



EMPLOYMENT TRIBUNALS

Claimant: Mr B Kell

Respondent: Magenta (UK) Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Nottingham **On:**

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: In Person

For the respondent: Mr N Caiden of Counsel

JUDGMENT

1. The claimant is not a disabled person within the meaning of section 6 of the Equality Act 2010. Accordingly, the claim for disability discrimination fails and is dismissed.
2. The claim for unfair dismissal is struck out.

REASONS

The Proceedings

1. By Claim Form presented on 17 April 2019 following a period of Early Conciliation from 12 March 2019 to 12 April 2019, the claimant brought claims for disability discrimination, unfair dismissal and breach of contract.
2. All of the claims are resisted by the respondent.
3. The case was listed for a Preliminary Hearing to determine whether the claimant is disabled within the meaning of section 6 of the Equality Act 2010 ("the EA").

4. Having determined the disability issue, I then considered the question of whether the complaint of unfair dismissal should be struck out.
5. I heard evidence today from the claimant, and there was an agreed bundle of evidence running to 58 pages. Both parties made oral submissions and Mr Caiden also produced a written skeleton argument on behalf of the respondent, for which I am grateful.

Findings of fact

6. The claimant was employed by the respondent as an assistant accountant from 29 November 2018 until 29 January 2019 when he was summarily dismissed.
7. The claimant gave evidence, which I accept, that he does not have any sense of smell at all, and has not been able to smell since he was 12 years old.
8. The claimant does not have a formal medical diagnosis of his condition, and never has done. He is currently undergoing tests, but these tests began in April 2019, some months after he was dismissed by the respondent. He suspects that his loss of smell is due to severe hay fever.
9. The claimant's inability to smell is, in my view, a physical impairment.
10. The claimant's evidence was that his loss of smell had not been a concern to him until he was dismissed. He told the Tribunal on more than one occasion that it wasn't until after he had left the respondent that his condition had affected his life.
11. Whilst employed by the respondent, in January 2019, the claimant completed a medical questionnaire at work. The claimant did not disclose his condition or that he considered himself to be disabled on the questionnaire. He did however tell his employer in December 2018 that he could not smell.
12. When completing the ET1 form he ticked 'no' to the disability question. I have placed very little weight however on this, as it is clear from the rest of the form that the claimant wished to pursue a claim of disability discrimination.
13. The claimant is not receiving any treatment for his condition. He has in the past tried using a nasal spray, but found that this did not have any effect.
14. The claimant's clear and consistent evidence, which I accept, was that until he was employed by the respondent, his condition had not caused any difficulties for him.
15. When asked what he couldn't do, or could only do with difficulty because of his condition, the claimant said that he could not smell things. He told me that his taste was not affected and he could taste things.
16. The claimant's evidence was that he washes more, can use too much deodorant (although he accepted that he was not sure about this because he is unable to smell the deodorant) and keeps his house clean.

17. There was no evidence before me of the claimant's inability to smell having an adverse impact on his ability to carry out normal day to day activities, and I find that it did not have an adverse impact on his ability to carry out normal day to day activities.

The Law

18. The relevant law is set out in Section 6 of the EA and Part 1 of Schedule 1 of the EA. The Secretary of State has also issued statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability.

19. Section 6 of the EA provides that: -

“(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 effect on P's ability to carry out normal day-to-day activities...”

20. Long-term effect is defined in Schedule 1, Part 1 of the EA as an effect which has lasted or is likely to last for at least 12 months, or is likely to last for the rest of the person's life.

21. Mr Caiden helpfully summarised the principles to be applied when considering questions of disability in his skeleton argument. He referred me to the cases of Walker v SITA Information Networking Computing Ltd UKEAT/0097/12 and Veitch v Red Sky Group Ltd [2010] NICA 39.

22. The burden of proving disability lies with the claimant. He must persuade the Tribunal that he was disabled at the relevant time, being the date(s) upon which he alleges the unlawful discrimination occurred.

23. In determining questions of disability, the Tribunal should consider the questions set out by the EAT in Goodwin v Patent Office [1999] ICR 302, namely: -

- a. Does the claimant have a physical or mental impairment?
- b. Does that impairment have an adverse effect on his ability to carry out normal day to day activities?
- c. If so, is the effect substantial, i.e. more than trivial?
- d. Is the adverse effect long term?

Conclusions

24. I found the claimant to be a credible witness and accept his evidence that he is unable to smell.

25. I have considered the following passage from Walker which Mr Caiden referred me to: -

“[w]here an individual presents as if disabled, but there is no recognised cause of that disability, it is open to a tribunal to conclude that he does not genuinely suffer from it. That is a judgment made on the whole of the evidence...”

