



EMPLOYMENT TRIBUNALS

Claimant: A

Respondents: 1. B
2. C

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the judgment on remission from the Employment Appeal Tribunal sent to the parties on 16 March 2018, is further corrected by inserting “D” for the union representative’s name at paragraph 11 and “A” for the claimant at paragraphs 25 and 46.

Employment Judge Ross

Date 15 January 2020

SENT TO THE PARTIES ON

16 January 2020

FOR THE TRIBUNAL OFFICE

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



EMPLOYMENT TRIBUNALS

Claimant: A

Respondent: 1. B
2. C

HELD AT: Manchester

ON: 9 March 2018

BEFORE: Employment Judge Ross
Mrs J Harper
Mrs M A Gill

REPRESENTATION:

Claimant: Mr K Ali, Counsel
Respondent: Ms R Wedderspoon, Counsel

FURTHER CORRECTED JUDGMENT ON REMISSION FROM THE EMPLOYMENT APPEAL TRIBUNAL

The claimant's claim that the respondents failed to make reasonable adjustments in the period February to June 2015 is well founded and succeeds.

REASONS

1. This claim was remitted to us by the EAT to consider its reasoning on the following questions:-
 - (1) whether the PCP placed the claimant at a substantial disadvantage and
 - (2) whether it was reasonable for the respondent to have to make the adjustment of permitting time off work to attend CBT appointments.

2. The relevant period of time is February-June 2015.
3. The Tribunal had the benefit of written submissions from the claimant's representative Mr Ali and the respondent's representative Ms Wedderspoon both of whom represented the parties at the original hearing and at the EAT hearing.
4. Ms Wedderspoon sought to persuade us that the first matter for consideration was the PCP. In this case we found that the PCP was the respondent "did require an Assistant Head Teacher to be physically present in the school during school hours and required staff normally to attend medical appointments outside school hours". See paragraph 89 of our original judgment dated 4 November 2016 and sent to the parties on 9 November 2016.
5. In the EAT Judgment at paragraph 19 it is noted that we found a PCP of requiring an Assistant Head Teacher to be physically present in the school during school hours and requiring staff normally to attend medical appointments outside school hours. There is no reference in the EAT judgment to any suggestion that there was an error or inaccuracy in the PCP. Accordingly we find no reason to disturb the PCP.
6. We turn to the first issue which the EAT requires us to consider again namely whether the PCP placed the claimant at a substantial disadvantage.
7. We reminded ourselves that in answering this question we must consider what it is about the operation of the PCP that causes disadvantage.
8. In this case the claimant was very unwell with depression.
9. On 16 January 2015 her GP Dr Gillick had referred her to the Crisis Team "I would be extremely grateful if she could be seen by the Crisis Team with regards to her suicidal risks as soon as possible. I am particularly concerned about her mental health and reviewing her weekly at present". See page 1360. The seriousness of the claimant's illness is reflected in the claimant's comment that she had thought that she would be "better off dead" made at a therapy session on 11/2/15. See p 1375.
10. We rely on our finding that (see paragraph 52 of our judgment) that the claimant had a set of sessions of CBT which were coming to an end: "the last session 11 February 2015, discharged 23 February 2015" see page 1375. We rely on our finding that a new set of sessions was due to start. Alison Pleszak stated at page 1375 "client's risk is being monitored weekly/fortnightly by CBT Therapists at Stepping Hill where she commenced treatment last week".
11. The Tribunal relies on an email from the claimant's union representative D at page 307A of the bundle dated 13 February 2015 "will A be able to access her CBT medical appointments (as arranged by her GP at the hospital) in school time currently early Wednesday morning" to show that the claimant had an appointment at that time for the new CBT sessions.
12. We also rely on an email from the claimant's union rep dated 20 February 2015 p312B to show the claimant had CBT appointments for Wednesday morning in February 2015: "I will follow it up on Monday-especially with

regard to the CBT appointments-and in particular for next Wednesday as you have an appointment already booked."

