Appeal No. UKEAT/0287/19/LA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 11 February 2020

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MRS ANNA-MARIE WHEATSTONE — APPELLANT

BLAKENEY NEWS FOOD AND WINE LTD AND OTHERS — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR GEORGE YAGOMBA (Representative)
For the Respondent	Respondent not attending

SUMMARY

DISABILITY DISCRIMINATION

An Employment Tribunal was entitled to find, on the medical evidence before it, that the admitted disability, namely epilepsy, was not the reason for the Appellant's absence from work. Consequently, its finding that the Respondent's unfavourable treatment of her arising from the that absence was not related to the disability was not an error of law.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is an appeal against a decision by an Employment Tribunal ("ET") sitting in Bristol, Employment Judge Street sitting with lay members Dr J Miller and Mr D Clements. In this judgment I shall refer to the parties as they were below.

2. The Claimant was represented at the ET hearing by Mr George Yagomba described in the ET's reasons as "a friend". Mr Yagomba appeared for the Claimant today and tells me he had some input into the Claimant's skeleton argument which is signed "the Appellant." The Respondents have not attended today, electing, as is their right, to rely on written submissions. Some of these are not relevant to the appeal, but those that are are directed principally to the contents of the medical notes.

3. By its Judgment (as corrected) the Tribunal found that the Claimant had been unfairly dismissed and also that certain sums that were due as contractual claims and unlawful deduction from wages. It had awarded a total of £14,244.03.

4. The only claims in relation to which the Claimant was unsuccessful were those relating to her admitted disability.

5. The background to the case as relevant to the appeal can be set out briefly. The Claimant had worked as an assistant in a village shop operated by the First Respondent, a limited company owned by the Second and Third Respondents. She suffered from epilepsy, but this appears from the findings to have had little or no effect on her day-to-day activities so far as work is concerned, other than her not climbing to get items from higher shelves or changing light bulbs.

6. Following an argument on 19 July 2017 with Mr Mills, the Second Respondent the Claimant was, as the ET found, told to submit her resignation the following day or be dismissed. No form of procedure had been followed.

7. Later that day the Claimant's partner telephoned to say that she had suffered what was described as "a major seizure."

8. A fit note was issued by her doctor the following day, 20 July. This noted that she was suffering from "work-related stress." A further and similar fit note was issued on 21 August 2017.

9. The ET set out the issues arising in relation to the Section 15 of the **Equality Act 2010** ("the EqA") claim at paragraphs 2.13 to 2.18:

> "***EQA, section 15: discrimination arising from disability***
>
> **2.13. Was the claimant treated unfavourably because of something arising in consequence of her disability.**
>
> **2.14. The "something arising" is pleaded as the claimant's sickness absence from 20/07/17.**
>
> **2.15. Did the respondent treat the claimant unfavourably by:**
>
> **i. Dismissing the claimant**
>
> **ii. Requiring her to resume her duties by 16/08/7 despite being medically certified as unfit to work (para 22 ET1)**
>
> **iii. Changing her duties and roles without warning, consultation or communication see 113 him to her, 20/07/17**
>
> **iv. And then replacing her altogether (para 22 ET1)**
>
> **v. Failing to contact or check on her following the sick note**
>
> **vi. Discussing her private life with "people in the village" including regarding her employment status**
>
> **vii. Informing her that her colleagues allegedly said they were not prepared to work alongside her and threatening to sue her**
>
> **viii. Stopping payment of her statutory sick pay without warning or notice.**
>
> **2.17. If so, including the dismissal, was that because of that sickness absence?**

2.18. If so, has the respondent shown that that unfavourable treatment was a proportionate means of achieving a legitimate aim?"

10. It dismissed her disability claims in the following findings:

"*Discrimination arising from disability*

5.51. The disability is epilepsy

5.52. The "something arising" in consequence of the disability is pleaded as the claimant's sickness absence from 20/07/17.

5.53. The GP signs her off for work place stress. All the notes are about work-related stress (68, 70, 94).

5.54. A petit mal was reported that evening, that is the evening of 19/07/17..

Mrs Wheatstone saw the GP the following day, saying she had had lots of petit mal. In spite of that, the notes are issued on the basis of work-related stress.

5.55. GP, in his more detailed later note confirming the diagnosis, does not make a connection between the epilepsy and the absences, save to say that in March 2018 she is going through a particularly stressful time (138).

5.56. On the medical evidence, the absence is not because of the epilepsy

5.57. We cannot infer, absent medical evidence, that these events caused an exacerbation in the epilepsy.

5.58. The absence did not arise in consequence of the disability. We cannot therefore consider the list of instances of unfavourable treatment as being related to the disability."

11. There were other findings in relation to reasonable adjustments, but they do arise for consideration on this appeal.

12. I should add that, at paragraphs 4.14 to 4.24, the ET had given itself a detailed self-direction of the law as it applied to s.15 of the **EqA**, including guidance given by the Employment Appeal Tribunal in **Pnaiser v NHS England and Coventry City Council** [2015] EAT 0137. No purpose is served by repeating those paragraphs here other than to set out the terms of Section 15 of the Act:

"15 *Discrimination arising from disability*

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

13. The appeal was rejected on the sift by Her Honour Judge Eady QC, as she then was, who considered, put shortly, that the Tribunal was entitled to reach the conclusion that it did on the basis of the medical evidence before it. At a Rule 3(10) Hearing His Honour Judge Auerbach permitted the appeal to proceed to a Full Hearing on an amended ground relating to the s.15 claim and the finding that the Claimant's sickness absence was not something arising out of her disability.

