



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Cuthe

Respondent: London Borough of Hounslow

Heard at: London South **On:** 26 September 2019

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: In person and with her husband

Respondent: Mrs C Eccles, Solicitor

PRELIMINARY HEARING RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

- 1) The Claimant is not disabled by reason a fractured back, Osteoporosis, Irritable Bowel Syndrome or anxiety and panic attacks. She is disabled by reason of her Type II Diabetes;
- 2) The complaints set out at paragraphs 14.1 and 14.2 of EJ Bryant QC's record of the issues arising in the disability discrimination complaints as detriments are dismissed on withdrawal by the Claimant.

REASONS

Background and issues for today's hearing

1. The Claimant, Mrs Jacqueline Cuthe, brought a claim against her ex-employer, the London Borough of Hounslow, in a Claim Form which was received by the Employment Tribunal on 31 January 2018. This followed a period of Early Conciliation which started on 15 December 2017 and ended on 2 January 2018. She has brought complaints of unfair dismissal and disability discrimination. In its Response received on 20 April 2018, the Respondent denies the claim in its entirety.
2. A Preliminary Hearing on case management was conducted by Employment Judge ("EJ") Sage on 11 September 2018. At that hearing EJ Sage identified the issues arising in each complaint and time-limit issues. She also set a number of case

management orders in order to prepare for the full hearing which was then listed for 1 July 2019. In particular, the Claimant was ordered to provide Further Information as to the nature of her disability and in respect of her complaints of direct discrimination, discrimination arising from disability, harassment relating to disability and failure to make reasonable adjustments. In addition, the Claimant was required to provide medical evidence relating to her disability and a disability impact statement.

3. The Claimant provided her response to the order relating to the provision of Further Information in a document dated 8 November 2018 and copies of her GP notes and an impact statement. However, the Respondent's position is that this did not shed light on the disability relied upon, whether it amounted to a disability in law or what her actual complaints were.
4. A further Preliminary Hearing on case management was conducted by EJ Bryant QC on 3 June 2019. At that hearing EJ Bryant QC further identified the issues and particulars arising in her various complaints. He further directed that the hearing on 1 July 2019 be converted to an open Preliminary Hearing at which the Employment Tribunal would consider: (a) the question of disability; (b) any application the Respondent makes to strike out and/or for a deposit order; and (c) any directions for further conduct of the case up to and including a final hearing. EJ Bryant QC also set a series of case management orders in order to prepare the case for that Preliminary Hearing.
5. In the event, the open Preliminary Hearing did not take place on 1 July 2019 and was relisted for today.
6. The Respondent specifically seeks a strike out order or a deposit order in respect of the complaints of disability discrimination related to detriments identified by EJ Bryant QC at paragraph 14.1 and 14.2 of his record of the Preliminary Hearing held on 3 June 2019.

Evidence

7. I was provided with written statements from the Claimant, her son, Damien John Cuthew and her husband, Peter Stephen Cuthew. The Claimant indicated that her son was not able to attend the hearing but could do so relatively quickly if required. I indicated that I would give an indication of whether he needed to do so after I had read his witness statement. However I did say that ultimately it was a matter for her. I was also provided with a small bundle of documents by the Claimant relating to her medical conditions. Where necessary I will refer to this as "C1".
8. I was provided with a bundle of documents by the Respondent consisting of 172 pages. Where necessary I refer to this as "R1".

Preliminary matters

9. I explained the purpose of today's hearing to the parties, the weight given to evidence of witnesses unable to attend and the procedure that would be followed. Given the Claimant's medical condition relating to her back I did urge her to ask for breaks if she needed them.
10. I then adjourned for 45 minutes to read the witness statements and the referenced documents in the bundle.
11. At the start of the resumed hearing, I indicated to the Claimant that I did not think she needed to call either her husband or her son to give evidence given that the matters which I needed to consider essentially related to her direct testimony.

