



EMPLOYMENT TRIBUNALS

Claimant: Ms M. Kennedy
Respondent: Premier Christian Communications Ltd

London Central Remote video hearing
Before: Employment Judge Goodman

On: 2 October 2020

Representation

Claimant: Mr B. Supiya, volunteer advocate
Respondent: Mr. M. Jones, solicitor

PRELIMINARY HEARING

JUDGMENT

1. The claimant was not disabled as claimed. The claims of disability discrimination and harassment under sections 13,15,20 and 26 of the Equality Act are dismissed.
2. The race discrimination claim is listed for final hearing on **22 and 23 April 2021**.
3. **Case Management Orders:**
 - 3.1 the parties are ordered to complete disclosure of documents on the remaining issues by 15 November 2020
 - 3.2 the respondent is to send the claimant a paginated hearing bundle by 13 December 2020 (and on pagination to heed what is said below on pdf bundles)
 - 3.3 the parties are to exchange witness statements for the final hearing by 12 March 2012.
 - 3.4 The respondent is to file an electronic bundle of documents and witness statements with the tribunal by 15 April, marked in the subject line with the hearing date.
 - 3.5 By 15 April the parties are to send to the tribunal *either* confirmation that they have agreed, subject to liability, the amount of the difference in wages, *or* an explanation of what the difference is between the parties on any point.

REASONS

1. This hearing was to determine whether the claimant was disabled within the meaning of the Equality Act. The tribunal also heard a previously notified application by the respondent for the costs of postponing earlier hearings. Both decisions were reserved for want of time on the day.
2. The claims, presented on 21 May 2019, are for disability discrimination in failing to make reasonable adjustment for disability, discriminating because of something arising from disability, and race discrimination in paying the claimant less than two colleagues were paid. An unfair dismissal claim was dismissed because the claimant lacked qualifying service.
3. The respondent disputes the claims, and in particular, that she was disabled.
4. The issues were identified at a case management hearing in October 2019. The matters identified as requiring a reasonable adjustments were sickness absence causing an extension of probation, that her working hours should have been reduced, that her workload had been increased, and that her targets were too demanding and should be reduced. On the section 15 claim ("something arising from" disability) it was said the hospital out-patients appointments should have been allowed as special leave and not treated as absence, her probation was extended because of the sickness absence (not, as the respondent says, for poor performance) and she was dismissed on 11 February 2019 at the end of the extended probation.

Disability

5. On the disability issue, I heard evidence from Melanie Kennedy, the claimant, and from her flatmate, Natasha Supiya. Ms Supiya is the daughter of the claimant's representative, who drafted the claim form, and has represented her at all the preliminary hearings, except in January 2020, when he was away.
6. In addition, I was supplied with a hearing bundle in 5 pdf's prepared by the respondent. This contained the witness statements, pleadings and orders, the medical records disclosed by the claimant, and the claimant's job application, and supervision record.
7. In the particulars of claim, the disability is identified as hiatus hernia, asthma, migraines, anxiety and depression, and dysmenorrhea.
8. The claimant was ordered at the case management hearing on 8 October 2019 to file a witness statement about her conditions, the dates she was impaired, the effect on her ability to carry out normal day to day activities, what the substantial disadvantage was that required making an adjustment, and how the impairment caused the matters arising from disability. The claimant filed a "disability position statement" on 14 November 2019. This described a hiatus hernia from 2014 causing unpredictable chest pain and requiring surgery, asthma, for which two inhalers were prescribed, light migraines controlled by paracetamol. Dysmenorrhea and anxiety and depression were not mentioned. She did however refer to knee pain, not mentioned in the claim form, for which she had had physiotherapy. The interaction of the chest pain, asthma and knee pain was said to have made her uncomfortable, and affected her concentration, as did the headaches. She had memory lapses as a result. Low self-esteem made her avoid some tasks. She avoided social contact, as she was embarrassed by her disability. Her flat-mate did the hoovering, the laundry and cleaned up, because these tasks could "trigger" the disability symptoms.
9. The claimant had also in October been ordered to send copies of relevant medical records. She sent a three page GP computer summary. When the respondent complained this was inadequate, and also that it had been redacted, the claimant

sent more documents, but no more medical records. On 14 September 2020 her representative sent the substantial file which is before the tribunal today.

