



EMPLOYMENT TRIBUNALS

Claimant: Lyanne Bibby

Respondent: Poole Hospital NHS Foundation Trust

Heard at: Southampton **On:** Thursday, 11th April 2019
Employment Tribunal

Before: Employment Judge Mr. M. Salter

Representation:
Claimant: Mr. P. O'Callaghan, counsel.
Respondent: Mr. N. Caidan, counsel

JUDGMENT

The Claimant's claim is struck out as having no reasonable prospect of success.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reserved reasons for the Preliminary Hearing on 11th April 2019.
2. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal

has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant's case as formulated in her ET1

3. The Claimant's complaint, as formulated in her Form ET1, presented to the tribunal on 15th February 2018, is in short, she was unfairly dismissed by the Respondent who ignored her medical circumstances. The dismissal was, therefore, she says also an act of disability discrimination.

The Respondent's Response

4. In its Form ET3, received by the tribunal 21st March 2018, the Respondent accepted the Claimant was an employee and that he was dismissed, but denied that that dismissal was unfair, contending it was for a potentially fair reason, namely a reason related to the Claimant's conduct and that that dismissal occurred after a reasonable investigation and was within the band of reasonable responses open to it.

Relevant Procedural History

5. The matter came before E.J Kolanko on 1st May 2018 where the claim of unfair dismissal was withdrawn and dismissed owing to the Claimant's lack of continuity of employment, E.J. Kolanko gave directions for the obtaining of a medical report. The disability discrimination claim was identified as being one of s15 Discrimination arising from disability and a failure to make reasonable adjustments.
6. Dr Trevor Hicks was jointly instructed [35] and produced a report [87] dated the 27th September 2018.

7. As a result of this report the Respondent applied for a strike out of the Claimant's claims or in the alternative that the tribunal consider a deposit order [43].
8. The matter then came before E.J. Maxwell on 7th December 2018 for a Telephone Preliminary Hearing. E.J. Maxwell set the matter down for an in-person preliminary hearing to consider the strike-out/deposit order application. He recorded that the Claimant intended to challenge the findings of Dr Hicks by way of her own oral evidence [47 §7], and made an Order that the Claimant provide a witness statement addressing the link between her conduct and disability [48 §1.2]
9. He gave directions for the exchange of skeleton arguments and gave the parties permission to ask questions of Dr. Hicks. The Claimant took the opportunity to ask questions [50] on 19th December, and received responses on 18th January 2019 [52].
10. The Respondents skeleton argument raised a point not covered by E.J. Maxwell's order that the claimant was dismissed for removal of oramorph from the pharmacy, this was a tendency to steal and so was excluded from the definition of impairment by paragraph 1 of schedule 1 of the Equality Act 2010 and the relevant regulations.

THE PRELIMINARY HEARING

General

11. The matter came before me preliminary hearing to consider the Respondent's applications and to case manage the matter. The hearing had a three-hour time estimate.
12. The Claimant was represented by Mr. P. O'Callaghan of counsel, who she had been throughout the previous tribunal hearings; the Respondent was represented by Mr. N. Caidan, of counsel.

DOCUMENTS AND EVIDENCE

Witness Evidence

13. As would be expected in a case concerning a strike out/deposit order and the interpretation and application of the Employment Tribunal rules of Procedure I heard no witness evidence. I was provided with a witness statement by the Claimant however, and did read this and did consider its contents when making my decisions. The witness statement is entitled "Statement Challenging the Opinions of Dr Hicks

within His Report for the Employment Tribunal of Lyanne Bibby v Poole Hospital NHS Foundation Trust”

Bundle

14. To further assist me in determining the matter I have before me today an agreed bundle consisting of some [179] pages prepared by the Respondent. My attention was taken to a number of these documents as part of me hearing submissions.
15. The Claimant also produced some additional documents which Mr. Caidan did not object to, headed “SSRIstories” that sets out side effects of antidepressant medication

Submissions

16. The hearing took the form of submissions by both parties who supplemented their written submissions. Since the skeletons are in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions.

