



## EMPLOYMENT TRIBUNALS

**Claimant**

Paula Frankland

**Respondent**

v The Royal Wolverhampton NHS Trust

## PRELIMINARY HEARING

**Heard at:** Birmingham

**On:** 15 April 2019

**Before:** Employment Judge Woffenden

**Appearances**

**For the Claimant:** Mr. I Clay, solicitor

**For the Respondent:** Mr. P Farrar, solicitor

## JUDGMENT

1. The claimant has leave to amend her claim by replacing section 8.2 of her claim form with paragraphs 8 to 33 of the Further and Better Particulars of Claim dated 6 November 2018 (“the Particulars”) save for “and direct discrimination on grounds of disability contrary to section 13 Equality Act 2010” of paragraph 8 and paragraphs 16 17 18 19 20 21 and 23 of the Particulars.
2. Unless by **29 April 2019** the claimant complies with paragraph 3.1 a) and b) of the order of Employment Judge Harding sent to the parties on 2 November 2018 (‘the Order’) the claim of disability discrimination shall be dismissed without further order.
3. The claims which presently continue to hearing are of unfair dismissal and section 15 Equality Act 2010.
4. The hearing is listed for 5 days as detailed in the Order.

*Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.*

## CASE MANAGEMENT SUMMARY

## The issues

1. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

### 2. *Unfair dismissal claim*

2.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the capability and that this was the reason for dismissal.

2.2. Did the respondent hold that belief in the claimant's capability on reasonable grounds? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

2.2.1. The respondent's wholesale failure to follow its own capability/long term absence management procedures and as set out in paragraph 5 of the Order.

2.3. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

2.4. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

2.5. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

### 3. **Disability**

3.1. Does the claimant have a mental impairment, namely anxiety?

3.2. If so, does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

3.3. If so, is that effect long term? In particular, when did it start and:

3.3.1. has the impairment lasted for at least 12 months?

3.3.2. 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.

- 3.4. 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?

**4. Section 15: Discrimination arising from disability**

4.1. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is the claimant was dismissed because of her sickness absence which arose from her anxiety. No comparator is needed.

4.2. Does the claimant prove that the respondent treated the claimant as set out in paragraph 4.1 above?

4.3. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

4.4. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following:

8.4.1 As to the business aim or need sought to be achieved: to ensure adequate staffing levels and managing attendance levels.

8.4.2 As to the reasonable necessity for the treatment: ?

8.4.3 As to proportionality: ?

4.5. 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?

**5. Remedies**

5.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy. The claimant is now working. I reminded Mr Clay that the burden of proof as to the nature and extent of any injury to feelings falls on the claimant.

5.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

**6. Judicial mediation**

7. I raised the possibility of this case being considered for an offer of judicial mediation. I explained how the process operates and provided a note giving a full explanation of the judicial mediation scheme. I emphasised that this was just an enquiry as to whether the parties would be interested in the Regional Employment Judge considering whether the case would be suitable for an offer of judicial mediation.

8. The claimant expressed interest in this matter being dealt with by way of judicial mediation. The respondent (as an NHS body) is not interested.
9. I made the following case management order by consent. Save as varied below the parties agreed the case management orders in the Order remain of full force and effect.

## **ORDERS**

### **Made pursuant to the Employment Tribunal Rules 2013**

#### **1. Amended response and Varied Orders**

1.1 The respondent has leave to present a draft amended response, marked for my attention, so as to arrive with the Tribunal and the claimant on or before **13 May 2019**. The amended response will set out the respondent's factual assertions in connection with the claims as now understood (including but not limited to the disability issue and legitimate aim) and leave will be granted if it does this.

1.2 Dates for compliance with the Order are varied as follows:

- a) Paragraph 5.1 - **3 June 2019**
- b) Paragraph 5.2- **17 June 2019**
- c) Paragraph 5.3- **1 July 2019**
- d) Paragraph 6.1- **15 July 2019**

1.3 By **22 July 2019** the parties shall write to the tribunal to confirm all directions have been complied with and the case is ready for hearing.

### **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.

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Employment Judge Woffenden

Date: 16.04.2019

