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EMPLOYMENT TRIBUNALS

Claimant: Ms F El Bergui

Respondent: Ria Financial Services Ltd

Heard at: East London Hearing Centre

On: Monday 11 February 2019

Before: Employment Judge Brook

Representation

Claimant: In Person

Respondent: Mr W Haines (Employment Law Consultant)

JUDGMENT ON PRELIMINARY ISSUE

At all relevant times the Claimant was disabled within the meaning of section 6 of the Equality Act 2010. The Claimant's disability is Hypothyroidism.

REASONS

1 At this Hearing the Claimant represented herself and the Respondent was represented by Mr Will Haines, Employment Law Consultant.

2 The matter came before the Tribunal to determine whether during the course of her employment the Claimant was disabled within the meaning of Section 6 of the Equality Act 2010. It was common ground that the Claimant had insufficient service to bring a claim in what might be called "ordinary" unfair dismissal and that the only claims before the Tribunal are in sex and disability discrimination. I was satisfied that the Claimant was disabled at the relevant times and gave that Judgment orally in the Hearing. The matter then moved to identifying the issues for the Tribunal to determine at a full merits hearing and to give directions in respect of the same.

Evidence

3 I heard evidence from the Claimant and considered the documents on the Tribunal file which included numerous Fitness to Work Certificates and brief synopsis of the Claimant's medical condition dated 4 July 2018 prepared by her GP, Dr Karen Miller. This describes Ms El Bergui as having a past medical history of epilepsy, hypothyroidism and benign positional vertigo. Dr Miller goes on to say that this can cause the Claimant to 'feel faint with severe dizziness, nausea, flushing ...' such that she '... feels as though she is going to pass out or vomit very quickly. This can come on quickly and can last for some hours'. Dr Miller also comments that it is very hard for the Claimant to predict these episodes and that often these symptoms are further complicated by accompanying epilepsy.

4 By an earlier letter from Dr Viridi, dated 21 May 2018 and addressed 'To Whom it May Concern' there is further reference to hypothyroidism, the symptoms of which Dr Viridi writes '... include tiredness and lethargy' with a suggestion that Ms El Bergui 'speak with her employers ... about consideration of a reduction in her working hours'. According to the Claimant this was given to the Respondent, her then employer.

5 Included in the documents were numerous Statement of Fitness for Work ('Certificates') dating from April 2016, some six months before the Claimant commenced employment with the Respondent, which Certificates cover a variety of symptoms and conditions including a miscarriage in late spring 2017 which unfortunate event gave rise to the Claimant having further time of work. It is not clear to me that the Respondent would have been able to tell on the basis of the Certificates alone that the Claimant suffered from the thyroid condition upon which she now relies in bringing her Claim. Be that as it may Mr Haines did not seek to suggest that the Respondent had not seen the letters of 21 May or 4 July. These factual issues will fall to be decided at the full merits hearing and I make no findings of fact today other than the Claimant was disabled as aforesaid at the relevant times and thus is able to continue her claims in disability discrimination.

Effect on Every Day Activities

6 For the purposes of this Hearing the Claimant provided a typewritten statement entitled "Claimant's Response", on its face dated 6 February 2017 but by common consent properly dated 6 February 2019. That statement sets out how hypothyroidism affects her everyday life and this account broadly reflected the matters set out in the letters of Drs Miller and Viridi, save that Ms El Bergui also refers to "severe pains in my hands and fingers which has been diagnosed as carpal tunnel syndrome". There is express reference to symptoms consistent with this syndrome in the Certificate dated 13 April 2016 however Ms El Bergui does not seek to rely on this condition as a relevant disability and her oral evidence on this aspect of her health was that she simply "put up with it". Her thyroid condition caused her to experience extreme fatigue and dizziness if she obliged to work "too long", and could then trigger vomiting and epilepsy. It is the Respondent's alleged treatment of the Claimant in respect of her disability, and to some extent her pregnancy, that lies at the heart of her Claim.

