



EMPLOYMENT TRIBUNALS

Claimant: Ms J Rogers

Respondent: JMD Law Limited and Nigel Jones

Heard at: Cardiff (by CVP) **On:** 17 August 2020

Before: Employment Judge S Moore

Representation

Claimant: Mr Bromige, Counsel

Respondent: Mr Isaacs, Counsel

JUDGMENT

Ms A Rogers is a disabled person within the meaning of S6 Equality Act 2010.

The respondent's application for a strike out of the unlawful deduction from wages claim is refused.

The respondent's application for a deposit order in respect of the claims for unlawful deduction from wages, constructive / unfair dismissal and disability discrimination are refused.

REASONS

Background and introduction

1. This claim is listed for hearing over 8 days commencing on 7 October 2020. There have been a number of preliminary hearings previously. This hearing was listed to consider the above matters. One of the claimant's claims is disability discrimination (by association).
2. The hearing was conducted remotely by CVP. I heard evidence from Ms A Rogers. Before me was an electronic bundle of pages. I also had sight of skeleton arguments from both Counsel.

Findings of fact

3. I made the following findings of fact on the balance of probability.

4. Ms Angela Rogers is the Claimant's sister. The relevant period for the purpose of determining whether or not she is disabled is 5 February 2019 to 8 August 2019. On 5 February 2019 Ms Rogers suffered agonising abdominal pain which led to her hospitalisation. She was diagnosed with an acute bowel obstruction and underwent major abdominal surgery on 8 February 2019. Thereafter she was in a recovery period lasting 12 weeks during which she was unable to stand for any length of time, drive and needed assistance for day to day tasks such as cleaning and cooking.
5. The surgeon informed Ms Rogers that it was not clear what had caused the obstruction and that it could re-occur. Ms Rogers gave further oral evidence, which I accepted, that the surgeon informed her that she could be "very lucky" and not have any further symptoms or she could experience a further blockage.
6. Ms Rogers agreed when asked by Counsel for the Respondent that both she and the surgeon did not know what the future held.
7. On 31 May 2019 Ms Rogers did experience a further blockage. An ambulance was called but took some 3 to 4 hours to arrive. By the time the ambulance had attended the Claimant had been experiencing violent vomiting which apparently cleared the obstruction. During and immediately after these episodes the Claimant is in constant pain, very unwell and unable to stand for long periods. She has no confidence and she is nervous about going out socially.
8. I had sight of a letter from the Consultant, Ms Cornish dated 10 January 2020, there was no other medical evidence including no GP notes or Consultant notes. The letter from Ms Cornish was of little assistance as to whether or not the impairment was likely to be long term at the relevant time as it largely related to Ms Rogers' condition and episodes outside of the relevant period.
9. There was a matter of dispute that arose in reference to the first paragraph of Ms Cornish's letter which stated that since February 2019 that she had experienced 3 further admissions and one similar but less severe episode not requiring admission in the past few weeks. It was put, quite understandably, to Ms Rogers that this contradicted her impact statement which talked about only one episode which had not required hospital admission as being in May 2019. I accepted Ms Rogers' explanation that this must have been an error by Ms Cornish in the letter and that the only episode that she experienced that did not require a hospital admission did happen in May 2019. Therefore in summary Ms Rogers during the relevant period experienced two of these abdominal episodes, one in February 2019 the symptoms of which lasted for 12 weeks and a further one on 31 May 2019.

Conclusions

10. My conclusions are as follows: It was accepted between the parties that the issues concerning Ms Rogers disability solely related to whether or not the condition was long term. I accepted Mr Isaac's point in principle that there was generally a lack of medical evidence. I balanced this against the

evidence that I heard from Ms Rogers which was persuasive and cogent.

11. I have considered the Guidance on the Definition of Disability definition of “likely” (“could well happen”) and also the case law as referred to, in particular the guidance by Baroness Hale in **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission Intervening) (2009) ICR 1056** (the word 'likely' in the phrase 'likely to have a substantial adverse effect' meant 'could well happen' rather than 'probable' or 'more likely than not').
12. I must only take into account the information before me up to the date of the discriminatory act. I have balanced the lack of medical evidence against Ms Rogers witness statement and the impact statement and the evidence I heard under oath today. I found the evidence regarding what Ms Rogers had been informed by the surgeon in February 2019 to be particularly persuasive that she would be “very lucky” if the blockage did not re-occur. From this in my judgment, it was likely that the episodes would re-occur, and indeed a further episode did re-occur within a four-month time frame.
13. I have therefore concluded on this basis that on the evidence before me the substantial adverse effects were likely to have lasted more than 12 months and for these reasons I find that Ms Rogers is a disabled person within the meaning of Section 6.

The Respondent’s applications for a strike out / deposit order of the unlawful deduction from wages claim and Deposit Order in respect of the disability discrimination claim and the wrongful and constructive dismissal

14. The applications were refused for the following reasons.
15. Rule 37 (1) (a) of the Employment Tribunal Rules of Procedure 2013 (“the Rules”) provide that part of a claim may be struck out if it is scandalous, vexatious or has no reasonable prospect of success.
16. In respect of the strike out application, this is in respect of a claim by the Claimant for commission allegedly due under her contract of employment. There is a dispute between the parties as to the intentions of the parties at the time of entering into the contract which will require oral evidence. What was being asked of me by the respondent was, in effect to conduct a forensic analysis of invoices, spreadsheets and contractual terms in order for me to conclude that there were no reasonable prospects.
17. In my judgment this was not possible for me to do this based on the information before me, nor was it appropriate. These matters require evidence to be heard and proper examination of the documents at a full hearing and I was particularly mindful there has not yet been full disclosure.
18. In respect of the Deposit Order of course there is a different test, and that being one of little reasonable prospect of success under Rule 29. For the same reasons outlined above I am not able to say there are little prospects of success in respect of the wages claim.

19. Turning to the constructive dismissal claim and the wrongful dismissal claim.
20. The Respondent relies on statements the claimant is alleged to have made to other employees. If they are found to have been made they will undoubtedly require careful consideration as to how the impact on the Claimant's claims. The Respondent says they have been independently transcribed but this is not agreed by the Claimant. The CCTV footage and transcripts are evidence that will need to be heard before findings can be made.
21. Further, the Claimant's claim is not just about the Claimant's alleged behaviour when the conversation is said to have been recorded by the Respondent. The Claimant relies on pre and post alleged breaches to that event. Some elements of disclosure remain outstanding in relation to the transcripts. The invitation to a disciplinary hearing also covers other matters apart from the alleged statements by the Claimant. I am unable to say, without conducting a mini trial, that the Claimant's case has little reasonable prospect of success.
22. In relation to the application for a deposit order in respect of the disability discrimination claim. This is based on the Claimant's own witness statement failing to establish that the Respondent would have known about Ms A Rogers' disability. I did not have sight of that witness statement. The Claimant points to a letter from the Respondent dated 5 July 2019 in which they acknowledge she had requested to reduce her working days from 5 to 4 to care for her mother and sister – as being one example of evidence that will be relied upon in respect of knowledge and this reverses the burden of proof in any event. The author of that letter will need to give evidence and be cross examined about what he knew about the reasons they would need care.
23. Again this dispute of evidence points to the fundamental and important conclusion that evidence needs to be heard from both parties and tested about what the Respondent knew and what the Claimant said she had imputed to the Respondent.
24. The applications are therefore refused.

Employment Judge **S Moore**
Date 14 September 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON 22 September 2020

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FOR THE TRIBUNAL OFFICE