



“Whether the claimant is and was at all material times suffering from a disability as defined in section 6 of the Equality Act 2010 and if so whether the respondent knew or ought reasonably to have known that the claimant suffered from such a disability”.

- 2 Although this hearing was listed for one day, in the event it took two days in order to hear preliminary submissions, the evidence, cross-examination and final submissions and it was necessary for me to reserve judgment.
- 3 In advance of the first day of hearing I had read the considerable documentation which had been prepared. The witnesses in the case were the claimant on her own behalf and the respondent on her behalf: Mrs Thubron also called one witness. There were issues as to additional witness evidence which the claimant wished to call as set out in the following paragraphs. A bundle of documents was provided which ultimately ran to 239 pages.
- 4 Prior to me commencing the hearing the respondent, through her representative, had communicated that she had appeared before me many years ago when I was sitting in a different judicial capacity. I responded that I had no recollection of her but the matter was put to the claimant and she confirmed that she had no objection to me continuing to sit and hear this preliminary matter.
- 5 Preliminary issues were raised before I commenced hearing evidence. The claimant stated that she had discovered from the CPS that the respondent had obtained access to a private document namely the claimant’s victim impact statement which was prepared within criminal proceedings against a person who had been prosecuted for an assault upon her and she objected to enquiries which the respondent had been making in order to obtain what she regarded as a confidential document. There was already reference in the bundle to documents indicating that the respondent was seeking details about the criminal proceedings against a third party in relation to which the claimant was the victim in which the respondent was seeking to check as to details which had been given by the claimant. The claimant took exception to these activities on the part of the respondent and had made various complaints regarding this. For the respondent it was said that the enquiries were legitimate and the victim statement was relevant with respect to statements which the claimant had made as to her disabilities. I found no basis upon which I needed to make any order with regard to that evidence or the enquiries made by the respondent.
- 6 The claimant further suggested that the respondent’s amended response was out of time and should be ruled as inadmissible but having heard representations there were no bases for the making of such an order.
- 7 The claimant requested leave to put in additional correspondence with regard to medical issues. Ms Hogben complained that the correspondence was late and outside the timetable which had been set in the management order and that in any event the further documentation was irrelevant. Having read the documents I considered that it was reasonable for them to be added to the bundle and their relevant and significance could be considered during the preliminary hearing.
- 8 The remaining preliminary matter was as to what was described as a “statement” by a friend and potential witness of the claimant which was in the form of a questionnaire. That person’s name had featured in the narrative from both claimant and respondent. The claimant wished to rely upon the statement.

However, the respondent objected to this as the statement had not been exchanged as a witness statement in accordance with the management directions and the document referred to was unsigned, undated and had no statement of truth. In addition, there was no reason why the person could not have been called as a witness. The claimant said that the potential witness was not available to give evidence. I held that the questionnaire document could be put in by the claimant but I explained that I could give very little weight to such a document if the witness was not present in order to give evidence and be cross-examined.

9 On the first day 27 July 2018 I then heard evidence from the claimant during which she referred to correspondence and documents of a medical nature within the bundle and maintained that she had two relevant disabilities namely irritable bowel syndrome and post-concussion syndrome. She was cross-examined at length by counsel for the respondent.

10 At the commencement of the second day of hearing 12 September 2018 further preliminary issues were raised. Firstly, the claimant produced a statement by Jodie McMaster, a former employee of the respondent. Ms McMaster was present at the Tribunal in order to give evidence.

Ms Hogben objected on the basis that such witness evidence was too late and it was noted that the statement by Ms McMaster was dated 6 September 2018 but had not been sent to the respondent prior to the hearing on 12 September. Furthermore, she stated that the evidence of Ms McMaster was irrelevant to the issues of the preliminary hearing and could not assist the Tribunal in ascertaining whether the respondent had actual or constructive knowledge of the claimant's disabilities. She said that it was clear that the evidence was prejudicial and was seeking to show that the respondent had "form" in treating employees unfairly in relation to disabilities.

