



EMPLOYMENT TRIBUNALS

Claimant

Mr D. Janssen

v

Respondent

Caffe Nero Ltd

PRELIMINARY HEARING

London Central video hearing

On: 5 June 2020

Before: Employment Judge Goodman

Appearances

For the Claimant: in person

For the Respondent: Mr. C. Rajgopaul, counsel

JUDGMENT

1. The claim for unfair dismissal is dismissed on withdrawal
2. The claim for unpaid wages is dismissed on withdrawal.

CASE MANAGEMENT SUMMARY

1. Listing the hearing

1.1 The case is already listed for **final hearing** on all issues on **20-23 October 2020**. It is expected that this will take place at Victory House as already notified.

1.2 An **open preliminary hearing** was listed for **Thursday 18 August**, for a remote video hearing. This hearing is to decide the respondent's applications to strike out the claim, alternatively for a deposit order, as set out in their letter dated 21 May 2020.

The complaints

1. By a claim form presented on 4 February 2020, the claimant brought complaints of unfair dismissal, unlawful deductions from wages, and disability discrimination. The respondent defended the claims.

2. Today the claimant withdrew the unfair dismissal claim because he did not have two years' qualifying service at the date of dismissal, and the unlawful deductions

claim because he has since been paid the outstanding sum due and there is no longer a dispute for the tribunal to resolve.

3. The disability claims were discussed and clarified. The claimant had had none but the most basic legal advice. It was not clear whether there is in fact a claim of direct discrimination but that is included in the list of issues as a precaution.

The issues

4. I now record that the issues between the parties which will fall to be determined by the Tribunal are as follows:

5. *Disability*

- a. Does the claimant have these physical or mental impairments, namely:
 1. Gastritis?
 2. Migraines?
 3. Anxiety and depression?
 4. Bipolar disorder?
- b. If so, does any impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
- c. If so, is that effect long term? In particular, when did it start and:
 - i. has the impairment lasted for at least 12 months?
 - ii. is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

- d. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

6. *Section 13: Direct discrimination on grounds of disability*

- a. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:
 1. Refusing toilet breaks when on day shift? (until 17 August 2019)
 2. Compelling him to work overtime on a night shift
 3. Dismissing him
- b. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant has not named comparators and relies on hypothetical comparators.

- c. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- d. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

7. Section 15: Discrimination arising from disability

- a. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is that because he was depressed and unable to attend a doctor's appointment or respond to the respondent's enquiries as to when he would attend work, he was dismissed.
- b. Does the claimant prove that the respondent treated the claimant as set out in paragraph a. above?
- c. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?
- d. Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? (The respondent has not so far pleaded this).
- e. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

8. Reasonable adjustments: section 20 and section 21

- a. Did the respondent apply the following provisions, criteria and/or practices ('the provisions') generally, namely:
 - (i) the requirement to work a shift without taking a toilet break
 - (ii) the rules about how to notify absence from work
 - (iii) the requirement not to finish the night shift until all tasks were completed, causing compulsory overtime working.
- b. Did the application of any such provision put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:
 - i. his gastritis required frequent toilet breaks
 - ii. long hours on night shift aggravated anxiety and depression
 - iii. migraine made it difficult to take action to contact the respondent
 - iv. depression made it difficult to contact the respondent
- c. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however

it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

- i. Permitting toilet breaks
 - ii. Allowing him to finish the shift punctually
 - iii. Relaxing the rules about contact during absence
- d. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above?

9. Time/limitation issues

- a. The claim form was presented on 4 February 2020. Accordingly any act or omission which took place more than 3 months before the claimant approached ACAS for Early Conciliation (day A) is potentially out of time, so that the tribunal may not have jurisdiction.

Note: the early conciliation certificate was not found in the hearing bundle. It would be helpful if it was available for the next hearing. The tribunal will not decide at that hearing whether any claim is out of time and whether time should be extended, but it will take account of time issues when assessing the prospects of success.

- b. The respondent argues that events occurring when the claimant was at work are out of time. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- c. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

10. Remedies

- a. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- b. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

Other matters

11. If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

12. The respondent has applied to strike out the claim (1) because it is scandalous or vexatious having regard to evidence of the claimant's activity when not at work during the relevant time period and/or (2) because it has no reasonable prospect of success. Alternatively, the respondent asks the tribunal to order payment of a deposit under rule 39 because the claimant has little reasonable prospect of success. These applications are listed for an **open preliminary hearing on 18 August 2020**.
13. Some disclosure has taken place. I discussed with the claimant how to apply for his UK GP records, which postdate the dismissal, and of the need to collect together and disclose as many of his German records as he could. He understands a German doctor is not able to disclose records unless he attends in person, which current travel restrictions prevent him doing, although he will discuss with the practice whether there is a means to obtain the records given current difficulties and the tribunal requirement to disclose documents relating to the conditions he asserts are disabling. He believes there are some paper records at home in Stuttgart, and he will ask his parents to find them.
14. We also discussed the need to collect and disclose emails about his work and non-work activity at the time of and since dismissal, having regard to the social media evidence the respondent has collected and will be rely on at the next hearing. Finally, it was explained that a tribunal considering a deposit order will want evidence of his ability to pay.
15. It was explained to the claimant that he may want to prepare a witness statement to give his account of the social media material.
16. I made the following case management orders in preparation for the open preliminary hearing. There may be further case management at the next preliminary hearing, when the respondent has considered whether any disability issue is or is not in dispute.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1 The parties are ordered to complete mutual disclosure of documents relevant to the issues identified above by list and copy documents, including medical records, so as to arrive **on or before 6 July 2020**.
- 1.2 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

- 1.3 The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

2. Bundle of documents

- 2.1 The respondent is to prepare a single joint bundle of documents for the Preliminary Hearing and send it to the claimant by **20 July**.

3. Witness statements

- 3.1 Any witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 3.2 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 3.3 It is ordered that witness statements are exchanged so as to arrive on or before **Tuesday 11 August**.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Goodman

Date:

JUDGMENT and SUMMARY SENT to the PARTIES ON

12/06/2020

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FOR THE TRIBUNAL OFFICE