13. The ongoing CBT is confirmed by the claimant's treating Psychiatrist Dr S K Salujha who had the opportunity of seeing the claimant on 16 February 2015 in clinic. By letter of 23 February 2015 the Psychiatrist confirmed "she has had six sessions of CBT and is being offered another twenty sessions of therapy which would suit her needs".
14. The Tribunal notes that the GP records at page 1442 show that on 4 February the claimant was:" much the same continuing to research suicide on the internet." On the 18 February 2015 "suicidal obsessions continued".
15. Therefore we find that the claimant's GP had prescribed further CBT because the claimant was very unwell. We find the therapy sessions were NHS sessions to take place at Stepping Hill Hospital. This was confirmed by page 1375 of the report from B Wellbeing Service, the email from the union representative at page 307A, and 312B and the claimant's email at page 309 "I came in after break on Wednesday as I had medical appointments in the morning" dated Friday 13 February.
16. We are satisfied that as we stated in our original judgment paragraph 91 that theoretically the PCP would place the claimant at a substantial disadvantage in comparison with persons who are not disabled because the intractable nature of her depression and the deterioration of her condition meant that she continued to require Cognitive Behavioural Therapy and the arranged appointments were during school hours. We rely on our finding that a person who is not disabled and required medical appointments, for example for a short term condition would be less likely to require ongoing appointments during school hours and therefore not be placed at a substantial disadvantage in comparison with the claimant.
17. Ms Wedderspoon took us to the Griffiths -v- Secretary of State for Work and Pensions decision 2015 EWCA Civ 1265. The Tribunal reminded itself that in that decision the Court rejected the employer's arguments that a like for like comparison favoured by the House of Lords in London Borough of Lewisham -v- Malcolm 2008 IRLR 700 HL was appropriate in a reasonable adjustments case. In the Griffiths case the Court held the question was simply whether the PCP put the disabled person at a substantial disadvantage compared with a non-disabled person.
18. In this case the claimant had been referred by the NHS to an appointment at Stepping Hill which was arranged for a Wednesday morning and therefore during school hours. The policy of the school (the PCP) put her at a disadvantage because she could not comply with the policy and attend those CBT appointments. We find the substantial disadvantage to the claimant was her inability to attend the session on a Wednesday morning.
19. In reaching this conclusion we rely on our findings of fact that (see paragraph 45 of our judgment) that on Friday 13 February the Head Teacher stated "as you now have been back at work for four weeks on a phased/reduced hours basis and as per the B absence management policy I would expect you to return to work week commencing Monday 23 February on full time normal contractual hours/responsibilities basis. In the interests

of consistency and continuity for the school I would ask now that any ongoing CBT/counselling appointments, if required, are arranged outside of normal school hours. I am happy however of course to consider and support any NHS arranged medical appointments that may be necessary for you to attend via the arrangement of your GP or medical specialist during school hours. Please complete an absence request form if required for this purpose".

20. We rely on our finding of fact at paragraph 46 that the claimant responded almost immediately stating "please clarify regarding being allowed to go to CBT appointments as this is an NHS arranged medical appointment arranged by the GP taking place at Stepping Hill". We rely on our finding of fact that the Head Teacher's response to that request for clarification was confusing. He stated "as noted below I am happy to consider unavoidable medical appointments during school hours however regular counselling/CBT should really be arranged outside of normal working hours. I would appreciate it if that could be arranged going forward", page 308.
21. In the absence of a clear response the claimant's union representative emailed the same day, Friday 13 February, at 15:07 asking "will A be able to access her CBT medical appointments (as arranged by her GP at the hospital in school time currently early Wednesday morning)". There was no reply. The following week was half term.
22. On Sunday 22 February the claimant sent an email saying she felt unable to return to work. She stated "I am assuming that your email of 13 February 2015 implicitly rejects my current fit note, the recommendations in that are precisely the things you have stated in your email cannot now occur. As you know a "you may be fit to work" note becomes a "you are not fit for work" note if it is rejected". We find the fit note dated 28 01 15 for the period 28.1.15 to 2.3.15 recommended adjustments of time off for medical appointments and reduced hours. See p1464.
23. The claim commenced a period of sick leave from Monday 23rd February.(p310)
24. A first stage sickness absence meeting took place on the afternoon of Wednesday 25 February 2015. At this meeting there was still no agreement the claimant could attend the therapy on a Wednesday morning. The Head Teacher stated "he felt he had been reasonable for twelve months and therefore an additional twenty weeks was not fair on colleagues as the wider team had to cover issues when they arose", page 341. He also stated he "felt it was not reasonable to agree to a further twenty week programme as this was not the only time that A could seek the treatment. A advised that her CBT Therapist didn't work Fridays and when she originally set up the timing of the appointment she was mindful of the school."
25. The Head Teacher went on to offer a temporary reduction in contract to complete the appointments. The Head Teacher "advised that after twelve month period of support that had taken place he would now expect A to be in attendance during school hours". There was then a conversation which lacked clarity in relation to appointments taking place at a different time.

