



# EMPLOYMENT TRIBUNALS

## Claimant

Miss N Smith

v

## Respondent

First Choice Bakers Limited

**Heard at:** London Central, by CVP

**On:** 8 July 2020

**Before:** Employment Judge A James

## Representation

**For the Claimant:** In person

**For the Respondent:** Mrs M Gyasi, lay representative

## JUDGMENT

- (1) The claimant has a disability within the meaning of section 6 Equality Act 2010.

## SUMMARY REASONS

1. The claimant has brought claims for disability discrimination and unpaid wages. The claim was listed today for an open preliminary hearing to determine the issue as to whether the claimant has a disability. The hearing had originally been listed for 1 May 2020 but that was adjourned to today's date because of the Covid-19 pandemic.
2. A bundle of documents has been prepared for this hearing, and the claimant has produced a witness statement. The claimant has affirmed that statement today and has been asked questions both by me and Mrs Gyasi.
3. Summary reasons are set out below, to assist the parties. Detailed reasons were given at the hearing and can be requested by either party as set out below, within 14 days of the date this judgment is sent to them. To determine whether the claimant has a disability, it is necessary to consider four questions. The first question is whether the claimant has a physical or mental impairment. In this case the physical impairment relied on is a hallux valgus, or bunion, on the claimant's right foot. That is not disputed.

4. Second, the claimant must show that the impairment had an adverse impact on her ability to carry out normal day-to-day activities. The claimant stated in her witness statement that the impairment affected day-to-day activities such as standing for a significant amount of time (which was part of her role at work, due to her working 10 hour shifts and having to stand up for much of that); climbing upstairs (which she had to do at work); carrying heavy weights (which again is part of her role at work, for example carrying boxes of patties and heavy jugs of water); and walking for a 'certain time with severe foot pain'. The claimant has provided further clarification today about the impact of the impairment on those activities. I am satisfied, based on the evidence presented, that those normal day-to-day activities were adversely affected by the impairment.
5. Third, the claimant must show that the adverse effect is substantial. In the Equality Act 2010, 'substantial' means 'more than minor or trivial'. Again, based on the evidence presented, I am satisfied that the impact is indeed more than minor or trivial. For example, the claimant cannot walk more than about 15 minutes, without suffering severe pain. Further, if she spends more than 15 minutes on her feet, she suffers pain.
6. The problem was so severe, that the claimant opted for elective surgery at the end of August 2019. She was waiting for over 3 years for that surgery. She had almost given up hope she would ever have it. For some 3 to 4 months afterwards, the claimant was even more severely affected. However, in any event I am satisfied that for a period of over two years leading up to the operation, the effect was substantial, and that continued beyond the date her employment ended on 14 October 2019.
7. Fourth, the claimant must show that the substantial adverse effect is long-term. That means 12 months or more. As will be clear from the above paragraph, I am satisfied that is the case.
8. Since the substantial adverse effect simply must be more than minor or trivial, establishing disability is not particularly difficult, where, as here, the claimant suffers a long-standing, chronic problem. I am satisfied that the chronic pain that the claimant suffered as a result of her impairment was more than minor or trivial, and that whilst she could still carry out the activities set out above, she could only do so by suffering significant discomfort. Hence, she has established substantial adverse effect.
9. I am therefore satisfied that the claimant does have a disability, and that her claim can proceed. Nevertheless, I have some concerns about the potential merits of the claimant's claims, particularly her disability discrimination claim, because of the issue of knowledge; and the wages claim, because of the rules relating to SSP. To assist the parties, I set out my provisional views below and make findings of fact relevant to the disability discrimination claims.