11 X stated that earlier this employee had been referred to as Jodie McAllister which was an incorrect name and this had made it difficult for her to be traced.

12 Ms Hogben submitted that the evidence was purely prejudicial and should not be admitted. In addition, the evidence was obtained after the claimant had given her own evidence and been cross-examined.

13 The claimant argued that the evidence of Ms McMaster was relevant as to credibility and that bearing in mind her own credibility had been brought into question, it was appropriate for her to be allowed to produce evidence from Ms McMaster and this also answered the suggestion that the claim was vexatious. X argued that the respondent was herself calling evidence to challenge the claimant's disability. Ms Hogben pointed out that the respondent's witness statement was one of fact not as to credibility.

14 Having considered these issues I decided that it was appropriate for me to read the statement by Ms McMaster. Having done so I held that the evidence would not be of assistance in determining the preliminary issues and that it related to the employment of another employee at a different time and that it was not appropriate to get into examination of the circumstances of that employee's employment or the relations between her and the respondent. I noted that the disability involved with Ms McMaster was entirely different from that which applied in the present case.

- 15 As a further preliminary issue the claimant asked for additional medical correspondence to be added to the bundle and this was agreed.
- 16 Finally, the claimant produced a signed statement of truth in relation to the potential witness and asked that his evidence be admitted and considered by the Tribunal. The respondent's counsel objected to the lateness of this and the fact that the evidence was signed following the claimant having been cross-examined. I held that I would consider the answers in the document now signed by the potential witness but again drew the claimant's attention to the fact that little weight could be attached to this, as he was not present to give evidence or be cross-examined.
- 17 Having heard the evidence and considered the documentation referred to, I find the following facts:-
- 17.1 The respondent has practised as a solicitor for 40 years as a sole practitioner. Her practice premises have been in Durham City for nine years. She is a sole practitioner and employs two legal secretaries on a part time basis. Her office premises are small, consisting effectively of two rooms, one of which is the reception area in which the secretaries also work and the other is the respondent's office where she sees clients and undertakes her own office work.
- 17.2 In October 2017 the respondent advertised a vacancy for a part-time legal secretary to work specifically on Monday and Friday each week.
- 17.3 The claimant responded to the advertisement on the Jobcentre website and applied for the role and submitted her CV. The claimant had been a student at Durham University taking a degree course in law. The claimant's CV referred to her being a "well organised, enthusiastic and highly motivated individual" and made reference to her organising charity fundraising events.
- 17.4 The respondent interviewed the claimant. It was the claimant's case that during that interview there was discussion about the fact that the claimant was taking a year out of university and that this was related to her health problems and in particular her irritable bowel syndrome. The respondent denied that there had been any mention of either the disability or the fact that the claimant was taking time out but the respondent stated that she did not query how the claimant, if she was still undertaking her law course at the University, would be able to work two days a week as a secretary but stated that she considered that this was a matter which the claimant would have been able to resolve herself in order to undertake her commitments. There were no notes of the interview and no subsequent correspondence referring to any health problems as far as the claimant was concerned. I do not find that there was any reference at the interview to the claimant having irritable bowel syndrome. The claimant applied for the position notwithstanding that she had no legal experience of a practical nature and confirmed that she had no audio typing experience. The respondent felt that the claimant would be able to undertake the duties required and decided to offer her work on a trial basis and invited her to come to the office for a day's training on 19 October 2017, training being given by the respondent's other secretary Christine Proudlock.

