RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms L E Katte**

Respondent: **Homerton University Hospital NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **Thursday 1 August 2019**

Before: **Employment Judge Prichard**

Representation

Claimant: Captain E Achunche, husband, pilot, LLB, and lay representative

Respondent: Mr S Nicholls, counsel instructed by Hempsons Solicitors, London EC2

JUDGMENT

It is the judgment of the tribunal that: -

1. **This preliminary hearing listed to consider strike out and/or deposit of the claims is hereby adjourned to Wednesday 23 October 2019 at East London Tribunal Service, 2nd Floor, Import Building (formerly Anchorage House), 2 Clove Crescent, London E14 2BE starting at 10.00am. Time estimate 1 day.**

2. **No future hearings are to be before the present Judge, who recuses himself.**

3. **Under Rule 76(1)(c) of the Tribunal Rules of Procedure 2013, the claimant is ordered to pay the respondent's costs of the adjournment in the sum of £850.**

REASONS

1 The same one-day preliminary hearing with the same agenda to consider striking out or ordering deposits on any of the claimant's claims will now be heard on Wednesday

23 October 2019 at East London Hearing at 10.00am - time estimate one day.

2 This is an unusual case. The claim form in its original state was hardly comprehensible. Accordingly, orders were made by Judge Burgher in writing for further information of the discrimination claims. There were two orders - one for particulars of the claim itself and of the alleged discrimination, and another concerning the claimant's disability.

3 The claimant has a rare condition. She has nerve palsy caused by a road traffic accident in April 2015 when she was driving in Ireland with two of her children in the car. Since then she developed neurological symptoms - principally recurrent migraines, and at one stage double vision but a great deal of eye strain and difficulty with her right eye. Not surprisingly, looking at computers for long periods is a strain for her.

4 The claimant complains of sundry other disabilities these have understandably not been accepted by the respondent as amounting to disabilities. By a letter from Hempsons Solicitors on 13 June 2019 the respondent accepts the claimant's nerve palsy falls within the definition in s 6 of the Equality Act 2010. The palsy affects the intracranial nerves 4, 5, and 6. The concession, which I am sure was rightly made, therefore means the claimant was a disabled person at the time of the events she complains of.

5 The respondent does not accept that the claimant's hypertension, IBS, right-side weakness, or rare sinusitis meet the Section 6 definition but that should not matter because the claimant's main problems in this case were to do with her optical impairments, and the resulting headaches. The disability threshold is not a problem here.

6 The problem today is with everything else in the case i.e. the stated claims. I was relieved and thankful to be told that the original claims of maternity, sexual orientation, age, and sex discrimination have all been withdrawn and are no longer pursued. The respondent's knowledge of the claimant's palsy is not an issue either. The respondent has throughout been aware of the claimant's nerve palsy. There has been a history of work place assessments, and adjustments etc. It is a controversial history. The claimant maintains the respondent did not do enough. The respondent says they did everything they could reasonably have done.

7 There is also an extant claim for holiday pay here. I understand that the respondent like majority of employers would not pay for days not worked. If someone returns on a phased return, say 3 days a week, and 2 days are not worked, they would only be paid for 3 days. Sometimes an employer, usually with the employee's agreement would pay the other two days as accrued holiday, or contractual sick pay, in order to maintain salary at its normal full-time level. That is a common practice. I have mentioned to the parties today the case of *O'Hanlon v Commissioners of Revenue & Customs* [2007] CA Civ 283. The important principle in that leading case is that it is not a reasonable adjustment to extend sick pay, to create disability leave or to facilitate an employee's absence from the workplace. That would be entirely contrary to all disability discrimination legislation which aims to facilitate attendance at work, not absence. An extension of that principle, I consider, clearly applies to this practice regarding phased returns, and would probably also apply to attending a large number of medical appointments as the claimant, through no fault of her own, has had to do. However, I know of no authority on that point.

8 The claimant works in a senior non-clinical nursing role as a Band 8A trained nurse / microbiologist. She is employed as the Lead for Safeguarding Adults with the respondent Trust. It is a unique role within the Trust there is only one such lead and the respondent had said that they require that role to be visible at the hospital, which was understandable. Nonetheless she was granted one day per week home working as a reasonable adjustment, because of her disability from the RTA.