#### **Discussion of the claimant's claims**

10. Whilst the basis of claimant's claims has still to be finally clarified, it is reasonably clear that the claimant is alleging that she was constructively dismissed, as a result of the respondent not paying statutory sick pay during her period of absence from 25 August 2019 to the date of her resignation on 14 October 2019. It does not appear to be being suggested that the failure

to pay sick pay was direct disability discrimination i.e. because the claimant had a disability. It does however appear reasonably clear that the facts set out by the claimant would potentially be covered by section 15 of the Equality Act 2010, in that it is potentially unfavourable treatment because of something arising from the disability, i.e. the disability-related sickness absence following the claimant's operation on 25 August 2019. However, for an employer to contravene section 15, an employer must know about the disability.

Knowledge of disability – findings of relevant facts

11. More specifically, in relation to an allegation that the alleged unfavourable treatment suffered by a claimant was because of something arising from the disability, the employer must know, or have been reasonably expected to know, of the disability (Section 15(2)).
12. Given that today's hearing was not arranged to decide the issue of knowledge, I am not reaching any conclusion on that issue today. Nevertheless, I consider that it is proportionate to find the following facts, given that they were not in dispute at today's hearing and are clearly relevant to that issue. If the case does proceed, it will be for a full tribunal to decide the issue of knowledge, based on the facts found below, together with any submissions made in relation to those facts and the relevant law. What is said below is also potentially relevant to the judicial assessment which is to take place on 23 July 2020.
13. It was not in dispute today that the claimant completed two declarations about her health, one prior to starting work for the respondent, dated 29 January 2018, the other on 13 February 2018. In both, she confirmed that she did not have a disability or relevant health issues apart from, in the second declaration, a reference to Reynard's syndrome.
14. The claimant gave evidence today, which I accept, that she did not mention her bunion problem when she applied for a job with the respondent, because she had been unsuccessful in two previous applications, when she had declared the bunion problem. She thought that might have been the reason. It is understandable in those circumstances why the claimant did not declare that she had a disability. Further, it was not disputed, that the claimant did not during her employment, inform the respondent that she had a bunion problem. She simply coped as well as she could. When it became too much, she phoned to say that she was not well enough to come to work – but at no point did she say that it was because of her bunion problem.
15. The claimant had a discussion with her employer at the beginning of August 2019, to inform them that she was going to have a foot operation at the end of August. She did not at that stage say what the operation was for. The respondent did not know that the claimant had a bunion problem, or that was what the surgery was for, until the two sick notes were provided, in August and September 2019.
16. On that basis, it appears to me (although as stated above, in fairness to both parties these are not final conclusions on the issue) that the respondent did not have knowledge of the disability, at the time that it made the decision not to pay statutory sick pay. The respondent knew that the claimant had the impairment – the bunion problem - which gave rise to the disability. But it

appears to me the respondent did not know, and could not reasonably have been expected to know, that the claimant had a disability as a result. This is because the claimant had not provided any information to the employer, which would have led to it concluding that she was struggling to cope, due to the bunion problem.

17. Further, the fact that the claimant had undergone an operation and needed some time off did not in my provisional view put the employer on notice that she had a disability at that stage. Arguably, the respondent did not know that, based on anything said to them. Nor, arguably, did it have reason to conclude that the claimant would be on long-term sick leave because of the operation.
18. It appears from what the claimant said today that she is still suffering problems. But the question for the tribunal in due course to determine in relation to the 'long term' issue is not what has happened; but whether or not it should have been apparent to the respondent on the basis of what it knew, or could reasonably have been expected to know, in August/September 2019, that it was likely that the problems would be long term – or in other words, would last for 12 months or more. It appears to me that it would not have been reasonable for the employer to conclude that, based on the information that it had at the relevant time.
19. If the tribunal in due course arrives at the same conclusion on the issue of knowledge, the claimant's disability discrimination claim cannot succeed. I have with the agreement of the parties set up a further remote hearing which will take place **at 2pm on 23 July 2020**, when I will carry out a judicial assessment of the disability discrimination and wages claims. Details as to how to join that hearing are set out below. There are also potential problems in relation to the question as to whether the failure to sick pay is causally related to the disability related sickness absence. That will also be discussed at the judicial assessment hearing.