- 17.5 The respondent did not find the claimant to be efficient in her duties but did not raise this formally as she was hoping that as time went on the claimant would improve in her performance.
- 17.6 During the week commencing 13 November 2017, the claimant agreed that she would cover extra days because Christine Proudlock was on holiday. On Thursday, 16 November 2017 Mrs Thubron received an early telephone call from the potential witness, described as the claimant's friend. He informed Mrs Thubron that the claimant had been punched in the head by a student at an event the previous evening and that X had been taken to hospital but then discharged. However, she would not be at work that day because she was "tired." Mr Ruparelia agreed that he would come into the office that day so that he could answer the telephone for the respondent. Mrs Thubron agreed and he undertook those duties. The next day, Friday 17 November X asked the respondent if she could borrow a pair of crutches which were in a cupboard at the respondent's premises. The claimant worked at her normal duties on 17 November 2017.
- 17.7 On Monday, 20 November the claimant attended at work as normal. She was accompanied by the potential witness and she asked if Mrs Thubron would mind if he covered her work for an hour as she had appointments to see the Police and the University about the assault case. In the event X did not attend for appointments but spoke to the Police and the University by telephone. The respondent could hear the claimant and the potential witness talking in the reception area. On two occasions she came through and said that the potential witness was free to leave and did not have to remain, but in the event he stayed all of the day.
- 17.8 By this stage Mrs Thubron decided that she did not feel that the claimant was suitable for the post of part-time legal secretary on a permanent basis and because of this she continued to look for other applicants who were answering her advert.
- 17.9 On Thursday, 23 November 2017 the respondent received an e-mail from the claimant stating that her GP had signed her off as not being fit to work until 15 December 2017 but that she was sure there would be a "big improvement between now and then".
- 17.10 On 30 November 2017 Mrs Thubron e-mailed the claimant to tell her that her services would no longer be required and she wished her well and attached a payslip and P45.
- 17.11 The claimant replied to the e-mail next day and stated that she acknowledged that the business needed a regular member of staff. In the e-mail she did not refer to any disability or suggest that the dismissal was connected with any disability but she did take issue as to calculation of holiday pay and requested one day's statutory sick pay.
- 17.12 On 5 December 2017, having spoken to her accountants, the respondent replied to the claimant stating that she was not entitled to statutory sick pay due to her length of service and that holiday pay had been recalculated. An amended payslip and P45 were sent.

- 17.13 On 7 December the claimant again e-mailed Mrs Thubron about holiday pay, notice pay and statutory sick pay saying that she had spoken to ACAS but again she did not refer to any disability or make any suggestion that the dismissal was connected with that.
- 17.14 Mrs Thubron replied the same day to communicate that no further payments would be made for the reasons indicated. The e-mail explained that the dismissal was due to the claimant's disappointing work ethic and attitude.
- 17.15 From the evidence of the claimant it was clear that she had suffered from irritable bowel syndrome from 2012. This was treated by medication which the claimant said was obtainable by her "over the counter" rather than by prescription by her GP. There was no incident during the employment whereby the claimant requested or indicated that she expected adjustments to be made to deal with any symptoms of irritable bowel syndrome. From the evidence it appeared that the IBS was a condition which was managed by medication. I found no convincing evidence of any discussion either verbally or in correspondence about irritable bowel syndrome during the claimant's employment.
- 17.16 There was evidence that the claimant sustained an injury during the criminal assault which was described. This led to the claimant initially having one day off work and subsequently being signed off by her GP for what was expected to be a short period of time. Apart from the sick note, no other documentation was provided during the time of the employment as to the post-concussion syndrome, the disability about which the claimant subsequently claimed. There was reference during the employment to the claimant having suffered from concussion as a transient condition expected to be of short duration.

18 **Submissions**

**Respondent**

- 18.1 Ms Hogben submitted written submissions. As to the preliminary issue of disability, she referred to the statutory test in section 6(1) of the Equality Act 2010 and to paragraph C4 of the Equality Act 2010 "Guidance on matters to be taken into account in determining questions relating to the definition of disability". She dealt with the issues of substantiality and long-term and the concept of likelihood referring to **SCA Packaging Limited v Boyle [2009] UKHL 37**.
- 18.2 As to the two claimed disabilities she submitted as follows:-
- Post-concussion syndrome – she pointed out that the assault was on 16 November 2017 and that following this the claimant said that she would be suffering from concussion "for a few days". She submitted that the evidence supplied by the claimant did not support the suggestion that the condition was long-term. Furthermore, although the claimant maintained that the condition had a substantial adverse effect on her ability to carry out day to day activities there was evidence that she had been able to set up two new businesses in December 2017 and February 2018. Additionally, tests carried out in February 2018 and supported by evidence produced by the claimant stated that her immediate memory was good

although her delayed recall was less good and in terms of concentration she was able to deal with tests reasonably well. Also, she had been able to start riding again without difficulty. Ms Hogben suggested that the evidence by the claimant was exaggerated. As to the respondent's knowledge she submitted that Mrs Thubron had no knowledge actual or constructive with regard to the medical condition referred to.

