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THE EMPLOYMENT TRIBUNALS

Claimant: Mrs Krista Mikane
Respondent: The Co-operative Food Limited
Heard at: East London Hearing Centre
On: 13 November 2018
Before: Employment Judge Burgher

Ms M Long
Mrs G A Everett

Representation

Claimant: Mr N Mikane (Husband)
Respondent: Mr G Graham (Counsel)

SUMMARY OF PRELIMINARY HEARING (OPEN)

1. The matter was listed for a full hearing for four days. However, it was apparent that the factual issues for determination were undefined. The Tribunal therefore spent an hour seeking to identify the factual allegations that the Claimant wished to make against the Respondent in respect of the specified heads of claim. Following this exercise the following issues were identified for determination.

Maternity Discrimination (Sex Discrimination arising from maternity)

2. The Claimant makes the following allegations:
- 2.1 Pawel Gorny and Russell McAleese (Shift Managers) did not offer the Claimant a risk assessment when she returned from maternity leave on or after 8 February 2017.
 - 2.2 Pawel Zabik (Team Manager) did not arrange a return to work meeting with the Claimant on 22 February 2017. It is also alleged that he failed to organise the bi monthly one to one meetings that the Claimant should

have had from 22 February 2017 until March 2018. The Claimant alleges that she only had one meeting.

- 2.3 Sean Byrne (Team Manager) following a meeting on 3 March 2017 did not allow the Claimant to reduce her working hours for breastfeeding whilst staying on full pay. It is alleged that he also failed to provide the training that the Claimant was promised before starting maternity leave and failed to provide the Claimant with the same position she has before she went on maternity leave.
- 2.4 Victoria Reyes (Team Manager) denied the Claimant's entitlement to a risk assessment for breastfeeding during communications on 6 December 2017.
- 2.5 Janet Johns (Warehouse Distribution Manager) denied the Claimant's entitlement to a risk assessment for breastfeeding when deciding the grievance on 23 January 2018.
- 2.6 Brian Keyworth (Warehouse Distribution Manager) denied the Claimant's entitlement to a risk assessment for breastfeeding when deciding the grievance appeal on 6 June 2018.

Race Discrimination

3. The Claimant is Latvian. She alleges that her shift manager, Pawel Gorney, who is Polish treated her less favourably than he treated other Polish workers or Polish speakers.

4. The Claimant relies upon Karoline Swarcz, Natalai Chemecka and Lusia Cicurova as comparators.

5. The allegations of less favourable treatment are:

- 5.1 The comparators had light duties when return from maternity leave;
- 5.2 The comparators had extra breaks for resting; and
- 5.3 The comparators returned to their previous positions held before going on maternity leave.

Sex Discrimination

6. The Claimant alleges that Pawel Gorny and Russell McAleese (Shift Managers) and Pawel Zabik (Team Manager) have:

- 6.1 Failed to arrange a return to work meeting with the Claimant on 22 February 2017.

- 6.2 Failed to organise the bi monthly one to one meetings that the Claimant should have had from 22 February 2017 until March 2018. The Claimant alleges that she only had one meeting.
 - 6.3 Failed to provide the Claimant with the training promised before she went on maternity leave.
 - 6.4 Failed to provide the Claimant with the same position she had before she left to go on maternity leave.
7. The Claimant relies on a hypothetical comparator.

Disability Discrimination

8. The Claimant asserts that she is disabled due to depression. The Respondent denies that the Claimant is disabled for the purposes of the Equality Act 2010. The Tribunal observed that there was no disability impact statement or medical evidence in the bundle for the Tribunal to properly determine this issue.
9. The Claimant complains of direct disability discrimination and/or harassment on grounds of disability. She alleges that Russell McAllesse and Anton Prior (Shift Managers) humiliated her in front of other colleagues on 7 March 2018 by discussing confidential information relating to the Claimant taking anti – depressants.
10. The Claimant alleges that the Respondent failed to make reasonable adjustments. Her medication for depression meant that she could not safely operate the machinery. The requirement to use the machinery was therefore the PCP. The Claimant alleges that other jobs such as security, clerk or working in sin bin (returned items) would have been reasonable adjustments for her to do.

Breach of Contract

11. Following discussion, it was concluded that as the Claimant remains employed, the Employment Tribunal does not have jurisdiction to consider her breach of contract complaint. The complaint seemingly focused on the Claimant being paid her salary as sick pay instead of normal pay. It was difficult to ascertain what, if any, financial loss the Claimant alleged resulted from this.