26. The Tribunal finds that after this meeting the claimant visited her GP, see page 1141 "had big meeting with boss today and union rep very stressed tearful, been given option of returning to work full time or not returning at all, he has ignored the occupational health report and not been understanding, she is very upset, feels down, no option then to be signed off work completely concerns she will lose her normal structure and slip more into depression".
27. The Tribunal finds that the PCP requiring the claimant to be physically present in school during school hours and requiring staff normally to attend medical appointments outside school hours put the claimant at a substantial disadvantage in relation to a relevant matter because the application of that policy meant that she was unable to attend her arranged CBT therapy appointments at Stepping Hill Hospital on a Wednesday morning (a course of twenty treatments). The facts relied on above show that the Head teacher applied the policy to the claimant. He did not give permission to attend a course of NHS arranged CBT appointment on a Wednesday morning.
28. The Tribunal finds the disadvantage was substantial because it caused the claimant to be unable to attend the session if she remained at work and the serious nature of her depression meant she needed that treatment. We find the refusal of the request was part of the immediate trigger for the claimant to become absent from work, combined with the refusal of the respondent to agree to the OH recommendation that she work flexibly, something which had previously been in place(see p303) and was withdrawn(p309).
29. The Tribunal makes no finding at this stage as to whether or not the claimant would have been absent from work with depression in any event during the period 23 February to June 2015. The Tribunal has noted in its fact finding both in this decision and its original decision that the claimant was very seriously unwell during January and February with persistent thoughts of suicide, such that she had been referred to the Mental Health Crisis Team and was continuing the prescribed anti-depressants and being referred to a Psychiatrist. She herself was very fearful of being sectioned (see her statement of evidence).
30. We have re-visited our finding that the claimant never formally put in an application for permission to attend an appointment at Stepping Hill Hospital on a Wednesday morning for CBT and gave evidence that she was not refused time off for an appointment when she completed a specific request.
31. On reflection the Tribunal is satisfied that that is unsurprising the claimant did not make a specific formal request on the appropriate form to attend CBT at Stepping Hill on a Wednesday morning in the context of the email exchange between the claimant and the Head Teacher (p308-10) , the lack of response to the specific request from the trade union representative that the claimant have time off permitted on a Wednesday morning to attend those therapy sessions(p307A) and the nature of the discussion at the stage 1 absence meeting. All those communications suggested the Head teacher was not willing to grant the claimant an hour off on a Wednesday morning to attend an NHS CBT appointment at Stepping Hill Hospital. Accordingly the Tribunal is satisfied that the claimant was put to a substantial disadvantage in relation to a relevant matter when she was unable to attend the therapy session on a Wednesday morning.

32. The respondents sought to rely on the discussion at the meeting on 25 February in relation to the possibility of the therapy taking place within school time on a different day or after school hours such as when after school meetings took place as showing the claimant was not placed at a substantial disadvantage. The Tribunal is not satisfied that the respondent can rely on this evidence to show this.
33. The point is the CBT sessions had been arranged for a Wednesday morning as the facts above show. The claimant had started to attend the sessions and the PCP remained in place. It was never clarified at the time or at Tribunal whether or not it was possible for the CBT therapy sessions to take place at any other time. The Tribunal has no reason to disbelieve the claimant that the therapy sessions normally took place within working hours and that the therapist did not work on Fridays, the day when the claimant may have been able to attend an after school hours appointment because the school closed early that day.
34. The Tribunal turns to the next question, did the respondent's fail to take such steps as it was reasonable to have to take to avoid the disadvantage? The claimant contended that a reasonable adjustment would have been to allow her to attend therapy appointments for one hour a week during non-contact time for such a period as was necessary to enable treatment to be completed.
35. The Tribunal reminds itself that the duty to make reasonable adjustment applies if the respondents knew that the claimant was disabled.
36. The answer to the question is yes. The respondent had a report from the occupational health doctor, see our original judgment at paragraph 37. The occupational health report is at pages 289 to 291. The occupational health physician confirmed that the claimant was likely to be covered by disability legislation and it would be good practice to consider adjustments. The report specifically states "she is likely to require time off work to attend appointments and it would be good practice to allow this as it would be beneficial to your employee's health".
37. We refer to our finding that the claimant had downplayed the seriousness of her illness to the occupational health doctor. However on the information the claimant did provide, the OH report indicated it was likely the claimant was covered by disability legislation. Accordingly we are satisfied that the Head Teacher knew the claimant was disabled and the nature of the report makes it clear that time off work to attend appointments was supported and recommended by OH.
38. Thus even though the claimant was considerably more seriously ill than she was informing occupational health doctor at that time, the Head Teacher was aware via the OH report that it was likely she was disabled within the meaning of the Equality Act and that time off for medical appointments would benefit her.
39. We then turned to the guidance in the EHRC Employment Code at paragraph 6.28