14. As the wording of the amended grounds differ slightly from HHJ Auerbach's reasons, I shall set out the latter as reflecting the issues before me today. The Judge said that it was arguable that the ET erred (a) in concluding that its conclusion was not supported by the medical evidence having regard to the entries in the GP records (as opposed to, merely, the contents of the fit notes); and (b) in concluding that it could not so find, absent supporting medical evidence, having regard to the evidence of the Claimant given in her impact statement.

15. I will consider the documentation which was before the ET and which bore on the issue of the Claimant's health as relevant to the issue on appeal. The Claimant's principal written statement refers to her having been stressed and panicky following her shift on 19 March her having a petit mal when speaking to her mother. When her partner came home, she had another panic attack and very strong petit mal.

16. The next day she went to her GP feeling more stressed and worried because she was not going to work and concerned that she would be sacked. She says that her GP, Dr Lacey, assessed

her and decided to sign her off work for a month to allow her health to improve. This is the first of the two fit notes referred to above.

17. The statement refers to her continuing to feel stressed because of concern at being sacked, but as time went by and she heard nothing more her health improved. She records her GP deciding that she was still not medically fit to resume work and issuing the second fit note.

18. On the following day, 22 August, after her mother had dropped off the fit note, she received a text message saying that she no longer worked for the company and she should seek legal advice. She described being shocked, stressed and extremely upset by this text and suffered "petit mals". Her health deteriorated thereafter.

19. The "impact statement" referred to above is to a witness statement dated 22 February 2018 made following an Order of the ET. The purpose (see paragraph 1) was to set out the adverse effects that her condition had on her ability to carry out normal day-to-day activities, this being a prerequisite to establishing disability under Section 6 of the **EqA**. Disability had not by that stage been admitted; see paragraph 2.11 of the reasons which records that the Respondent accepted that she met the definition of disability "at the Hearing."

20. The witness statement refers to the Claimant having suffered from epilepsy from 1997 and that a work-related incident triggered epileptic seizures and depression (stress and anxiety) from 19 July 2017 after which she was signed off work. It goes on to say that her epilepsy was largely under control but that she occasionally had "petit mals" when she encountered stress. The remainder of the statement is, as would be expected, a statement of her then current state of health and the effects. It refers to increasing petit mal seizures as well as panic attacks which in turn has led to depression.

21. The effect on her everyday life are, understandably, referred to in the present tense. This information must be inevitably be of limited assistance to a Tribunal considering not whether the Claimant had a disability but whether of the sickness absence following 20 July was something related to it. The ET also had a letter from her GP dated 15 March which confirmed the diagnosis in 1997 and recorded that the Claimant had thereafter been on medication. The letter states that the seizures had generally been well controlled but "***in recent months*** she has had an increase in seizure frequency…" (emphasis added).

22. Finally, the ET had before it a printout of GP notes. The first relevant entry is dated 20 July 2017 and records the history given by the Claimant of what happened the previous day. It contains the entry "lots of petit mals" and notes that the Claimant was looking at getting a solicitor involved and that there was a possibility of a claim of constructive dismissal.

23. In her skeleton argument prepared for the Rule 3(10) Hearing, the Claimant pointed to the sparse nature of the medical notes and the fact that the fit notes referred only to "work-related stress" without further explanation. It went on to argue that this was not enough to satisfy the task which the Tribunal was conducting. It points out, too, that the Tribunal relied on the GP's letter of March 2018, "yet this was only a status letter from the GP not dealing with the absence or link between her stress and disability". This is, with respect, a curious complaint because the burden of establishing disability lay on the Claimant and the documents which the ET was commenting on were simply those which she had provided.

24. In her skeleton argument for the present hearing the Claimant seeks to argue that the Tribunal should have reached the conclusion that the sickness absence was "something related to disability" essentially because the absence "clearly had more than one causal element" including

her epilepsy. She relies on the passage from the Judgment of Simler P in **Pnaiser v NHS England**, namely paragraph 31(d):

> **"(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability."**

25. However, the passage must be put in proper context by reading the passage immediately following:

> **"(e) For example, in Land Registry v Houghton UKEAT/0149/14 a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact."**

26. In my judgement, read together, these passages are of little relevance to the straightforward factual question before this ET, namely was the Claimant's sickness absence something which arose in consequence of the Claimant's epilepsy? No issue arose to the other elements of what is said to have flowed from the sickness absence – the ET never reached that stage in the light of its primary finding.

27. Another way of phrasing the relevant question using ordinary language, and not that of the statue is "what was the cause of her sickness absence?" That is not something which a Tribunal can establish other then by reference to medical evidence and, possibly, from evidence from the Claimant herself, insofar as that augments the medical evidence. However, where there is a conflict between the two, it would be unsurprising if an ET preferred evidence from a medical practitioner.

28. In the present case, the GP diagnosed "work-related stress" on the two occasions that a fit note was issued. Although reference was made to the Claimant having reported petit mals, this formed no part of the diagnosis and as the Claimant herself pointed out the March letter from the GP did not deal with the absence or link between her stress and disability.

29. It seems to me unarguable that the ET's finding that the reason for the sickness absence was not the disability - epilepsy - but work-related stress was one which was plainly open to it. The ET had medical evidence before it, as well as the Claimant's own statement that the incident on 19 July triggered not only seizures but depression in the form of stress and anxiety. The March letter referred to an increase in seizures "in recent months." It is a moot point whether that could possibly be taken as a reference to July and August the previous year.

30. Having considered all the evidence with care, I find myself in agreement with the comments of HHJ Eady QC at the sift, namely that the ET was entitled to attach greater weight to the medical evidence, which made no reference to there being a connection between the Claimant's epilepsy and her absence at work. I go further: there is little or nothing in the Claimant's evidence from which a contrary conclusion could have been drawn. In the circumstances, I conclude that the Tribunal was entitled to reach the conclusion it did from the evidence that was before it and the appeal is dismissed.