



EMPLOYMENT TRIBUNALS

Claimant: Mr R Burgon

Respondent: Healthcare Homes Group Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Bury St Edmunds

On: 22 August 2019

Before: Employment Judge Laidler (sitting alone)

Appearances

For the claimant: In person.

For the respondent: Miss E Couldrey, Human Resources Manager.

JUDGMENT

In so far as leave to amend is required the claimant is given leave to amend his claim to include allegations of disability discrimination as set out in paragraph 7 below

CASE MANAGEMENT SUMMARY

Case management discussion

- (1) This matter was last before this Employment Judge on 22 January 2019. That had been listed as the full merits hearing of the claimant's claim. The claimant did not attend, and the matter was adjourned to a preliminary hearing on 14 June 2019 to clarify the issues in the claim. Unfortunately, due to lack of judicial resources that hearing was postponed to today's date.
- (2) The claimant had contacted the employment tribunal by telephone at approximately 9.10am on the morning of the hearing on 22 January 2019 to advise that he was unwell and unable to attend. The issue of the respondent's costs of that adjournment are still reserved to the full merits hearing.

- (3) Upon receipt of the ET3 an order had been made to the claimant to advise whether he was bringing a claim under the Equality Act 2010 by virtue of his depression which was referred to on the ET1 form. By letter of 21 January 2019 the claimant confirmed that he was. No further information was given. A further order was made requiring the claimant to set out in writing the nature of his disability and how states he was treated less favourably because of it. This information was eventually provided in a letter of 23 March 2019 which was discussed at this hearing.

Amendment of the ET1

- (4) There was an issue as to whether the claimant required leave to amend his ET1 claim form as he had not specifically brought a claim of disability discrimination. The Judge was satisfied that there was reference to being treated unfavourably because of his ill health and there was also reference in section 15 of the form to the fact he was being treated for depression which he stated was well known to his employer who had been in receipt of an occupational health report giving guidance of the implications of the Equality Act and effects on his mental health. The claimant stated that that report also recommended that the claimant be accompanied to meetings by someone who could support him. Whilst therefore not pleaded in a technical legal way the Judge was satisfied that this did alert both the tribunal and the respondent to the fact that the claimant might be bringing a claim under the Equality Act 2010 and that therefore strictly leave to amend is not required as it is putting other legal labels on facts already pleaded.
- (5) However, it could be argued that what the claimant is now seeking to raise in his letter of 29 March 2019 goes further than that as he is asserting new facts. Having considered all of the relevant principles the tribunal was still satisfied that at this early stage of the proceedings and bearing in mind that the claimant is a litigant in person leave to amend should be given. It will involve the respondent in very little if any additional work as the matters concerning the claimant's ill health will be matters that they will need to be addressed in any event in relation to the free-standing complaint of unfair dismissal.

The Issues

Disability

- (6) The respondent accepts that the claimant satisfied the definition of disabled by virtue of depression and that this was known to it upon receipt of the occupational health report on 6 July 2018.

Allegations of less favourable treatment

- (7) A detailed discussion ensued regarding the particulars contained in the claimant's letter of 23 March 2019. Whilst appreciating that the claimant is acting as a litigant in person it was somewhat surprising that he had not carried out any research which could be done online into the principles of the Equality Act 2010. He may wish to visit the website of the Equality and Human Rights

Commission which might assist him further. Whilst not wishing to be too legalistic it is necessary for the tribunal to ascertain the claims and issues that go forward to a full merits' hearing and the respondent is entitled to know the case that it must meet.

- (i) *Not providing the claimant with supervision at work on his return to work.*

Having discussed with the parties the chronology this appeared to relate to the claimant's return to work from an earlier period of absence between 12 February and 5 June 2018. The claimant was subsequently suspended in relation to the matters that are the subject of this claim on the 25 June 2018. The period therefore that he is referring to when he alleges that no supervision was given is the 20 days between his return and suspension. It was confirmed that he was given a phased return to work starting at approximately 2 - 3 days a week, moving up to full time by the time of his suspension. The claimant in his letter specifically states that supervision would have enabled him to express his anxieties and discuss work as he had done previously but he felt ignored. The claimant was not able to explain in what way he was stating this lack of supervision (if that did indeed occur) was because of or due to matters arising from his disability.

- (ii) *That the claimant went through the whole disciplinary process while suffering from his depression and no one within the company was available to discuss this with him.*

The claimant specifically asserts that "normal practice within the home" would dictate that someone suffering from a disability would be supported. Again, unfortunately, the claimant was not able to explain what form this support would have taken or how he asserted that the lack of it was in any way because of, or because of matters arising in consequence of his disability of depression.

- (iii) *Recommendations from occupational health were not followed for example not to hold meetings at Haughgate House.*

It is the respondent's case that the occupational health report was not read until 6 July 2018. The respondent accepts that the first meeting was scheduled to take place at the home but once the claimant asked for it to be moved that was done. He was therefore never required to attend a meeting at Haughgate House.

- (iv) *Not providing the claimant with any supernumerary hours or training for him to familiarise himself with changes to resident's care plans that had taken place in his absence.*

The claimant believes that the care plan for the resident in question had changed during his absence. Reference, he says was made in the disciplinary process to the claimant not following the care plan. The respondent believes that the care plan for the resident was dated

22 March 2018 and the reference may be to there being a necessity for two people to attend to use a hoist for the resident. Again, it is not clear how the claimant argues less favourable treatment in this respect because of his disability.