9 The matter came for a preliminary case management hearing before Judge Tobin on 15 April and he made an order listing this case today for a preliminary hearing to consider Rule 37(1)(a) strike out / Rule 39 deposit. We later received the claimant's 52-page Detailed Statement of Grounds, on 29/04/2019, which is clearly drafted by Captain Achunche. The document was extraordinarily hard to read, repetitive, and for the most part incomprehensible. It abounds in inappropriate legal references and is full of hyperbole - a quote to give a feel of it:

> "R's managers found C's constant reference to authorities and use of legal principles and legal terminology that they described their conduct as illegal unlawful, irrational, unfair, egregious and inexplicable errors of law, bias, abuse of power, wrongful and/or unlawful exercise of discretion with specific references to judgments handed down by tribunals and court in this jurisdiction the ECHR, ECJ and CJEU offensive."

I am not sure what any tribunal is supposed to do with that.

10 There is constant and inflammatory reference to fabrications, forgery, abuse, bad faith, and fraud. Indeed, at the beginning of this hearing Captain Achunche asserted that "the respondent is playing fast and loose with the rules from the moment that they put in their ET3 response". No explanation was given for that sweeping statement, and it appears demonstrably untrue.

11 I am in an invidious position today I cannot help a claimant who is represented. Representing a person before the tribunal is a huge responsibility. The tribunal makes allowances for unrepresented people. We talk to them, we try to understand their cases. We do not do that with people who are represented. A person who is poorly represented, as here, therefore suffers a double disadvantage. They are two-time losers. They have bad representation, and they lose the tribunal's allowances. There is legal authority for the proposition that the tribunal cannot take it upon itself to sack a party's chosen representative - *Bache v Essex County Council* [2000] IRLR, 251, CA.

12 I have asked Captain Achunche to give serious consideration to standing down. I have told him squarely that I consider that this case as it stands now is completely untriable. This is preventing the case from getting started and it is more than possible that the final hearing in March 2020 (5-days) may well have have to be postponed if the case preparation cannot take place. Now, nothing can be done until we have been through this preliminary hearing to consider strike outs and deposits. It is holding progress up

13 I was on the point of striking this out on the basis of that 52-page detailed grounds on the basis of 37(1)(a) that the claim had "no reasonable prospect of success", but also, and unusually, under 37(1)(e) of the 2013 Rules "that the tribunal considers it is no longer possible to have a fair hearing in respect of the claim…". Both currently apply.

14 The holiday pay claim is at least comprehensible but because of *O'Hanlon* it has no reasonable prospect of succeeding.

15 The problem is that the overlay of legalese particularly over the reasonable adjustments, and the super-abundance of irrelevant and ancient authorities which more often than not are not explained (just a stark direction "See"), make this potentially triable case, untriable.

16 I cannot remedy that and do not consider that Captain Achunche will ever be capable of doing so either. He seems to consider that this was his best shot. It has obviously been time-consuming for him, even allowing for copious amounts of obvious "Copy and Paste".

17 There are irrelevant matters. The claimant sent a letter to the respondent as a reaction to the dismissal of the appeal against her flexible working request from Ms Pelley. By the way it was presented in the email, it seemed to be embedded in a High Court writ. The respondent took the view that this looked deliberate and appeared to be designed to intimidate. Captain Achnunche says it was a complete administrative error on their part. There has been a formal investigation into this but it has not got under way. Nothing can happen. The claimant is not engaging with the process at all. A formal meeting was tried. The claimant did not attend.

18 There was another problem in as much as the claimant has history of covertly recording meetings. She was specifically told not to do so, and yet continued to do so. At some meetings she said she would not guarantee that she was not recording it, so the meeting did not go ahead and was called off.

19 Captain Achunche comes back with a whole load of case authorities on covert recordings in evidence in civil proceedings. That is totally beside the point. What this looks like is disobeying a reasonable request from your management to stop recording meetings. Currently, this whole incident has nothing whatsoever to do with the claim which is before the tribunal.

20 There has been discussion of the legal definition of forgery. The respondent has come close to accusing the claimant of fraudulent doctoring a document for the purpose of causing alarm (the High Court Writ above). Again, this whole incident has nothing whatsoever to do with the claim which is before the tribunal.

