because she knew she and the other two respondents had discriminated against me on protected grounds of my disability."

5. Essentially the protected act is her letter appealing the dismissal dated 23 February 2017 (Bp80-87), having received the letter confirming her dismissal the day before. The disability related issue invoked therein in terms of the process is that her disability means she will need longer to prepare an effective appeal than the five days stipulated; thus she is being disadvantaged. . First I note that in terms of alleged disadvantage the appeal letter is well constructed and shows a full grasp of the law involved including citing jurisprudence. In any event it is now clear that the claim of victimisation is misconceived in that by her reply dated 24 February 2017 (Bp 87a) and which is now before me, Ms Gibson of the respondent at paragraph 1 makes abundantly clear that in fact the Claimant having submitted her notice of appeal[1], apropos the policy now had the right to provide a statement of the full reasons of her appeal, together with

[1] In other words the letter of the 23rd February.

statements of any possible witnesses she wished to call, any relevant documents or records, any new evidence to be considered, and any mitigation. It was made clear that the deadline for providing all of this was at least 5 working days prior to the appeal hearing. But Ms Gibson added that given "the requirement to set up a panel of senior colleagues this is likely to take a number of weeks. Under these circumstances this will give you adequate time to prepare your appeal". Thus there is of course no substantial disadvantage and the five day deadline as an act of victimisation simply doesn't engage.

6. Not on point but relevant to the fairness or otherwise of the appeal process, albeit the claimant did not attend, is paragraph 2:

> *Please not that as per section 57 of the disciplinary Procedure, an appeal is a mechanism to address procedural irregularity in the previous stages of the case. So the time frame to register your intent to appeal is out of scope and will not be considered."*

7. What does that mean? As to the scope of an appeal, applying **Taylor v OCS Group Ltd (2006) IRLR 613 CA** this assertion is wrong. But it is not relied upon as an act of victimisation by the Claimant and it is seemingly contradicted by paragraph 1. In any event the issue was never tested as such as she chose to not participate in the appeal because she had lost trust and confidence.

8. That brings me to paragraph 3 of Ms Gibson's e-mail:

> *" In relation to you point 18…I need to inform you that you do not have recourse to the Grievance Procedure as you are no longer an employee of the university…"*

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9. This is as per policy. There is no allegation that any relaxation from the policy was applied to other ex-employees. None has been cited by the Claimant. And in any event of course she doesn't need to raise a grievance in isolation anyway given the wide ranging compass of her appeal grounds.

10. What it means is that any possible procedural is so de minimis that this is not a victimisation case. It is misconceived. Therefore I dismiss it.

That which therefore proceeds

11. What it means is that I am back to square one in terms of the issues as I originally identified them, namely that there is a prima facie case of disability discrimination based on unfavourable treatment pursuant to Section 15 and failure to make reasonable adjustment pursuant to Section 20-21 of the Equality Act 2010. Therefore they will proceed to a full Hearing.

Outstanding issues as to disability

12. At the last hearing the Respondent conceded that at the material time the Claimant was disabled by reason of depression which I factor in would include vulnerability to such as stress and anxiety. What was left outstanding were two other conditions relied upon by the Claimant as being disabling at the material time namely migraine and whiplash. These are not conceded by the Respondent as disabilities as per s1 and schedule 6 of the EqA and particularly at the time of the material events. As per the last hearing I have before me the extensive

medical records; the Claimant impact statement and further written submissions; and finally inter alia a very recent letter dated 14 March 2018 from her GP. The issue I have to determine in the case of both of these conditions is whether at the material time each individually had lasted or was likely to last more than 12 months and the latter is to be interpreted as a test as "could well happen": see Counsel's legal principles most helpfully prepared indeed for the last hearing. I have been taken exhaustively through the medical notes. I have heard at length from the Claimant and Counsel.

Findings

13. The Claimant says the whiplash condition arises from two RTA's she was involved in on 14 January 2016 and 25 August 2016. But stopping there following the first RTA the only recorded complaint/diagnosis on presentation at A&E was right leg pain. The issue of neck pain was only reported on presentation to Solihull Hospital following the second RTA.

14. I have read all the side reports from specialists from time to time and to bring me right up to date I have had before me today the report of 14 March 2018 which, albeit penned by the GP, Dr Chambers, is in fact primarily a paste and cut of the report of the specialist neurologist at the local hospital. I will accept what the Claimant tells me that she saw that neurologist on 14 December 2017

15. Counsel seeks to argue understandably that the Claimant's not being as diligent as she should have been on the subject of getting medical evidence. I am not persuaded by that. I remind myself that the Claimant produced the medical notes at the last hearing and I think that she has tried her best to get the information out of the doctors. Finally I can understand why Dr Chambers would rather rely on the neurology report than give an opinion himself on what is clearly a difficult diagnosis and given the well publicised controversy as to what is whiplash.

