



EMPLOYMENT TRIBUNALS

Claimant: Ms M Wilkinson

Respondent: Medivet Group Limited

Heard at: Leeds via CVP

On: 30th August 2023

Before: Employment Judge Moxon

Representation

Claimant: Attended in person

Respondent: Ms Boyd, Counsel

JUDGMENT

1. The Claimant's claim of direct disability discrimination, contrary to section 13 of the Equality Act 2010, is not upheld and is dismissed.
2. The Claimant's claim of sex discrimination, contrary to section 13 of the Equality Act 2010, is not affected by this Judgment.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a clinical director lead veterinary surgeon from 20th June 2022 until her dismissal on 29th July 2022.
2. By claim form, presented on 12th January 2023, she claimed that she had been unfairly dismissed and had been discriminated against on account of sex. The claim of unfair dismissal was struck out by Employment Judge Cox on 14th March 2023 on account of the Claimant having not accrued two years' continuous employment with the Respondent.
3. By Judgment of Employment Judge Martin, dated 11th April 2023, the Claimant was permitted an extension of time to bring a claim of direct disability discrimination and the Respondent was permitted an extension of time to

respond.

4. During a preliminary hearing before Employment Judge Flanagan on 30th June 2023, the issues were clarified and the final hearing was listed to commence on 18th December 2023. In summary, the issues included a claim for direct disability discrimination and direct sex discrimination. The unfavourable treatment alleged was the dismissal of the Claimant.
5. Judge Flanagan listed a further preliminary hearing to be heard on 30th August 2023 to determine whether the Claimant is disabled, within the definition of section 6 of the Equality Act 2010 and, if so, whether the Respondent had actual or constructive knowledge. The hearing would also consider an application by the Respondent for a deposit order in relation to the entirety of the claim.
6. By email, dated 28th July 2023, the Respondent indicated that they would argue that the case should be struck out, which gave the Claimant a reasonable opportunity to respond, which she did in writing on 29th August 2023 and during the hearing.

The 30th August 2023 Hearing

7. I (Employment Judge Moxon) conducted the 30th August 2023 hearing which was held remotely by CVP. The equipment worked well and did not disadvantage either party.
8. An agreed bundle of 270 pages was relied upon. The Claimant also provided various additional documents the day prior to the hearing and the Respondent provided an email sent by the Claimant to her line manager on the date of her dismissal. There was no objection to the late reliance of those documents.
9. The Claimant provided a witness statement, dated 29th August 2023, and gave oral evidence.
10. The Respondent relied upon witness statements from the following:
 - a. Rachel West, who was the Claimant's line manager from 20th June 2022;
 - b. Claire Moody, Head Nurse;
 - c. Dawn Chapman, Veterinary Nurse; and
 - d. Paul Knott, Clinical Director.
11. Mrs West and Miss Moody also gave oral evidence.
12. I considered oral submissions from the parties.
13. I announced my judgment and gave oral reasons at the end of the hearing and stated that, given the pressure of time, I would provide perfected written reasons in due course.

Disability – The Law

14. A person is disabled, within the definition provided by section 6 of the Equality Act 2010, if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.
15. Pursuant to section 15 of the 2010 Act, an employer cannot be found to have discriminated against an employee arising from disability if it shows that it did not know, and could not have reasonably have been expected to know, that the employee had the disability.

Determination – Disability

16. The Claimant claims that she is disabled on account of hypothyroidism.
17. The Claimant provided medical evidence to show that she has a diagnosis of hypothyroidism, since 1996, for which she continues to be medicated. The condition is long term and was present during the time that the Claimant worked for the Respondent. It is a condition that continues. It causes physical and mental impairment, particularly fatigue.
18. As accepted by the Claimant, the condition does not have a substantial adverse effect on her ability to carry out day-to-day activities and, within her impact statement, she said that she is able to cope with a 10-hour veterinary shift.
19. However, if she works longer hours, or does not take her medication, she is significantly fatigued. Without medication she is unable to get out of bed and work, has difficulty writing emails due to reduced cognitive function and has no patellar reflex.
20. That account is supported by the letter from her General Practitioner, dated 25th July 2023, who details that in 2011 the Claimant's medication was increased due to symptoms of fatigue and that in 2017 it was decided not to decrease the dose. In 2018 it was discussed about reducing her dose but it was feared that symptoms of fatigue would "*return / increase*".
21. I accept the Claimant's account, as credible in light of the medical evidence, that if she were to forget her medication over 24-hours she would feel significant effects of fatigue, which would reduce her cognition and ability to work, and that as a consequence she would never go 48 hours without taking the medication.
22. I am satisfied that the Claimant is disabled within the definition of the Equality Act as, in the absence of her medication, she would have substantial and long-term adverse effects on her ability to carry out normal day-to-day activities on account of hyperthyroidism.

