



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss Alexandra Roberts

AND

Respondent

Heart of the South Care Agency Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth

ON

14 January 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mr Williams of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

- 1: The claimant was a disabled person by reason of depressive illness with effect from May 2017, but the respondent did not know (and it cannot be said that it ought reasonably to have known) that the claimant was so disabled; and**
- 2: Accordingly, the claimant's claims for discrimination arising from disability, and in respect of reasonable adjustments, are both dismissed (applying section 15(2) and paragraph 20(1)(b) of Schedule 8 of the Equality Act 2010); and**
- 3: The claimant's remaining claims of harassment related to disability and for unfair constructive dismissal are dealt with in the attached case management summary.**

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times, and whether (and if so when) the respondent knew of the claimant's disability.
2. I have heard from the claimant, and from her partner Mr Stephen Bradley, Ms Emily Richards and Ms Hannah Smith on her behalf. For the respondent I have heard from Mrs Susan Amit and Mrs Sam Steiner.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company is a care agency based in Cornwall and provides care for vulnerable adults. The claimant commenced employment with the respondent on 5 January 2015 as a Care Coordinator. On 15 April 2016 she was promoted to Assistant Care Manager. Mrs Sam Steiner, from whom I have heard, was the claimant's line manager. Mrs Susan Amit, from whom I have heard, is a director of the respondent.
5. The claimant asserts that she suffers from anxiety and depression, and that this amounts to a disability. She resigned her employment on 21 July 2017. She issued these proceedings on 17 October 2017 claiming unfair constructive dismissal, discrimination arising from her disability, in respect of an alleged failure by the respondent to make reasonable adjustments, and for harassment. The respondent denies the claims, and denies that the claimant was a disabled person and/or that it knew (or ought reasonably to have known) of that disability.
6. The claimant has historically suffered from bowel problems, which resulted in an ileostomy, and at all material times the respondent was aware of this. However, this is not the impairment upon which the claimant relies for the purposes of her disability discrimination claims. Rather, the claimant relies on a different and distinct mental impairment, namely anxiety and depression.
7. The claimant's application form for employment with the respondent dated 10 December 2014 included Annex B which was a medical questionnaire. In reply to a question whether any condition or illness had ever affected her work or might do so, she replied "yes - only due to past operations (loop ileostomy)". When asked to declare whether she currently suffered from or had ever suffered from mental health problems (e.g. depression) she replied "No". Similarly, in annex C (which was an equal opportunities monitoring form) the claimant confirmed that she did not consider herself to be disabled nor that she had any mental health disability (including serious depression).
8. The claimant had a number of supervision meetings with the respondent, initially with Mrs Steiner who was her line manager, and these were recorded in pro forma forms. Although the claimant now suggests that some of the contents were either untrue or are now missing, and that the respondent should have supported her with more such meetings, the claimant signed the forms at the time to confirm their accuracy, and there is no mention of any request for further supervision. On the contrary, it was clear that the claimant enjoyed her job and that the respondent thought highly of her.
9. At a meeting on 23 April 2015 the claimant confirmed that she had "no concerns" and it was noted by the respondent that she had received "brilliant feedback from staff in the office and from all the services". On 25 January 2016 it was noted that the claimant thought that: "Workload good, but will feel much happier when not responsible for training" with the result that the respondent assigned training responsibilities to work colleagues, namely Mr Bradley and Ms Richards. The respondent also noted: "Brilliant with completing all staff training on time. Services always very pleased with support." At a meeting on 8 April 2016 the notes were all positive save that the claimant had noted that it was "stressful when starting training coordinator position as so much to do, and not

