



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Hulton

**Respondent:** The Estate of Mr P Hazlehurst (deceased) formerly t/a Mr Neil Frain

**Heard at:** Manchester

**On:** 29 March 2019

**Before:** Employment Judge Hill

## REPRESENTATION:

**Claimant:** In person

**Respondent:** Mr D Yazdi, Solicitor

# JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that:

1. The judgment of the Tribunal is that the claimant is not disabled for the purposes of the Equality Act 2010, and the claimant's claims for disability discrimination under sections 13, 15, 20 and 21 are struck out.
2. The respondent's application for a strike out of the claimant's claims of unlawful deduction of wages, unpaid notice pay and holiday pay is dismissed.
3. The claimant's application to join Mr John Smith as a party to the proceedings is dismissed upon withdrawal by the claimant.

# REASONS

**Disability: whether the claimant was at the relevant time a disabled person within the meaning of the Equality Act 2010**

1. The evidence before the Tribunal was:
  - (1) Impact statement;
  - (2) Medical reports of Dr Clark dated 11 February 2019 and 5 June 2017;

(3) Various fit notes.

2. The claimant provided an impact statement where she stated that between August 2016 and March 2017 she had felt nervous about going to work and at the end of November 2016 she had fainted on her way home from work and had thereafter been bedridden and unable to cook meals between 10 December 2016 and 24 December 2016.

3. The medical evidence provided by the claimant in support of this period of sickness is found at page 7 of the bundle comprising the fit note which states "viral illness". This period of absence is not referenced at all in the medical report/letter provided by the claimant's GP dated 11 February 2019, which was specifically prepared for these proceedings.

4. The first reference of the claimant attending her GP as referred to in this medical report is 7 March 2017 where the claimant was diagnosed with enteritis (a stomach problem). The claimant reports that she considers that these symptoms were related to anxiety and her GP in this letter has confirmed that this is a possibility.

5. The first record of the claimant reporting anxiety symptoms to her GP was on 24 April 2017. The claimant complains of migraines, being unable to sleep and panic attacks. She visited her GP again on 22 May 2017 where she described her mental health as being "improved slightly". Further sick notes were issued, and on 20 June the claimant was issued with a fit note which stated that she could possibly return to work with amended duties.

6. In September 2017 the claimant was issued with a further fit note stating that she was able to return to work on reduced hours and amended duties. In November 2017 her GP reports that she was having difficulty sleeping and had complained of being owed money by her employers and was feeling anxious. A further fit note was issued until 20 January 2018. The claimant's final visit to the GP was on 19 January 2018 when a fit note was issued until 19 February 2018. The claimant reports that she did not require any further fit notes because she had moved onto Jobseeker's Allowance.

7. The medical evidence supplied to the Tribunal shows that no further sick notes were issued and there are no further reports of visits to the GP detailing anxiety symptoms after 19 January 2018.

8. The claimant states in her impact statement that in February and March 2017 she was tearful and upset. She says that she experienced palpitations in March and April 2017 and felt anxious and depressed. She also reports not being able to carry out household chores and describes feeling lethargic and uninterested in social activities and wanting to stay at home. Throughout this period the claimant was not prescribed any medication and whilst she was referred to counselling the claimant did not follow this up.

9. During May to July 2017 the claimant describes symptoms of finding it difficult to be away from home and would feel anxious. In September 2017 the claimant states at paragraph 17 of her impact statement that she returned to her GP because she required valid sick notes for her Employment Support Allowance and was

struggling with daily chores and leaving home. The claimant states that her mental anxiety continued into 2018 but that she had been assigned a coach by the Jobcentre and that she felt less depressed and anxious. The claimant has not seen her GP for anxiety and/or depression since 19 January 2018.

### **The Law**

10. Section 6 of the Equality Act 2010 provides:

“(1) A person (P) has a disability if –

(a) P has a physical or mental impairment; and

(b) The impairment has a substantial and long-term adverse impact on P’s ability to carry out normal day-to-day activities.”

11. The Tribunal is required to consider this along with statutory guidance on the meaning of disability as it thinks relevant. The following should be considered:

(a) Does the claimant have a physical or mental condition?