Reasonable Adjustments

7 Briefly, Ms El Bergui alleges that she was obliged to work longer hours than she could cope with at a branch further from her home than her original place of work, that she was excluded from participation in the bonus scheme ostensibly because of her sickness absences, that she was denied contractual sick pay and was underpaid statutory sick pay. The long hours caused her to become ill necessitating absences from work which, she alleges, eventually led to her dismissal. It is in this way that the Claimant puts her disability discrimination case against the Respondent. She alleges that matters deteriorated on being transferred to the Seven Sister Branch, where she was promised a shorter working week and daily hours to accommodate her disability, but that this was soon ignored which exacerbated her health and led to her dismissal.

Respondent's Position

8 Suffice it to say the Respondent denies all allegations of disability and sex discrimination, takes issue with the Claimant as to whether the Respondent had notice of the Claimant's disability, whether the Claimant was disabled within the meaning of the Equality Act (this now having fallen away as a result of my decision on this point), that many of the allegations appear to be out of time, and that in all the circumstances the Claimant was lawfully dismissed.

9 Mr Haines pointed out to the Claimant, and she accepted in her evidence, that at Section 12.1 in her ET1, which asks "Do you have a disability?", the Claimant had ticked the "No" box. The Claimant had however, at Section 8 of that Form, clearly ticked the relevant box for a claim in discrimination including dismissal by reason of disability. Her explanation for this apparent conflict was that she had ticked the "No" box in error. She also relied on her Particulars of Claim, brief as they are, which expressly refers to her being "dismissed due to my health and absences that were signed by the doctor". It is true to say, and indeed a point properly taken by Mr Haines, that the Claimant's Particulars do not identify the disability she relies upon and indeed these Particulars spend some time reciting the circumstances of her "pregnancy complication" which sadly, in late March 2017, ended with a miscarriage. This in turn led the Claimant to suffer what she describes as a period of "severe depression". In her written statement she states that she "already suffer (sic) as a result of my long-term health issues". Ms Bergui's evidence was that when she commenced employment her thyroid condition had already lasted 'some years' and continues to this day.

Notice of Termination 27th May 2017

10 On 25 May 2017 the Claimant received an email terminating her employment with immediate effect. Shortly thereafter, following a discussion with the Respondent's Ms Victoria Ezeagbo, the Claimant was reinstated. There is an issue as to whether in fact termination was brought into effect or whether notice was withdrawn prior to an actual dismissal. Be that as it may the Claimant was told her employment had been terminated because her "medical note had run out and I did not inform them". As to that Ms Bergui asserts that the Respondent had asked her for medical information in a manner and with a frequency that she regarded as harassment. She states that she felt she was 'not believed' and treated with disbelief.

Sex/Pregnancy Discrimination

11 In her ET1 the Claimant did not expressly tick the relevant pro forma box for a claim in sex or pregnancy discrimination though is indicated in the Particulars. Mr Haines conceded that this could be a proper claim under Section 99(3)(a) of the Employment Rights Act 1996, though in his view is out of time. The Claim clearly concentrates on disability discrimination however there is an allegation that the May dismissal notice was pregnancy related and that the Respondent's alleged insistence on medical information during pregnancy and after her miscarriage amounted to sex/pregnancy related harassment and victimisation. Mr Haines had helpfully provided a draft half list of issues which we were able to augment and further clarify in the course of the Hearing, though all matters of fact will be determined at the final Hearing.

Decision on Disability

12 I was satisfied that at the relevant times the Claimant was disabled by reason of hypothyroidism with associated symptoms of epilepsy and benign positional vertigo. Mr Haines indicated that there will very probably be Requests for further information made of the Claimant and the Respondent reserves its position on the issues of time and relevant knowledge etc, all of which fall to be decided at the final Hearing. The Claimant must expect the Respondent to serve Requests referable to the Issues.

13 Having given Judgment on disability, on which the Parties required written reasons, we then moved to identifying the List of Issues for the Tribunal to determine at that future Hearing.