- able to do anything else.” The claimant also noted that she liked the opportunities which the respondent provided and enjoyed the responsibility and trust reposed in her by her director and manager (Mrs Amit and Mrs Steiner). She commented that she felt a “Far more confident person since joining”. She also confirmed that she would like to take a more senior role and could undertake more responsibility.
10. It seems that the claimant then suffered some food poisoning which affected her bowel condition. She was absent on certified sick leave from 1 to 15 August 2016. A return to work interview form records the reason for this absence as being “stress leading on to colitis”. She confirmed that she had sought advice from her GP and the stoma nurses and that she had been advised to rest. The form noted that the underlying problem related to the claimant’s stoma and stomach condition and the respondent agreed to “help with workload”. Other than that the parties recorded that no further action was required.
 11. The notes of a subsequent supervision meeting on 7 September 2016 records that the claimant felt confident within her job role and was happy as the Assistant Care Manager with more responsibility, and without being in charge of the training. There is no mention of any difficulty with regard to anxiety or depression or any request for further support. The final example of the supervision form is dated 12 May 2017 at which the claimant confirmed that she was happy with the support she was receiving and when asked if she had any concerns were team issues she replied “no, everyone brilliant”. The feedback from Mrs Amit was that the claimant was “fantastic, really proactive, good assistant manager”.
 12. Other relevant exchanges between the parties on which I have heard evidence are as follows. The claimant and Mrs Steiner had a conversation on about 3 March 2016 on which the claimant now relies to suggest that she informed the respondent that she was disabled by reason of anxiety and depression. She says she disclosed to Mrs Steiner the fact that her GP had prescribed sertraline. Mrs Steiner is adamant that the claimant was insistent that the reason for the medication was not for depression or anxiety, but rather it was because she had not been sleeping because of her stoma problems and the doctor had given her that medication to help her sleep pattern become more regular. Mrs Steiner’s version is supported by the contemporaneous document of the report to the respondent’s HR advisers which she made on 3 March 2016 to this effect: “Alex has informed me that she is on medication to correct her sleep pattern. I have requested a fit for work certificate from her doctor...” For this reason I prefer the respondent’s version of this conversation because it is supported by this contemporaneous document.
 13. Mrs Steiner had reported the conversation to Mrs Amit, who was concerned to hear of the prescription of sertraline because she knew from her daughter’s condition that this drug is sometimes prescribed for depression. Despite the claimant’s reassurances, she therefore decided to seek a report from the claimant’s GP, and agreed to pay for this, to ensure that the claimant was fit to work. The claimant’s GP wrote in March 2016 to this effect: “This is to confirm that the above named is a patient of mine at Narrowcliff Surgery. In my opinion she is fit and well and has no medical problems that would impact on her ability to perform her work.”
 14. I have also been referred to some printouts of text message exchanges between the claimant and Mrs Steiner. On 29 July 2016 Mrs Steiner was clearly aware that the claimant had been unwell and referred to the claimant being “so stressed”. On 1 September 2016 the claimant reported to Mrs Steiner: “hello been to doctors had a good chat, upping my tablets and going to sort the past ...” Mrs Steiner denies that she was aware that the claimant was suffering from any ongoing anxiety or depression, and that these comments are in any way indicative of this, but rather relate to Mrs Steiner’s knowledge of the claimant’s absence for stress arising from stoma related reasons for two weeks in August 2016. This is consistent with a contemporaneous report which she made to the respondent’s HR advisers on 16 August 2016 to this effect: “Alex returned to work today after being signed off sick for two weeks with stress. Alex is feeling much better now and has carried out a back to work interview with myself. There is no further action to be taken.”