(b) Does it have an adverse effect on the day-to-day activities?

(c) Is it substantial?

(d) Is it long-term?

12. The burden of proof is on the claimant.

13. The medical evidence provided in this case is limited to the GP’s letter which makes no comment on the claimant’s ability to carry out normal day-to-day activities and is merely a report of the claimant’s attendance at GP surgeries. The claimant’s impact statement is also very sparse in respect of the adverse effect her condition had on her ability to carry out day-to-day activities. The Tribunal finds that the evidence provided has not sufficiently addressed the issue.

14. The medical evidence in the case is that the first diagnosis of the mental impairment was at the end of April 2017 (24 April 2017) and that the claimant last visited her GP with anxiety issues in January 2019. Whilst the Tribunal accepts that the claimant may have had anxiety symptoms prior to visiting her GP in April 2017, it is clear that by September 2017 her GP considered that she was able to return to work albeit on limited duties.

15. Since September 2017 the claimant’s impact statement has failed to set out in any detail how her mental health condition has had an adverse effect on her ability to carry out normal day-to-day activities.

16. The Tribunal therefore finds that the claimant’s condition has not lasted more than 12 months and was not likely to last more than 12 months. In addition, the claimant has failed to demonstrate that the effects of the condition have had a substantial adverse effect on her ability to carry out day-to-day activities.

### **Respondent’s application for a strike out**

17. The respondent made an application for a strike out of the claimant's claim for failure to pay notice pay, failure to pay accrued holiday pay and an unlawful deduction of wages.

18. The claimant commenced proceedings in relation to her claims for failure to pay notice pay, failure to pay accrued holiday pay and unlawful deduction of wages in the County Court in November 2017. The total amount of her claim was for £2,385.52. During the course of those proceedings the respondent made a part admission and settled part of the claims on 15 November 2017 in the sum of £1,260. The claimant confirmed that she had received that amount. The claim continued in the County Court on the basis that the claimant did not accept the part admission. On 24 November 2017 the claimant commenced the ACAS early conciliation process and an ACAS early conciliation certificate was issued on 4 January 2018. On 18 January 2018 the parties were informed by the County Court that the case had been transferred to Manchester County Court Hearing Centre to be allocated to a track and the case management directions to be given. On 29 January 2018 the claimant started proceedings in the Manchester Employment Tribunal and included the claims for failure to pay notice pay, failure to pay accrued holiday pay and unlawful deduction of wages.

19. Subsequently the claim in the County Court was allocated to the small claims track and listed for trial on 1 May 2018, and the claimant was required to pay a trial fee of £170 by 3 April 2018. If the payment of the fee was not made the claimant was made aware that the claim would be struck out with effect from that date. The claimant did not pay the required fee by the deadline and therefore the claim was automatically struck out on 23 April 2018. The Tribunal has had sight of the letter from the Court Service dated 23 April 2018 which states:

“Due to the fact that the hearing fee has not been paid and in accordance with the Civil Procedure Rules part 3.7 I can confirm that the hearing has been cancelled and the claim has been automatically struck out without further order of the Court.”

20. The respondent argues that the claimant was estopped from bringing claims in the Employment Tribunal under the principle of *res judicata*. The respondent's position is that the claimant's claims are exactly the same as those that were raised in the County Court claim and are based upon the same facts. The respondent states that the claimant chose not to proceed by failing to pay the trial fee and in doing so she accepted that the claim would be dismissed. The respondent referred the Tribunal to the Court of Appeal case in **Lennon v Birmingham City Council [2001] IRLR 826** and specifically referred the Tribunal to paragraph 29 where the Court held that:

“Adjudication is not in any event limited to a trial on the merits...what matters is that there has been an actual decision of a competent court dismissing the process.”

21. The respondent further states that it matters not the reason why the claimant chose not to continue with the claim and that that is irrelevant, and refers to paragraph 30 of the same case, referring to:

“The doctrine turns not on the reason why the court’s decision to dismiss the claim was consented to by the party making the claim, nor on the reason why a court made the order on the simple fact that the order was in fact made.”

