



EMPLOYMENT TRIBUNALS

Claimant: Mrs E Bennett

Respondent: Chief Constable of Merseyside Police

Heard at: Liverpool

On: 4 September 2020

Before: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Clark, lay representative

Respondent: Mr Tinkler, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant met the criteria in Section 6 of the Equality Act 2010 as a disabled person, commencing at the date of the outcome of her grievance appeal on 1 October 2018.
2. The claimant's first two claims for a failure to make reasonable adjustments fail and are dismissed, as those incidents occurred before the claimant's mental impairment had either lasted for twelve months or was likely to last for twelve months. At the time of those incidents, the claimant was not disabled within the meaning set out in section 6 of the Equality Act 2010.
3. The claimant's third claim for a failure to make reasonable adjustments has little prospect of success and is therefore subject to the payment of a deposit of £300 to allow it to continue. The terms of the claimant's deposit order are contained in a separate order of the Tribunal but the reasons for this are set out below.
4. The claimant's claim for constructive unfair dismissal may proceed to a final hearing without the payment of a deposit.

5. The case is set down for a further Case Management Hearing to be conducted by telephone in private with an estimated duration of one hour to take place at 11.30 am on 26 October 2020. At this hearing, Case Management Orders will be made to prepare the case for a final hearing and a date for that final hearing will be fixed.

REASONS

Background and issues for the Tribunal to decide

1. The claimant was employed as a security guard by the respondent from July 2010 until her resignation at the expiry of one month's notice on 11 December 2018.
2. The claimant brings claims for disability discrimination, constructive unfair dismissal and breach of contract.
3. The respondent alleges that the claimant was not a disabled person within the meaning set out in section 6 of the Equality Act 2010 at the time to which the alleged acts of discrimination relate.
4. In particular, the respondent says that at the time the alleged incidents of discrimination occurred, the claimant's mental health condition had not lasted for twelve months, nor was it likely to last for twelve months as per Schedule 1, paragraph 2(1) of the Equality Act 2020. It is accepted that in this context, "likely" means that "*it could well happen*".
5. It is settled guidance on this issue that when assessing the likelihood of an impairment lasting for twelve 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. (as per the "*Guidance on the Definition of Disability 2011*" issued under s6(5) of the Equality Act 2010). What is required is an assessment of whether, at the time to which the allegations relate (and therefore at the time when the claimant says the employer was under a duty to make reasonable adjustments), the claimant was a disabled person. It is not relevant to consider whether the claimant has since fulfilled the definition of a disabled person.
6. Furthermore, an employer is only under a duty to make reasonable adjustments if at the date of the alleged failure to do so, the employer knew or ought to have known that the person was a disabled person.
7. At this hearing the respondent applies for the following two issues to be determined by the Tribunal:
 - a. For a ruling that the claimant was not a disabled person at the time to which the allegations of discrimination relate; and
 - b. That deposit orders to be made against the claimant to be allowed to continue with all of her claims against the respondent. It is the

respondent's case that the claimant's claims have little prospects of success. Even if it is accepted by the Tribunal that the claimant is a disabled person within the meaning of Section 6 of the Equality Act 2010, it is the respondent's case that her claims have little reasonable prospects of success and therefore that the Tribunal ought to make an order requiring her to pay a deposit as a condition of continuing to advance these allegations as per Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1.

8. The Tribunal was grateful for the written and oral submissions of both the claimant's representative Mr Clark and the respondent's representative Mr Tinkler. The Tribunal was also grateful for the evidence given by the claimant herself Mrs Bennett, both in the form of a witness statement, a disability impact statement, and in answer to questions under oath.
9. This hearing was a hearing in person under conditions of social distancing in accordance with the provisions in place as a result of the Covid 19 pandemic.

Findings of Fact

When did the alleged incidents of disability discrimination take place and was the claimant a disabled person at that time?

