

RM



EMPLOYMENT TRIBUNALS

Claimant: Ms L E Kattee
Respondent: Homerton University Hospital NHS Foundation Trust
Heard at: East London Hearing Centre
On: 23 October 2019
Before: Employment Judge GD Tobin

Representation

Claimant: Captain Achunche (lay representative)
Respondent: Mr S Nicholls (counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant's following complaints are struck out as having no reasonable prospects of success:
 - a. harassment related to the claimant's disability;
 - b. unauthorised deductions from wages; and
 - c. accrued and unpaid holiday pay.

2. The claimant's following allegations and/or arguments are subject to a deposit order of £500.00 each. Such allegation and/or arguments as sets out in the list of issues contained within the Case Management Orders of Regional Employment Judge Taylor dated 3 October 2019 (and promulgated 19 October 2019):
 - a. Paragraph 17.1
 - b. Paragraph 17.2
 - c. Paragraph 17.3

d. Paragraph 24.1

e. Paragraph 24.2

In addition, the 5 time limit arguments identified at paragraphs 7 and 8 of this Judgment and Reasons shall each be subject to a deposit of £500.

REASONS

The hearing

1 Regional Employment Judge Taylor, to whom this hearing was reserved, was not available for the hearing and the hearing allocation was reduced to ½-day because of the availability of judicial resources. The claimant arrived late for the hearing (at 10.35am) but we were nevertheless able to complete the hearing by 1.10pm.

The List of Issues

2 Judge Taylor had spent a considerable amount of time going through the voluminous documents in order to identify the issues of this claim. She had prepared a list of issues on 3 October 2019 (“the Tribunal’s draft LOI”) which was sent to the parties on 19 October 2019. Proceedings had been issued on 4 January 2019 and it had taken over 10 months to identify what the claims were about. I note that the respondent said, in the Response, it was unable to comprehend the claims that had been made. I had initially case managed these proceedings and I told the parties that I had spent some hours the preceding day going through the Tribunal’s file and the Tribunal’s draft LOI and so far as I could see this represented an appropriate breakdown of the legal and factual issues of the claim. Capt Achunche had emailed the Tribunal, from home at 9.03am the morning of the hearing, a document entitled “claimant’s detailed statement of grounds”. I arranged for a copy of the claimant’s late document to be given to the respondent’s representative and because the claimant and her representative were so late the other party and I had enough time to review this document carefully.

3 At the hearing Capt Achunche said the claimant’s detailed statement of grounds gave an abridged and clearer statement of details of complaint and was an alternative list of issues. Mr Nicholls said that he did not understand the claim before the Tribunal’s draft LOI. He said that he appreciated Judge Taylors’ efforts in distilling these proceedings into a list of issues, which he said he accepted. Mr Nicholls objected to the Tribunal accepting Capt Achunche’s late document as clarifying the complaint, he said that this was yet another document from the claimant’s representative that obfuscated an already muddled claim. He said that the document itself was virtually incomprehensible, it did not clarify any of the issues in this case and appeared to raise further claims that had not be raised in the Claim Form.

4 Having read his document before we commenced the hearing, and upon hearing the representatives, I said that Capt Anunche’s document was not helpful because it did not identify the legal and factual issues to be determined in any recognisable form and, furthermore, even as early as the second paragraph, the claimant had raised a claim of reasonable adjustments in respect of office equipment, which had never formed part of her claim hitherto. I determined that I was not going to rely upon this document. If the

claimant wants to include further claims against the respondent referred to therein, then she will need to apply to amend the claim or issue further proceedings as appropriate. Capt Achunche signalled he accepted that I was going through the Tribunal's draft LOI (as a working document) to consider whether to strike out the claims and/or order a deposit as set out in the notice of hearing and paragraph 3 of the Case Management Orders.

The claimant's disability

5 The respondent does not dispute that the claimant is a disabled person (within the meaning of s6 Equality Act 2010) in respect of Bell's palsy/nervy palsy. I considered the claimant's other conditions initially by going through the appropriate medical evidence and then discussing this with Capt Achunche. We spent some time discussing the various medical reports and in particular the medical report of Dr Baggaley and a report of Dr Giagonidis recently disclosed. There was a lot of medical evidence that had not been sent to the Tribunal. Upon review of the medical evidence available at the hearing and hearing from the claimant's representative, I determine that in respect of the conditions identified at 17.1 to 17.3 of the Tribunal's draft LOI (i.e. hypertension, irritable bowel syndrome and right sided weakness respectively) there was no evidence or information to show that the aforementioned conditions had a *substantial* adverse effect on the claimant's ability to carry out normal day-to-day activities. The claimant withdrew her claim in respect of rare sinusitis, i.e. the condition identified at issue 17.4.

6 Sufficient information that conditions 17.1 to 17.3 constituted a disability were not provided in the claimant's 22-page document sent to the Tribunal on 24 May 2019, neither was there sufficient information contained within the claimant's 22-page detailed statement of grounds which accompanied her Claim Form of 4 January 2019. I have checked all the documents since and I am satisfied that this information has not been available in respect of the various bundles of information sent to the Tribunal. Accordingly, if the claimant wishes to pursue an argument that she was disabled by any of these 3 additional conditions she will need to pay a deposit of £500 per condition: i.e. £500 in respect of condition 17.1; £500 in respect of condition 17.2; and £500 in respect of condition 17.3.

The Reasonable adjustments claims

7 In respect of the claimant's reasonable adjustment claims, the respondent's representative said that he could not understand this at all. So far as issue 24 was concerned Capt Achunche said that there were various incidents, but he was not able to provide all of the relevant dates. In view of the length of time that proceeding have been underway and as the Tribunal's draft LOI has been prepared with sufficient time for both the claimant and the respondent to consider this in detail, I expected the claimant (and her representative) to know and to be able to explain what her claim is about. Under these circumstances I was not going to leave this case open ended. The claimant contended that there were 3 tranches of allegations in respect of a failure to arrange a consultation meeting with her to discuss and assess the degree of her disability so issue 24.1 is identified as follows:

- 7.1 After much discussion Capt Achunche said that this allegation related to an email from the claimant to Ms Elaine Connolly (of Human Resources) on 14 April 2018. In the email the claimant asked the respondent to consider all of

the claimant's medical records.

- 7.2 On 2 July 2018 at a meeting to consider flexible working arrangement Ms Clementine Feniola (the claimant's line manager) failed to arrange a consultation meeting.
- 7.3 Between 15 August 2019 and 23 August 2019, the claimant made various requests by email to Ms Catherine Pelley (Chief Nurse) prior to the flexible working appeal meeting with her.

8 The allegation at issue 24.2 was in respect of a failure to make relevant medical evidence provided by the claimant available to the Occupational Health Practitioner (so that the OHP could make appropriate recommendations). After 3 times in asking Capt Achunche said that this related to matters identified in paragraphs 7.2 and 7.3 before.

9 We discussed the reasonable adjustments claims at length. The respondent contended that it made extensive reasonable adjustments (at issue 25). I could not understand the basis of the claim as it seems that the respondent considered the claimant's medical condition at various stages and proceeded to make some adjustments. Capt Achunche said that he was not aware of the provision, criterion or practice ("PCP") identified by Judge Taylor but he did not proffer an alternative PCP for consideration. Under the circumstances, I am not satisfied that there is no prospects of this claim succeeding because that might entail hearing extensive evidence but I am satisfied that this is a fundamentally weak claim both on the basis of the documentary evidence so far submitted and on the basis of our discussion. Under the circumstances I order that the claimant pay a deposit of £500 per argument advanced in respect of her reasonable adjustments claims, i.e. £500 in respect of issue 24.1 and £500 in respect of issue 24.2.

Harassment claims

10 Issue 26.1 identified that the claimant alleged that she was subjected to an unwarranted disciplinary investigation for: (a) making a digital recording of 1 or more meeting with her line-manager; and (b) for embedding a letter to the respondent with a High Court injunction document. The respondent contended that (b) was both threatening and unacceptable behaviour. In respect of (a) Capt Achunche said that it was in the interests of justice to make a digital recording at this meeting. Mr Nicholls averred that in July or August 2017 the claimant was specifically told by Lesley Rogers (a manager) not to record any meetings. The claimant then went on to record these meetings in direct contravention of this instruction. This matter was dealt with in the grounds of resistance under paragraph 43 to 51.

11 My concern about recording meeting(s) and the argument in respect of the High Court injunction document is that they both have no relation to an alleged detriment arising from the claimant's disability. I understand that the claimant had raised concerns about how the respondent's managers were acting towards her disability, but these 2 allegations are wholly unrelated the fact that the claimant had a disability at this relevant time and the allegations give no indication that the harassment was related to her protected characteristic. Indeed, Capt Achunche said that the deterrents in respect of issue 26.1 were to do with the claimant's protected disclosure. Under the circumstances, I strike out this aspect of the claim in its entirety.

Unauthorised deductions, accrued holiday pay and/or other payment(s)

12 The claim in respect for failing to pay the claimant's wages on days that she did not work during the period of her phased return was not pursued as a reasonable adjustment claim. It was advanced as a claim of unlawful deduction of wages, pursuant to s13 Employment Rights Act 1996. Capt Achunche said that the respondent had a contractual and/or a statutory duty to make reasonable adjustment to facilitate the claimant's return to work and that because of the respondent's failures to make reasonable adjustments for 4 years the claimant needed a phased return to work. This claim had been discussed with Judge Prichard at the previous Preliminary Hearing. There was a phased return to work in 2015. The claimant claims that she ought to have been paid in full for the period of this phased return to work, i.e. for the time that she did not work during the 4-week phased return.

13 We discussed the case of *O'Hanlon v HMRC [2007] EWCA Civ 283* which was a case in respect of reasonable adjustments and sick pay. *O'Hanlon* established the principle that it is not discrimination for an employer to refuse to extend sick pay for a disabled employee. This is a s13 Employment Rights Act claim in respect of a shortfall of pay; *O'Hanlon* has no merit in respect of a discrimination claim; however, the claimant missed the (bad) point completely in respect of a non-payment of wages claim. This claim has no prospect of success, it is without any merit and I dismiss it.

14 In any event, the phased return was for 4 weeks culminating in 28 October 2015. This claim was well over 3 years out of time by the time it was issued in the Employment Tribunal. The claimant had been working subsequently and had embarked upon a separate phased return to work in June 2018. The claimant is not claiming in respect of her return to work in June 2018. There is no merit either in the substantive allegation or the excuse for it being outside the appropriate time limit. I determine that it would have been reasonably practicable for this claim to be issued within 3 months (plus conciliation time) of the claimant's return to work in October 2015 because she was not so incapacitated as has been alleged by Captain Achunche. Stress and depression are not a good enough excuse in this instance because the claimant was able to return to work. I do not accept that the claimant's will was broken or that she was oppressed or bullied at this time as it was possible for her to return to work some time ago and cope with all the requirements of work and life for some considerable time.

15 In relation to the holiday pay at issue 30, the claimant said that she did not know what period the 9-day claimed related to. Mr Nicholls said the respondent did not know what days the claimant was claiming for in respect of unpaid holiday pay. The appropriate dates appear to be sometime between 2017 and 2018 and the claim is in respect of the claimant using holiday time for her medical treatment. If that was the case, then it should have been easy to ascertain what dates the claimant took as holidays to correspond with entries in her diary (or other place) for the treatment received. We do not have these dates and we are not able to ascertain this information some 10 months after proceedings were issued. So, under the circumstances, I dismiss this claim also.

16 The allegation in respect of issue 32 related to issue 27 so that claim has been dismissed also.

Time limits

17 In respect of time limits, the claimant said that there was a prolonged failure by the respondent to make reasonable adjustment. That is not an excuse for failing to issue proceedings within the appropriate time limit. Proceedings were issued on 4 January 2019. The respondent contended that anything before 3 September 2018 (allowing time for the early conciliation period) was prima facie out of time.

18 So, 7.1, 7.2 and 7.3 above in respect of issues 24.1 are prima facie out of time and the allegation at 7.2 and 7.3 above are also prima facie out of time in respect of issues 24.2. A deposit order can relate to an argument as well as an allegation. 5 matters are out of time. I order a £500 deposit for each of these out of time arguments and/or allegations.

Consideration of the claimant's means

19 In respect of the deposit, I considered the claimant's means before coming to the above deposits. Capt Achunche confirmed that the claimant was employed as a band 8A nurse. He said that he was married to the claimant and that they lived together so he requested that I take into account the whole household income. He said that he has a commercial pilot's licence but that his pilot's licence had been frozen, and he has not been working in the transport industry. He is currently a freelance journalist. He said he was not on either on a fixed or a particularly high income. He did not elaborate on this. In respect of his freelance journalism he said he has not worked for a while because he had an accident whilst undertaking some undercover reporting. He said that he had to build up his fitness because he needed to be able to run away from danger and that he could be shot at any stage because of his journalistic activities. Capt Achunche did not provide any information or evidence in respect of the household's outgoings.

20 Capt Achunche drew attention to the guidance sent by the Employment Tribunal in respect of this hearing. This guidance referred to a deposit of up to £500 as a condition to being permitted to continue to take part in the proceedings. This guidance might be out-of-date although the documents elsewhere and, in particular, the hearing notification said that the deposit could be up to £1,000 for any allegation or argument. In any event I take regard to the totality of the deposits order and because of the total amount of the order and also bearing in mind the out-of-date guidance sent by the Tribunal, I will limit any deposit to £500 for each argument. So therefore, I order a deposit of £500 for each of the 10 arguments and/or allegations identified above (i.e. 3 allegations in respect of additional disabilities, the 2 substantive allegations for failures to make reason adjustments and the 5 arguments in respect of the time limit points). So if the claimant wishes to pursue all of the claims that I have not struck out then the total deposit will be £5,000. I am satisfied that this is a fair and appropriate amount to order within the totality of the case.

21 If the claimant chooses to pay a deposit in respect to certain allegations or arguments only then she will need to identify which matters are pursued.

22 Mr Nicholls said that the hearing was listed for 5-days commencing on 4 March 2020. He said he was concerned that the case would not be prepared in time, particularly allowing for the claimant time to pay the deposits. I do not expect the respondent to undertake any preparation until it has heard that the claimant has paid some or all of the

deposit ordered so I share his concerns about preparation time available. Accordingly, I vacate this hearing. If the claimant pays the appropriate deposit, then the Tribunal shall issue further Case Management Orders.

Employment Judge GD Tobin

Dated: 13 November 2019