15. The claimant then needed an operation in relation to her ileostomy, and was absent for a further two weeks towards the end of November 2016. The respondent exercised its discretion to pay the claimant full pay during this absence. On 28 November 2016 Mrs Steiner sent a text to this effect: "You know yourself what it's like dealing with anxiety, so does Stephen for that matter, I personally think keeping busy is the best way to combat it". Again, Mrs Steiner confirmed that what she meant by this was that she was aware of the claimant's illness relating to her ileostomy, and that the claimant would have been concerned about this, but denies any knowledge of any separate condition of anxiety and depression. Mrs Steiner's report to the HR advisers at that time records: "Alex has been off work for two weeks due to having an operation. Alex is then on a phased return working from home for two weeks. Alex has obtained a note from her doctor."
16. I now turn to the medical evidence to which I have been referred. As noted above, the claimant's GP reported to the respondent by letter in March 2016 that the claimant was fit and well and had no medical problems which would impact on her ability to perform her work. The extracts from the claimant's GP notes predominantly relate to the claimant's ileostomy and the extent to which this became "de-functioning". Nonetheless there are some entries relating to mental impairment. On 1 March 2016 following a telephone consultation the claimant's GP entered "depressive disorder" for the first time replacing an earlier comment of low mood. That was when sertraline was first prescribed, as noted above. Clearly the claimant's GP did not consider this to be sufficiently serious to mention it in the letter to the respondent that same month. Next was an entry on 28 July 2016 which was the first entry for "Stress at work". It recorded "Working overtime and on call due to sickness at work, struggling to cope". This was reviewed three days later on 1 August 2016 when the claimant's GP issued a statement to the effect that she was not fit for work because of stress at work. This related to the absence noted above between 1 and 15 August 2016 which the claimant reported at a return to work interview was for stress which was related to her colitis. The matter was reviewed on 1 September 2016 as "Low mood - combined with depressive disorder" with the note "Back at work and had long chat with manager and things sorted out but feels low."
17. There were then no further recorded instances of the claimant seeking advice from her GP from 1 September 2016 until the events of July 2017 when the relationship between the parties deteriorated and the claimant exercised a formal grievance and subsequently resigned. The claimant next sought advice from her GP on 26 June 2017 and was signed off as not fit for work because of "Stress at work" from 3 July 2017, and resigned on 21 July 2017 without having return to work.
18. The claimant also attended some counselling sessions before September 2016, but it is not clear that these were arranged to assist any specific diagnosis of depressive illness. Mrs Steiner was aware that the claimant had attended some counselling, but was under the impression that this was for other personal reasons.
19. The claimant has also obtained a letter from her GP for the purposes of these proceedings which is dated 26 July 2018, more than a year after she finished employment. That letter reports: "Alexandra has been diagnosed with anxiety and depression, which in my opinion over the last few years has been exacerbated by work-related stress." She was commenced on medication on 21 September 2016 (fluoxetine) to help treat this and was later changed to sertraline on 1 March 2016. The fluoxetine was not helping with the work related stress so the change was made to an alternative antidepressant. Alexandra was reviewed in July when the stress levels were particularly high when she was working overtime. She was signed off work in August 2016 for stress. She was reviewed on 1 September 2016 and though she was back at work, her symptoms of depression had worsened and the dose of medication was increased. This was reduced in May 2017 but increased again to the current dose when the work stress increased. I note that Alexandra was signed off on 3 March 2017 with work-related stress and again in June and July 2017. I have supplied copies of the sick notes." It seems to me that this letter is not entirely consistent with the extracts from the GP notes which I have seen, and the first date appears to be a misprint for 21 September 2015. In addition,

- there was no letter or report from the claimant's GP to this effect before the respondent during the claimant's employment.
20. Finally, with regard to normal day-to-day activities, the claimant has given evidence to the effect that she suffers from "extreme levels of anxiety and depression" and this affects her ability to manage stressful situations and she struggles to sleep. She says that she began to isolate herself from friends and family because she did not wish to interact and she stopped carrying out her hobbies. Getting up in the morning became a struggle which in turn increased levels of anxiety. She confirmed that the respondent may not have known this or noticed this because of the effect of the medication which she was on which would have helped to mask the problem.
 21. Having established the above facts, I now apply the law.
 22. The claimant alleges discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from her disability, failure by the respondent to comply with its duty to make adjustments, and harassment.
 23. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
 24. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
 25. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
 26. Under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) ... that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
 27. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
 28. There are two apparent difficulties with this case. The first is that the claimant only relies on a mental impairment, namely anxiety and depression, which is separate and distinct from her bowel condition resulting in her ileostomy. The second is that the respondent was aware of the claimant's ileostomy and the occasional difficulties which she encountered with this condition during her employment, but is adamant that despite having a frank and supportive relationship with the claimant, was unaware of any mental impairment of anxiety or depression.