The migraines

16 The medical notes put at their simplest show that Ms Akhtar over the years has laboured with a lot of health difficulties, most of them to do with mental health issues. In the past she engaged in substance abuse but she is to be congratulated for turning her life round really from about 2008 and of course inter alia getting her PHD all of which I referred to last time. I accept she also has her own coping strategies. And finally it is self-evident to me from all the medical reports that she is mentally very fragile and would therefore be easily likely to subside into depression should adverse life chances come her way; and I really dealt with that in terms of my finding last time that she was and is disabled because of clinical depression.

17. As to the migraines, I accept that severe migraines can be disabling. Of course they can. When a person is suffering from the same it affects their sight, hearing, and inter alia ability to think and function; all of which is well known and to particularly such as myself having heard many disability related cases over the years. And I note that the neurology report as per Dr Chambers on 14 March 2018 in terms of the presentation and examination as at 14 December 2017 concludes that this is severe migraines: "could last up to 5 to 6 hours, up to 4 days and 10/10 severity".

18. I of course accept that the neurologist is giving a diagnosis on what he has

had explained to him by the Claimant. He will also obviously consider her medical history. In terms of that medical history it is patchy. There is a gap in the medical notes that I have got, possibly explained by the fact that the Claimant has changed surgeries from time to time or it may be that she simply didn't present during the period and that is between February 2011 and effectively January 2017. It may be that during this period the Claimant did not need psychological intervention. I detect that this may be because during the last period of her studies ie the PHD much of it was being conducted from the relaxed conditions at home. Also the Claimant has her own coping strategies. However the Claimant tells me that she was suffering from migraines during this period. But I have few entries during the preceding years that assist on this issue. None go so far as to diagnose migraine. However there is first an entry on 12 May 1999 – headaches consistent with stress. Then on 15 September 2009 is recorded, having against presented with headaches along with depression, that during 2008 and 2009 a history of headaches. To turn it round another way there is no diagnosis during this period whatsoever of migraine albeit there has been a diagnosis from time to time of depression.

19. The Claimant's second road traffic accident to which I have now referred did not lead to any referral at that time to such as a neurologist because of headaches. By October 2016 of course the Claimant's job was in trouble. From the pleadings and other documents before me, she must have known that. In that period however it is right that I do point out that she had two periods of absence which could be linked possibly to migraine and these were 18 October – 25 October. The Claimant then however started to present to her doctors circa 26 January 2017 as to which I refer to the Washwood Health Urgent Care Centre report where there is an entry "severe dizziness with headache since RTC 5 months ago, not seen GP. Normally fit and well. No reg meds – states current stressful work environment increasing symptoms". She had no other health pointers to anything of concern and "was advised could be stress induced, needs to speak to works union but told to make urgent GP appointment". She saw the GP on 28 February 2017 and the history relates to elaborating on what I have now described. The work related issues were now coming to a head and inter alia recorded was "had severe left side migraines frontal, now better but still gets constant headaches and feels low depressed due to this…" The advice in the context of the history of depression etc and other possible psychosomatic indicators such as palpations and chest pains was diagnosed as stress related problem. The Claimant was at this stage referred to the local psychiatric primary care trust's first port of call. There is a report from the specialist back to the then Claimant's GP at the Omnia Practice explaining that she was now going to be offered CBT and inter alia that: "I also recommended you speak to your GP about being referred to a specialist about your migraines as they have a significant impact on your mental health state."

20. Suffice it to say that there were thereafter repeat presentations inter alia on the mental health and migraine front and indeed whiplash, the last of which to which I shall return, then there was the referral to neurology, thence we get back to the report dated 14 March 2018 to which I have referred. The issue I have to determine is first of all the following:-

> 20.1 Has there been identified a mental health condition capable of being an impairment? Answer yes, migraine. I say mental health because it doesn't have any organic reasons for it ie the MRI scans on the head and the neck are clear.

20.2 Is it something that would be likely to have a more than minor or trivial impact upon the ability to undertake normal day to day activities? Well I've got the Claimant's impact statement. I have also got the medical notes; and I have no doubt whatsoever that when the migraines flared up they could be so debilitating as to constitute a significant impact on ability to function ie undertake normal day to day activities.

20.3 The third issue therefore is at the time of the material events had it lasted or was it likely to last for more than 12 months? Well given the Claimant's situation as presented both historically which shows a vulnerability to such as stress and therefore headaches without giving the label migraine, then taking her difficulties in coping with stressful situations ie study back in 2008/2009 and the reference to headaches, then factor in the very adverse life circumstances beginning to operate from October 2016 and given then the description she gives of her condition at that time; then the findings thereafter; and I have concluded that it is more probable than not that this condition was in existence such as to be disabling at the material time and with a likelihood that it would last, if it had not done so already, for more than 12 months.