List of Issues

14 Mr Haines produced a helpful draft list of issues which formed the basis of discussion from which the following issues were identified.

Sex/Pregnancy Discrimination

- 141 Was the reason or principal reason for the Respondent serving notice of dismissal on the Claimant on 27th May 2017 a reason or set of circumstances relating to her sex and/or her pregnancy or miscarriage?
- 142 Did the Respondent know the Claimant was Pregnant or had miscarried?
- 143 Was there an effective dismissal pursuant to the provisions of Section 99(3)(a) Employment Rights Act 1996?
- 144 What is the Respondent's stated reason for the notice and/or actual dismissal?
- 145 Was this dismissal principally because of the Claimant's sex and/or her pregnancy or miscarriage?
- 146 Did the said notice of dismissal and/or actual dismissal constitute sex/pregnancy related victimisation and/or harassment of the Claimant?

- 14.7 Did the Respondent repeatedly and/or unreasonably demand medical information from the Claimant about her pregnancy or miscarriage? The Claimant asserts the Respondent knew of her delicate and vulnerable state but persisted in these requests and did so in a manner that questioned the genuineness of her ill health. She asserts that on or around 25th May 2017 in relation to one such request the Respondent's Ms Victoria Ezeagbo told the Claimant 'I don't want to have to catch you out'. The Claimant believes this was as much related to her disability as it was to her then pregnancy and miscarriage.
- 14.8 Was this remark made to the Claimant? If so did these requests and/or remark amount to victimisation and/or harassment of the Claimant?
- 14.9 The Claimant asserts that the conduct set out above was contiguous with the conduct relied upon as disability related (see below). Are any the above complaints out of time as sex/pregnancy discrimination? If so is it just and equitable to extend time in respect of the same?

Disability Discrimination

- 14.10 The disability relied upon by the Claimant is Hypothyroidism which disability persisted during the period of the Claimant's employment.
- 14.11 Did the Respondent know/could reasonably be expected to have known that the Claimant had this disability at the times the Claimant says she was discriminated against? If so then when did the Respondent know or could reasonably have been expected to know of this disability?
- 14.12 Did all/any of the alleged act(s)/ omission(s) set out below occur?
- 14.13 The Claimant asserts that these act(s)/omission(s) form part of a course of discriminatory conduct. If held not to be a course of conduct then are any the above complaints out of time as disability discrimination? If so is it just and equitable to extend time in respect of the same?
- 14.14 The Claimant asserts that the following acts/omissions of the Respondent amounted to discrimination/less favourable treatment of her:
- i. Requiring her to work longer shifts than 9am to 4pm;
 - ii. Requiring her to work at the Seven Sisters Branch;
 - iii. Requiring her to work more than 3 days per week;
 - iv. Excluding her from the Bonus Scheme;
 - v. Failing to make reasonable adjustments in respect of the above;
 - vi. Failing to pay contractual sick pay (breach of contract and as victimisation/harassment);

- vii. Underpaying statutory sick pay (breach of statutory obligation and as victimisation/harassment);
- viii. Repeatedly and/or unreasonably demanding medical information from the Claimant about her disability (victimisation/harassment);
- ix. Dismissed the Claimant by reason of her disability.

15 So far as may be necessary the Claimant relies upon her non-disabled co-workers as comparators. The Claimant relies upon these acts/omissions as part of a continuing course of discriminatory course of conduct by the Respondent. If any are held not to be a course of conduct then are any the complaints out of time as disability discrimination? If so is it just and equitable to extend time in respect of the same?

Failure to Make Reasonable Adjustments to Working Hours

15.1 Allegations i, ii, & iii above are relied upon by the Claimant as failures to make reasonable adjustments pursuant to the provisions of Section 20 Equality Act 20. The Claimant asserts that on being transferred to the Respondent's Seven Sisters Branch, further away from her home than her initial place of work, it was agreed that her daily hours would not exceed 9am to 4pm for a maximum 3 days a week, these being the hours she could cope with given her disability. The Claimant alleges the Respondent did not keep to these agreed hours/days which are the reasonable adjustments relied upon by the Claimant. The Issues for the Tribunal are:

15.1.1 Was there an agreement that on moving to the Seven Sisters Branch the Claimant would only be required to work a 3 day week with 9am to 4pm daily hours?