- * whether any particular steps would be effective in preventing this substantial disadvantage;
 - * the practicability of the step;
 - * the financial and other costs of making the adjustment and the extent of any disruption caused;
 - * the extent of the employer's financial or other resources;
 - * the availability to the employer of financial other assistance to make an adjustment (such as advice through Access to Work) and
 - * the type and size of employer.
40. We reminded ourselves that ultimately the test of the reasonableness of any step an employer may have to take is an objective one and will depend on the circumstances of the case.
41. The respondent reminded us of the principles in Project Management Institute -v- Latif UAEAT 002807 CEA and "the holistic approach" as recommended in Burke -v- The College of Law 2012 EWCA Civ 37.
42. The adjustment contended for by the claimant was one hour per week on a Wednesday morning to attend CBT therapy at Stepping Hill hospital. Although having regard to our original judgment, the fact that the respondent had in essence run out of patience with the claimant's absence from work to attend therapy appointments at this point because it had existed for at least twelve months and they were unaware precisely how seriously ill she was, that is not strictly relevant. The relevant issues we must decide is did the PCP put the claimant at a substantial disadvantage in relation to a relevant matter and did the respondent take such steps as is reasonable to have to take bearing in mind the guidance at paragraph 6.28. We reminded ourselves that within this case the substantial disadvantage was the inability of the claimant to attend an appointment on Wednesday morning.
43. The adjustment contended for was permitting the claimant to attend for one hour a week on a Wednesday morning during school time would enable her to go to that appointment and therefore remove the substantial disadvantage caused by the policy.
44. When considering whether it was reasonable for the respondents to continue to meet this request the Tribunal has borne in mind the school was able to accommodate it, both before and after the period February 2015 and June 2015. The Tribunal has also taken into account the comment made by the EAT that if the school was able to accommodate the claimant on reduced hours it is difficult to see why they could not accommodate the claimant having an appointment for one hour on a Wednesday morning. We have also relied on our finding that the respondent is a large secondary school with a team of senior leaders.

45. We rely on the fact that the respondent had been able to accommodate the claimant during her earlier period of adjustment and subsequently to suggest that permitting her to attend an appointment on a Wednesday morning was a reasonable adjustment.
46. In the meeting of 25 February the Head Teacher indicated "he was more than happy for A to miss meetings and after school enrichment activities to attend the appointments if necessary". The claimant did not want to do so: "DT advised A didn't want to miss those meetings and A added that she felt missing them undermined her management role more". The Head Teacher advised that there were meetings on two nights a week so there would be three other nights when the appointments could take place. The claimant repeated that there were no Friday appointments.
47. The Tribunal never heard any detailed evidence from the claimant as to whether or not a CBT appointment at Stepping Hill was available at any other time. Her union representative seemed to suggest seemed to suggest an appointment up to 4pm might be possible (307A). However the tribunal is not satisfied that the discussion on 25 February about possible alternatives or the possible suggestion by the union representative assists the Tribunal. The question for the Tribunal is not whether or not it was reasonable to permit the claimant to attend a CBT appointment which may or may not have been available at another time. It was whether or not it was reasonable to permit the claimant to attend a CBT appointments arranged for an hour during non contact time on a Wednesday morning.
48. The Tribunal is satisfied that the adjustment sought by the claimant to attend CBT appointments for an hour on a Wednesday morning was a step it was reasonable for the respondent to take.

Employment Judge Ross

Date 15 March 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

16 March 2018

FOR THE TRIBUNAL OFFICE

[JE]