EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: Miss C Sheridan

Respondent: University of Greenwich

HELD AT: London South Tribunals
ON: 14 and 15 October 2019

Before: Employment Judge Freer
Members: Ms B C Leverton
Mr N Shanks

Appearances
For the Claimant: In person
For the Respondent: Miss C Hollins, Solicitor

REASONS FOR JUDGMENT

1. These are the written reasons for the unanimous judgment of the Tribunal that the Claimant's claim of a failure by the Respondent to comply with its duty to make a reasonable adjustment is unsuccessful.

2. These reasons are provided at the request of the Claimant. Oral reasons were given at the hearing.

3. The issues for the Tribunal to determine were initially set out in a case management order of Employment Judge Tsamados on 26 July 2018, but after discussion at the outset of this hearing it became apparent that the parties thought that two potential matters remained of a failure to make reasonable adjustments and discrimination arising from disability. On examination of the papers is quite clear that the discrimination arising from disability matter was part of a deposit order made by Judge Tsamados and in respect of which the Claimant withdrew the claims.

4. Therefore the only issue before the Tribunal at this hearing is the allegation of the Respondent's failure to make a reasonable adjustment and that is set out the list of issues at page 44.

5. The Tribunal explained to the parties to the law relevant to that claim as set out in sections 20 and 21 the Equality Act 2010. The steps that the Tribunal needs to work through are usefully and accurately set out at page 44 of the bundle.

A summary of the relevant law

6. Sections 20 to 21 of the Equality Act 2010 set out provisions relating to the duty to make reasonable adjustments:

"(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

21 **Failure to comply with duty**

A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

7. The applicable schedule is Schedule 8,

8. The Equality and Human Rights Commission has produced a Code of Practice on Employment (2011) ("the Equality Code"). The Code of Practice does not impose legal obligations, but provides instructive guidance. This has been taken into account by the Tribunal. For example, the Equality Act 2010 no longer lists factors to be considered when determining reasonableness, but these factors appear in the Code of Practice (paragraph 6.28). However, it will not be an error of law to fail to consider any of those factors. All the relevant circumstances should be considered.

9. The duty to make adjustments may require the employer to treat a disabled person more favourably to remove the disadvantage which is attributable to the disability. This necessarily entails a measure of positive discrimination (**Archibald v Fife Council** [2004] IRLR 651, HL).

10. The test of reasonableness is an objective one.

11. A failure to consult is not of itself a failure to make a reasonable adjustment. It is necessary to identify the adjustment step/s that should be taken. (see **Tarbuck -v- Sainsburys Supermarkets** [2006] IRLR 664 and **H M Prison Service & Johnson** [2007] IRLR 951, EAT).

12. In **Royal Bank of Scotland -v- Ashton** 2011 ICR 632, the EAT emphasised that when addressing the issue of reasonableness of any proposed adjustment the focus has to be on the practical result of the measures that can be taken: "It is not — and it is an error — for the focus to be upon the process of reasoning by which a possible adjustment was considered… [I]t is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment".

13. The correct approach to assessing reasonable adjustments is addressed in **Smith –v- Churchills Stairlifts plc** [2006] IRLR 41; **Project Management Institute –v- Latif** [2007] IRLR 579; and **Environment Agency –v- Rowan** [2008] IRLR 20;.

14. In **Smith**, the comparative exercise required by s.6(1) of the DDA was considered by the Court of Appeal having regard to the speeches contained in the judgment of the House of Lords in **Archibald**. Maurice Kay LJ stated:

    ". . . Notwithstanding the differences of language, it would be inappropriate to discern a significant difference of approach in these speeches. . . it is apparent from each of the speeches in **Archibald** that the proper comparator is readily identified by reference to the disadvantage caused by the relevant arrangements".

15. The EAT in **Leeds Teaching Hospital NHS Trust –v- Foster** [2011] EqLR 1075 emphasised that when considering whether an adjustment is 'reasonable', it is sufficient for a Tribunal to find that there would be 'a prospect' of the adjustment removing the disadvantage and that there does not have to be a 'good' or 'real' prospect of that occurring.

16. With regard to knowledge the EAT in **Secretary of State for the Department of Work and Pensions v Alam** [2009] UKEAT 0242/09 held that the correct statutory construction of s 4A(3)(b) involved asking two questions: (1) Did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: 'no' then (2) Ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is also 'no', there is no duty to make reasonable adjustments.

17. The Court of Appeal in **Matuszowicz –V- Kingston Upon Hull City Council** [2009] IRLR 288 held that there may breaches of the duty to make reasonable adjustments "due to lack of diligence, or competence, or any reason other than conscious refusal".

18. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

"(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

Facts and associated conclusions

19. The Respondent accepts that the Claimant was a disabled person at the material times with the condition of Depression. However, the Respondent disputes knowing of the disability until an Occupational Health report was produced on 28 March 2018, to which the Tribunal will return in due course.

20. It is not in dispute that the Respondent operates a provision criteria or practice of a requirement for employees to work with others.

21. Therefore the two main points to consider are whether or not that provision criteria and practice placed the Claimant at a substantial disadvantage compared to non-disabled persons and if so, whether the Respondent made any reasonable adjustment to avoid the disadvantage.

22. The Claimant, Dr Claire Sheridan, first raised issues relating to a matter she had experienced with a previous employer with Dr Pettit in March 2017 and the Tribunal finds that Dr Pettit was sympathetic and provided links to possible support services to the Claimant.

23. The issue was raised by the Claimant again in November 2017 and was also received with empathy by Dr Pettit.

24. On 12 December 2017 there is an email from the Claimant to Dr Pettit that raised issues regarding the University of Greenwich and essentially to pre-empt any gossip that may have arisen from the previous events. The Claimant states in that email: "I am very happy at Greenwich, I like my colleagues I feel I get on with them well".

25. There were some subsequent communications, but matters took a different turn by an email dated 15 February 2018, which is at page 87 of the bundle. The Tribunal is not going to set out the detail of that e-mail in these reasons: the Tribunal has read it and the parties are familiar with it.

26. That e-mail contains allegations, essentially against Dr Morton and Professor King. There were communications between Dr Pettit and the Claimant to address the new allegations and there was an email of relevance dated 19 February 2018 at page 88 of the bundle, in which Dr Pettit told the Claimant not to attend any lecture where Dr Morton was present.

27. There was a meeting between Dr Pettit and the Claimant on 05 March 2018 and the content of that meeting is at page 92 of the bundle.

28. As a consequence of that meeting, which the Tribunal considers was probably difficult from both sides, the Claimant was told that she will be referred to Occupational Health and as an interim measure Dr Pettit said that she would request colleagues not to attend the Claimant's lectures until she received further advice from Occupational Health. The Tribunal concludes that both of those steps by Dr Pettit were reasonable and sensible actions.

29. The Claimant was referred to Occupational Health. She met Dr Nicola Cordell on 28 March 2018 and an Occupational Health report was produced of the same date, starting at page 56 of the bundle. Dr Pettit received a copy of that report on 06 April 2018.

30. That Occupational Health report usefully sets out a 'Summary of History' at page 57 and states: "Ms Sheridan does feel that two of the staff members (male colleagues who she has identified to you previously) have been inappropriate in their conversations with her which have made her feel very uncomfortable. She will benefit from finding means to reduce personal contact with them as much as possible whilst she feels vulnerable. Miss Sheridan does recognise the requirement for attendance at meetings/events where one or both colleagues may be present. I have advised that she attends such meetings with a college she trusts and to maintain a professional relationship at all times with colleagues even if she feels uncomfortable. We discussed some techniques which may help her during this difficult time".

31. The Occupational Health report sets out recommendations which mirror the above paragraph and which states: "Miss Sheridan will benefit from reduced contact with her two colleagues while she rebuilds her emotional resilience. This is likely to be for a few months. It is understood from the referral that this is likely to be a challenge and we discussed the practical issues that arise

from working in a small team and I would recommend that you discuss with Miss Sheridan what measures could be taken to reduce contact temporarily without significantly impacting on the functions of the team".

32. The report also confirms that the Claimant was fit to work and to undertake her normal role as Lecturer. The report also reconfirms reduced contact, which was likely to be for a few months dependent on the Claimant accessing further counselling or psychotherapy and states: "It is understood that the University is limited in what they can influence with regard to the wider issues, but she will benefit from some discussions indicated above and what support can be provided to her during this difficult time".

33. Dr Pettit attempted to arrange a telephone conference to discuss the Occupational Health recommendations with herself, HR, the Claimant and Occupational Health, with an offer of a trade union representative being present for the Claimant.

34. The Tribunal finds that this was a route open to Dr Pettit under regular procedures available to the Respondent.

35. Through subsequent correspondence the Claimant declined that offer and therefore Dr Pettit sought written information from Occupational Health, which culminated in what was called a 'Clarification of Report' at page 59 of the bundle.

36. It confirms: "The report was not asking for any action against the other colleagues, but just that Dr Sheridan will benefit from some space to process what has happened and to rebuild trust/relationships with colleagues who she perceives have not reacted to her in a way she feels appropriate".