15.1.2 If so was that agreement broken and why?

15.1.3 If no such agreement, or that agreement having lapsed, what are the provisions, criterion or practices ("PCP") that it is alleged placed the Claimant at a substantial disadvantage in and about her working hours in comparison to a person who is not disabled and what is the date of each event on which it is alleged these PCPs were applied?

15.1.4 Was the Respondent under a duty in respect of any PCP to make reasonable adjustments in respect of the Claimant? Did in fact any PCP place the Claimant at a substantial disadvantage in comparison to persons who did not have the Claimant's disability?

15.1.5 If so, did the Respondent take such steps as were reasonable (taking into account its knowledge of the Claimant's disability) to avoid disadvantage to the Claimant?

15.1.6 If any particular act or omission relied upon by the Claimant out of time? If so, is the said act or omission part of a series of acts or omissions and if so, is the last in the series in time? If not, then is it just and equitable to extend time?

- 15.1.7 What is the substantial disadvantage at which the Claimant was placed?
- 15.1.8 Did the Respondent know or could reasonably be expected to have known that the Claimant was likely to be placed at that substantial disadvantage?
- 15.1.9 What are the steps which the Claimant says would have been reasonable for the Respondent to take? In what way would those steps have prevented the substantial disadvantage relied upon by the Claimant?

Exclusion from the Contractual Bonus Scheme

152 As to this allegation (iv above) the Claimant asserts that the Respondent calculated bonus targets on the basis of attendance making no allowance for sickness absences. This is the Respondent's Practice, Criterion or Policy (PCP) now relied upon as discriminatory by the Claimant. When at work the Claimant asserts that she performed well and met or exceeded daily targets. However, the Claimant was frequently absent by reason of her disability, such absences allegedly caused/exacerbated by the Respondent's failure to make reasonable adjustments to her working hours. By reason of her disability absences the Claimant was unable to meet the targets and was thus effectively excluded from the bonus scheme. The Claimant asserts that her disability absences should not have counted against her. The Issues for the Tribunal are:

- 15.2.1 What are the provisions, criterion or practices ("PCP") that it is alleged placed the Claimant at a substantial disadvantage in comparison to a person who is not disabled and what is the date of each event on which it is alleged these PCPs were applied?
- 15.2.2 Was the Respondent under a duty in respect of any PCP to make reasonable adjustments in respect of the Claimant? Did in fact any PCP place the Claimant at a substantial disadvantage in comparison to persons who did not have the Claimant's disability?
- 15.2.3 If so, did the Respondent take such steps as were reasonable (taking into account its knowledge of the Claimant's disability) to avoid disadvantage to the Claimant?
- 15.2.4 If any particular act or omission relied upon by the Claimant out of time? If so, is the said act or omission part of a series of acts or omissions and if so, is the last in the series in time? If not, then is it just and equitable to extend time?
- 15.2.5 What is the substantial disadvantage at which the Claimant was placed?

15.2.6 Did the Respondent know or could reasonably be expected to have known that the Claimant was likely to be placed at that substantial disadvantage?

15.2.7 What are the steps which the Claimant says would have been reasonable for the Respondent to take?

15.2.8 In what way would those steps have prevented the substantial disadvantage relied upon by the Claimant?

Failure to Pay Sick Pay

153 The Claimant asserts (vi & vii above) there are sums outstanding in respect of both contractual & statutory sick pay. She relies upon these alleged failures as amounting to breach of contract/statutory obligation and as harassment and/or victimisation. The issues for the Tribunal are:

15.3.1 Was the Claimant contractually entitled to sick pay?

15.3.2 If so, was the Claimant entitled to receive contractual sick pay from the Respondent during her periods of absence?