- 18.3 Irritable bowel syndrome – Ms Hogben conceded that the claimant had this condition although drew attention to the fact that the claimant did not provide disclosure of her full medical records. The medical report dated 20 October 2014 indicated that there was nothing in the GP records about irritable bowel syndrome between July 2012 and April 2014. The victim impact statement at 214 in the bundle included a statement by the claimant that prior to the assault she was an individual who had led a full and active social life and worked well under pressure. This conflicted with the suggestion that irritable bowel syndrome had a substantial adverse effect on her ability to carry out day to day activities.

She submitted that neither the respondent nor her secretary heard any reference from the claimant to her suffering from IBS. The first time they knew of this was when the claimant included it in her Tribunal application form which the respondent saw at the beginning of March 2018.

The claimant had suggested that she mentioned her disabilities to ACAS but it was submitted by Ms Hogben that these were not specific references. She also referred to the fact that the claimant was conducting a vendetta against Mrs Thubron and this was shown by her seeking to extend the proceedings and by her campaign of reporting Mrs Thubron to Durham Police, CPS and at the Solicitors Regulation Authority. She referred to the impact which this had had upon Mrs Thubron.

### **Claimant**

- 18.4 X made detailed submissions on her own behalf. She referred to the notes which had been attached to the summary of the preliminary hearing before Employment Judge Johnson where he had set out at some length relevant law and authorities as to disability. With regard to post-concussion syndrome she referred to the appropriate definition of the word 'likely' and suggested that her post-concussion syndrome fell within the definition of a condition which was likely to be long-term.
- 18.5 She submitted that with regard to IBS she had dealt with this by over the counter medication, namely Loperamide and that the condition was managed by effective medical treatment and she referred to section 136(5) submitting that but for this medication the effects of the symptoms of IBS would have interfered with her ability to carry out day to day activities.
- 18.6 She challenged the fact that Mrs Thubron maintained in evidence that if IBS had been mentioned by the claimant she would have mentioned this because Mrs Thubron's daughter suffers from the same condition. She maintained that that evidence was incorrect and showed lack of empathy on the part of the respondent.

- 18.7 As to post-concussion syndrome, the respondent had said that she saw no signs of injury upon the claimant when she returned to work after the assault, but that she did have evidence that the assault had occurred. The claimant maintained that her evidence as to knowledge of IBS and as to knowledge of the post-concussion syndrome should be accepted. She maintained that the evidence which she had provided, although referring to post traumatic stress disorder, indicated that that was linked with post-concussion syndrome.
- 18.8 She submitted that she was still suffering from the effects although she remained to have further tests carried out. She challenged the suggestion that her performance at her work had been unsatisfactory. Mrs Thubron had not undertaken any review and there was no evidence that she had interviewed her or written to her with regard to her performance. She maintained that it had been made clear that she was taking time out from University because of medical problems and that Mrs Thubron knew of this specifically and that it would have been obvious in any event. She submitted that she was being referred to a post traumatic neurology clinic and that the respondent had not produced any medical evidence to contravene what she had said. She maintained that her disabilities were substantial and that Mrs Thubron knew of the disabilities.

19 **The law**

In dealing with these preliminary issues the relevant law is section 6 of the Equality Act 2010 which states as follows:-

- “6 Disability
- (1) A person (P) has a disability if –
    - (a) P has a physical or mental impairment; and
    - (b) The impairment has a substantial and long-term effect on P’s ability to carry out normal day to day activities.
  - (2) A reference to a disabled person is a reference to a person who has a disability.
  - (3) In relation to the protected characteristic of disability –
    - (a) A reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
    - (b) A reference to persons who share a protected characteristic is a reference to persons who have the same disability”.

