

LETICIA MENSAH

Claimant

-and-

ST MARY'S NURSING AND RESIDENTIAL HOME

Respondent

CLAIMANT'S NOTE FOR PRELIMINARY HEARING ON
TUESDAY 24TH MARCH 2020

INTRODUCTION

1. This matter is listed today for Preliminary Hearing ("PH") for Case Management.

This Note contains:

- (a) The Claimant's position at Preliminary Hearing (paragraphs 2);
- (b) a list of issues (paragraphs 3);

CLAIMANT'S POSITION AT PRELIMINARY HEARING

2. The Claimant:

- (a) is of the opinion that the matter should be ready to list for a Preliminary Hearing to determine disability and a Final Hearing;
- (b) accepts that as she is still an employee, the tribunal has no jurisdiction to hear her complaint of breach of contract (Articles 3(c) and 7 Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994);

ISSUES TO BE DETERMINED AT PRELIMINARY AND FINAL HEARINGS

3. Having considered the pleadings the Claimant considers the issues to be as follows:

Jurisdiction

Time/limitation issues

4. The dates for ACAS Conciliation are Date A: 27th July 2019 and Date B: 27th August 2019. The Claimant presented her ET1 on 26th September 2019.
5. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 28th April 2019 is

potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

6. Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA") and sections 23(2) to (4), of the Employment Rights Act 1996 ("ERA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether it was not reasonably practicable for a complaint to be presented within the primary time limit; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred.

Equality Act 2010 Claims

Protected Characteristic:

7. The Claimant relies upon the protected characteristic of disability.

Disability

8. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times [because of the following condition(s):]?
 - (a) Total right knee replacement;
 - (b) Osteoarthritis in left knee; and
 - (c) Gallstones.
9. Did/does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?
10. Is that effect long term? In particular, when did it start and:
 - (a) has the impairment lasted for at least 12 months?
 - (b) is or was the impairment likely to last at least 12 months or the rest of the claimant's life, if less than 12 months?
11. Were any measures taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities?

12. The relevant time for assessing whether the claimant had/has a disability (namely, when the discrimination is alleged to have occurred) is from 12th August 2017 until presentation of the ET1: 26th September 2019.

Section 13: Direct Discrimination

13. Did the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely

- (a) Refusing or failing to permit her to return to work from April 2017;
- (b) On 23rd April 2019:
 - (i) Priscilla Chibanda saying to the Claimant “what are you coming here for, there is no job anymore as a night carer at St Mary’s and no light duties for you to do even if you worked in the kitchen, I don’t want to see you sitting down when others are working. St Mary’s cannot employ you here so its better for you to stay back at home for your own safety” (paragraph 11 of Particulars)
 - (ii) Johnathan Kamara saying to the Claimant: “your sickness is up to date but St Mary’s can no longer employ you” (para 12 of Particulars)
- (c) On 9th May 2019:
 - (i) Yogesh Patel asking the Claimant “can you bend down” and when told that the Claimant could not, telling the Claimant “if you cannot bend down then St Mary’s cannot employ you” and that “you cant just do feeding just do feeding because its an hour; care work is a complete job and not separate. The rota is from 8am – 8pm for day staff and 8pm to 8am for night staff, we cannot give you a few hours to do. Can you do care plans?” paragraph 16 of Particulars)’
 - (ii) Requiring the Claimant to provide CRB check and reference documents (paragraph 17 of Particulars)
- (d) Fail to address the Claimant’s request for an assessment to identify the duties the claimant could undertake and undertake a risk assessment or arrange the same (paragraph 18 of Particulars of Claim)
- (e) Fail to address her questions regarding the OH referral;
- (f) Failing to address the claimant’s grievance of 13th May 2019 (paragraph 20 of Particulars)
- (g) Criticizing the Claimant for failing to “communicate with them” despite knowing the Claimant was on sleeping tablets and had requested communications go to her daughter (paragraph 24 of the Particulars)

14. Did the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators who are not in materially different circumstances? The claimant relies on hypothetical comparators.
15. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
16. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Section 15: Discrimination arising from disability

17. Did the following thing arise as a consequence of the Claimant's disability:
 - (a) Her absence from work;
 - (b) Her unfitness to work until April 2017
18. Did the Respondent treat the Claimant unfavorably by refusing to permit the Claimant to return to work.
19. Did the Respondent treat the Claimant unfavorably in any of those ways because of her absence.
20. No comparator is needed.
21. Has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

Section 19: Indirect discrimination

22. Did the respondent apply the following provision, criteria and/or practice ('the PCP') at the relevant time, generally, namely:
 - (a) Requiring employees to undertake work that involves lifting and bending
 - (b) Requiring employees to work full 12 hour shifts;
 - (c) Requiring staff to communicate with the Respondent directly and not through an intermediary;

23. Does the application of the PCP put other disabled people at a particular disadvantage when compared with persons who do not have this protected characteristic?
24. Did the Respondent apply the PCP to the Claimant?
25. Did the application of the PCP put the claimant at that disadvantage in that:
 - (a) She could not undertake lifting and bending
 - (b) She could not work a full 12 hour shift
 - (c) She could not communicate with the Respondent owing to medication

Section 20 and 21: Reasonable Adjustments

26. Did the respondent not know or could the respondent not be reasonably expected to know that the claimant had a disability?
27. Did the respondent apply the following provision, criteria and/or practice ('the PCP') generally, namely:
 - (a) requiring staff to undertake full duties;
 - (b) requiring staff to work full hours;
 - (c) keeping the Claimant off work from April 2019;
 - (d) requiring direct communication between themselves and employees;
28. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:
 - (a) she could not undertake full duties;
 - (b) she was fit to return to work from April 2019
 - (c) she was unable to communicate directly owing to medication she was on
29. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however, it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:
 - (a) amending the Claimant's duties to include permitting he claimant to sit down;

- (b) finding the claimant alternative work;
 - (c) permitting the claimant to return to work from April 2019;
 - (d) communicating with the Claimant's daughter rather than the Claimant.
30. Did the Respondent not know or could it reasonably have been expected to know that the Claimant was likely to be placed at the disadvantage set out above?
31. Would it have been reasonable for the Respondent to have taken those steps at any relevant time?

Section 26: Harassment related to Disability

32. Did the Respondent engage in conduct complained of as acts of direct discrimination (see paragraph 13 above).
33. If so, was the conduct unwanted?
34. If so, was the conduct related to the Claimant's disability.
35. Did the conduct have the purpose of:
- (a) violating the claimant's dignity; or
 - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
36. If not, did the conduct have the effect of:
- (a) violating the claimant's dignity; or
 - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
37. In considering whether the conduct had that effect, the Tribunal will consider the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
38. Any act of harassment cannot be direct discrimination s212(1).

Employer's Defence

39. The Employer is not advancing the Statutory defence, its contention is the discrimination alleged did not occur.

Unauthorised Deduction from Wages

40. Was the Claimant entitled to be paid her salary from April 2019?
41. Was the Claimant owed sick pay for the year 2018, and 2019
42. If so, has the Respondent made a deduction?
43. If so, was the Respondent authorized to make that deduction by a relevant written contractual provision or prior written agreement or consent by the Claimant?

Remedies

44. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest and
45. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Financial Penalty

46. Pursuant to s12A of the Employment Tribunals Act 1996 should the tribunal order the Respondent to pay a financial penalty to the Secretary of State for breaches of the Claimant's employment rights?

Sunday, 24 March 2020

Michael Salter
Ely Place Chambers