37. It also states that Dr Cordell would plan for three months: "but it is difficult to be precise as people recover at different rates. If the adjustments recommended in report could be made, then she is well enough to be at work". It also confirms: "Apart from minimising contact with colleagues as discussed above, no additional support is required as she is accessing the medical support she needs through NHS services". It was suggested that if a review that required, Dr Cordell would be happy to arrange one in eight weeks' time.

38. Therefore, Dr Pettit wrote to the Claimant on 02 May 2018, at page 103 of the bundle, informing the Claimant of the measures that were to be in place.

39. That email states: "As you decline the opportunity to discuss the recommendations as part of a conference call with Dr Cordell, I subsequently sought clarification from the Doctor regarding timescales required for implementing this recommendation. It has been confirmed that a plan should be in place 3 months effective from 28 March 2018".

40. Dr Pettit then set out three of her proposals, as set out in detail at pages 103 and 104 of the bundle, regarding attendance at meetings and to minimise contact with the two persons concerned.

41. That email ends by saying: “If you have any other thoughts on what you would like me to consider please let me know. I am also happy to discuss this further with you in person if you wish. I will also be looking to have a further review with OH in 8 weeks to establish progress”.

42. The Claimant said in evidence that she did not read this letter in detail because at that time she was concentrating on her claim to the Employment Tribunal, which was presented on 03 May, the day after Dr Pettit's letter.

43. Whether or not an employer has complied with a duty to make a reasonable adjustment is a question of fact for the Tribunal, but processes, intention and motive are not relevant in that determination (se **Ashton** above).

44. The Claimant accepted in evidence that during the period from the Occupational Health report to the Tribunal presentation of her claim, she had not attended any meeting or any other work events at which Professor King or Dr Morton were present.

45. Indeed, it is the understanding of the Tribunal that this set of circumstances had endured for around 15 months, although the period after presentation of the employment Tribunal claim is not of particular relevance to our decision.

46. With regard to whether the provision criteria and practice of working with others placed the Claimant at a substantial disadvantage compared to non-disabled persons, the Occupational Health report confirms that the Claimant had increased anxiety at work (which the Tribunal concludes was part of her Depression condition), that contact with the two staff members made her very uncomfortable and distressed, and that she found it difficult emotionally when threatened.

47. The Tribunal concludes on balance that this was a disadvantage to the Claimant and was substantial (e.g. more than minor or trivial) when the Claimant is compared to non-disabled persons. The Tribunal considers that the facts speak for themselves, but non-disabled persons would not have been placed at the above identified disadvantage in the particular circumstances.

48. Therefore, the final question for the Tribunal is whether or not the Respondent complied with its duty to make a reasonable adjustment to avoid the disadvantage.

49. The Claimant suggested at the outset of the hearing that the adjustment was for her to have no dealings with Professor King and Dr Morton. That view is consistent with the Occupational Health recommendation. There has been no suggestion of any other adjustment that was being sought.

50. The Tribunal finds as fact that the reality was that the Claimant did not attend events where Professor King and Dr Morton were present during the time from the Occupational Health report to the time that the Employment Tribunal claim was presented. The Occupational Health report was the date on which Dr Pettit could have known, or ought reasonably to have known, about both the Claimant's disability and the potential disadvantage.

51. Dr Pettit's email, at page 103, implemented the Occupational Health recommendations and despite the fact that there was at that time only eight people in the English Literature Programme Team, there was no indication from the Respondent that it was not going to comply with the recommendations of Occupational Health. There was also no indication at that time that any disciplinary process, or any other punishment, would arise if the Claimant did not attend at any meetings or events where Professor King or Dr Morton were present.

52. The Claimant's argument seemed to be predicated mainly on the view that the email at page 103 stated that the adjustments were going to be in place for three months effective from 28 March and that this indicated an inflexibility, or at least a restricted time period, in respect of which those matters would be in place. The Claimant argued this was contrary to the provisions set out in the Occupational Health advice.

53. The Tribunal concludes that the three-month period was entirely consistent with the content of the Occupational Health advice, which said to plan for a three-month period. In addition, the email from Dr Pettit, if it was read carefully, also quite clearly and expressly stated that there was going to be a "review with OH in 8 weeks to establish progress". The three-month period was not inflexible nor only for that limited period.

54. Therefore it is the unanimous conclusion of the Tribunal that the Respondent did comply with its duty to make a reasonable adjustment and made all the adjustments recommended to it by medical and Occupational Health advice. The Claimant's claim is unsuccessful.

Employment Judge Freer
Date: 17 April 2020

The reasons for this decision were given orally at the hearing. Written reasons will not be provided unless they are asked for by a written request presented by any party within 14 days of this written judgment being sent to the parties.

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