



## EMPLOYMENT TRIBUNALS

**Claimant**

**Miss R Sandhu**

**Respondent**

**Enterprise Rent-A-Car Limited**

v

### RECONSIDERATION PRELIMINARY HEARING

**Heard at: Watford**

**On: 13 February 2020**

**Before: Employment Judge Smail**

**Appearances:**

**For the Claimant: Mr B Beyzade, Counsel**

**For the Respondents: Mr B Mitchell, Counsel**

## JUDGMENT

The decision, judgment or order refusing the Claimant permission to add claims of disability discrimination relating to her own alleged condition rather than her father's condition, promulgated on 23 December 2019, is confirmed.

## REASONS

1. This is an application for a reconsideration, whether under Rule 70 or Rule 29, of my decision on the papers communicated on 23 December 2019 whereby I refused the claimant's application to amend the claim to add a claim of disability discrimination relating to her own alleged disability. The reasons I gave were, first, that the list of issues filed by the claimant on 11 June 2019 accurately reflected the claim made by the claimant in the particulars of claim based upon unfair dismissal and discrimination associated with her father's disability. Secondly, the claimant was dismissed on 15 May 2018. Dr Mackenzie, the claimant's GP, in a letter dated 15 May 2019 described onset of symptoms in March 2018. There was a two-month period of illness in 2017 which resolved,

the point being that any disability would not be established at the time of the respondent's dealings with the claimant prior to May 2018 which stretched back earlier than March 2018. I concluded that on the papers there was not a prima facie case of disability discrimination relating to the claimant's own alleged disability even before issues of time limits were considered.

2. As to time limits: I note Mr Beyzade's point that on an earlier occasion I extended time for the presentation of the claimant's associative discrimination claim based upon sickness suffered by the claimant.
3. The list of issues was filed further to the preliminary hearing that took place on 21 May 2019, when I extended time. The claim form was presented on 4 October 2018 and the claimant's length of service as an accounting payroll supervisor was between 1 June 1999 and 15 May 2018. That list of issues accurately sets out the claim as understood from the existing pleadings.
4. I will set out those issues in some detail and then set out the amendment so that one can see that there is substantive addition of claims rather than a re-labelling.

### **THE EXISTING ISSUES**

5. The issues as they presently stand are:

#### **Unfair Dismissal**

- 5.1 What was the permitted reason for the claimant's dismissal? The respondent relies on the permitted ground of capability, three years of alleged poor performance and potentially some other substantial reason for refusing to accept change within her department and a new reporting structure. The claimant asserts that the real reason for her dismissal was because of her father's illness.
- 5.2 Secondly, if it is accepted that the permitted reason was capability, did the respondent carry out a fair capability procedure? The claimant complains of failure of the respondent to allow the claimant the chance to improve her performance after the February 2018 oral warning; failure by the respondent to give a warning to the claimant that she would be dismissed if her performance did not improve; failure to address in the dismissal letter of 15 May 2018 the points raised by the claimant at the disciplinary on 8 May 2018 including relating to the time and attendance project; issues at the appeal. It is asserted that dismissal was pre-judged because there was a settlement offer. There was a refusal to grant a postponement to allow the claimant to get a union representative and it is said there was no consideration of sanctions less than dismissal. It is said there was inconsistency of treatment and that dismissal was outside the band of reasonable responses. There was, it is suggested, a failure to follow incremental disciplinary sanctions.

### Direct Disability Discrimination/Harassment

- 5.3 As to associative discrimination advanced both as direct discrimination and harassment, the claimant complained of the following:
- 5.3.1 Whether the claimant's father was at all times disabled for the purposes of the Act because he had cancer?
  - 5.3.2 Relying on a hypothetical comparator working as a payroll supervisor with a team to manage with a parent who does not have a disability requiring assistance, were there acts of less favourable treatment by the respondent because of her father's alleged disability and the need to assist him?
  - 5.3.3 Did on 8 February 2018 Steve Young, her immediate line manager, prevent the claimant from leaving work to go on approved time off to attend a hospital appointment with her father by overloading her with tasks to be done that day?
  - 5.3.4 Was she subject on 18 February 2018 to disciplinary proceedings and issued with a warning?
  - 5.3.5 In January to March 2018 did Mark Astil and Joanne Keeley hide information and did not reply to the claimant's emails?
  - 5.3.6 On 12 March 2018 the claimant was feeling ill with anxiety, stress and a sore eye but Steve Young refused the claimant permission to go home; however Jo and Mark Astil were allowed to go to GP appointments during the course of a normal working day; further, both Mark and Jo were allowed to have extended lunches, Jo was allowed to leave early from work to take her dog to the vet and even had extended lunches to take her dog for a walk;
  - 5.3.7 On 27 March 2018 Mark Astil extended Joanne Keeley's deadline but told Steve Young the claimant was late by 10 minutes;
  - 5.3.8 In the last week of March 2018 Sinita Johal was rude to the claimant about her arriving late from having been to the hospital;
  - 5.3.9 28 March 2018 Rob Taylor and Steve Young offered the claimant to leave under a settlement agreement and said "why don't you take time off with your Dad?"
  - 5.3.10 from 28 March until dismissal the claimant was excluded from the respondent's premises and told not to speak to colleagues;
  - 5.3.11 she was dismissed on 14 May.
- 5.4 Some of these are emphasized as harassment: for example on 8 February 2018 Steve Young prevented the claimant from leaving work to go on

approved time off to attend a hospital appointment with her father by overloading her with tasks to be done that day; and some of the direct discrimination allegations are then rephrased as harassment; but there is a coherent claim based upon associative discrimination relating to her father's illness and a positive case on unfair dismissal that the real reason for her dismissal was because of her father's illness.

