



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs G Sowden

v Optimal Recruitment Solutions Ltd

PRELIMINARY HEARING

Heard at Sheffield by CVP

On: 13 July 2023

Before: Employment Judge Brain

Appearance:

For the Claimant: In person

For the Respondent: Miss M Stead, Director

Mrs H Naylor, Operations Director

CASE MANAGEMENT SUMMARY

1. The claimant presented her claim form on 25 January 2023. Before doing so, she went through mandatory early conciliation as required by the Employment Tribunals Act 1996. Early conciliation commenced on 27 September 2022 and ended on 10 October 2022.
2. The claim form named two respondents: Optimal HR Services Ltd and Melanie Stead. On 7 March 2023 the claim form was rejected upon the direction of Legal Officer Woolley upon the grounds that there was no early conciliation certificate naming Miss Stead as a prospective respondent and that the name of the other respondent (the claimant's employer) differed as between the early conciliation certificate and the claim form. The claimant was told that she had 14 days to apply for a reconsideration. She did this on 21 March 2023.
3. On 6 April 2023 Employment Judge Rogerson directed that the claimant's claim as against Optimal HR Services Limited was accepted with effect from 21 March 2023.
4. Upon receipt of the respondent's notice of appearance, it appeared that the claimant's claims may have been brought outside the relevant limitation periods applicable to the claimant's several claims. Accordingly, the case was listed for today to decide whether some or all of the claims were brought out of time and if so whether time should be extended under the relevant statutory provisions. The

Tribunal's determination upon this issue is in the judgment given during the course of this morning's hearing.

5. In summary, the claims which are permitted to proceed are:
 - 5.1. Discrimination and harassment brought pursuant to the Equality Act 2010.
 - 5.2. Breach of contract and that the respondent made an unauthorised deduction from wages brought pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the Employment Rights Act 1996 respectively. This is confined to the claimant's claim for commission payable at the end of October 2022 for work completed in September 2022. *(The respondent says that no commission was due to the claimant for work completed in September 2022 as the supplier with whom the claimant was dealing went into administration and therefore no placements were made. The respondent volunteered to demonstrate this to the claimant by giving early voluntary disclosure. Should the claimant accept the respondent's case upon this point, then she may write to withdraw the breach of contract and unauthorised deduction from wages complaint).*
 - 5.3. The respondent's counter claim for the repayment of a loan made to her by the respondent and for damage to the respondent's property (in particular, a mobile telephone).
6. Some time was spent this morning (before the time limit issue was decided) identifying the claimant's claims. The issues shall now be set out.

1. Disability

- 1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? This appears primarily to be about events in August and September 2022. The Tribunal will decide:
 - 1.1.1 Did the claimant have a physical or mental impairment: in this case, the disability in issue is anxiety?
 - 1.1.2 Did the impairment have a substantial adverse effect on her ability to carry out day-to-day activities?
 - 1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
 - 1.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
 - 1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
 - 1.1.5.1 did the effects of the impairment last at least 12 months, or were they likely to last at least 12 months?
 - 1.1.5.2 if not, were they likely to recur?

2. **Discrimination arising from disability (Equality Act 2010 section 15)**

- 2.1 Did the respondent treat the claimant unfavourably by:
 - 2.1.1 Dismissing her on 21 September 2022.
- 2.2 Did the following things arise in consequence of the claimant's disability:
 - 2.2.1 The claimant's sickness absence from around 5 August 2022.
- 2.3 Was the unfavourable treatment because of the matters identified in sub paragraph 2.2? Did the respondent dismiss the claimant because of her sickness absence?
- 2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:
 - 2.4.1 The efficient running of their business.
- 2.5 The Tribunal will decide in particular:
 - 2.5.1 was the treatment an appropriate and reasonably necessary way to achieve these aims;
 - 2.5.2 could something less discriminatory have been done instead;
 - 2.5.3 how should the needs of the claimant and the respondent be balanced?
- 2.6 Did the respondent know or could they reasonably have been expected to know that the claimant had the disability? If so, from what date?

3. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

- 3.1 Did the respondent know, or could they reasonably have been expected to know that the claimant had the disability? From what date?
- 3.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
 - 3.2.1 Requiring the claimant to attend the respondent's offices to undertake her role as a senior recruitment consultant.
 - 3.2.2 Their attendance management policy.
- 3.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the disability made it difficult to maintain regular attendance at the office and rendered her

more liable than a non-disabled person would be to find herself being managed pursuant to the absence management policy.

- 3.4 Did the respondent know, or could they reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
 - 3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
 - 3.5.1 Being permitted to work from home.
 - 3.5.2 Deferring management of her under the attendance management policy.
 - 3.5.3 Postponing any work, health or return to work meetings until the claimant was fit to deal with them.
 - 3.6 Was it reasonable for the respondent to have to take those steps and when? The respondent says that a number of steps were taken by them to seek to avoid the disadvantage including permitting the claimant to work from home (which the claimant disputes), arranging counselling for her and providing other support.
 - 3.7 Did the respondent fail to take such steps as were reasonable to ameliorate the disadvantage caused to the claimant?
4. **Harassment related to disability (Equality Act 2010 section 26)**
- 4.1 Did the respondent do the following things:
 - 4.1.1 Mel Stead saying on 12 August 2022, *“you’re not about to have a breakdown Georgie, you are in a breakdown.”*
 - 4.2 If so, was that unwanted conduct?
 - 4.3 Did it relate to the claimant’s disability etc?
 - 4.4 Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
 - 4.5 If not, did it have that effect? The Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
5. **Remedy for discrimination or victimisation**

- 5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 5.2 What financial losses has the discrimination caused the claimant?
- 5.3 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6. Unauthorised deductions/Breach of Contract

- 6.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted? Was the respondent in breach of contract in failing to pay the wages in question? (*The wages in question are commission payments which the claimant says were due to her for work completed in September 2022 payable on or around 29 October 2022*)?

7. Employer's Contract Claim

- 7.1 Was the claimant in breach of contract by failing to repay to the respondent a loan advanced to her and for damage allegedly caused by her to a mobile telephone belonging to the respondent.
- 7.2 If so, how much should the respondent be awarded as damages?

7. Having identified the issues in the cases the Tribunal gives the following case management directions:

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. On or before **27 July 2023** the claimant shall send to the respondent and to the Employment Tribunal her defence to the respondent's counter claim.
2. On or before **27 July 2023** the claimant shall send to the respondent and to the Employment Tribunal her schedule of loss. This shall set out how much compensation for lost earnings or other losses the claimant is claiming and how the amount is calculated.
3. On or before **25 August 2023** the claimant shall serve upon the respondent relevant medical evidence together with a witness statement in support of her case that she was a disabled person for the purposes of the 2010 Act at the material time (that is to say, in August and September 2022). The statement shall address the issues in sub paragraph 1 of paragraph 6 above. The claimant may find it helpful to refer to the "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*" (2011) published by the Secretary of State and which is available upon the internet. The claimant

shall give evidence of how long she has had the relevant disability, the effects of it upon her ability to do day to day activities and why she says the effects are long term (that is to say, that at the relevant time they had lasted longer than 12 months and were likely to last longer than 12 months)? so the claimant shall give clear examples of the impact of the disability upon her day to day activities at the relevant time.

In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

4. On or before **29 September 2023** the respondent shall write to the Employment Tribunal and to the claimant setting out their position upon disability. In particular, the respondent will say whether they accept that the claimant was a disabled person within the meaning of section 6 of the 2010 Act at the material time.
5. There shall be a further case management hearing. This shall be conducted by telephone and shall be held on **6 October 2023** commencing at **10am with an estimated length of hearing of 90 minutes**. At the case management hearing, the Tribunal shall give directions with a view to listing the case for a final hearing or alternatively (if disability remains in dispute) for a preliminary hearing to decide upon that question.

Employment Judge Brain

Date: 25 July 2023.