29. With regard to the claimant's disability, and the conflict of evidence between the parties, it is clearly important to look at the contemporaneous medical evidence. Although the first mention of any depressive disorder was on 1 March 2016, this was a telephone consultation at which the claimant's GP made a diagnosis of depressive disorder and prescribed sertraline, and effectively upgraded the diagnosis of "low mood" because the fluoxetine (otherwise known as Prozac) had not apparently been helping. There were then subsequent consultations with regard to low mood and "stress at work" on 28 July and 1 August 2016 following which the claimant was signed off as unfit for work for two weeks. On 1 September 2016 the diagnosis was "Low mood - combined with depressive disorder". According to the GP's letter dated 26 July 2018 as at 1 September 2016 the claimant symptoms of depression had worsened and her medication was increased, and was not reduced again until May 2017.
30. In my judgment the claimant was clearly suffering from a mental impairment which was a form of depressive illness. This was first diagnosed as depressive disorder on 1 March 2016, and on 1 September 2016 was confirmed as low mood with depressive disorder, and considered to have worsened with the result that medication was increased. By this stage it had lasted for five months even without considering the previous bouts of low mood from the end of 2015 for which fluoxetine (Prozac) had been prescribed. Given that the increase in medication prescribed in September 2016 was not reduced until May 2017, I find that the claimant was suffering from a mental impairment which by this stage (as at May 2017) had lasted at least 12 months. The claimant's evidence to the effect that it had had an adverse effect which was substantial (in the sense that it was more than minor or trivial) on her normal day-to-day activities was not something which the respondent could effectively challenge. For these reasons I find that the claimant was a disabled person by reason of a depressive disorder. I also find that the claimant was disabled by reason of this mental impairment with effect from May 2017.
31. I now turn to the question of whether the respondent knew, or ought reasonably to have known, that the claimant was so disabled.
32. It is clear that the respondent did not know of this disability at the outset of the claimant's employment, nor ought it reasonably to have known as at that stage. The claimant had confirmed herself to the respondent in her employment application that she did not suffer from any mental illness, and did not consider herself to be disabled in that respect.
33. Similarly, I prefer the respondent's version of events as to the discussions in March 2016. The claimant now suggests that she told the respondent that she was suffering from a mental illness, when in fact I find that the opposite was true. Indeed it is ironic that the respondent was sufficiently concerned to establish whether the claimant was suffering from mental illness (when the claimant was strongly contesting the contrary) that the respondent insisted on obtaining a medical report at its own expense from the claimant's GP, who confirmed that there was nothing wrong with her and that she was fit to work. The respondent was clearly entitled to take this letter from the claimant's GP at face value.
34. When the claimant was absent from work for two weeks in August 2016 she confirmed that this was because of stress arising from her colitis, and not because of any separate depressive illness. The claimant's subsequent absence in November 2016 was because of treatment required for her bowel condition and ileostomy and not because of any depressive illness. This is all consistent with my finding that the claimant was not disabled by reason of depressive illness until at least May 2017.
35. I can see no reason therefore why the respondent can be said to have known, or ought reasonably to have known, that the claimant was disabled by way of any mental impairment at the time the claimant became a disabled person in May 2017.
36. The claimant was then certified as unfit to work with effect from 3 July 2017 by reason of "stress at work" and resigned her employment within three weeks without having returned to work. The diagnosis, and the reason given for absence, was "stress at work", which was consistent with the claimant's concerns and grievance at that time, and not because of any distinct or separate diagnosis of depressive illness. As noted above, in my judgment the respondent did not know and it could not be said that it ought reasonably to

- have known that the claimant was disabled as at that time, nor that any action on the part of the respondent might have caused any substantial disadvantage of the claimant because of any depressive illness.
37. If the matter had continued for some weeks it might well be said that the respondent ought at that stage to have made enquiry of the claimant's GP and/or sought an occupational health report on the nature of the claimant's illness/stress at work, which by this stage arguably they might have concluded was distinct from the claimant's ileostomy and occasional related difficulties. However, the claimant did not return to work and resigned within three weeks.
 38. In my judgment therefore it cannot be said that as at the date of the claimant's resignation on 21 July 2017 the respondent knew that the claimant was disabled by reason of a depressive illness, nor that it ought reasonably to have known that this was the case, nor that any acts or omissions on its part might have given rise to a substantial disadvantage to the claimant.
 39. Accordingly, I dismiss the claimant's claim of disability arising from discrimination applying section 15(2) EqA. I also dismiss the claimant's claim alleging a failure by the respondent to make reasonable adjustments, applying paragraph 20(1)(b) of Schedule 8 EqA.
 40. The claimant's two remaining claims are for harassment related to disability, and for unfair constructive dismissal, and the future conduct of these claims are dealt with in the attached case management summary and orders.

Employment Judge N J Roper
Dated 15 January 2019
Judgment sent to Parties on

23 January 2019