MATERIAL FACTS

General Points

17. For my purposes I must take the Claimant’s case at its highest and presume it is correct.
18. She was employed by the Respondent as a Pharmacy Assistant. She was dismissed for gross-misconduct after she removed, without authority or for any work reason, a batch of Oramorph.
19. The Respondent observed the removal of the oramorph and, in accordance with its disciplinary policy, commenced disciplinary proceedings against the Claimant for “theft” and “dishonesty”.
20. The Respondent accepts, at the relevant time, disabled within the meaning of the Equality Act 2010 by reason of depression and anxiety.
21. At the end of the disciplinary process the Claimant was dismissed and, although the dismissal was upheld on appeal, two of her grounds of appeal were successful.

During the disciplinary procedure the claimant made various admissions, admitting taking the items and that she knew what she was doing [134, 175]

22. Within the bundle are letters from her GP and Dr Grenholm, a Locum Consultant Neurologist both who give their opinion that the drugs she was taking (Sertaline) resulted in her making “irrational decisions” [171] and that it “has been relevant for many of her symptoms” [170]. It should be noted that these letters refer to the claimant going to court for shoplifting matters, but I am told these are errors in the letters and the Claimant was not being prosecuted for any such matter.
23. The claimant presented her application for ACAS conciliation on 6th January 2018 and this lasted until 29 January 2018. Her claim form was presented on 15th February 2019.
24. As outlined above, Dr Hicks prepared a report for the purposes of this litigation. He was jointly instructed by both parties who had an input into the letter of instruction.
25. His report contains the following paragraphs:

In my opinion it is unlikely that the cause of her obtaining choral hydrate (sedative) on 5th March 2017 or oramorph (opiate analgesic) by deception on 20th March 2017 was either her depressive episode or the side effects of her sertraline (antidepressant) medication”

[88]

and

“In my opinion her account is not consistent with depression clouding her judgement to the extent of taking the oramorph”

and

“in my opinion it is unlikely that the cause of her obtaining oramorph (opiate analgesic) by deception on 20th March 2017 was caused either by her depressive episode or the side effects of her sertraline (antidepressant)

[123 §4.5]

26. In accordance with the Order of E.J. Maxwell the Claimant asked questions of DR Hicks on 19th December 2018 [50]. And received responses on 18th January 2019 [52]. Dr Hicks was asked the question [50 §2]:

“It is Miss Bibby’s case that the incident involving oramorph would not have occurred but for her depression and exacerbating negative side effects of sertraline. DO you accept that the side effect of the medication upon the claimant’s medical condition could have caused her to act “out of character” and in an unpredictable and unforeseeable manner?”

To which he replies [[55 §2]:

“In my opinion her account is not consistent with depression or the side effects of sertraline clouding her judgment to the extent of taking the oramorph...”

27. He then sets out a number of factual matters which influenced his opinion including that the Claimant’s account was not consistent with depression causing her actions as her depression had improved and that the pre-planned nature of her taking the oramorph (the claimant explained that she was aware of her actions, the consequences of it and that she was done it as a cry for help) meant that it was unlikely she was acting under some acute confusional state as a result of the sertraline.
28. Dr Hicks also notes there was no complaint the Claimant’s GP of impairment of judgment at any material time; and when asked on the balance of probabilities whether the Claimant’s decision making was impaired Dr Hicks does not accept this as there was no supporting evidence of this [61 §7 and 8].
29. Th Claimant’s witness statement, as ordered by Employment Judge Maxwell, consists of a number of areas in which she records what she says are inaccuracies in the report.

THE LAW

Statute

30. So far as is relevant the Equality Act 2010 states:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B’s disability, and

20 Duty to make adjustments

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, 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, to take such steps as it is reasonable to have to take to avoid the disadvantage.

31. Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulation 2013 states:

37 Striking out

- (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
 - (a) that it is scandalous or vexatious or has no reasonable prospect of success;...

39 Deposit orders

- (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

Authorities and Texts

32. The Respondent referred me to the authorities in their skeleton argument which I do not set out or repeat here but have had reference to.

33. In Balls v Downham Market High School & College [2011] IRLR 217 the Appeal Tribunal noted:

"the tribunal must first consider whether on a careful consideration of all the available material it can properly conclude that the claim has no reasonable prospect of success. I stress the word 'no' because it shows that the test is not, whether the Claimant's claim is likely to fail nor is the matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."

CONCLUSIONS ON THE ISSUES

General

34. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.
35. I first remind myself of the appellate court and tribunal's need for caution when considering striking out discrimination claims. That said I consider that the basis of this application is different from the many applications to strike out discrimination claims as it is not one based on the underlying facts of the claim and therefore dependant on inferences drawn at the conclusion of hearing all the evidence; rather this application is based primarily upon the evidence of the independent medical expert jointly instructed by the parties that is in writing and then a consideration of the law and its application.

Causation

36. It is an essential element of s15 and any claim for a failure to make reasonable adjustments, that there be causation, that is a link of sufficient force and described in differing ways in the Equality Act 2010. For a claim under s15 there must be causation between the impairment and the "thing arising" from that impairment that is the reason for the unfavourable treatment; and for reasonable adjustments claims there must a substantial disadvantage when in comparison to those who are not disabled and that that substantial disadvantage is caused by the disability.
37. Having considered the material in this matter consisting of the medical report, the questions asked by the Claimant and the answers to those questions, and the Claimant's response to Dr Hick's report I have arrived at the conclusion that her claims of disability discrimination demonstrate no reasonable prospect of success and so should be struck out on the basis that the Claimant has no reasonable prospect in establishing the required element of causation key in both claims.
38. Dr Hick's report states in clear terms that the Claimant's impairment did not cause her to act in the way that she did when she removed the oramorph from the pharmacy, those conclusions are reasoned and based on the contemporaneous evidence of the claimant. He was expressly asked about this very matter and gave clear answers based on evidence.

39. I consider it important for me to note that the Claimant's response to Dr Hicks's report does not seek to present any material on which she would realistically hope to challenge his conclusions. I note the medical evidence presented by the Claimant does not specifically state that the misconduct was the likely effect of the drugs taken by the Claimant, whereas this point is expressly dealt with by Dr. Hicks who confirms this when questioned on this point. The medical evidence produced by the Claimant shows a co-occurrence of the incident and the use of sertraline whereas the evidence of Dr Hicks expressly rejects the causation between the two.
40. There is nothing I have been taken to, heard submissions on, or had highlighted to me which I find goes beyond a hope that there may be something on which a tribunal could reject Dr Hicks' evidence.
41. On the material I have before me, and taking the Claimant's case at its highest, I do not consider that she has a realistic prospect of successfully establishing causation in her claims. Having read the Claimant witness statement I do not consider that this provides me with a basis from which I could conclude there is material for supposing that cross-examination would increase the claimant's prospects.

Excluded Condition

42. Although in light of my findings above I am not required to make a decision on this issue. I would profess to being uncomfortable in this matter striking out the matter out on this grounds. The Equality Act expressly excludes claims where the "impairment" is a tendency to steal; the Respondents in the matter before me accept that the Claimant's impairment is depression and anxiety, this is not itself a tendency to steal, the exclusion would, therefore not appear to apply to Ms. Bibby's case.
43. That said the appellate tribunal has considered that claims where the consequence of an impairment are sufficient to trigger the statutory exclusion: see for instance Wood where the claimant's impairment was PTSD and he was dismissed for shoplifting.

Employment Judge Salter

Date: 9 May 2019

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