21 I am afraid Dr Achunche has a tendency to use the law as an instrument of oppression against the respondent. This is utterly inappropriate in today's workplace or any other day's workplace. The tribunal needs to know the facts of a case. We do not need rafts of authorities. Legal authorities come (if at all) all right at the end of the final hearing when the parties are making their submissions. There are often none, and usually a pared down selection of relevant authorities if the case contains unusual contentions, which this case does not. These authorities have no place in a claim form or a Detailed Grounds of claim.

22 The main claim seemed in this case to be for reasonable adjustments, and under Section 15 of the Equality Act 2010. References in this pleading to the DDA 1995 are

mistaken and wrong. It was repealed in 2010 when the Equality Act 2010was enacted. Section 5 of the DDA 1995 is a different section from Section 15 of the Equality Act 2010. The former is history, repealed before the claimant even started work for the respondent in 2014. The academic jurisprudential comparison of the sections by Dr Achunche is of no help. It looks like showing off - legal debate for the sake of debate.

23 I gave the claimant and her husband time to discuss the position as I saw it. I stated that if he continued to represent her and continued to rely upon this 52-page Detailed Grounds, it is more likely than not that a judge would strike out the entire proceedings on the grounds I have mentioned above.

24 After consulting, the claimant made the fair request that she wanted a second opinion on this situation and the suitability of husband, Captain Achunche to represent her. As they were not necessarily expecting the views I have expressed today, I have acceded to their request for a postponement to get a second opinion.

25 The case needs to be licked into shape somehow either by the claimant acting in person and the tribunal doing what it often does with unrepresented claimants. Otherwise the claimant may find an alternative representative to try to render these proceedings triable.

26 I will not ask the respondent to put in an amended response to the claim, because the Detailed Grounds are incomprehensible as they stand, teeming with irrelevance, hyperbole, excessive irrelevant or unnecessary legalese and legal authorities.

27 For instance - *Nisa v Waverley Education Foundation Ltd UKEAT/0135/18* is a case that involves Section 6 of the Equality Act 2010 and the definition of disability. Section 6 is the only area where the claimant does not have a problem. Captain Achunche this afternoon seriously stated that the claim about a standard working reference was supported by the *Nisa* case. That submission is complete rubbish. *Nisa* has nothing to do with references whatsoever. Yet he says this earnestly, and apparently sincerely.

28 That is disappointing considering that he says he has an LLB for which he read at London Metropolitan University.

29 He also stated there is no rule of law requiring brevity. That may be literally true, but prolix baroque pleading such as this is totally against the overriding objective in Rule 2 of the Employment Tribunal Rules of Procedure 2013.

30 There is a complaint about an "over rigid" application by the respondent of the standard work reference. The claimant applied for jobs elsewhere which might have amounted to career progression. One was with Wolverhampton Hospital NHS Trust and another with the Redbridge Clinical Commissioning Group. She asked for references. She received a reference which it is the Trust policy to give. That is a standard work reference i.e. dates of employment and the role which she had, and her banding etc.- just that. There was nothing to do with her absences from work. To say that such a reference is "misleading" is typical of the hyperbole that there has been.

31 This reference is not misleading - it says so little it could hardly be misleading. This is standard policy with the Trust, and not only this Trust, but all London NHS Trusts to give standard work references / factual references unless there are serious concerns or if there was anything, say, involving the NMC or patient safety. There is nothing like that in this case. This is a successful senior nurse seeking progression. This aspect of the claim seems to have absolutely no prospect of success. Even if the respondent was wrong to provide that reference, I cannot discern any nexus between that and the agreed protected characteristic of neural palsy.

32 The claimant needs to give serious thought to these proceedings and to her representation. That is what the adjournment is for. There is a future date now set and that will only be further postponed in truly exceptional circumstances.

33 Because I have stated strong and trenchant views in this judgment I consider it is wise for me to recuse myself from future hearings, certainly if Capt. Achunche continues to represent.

34 On the costs order under Rule 76(1)(c) of the 2013 Rules there is no need for the receiving party to establish unreasonable conduct on behalf of the paying party when there is an adjournment.

35 I have asked Captain Achunche and the claimant if they would have difficulty meeting the costs of counsel's brief fee today of £850 (no VAT chargeable). Neither of them clearly said they would have a problem. If Captain Achunche is a commercial pilot, and if the claimant is in a job earning nearly £55,000 at Band 8A, I cannot imagine that an award of £850 costs would be unaffordable. That is my determination under Rule 84 of the Employment Tribunal Rules of Procedure 2013.

Employment Judge Prichard

6 August 2019