EMPLOYMENT TRIBUNALS

Claimant: Miss J Winter

Respondent: Victoria Plum Limited

Heard at: Hull **On:** 7 October 2019

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: Mr M Collins, Counsel
Miss J Nelson, Paralegal
Respondent: Mr S Healey, Counsel
Mr L Whiting, Solicitor

JUDGMENT

The application to strike out the response on the grounds that the manner in which the proceedings have been conducted was unreasonable is dismissed.

REASONS

Discussion

1. This is the application of the claimant to strike out the response on the ground that the respondent or its representative has conducted the proceedings unreasonably. The history of the case is as follows.

2. The claimant was employed by the respondent as a Trade Customer Services Coordinator between 16 March 2018 and 9 October 2018. The claimant presented a complaint for disability discrimination on 18 February 2019.

3. The respondent submitted its response and a request for further information in respect of the nature of the disability and it was clarified by further information on 16 April 2019. That clarification was that the impairment was hypothyroidism with associated symptoms of chronic fatigue, anxiety and depression.

4. The case came for hearing before Employment Judge Rostant for case management purposes on 24 April 2019. At that hearing Employment Judge Rostant heard the representations of the parties, in particular in respect of the disability and its effects. Mr Whiting, on behalf of the respondent, suggested that the Tribunal might be assisted by a jointly instructed expert in respect of whether the hypothyroidism was likely to result in the symptoms which led to the claimant being absent from work. At that hearing Employment Judge Rostant expressed the view that a report would not be proportionate at that stage but the claimant should serve upon the respondent medical notes and a statement setting out the effect of the condition whereupon the respondent could take stock and renew the application if appropriate. Employment Judge Rostant added that should the application be renewed he would not be influenced by the timetable which he had set for the hearing (the hearing was due to commence 7 October 2019 for a period of three days).

5. The claimant duly served her medical records and a statement in respect of the condition, and the respondent conceded that the hypothyroidism was a disability, having taken into account the deduced effects, namely the fact that it was necessary to ignore the consequence of medical treatment pursuant to Schedule 1 of the Equality Act 2010 (EqA).

6. The respondent instructed a medical expert to deal with the issue of causation, namely whether the claimant's absences from work were attributable to the hypothyroidism. Mr Whiting drafted a letter of instruction on 19 July 2019, and posed a series of questions, as is customary in the instruction of experts. These went somewhat beyond whether the condition impacted upon the claimant in respect of her absences, including posing a question as to whether the impairment had a substantial adverse effect on the claimant's ability to undertake normal day-to-day activities, the section 6(1)(b) EqA question. In addition, Mr Whiting posed further questions as to causation which I have summarised.

7. The expert, Dr Jennings, who is a Consultant Physician and Honorary Senior Lecturer in General Internal Medicine, Diabetes and Endocrinology at York Hospital, answered the questions in a report dated 14 August 2019, having had sent to him the medical records from 2013 of the claimant and her impact statement. He concluded that the absences were not attributable to the hypothyroidism but he did say in paragraph 6(a) that he suspected further information from the full set of case records might more adequately explain the symptoms. It seems to me, therefore, there remained a question for any medical expert to consider in the light of further disclosure.

8. There was then a delay in serving that report upon the claimant's representative, who was unaware it had been commissioned. This is dealt with in a letter of Mr Whiting and concerned a delay in the doctor's PA sending out the report until 20 August and then a combination of absences of the representatives. At all events, a letter was sent by Mr Whiting enclosing the report on 6 September and setting out the consequences that had upon the approach of the respondent to the claim.

9. On 13 September 2019 the claimant made this application to strike out the response on the grounds it was scandalous, unreasonable or vexatious pursuant to

rule 37, but Mr Collins has modified that at today's hearing to base the application on the grounds of unreasonable conduct of the proceedings. The grounds are that the disclosure of the medical records was unlawful, the commission of the report was contrary to the order made by Employment Judge Rostant and the proceedings had been derailed with the consequence that a fair trial was not possible, and it would be grossly inequitable to the claimant who had suffered distress to wait many months for the resolution of the litigation.

10. Turning to rule 37, the power of the Tribunal to strike out on the grounds I have summarised has been considered in a number of authorities, and even if the Tribunal has determined that there has been unreasonable conduct it is necessary before striking out a claim to consider whether a fair trial is nevertheless still possible.

11. I start with the question as to whether there has been unreasonable conduct. In the light of the way in which submissions were developed it is not necessary for me to make a ruling as to whether the disclosure of medical records to Dr Jennings and the witness statement and the claimant was compliant or not with the General Data Protection Regulations 2018 (the GDPR). Disclosure of information of this type under the GDPR is defined as 'special category data'. It is not uncommon in cases of this type for medical experts to give opinions on the medical records to assist the Tribunal to determine the issues, such as whether a disability is established under section 6 of the Equality Act 2010, whether or not other conditions arise from it and whether they caused or were related to the subject matter of the legal complaint and what adjustments could be made to reduce or avoid any disadvantage which arises. In this case Mr Healey points to an issue under section 15 of the Equality Act 2010 as to whether the absences were something which arose because of the disability, and Dr Jennings provides an opinion on that which he says may assist the Tribunal.