#### The wages claim - SSP

20. As for the wages claim for unpaid statutory sick pay (SSP), this depends on whether the claimant was eligible for statutory sick pay during her sickness absence. That in turn depends on whether her average weekly earnings (AWE) during the eight-week period leading up to her absence on sick leave, was £118 or more - that figure being the minimum AWE for her to be eligible for SSP in 2019/20. It is the respondent's position that the claimant's average weekly earnings were £49.58, well below the eligibility rate.
21. It appears that the main reason for the wages being low was because the claimant was on holiday for five of the weeks leading up to her absence, and when she returned in August, she was not given many shifts (She was on a zero-hours contract). Prior to the judicial assessment, it will be helpful if the respondent could provide further information in relation to the wages paid to the claimant. In Annex A below, I set out further directions. Since the claimant has queried in her claim whether she was paid the correct holiday pay, I have specifically made a direction relating to holiday pay.

Compliance with directions and the final hearing

22. There have been some issues in relation to the claimant's non-compliance with the directions made on 1 May 2020, in preparation for today's preliminary hearing. In particular, the claimant did not provide copies of medical records, or a witness statement relating to disability when she should have done. Mrs Gyasi, for the respondent, has nevertheless made every effort to ensure that a bundle of documents was prepared for the hearing, and included all the documents the claimant provided, even though she provided them late. This led to a further copy of the bundle having to be sent to the claimant, just a few days before the hearing took place.
23. Whilst I understand that the claimant has on going mental health issues, which affect her ability to engage with this case, I informed her that employment tribunal directions must be complied with, and that if she did not do so, and in the absence of specific medical evidence confirming that she was not able to comply (which has not been provided in this case) there could be two possible consequences. First, her claims could be struck out because of her failing to comply with the tribunal directions. Second, either alternatively or in addition, to the extent that Mrs Gyasi had to spend extra time preparing the case for hearing, because of the late disclosure of documents, the respondent would be entitled to apply for a preparation time order, in relation to the extra time spent.
24. The claimant also told me that she was going to be away for a month between the end of July and end of August, and would find it difficult to comply with any further directions made, in relation to the preparation of the case for a final hearing which is still listed for 2, 3 and 4 September 2020. The claimant has known about the final hearing for some time, and if that hearing is to go ahead, and the claimant does not prepare for it, her claim could be struck out not only because she hasn't complied with any further directions but also because she is not actively pursuing it. As I explained to the parties today, if the hearing does not go ahead in September, it would not be possible to relist it until July 2021 at the earliest. That is not in my view in either parties' interest.
25. Finally, the parties attention is drawn to the further case management directions set out below.

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Employment Judge A James  
London Central Region

Dated 9 July 2020

Sent to the parties on:

.10/07/2020.

For the Tribunals Office

Notes

Reasons for the judgment having been given orally at the hearing, and only summary reasons having been provided above, full written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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## ANNEX A – CASE MANAGEMENT ORDERS

1. **By 4pm on 27 July 2020** the respondent is to provide to the claimant and to the tribunal the following information:
  - a. a copy of the claimant’s contract, setting out the provisions relating to holiday and holiday pay.
  - b. details of the gross weekly wage paid to the claimant each week from 1 April 2019 to 14 October 2019.
  - c. details of the holiday pay paid to the claimant in about July 2019, together with calculations as to how that was calculated.
  - d. details of the wages paid to the claimant between 29 June and 23 August 2019, being the eight-week qualifying period, for the purposes of statutory sick pay.
2. **There will be a Judicial Assessment hearing held in private and conducted via cloud Virtual Platform (CVP) on 23 July 2020 at 2pm.** The joining details are the same as for the hearing held on 8 July 2020. **To join by web browser cut and paste <https://meet.video.justice.gov.uk/go/f26f90db-1dd4-45d9-9ba8-be85908b9aad/> into the Google Chrome browser and enter hmcts1212@meet.video.justice.gov.uk where it says “Conference alias of URI”. The Guest PIN is 0707.**