10. It was apparent from the evidence before the Tribunal that the claimant did not have an underlying mental health condition prior to an incident at work on 22 December 2017 that the claimant alleges was the starting point of her issues with the respondent and also her mental health issues.
11. I accept her evidence that prior to 22 December 2017 she enjoyed hobbies and an active life and good relationships with friends and family and was not taking medication for any mental health conditions. She had suffered ongoing back problems in the form of sciatica prior to that date, but her evidence to the Tribunal was that she managed this through medication and had not taken time off from work as a result. The claimant's sciatica is not an "impairment" for the purposes of her disability discrimination claim in these proceedings.
12. On 22 December 2017 the claimant was in work with her line manager David McGurk. On the respondent's case, the claimant and Mr McGurk had a disagreement and both raised their voices, but the respondent accepts that the claimant was spoken to in an unprofessional manner by Mr McGurk.
13. The claimant's evidence is that Mr McGurk screamed in her face and that she was physically bullied by him. When recalling the incident while giving evidence, the claimant became highly distressed. It is apparent that this incident was the trigger for a collapse in the claimant's mental health. The claimant left work on the same day of the altercation and did not return thereafter. She resigned on 11 November 2018 with one month's notice which expired on 11 December 2018. Between 22 December 2017 and the date of her resignation, the claimant was signed off work with "workplace stress" for the entire period.

14. The claimant's case is that her stress was severe enough to amount to a disability within the meaning of section 6 of the Equality Act 2010 and was solely caused by her treatment by the respondent during the period from 22 December 2017 onwards. Her case as to when she ought to be classed as disabled according to s6 Equality Act 2010 is, as understood by the Tribunal, as of the commencement of her sickness absence and therefore 22 December 2017.
15. It is the respondent's case that the claimant at no point during her employment with the respondent fulfilled the definition of a disabled person. She resigned less than twelve months after 22 December 2017 and at none of the times to which the allegations of a failure to make reasonable adjustments relate, could it be said that it was "likely" that her illness would last for 12 months. What was "likely", in the respondent's case, was that the matter would be resolved by the respondent and the claimant would return to work.
16. The claimant's evidence as to the adverse effect and mental health difficulties was clear in that, as noted above, she suffered an almost immediate and significant adverse effect on her mental health following the altercation with Mr McGurk on 22 December 2017. The claimant's medical notes show that she visited her GP shortly afterwards on 29 December 2017 and was given a diagnosis of work related stress and certified as not fit for work and agreed to medication.
17. Having no previous history of depression and no underlying diagnosis of depression, the altercation at work plunged her almost immediately into severe difficulties with mood, concentration and sleep and on the claimant's account exacerbated her sciatica to the extent that she was at times severely sleep deprived. The Tribunal accepts the claimant's evidence in this regard.
18. The Tribunal notes that although the claimant's sciatica could be said to be an exacerbating factor, the "*Guidance on the Definition of Disability (2011)*" at Section A gives clear guidance to the Tribunal that it is not necessary to consider how an impairment is caused and that whether a person is disabled is generally determined by reference to the effect that an impairment has on a person's ability to carry out normal day to day activities. It is not necessary for an impairment to have a clearly identifiable diagnosis and paragraph A8 of the 2011 Guidance in particular states that there are many conditions which are not immediately obvious to identify.
19. The claimant visited her GP on a regular basis throughout 2018 and was referred for counselling. Eventually, in May 2018, she agreed to commence anti-depressant medication which she stopped after a few days because of side-effects but resumed other medication in October 2018 which she continued to take past the date of her resignation from work and was still taking on 26 February 2019, which was the date of her last medical evidence in the bundle.
20. It is therefore accepted that in terms of the definition in section 6 of the Equality Act 2010 that the claimant had a mental impairment that had a substantial adverse effect on her ability to carry out normal day to day activities.