- 5.5 At the open preliminary hearing it was mentioned that there was a desire to put an argument based upon the claimant's own alleged disability. I ruled that that had to be by way of amendment and an amendment was filed.
- 5.6 The factual background was not set out in any greater detail than was in the existing documentation. The existing documentation consists of two pages of the original claim form which require interpretation as to precisely what causes of action are in there; but it is discernible from them that claims relate to the claimant's relatives. There is an extensive detailed email called "further and better particulars", again which require some interpretation.

### **THE PROPOSED AMENDMENT**

- 5.7 The amendment that was sent in was "summary of proposed additional claims". Disability - it said the claimant suffers and suffered from anxiety, depression and stress which lasted at least 12 months at the material times in question. There was discrimination arising from disability under s.15. The claimant asserts that if she was unable to perform to the standard required by the respondent and/or to complete tasks within the appropriate timeframe set by the respondent and/or to follow and/or accept changes or reporting lines then it was in consequence of her disabilities which then ultimately led to an oral warning in February 2018 and then to her dismissal on 15 May 2018. So the timeframe envisaged by that averment is disability pre-existing both February 2018 and May 2018.
- 5.8 Failure to make reasonable adjustments is the next cause of action proposed. The PCP was for payroll supervisors to perform all tasks to a reasonable standard and/or to complete tasks within the appropriate timeframes. The adjustments were contended as follows, it being asserted that if the claimant was unable to perform to the standard required by the respondent and/or to complete tasks within the appropriate timeframe set by the respondent then it was incumbent upon the respondent to make reasonable adjustments which included but were not limited to: (a) reducing the claimant's workload and/or (b) providing the claimant with support and/or additional staff members to assist in the completion of her tasks and/or (c) giving the claimant additional time to complete the tasks; (d) referring the claimant to occupational health for guidance as to what steps to take to assist the claimant in her performance and/or acceptance of procedures and (e) reducing the sanction of dismissal to a final written warning.
- 5.9 Then there is proposed a section 13 claim of direct disability discrimination. The claimant relying upon a hypothetical payroll supervisor without a

disability. The claimant asserts that less favourable treatment included her not being allowed to work after normal working hours until certain works were completed, being subjected to disciplinary proceedings, being issued with an oral warning in February 2018 and being dismissed on 15 May 2018, not upholding her appeal heard on 17 August 2018.

5.10 There are passages in the various witness statements that have been put before me which are relevant. In the witness statement dated 11 June 2019, which was in support of the application for leave to amend and came in on the papers, the claimant said at paragraph 7 “I was dismissed for alleged poor performance dating back to some three years from dismissal on 15 May 2018. However, I believe that the company failed to take into account my disability when issuing me with an oral warning in February 2018 and then dismissing me on 15 May 2018” so it is implicit in that that there is a contention that she was disabled during the period of the three years poor performance.

5.11 There is then a passage in the witness statement that she relied upon successfully to get an extension of time for the presentation of the original claim and she writes at paragraph 14:

“As a result of the deaths of my brother and uncle as well as the illness of my father who was suffering from stage 4 cancer, I began to suffer extreme anxiety and depression. I notified the respondent of the deaths of my brother and uncle and submitted fit notes to the respondent from June 2018 to 4 October 2018 and I believe I was still under an obligation to do so until the outcome of the appeal hearing.”

5.12 There are other passages in her three witness statements. She has also prepared a statement for today which purports to set out evidence of a disability aimed towards the present application. Each witness statement she prepares is aimed at the relevant application and there is a danger that they are self-serving.

5.13 I indicated at the preliminary hearing that medical evidence would be appropriate. There was in the papers and I have seen before a short letter from Dr Ian Potheary dated 24 May 2018: Apparently this was submitted in the proceedings before the employer, that is to say, before it came to the tribunal. Dr Potheary wrote as follows:-

“To whom it may concern

I am writing to confirm that Ms Sandhu was seen by Dr Hart in April 2017. She has a history of difficulties at work causing pressures and relationship difficulty. This has had quite an impact on her causing anxiety and she has required treatment with medication. We have been seeing her ever since with the problem and she has been diagnosed with an anxiety disorder as a result of stress at work. She currently has to take Citalopram, Zopiclone, Diazepam and Propranolol as a result. The problems have got worse at work earlier this year after mentioning family illness to her workplace.”

5.14 So on the face of it that is of some assistance to the claimant. However, submitted along with the application was a far more detailed letter from the

same practice. Dr Potheary works for the Rudgewick Medical Centre as does Dr David Mackenzie and a far more detailed letter came in. It is fair to say I place much greater reliance on this because it purported to be more detailed.