Application to postpone the full hearing

12. Following clarification of the issues as set out above, Mr Graham on behalf of the Respondent requested time to take instructions which was granted. He then applied to postpone the hearing on the basis that the Respondent had prepared for the hearing with witness evidence of Mr Gorny, Ms Johns and Mr Rymer. He candidly accepted that the Respondent was aware that general allegation were being made against other witnesses but such allegations were not specified in the terms set out above and as such the Respondent would be significantly prejudiced in proceeding with the hearing without such witnesses.

13. Mr Graham made enquiries about the possibility of securing the relevant witnesses in the remaining three days listed for the hearing and stated that witnesses were not contactable, some were working nightshifts and it was not practicable to seek to proof them on the specified allegations in the short time available.

14. Mr Mikane, on behalf of the Claimant did not object to the postponement application and stated that the Claimant wanted the relevant witnesses to be in attendance to be questioned. Whilst it was a matter for the Respondent to call the witnesses it felt appropriate the Tribunal accepted that the Claimant wished to put her allegations to the relevant witnesses.

15. When deciding whether or not to postpone the hearing the Tribunal had regard to the issues that had been clarified, the submissions of the parties and the overriding objective. Whilst Tribunal time and resources are limited and avoiding delay and saving expense are key considerations we concluded that a postponement in this matter was appropriate to deal with the case fairly and justly. The opportunity to call relevant witnesses on the defined issues and further evidence in respect of the issue disability would ensure the parties were on an equal footing. The Tribunal therefore postponed the hearing and made the following directions.

16. Separately, the Claimant was made aware that legal advice may be available from a local law centre, Citizens Advice Bureau or Advocate in respect of the issues in her case including the issue of disability and the amount that could be awarded for her claims.

ORDERS

Made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Disability

1. The Claimant is ordered to provide the Respondent by 4pm on **14 January 2019**:

- 1.1 Her Medical Records (including General Practitioner and Hospital Records) relating to her depression;
- 1.2 A Disability Impact Statement; and
- 1.3 Any Medical Report on which she intends to rely in support of her assertion that she is disabled.

Amended ET3

2. The Respondent is to provide an amended ET3 dealing with the defined issues and indicating whether it is conceded that the Claimant suffers from the relevant disability by 4pm on **18 February 2019**.

Schedule of loss

3. The Claimant shall send to the Respondent a “schedule of loss”, i.e. a written statement of what is claimed, including a breakdown of the sums concerned showing how they are calculated by 4pm on **2 March 2019**. The Respondent shall send the Claimant a counter schedule of loss by 4pm on **16 March 2019**.

Update Bundle

4. For the Hearing, the parties shall agree a bundle of documents limited to those which are relevant to the determination by the Tribunal of the issues in the case. Because it appears likely that the Respondent has most of the original documents, the Respondent shall create the bundle unless the parties specifically agree otherwise. On or before **25 February 2019** the Respondent shall provide to the Claimant a clear, indexed, paginated copy of the updated bundle, assembled in chronological order (save in respect of formal policies or procedures, which may be placed together) and containing all the relevant documents which any party wishes to be included. The Respondent shall bring four copies to the Hearing (three for the Tribunal and one for any witness).

Witness statements

5. On or before **2 March 2019**, the parties shall exchange written witness statements (including one from a party who intends to give evidence). The witness statement should set out all of the evidence of the relevant facts which that witness intends to put before the Tribunal. If it is intended to refer to any document, the witness statement should refer to page/s in the agreed bundle. A failure to comply with this order may result in a witness not being permitted to give evidence because it has not been disclosed in a witness statement; or in an adjournment of the hearing and an appropriate order for costs caused by such adjournment. Each party shall bring four copies of any such witness statement to the hearing. The Claimant’s statement should contain evidence relevant to the schedule of loss.

Hearing time

6. The case has been listed for a full Hearing on **13, 14, 15 and 16 August 2019** on the Judge’s estimate of four days required for it. That estimate is intended to include the time needed for considering the oral and written evidence; the party’s closing statements; the consideration and delivery of the judgment of the Tribunal; and consideration and judgment on remedy, if arising. The Tribunal will require the case to be completed within the time allocated to it.

Other matters

7. A Latvian Interpreter will be required to assist in the full hearing.

8. Public access to employment tribunal decisions. All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

9. Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

10. Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

11. You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge Burgher

15 November 2018