Account has also been had to the provisions of the Act dealing with the application of the statutory definition of disability.

20 **Findings**

20.1 **Irritable bowel syndrome**



I have considered the reports and documents provided by the claimant as to IBS and the various items of medical records and correspondence. I have also taken into account the evidence of the claimant as to this condition. I consider that at the relevant time, namely from her recruitment by the respondent up to the termination of that employment, the claimant was suffering from irritable bowel syndrome and that this is a disability within the legal definition. It was a condition which was being controlled by medication which was self-prescribed. Despite the fact that there was no comprehensive medical report or letter from a GP providing an outline of the condition and its relevance at the time, I am satisfied that the claimant did suffer from this disability.

- 20.2 As to knowledge, I find that the respondent did not have actual or constructive knowledge of the condition. I accept the evidence of Mrs Thubron that the claimant did not make any reference to irritable bowel syndrome either at the time of her application, during interview or at any time during her employment up to the time she was dismissed. I find the account by the respondent supported by her witness to be convincing. There was no credible evidence from the claimant either in writing or in her testimony which persuaded me that irritable bowel syndrome was raised as an issue at any time or that anything occurred which would or should have led Mrs Thubron to believe that the claimant was suffering from that condition. The claimant's own evidence was to the effect that it was well controlled by the medication which she preferred to obtain over the counter and that in reliance upon that medication she was able to undertake all of her usual day to day activities including being a regular organiser of events.
- 20.3 The suggestion from the claimant that it was made clear to the respondent or was obvious from the circumstances that the claimant had taken time off from her law course due to a disability was entirely unconvincing.

20.4 **Post-concussion syndrome**

The medical evidence which was provided by the claimant in relation to this condition was unclear. Although there was early reference to concussion immediately following the assault, that is generally a transient condition which is not likely to have a long-term effect. The fact that a person suffers from concussion following a trauma to the head, would not lead to any suggestion or suspicion that this is likely to be a long-term syndrome. In the claimant's case, she returned to work within a day of the assault and was then signed off by her GP with a condition and with a supported e-mail from the claimant and the suggestion that this was not likely to be a long-term problem.

- 20.5 Subsequent medical evidence suggests that the claimant's problems were related to post-traumatic stress syndrome and that it was about this that she was receiving further medical assistance. However, by the time of her dismissal there was no evidence to suggest that she was suffering from a disability.
- 20.6 The evidence which the claimant submitted in relation to the investigations which were being conducted was not convincing and was not by the relevant level or specialty of medical personnel who would be able to give

evidence sufficient to support the fact that the claimant was suffering from post-concussion syndrome and indeed even at the time of the hearing the claimant was awaiting undergoing relevant tests in order to determine the true nature of her medical problems and whether they were indeed physical, namely post-concussion syndrome, or psychological namely post-traumatic stress disorder, the indication being given that it was more likely to be the latter which was the long-term difficulty.

Accordingly, I do not find on the evidence that the claimant was suffering from post-concussion syndrome as a disability at the relevant time. For completeness I find that the respondent did not and could not have known that the claimant suffered from any such disability.

- 20.7 In resolving conflicts of evidence between the claimant and respondent I found the evidence of the respondent to be more credible and compelling. I found that the claimant had a tendency to exaggerate her evidence and her attitude in relation to the proceedings appeared to amount to a vendetta against the respondent.
- 21 In view of the above findings, the Tribunal does not have jurisdiction to hear these claims of disability discrimination and accordingly both of these claims are dismissed.
- 22 There remain two money claims for annual holiday and notice pay. These are capable of being dealt with by a short one hour hearing. If the claimant confirms within 21 days of receiving this decision that she wishes the matters to proceed then they will be listed for a one hour hearing Judge sitting alone.

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**EMPLOYMENT JUDGE SPEKER OBE DL**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON  
8 October 2018**

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