10. The respondent had objected that the “position statement” did not cover the matters identified in the October 2019 order. The claimant said it was adequate. On 10 September a decision was made not to strike out for non-compliance, or make a further unless order, but to decide the issue on the material the claimant said was adequate at the hearing listed for 16 September (which was to have been the first day of the final hearing). At that hearing, the disability issue was postponed to today because the claimant had only just served the large bundle of medical records, and the respondent had no time to prepare. The open preliminary hearing having been postponed to 2 October, the claimant then served a further witness statement on 25 September 2020.
11. This witness statement describes how the hiatus hernia caused chest pain, for which medication was prescribed in 2011. She was also prescribed ferrous sulphate and vitamin D, as she avoided some foods because of the hernia. In 2014 she had an episode of gastritis. In 2018 she had a gastroscopy.
12. She described asthma making her breathless on physical exercise, or when the weather was either humid or cold and dry, or in response to particular allergens, or because she was obese. This is the first mention of obesity. She mentioned asthma being caused on one occasion at work when called to a meeting at which she expected to be dismissed, and on another by a cold air vent. She also described how her breathing was affected when in July 2018 she had flu. In answer to questions in the hearing, she said she did not use the brown steroid inhaler, intended as preventive, because it made her nauseous, and used the blue inhaler just when she was short of breath.
13. On migraine headaches, she describes extensive tests which did not show an underlying cause, and said she found she could control the headaches with migraleave or paracetamol, or retreat to a dark room. She found that using a computer screen could cause these headaches.
14. On dysmenorrhea she describes headache, cramps and vomiting on 1-2 days per month, and that on the first day of the monthly period it is “almost impossible” to travel to work or do any work.
15. On anxiety and depression, she said low mood began in 2015, and she was referred to IAPT for counselling in 2016. The intensity was later stepped up. She said that the anxiety combined with obesity made her “paranoid and embarrassed” when meeting people. She was also accused of being unresponsive at work when she was using a “holding safe” technique of not responding to the person she was interacting with. She had not told the respondent of her mental health difficulty.
16. The witness statement is not clear about when these conditions occurred or how often. One reference point for exploring this is the absence record. According to her pleaded case, during the eight months of employment the claimant was absent from work on two days for hospital appointments (16 July and 10 August, the first being the gastroscopy investigation), on 17, 19 and 20 July 2018 for flu, on two days (3 months apart) for dysmenorrhea, and on two other days (1 and 26 October) for chest pain, though it has to be said that on one of these (1 October) the explanation she gave to the employer at the time was not chest pain but that she had not slept the previous night because of prolonged disturbance when a man was stabbed at her block of flats. When questioned about that the discrepancy, she said she had constructed the reasons for each absence on the claim form from memory or by reference to her phone, and had no contemporary record.