22. The Tribunal invited the respondent to comment on the case of **Nayif v The High Commissioner of Brunei Darussalam [2014] EWCA Civ 1521** where in that case Mr Nayif issued an Employment Tribunal claim against the High Commission alleging amongst other things that he had suffered race discrimination resulting in psychiatric injury. These claims had been submitted outside the three month time limit and the Tribunal, without engaging with the substantive merits of the case, refused to extend time. Mr Nayif then went on to issue proceedings in the High Court for negligence. The High Commission relied on the defence of issue estoppel on the basis that the Employment Tribunal dismissed a claim on the same issues. The High Court felt bound by the authority, particularly in *Lennon v Birmingham City Council*, to strike out the claim. The matter was appealed and the Court of Appeal disagreed, noting that a determination that an issue could not be considered at all did not amount to a final disposal of the claim. The Court of Appeal stated that the test in *Lennon* which states that *res judicata* applies wherever there has been any order dismissing the case was too wide and did not cover situations where the order dismissing proceedings was the result of a refusal to accept jurisdiction. As a result Mr Nayif was allowed to pursue his action in the High Court.

23. The respondent argued that in this case they were relying upon cause of action estoppel and that the facts in **Nayif** could be distinguished. The Tribunal considers that in this case the automatic strike out under CPR part 3.7 was not a determination/order on the merits of the claim and was an automatic result of non payment of the fee and was not a final disposal of the claim.

24. The claimant’s failure to pay the fee was made in the knowledge that a hearing in that jurisdiction would not go ahead, and the claimant had already included those claims in her ET1. The Tribunal considered that the claimant knew that this would be a discontinuance of her County Court claim rather than an order of the Court based on the merits of the claim. The Tribunal notes that the Court had made no order in respect of the County Court claim and that the letter dated 28 April 2018 is exactly that: a letter from the Court and not an order of the Court.

### **Application to join Mr John Smith as a party to the proceedings**

25. During the case management discussion in front of Employment Judge Porter on 9 January 2019 an issue arose as to whether the claimant wished to join Mr Simon Smith as a party to these proceedings.

26. At this hearing it was apparent that Mr Smith had not been informed and had not been put on notice of today’s hearing and was therefore not present. The Tribunal considered it was therefore unable to proceed with Mr Smith not being able to defend such an application.

27. The claimant was invited to make a further application to the Tribunal setting out which aspects of the claim she considered Mr Smith should be joined and what she actually considered he was responsible for. The Tribunal also advised the claimant that she may be required to make an application for some of the issues that she alleged Mr Smith was responsible for being out of time. The claimant having

considered this decided that she no longer wished to pursue her application to join Mr Smith and therefore the application was dismissed upon withdrawal by the claimant.

### Case Management Orders

28. A hearing in this case has already been listed for 2, 3 and 4 October 2019. After discussion with the parties it was agreed the following Case Management Orders were required in order to ensure that the case was ready for hearing in October 2019:

- (1) On or before 26 April 2019 the parties to send to each other any additional documents included in the trial bundle.
- (2) On or before 10 May 2019 the respondent shall prepare and send a copy of the bundle to the claimant.
- (3) On or before 7 June 2019 the parties shall prepare and send to each other updated witness statements. Any witness statements already exchanged shall be included in the bundle.
- (4) Seven days before the final hearing the respondent to provide an up-to-date List of Issues to be sent to the claimant. The respondent shall bring three copies of the updated list to the Tribunal on the morning of the hearing along with sufficient copies of the bundle.
- (5) The parties shall ensure that they bring sufficient copies of the witness statements to the Tribunal, which will consist of a full panel, and therefore the parties should bring four copies of the witness statements, to include the witness stand.

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Employment Judge Hill

Date 22 April 2019 \_\_\_\_\_

JUDGMENT, REASONS AND ORDERS  
SENT TO THE PARTIES ON 29 April 2019

FOR THE TRIBUNAL OFFICE

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**(1) 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.**

**(2) 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.**

**(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.**