21. However, section 6 also requires that an impairment be “long term”. As set out above this means that it has lasted for twelve months or, at the time when the discrimination occurred, that it is likely to last for a period of twelve months. “Likely” is defined as meaning that it “*could well happen*” that the impairment would last for twelve months or more.
22. It is necessary, given that the three allegations of a failure to make reasonable adjustments occur at different dates, to consider whether the claimant was a disabled person in connection with each separate allegation.
23. Taking the first claim for a failure to make reasonable adjustments, which is a failure to allow the claimant to be accompanied by Mr Clark at a hearing in connection with her grievance, the respondent’s case is that the relevant date is 22 May 2018 only. The claimant’s case is that the relevant dates commence on 22 May but continue until the outcome of the grievance appeal.
24. Having considered the submissions and evidence of both parties, the Tribunal finds that the relevant period commences on 22 May 2018 and lasted until the outcome of the claimant’s grievance, which was 14 August 2018. This is because in relation to the grievance appeal which was commenced on 28 August 2018, the claimant was permitted to be accompanied by Mr Clark and so there can be said to have been no failure to make reasonable adjustments in relation to this stage of the grievance process. Therefore the relevant period for the first failure to make reasonable adjustments is 22 May 2018 to 14 August 2018.
25. In relation to the second failure to make reasonable adjustments, the relevant period is said by the respondent to be the date on which the claimant was placed on half pay, which is 23 June 2018. It is the respondent’s case that this was a single act with ongoing consequences as opposed to an ongoing series of discriminatory acts. It is the claimant’s case that the discrimination continued for the entire period of the claimant’s employment until she resigned.
26. I find this is a single act with ongoing consequences rather than a series of ongoing acts. The action to move the claimant to half pay was taken once and no further action was taken by the respondent in this regard thereafter. Therefore, the alleged act of discrimination took place on 23 June 2018, even though the consequences of that act were felt by the claimant until the termination of her contract in December 2018.
27. The third alleged failure to make reasonable adjustments relates to the respondent’s actions in attempting to get the claimant to return to work. The Tribunal accepts the claimant’s evidence that this alleged failure continued up until the date of the email to her from Ms Baccino on 9 November 2018.
28. In terms of when it can be said that an assessment of the claimant’s mental health condition would have revealed that it was likely to happen that her mental impairment would last for at least twelve months, having considered the evidence of both parties the Tribunal concludes that this would not have been clear until the outcome of the grievance appeal on 1 October 2018. By 1 October 2018 there was an indication that the claimant’s mental health issues

were likely to last for twelve months or more. By this point it would have been clear to the respondent that the conclusion of the grievance process and the grievance appeal would not resolve the claimant's issues, as they had expected.

29. Prior to 1 October 2018 the Tribunal finds on the balance of probabilities that there was a reasonable expectation that the claimant would be able to return to work if her complaints were dealt with. All of the evidence from the claimant was that her mental health problems were caused by the ongoing issues at work and a proper conclusion of the grievance or the grievance appeal would have resolved her problems and allowed her to return to work. There was no evidence whatsoever available either to the respondent during the grievance process or to the Tribunal during this hearing that there was any underlying issue or diagnosis of depression, therefore there was no underlying condition present to indicate that the claimant's reaction to her problems at work would last longer than a resolution of those problems by the respondent.
30. After 1 October 2018, although the claimant had not been suffering for twelve months with her mental health condition at that point, it would have been clear to the respondent that its internal processes would not assist the claimant to return to work and that it "could well happen" that the problems would persist past the 12 month period.
31. The claimant was a disabled person within the meaning of section 6 as of 1 October 2018. Therefore, only the third allegation of a failure to make reasonable adjustments can proceed to a final hearing, as only this allegation took place when the respondent ought reasonably to have known that the claimant's mental health issues were likely to last for twelve months or more. Although the claimant's case was that this ought not to matter, and that what was more important was that the claimant was now disabled, this is not (as explained above) how the disability provisions of the Equality Act work in relation to an employer's responsibility during the employee's employment.
32. The first two claims for a failure to make reasonable adjustments fail, as the claimant was not a disabled person within the definition of Section 6 at the time when those allegations arose. They are hereby dismissed.

Deposit Order – Failure to Make Reasonable Adjustments

33. The claimant's third allegation of a failure to make reasonable adjustments is that the respondent failed to grasp and properly deal with the seriousness of the issues that were causing the claimant's workplace stress before pressing her to return to work. For the reasons set out below, this allegation has little reasonable prospects of success.
34. The provisions of the Equality Act 2010 in relation to a failure to make reasonable adjustments are:

"S20: Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply;

and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) *The duty comprises the following three requirements.*

