



EMPLOYMENT TRIBUNALS

Claimant: Miss M Cooksey

Respondent: Welcomm Communications Ltd

JUDGMENT ON A PRELIMINARY HEARING

Heard at: Leicester (remotely via CVP)

On: 20 November 2020

Before: Employment Judge Ahmed (sitting alone)

Representation

For the Claimant: Mr Nicholas Bidnell-Edwards of Counsel

For the Respondent: Ms Dee Masters of Counsel

JUDGMENT

The Claimant's complaints of direct disability discrimination and discrimination arising from disability are both struck out.

REASONS

1. In these proceedings the Claimant brings complaints of disability discrimination only.

2. This was a preliminary hearing to determine both whether the Claimant was a 'disabled person' within the meaning of section 6 and Schedule 1 of the Equality Act 2010 ("EA 2010") in relation to conditions not conceded, namely anxiety and depression and to consider whether the complaints of disability discrimination should be struck out as having no reasonable prospects of success or a deposit ordered. The

Respondent concedes that the Claimant was disabled by reason of a personality disorder.

3. With the agreement of the parties the issue of striking out/deposit was dealt with first for if the claim was struck out the question of whether the Claimant was disabled in relation to the disputed impairments becomes irrelevant. Judgment on the decision was given orally at the conclusion of the hearing. These reasons are sent pursuant to a request by the Claimant.

4. The Claimant was employed by the Respondent from 25 March 2019 as a Business Account Manager. The Respondent provides communication solutions to customers including Telephony, Energy and Information Technology services. It is based in Market Harborough, Leicestershire, which is where the Claimant worked. It employs around 70 people. The Claimant's role involved managing a customer base of around 200 small and medium enterprises to manage their account, keep them in contact, to re-sign them to contracts and sell other services. The Claimant was dismissed on 17 September 2019 due to concerns about her performance and behaviour.

5. When completing the Respondent's general induction questionnaires and health information the Claimant cited a number of medical conditions she suffered from and explained the medication she was taking for them. The Claimant completed the questionnaire and forms and gave them to one of the Respondent's HR advisor on 25 March 2019.

6. There then followed a discussion between the Claimant and Miss Kate Fogg, an HR manager of the Respondent, on 3rd April 2019 regarding these conditions. Miss Fogg was anxious to ensure that the Claimant was fully supported in her role and that all reasonable adjustments necessary to enable the Claimant to undertake her role were made. Miss Fogg did not however request to see the Claimant's medical records but did explain that the Respondent would be seeking medical advice to ensure that the Claimant was fully supported with all necessary reasonable adjustments.

7. On 3 April 2019, Miss Fogg wrote to the Claimant to set out what the proposed actions were which included an ergonomic assessment, making management aware of the need to support the Claimant if they saw any symptoms which necessitated adjustment and to take medical advice in relation to the Claimant's roles and expectations so that appropriate work recommendations/adjustments could be made. Miss Fogg made it clear that the nature and details of the Claimant's conditions would not be shared with management save with her line manager. She also made it clear that she would not be seeking the Claimant's full medical history.

8. On 3 April 2019 Miss Fogg emailed management about the information gained. In addition an ergonomic assessment was completed on 4th April.

9. On 25 April 2019 Miss Westwood, the Respondent's Centre Sales Manager, conducted the Claimants monthly probation review. She outlined a number of improvements that were required by the Claimant. These were largely in relation to the style of her communication with customers. The Respondent has a traffic light rating on performance standards. Red is 'poor', Amber is 'below standard' and green is 'acceptable'. The Claimant received an amber rating at that point.

10. On 10 May 2019 Miss Fogg emailed the Claimant again requesting details of the Claimants medical contact. Miss Cooksey said that she would supply the information but failed to do so.

11. On 21 May 2019 Miss Westwood conducted the Claimant second monthly probation review and once again the Claimant received an amber rating.

12. In early June 2019 the Claimant made an error with a client which she found upsetting. She was assured by the customer account manager that the error was not serious and was fully supported. The Claimant became distressed and began swearing. She subsequently apologised for her behaviour.

13. On 17 June 2019 Miss Westwood conducted the Claimants third monthly probation meeting in which she outlined a number of areas of necessary improvement. Subject to attention and progress in those areas the Claimant received a green rating.

14. On around 31 July 2019 the Claimant was engaged in discussions with colleagues about the Christmas period working when she suddenly became aggressive and argumentative towards her colleagues. She later apologised for her conduct.

15. On 8 August 2019 a customer the Respondent called to discuss a contract renewal. The Respondent emailed the Claimant requesting a call back but the customer but the Claimant failed to do so.

16. On 23rd August 2019 the Respondent conducted the Claimants quarterly review. There were concerns and discussions about the Claimant's behaviour and performance in recent months.

17. On 5 September 2019 a Customer Support Manager noticed the claimant was struggling with a customer call having spent an hour on the telephone.

18. On 10 September 2019 the Claimant failed to call back a customer.

19. On 16 September 2019 the Claimant was spoken to by Rebecca Margison, a Sales Manager, following incidents the previous day when the Claimant was engaged in inappropriate behaviour which disrupted the work of her colleagues. She was invited to a meeting the following day to discuss her performance and behaviour. Following the meeting on 18 September 2019 the Respondent wrote to the Claimant and confirmed that her employment was terminated due to underperformance and unacceptable behaviour.