26. That passage is not, in my view, authority for the proposition that a Tribunal is bound to conclude that an individual does not suffer from a condition where there is no recognised cause of it – merely that it is open for the Tribunal to reach that conclusion if it considers it to be the right conclusion reached after considering all the evidence.

27. Having considered the evidence before me, I find on balance that the claimant’s inability to smell amounts to a physical impairment.

28. I do not however find that the claimant’s physical impairment has a substantial adverse effect on his ability to carry out normal day to day activities.

29. I have considered the extract of the judgment in Veitch: -

“...The presence or absence of medical evidence may be a matter of relevance to be taken into consideration in deciding what weight to put on evidence of claimed difficulties causing alleged disability but its absence does not of itself preclude a finding of fact that a person suffers from an impairment that has substantial long-term adverse effect. The absence of medical evidence may become of central importance in considering whether there is evidence of long-term adverse effect from an impairment. Frequently in the absence of such evidence a Tribunal would have insufficient material from which it could draw the conclusion that long-term effects had been demonstrated.”

30. There is, quite simply, no evidence before me of any impact on the claimant’s ability to carry out normal day to day activities, or that any such impact was substantial. The claimant said that his condition had not affected him until the time of his employment by the respondent. The only evidence of any impact of the condition on the claimant’s daily life was that he washes more, can sometimes wear too much deodorant, and keeps his house clean. That does not amount to evidence of an adverse impact on ability to carry out day to day activities.

31. In determining whether there is a substantial adverse impact, the focus should be on what the claimant cannot do, or can only do with difficulty. There was no evidence before me of any activities that the claimant cannot carry out or can only carry out with difficulty, except smell.

32. The claimant has not discharged the burden of proving that his condition has a substantial adverse long-term effect on his ability to carry out normal day to day activities or that the effect was long term.

33. Accordingly, I find that the claimant is not disabled for the purposes of the EA. His claim for disability discrimination must therefore fail, and is dismissed.

Unfair dismissal

34. Having heard my judgment on the question of disability, the claimant informed me that he acknowledged that his claim for unfair dismissal must fail also. The claimant only has two months' service, and the basis for his allegation of unfair dismissal is that he believes his dismissal was discriminatory because it was linked to his inability to smell. As his disability discrimination claim is dismissed, his unfair dismissal claim cannot proceed.
35. I therefore strike out the claim for unfair dismissal.

CASE MANAGEMENT SUMMARY

Final hearing

- (1) All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting alone at the Employment Tribunals, **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG**, on **Thursday 30 January 2020**, starting at 10 am or as soon as possible afterwards. The time estimate for the hearing is 3 hours. The hearing which had been listed for 24th to the 26th August 2020 is vacated.
- (2) The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The issues

- (3) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Breach of contract

- (i) Did the respondent breach the claimant's contract of employment?

Remedy

- (ii) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and, if the claimant is awarded damages for breach of contract will decide how much should be awarded.

Other matters

- (4) 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/

- (5) 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 don’t comply with this rule, the tribunal may decide not to consider what they have written.**
- (6) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and to co-operate generally with other parties and with the Tribunal.
- (7) The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. Further information

- 2.1 The claimant must provide to the respondent and to the Tribunal by **1 November 2019** full details of his claim for breach of contract which include:
 - - 2.1.1 The terms of the contract and / or the handbook that the claimant alleges the respondent has breached; and
 - 2.1.2 How the claimant alleges that the respondent breached those terms.
- 2.2 The respondent has leave to file an amended response following receipt of the further information if so advised. The respondent must send the amended response to the claimant and the Tribunal by **15 November 2019**.

3. Statement of remedy / schedule of loss

- 3.1 The claimant must provide to the respondent by **1 November 2019** an updated Schedule of Loss setting out what remedy is being sought and how much damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amount has been calculated.

4. Documents

- 4.1 On or before **13 December 2019** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

5. Final hearing bundle

- 5.1 By **27 December 2019**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to consider.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

- 5.2 The respondent shall bring two copies of the bundle to the hearing for use by the Tribunal.

6. Witness statements

- 6.1 The claimant and the respondent shall prepare full written statements containing all the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **16 January 2020**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle; contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of damages he is claiming, together with an explanation of how it has been calculated.

7. Other matters

- 7.1 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.
- 7.2 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.
- 7.3 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.
- 7.4 **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.
- 7.5 **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.**
- 7.6 **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 Ayre

11 October 2019

Sent to the parties on:

For the Tribunal:

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