12. I have regard in particular to the approach taken by Employment Judge Rostant at the preliminary hearing and how the parties would have expected the litigation to have unfolded in the light of that. In respect of whether there would have been disclosure of medical records and the impact statement information to Dr Jennings or another expert, I have no doubt there would have been. It would have been necessary and proportionate in the light of the issues in this case for a medical expert to have given an opinion on whether there was the relevant causal connection. Had the matter been referred back to Employment Judge Rostant he would have ordered that there to be such a report. Whether the respondent has breached the GDPR has to be seen in the context of me being satisfied that it would have been necessary for resolution of an issue in these proceedings for such disclosure to take place. However, I have no doubt that the claimant and her representatives were taken by surprise at the production of the report from Dr Jennings and this upset the claimant because it came out of the blue that her medical records had been used in this way.

13. It seems to me clear that the expectation the Tribunal was setting was that it would be proportionate in this case for medical evidence to be commissioned by way of a joint expert if the claimant had agreed. Thus Judge Rostant specifically stated that there could be a further application if the disclosure of medical records and witness statements did not suffice to dispose of the issues. The Tribunal will usually prefer to have the benefit of a jointly instructed expert which would be less costly

than the opinions of two experts instructed by both parties. That may proliferate expense and add to delay, both factors which have to be taken into account under the overriding objective in rule 2.

14. I therefore find that it was unreasonable not to return to the Tribunal to seek further directions in respect of a jointly instructed expert, not only because Employment Judge Rostant had made that clear but also because it is necessary to consider whether an expert needs to have an examination with the claimant and to obtain the permission of the claimant to attend any such meeting. The report of Dr Jennings did not involve an examination of the claimant and whether or not that is necessary should be considered by the expert to be instructed. Such an examination is often required and it may be, given that there were questions posed by Dr Jennings which I have referred to which he thought might be addressed by disclosure of further medical records, they could be supplemented by comment of the claimant at an examination. That is a further reason why I am satisfied it was unreasonable of the respondent to commission an expert's report in this particular case without first making an application for a joint expert.

15. The consequence of that is that the hearing on 7 October was not possible. The claimant could not have responded to that medical expert opinion without being offered the opportunity to commission her own expert. As a consequence, the parties agreed that this hearing should be converted to a preliminary hearing for me to consider the application and make consequential directions if appropriate.

16. It will take 6-8 weeks for a report to be obtained and that would then require service and consequential statements being provided such that it will take two months extra for the case to come to a hearing. That said, I am not satisfied that the delay was wholly unforeseeable. Employment Judge Rostant had in mind the fact that if a joint expert's report was necessary there would need to be further delay so that the parties could collate the appropriate evidence to ensure that the issues between them could properly be determined. The loss of the listed hearing is unfortunate but not unforeseeable or unnecessary. It is the circumstances in which it came about, for the reasons I have set, which were unreasonable.

17. I therefore turn to the question as to whether having found there was unreasonable conduct I should strike out the response. I have no doubt that a fair trial is still possible. It is possible to address the causation question in a number of ways which will allow the parties to adduce the appropriate evidence proportionately to determine the issues, either by allowing the claimant permission to instruct her own expert or requiring commission of a joint expert to which I shall return. I am satisfied that it is possible within a reasonable timeframe for sufficient evidence to be adduced to ensure a fair trial is possible. It therefore follows that I am not going to strike out the response.

18. I am asked by Mr Collins to require the respondent to share the costs of a jointly commissioned report and to cooperate to that effect. I am asked by Mr Healey to allow the claimant permission to call her own expert but to allow the respondent to rely upon its own expert's report. No doubt displeasing both parties I am going to find a middle ground, namely I am going to require the parties to instruct a joint expert to address issues which the parties agree in default of which the matter shall be referred back to the Tribunal. I am going to allow the respondent, if they so wish, to

rely upon the report of Dr Jennings if the report of the jointly commissioned expert is not one upon with which they agree.

19. It would be unfair to require the claimant to have to pay all the costs of an expert report herself given what Employment Judge Rostant had said at the earlier preliminary hearing. Furthermore, it may be that the expert considers it necessary for the claimant to have an examination. Because the unreasonable conduct has contributed to this state of affairs, I am satisfied that the expert should be jointly paid for. I do not consider it would be fair for the respondent to be deprived from relying upon Dr Jennings if his evidence remained material and relevant to any issue. It would plainly not be fair to make Dr Jennings the jointly instructed expert. No claimant could perceive the foisting upon her of an expert who had come to a conclusion adverse to her case to be fair.

Employment Judge D N Jones

Date: 18 October 2019