15.3.3 If so, did the Claimant receive her full contractual entitlement?

15.3.4 Did the Claimant qualify for statutory sick pay?

15.3.5 If so, did the Claimant receive her full entitlement?

15.3.6 What was the Respondent's reason for underpayment?

15.3.7 Did any underpayment amount to sex and/or disability harassment/victimisation of the Claimant by the Respondent?

Repeatedly and/or Unreasonably Demanding Medical Information from the Claimant

154 The Claimant asserts that throughout her employment the Respondent repeatedly and persistently requested medical information as to her state of health and did so in a manner that questioned the genuineness of her ill health. The Respondent allegedly persisted in making these requests despite knowing the Claimant's delicate and vulnerable state. This conduct the Claimant says was unreasonable. The Claimant asserts that on or around 25th May 2017 in relation to one such request the Respondent's Ms Victoria Ezeagbo told the Claimant 'I don't want to have to catch you out'. The Claimant believes this was as much related to her disability as it was to her then pregnancy and miscarriage. The Claimant asserts the conduct set out above was contiguous with the conduct relied upon as sex/pregnancy discrimination (see above) and relies upon the same as part of a course of discriminatory conduct. The issues for the Tribunal are:

- 15.4.1 Did the Respondent make persistent requests for medical information?
- 15.4.2 Did the Respondent request the same in a 'disbelieving manner'?
- 15.4.3 In all the circumstances were these requests reasonable?
- 15.4.4 If not reasonable then did the conduct amount to disability discrimination?
- 15.4.5 Did Respondent's Ms Victoria Ezeagbo tell the Claimant 'I don't want to have to catch you out'? If so then did this amount to victimisation/harassment of the Claimant?

Dismissal

- 16 What was the reason for the Claimant's dismissal?

Remedy – Polkey Reduction

- 17 In the event of the Tribunal making an award is it just and equitable for the Tribunal to reduce the same to reflect the prospect of the Claimant's dismissal in any event. In particular, if it be found that the Respondent did not follow a fair procedure, then whether the Claimant would have been, or would have been likely to be, lawfully dismissed in any event. If there is to be a Polkey Reduction to any award, then what should this be?

Contributory Fault

- 18 Whether there was any contributory fault on the part of the Claimant, such that:
- i. The Claimant's conduct was culpable or blameworthy;
 - ii. The Claimant's conduct caused or contributed to the dismissal;
 - iii. Should the Tribunal make a deduction for contributory fault and if so, what deduction?

Mitigation

- 19 Has the Claimant complied with a duty to mitigate her loss? If not, should the Tribunal make a deduction to the compensatory award?

CASE MANAGEMENT ORDERS

Made under the Employment Tribunals Rules of Procedure 2013

- 1 The following directions were agreed by consent:
- 1.1 On or before **11 March 2019**, the Claimant is to provide the Respondent with a copy to the Tribunal a Schedule of Loss;
 - 1.2 On or before **17 August 2019**, there shall be exchange of documents by list and by copies;

- 1.3 On or before **24 September 2019**, the Respondent is to prepare an indexed and paginated bundle of documents to be relied upon at the full merits hearing. The Parties are reminded of the duty to cooperate for the purposes of agreeing the content of this bundle. The Respondent shall be responsible for bringing a further four copies of the bundle for the use of the Tribunal on the first day of the full merits hearing;
- 1.4 On or before **22 October 2019**, the parties shall mutually exchange witness statements of those witnesses expected to give oral testimony at the full merits hearing. The statements shall include that of the Claimant;
- 1.5 The trial is listed for a Full Merits Hearing before **a full Tribunal** with a time estimate of four days on **12, 13, 14 & 15 November 2019 at 10am**.

2 Other Matters

- 2.1 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 2.2 Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.
- 2.3 Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.
- 2.4 You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge Brook
Date: 16 April 2019