Findings

12. I set out below the findings the Tribunal considered relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.
13. Without treading on the toes of the Employment Tribunal dealing with the full hearing of this Claim, I set out the following circumstances in as far as they are non-contentious and act as background to the matter I have to decide.
14. The Claimant relies on the following matters both individually and collectively as disabilities for the purpose of her claims (identified at the hearing in front of EJ Bryant QC at R1 56):
 - a. A fractured back: she fractured her back in a fall at home on 4 January 2016 (she believes the fracture was of her L1 vertebra) and she says that it has never healed;
 - b. Osteoporosis: she says that this was diagnosed in 2016 during investigations as to why the back fracture was not healing;
 - c. Type II diabetes: this was diagnosed in around 2015 or possibly earlier;
 - d. Anxiety and panic attacks: she has been suffering from these since May 2015.
15. The Claimant was originally employed in January 2001 as a Customer Information Officer within the Grants Department and subsequently from November 2001 she took up the role of Housing Advice Officer within the Housing Department. She then moved to the Rent Deposit Team in 2005 to July 2006. At the time of the events in question she was working 18 hours per week in the Housing Department and 14 hours per week as a Sales and Acquisitions Officer within the Temporary Accommodation Unit.
16. In essence, the Claimant relies on the following matters (cross referenced to the relevant documents in R1):
 - a. On 12 April 2015, she was berated by Mr Tony Brown, the Housing Client Services Manager, as to why she had written to a client explaining the reasons behind the delay in visiting him. She was already concerned because there had been rumours that the Respondent was listening to staff calls and reading emails. She was very concerned that Mr Brown had printed off her email without her permission. Further, on later questioning he would not tell her what she was supposed to have done wrong. She believes that this matter was as a result of her refusing to take up a full-time role in Sales & Acquisitions when asked repeatedly to do so. As a result, she states that she went into a state of total shock, became very tearful and felt violated. She further states that she started to become paranoid and she felt she was under scrutiny, being watched and her telephone calls were being listened to and/or recorded. This culminated in her suffering a massive panic attack in the middle of Asda;
 - b. On 13 May 2015, having spoken to Mr Brown as to how she was feeling, he advised her to take a week off work. She attended her GP on 18 May 2015, and he signed her off work with "low mood" until 1 June 2015 and prescribed her with Citalopram (which is an anti-depressant). She continued to be absent from work initially with "low mood" and then "stress related to job" and then "low mood" again until 3 December 2015. Her GP records indicate that by 10 November 2015 she had "weaned herself off the antidepressants as she was feeling better in herself" and "planned to return to work" (at R1 94);
 - c. On 7 September 2015, the Claimant attended an appointment with the

Respondent's Occupational Health advisor (R1 106-107). The adviser noted that the Claimant told him that she believes she is suffering from work-related stress. In his opinion she was currently not fit for work and he arranged to review her again in three weeks time. He advised that on return to work and individual Stress Risk Assessment should be carried out;