Determination - Knowledge

23. The Respondent contends that it did not know, and could not have been reasonably expected to know, that the Claimant had a disability.

24. The Claimant stated that, when working for in the Respondent's other practices, as a locum between 2018 and 2021, she disclosed her medical conditions, including hypothyroidism for which she was medicated. However, she accepted during questioning that she did not tell them of any affect upon day-to-day activities.
25. In fact, on account of her medication she did not have day to day activities unless she worked above and beyond normal working hours. Within her claim form she did not raise disability and ticked "no" when asked whether she is disabled. She stated in her written accounts that she did not consider herself disabled. In her witness statement, dated 29th August 2023, she stated:
- "There is no requirement for me to have declared myself as disabled to my new employer; my contract was never finalised. I have never considered myself as disabled and was not aware I was classified as disabled under the 2010 Equality Act.....I have never considered myself as disabled and was unaware that I qualified as disabled under the 2010 Equality Act. There is no requirement for me to inform any employer that I am disabled, and this does not preclude me from being covered by this Act.... I understand that the Respondent must have implied knowledge over my own disability."*
26. She was asked in cross-examination how she believed that the Respondent had "implied knowledge" and she stated that it was because she had disclosed her medical conditions when she was a locum.
27. That, however, is insufficient. Simply telling an employer of a medical condition does not put them on notice, without it being obvious or without there being further information, of a person having difficulty completing day to day activities. The information she provided to the Respondent was not sufficient for them to have knowledge, either actual or constructive, of disability.
28. The circumstances were that when the when Claimant was employed by the Respondent she herself did not believe that she was disabled. She never told the Respondent that she was disabled. If she told the Respondent anything, it was only of the diagnosis and the fact that she was medicated, without disclosing any day-to-day difficulties. As such, it is not plausible to conclude that the Respondent knew that the Claimant was disabled or could have been reasonably expected to know.
29. Regardless of any perceived failures in the induction process, the Claimant had ample opportunity to notify the Respondent of any disability.
30. The Claimant provided the email to her from the Respondent's HR department, dated 10th June 2022, and therefore 10 days before she commenced the role, welcoming her to the company. It stated the following:

"Your health and wellbeing is really important to us at Medivet and to ensure that we give you any support needed, please complete our pre-placement questionnaire that forms part of our onboard process. This will be sent to you from notifications@orchardlive.com. Please look out for this in your inbox or spam/junk"

31. The Claimant therefore knew the purpose of the form and who it was to be sent from, which undermines her initial assertion that she was unclear of the source of the request. She admitted that she never completed the form. I accept the evidence from the Respondent's HR department that the Claimant was automatically re-sent the form every three days as she had not responded to it.
32. In *A Ltd v Z* 2020 ICR 199 the Employment Appeal Tribunal held that it should be considered what enquiries an employer could reasonably be expected to make. In this case, not only had the Claimant not volunteered any day-to-day difficulties on account of medical conditions, but she had also failed to complete the medical questionnaires repeatedly sent to her.
33. In addition to that, the Claimant could have notified any manager, including Rachel West when she commenced the role of the Claimant's line manager. She could have requested a face-to-face meeting or could have notified her by telephone or by email. I note that the Claimant and Ms West were in email correspondence.
34. I do not accept that the Claimant told Ms Moody on 4th July 2022 that she had hypothyroidism. I note that the Claimant made no reference to that discussion prior to her witness statement on 29th August 2023. The height of the Claimant's evidence is that she says that she "*believes*" that she told Ms Moody, whereas Ms Moody is adamant that, whilst she observed the Claimant taking the injection, she was not told of the reasons or of any fatigue. I prefer the evidence of Ms Moody. In any event, I am satisfied that the Claimant telling a subordinate about the use of B12 injections, or that she has hypothyroidism causing fatigue, does not equate to the Respondent having knowledge, either actual or constructive, about the Claimant's disability.
35. I am therefore satisfied, and it accepted by the Claimant, that she at no stage told the Respondent of any day-to-day difficulties or disability, despite being sent documentation to complete about medical conditions. I am therefore satisfied that the Respondent neither knew, nor should have known, that the Claimant was disabled.