21. Back to the whiplash. There is no evidence when the Claimant was seen in Solihull Hospital that she had sustained any damage other than that which could be fleeting as a consequence of that RTA. There is no neurological evidence as I have already said to show that this is a physical condition or to turn it round another way that there is evidence that it is a physical impairment. The Claimant has not in her impact statement referred to such as the need to wear a surgical neck brace, frequently to be seen worn by whiplash sufferers, or the need for a back support, orthopaedic pillows, or a special chair or matters of that nature. The more likely scenario from all I have read and picking up again on the neurologist, and it's something flagged up also by the GP, is that this is probably more likely a manifestation of the Claimant's underlying mental health disability. I am not a psychiatrist but I am not at all persuaded that it couldn't just be psychosomatic and as to whether or not it is in itself disabling I am afraid the jury's out ie I have no evidence to that effect from any of the medics and the burden of proof is upon the Claimant to satisfy me if she wants it to be seen as a distinct condition and disabling. I therefore conclude that I do not find that the whiplash injury constitutes a disability let alone one that had lasted or was likely to last for more than 12 months at the time of material events.

22. It follows that when the main Tribunal has to decide on the issues as to disability discrimination it is dealing with as disabilities:-

13.1 Depression and;

13.2 migraine.

CASE MANAGEMENT SUMMARY AND ORDERS

Made pursuant to the Employment Tribunal Rules 2013

The following supersede all previous directions.

1. By way of first stage discovery the Respondent will send to the Claimant by **1 June 2018** its proposed trial bundle index. It will be double spaced. It will describe by very brief description the document. Having received the same by **27 June 2018** the Claimant will reply thereto adding by brief description at the appropriate place, preferably in red, any additional document she requires in the trial bundle. If she has the same she will send a copy for inclusion in that bundle. If she believes the document is in the custody or control of the Respondent she will make that plain.

2. I remind both parties of their obligation to disclose for the purposes of the trial bundle all that is potentially reasonably relevant and necessary to the issues. If there is any doubt it is for a Judge to decide at a Preliminary Hearing upon application. And the Claimant of course understands that in terms of her disclosure it must include all documented evidence of job seeking.

3. Preparation of trial bundle. By not later than **24 August 2018**, a single bundle of documents is to be agreed. The Respondent shall have the conduct for the preparation of the bundle for the hearing. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

4. By not later than **28 September 2018**, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include an updated

statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

The Trial

5. This will take place over **7 days between 3 and 11 December 2018 at the Nottingham Hearing Centre, 50 Carrington Street, Nottingham NG1 7FG**. The first day of the trial will be a reading in period to which the parties attendance will not be required. Both for the purposes of the trial and the reading in period the following will occur:-

5.1 Not later than 7 days before the first hearing date the parties will have agreed the following:-

5.1.1 A list of issues. In that sense Counsel for the Respondent has prepared one which looks to me to be succinct and appropriate. If the Claimant wishes to add to the same she must make sure that she has done that within the deadline I have now ordered. The Respondent will have conduct of the final document.

5.1.2 By the same deadline a chronology, a cast list and a reading in list, again the Respondent to have conduct of all the same.

5.2 For the purposes of the reading in day prior thereto via the Respondent there will be deposited at the Tribunal in triplicate the following:-

5.2.1 The trial bundle.

5.2.2 The list of issues; chronology; cast list; and reading in list.

5.2.3 A combined, indexed, witness statement bundle.

6. As to the hearing the Claimant has today ably acquitted herself. I of course factor in that her mental health condition is a recurring one. I very much hope that she will be fit for the hearing which I have scheduled a long way from today albeit that's because of tribunal availability. If it becomes that she can't cope with the live hearing by attending the same and requires to conduct her case by video link from Birmingham, then the Tribunal will need to know that at latest 14 days before the hearing. Counsel is concerned that potentially it might be that the whole of the hearing cannot be permitted to proceed where a Claimant conducting her own case is not present other than by video link. She will provide any submissions to that effect by 28 days from today.

Judicial Mediation

7. I explored this with the parties. Suffice it to say that at present this is not an option albeit I can see the potential. Should the parties position, and in particular that of the Claimant, change then of course the Tribunal is to be notified.

NOTES

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

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management':
https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge P Britton
Date: 17 April 2018

JUDGMENT SENT TO THE PARTIES ON

21 April 2018

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FOR THE TRIBUNAL OFFICE