- d. On 17 September 2015, the Claimant had a meeting with Mr Tariq Qureshi and Mr Ken Emerson at which she states that she was told that if she would not take a single role in Sales and Acquisitions her future with the Respondent would be limited;
- e. On 1 October 2015, she was diagnosed with Type II Diabetes and advised to see Diabetes UK website and look up GI index/diet (R1 95). The Claimant accepted in evidence that after changes to her lifestyle to avoid having to take diabetes medication she was able to control the condition if she managed it well. She had to monitor her blood sugar regularly and after a month her husband got her a machine in order to do so. If it was low then she has to eat sugar and if it was high she has to undertake exercise to bring it down. She explained that now she eats well but has not been able to exercise since the injury to her back (as set out below). However, there is nothing in her medical notes as to the need to exercise but simply to control her diabetes with diet;
- f. On 4 January 2016, she fell down the stairs at home hitting the bottom of her back on the last step. After initially experiencing stiffness, then muscle spasms and pain when attempting to move, on 6 January 2016 she was taken by ambulance to A&E at West Middlesex Hospital. Following x-ray an initial diagnosis of possible fracture to the lower back was made. This was confirmed at a further appointment on 8 January 2016 at which the hospital advised that her GP should investigate further possible osteoporosis. The Discharge Summaries are at R1 114 and 115. The referral letter to her GP is at R1 116 which contains the words "? osteoporosis". The Claimant continued to experience pain and discomfort throughout January and February 2016. She saw her GP, was provided with medical certificates and given medication to relieve the pain (R1 118-121, 124-125 and 133). However, she was not taking this medication beyond February 2016;
- g. She attended the Respondent's Occupational Health advisor on 30 March 2016 (at R1 126-127). His report states that the Claimant has been making progress since the accident and is currently getting regular load-bearing exercises, although prolonged sitting and standing are to be avoided at the moment. His report also refers to her diabetes which she has been learning to manage. He advised that she was unfit for work irrespective of any adjustments but suggested a phased return to work and referral to the Respondent's in-house osteopath;
- h. The Claimant attended Ashford and St Peter's Hospitals NHS Trust on 16 March 2016. The Clinical Report at R1 128-129 confirms that the Claimant had a wedge fracture of L1 and that there is "vertebral osteopenia with an increased risk of future fracture compared to the age-matched population". At R1 131 there is an information sheet which it would appear that the Claimant was given by the hospital at that time. This is headed "Treatment Management For Each BMD Group". It contains three categories of which Normal is first, Osteopenia is the middle one and Osteoporosis is the final one. This would appear to indicate that Osteoporosis is different to Osteopenia and a higher category;
- i. Indeed, I had printed out information about Osteopenia and Osteoporosis from the NHS website which I provided to the parties. This indicates that Osteopenia is an earlier stage of Osteoporosis but is not in itself not an impairment and that the one does not always lead to the other;
- j. At a meeting with the Respondent on 22 April 2016, the Claimant felt pressurised into providing a date of return to work. This would appear to have been a first stage Management of Absence Meeting;
- k. The Claimant requested a ground floor parking space to avoid climbing flights of stairs on arrival and leaving work. This she says was refused;

- l. The Claimant was referred to the Respondent's osteopath who carried out manipulation of her back and recommended exercises to do at home;
 - m. The Claimant saw her GP on 20 January 2017 (R1 87) for which the medical records state "did have period of work-related stress" and "work stress previously". She saw her GP again on 29 March 2017 (at R1 86-87) in which the medical records state "depression screening using questions stable". The Claimant accepted that there was no further mention of anxiety or panic attacks within the medical records that she has provided although she states that it still continued;
 - n. It would appear from the statement of fitness for work certificates within R1 that the Claimant was absent from work due to back pain from 13 February 2017 31 March 2017 (at R1 148-153);
 - o. The Claimant attended an appointment with the Respondent's Occupational Health advisor on 14 March 2017 (at R1 155-156). The report indicates that the Claimant presented with symptoms of discomfort from lower back pain which she perceives to have been triggered by the fall in 2016. The report also refers to a clinical assessment indicating a diagnosis of Osteoporosis, although it is not clear where this comes from or whether it is simply something that the Claimant said to the adviser. The report also indicates that the Claimant referred to symptoms of IBS exacerbated by perceived work-related stressors and to her Diabetes. The adviser stated that the Claimant indicated that she anticipates being able to return to work on expiry of her current fit note and that she should return on a phased basis and he also suggested a number of adjustments;
 - p. The Claimant was declared as possibly fit for work on 19 April 2017 with a phased return to work, amended duties and alternate hours until 10 May 2017 (at R1 158). The GP did not go into any more detail as to these adjustments;
 - q. The Claimant attended the Trauma and Orthopedic Unit at Ashford Hospital on 29 September 2017 (at R1 165-166). This indicated that she had been confirmed as having a wedge fracture of L1 and that she was Osteopenia. The letter further indicated that the Claimant denies any "red flag symptoms clinically beyond difficulty getting comfortable at night. The letter indicated that her back pain could be addressed by a course of physiotherapy;
 - r. The Claimant has IBS for which she takes Buscapan and Omeprazol. She accepted that there was no medical diagnosis of this condition by her doctor. She said that when it flares up she has to go to the toilet immediately. She has to be careful with what she eats and to be near a toilet at all times. She can feel when it is coming on because she has cramps and it builds up but can go on for a few days and then goes away.
17. I also had regard to the Claimant's impact statement at R1 77 to 79. This refers to the need to eat regularly and low sugar in order to control her diabetes, and as to pain affecting her bowels, her ability to pay and to wash her hair, and as to bending and lifting. Her ability to carry out household activities is affected. She cannot engage in sporting activities with her children or recreational walks and cycling trips. She has to have assistance when carrying out food shopping. She cannot sit for long periods and has a spine cushioning back support.