Conclusion – disability

36. Given my finding that the Respondent did not have actual or constructive knowledge of the Claimant's disability, the claim for disability discrimination cannot succeed and therefore fails.

Strike out – The Law

37. Rule 37(1)(a) of the Employment Tribunal Procedure Rules provides that a claim can be struck out if it has no reasonable prospect of success.
38. *Anyanwu v South Bank Student Union* [2001] ICR 391 and other cases have highlighted that striking out discrimination cases should be rare and only "*..in the most obvious and plainest cases*".

39. In *Chandhok v Tirkey* [2015] ICR 527, the Employment Appeal Tribunal stated, at paragraph 20 that there was no “...*blanket ban on strike-out applications succeeding in discrimination claims*” and stated that a claim can be properly struck out where: “...*on the case as pleaded, there is really no more than an assertion of a different of treatment and a difference of characteristic*”.
40. In *Ahir v British Airways plc* [2017] EWCA Civ 1392 the Court of Appeal stated, at paragraph 21, that claims should be struck out where the Claimant’s “*case theory*” is “*not only speculative but highly implausible*”. In other cases, such as the *Court of Appeal in ABN AMRO Management Services Ltd and The Royal Bank of Scotland v Hogben* UKEAT/0266/09/DM allegations of discrimination were struck out as they were assessed as “*fanciful*”.

Determination - Strike out – Direct Disability Discrimination Claim

41. Had I found that the Respondent had knowledge of the Claimant’s disability, I would nevertheless have struck out the claim for direct disability discrimination.
42. When the Claimant initially presented her claim, she made no reference to being disabled and stated that she was not disabled. She only claimed disability discrimination upon being given the opportunity to amend her claim.
43. However, thereafter, both in writing and orally when specifically asked, she has failed to explain how her disability has any connection to her dismissal. She had not refused to work the extra hours required by the Respondent. She said that the working of the longer hours would cause her to become fatigued which would could then affect her behaviour and practice, although she disputed that she had behaved inappropriately or that there had been any problem with her practice.
44. Further, the Claimant stated in her oral evidence that she was dismissed as the Respondent could no longer afford two clinical leads and that they had decided to prefer Mr Knott for the role at the expense of the Claimant. That is not related to disability in any way. She has at no point alleged that Mr Knott was preferred as he was not disabled.
45. I accept that striking out a discrimination claim is an exceptional course of action but, had I found that the Respondent had knowledge of the disability, I would nevertheless have struck out the claim having had regard to the tests outlined in the case law.

Determination - Strike out – Direct Sex Discrimination Claim

46. The sex discrimination case is clearly distinguishable from the disability discrimination claim as in the former there is some claimed link between the protected characteristic and the dismissal whereas in the latter there is not. In relation to sex discrimination the Claimant says that she was dismissed in favour of a male colleague and also says that she was told by Ms Moody that the Respondent “*prefers males*”.

47. For reasons outlined in the Deposit Order, there is little reasonable prospect of success in the sex discrimination claim. However, I do not consider that it can be dismissed as speculative or fanciful. Whilst the Claimant has said that she was dismissed due to the Respondent not wishing to employ two clinical leads, the fact that she claims that a male was retained whilst she was chosen for dismissal, as males were given preference, is sufficient evidence for the matter not to be struck out.

Employment Judge Moxon

Date: 31st August 2023