(3) *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

(4) *The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

(5) *The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid."*

35. From the citation above it is clear that an employer has a three-fold duty to consider making reasonable adjustments as set out in sections 20(3) to 20(5). From the claimant's pleaded case it would seem that she is not complaining about a physical feature of her workplace (s20(4)) or the lack of an auxiliary aid (s20(5)). Therefore, the failure to make reasonable adjustments must relate to a "*provision, criterion or practice*" of the respondent's in accordance with s20(3).
36. The respondent's counsel said that he struggled to understand what the provision, criterion or practice could be, in relation to the allegations that were made. I also struggled to understand the claimant's case in this regard.
37. I raised the issue with the claimant and her representative during the hearing and explored with Mr Clark whether a failure to make reasonable adjustments was the correct "label" to be attached to the claimant's allegations.
38. Mr Clark told the Tribunal that the issue was not one of direct discrimination, in that he was not saying that the claimant was pressed to return to work because she was a disabled person.
39. The claimant also did not appear to be saying that this was an issue arising out of the claimant's disability. Unusually, the claimant's case is not that she had an underlying mental health complaint that the respondent had failed to address, but that the respondent's actions caused and then exacerbated her mental health complaint and had the respondent acted properly and resolved her complaints adequately that her health issues would have been resolved.
40. There was no suggestion of harassment because of her status as a disabled person and no suggestion of victimisation.

41. It was acknowledged by the claimant when asked by me that the issues that are in the third allegation are covered by the constructive unfair dismissal complaint. Mr Clark conceded that it was difficult for him to be clear on the claimant's behalf how this claim should be formulated under the ambit of a disability discrimination complaint.
42. At the conclusion of the discussion, it was still not clear as per s20(3), what *"provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter"*. It is for a claimant to first identify what the respondent's provision etc is that has put her at a disadvantage as a disabled person and then state what adjustments could have reasonably been taken to avoid the disadvantage. It is not currently apparent.
43. It is not for the Tribunal to plead a party's case for it. It is appropriate to explore the nature of a party's complaint if they do not have legal representation and this was done during the hearing. However, no clear conclusion was reached.
44. The claimant says that the respondent's *"continuous attempts to get the claimant to return to work ... were made without addressing the cause of the claimant's mental impairment and therefore her absence"*.
45. If *"getting the claimant to return to work"* is taken to be the "practice" envisioned by s20(3), and if it can be said that the "adjustment" involved the imposition of a more stringent punishment for Mr McGurk and an absence of any reference in the grievance outcome to any culpability on the part of the claimant, it is difficult to see how this is connected to the claimant's disability specifically. The "adjustment" also appeared to involve addressing the alleged failures to investigate her complaint against Mr McGurk earlier. Again, it is difficult to see how this is not an issue that would apply to all employees irrespective of any disability.
46. Furthermore, the claimant's allegations appear to be contrary to the evidence currently available of the respondent's conduct of the claimant's grievance and appeal. The respondent, later than the claimant wished and not to the standard that she wished, still conducted a lengthy and detailed grievance investigation and grievance appeal. Mr McGurk was found to have behaved inappropriately and was spoken to informally. The claimant was found to have had some culpability during the argument on 22 December 2017. Mediation was offered to the claimant and Mr McGurk was noted to have offered to apologise. There was discussion of a temporary new role away from Mr McGurk.
47. The claimant told the Tribunal that the punishment given to Mr McGurk fell far short of what his behaviour required and that the respondent's conduct of her grievance and grievance appeal exacerbated her mental health problems because it was so badly handled, and the relocation offered was inadequate. She took gross exception to the offer of an apology because the offer of it referred to Mr McGurk offering to apologise *"again"*. By the claimant's account, the first offer of an apology was never made, and she takes this as improper conduct by the respondent.

48. However, I find that the evidence at this stage does not allow any inference that the respondent failed to grasp or address the cause of the claimant's mental impairment. On the basis of the information before the Tribunal at this hearing, the respondent did address the cause of the claimant's mental health difficulties and therefore her absence, but reached a conclusion that the claimant did not agree with. Solutions were offered to the conflict with Mr McGurk, but they were not acceptable to the claimant. That is not the same as a failure to address the issue. The allegation that the actions taken by the respondent were inadequate does not appear to be based on an allegation that the respondent did so due to the claimant's disability, (and indeed for much of the duration of the grievance process the claimant was not a "disabled person" as per s6), but it is suggested that this was due to negligence and/or incompetence.
49. It is also difficult to envisage how a claimant could succeed in persuading a future Tribunal that it was a "reasonable" adjustment to require her employer to increase the severity of the disciplinary sanctions on those she considered responsible as a prerequisite to requiring her to consider a return to work.
50. Therefore, on the basis of the information before me, the claimant's claim for a failure to make reasonable adjustments in relation to the respondent's attempts to get her to return to work appears to have little prospects of success. To continue with this claim at the final hearing the claimant is required to pay a deposit of £300.
51. I have considered whether it would be more appropriate to direct the claimant to provide written clarification of this complaint as an alternative to an order for the payment of a deposit. However, there have been previous case management discussions and a considerable amount of correspondence in this matter, and a discussion was held on this occasion also. The claimant has therefore been given a reasonable opportunity to present her claims and to ask for clarification of any legal or procedural issues that she may find unclear. It is therefore not appropriate to direct her to address this issue a further time.
52. The claimant was given the opportunity to present evidence as to her means but declined to do so. Her representative Mr Clarke informed the Tribunal that the claimant did have means to pay for a deposit but that she is retired and in receipt of a pension. The Tribunal can order a deposit to be paid of up to £1,000 per complaint, but I have taken her status as a pensioner into account and have reduced the sum accordingly.

Deposit Order – Constructive Unfair Dismissal

53. The claimant's constructive dismissal case is that there were a series of breaches of the implied duty of trust and confidence by the respondent in handling her sickness absence and her complains against Mr McGurk, in addition to poor management and mishandling of both her grievance and her grievance appeal and her return to work. This culminated in the "last straw" being the email received from Ms Baccino on 9 November 2018:

"Hello Eileen

How are you now feeling?

Can we please arrange a time to meet next week as we have not met since 13 September 2018. Can I please take this opportunity to remind you that as a Merseyside Police Staff Member you have obligations to adhere to the Attendance Management Policy and I draw your attention to the following points:-

- Remain contactable during absence and maintain regular contact with managers, contact must be either by face to face or by telephone, text or email contact is not acceptable.*
- Attend meetings with managers during sickness absence and return to work as required.*

I look forward to hearing from you.

Kind regards

Belinda”

54. The claimant will say that she interpreted this email as a threat that she had to attend work or be in breach of the respondent's attendance management policy with adverse consequences for her, particularly given the history of her dealings with Ms Baccino and what the claimant alleges were repeated insistences from Ms Baccino that the claimant be required to meet her.
55. It is the respondent's case that when viewed in the appropriate context of what the claimant ought reasonably to have believed, it could not have been interpreted as being a threat of sanctions being applied and therefore was not a further breach of the implied duty of trust and confidence. As there has been no “last straw”, her claim has little prospects of success and she should be ordered to pay a deposit as a condition of being allowed to continue.
56. The claimant's constructive unfair dismissal claim does not in the opinion of this Tribunal at present appear to have only little reasonable prospects of success. It is the claimant's case that the “last straw” email of 9 November 2018 ought reasonably to be considered in context of her previous dealings with Ms Baccino. From the evidence of the case presented at this hearing the Tribunal accepts that there may be evidence that could be presented on behalf of the claimant at a final hearing that supports the claimant's contention that a reasonable consideration of Ms Baccino's email of 9 November was a further breach of the implied duty of trust and confidence.
57. Therefore, it cannot be said that the claimant's constructive unfair dismissal claim has little reasonable prospects of success such that an order to pay a deposit is appropriate as a condition of continuing to advance that allegation.

Further Case Management Hearing

58. The original agenda for this hearing included that following the determination of the application for deposit orders and the claimant's status as a disabled person that the Tribunal would conduct a case management hearing to list the matter for a final hearing and set down further orders to enable the good preparation of the case for that final hearing.
59. However, time was not available to do so and the parties are therefore instead directed to attend a one-hour telephone case management discussion on 26 October 2020 at 11:30 am, further details will be sent to the parties in this regard by the Tribunal administration.

Employment Judge Barker
18 September 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 September 2020

FOR THE TRIBUNAL OFFICE

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