- (v) *Sending the claimant official confidential correspondence by the home maintenance worker rather than normal post.*

This relates to the disciplinary outcome letter. The claimant asserts that the dismissal letter was sent to him with a handwritten envelope to his home, hand delivered by the handyman. It was not stated on the front to be 'Private and Confidential'. The claimant alleges this was a severe breach of confidentiality and the staff at the home had every opportunity to read it. He does not assert that they did. The claimant acknowledged that this was a concern separate from the issue of depression and disability.

- (8) Having read the above back to the claimant he agreed that these summed up his claim of disability discrimination. There is an issue as to whether individually or together these matters could amount to disability discrimination. As the claimant has the length of service to bring a free standing unfair dismissal claim it would not be proportionate to list a preliminary hearing to determine whether the discrimination claims have any prospect of success. They will be determined at the full merits hearing.

Unfair dismissal

- (9) In the claim form the claimant just quoted his appeal letter as to why he considered his dismissal unfair. This was discussed at this hearing. The claimant relies upon the following in arguing that the dismissal was unfair.

- (i) Not following the home's disciplinary procedure.

This allegation is that minutes of the disciplinary hearing and the appeal were wrong, and that the claimant had to ask for corrections to be made. Some of which were done and others were not. The claimant states that that shows the process was conducted in an unfair manner as the note taking was not accurate.

- (ii) Insufficient regard was taken of the fact that there were no independent witnesses to the alleged incident.
- (iii) The process was commenced whilst the claimant was on ill health.
- (iv) The notes of both meetings were inaccurate.
- (v) Insufficient regard was had to the claimant's personal circumstances concerning his employment at the home.

The claimant elaborated that his partner had been the previous manager of home and had cause to discipline both Tina Philbrick, care assistant and Sophie Cox, senior care assistant from whom the current allegations emanated.

- (vi) Insufficient regard was had to collusion of staff reporting the allegation.

This relates to the same matter as above. The claimant asserts that the allegations were made up and unjustified.

- (10) The claimant in his ET1 had stated who he wanted the respondent to call as witnesses. It was explained that it is a matter for each party to determine which witnesses it intends to call in relation to the issues to be determined. There is an issue which the respondent will have to resolve as to whether it needs to call Tina Philbrick and/or Sophie Cox. Whilst they made the allegation in the first place, the Judge reminded the parties that the tribunal is concerned with the actions taken by the employer rather than conducting its own investigation. It will however be a matter for the respondent as to who it wishes to call.
- (11) It was explained to the claimant that he is free to contact anyone who he thinks would be a relevant witness even if they still work for the respondent. However, if he calls a witness, he will be bound by the evidence given by them and will not be able to challenge that.

Remedy

- (12) In listing the hearing remedy will also be dealt with in the event that the claimant is successful. The claimant was reminded that the respondent is seeking to argue that in that event it would not be just and equitable to make an award to the claimant as it would have commenced further disciplinary action against the claimant. It is alleged that in the claimant's application form to the respondent of April 2015 he stated he had retired from his previous employment with the NHS, when in fact he had been dismissed for gross misconduct which led to him being struck off. This is a matter that may go to remedy.

Listing

- (13) The respondent will have at least four witnesses and the claimant will give evidence on his own account. It was agreed to list the matter for 4 days to include remedy if necessary.
- (14) Witness statements had already been exchanged prior to the last hearing. In view of this further clarification of the issues it has been agreed that any further witness statements or indeed supplemental witness statements from the witnesses whose statements have already been served must be served by the date given in the orders set out below.
- (15) Any additional documents which are relevant must also be disclosed, and the respondent will update the bundle.

- (16) The claimant should, if possible, seek independent legal advice on his position and take a copy of this summary and ideally the bundle which he already has to any such representative. It was stressed to him a number of times throughout this hearing that the tribunal's role is not to investigate whether the incident occurred, but to consider on all the evidence whether the respondent had a reasonable belief after reasonable investigation that the claimant was guilty of the misconduct with which he was charged at the disciplinary process. It must then consider whether the respondent acted reasonably in treating that as a reason for dismissal. The tribunal is not conducting its own independent investigation of the incident.

Other matters

- (17) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (18) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise) ...*" **If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.**
- (19) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (20) If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with s.12A of the Employment Tribunals Act 1996.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Amendment response

The respondent has leave to file and serve an amended response **within 21 days of this summary being sent to the parties.**

2. Disclosure of documents

By **31 October 2019** the parties will exchange any additional documents they seek to rely on arising out of this clarification of the issues.

3. Witness statements

By **31 October 2019** the parties will exchange any additional or supplemental witness statements relevant to the issues.

4. Statement of remedy/schedule of loss

By **31 October 2019** the claimant will also file and serve an updated schedule of loss setting out the loss of earnings claimed by him and acknowledging and providing evidence as to the new employment now obtained by him.

5. The final hearing

The full merits hearing will now take place on **8 June 2020** at **Bury St Edmunds Employment Tribunal, 1st Floor, Triton House, St Andrews Street North, BURY ST EDMUNDS, IP33 1TR** with a time estimate of **4 days**.

6. Other matters

6.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

6.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

6.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

6.4 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.

6.5 Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

6.6 Under rule 6, if any of the above orders 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.

Employment Judge Laidler

Date: 23/8/19

Sent to the parties on:

.....19/9/19

For the Tribunal:

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