Disability

18. Under section 6(1) of the Equality Act 2010 a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Guidance is also provided in the 2011 Office for Disability Issues guidance, Equality Act 2010: Guidance on matters to be taken into account in determining questions relating to the definition of disability.
19. The Respondent accepted that the Claimant experienced anxiety and panic attacks

between May and November 2016 whilst she was absent from work due to ill health. However, the Claimant did return to work and given that her anxiety and panic attacks were a reaction to particular events at work there was no reason to suppose that the impairments would be expected to last a year. There is nothing in her medical notes mentioning ongoing medication and what references there are are positive ones. Whilst the Claimant originally identified the anxiety and panic attacks as relating to two particular periods of stress and then weight loss or anxiety, there is no evidence of any underlying condition but more a reaction to particular events.

20. My conclusion is that this is essentially correct the medical evidence does not indicate that the anxiety or panic attacks continued beyond November 2016. At the time those matters appear clearly to be connected to specific events which occurred on two occasions and the medical evidence indicates that the Claimant came off the medication was provided and was coping. As a result this was not an impairment is expected to last year and indeed did not do so.
21. The Respondent accepted that the Claimant fractured her back in January 2016 and that this would take longer to heal but there was no evidence to show that it would take longer than a year. There is no mention of back pain within the medical evidence beyond November 2016.
22. My conclusion is that at the time there was no expectation that the issues arising from the Claimant's back injury would continue for at least one year although it is fair to say that they did and that there were issues identified by the medical practitioner that the Claimant had seen on 29 September 2017 (at R1 165-166). However at the material times this was not the expectation.
23. The Respondent did not accept that the Claimant had been diagnosed with Osteoporosis. She had been diagnosed with Osteopenia but there is no evidence of this condition having an adverse effect by itself. It is a condition that can develop into Osteoporosis.
24. My conclusion based on the above findings is that the Claimant was not diagnosed with Osteoporosis and perhaps she is simply confused the information that she was given as to the need to investigate and the diagnosis of Osteopenia.
25. The Respondent accepted that the Claimant had been diagnosed with Type II Diabetes but the evidence provided indicated that this could be controlled by diet. There was no evidence to show control by exercise.
26. My conclusion based on my above findings is that notwithstanding the methodology adopted by the Claimant as a means of control has Type II Diabetes and there was nothing to indicate that her medical advisers saw this as something that would resolve itself within a year. The medical advice was asked to control.
27. The Respondent did not accept that Irritable Bowel Syndrome amounted to a disability. The Claimant's evidence was that she needed to use the toilet occasionally and this is something that affects all of the population at some time. Whilst the Respondent acknowledged that there was the uncertainty of not knowing when she would need to use the toilet, the Claimant did say in evidence that she suffers from cramps first of all, which act as a warning that she needs to use the toilet.
28. My conclusion based on my above findings is that notwithstanding the obvious unpleasantness and discomfort caused by IBS, this is not something that was ever formally diagnosed and that the Claimant essentially needs to use the toilet when she has warning through cramps that she needs to do so. It did appear to me that the need to use the toilet in the circumstances is not something that amounts to a

disability in law.

29. The Respondent did not accept that either individually or collectively these various impairments amounted to disability in law. The Respondent saw them as quite separate with the Claimants focus being on her back condition.
30. My conclusion is that given that even considering these matters collectively it does not elevate those matters that I have decided to do not amount to a disability beyond my individual findings.