THE LAW

20. The relevant statutory provisions from the Equality Act 2010 are as follows:

Section 13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

21. Rule 37 of the Employment Tribunal Rules of Procedure 2013 deals with striking out claims and the relevant part of that is as follows:

“ At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

22. In coming to my decision I have considered the provisions of Rule 37 and also whether in all of the circumstances it is appropriate to exercise the discretion to strike out.

23. The complaints brought in these proceedings are of direct disability discrimination under section 13 EA 2010 and discrimination arising from disability under section 15 EA 2010. They are not very well pleaded in the ET1 which unfortunately is a rather long, rambling and difficult to follow document. It has effectively been replaced by an amended document headed 'Statement of Case' which was supposed to contain only further and better particulars and not a resubmission of the claim. It has to be said that no permission has ever been sought or given to amend the Claimant's claim and to amend the pleadings by way of further and better particulars without leave is not the correct procedure. I have proceeded on the assumption that the Claimant has been permitted to amend her claim in the form it now stands so that the matters can be considered today.

24. The Claimant clarifies in those further and better particulars that she has been subjected to *direct* disability discrimination because:

24.1 From 3 April 2019 to the end of her employment she was asked to give more and more information about her health conditions, almost on a daily basis which she found upsetting and intrusive;

24.2 That she was pressurised into providing her medical records by being told this was in her best interests even though she had said that no other reasonable adjustments other than those made or contemplated would be required. The Claimant says that she informed Miss Fogg that she was trying to obtain her medical records from her GP (unsuccessfully) and repeated pressure for information and requests affected her health and thereby caused detriment.

24.3 Specifically, that in late August/early September 2019 Miss Fogg replied to the Claimant's statement that she would like to inform team members about her conditions by saying that to do so would scare her colleagues and make them feel uneasy.

25. The allegations of discrimination arising from disability are:

25.1 That the Respondent had a stereotypical preconception about the Claimant being incapable of working effectively due to her ill-health;

25.2 that the “something arising” is that she made a disclosure stating she suffered from various medical conditions and her inability to provide medical records led to unfavourable comments by Miss Fogg and others.

25.3 That Ms Fogg made repeated requests for more and more information about her medical conditions, with the Claimant having to be re-assessed and having to go through her medical history and not being able to discuss her medical difficulties with her colleagues.

CONCLUSIONS

26. In coming to my decision I am conscious of the authorities which caution against striking out discrimination complaints before a final hearing and without hearing all of the evidence. I recognise that striking out a claim is a draconian action and should only be used exceptionally, in particular where there was a factual dispute (see **Anyanwu v South Bank Students Union** [2001] ICR 391 and **Ezsias v North Glamorgan NHS Trust** [2007]).

27. On the other hand the power to strike out exists for a reason and the authorities also make it clear are other authorities that it is permissible to use the power where the claim genuinely has no reasonable prospect of success such (see for example **Ahir v British Airways** (UKEAT/0014/16/RN))

28. I agree with Ms Masters' primary submission that this case makes no sense, either legally or factually, as a complaint of discrimination arising from disability and that it is really a complaint of direct discrimination only. If the Claimant's case is that she was treated unfavourably or less favourably because she revealed she was disabled and the detriment flowed from that then this in reality a section 13 direct discrimination claim only. The attempt to introduce the 'something arising' is my judgment somewhat contrived.

29. The mis-labelling does of course not matter if there is any substance in the allegations. Ultimately it seems to me to matters little because the Claimant's allegations have no reasonable prospect of succeeding for the following reasons:

29.1 It is clear from the documentation that the Respondent has throughout the entire process been seeking to gain sufficient information about the claimant to comply with its legal duty to make reasonable adjustments;

29.2 There is nothing to suggest that the Claimant was unable to provide her medical evidence or information. It was not an onerous task. I appreciate the Claimant had some difficulty in obtaining historical information from a former employer but it is not disability discrimination to request medical information.

29.3 There is nothing to suggest that there is any relationship between the Claimant's personality disorder and being asked to see medical records or that there was any undue pressure applied. The Claimant was chased for information but that was because she at times failed to do what she agreed.

29.4 It is clear from the documentation that the requests for information were not overwhelming, excessively onerous or intrusive. The real reason for dismissal was that the claimant was found to have been guilty of unprofessional conduct at work and she had not performed to the required standards. She does not have the qualifying period of service to bring a complaint of unfair dismissal.

30. There is nothing to suggest that the Respondent broke its promise in not seeking her full medical history or asking for information without getting the Claimant's approval first. There are a number of incidents in late July, August and in particular in September 2019 in relation to the Claimant's performance and behaviour which have nothing to do with the requests for medical information or any disability.

31. I do not accept that this is a case where evidence where further evidence will make her case any stronger. Accordingly, I consider it is appropriate to exercise the discretion strike out the claim at this stage as having no reasonable prospect of success within the meaning of Rule 37(1) (a) of the Employment Tribunal Rules.

Employment Judge Ahmed

Date: 15 January 2021

Sent to the parties on:

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For the Tribunal:

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Note: This was a remote hearing by video via Cloud Video Platform (CVP) which was not objected to by the parties. A face to face hearing was not held because it was not practicable and no-one requested the same . All issues could be determined in a remote hearing.