17. The other reference point is the medical records. Even on the second attempt at disclosure these are incomplete. The usual computer notes of consultations were absent, but there was the redacted, and also now an unredacted, GP summary sheet printed in October 2019 listing medications, allergies, immunisations and selected consultations. The claimant said the records disclosed were all those to which her general practice had given her online access, either in 2019 (when she sent the redacted three page document to the respondent) or in September 2020 when she made a further request. The 2019 summary had the “active problems” listed as low serum iron in October 2019, vitamin D deficiency August 2018, anxiety with depression April 2016, and asthma from 2002. “Significant past” problems were a simple hiatus hernia diagnosed on gastroscopy in August 2018, and a helicobacter test in 2004. “Minor past” problems listed were knee pain in 2018, various coughs and a URTI, wrist pain in 2014, a migraine in 2011, and chest pain in 2011.
18. The significant condition affecting health but not mentioned in the claim form or the position statement, but listed in the unredacted summary sheet, is obesity. (The redactions from the October 2019 summary sheet are all references to obesity). Her recorded weight was 22 stone, which must be a burden to any woman, and with her BMI (body mass index) at 40+, she was classed as “severely obese”. In May 2018, shortly before she started work for the respondent, her GP referred her to Homerton Hospital for consideration of bariatric (weight reduction) surgery. The bariatric clinic notes start in July 2018, when she was consented for the gastroscopy. The gastroscopy showed “small hiatus hernia, otherwise normal” and “mild antral gastritis”. She was negative for helicobacter pylori (the pathogen found and treated in 2004). She spent some time receiving advice from dieticians. In 2020, she had a laparoscopic sleeve gastrectomy, an operation designed to limit the capacity of the stomach.
19. These notes (and in particular the GP referral letter) show she was not referred to hospital for the symptoms of a hiatus hernia, as the claimant says, but for weight reduction surgery. It said she had been trying to lose weight, without success, for two years, and would benefit from surgical intervention. The hernia was found on investigation of the stomach for bariatric surgery. It was repaired in August 2020, but from the surgeon’s report to the GP, it appears to have been incidental to the weight reduction surgery, and not because it had been found in 2018. The only records in the notes of chest pain is for an attendance at Whittington Hospital in 2014, for which she was given Gaviscon, an antacid used to treat heartburn, and a visit to the GP in March 2011, when she had one month’s course of an unnamed medication, which may also have been Gaviscon as that is mentioned in the Homerton questionnaires. There the claimant listed stomach pain and gastric symptoms from heartburn (reflux). The GP listed chest pain as “minor past”.
20. Because of the asthma diagnosis, the claimant was reviewed for asthma from time to time (they are described as annual reviews but if they were annual, many notes are missing). There are notes of her responses to questions on her symptoms. Listing all the years for which notes are available, in 2003, it was disturbing her sleep, but never restricted her exercise. In 2005 she was not limiting her activity, nor was it disturbing her sleep. There is a 2005 note she had inhaled steroids. In 2006 there was night waking and she sometimes restricted her exercise. In 2009 she enjoyed moderate exercise, not disturbing her sleep, she was not restricting her exercise, and she had daytime symptoms once or twice a week. In 2011 she was not using inhaled steroids, enjoyed light exercise, and took regular active exercise. In September 2017 she had daytime symptoms once or twice a week, was not limiting her activities, and it was not disturbing her sleep. She used a bronchodilator once a day. These six reviews do not show substantial impairment, but the occasional use of an inhaler does require consideration of the deduced effect – what she could do if not using an inhaler. In July 2018, in answer to questions at the bariatric clinic, she said she could walk for up to one hour, and one flight of stairs, before becoming breathless. In June

2019 she reported four episodes of wheezing in the last year, that year having included the entire period of employment by the respondent. These answers suggest a mild impairment only, but contrast with her answers in the hearing, when she said that asthma caused her to be late for work because she had to stop several times when she found it difficult to breathe, and that sometimes she could not speak or complete tasks.

21. On knee pain, there is reference in the Homerton bariatric questionnaire in July 2018 to having joint pain, knee pain, and foot pain. She added as an explanation for wanting weight reduction surgery that “my knees hurt all the time and it’s like they can’t carry me”.
22. On anxiety, the GP record shows a referral to Talking therapies in May 2016, a step up to high intensity in November 2016, and a letter of 27 September 2017 showing treatment had been completed but if she wished the patient could refer herself back at any time. The claimant said she had not done this. She indicated in the hearing that she may have seen other therapists, but there is no mention of this in the witness statements, nor has she disclosed any records or included any treatment costs in her special damage schedule.
23. A useful snapshot of her state of mind is in the Homerton questionnaire from July 2018: she reported not feeling down, depressed or hopeless in the last 2 weeks, but on “several days” in the last 2 weeks she had been feeling tired or of low energy with little pleasure in doing things (other options not chosen could have been “more than half the days” and “nearly every day”). Importantly, she said she had no trouble concentrating. She did not feel nervous, anxious or on edge, but on several days she had “worried too much”. She reported having had an antidepressant in the past, but none at the time. The consultant, reporting back to the GP, said “no current mental health problems”.
24. The claimant’s account, if unsupported by or conflicting with the records should also be treated with care, because of discrepancies in her account. One discrepancy arose from her reply to questions about the September 2017 asthma review. She said the review downplayed her symptoms because she was not working or studying, in fact was barely able to get out of bed, so her activity was nil. However, she had said on the application form for employment with the respondent that from August 2017 to March 2018 her job title was “counselling and pastoral care lecturer; administrator”, and her salary £26,000 p.a. but that she was “currently employed on a part-time basis”, Saturdays only. It turned out she was a volunteer, not employed, in this role, and that she entered that salary because on a study of job vacancies she reckoned that was the appropriate level for the duties she performed, and “I didn’t want gaps in my resume”. Of course people present the best version of themselves when applying for jobs, but to represent that you are employed and paid £26,000 per annum when in fact you are a volunteer who is assisting, not going to the premises, demonstrates an approach to accuracy that most would say was so misleading as to be untruthful. Her voluntary activity in turn casts doubt on her explanation for having few asthma symptoms in September 2017: it is hard to know which account to believe. She also exaggerated when questioned by the respondent. The dysmenorrhoea omitted from the position statement, and described in the previous week’s witness statement as severe one day a month, became “every single month for 5-6 days”. In the claim form it was said to have caused her to be off work on two days in the period, but the documents showed at least one of those days was for a different reason. On the chest pain, she said this was caused by the hiatus hernia, and could not have been “minor past” as her GP listed it, because “I had surgery for it two months ago”, which she said would have been done if there had been no weight loss operation, but as discussed, the records show the surgery was for weight loss, and the hernia repair an incidental finding, repaired when the bariatric surgery presented an opportunity. Questioned why the gastric pain from the hernia was never mentioned in the bariatric

clinic questionnaires (where there was a list of conditions to circle as appropriate), she said it had only happened twice, “when the germ was in my stomach”, so was not significant enough to mention. It was however “actually quite significant”.

25. Natasha Supiya, her flatmate, said she had moved in with her in 2016 to help as she was struggling. She confirmed that she helped with the laundry because the claimant could not bend to get clothes in and out of the washer and dryer, or clean the cat litter tray, or change the duvet cover, but the claimant folded the washing. Ms Supiya did most of the shopping because of the claimant’s “mobility issues”, and carried shopping because they lived two floors up and the claimant became breathless on stairs. She also vacuumed the floors alternate days, cleaned the bath and did the dishes for the same reason.

Relevant Law

26. By section 6 of the Equality Act, a person (P) is disabled if: (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
27. “Substantial” means more than minor or trivial, following the 2010 Guidance on Disability, and long-term is explained in schedule 1 Part 1 as meaning it has lasted or is expected to last more than 12 months, and if it has ceased, whether it is “likely to recur”. Likely means “could well happen” – **SCA Packaging v Boyle 2009 UKHL 37**.
28. As for what is an impairment, the European Court has said :

‘the concept of disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers’.”
HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab C-355/11 [2013] IRLR 571.

This comes from the EU Directive, and from the UN Convention on Disability to which the UK is a signatory. This was also cited in a more recent CJEU case on whether obesity is an impairment.

The assessment of what is long-term must be made at the material time, not with hindsight, and be an assessment of its effects, not the diagnosis – **Nissa v Waverley Foundries Ltd UKEAT 0135718**.

29. Where a condition is being treated, part 1 (5) of the schedule 1 to the Act states:

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—(a) measures are being taken to treat or correct it, and (b) but for that, it would be likely to have that effect.”

30. If the treatment has effected a permanent improvement, this need not be done – there is no longer an impairment.

Submissions

31. The respondent argues that in her witness statements the claimant had not referred

to mobility, and in respect of household tasks, had said she avoided them because of “what they could trigger” rather than being unable to do them. Ms Supiya had made no mention of dysmenorrhea or headaches as the reason why she needed help with housework or shopping. The effect on her mood is attested only by the claimant herself, whose evidence was not reliable. It was not possible to conclude from the incomplete evidence that she was disabled.

32. The claimant’s representative had prepared a written argument which usefully surveys relevant law. On the particular facts, he argues that obesity, while not claimed a disability, “impacts on the impairments caused by asthma and depression”, and that the adverse effects of her various conditions should be assessed cumulatively.

Discussion and Conclusion

33. Taking the conditions one by one, and first the anxiety and depression, the evidence of the records is that it arose in response to life events in 2016, that by September 2017 the claimant had ceased treatment, and despite the invitation to refer back if she wished, had not seen a need. This is confirmed by the Homerton questionnaires she completed in 2018, within the period material to this assessment, leading to the conclusion that she had no current mental health issues, and the GP referral of May 2018, which called it a past problem. As for whether she was impaired by any mental health condition, Ms Supiya does not mention it. The claimant says that because of this in combination with her other conditions she found it hard to concentrate (and so failed in what she was being told by her manager about how to do her work), but she denied any loss of concentration in the hospital questionnaires. These may be snapshots, but taken together, and knowing that in certain respects the claimant’s own evidence has been shown unreliable, there is insufficient evidence that she was by reason of anxiety and depression impaired in her concentration, or that the impairment had a substantial and long term effect on her ability to carry out normal day to day activities at work or at home.
34. Taking asthma next, the claimant has been diagnosed with this condition for some years. She had two inhalers, but told the tribunal she only used the brown one, when she actually had shortness of breath, not the blue one. This means it is not necessary to establish the deduced effect, as would be necessary if she had also used the blue inhaler. As for when she had shortness of breath, the 2017 assessment noted she was not limiting her activities because of it. This was the same as in earlier years (except 2016) – she was taking moderate or light exercise, and not restricting her activity because of it. She told Homerton Hospital in July 2018 she could walk for an hour without getting breathless and manage one flight of steps. As she had two flights to get to her flat, that would suggest she was out of breath taking the second flight whenever she went home, but not enough to use the inhaler, as she mentioned only using it four times a year. That suggests that breathlessness on climbing stairs was because of her weight, and not needing to use the inhaler indicates it was not because of asthma. She did suggest that asthma in cold weather caused her to be late for work, but there is nothing to confirm this in the medical notes or in the employer’s notes of her attendance, and she has been shown to exaggerate, or be unreliable, in some respects. She did attend hospital on one of the days when off with flu immediately following the July 2018 gastroscopy, but the findings and treatment on this visit are not recorded. Taken together, there is insufficient evidence that impairment from asthma had a substantial effect on her ability to carry out day to day activities.
35. Dysmenorrhea (painful periods for a day or two a month) is not uncommon, but in some it can be severe, especially when linked to gynaecological conditions such as fibroids. The claimant had never seen her doctor about this. Her flatmate did not mention it as why she needed help with housework and shopping. The length of time

it affected her increased in the telling. In the eight months of employment she took two days off for that reason. The tribunal does not conclude that dysmenorrhoea had a substantial impact on her ability to carry out any normal day to day activity.

36. The headaches are mentioned once in the GP notes, some time before. No specific cause was found. They were controlled by paracetamol. The frequency is not known. They are not mentioned by her flat mate as a reason for needing help at home. The claimant says they contributed to loss of concentration at work, but as noted, she had denied loss of concentration at the material time. The tribunal concludes there may have been days when she had a headache and found it hard to concentrate, but there is insufficient evidence that this had a substantial effect on her day to day activities.
37. On the hiatus hernia, the impairment is said to be chest pain. She had had acid reflux. An acid reflux is noted by the GP on the May 2018 referral, and several years before it had been treated with Gaviscon. The only episode of chest pain mentioned in the records was from some years before, in 2004, when she had *Helicobacter pylori*, which was treated and no longer present in 2018. On the claimant's account she was off sick with chest pain on 1 and 26 October 2018, but on the records one of those days was for sleeplessness, not chest pain. The hiatus hernia was not the reason for the surgical referral, which clearly was for consideration of weight loss reduction surgery. The gastroscopy finding was that it was small. It was not thought necessary to repair it before all the other assessments (mental health, ability to diet, motivation) had been made on whether she was suitable for weight loss reduction surgery, and it may only have been repaired because she was having surgery to the stomach for another reason. There is no evidence that chest pain had any impact on her ability to carry out day to day activity save that on one day she was on her account unable to go to work because of it. This is not a substantial impairment, and did not have a substantial impact on her activity.
38. Next, the knee pain. This was not pleaded as a condition causing disability. It is mentioned, but no more than that, in the November 2019 position statement, and there is no information at all on when or for how long she had physiotherapy. She does not say she took painkillers for it. This reticence may be because the claimant regarded this as a consequence of obesity – as she did in her hospital questionnaires. She did say in the hearing through her representative that she did not mention obesity in the claim, or either witness statement, because she was too embarrassed to claim disability by reason of it. Knee pain may have been the reason for getting her flat mate to do the shopping, and the reason given by her flat mate for assisting with household tasks was that the claimant found it hard to bend over. Despite knee pain she was able to take some exercise, as recorded in the asthma reviews. She does not describe knee pain inhibiting her ability to travel to work, or work when she got there, save if combined with headache or anxiety to impair concentration.
39. Given the claimant's evidence that the combination of effects of different conditions impaired her concentration overall, I stand back to assess whether in combination the pleaded conditions did have a substantial and long-term effect on her ability to carry out day to day activities. The claimant joins breathlessness from asthma, pain in the chest and knees, and anxiety and depression, to paint a picture of impairment of concentration in consequence, and of therapy technique sometimes making her appear unresponsive to discussion and instruction. Other than the knee pain, which at some level was probably constant, there is no evidence that the other conditions had an effect on her much or at all in the material period. Nor does she describe incidents when she was unresponsive. Nor is there in any case reliable evidence of impairment of concentration during the material period.
40. I conclude that the claimant was not disabled by reason of hiatus hernia, asthma, migraines, anxiety and depression or dysmenorrhoea, whether singly or in combination. She is likely to have had impaired mobility, so as to need help with

housework and shopping, because of obesity and knee pain, but impaired mobility was not pleaded as a disability in this claim, which is all about the effect of disability on her sickness record, on her ability to manage her workload, and in particular on her ability to remember and carry out tasks as instructed.

The Costs Application

41. The respondent applied on 30 September, having notified on 16 September its intention to do so. It is argued the claimant has conducted the case unreasonably by failing to send medical records as ordered in October 2019, or a witness statement that gave the information ordered.
42. It is also argued that the claimant's conduct led to postponement of three hearings: the five day final hearing due to start 28 January 2019, the postponed five day final hearing due to start on 16 September, and the postponement of the disability issue from 16 September to today.
43. The claimant argued that medical records had been sent in November 2019, both the initial three page summary, then more at the end of the month. The respondent should not have the costs of the unless order as it should not have been made in the claimant's absence. He did not address the adjournment issues. He said costs should be in the cause.
44. The respondent replied that the additional documents sent in November 2019 did not include more medical records, only the respondent's own documents recopied to them. The records now sent include a November 2019 entry that postdates the date the claimant's representative says he sent the additional material.
45. The employment tribunal, costs are not in the cause, and are the exception rather than the rule. By rule 76 of the Employment Tribunal Rules of Procedure 2013,
 - (1) A tribunal may make a costs order ... where it considers that – (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably either the bringing of the proceedings (or part) all the way that the proceedings (or part) have been conducted; or (b) any claim or response had no reasonable prospect of success
 - (2) A tribunal may also make such an order where a party has been in breach of any order or practice direction or wear a hearing has been postponed or adjourned on the application of the party".
46. A tribunal considering rule 76(1) must first consider whether the conduct point is made out, and then exercise discretion whether to make an order. Account may be taken of the paying party's ability to pay – rule 84.
47. The claimant had not volunteered information as to her ability to pay, and so I questioned her. She is living on Universal Credit at £735 per month. She pays £120 per month in rent, her other outgoings include council tax, internet, gas and electricity, a car, the TV licence, payments towards credit card debt and bank overdraft fees. She does not have savings. She has had a student loan (asserted by Mr Supiya as the reason why by the end of 2019 she had not applied for universal credit). I was not told the total of her debts.
48. There is no doubt that the claimant did not supply a witness statement that contained information ordered employment Judge start in 8 October 2019. When the respondent pointed this out, the claimant's representative replied November "provided a disability statement which is broadly similar others dismiss this tribunal is that set by respondents. We are at a loss as to why respondent funds finds the claimant's disability statement in adequate". He added that the medical evidence disclosed was "slightly redacted to retain medical confidentiality not relevant to the claim". It was a further order by employment of stout laid on 27th September that by

noon on Friday 29th November claimant was to remedy outstanding orders not hitherto complied with as identified by the respondent in a letter 22nd November, told the tribunal what those steps were and inform the tribunal whether the claimant disagreed with any matter in respondent stress the 22nd November. The claimant did not and on 4 December the respondent reported the position. 6 December employment Judge start this to the case for a preliminary hearing on 6 of 10 January to consider whether the claim should be struck out failure to comply with orders, or whether an unless order should be made under rule 38, and to make further directions to ensure that it is ready for final merit theory 28 January, and whether any also costs to be made against the claimant in respect of matters that have given rise to the need to list a preliminary hearing.

49. What happened next is set out in the order of 10 September 2020: a request by the claims representative the postponement of 13 January because he was out of the country was overlooked. In his absence, and unless order was made for disclosure of all medical records, other components with orders, and if there was no compliance for an application to vary the orders, the claim would be dismissed. In the meantime hearing due to start 28 January was postponed to 16 September because it was clearly not ready. These steps had to be done by 23rd of January. Unfortunately the after did not send the unless order to the parties until 4th February. 18 February the claimant's representative applied the reconsideration on the basis that it was made in the absence of the party, and in any case did not come to the claimant's attention until after the date the compliance had passed. The application also said that the claimant disputed the claims that she had failed to send a suitable disability statement and disclosure, and said "the matters on which the respondent follows with a hotly disputed and are a matter of case management".
50. The directions given to the administration list the case for a reconsideration hearing, but no action was taken, there was no follow-up on either side, and it came to my attention when the case was brought out for review 7 days before the final hearing now listed for 16th of September. I reviewed the reconsideration application under rule 72 in order central reasons on 10 September, indicating the matter should be reconsidered, but rather than Institute of unless order, and in view the claimant's contentions that she was not in breach of the earlier order either with regard to the witness statement of the medical records, the best way to proceed was to try the disability issue on 16 September as a preliminary issue, and on the evidence on which the claimant relied, and which in her view was adequate.
51. As noted above, this prompted the claimant to disclose much fuller medical records to the respondent on 14 September. When the hearing began on 16 September, respondent's solicitor objected that, working part-time, he had not had the opportunity to put the records in order to begin to read them. The hearing of the disability issue was postponed to 2 October, because otherwise there was unfairness to the respondent, unable to prepare, and because the tribunal did not have the records for the hearing.
52. Nothing was said on 16 September about further witness evidence, but the claimant did in fact serve a full witness statement on 25 September.
53. I conclude that the claimant or her representative have acted unreasonably and in breach of order in the conduct of the claim. Employment Judge Stout's order of 8 October was clear and specific about the content of the statement the claimant was to make. The "position statement" does not, as ordered, state the dates each impairment lasted, does not identify the effect of alleged disability on her ability to carry out normal day to day activities, or say how each disability caused substantial disadvantage requiring adjustment, even though the order referred the claimant to section 6 of the Act, to schedule 1, to the Code of Practice, and to the Presidential Guidance, all of which would have helped an inexperienced representative to see

what was required. When the respondent asked for more, the claimant's representative said this kind of statement had been accepted in other cases. When both Judge Stout and Judge Palca made orders, which the claimant was sent, expressing the view there had not been compliance, the claimant's representative did not add to the statement, but instead said the contention was "hotly disputed". The same can be said about the medical records. The three page summary was objected to as inadequate by the respondent, and then mentioned by the judges. The claimant's representative has tried to suggest more records were sent in November 2019, but that is not the case, and in fact I see from the GP notes recently disclosed that the claimant made her subject access request on 17 December 2019, which suggests that it was the strike out warning of 6 December that prompted her action. Nevertheless, no more notes were sent until 14 September 2020, when it was now clear from the order and reasons of 10 September that the disability issue was going to be heard on 16 September on the basis of what had been disclosed. It is hard to understand why the claimant would not have acted before then when the written reasons for the unless order made on 9 January (even though in her absence) showed that the tribunal did not consider there had been compliance, and when a final hearing was now due to start on 16 September, unless he was waiting to see if the unless order was reconsidered and set aside. The fact that the claimant's representative asked that disability was not heard as a preliminary issue suggests he never thought the statement and records were adequate, and was leaving proper preparation until there was a new hearing date in the diary.

54. What have been the consequences? Most notably, the hearing listed for 28 January had to be postponed for want of compliance with the orders on disability, although there was other non-compliance, notably disclosure of the claimant's attempts to mitigate. The claimant's representative in his email to the tribunal seeking postponement of 6 January hearing said he was out of the country from 16 December to 13 January and that the trip had been pre-booked, so there was then no emergency to disrupt his preparation for the 28 January hearing.
55. The continuing failure to amplify the witness statement or disclose more than a short summary of records has also led to postponement of the 16 September hearing notified to the claimant in February. The representative must have known that if the unless order was set aside the hearing would be effective. Although he had not heard anything after his application to reconsider, he made no attempt to follow up whether the claim was struck out, or whether the 16 September hearing was effective, or otherwise find out the position. Whether preparing for a hearing of all issues in January or one in September, the claimant's representative would have recognised that he needed to do more, as shown by the sending of additional records on 14 September, too late for there even to be a one day hearing, and the proper witness statement on 25 September. In the meantime the respondent has had to prepare for a January hearing, engage in considerable correspondence with the claimant and tribunal to try to ensure compliance, and attend the preliminary hearing in January which would have occurred even if listed for a date when the claimant's representative was in the country.
56. The representative has some experience of tribunals. He corresponds from an address in Chingford called "Community Voluntary Advocates" at suite 39, 33 Heathcote Grove, suggesting this is an office, not his home address. In September the respondent asked for details of being a registered claims manager, and when he did not reply, suggested the claimant seek advice from the CAB or other sources of free advice. He described himself at the 8 October hearing as a trade union representative, and when asked about this by me on 16 September said he had worked for PCS in the past. On 16 September he described himself as a volunteer advocate. The reference to the position statement having been acceptable in other cases suggests experience, as does the phrase "costs in the cause" though inapt to tribunals. Though not legally qualified, he should be aware that orders must be

complied with. Costs were also mentioned in the standard text concluding the order of 8 October, and in the strike out warning sent to the parties on 9 December. The claimant and her representative cannot be treated entirely as litigants in person, at sea in what is required by orders.

57. The extent of the non-compliance, and the consequences it has caused the respondent in delay and additional work, indicate, before considering the claimant's means, that it is right to make an order. It is probable from the claimant's evidence, and the document in the bundle showing a medical assessment for universal credit, that she is on a means tested benefit and has debts rather than savings. If an order is made she cannot pay it now.
58. However, an order can be made if she has some earning capacity and there is a prospect of future earnings. Her CV shows in 2009 she gained an honours degree in Psychology and Education Studies from London Metropolitan University, and in 2014 certificates in applied theology, and Christian counselling and pastoral care, at University of Winchester, and she has done counselling for church groups, as well as paid employment for a personal credit firm and a taxi company. Following the surgery this summer she may be encouraged to seek work, but the labour market at present, with businesses failing because of the Covid 19 restrictions, is not promising. She may come into money if successful in the race discrimination claim, but I must consider that very likely she is in debt. I conclude that the claimant's experience and qualifications, together with her debts, mean there is little real prospect she will be able to meet an order for costs for many years into the future.
59. Were Mr Supiya acting on a paid basis, or in the expectation of payment if the claimant succeeds, I would have considered an order for wasted costs under rule 80, but he states he is a volunteer, so presumably not "acting in pursuit of profit", now or later.
60. With some regret, given the conduct of the claimant's representative, and the additional work and hearing day caused by that leading to unjustified expense to the respondent, I do not exercise discretion to make an order. Had I made an order, the claimed £2,340 (ex VAT) appears not unreasonable.

Further Case Management

61. There remains the claim of race discrimination in paying more to two colleagues. It is admitted that they were paid more, and denied that race was any part of the reason for this. I estimate that two days will suffice for the final hearing, and after consulting the parties' availability it is listed for 22 and 23 April.
62. The parties must exchange documents on this issue if they have not already done so. That includes the job descriptions, and documents on the other two employees' qualifications, experience and performance, and any notes or emails about the reasons for the salary decisions.
63. The respondent should prepare the hearing bundle after consulting the claimant about what should be included and what can be omitted. An electronic bundle should be sent to the tribunal a week before the hearing. If this is in one pdf the index must either be filed separately, or the first page of the index must be numbered page 1 (and so on) so as to ensure that the pdf page number corresponds to the page number in the index and statements. If more than one pdf, the index must be sent separately, and each pdf be identified as A, B, and so on, and each should start the numbering from 1 afresh, so the pages are referred to as A72, or B6. This will aid navigation. The witness statements must be sent to the tribunal as a bundle of their own.
64. The witness statements must refer to the paginated bundle, and include evidence on

all remaining matters to be decided by the tribunal. They must be exchanged by the date ordered. The parties can agree to exchange on an earlier date, but if they seek to postpone exchange there must be a prior application to the tribunal.

65. The parties are asked to try to agree the amount to be awarded for the difference in gross pay should the claim succeed. The claimant calculated the difference in pay between herself and the lower paid comparator at £2,000 for one year. The respondent's counterschedule calculates £941.16 for the 36 weeks she was employed. It is hard to see why the claim should be for a period of more than the number of weeks she was paid. It should be calculated on the basis of the gross wage, as the award is liable to tax when it is paid. If the amount is not agreed, they must have ready at the hearing a note of the precise reasons why the amount is not agreed, whether of fact or principle, so that the issues can be properly argued.
66. In the light of the procedural history of this claim, the claimant's representative must ensure that from now on all orders are complied with properly and punctually. He is well aware of the potential consequences of failure to comply.

Employment Judge - Goodman

Date : 6th Oct 2020

JUDGMENT SENT TO THE PARTIES ON

06/10/2020

FOR THE TRIBUNAL OFFICE