- 5.15 At paragraph 1 he writes I can confirm that Ranjit, has been registered at Rudgewick Medical Centre since April 2010 and was diagnosed with anxiety and depression in April 2017. He goes on: "Ranjit has had 53 appointments in the past 14 months compared with 15 appointments over the preceding 5 years as well as 55 other telephone contacts and actions compared to 8 prior to March 2018." The 14 months written in 15 May 2019 refers back to March 2018 which becomes a pivotal month in the history of the matter.
- 5.16 There is some reference then to what the claimant herself was telling him and as I say one has to be aware of self-serving material in that regard but on the second page there is really quite direct evidence contained in the document served by the claimant and the last two paragraphs say this, and I quote:

"She was also reviewed by the Time to Talk team recently. However, given the significant delay from referral to actual treatment they felt that she had escalated the point that she needed to be seen by the mental health trust and has therefore been referred to this service. I would say that prior to the development of these issues in the past 12 months she has been mentally very stable and solid apart from an episode in 2017 which was precipitated by her feeling that her immediate manager was undermining her for which she received a short course of approximately two months' worth of Citalopram nor have any of the other issues which have appeared in the past 12 months ever been a problem for her prior to this.

Given that she had no significant issues prior to March last year I believe there is a reasonable chance of a full recovery once this current episode is stabilised and treated with no further problems in the future. However, given the extended duration and severity in the absence of control that she has over the contributing factors there is a chance it will continue on to have a lifelong impact"

- 5.17 These paragraphs provide a very serious obstacle to the claimant being able to demonstrate even on the face of it that she was suffering from a disability prior to March and then of course she was dismissed in May so if the onset of these issues started in March, the fact that she was dismissed in May does not mean that at the time of her dismissal she was disabled. There is a 12-month qualifying rule. Yes, of course, if circumstances are such that even after two months of a condition it is likely to last 12 months one can assess disability at that point, then there can be a prima facie case of disability. However, that would only in any event be from May 2018 and not relevant to the periods of three years' poor performance leading up to that period. Given that she had had a two-month episode completed in 2017 there is no reason to think that any episode starting in March 2018 would be likely to last 12 months.
- 5.18 There is reference to attending counselling as from December 2017 and there is a letter from a counsellor but this report from Dr Mackenzie was served with view to the claimant's application to amend. I was challenged

by the claimant's solicitor for apparently overlooking the letter from Dr Potheary. I did not overlook it. I took note of its short one paragraph nature. I place much greater emphasis on the document from Dr MacKenzie which was designed to support the claimant's application to amend and unfortunately for the claimant a fair reading of it does not support her position that she was prima facie disabled at any time prior to March 2018 because there was a two month only episode in April 2017 and it does not say or could not be read as showing on the face of it that she was disabled as at May 2018. The onset was in March 2018 , only two months before her dismissal.

## **CONCLUSION**

- 5.19 So there are at least two substantial obstacles in my judgment for her disability discrimination claim relating to her own alleged condition to get off the ground. First, it contradicts her existing pleaded claim that she was discriminated against because of her father's disability. Secondly, the evidence does not indicate even a prima facie case that she was disabled at the material times. I do not find that on the face of it there are reasonable prospects of her establishing disability at the relevant times required for her amendment. Her reasonable adjustments claim has to relate to the period of poor performance but the disability evidence does not engage with that period. I exercise my discretion to refuse amendment on the basis primarily that there was no prima facie support for her contention that she was a disabled person at relevant times and the amendment contradicts how her claim is presently pleaded. Insofar as balance of prejudice analysis is appropriate, I find the balance favours the Respondent. They should not be forced to defend a claim that on its face does not get off the ground.
- 5.20 If the Claimant was subject to associated discrimination relating to her fathers disability, then, of course, she can claim personal injury that flows from that discrimination, if appropriate.
- 5.21 We considered whether today's reconsideration is under Rule 70 or Rule 29. The view was that it does not matter. I am told I can call it an oral hearing under Rule 29. The application is based on Mr Potheary's letter. I have given my reasons as to why I preferred reliance upon the more detailed letter. Nothing that has been said to me today persuades me that it is in the interests of justice to revoke my determination on this application to amend and I confirm my decision of 23 December 2019. There is, as I say, a well identified and well-established claim of unfair dismissal and disability discrimination based upon associative discrimination with nothing preventing the claimant from claiming personal injury caused by her treatment alleged therein and this application is an attempt significantly to move the goal posts. It is a new cause of action; it is not a re-labelling exercise. The pleadings, the original claim plus the further and better particulars are frequently very difficult to interpret. What might have been said I do not know.

5.22 What is proposed here are new causes of action, not a re-labelling exercise. It does not disclose a prima facie case with prospects of success and as I say I confirm the original decision. I am minded now to give directions so that the original claim can be heard as planned in Reading in May 2020.

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**Employment Judge Smail**

30<sup>th</sup> September 2020

Sent to the parties on:

30<sup>th</sup> September 2020

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For the Tribunal:

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