Case No: 2602234/2017

EMPLOYMENT TRIBUNALS

Between:

Miss J Churm	**and**	Birchwood Home Caring Services Ltd
Claimant		**Respondent**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: Nottingham **On:** Monday 9 April 2018

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: In person **For the Respondent:** Mr D Bansal, Solicitor

JUDGMENT

1. By consent, the claim of unfair dismissal is dismissed for want of jurisdiction, the Claimant not having the necessary 2 years qualifying service.

2. By consent, the claim of failure to provide written terms and conditions is dismissed, the Claimant not having been employed for the requisite 2 months at the effective date of termination.

3. The claims of Section 15 unfavourable treatment and Sections 20 – 21 failure to make reasonable adjustment, both pursuant to the Equality Act 2010 (the EqA) will proceed.

4. Directions are hereinafter set out.

Introduction

1. The Claimant presented her claim (ET1) to the Tribunal on 30 December 2017. It is in time and ACAS EC compliant. What I have obtained today in this case management discussion is further and better particulars from

the Claimant. I will now put those into the scenario and I will factor in the defence as it is at the present time.

2. The Claimant commenced work for the Respondent as a peripatetic healthcare assistant on 18 September 2017. The employment ended on 9 November 2017 when she resigned for reasons which I shall come to. The Claimant is a type 1 diabetic sufferer and thus of course is disabled pursuant to the provisions of the EqA. She disclosed her type 1 diabetes when she obtained the employment.

3. The employment necessitated her being trained up and so for the period of the employment it seems that she would travel to her duties and be trained on the job, so to speak, by one of three managers, first Dawn, then Jo and finally Miranda. She has described to me the working regime. I factor in that I am well aware from my judicial experience of this type of care work and of course I am also aware of the demands upon the service and the financial constraints upon employers because of the rates which are being paid by principally the local authorities.

4. The working regime was essentially as follows. It would start at 06:30, the Claimant being picked up from home as she cannot drive by one of the three managers. Sometimes she would take a bus and thence be picked up by the relevant manager. The caring would then take place at the various clients' homes. She described how, for the purposes of getting up such clients and washing and dressing them and making sure they had some breakfast and a cup of tea before departing, that there would be some 7 calls to be made during the morning commencing at 07:00. The time allocated for each client was between 45 minutes and one hour. There was travelling of course in between each client's home. She told me how the travelling time was not factored into the working day and she was not paid for this. At that point, I observed to Mr Bansal that if that be correct then it would fly in the face of a recent ruling last year of the ECJ.

5. Then the same routine would apply in terms of visiting clients for the purposes of providing them with lunch and again making sure that they were clean etc; ;there were usually 7 clients to be cared for. The third part of the day was then to provide the clients with tea and ready them for bed. There between 5 and 7 clients per day. This work started at 3pm and carried on to approx 7pm..

6. If that be correct, it can readily be seen that this working regime left very little time for statutory breaks as required by the Working Time Regulations.

7. In a nutshell, the Claimant's case is that because of her type 1 diabetes this had a severe effect on her health. She has to administer injections to herself during the course of the day as her diabetes is at the serious end of the scale. She also requires to be able to take regular meals in order to maintain her blood sugar level. The net result of the working regime and the inability to take breaks for these purposes is that she

began to suffer from a condition which is known as Ketones: it can result in comas and be life threatening.

8. Finally, she told me that she repeatedly raised her concerns with line managers and that adjustment needed to be made for her and that this was not achieved. Indeed, despite promises to the contrary, there was no change at all in the last rota that she received, hence she decided to resign as she could not risk the ongoing risks to her health. Inter alia because of what was happening, she was also now beginning to suffer from stress and anxiety.

Obviously from the discussion today, this can be linked to her concerns about being unable to properly treat her diabetes.

9. Constructive dismissal in those circumstances, in other words breach of trust and confidence because of a failure to make reasonable adjustment for her disability, can be actionable discrimination pursuant to Section 32(2)(c) of the EqA.

10. The Claimant does not understand the Equality Act at all. But with the leave of Mr Bansal I was able to label her claims, which obviously are ones of first failure to make reasonable adjustments to the provision, criterion or practice, ie the working routine, and whereby she could be given sufficient breaks to treat her diabetes because otherwise of course the PCP would put her at a substantial disadvantage. Her second claim is one of unfavourable treatment pursuant to Section 15 because of something arising in consequence of her disability, namely a failure to make these reasonable adjustments and thus the breakdown of trust and confidence and the constructive dismissal.

11. The Respondent can of course plead in due course as to the extent of the reasonable adjustments it made, if any, and also as to whether or not if there was a constructive dismissal, it was a proportionate response pursuant to s15. Of course, if there was a failure to make reasonable adjustment, it will be in some difficulty.

12. There are subsidiary claims including as articulated today a claim relating to the non-payment of travelling time in between assignments.

13. The final claim that remains is for unpaid accrued holiday entitlement.

14. So, the claims that proceed are:

    14.1 disability discrimination pursuant to Section 15 and Sections 20 – 21 of the EqA;
    14.2 Non-payment of wages pursuant to Part 1 of the Employment Rights Act 1996 and including the outstanding holiday pay.

15. The final issue is that the Claimant says she was wrongfully not paid sick pay for a 2 week absence. The Respondent appears to be pleading that it was at law not obliged to pay SSP but that in any event it provided her with the necessary statutory form to claim it from the Job Centre. The

Claimant says that she never received any such form. That also can be dealt with in due course.

16. Currently, the pleaded Response (ET3) is one of stark conflict, namely that the rota did provide sufficient breaks and that she did get the statutory sick pay form and that she had not made plain her problems with her type 1 diabetes. Of course, that is going to require findings of fact. I made plain to Mr Bansal today that he understands that the following is going to be essential, namely the records of all patient visits on her rota for the material time, which would be cross-referenced to not only the 'phone checking system that the Respondent adopts but the care plan records for each client. Second the allotted route plans between visits and the time allocated for travel. This taken together should be able to show what the reality was of the working day and whether it did allow for sufficient breaks. If so had the employer investigated the matter, the other corroborative evidence one way or the other would have been Dawn, Jo and Miranda.

17. The case has already been listed for hearing in January 2019 and directions given. I do not intend to change any of that. What did emerge before me today is that Mr Bansal will now want to get further instructions. Having discussed the matter with the parties and my having made plain that this case is eminently suitable for Judicial Mediation, he get instructions on that front. The Claimant having discussed the matter with me today, is willing to undertake Judicial Mediation.

18. Accordingly, I make only one direction as the preceding directions remain and it is as follows.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Respondent will inform the tribunal within 7 days by letter marked for particularly consideration by this Judge as to whether it is prepared to agree Judicial Mediation. If it so agrees, then there will be a short case management discussion to set up the arrangements for Judicial Mediation, at which stage the current directions can be further considered.

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/presidentialguidance-general-case-management-20170406-3.2.pdf

(iv) 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.

_____

Employment Judge Britton

Date: 30 April 2018

Sent to the parties on:

01 May 2018

For the Tribunal: