



EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING IN PUBLIC

Claimant: Ms S Collings

Respondents: (1) Barkers of Richmond Limited and (2) Mr K Moore

Heard at: Teesside Justice Hearing Centre
On: Friday 8th November 2019

Before: Employment Judge Deeley

Appearances:

Claimant: Mr R Johns, Counsel
Respondent: Mr M Rowlinson, Solicitor

RESERVED JUDGMENT

1. The claimant had a disability for the purposes of s6 of the Equality Act 2010 (the **Equality Act**) at all material times from 17 January 2019 to 5 July 2019 (inclusive) because of her conditions of Emotionally Unstable Personality Disorder (or Borderline Personality Disorder), Anxiety, Depression and Post Traumatic Stress Disorder amounted to.
2. The claimant has sufficient continuity of service under s108(1) of the Employment Rights Act 1996 (the **ERA**) to bring a claim of ordinary unfair dismissal under s94 of the ERA.

REASONS

INTRODUCTION

Background

3. At the time of the events referred to in these claims, the first respondent's business consisted of two fish and chip shops (one of which also had a fish and chip restaurant). The claimant was the manager of the first respondent's fish and chip shop and restaurant in Richmond. The directors of the first respondent's business were Mr Alan Moore, Mrs Dee Moore and Mr Karl Moore (the second respondent to the claimant's second claim).
4. The claimant started working for the first respondent in January 2010. She was paid weekly in cash from the business' takings. The claimant resigned from her employment in late 2016 with three months' notice. The claimant maintains that she never in fact stopped working for the respondent until she was dismissed by the first respondent with immediate effect on 5 July 2017. She maintains that she continued to be paid by the first respondent during this period. The respondents maintain that the claimant was not employed by the first respondent from 9 February 2017 until 27 July 2017.
5. The claimant raised a grievance, containing allegations of disability discrimination and other matters on 2 March 2019. The first respondent suspended the claimant without pay and brought disciplinary proceedings against her on 5 March 2019. The first respondent did not uphold the claimant's grievance and rejected her appeal against the outcome of her grievance. The first respondent added an additional allegation to the disciplinary proceedings on 12 May 2019 and later dismissed the claimant for gross misconduct without notice on 5 July 2019.

The claims

6. By a claim form presented on 1st July 2019, the claimant brought complaints of disability discrimination (including victimisation) against the first respondent only. The first respondent defended the claim. The claimant was dismissed by the first respondent after she submitted her original claim form.
7. The claimant's representative stated at the first preliminary hearing on 30 August 2019 that she intended to amend her claim to include claims relating to her dismissal. The claimant subsequently decided that she would instead submit a further claim against the first respondent and the second respondent. This second claim (submitted on 4 October 2019) includes complaints of unfair dismissal, wrongful dismissal, disability discrimination (including victimisation) and unlawful deductions from wages. The respondents' response to these claims was not due to be submitted until 12 November 2019, which was after the public preliminary hearing held on 8 November 2019.

8. Employment Judge Johnson considered the first claim at a case management hearing in August 2019 and listed the first claim for a public preliminary hearing to consider the following issues:
 - i) whether the claimant's application to amend her claim form should be accepted;
 - ii) if that application were accepted, whether the claimant had not less than 2 years continuous service with the respondent as at the effective date of termination of her employment; and
 - iii) whether the claimant at all material times for the purposes of her claims had a disability as defined in s6 of the Equality Act 2010.
9. In relation to the issues set out above, as at 8 November 2019 when the public preliminary hearing was held:
 - i) the first issue no longer required determination at the hearing because the claimant submitted a second claim (2503467/2019), and no longer needed to apply to amend her first claim (2502200/2019);
 - ii) the Tribunal ordered that both claims be consolidated, with the agreement of the parties;
 - iii) Mr Rowlinson, who stated that he was instructed to act on behalf of both respondents, confirmed that the respondents did not object to the Tribunal determining the second issue at the public preliminary hearing on 8 November 2019, even though the respondents had not yet submitted their respective responses to the second claim; and
 - iv) the parties agreed that the relevant dates of any disability discrimination allegations for both of the claimant's claims ranged from 17 January 2019 to 5 July 2019 (inclusive).
10. Mr Rowlinson later stated during his closing submissions that the respondents conceded that the claimant was disabled from 5 March 2019 to 5 July 2019 (inclusive). However, Mr Rowlinson confirmed that the respondents did not concede that the claimant was disabled from 17 January 2019 to 4 March 2019 (inclusive).
11. The Tribunal was not required to determine the issue of the respondents' knowledge of disability at the public preliminary hearing. However, I note that Mr Rowlinson stated that the respondents did not concede that they knew or ought to have known that the claimant was disabled at any time from 17 January 2019 to 5 July 2019 (inclusive).
12. Case management orders were also agreed with the parties and have been issued separately to this judgment.

EVIDENCE AND SUBMISSIONS

13. I heard evidence from the claimant, Mr Parker (the claimant's partner) and Mrs Bohanan (a former colleague of the claimant). I also heard evidence on behalf of the respondents from Mr Karl Moore (a director of the first respondent and the claimant's line manager).
14. The claimant and the respondents attached documentary evidence to their statements. This evidence included:
 - i) the claimant's GP and other medical records;
 - ii) documents from both parties which they relied upon in relation to the claimant's continuity of employment during 2017, which were appended to the statements of the claimant and of Mr Karl Moore.
15. Mr Johns also exhibited the claimant's mobile phone which contained a copy of a WhatsApp message sent by a former colleague of the claimant to the claimant on 10 May 2017, containing a picture of a rota which was appended to the claimant's statement and dated 4 May 2017. Mr Rowlinson confirmed that the picture of the rota contained in the WhatsApp message was identical to the copy of the rota dated 4 May 2017, although Mr Karl Moore disputed that this rota was prepared by or on behalf of the first respondent.
16. Mr Johns and Mr Rowlinson made helpful oral submissions during the hearing, which I have considered as part of this judgment.

DISABILITY (s6 of the Equality Act)

17. The claimant contended that her conditions of Emotionally Unstable Personality Disorder (or Borderline Personality Disorder), Anxiety, Depression and Post Traumatic Stress Disorder amounted to a disability, either individually or taken together.
18. The respondents conceded during their closing submissions that the claimant's conditions amounted to a disability from 5 March 2019 onwards. However, the respondents contended that the claimant's conditions, either individually or taken together, did not amount to a disability for the period from 17 January 2019 to 4 March 2019 (inclusive) (the **contested period**).

Law

19. Section 6(1) of the Equality Act defines 'disability' for the purposes of that Act as follows:

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. Schedule 1 of the Equality Act 2010 sets out factors to be considered in determining whether a person has a disability. The government has also published statutory guidance entitled "Guidance on matters to be taken into account in determining questions relating to the definition of disability", including examples of normal day to day activities.
21. I note that caselaw and legislation indicates that:
- i) the Tribunal must focus on what the claimant maintains she cannot do (or cannot do without difficulty) as a result of her physical or mental impairment (*Aderemi v London & South East Railway Ltd* UKEAT/0316/12);
 - ii) 'substantial' adverse effect for these purposes means 'more than minor or trivial' (s212(2) of the Equality Act);
 - iii) 'long term' is defined under paragraph 2 of Schedule 1 of the Equality Act as a condition that:
 - a. has lasted or is likely to last for 12 months or more;
 - b. is likely to recur (i.e. it could well happen – *Martin v University of Exeter* UKEAT/0092/18); or
 - c. is likely to last for the rest of the claimant's life;when viewed at the time of the alleged discriminatory acts; and
 - iv) the condition must be assessed as if the claimant were not receiving medication and other treatment, where such medication or other treatment has led to a temporary (rather than a permanent) improvement (Schedule 1, paragraph 5 of the Equality Act).

Findings of fact

22. The respondents did not seek to challenge the claimant's claim that she suffers from mental health conditions, consisting of Emotionally Unstable Personality Disorder (or Borderline Personality Disorder), Anxiety, Depression and Post Traumatic Stress Disorder. I find that the claimant suffered from these conditions at all material times for the purposes of her claims.
23. The Claimant's evidence was that she had difficulty with day to day activities from at least 2017 onwards. Under cross-examination, the Claimant stated that she had 'good days and bad days' throughout the period from 2017 onwards, but that her difficulties worsened from late 2018 onwards.
24. The Claimant described the difficulties that she faced on 'bad days' from 2017 onwards as follows:
- i) difficulty in performing everyday tasks, such as cooking, cleaning and attending to personal hygiene;

- ii) difficulty in communicating with other people, including her partner and children;
 - iii) inability to leave the house in order to participate in everyday activities, such as shopping and socialising;
 - iv) difficulty in sleeping and concentrating on tasks;
 - v) frequent crying and suicidal thoughts; and
 - vi) inability to attend work for several periods of 3 weeks or more due to sickness absences due to her conditions during 2017, 2018 and 2019 (including 3 weeks in February 2019 and from early March until her dismissal).
25. The Claimant stated that the difficulties listed above continued throughout the disputed period and that she still experienced them on 'bad days' as at the date of this hearing.
26. I accept the Claimant's evidence because it was credible and consistent with the evidence provided by her partner and the notes contained in her contemporaneous medical records.
27. I note from the claimant's medical records that she has taken different types of medication and undergone other treatment to assist her to manage her conditions. The claimant's GP records indicate that her medication and treatment have included:
- i) fluoxetine from at least 2016 to 2018 (for example, as referred to in the GP records on 19 June 2017);
 - ii) propranolol from February 2018, which she stated helps to keep her calm and which she took up to 3 times per day if required;
 - ii) promethazine in March 2019, pregabalin in May 2019 and sertraline since June 2019 (which I note were all after the contested period); and
 - iii) counselling and other support from the NHS Stockton Access team (based at the Mental Health Resource Centre) during 2018 and 2019.
28. I asked the claimant if she could recall the times at which she took the different types of medication prior to March 2019 because her GP records were not clear on this point. The claimant could not recall which medication she took, other than propranolol which she stated she took on a regular basis from February 2018 onwards. She stated that she tried to avoid taking medication on an ongoing basis because of the side effects that she experienced.

Reasons

29. It is not disputed that that the claimants' conditions of Emotionally Unstable Personality Disorder (or Borderline Personality Disorder), Anxiety, Depression and Post Traumatic Stress Disorder, whether singly or taken together, constitute a mental impairment.
30. I find that the claimant's conditions had an adverse effect on her ability to carry out normal day to day activities, including:
- i) difficulty in performing everyday tasks, such as cooking, cleaning and attending to personal hygiene;
 - ii) difficulty in communicating with other people, including her partner and children;
 - iii) inability to leave the house in order to participate in everyday activities, such as shopping and socialising;
 - iv) difficulty in sleeping and concentrating on tasks;
 - v) frequent crying and suicidal thoughts; and
 - vi) inability to attend work for several periods of 3 weeks or more due to sickness absences due to her conditions during 2017, 2018 and 2019 (including 3 weeks in February 2019 and from early March until her dismissal).
31. I find that the adverse effect was substantial because it was more than minor or trivial, due to the extent of its impact on the claimant's ability to carry out the normal day to day activities listed above.
32. In addition, I find that the claimant's medication and the other treatment that she received reduced the extent of the symptoms that she experienced. The claimant's symptoms would have, therefore, had a more severe adverse effect on her ability to carry out normal day to day activities if she had not taken such medication and/or received such other treatment.
33. I find that the substantial adverse effect was long term because it had lasted for 12 months or more prior to the contested period.

Conclusion

34. For the reasons set out above, I find that the claimant was disabled for the purposes of s6 of the Equality Act throughout the whole of the contested period and at all material times for the purpose of her claim.

CONTINUITY OF EMPLOYMENT (s108(1) and Chapter 1, Part XIV of the ERA)

35. The claimant contended that she had been employed continuously by the first respondent for over 10 years, providing her with sufficient continuous service to submit a claim for ordinary unfair dismissal under s94 of the ERA. The respondent's position was that the claimant had less than two years' continuous service, because she was not employed by the respondent for the period from 9 February to 27 July 2017 (the **disputed period**).

Law

36. Section 108(1) of the ERA sets out the two year qualifying period of employment required before a claimant can bring a claim for unfair dismissal under s94 of the ERA.
37. Section 210 of the ERA sets out various rules relating to the calculation of a continuous period of employment. These include s210(5) of the ERA which states that there is a "**presumption**" of continuity of employment, as set out below:

A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

38. The presumption will be rebutted if there is evidence which demonstrates that during the allegedly continuous period there was a week of employment (Sunday to Saturday) which:
- a. did not count for the purposes of continuous employment under Chapter 1, Part XIV of the ERA; and
 - b. is not a week in relation to which continuity is preserved by a provision of that legislation.

Findings of fact

39. The claimant states that she resigned from her employment with the first respondent with three months' notice in 2017 in order to join a competitor of the first respondent. However, the claimant gave evidence that she in fact continued to work for the first respondent during her first week of employment by the competitor because there was no one else who could manage the shop/restaurant if she left. The claimant states that she only worked for the competitor for one week, before leaving because the competitor was not happy that she was continuing to work for the first respondent.
40. The first respondent contended that the claimant resigned from her employment with effect from 9 February 2017. The first respondent contended that the claimant was then re-employed by the first respondent with effect from 27 July 2017 under a new contract of employment. However, the claimant's evidence that she did not sign a new contract of employment was not challenged during cross-examination.

41. There was a direct conflict in the witness evidence provided by the claimant and by Mr Karl Moore regarding the claimant's continuity of employment. The matters in dispute included:
- i) what tasks the claimant performed for the first respondent during the disputed period;
 - ii) in what capacity the claimant performed any such tasks for the first respondent during the disputed period; and
 - iii) whether the claimant was paid by the first respondent during the disputed period.
42. I accept the evidence of the claimant that she continued to be employed by the first respondent as a manager on her existing terms of employment throughout the disputed period. I find that throughout the disputed period, the claimant continued to:
- i) attend the first respondent's premises each week for her shifts;
 - ii) perform managerial tasks, as evidenced by emails produced by the claimant which demonstrate that the claimant liaised with suppliers regarding the production of menus for the first respondent and dealt with recruitment; and
 - iii) perform other tasks related to her employment, such as assisting with the re-decoration of the first respondent's premises; and
 - iv) receive her weekly wages in cash.
43. The key reasons why I preferred the evidence of the claimant included:
- i) the claimant provided copies of emails, which demonstrate that she continued to be involved in managerial tasks on behalf of the first respondent during the disputed period including:
 - a) liaising with suppliers regarding the production of new takeaway menus and restaurant menus for the first respondent in March 2017. In particular, she approved the production costs of such materials on behalf of the first respondent; and
 - b) dealing with the recruitment of staff in April 2017;
 - ii) the claimant produced bank statements and maintained that certain cash deposits were her all or part of her wages from the first respondent. The bank statements and witness evidence were insufficient to establish that the cash deposits referred to on those bank statements did in fact consist of all or part of any wages that the claimant received from the first respondent. However, it was common ground that the first respondent normally paid wages in cash from the shop's takings, rather than by bank transfer. I accept the claimant's

evidence that she did not always receive payslips at the time of receiving her wages because these were prepared by Mr Karl Moore at a different site, using the first respondent's payroll software systems. I also accept the claimant's unchallenged evidence that she had queried with Mr Karl Moore why she had received correspondence from her pension provider around the time of the disputed period and he said that he would 'sort this out', rather than responding that it was because she was no longer employed by the first respondent. For these reasons, I find that the claimant continued to be paid at her existing rate by the first respondent during the disputed period;

iii) the claimant's working hours were included in a rota document dated 4 May 2017 and in the claimant's diary entry for the first respondent's staff working hours dated 2 April 2017. The claimant's diary entry for 2 April 2017 also included the amount of wages due for staff that week, including herself. I note that Mr Karl Moore did not accept that the rota document was a genuine document and contended that it may have been scribbled on and/or copied from another rota. However, I prefer the claimant's evidence that the rota document was genuine because she provided a WhatsApp message dated 10 May 2017 which demonstrated that the rota was sent to the claimant by a colleague on that date, i.e. over 2 years before her claims were submitted to the Tribunal. Mr Karl Moore was unable to provide any alternative explanation as to why such rota would have been sent to the claimant on 10 May 2017 during cross-examination;

iv) Mrs Robyn Bohanan, who managed a nearby shop for the first respondent, gave evidence that the claimant continued to work for the first respondent during the disputed period. Mr Rowlinson challenged Mrs Bohanan during cross-examination on whether she would have been aware of the claimant's day to day work because they worked at different shops. However, Mrs Bohanan's unchallenged response that she would often go to the shop where the claimant worked during her breaks and that they would meet in the restaurant. I found Mrs Bohanan's evidence on this point to be credible; and

v) Mr Karl Moore stated that the claimant had 'helped tremendously' with the business from February to July 2017, even though the first respondent contended that she was not employed. Mr Karl Moore's explanation for this was that the claimant was a friend of his and that in return he allowed her to use his private villa for a week without charge. Mr Karl Moore agreed that the claimant had assisted with redecorating the premises and accepted during cross-examination that she had liaised with suppliers to order new takeaway and restaurant menus. I find it unlikely that the claimant would have provided this level of assistance on a regular basis, particularly given the travel distance from her home, unless she were employed by and paid by the first respondent during the disputed period.

Reasons

44. I find that the claimant remained employed on her existing terms of employment in the role of manager for the first respondent throughout the disputed period.

45. The key reasons for my decision are:
- i) the claimant continued to perform managerial services to the first respondent during the disputed period, evidenced by the emails and other documents that she produced at the hearing. Mr Karl Moore accepted that the claimant had 'helped tremendously' with the first respondent's business during the disputed period. The first respondent was unable to provide a credible explanation as to why she provided those services in the absence of any continued employment;
 - ii) Mrs Bohanan gave unchallenged evidence that she met with the claimant frequently whilst they were both working for the first respondent during the disputed period;
 - iii) the discussions regarding the claimant's pension correspondence indicated that Mr Karl Moore regarded the claimant as being employed during the disputed period.
46. In the alternative, I find that the evidence provided during this hearing was not sufficient to rebut the presumption of continuity of employment under s210(5) of the ERA.

Conclusion

47. For the reasons set out above, I find that the claimant has sufficient continuity of employment for the purposes of s108(1) of the ERA to bring a claim for ordinary unfair dismissal under s94 of the ERA.

Employment Judge Deeley

Date 20 November 2019

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