Strike Out/Deposit Order

31. The Respondent seeks a strike out of the complaints of discrimination relating to harassment as set out at paragraphs 14.1 and 14.2 of the issues identified by EJ Bryant QC in his record of the Preliminary Hearing at R1 56.
32. Essentially under Rule 37(1)(a) of the Employment Tribunal Constitution & Rules of Procedure) Regulations 2013, I am required to form a view on the merits of certain elements of the Claimant's claim and only where I am satisfied that those elements have no reasonable prospect of succeeding can I exercise my power to strike out.
33. **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603, CA, states that it would only be in an exceptional case that a claim would be struck out as having no reasonable prospects of success when the central facts are in dispute.
34. There are special considerations where a tribunal is asked to strike out a claim of unlawful discrimination. In **Anyanwu v South Bank Student's Union** [2001] IRLR 305, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.
35. In **Ezsias**, the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court of Appeal stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.
36. His Honourable Judge Mitting, at paragraph 14 of **Mechkarov v Citibank NA** UAEAT/0041/16, having reviewed the relevant authorities, set out the approach that should be taken in a strike out application in a discrimination:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

37. In the alternative, the Respondent seeks a deposit order in respect of those complaints on the basis that they have little reasonable prospect of success and so she that should be ordered to pay a deposit as a precondition of continuing in respect of each.
38. The test of whether to make a deposit order is clearly set at a lower threshold than that contained within rule 37 of the Rules of Procedure and is intended as a less draconian alternative to striking out. To that extent the authorities referred to above are also of importance particularly when considering discrimination complaints.

39. In Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0096/07, the Employment Appeal Tribunal held that in dealing with the issue of whether to award a deposit order an Employment Judge could have regard to the likelihood of the facts being established relevant to the claim when making a deposit order.
40. With regard to the complaint of disability harassment the Claimant relies on the meeting with Mr Brown on 12 April 2015 (at paragraph 14.1 of EJ Bryant QC's record of the Preliminary Hearing at R1 56) and R1 13 of her of the details of her claim.
41. However, there is nothing in the particulars of this complaint that obviously links the treatment complained of to disability. By her own admission she links the treatment to not accepting the job that was offered to her and at the time she only suffered from IBS. The Claimant's position is that Mr Brown possibly did this to cause her IBS to flare up although I did indicate that she was in some difficulty in her use of the word "possibly".
42. The Claimant also relies on a meeting held on 17 September 2017 with Mr Tariq Qureshi and Mr Ken Emerson as amounting to disability harassment (at paragraph 14.2 of EJ Bryant QC's record of the Preliminary Hearing at R1 56) and at R1 13 of her details of claim. However, within her particulars she provides a non-discriminatory explanation for this treatment that is not to do with disability. The Claimant's position is that Mr Emerson told her that the Respondent would use anything they could to get rid of her, they would use your IBS. However, this is not in her Claim Form, Further Information or witness statement. I pointed out to the Claimant that the absence of this detail from these documents would no doubt be used by the Respondent to suggest that it is not true. The Respondent indicated as much and directed me to simply consider the case as set out in writing.
43. Mr Cuthew intervened at this point asking what this had to do with the complaint of unfair dismissal. I explained that it is not connected and that we were simply focusing on the Respondent's application to strike out these elements of the Claimant's disability discrimination complaints on the basis that they had no reasonable chance of succeeding. I further explained that the issue being raised was that it did not appear that these matters were linked to disability. I added that this did not mean that these things did not happen or that they were not unpleasant or that if these elements of the complaints were struck out that the matters complained could not form background to the unfair dismissal complaint. I also explained to the Claimant and her husband that one way of dealing with this was to take the view that I will not continue with this as part of the disability discrimination case, but I will rely on this as part of my unfair dismissal case. I emphasised that I was not placing any pressure on the Claimant to do so and that if she wished, we could have a break in order for her to discuss this with her husband. If she decided to proceed then I would consider whether to strike out these parts of her complaints or whether to make a deposit order or not.
44. After a short adjournment, Mr Cuthew indicated that his wife wished to withdraw those elements of her complaint.
45. I therefore record that those matters set out at paragraphs 14.1 and 14.2 of EJ Bryant QC's record of the issues arising in the disability discrimination complaints as detriments are dismissed on withdrawal by the Claimant.
46. On this basis I did not need to consider the Respondent's application for strike out any further or go on to consider the alternative application for a deposit order.

47. I then went on to deal with further case management of the remaining parts of the Claimant's complaints of disability discrimination and unfair dismissal. These are set out in a separate document.

Employment Judge Tsamados
Date 12 December 2019