



EMPLOYMENT TRIBUNALS

Claimant: Miss A Ozcan

Respondent: Guy's & St Thomas' NHS Foundation Trust

At: London South Employment Tribunal by video link

Before: Employment Judge A Frazer
Tribunal Member Sheath
Tribunal Member Oldfield

Heard on: 16th and 17th November 2023

WRITTEN REASONS

Employment Tribunals Rules of Procedure 2013

1. The ACAS early conciliation notification was made on 13th September 2022 and the certificate was issued on 18th October 2022. The claim was presented on 22nd October 2022. The claim is for a failure to make reasonable adjustments under s.21 Equality Act 2010 brought on the basis that it is alleged by the Claimant that the Respondent failed to provide an auxiliary aid, namely an ergonomic chair within a reasonable period of time.
2. The issues were set out in the case management order of EJ Abbott dated 18th September 2023 (see page 49). Disability was conceded. Knowledge and substantial disadvantage were conceded by the Respondent at the start of the hearing. Reasonableness of steps taken to provide the aid was the main issue.

The hearing

3. We heard evidence from Tim Wall, who was the Claimant's line manager at the time, and the Claimant on the first day. We received closing submissions orally and in writing from both parties' representatives on the morning of the second day. We are grateful for the competent, clear and professional manner in which both parties presented their cases.

The Law

4. Under s.20(5) Equality Act 2010 the obligation to make reasonable adjustments with regard to an auxiliary aid is set out as follows:

‘The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid’.

Burden of proof

5. In **Project Institute Management v Latif [2007] WL 1292710** it was held at paragraph 54, that the burden of proof provision ought to be properly read as follows in compliance with the Code of Practice:

“In our opinion the paragraph in the Code is correct. The key point identified therein is that the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached.”

Time limits

6. In the recent case of **Ms M Fernandes v Department for Work and Pensions [2023] EAT 114** HHJ Beard held:

“16. The principles set out in the existing authorities amount to the following propositions:

a. The duty to make an adjustment, under the statutory scheme, arises as soon as there is a substantial disadvantage to the disabled employee from a PCP (presuming the knowledge requirements are met) and failure to make the adjustment is a breach of the duty once it becomes reasonable for the employer to have to make the adjustment.

b. Where the employer is under a duty to make an adjustment, however, limitation may not begin to run from the date of breach but at a later notional date. As is the case where the employer is under a duty to make an adjustment and omits to do so there will be a notional date where time begins to run whether the same omission continues or not.

c. That notional date will accrue if the employer does an act inconsistent with complying with the duty.

d. If the employer does not act inconsistently with the duty the notional date will accrue at a stage where it would be reasonable for the employee to conclude that the employer will not comply, based on the facts known to the employee”.

Submissions

Respondent

7. The analysis is from 7 February to 19 July. When the Claimant was on sick leave – between 22 May and 29 August - she did not suffer substantial disadvantage as she was not at work so she was not having to work without an ergonomic chair.
8. The Respondent was taking reasonable steps during that period to secure the chair. There was a period of three weeks' delay. Mr Wall did the best in the circumstances and that delay was not unreasonable. The chair was ordered on 7 April. The period C primarily complains about starts from that date onwards. On a balance of probabilities the complaints start in around May. Sick leave commenced on 21st May. The Claimant doesn't attribute the cause as not having been provided with a chair. She said that her pain was worse but doesn't say that it was the cause. The cause was nerve irritation due to symptoms on right side developing on her left side.
9. Tim Wall had no reason to make those enquiries in May. He believed that the chair was on back order. After being asked the question three times he had no reason to make the enquiry. He thought the chair was on his way and would be delivered imminently. It lies ill in the Claimant's mouth that Mr Wall ought to have made that enquiry. She did not raise this herself until July. When Mr Wall becomes aware the matter is resolved very quickly. The Claimant had the chair just 8 days later.
10. There were unfortunate delays for which the Respondent was regretful and those delays were beyond its control. On balance the Respondent is not culpable. To suggest that it was culpable because it had not paid an invoice before is not reasonable. The Tribunal has no details around the specific details of that invoice.
11. Mr Wall explained that he would expect to be told by a supplier if there was a problem with payment. This was a perfectly reasonable step to take. This was a case involving a caring and concerned line manager who genuinely took all reasonable steps to secure the Claimant with the chair. It was not reasonable to suggest that this was not going to happen or that the Respondent was not going to meet its duty to make reasonable adjustments.
12. The claim is out of time as on the evidence the Claimant formed the view on the breach on 13th July. She went into EC on 18th October but would have needed to do so on 12th October.

Claimant

13. The Claimant submitted that her claim was not out of time because she could not have contacted ACAS without giving the situation some time to see if it was rectified.

14. It took her manager three weeks to forward an email to request approval to order a chair. He was only on leave for a week. Month end reporting was not an excuse as this was a quick email. There was another two week delay to get the approval from management. Management ought to have been more proactive in investigating the Claimant's concerns about the delay particularly when the Claimant sent a number of emails in May, June and July. Mr Wall accepted in cross-examination that Accounts Payable should have picked up the delay a lot sooner. He agreed that if he had contacted them a lot sooner there would have been more clarity over the reason for the delay. It was also accepted that the delay affected the Claimant's recovery and would have had an impact on her mental health. The Claimant submitted that when under stress, she requires a lot more energy to solve issues, meet everyday expectations and to think clearly. The Claimant says that she went through a lot of upset, stress and worry and felt like she was unheard and not treated like a priority. She says that the delay caused a setback in her recovery and ability to return to work.

Findings of Fact

15. The Respondent has accepted that the Claimant was a disabled person at the relevant time for the purposes of s.6 Equality Act 2010 by reason of multiple sclerosis. The Claimant was diagnosed in 2014 with relapsing remitting MS.
16. The Claimant has been employed by the Respondent full time as Deputy Finance Manager since 20th December 2019.
17. On 1st November 2021 the Claimant was admitted to King's College Hospital to undergo immediate microdiscectomy surgery due to a L4/L5 disc bulge which caused her sciatic and nerve pain. The Claimant was signed off sick from 11th November 2021 to 14th January 2022.
18. At the time the Claimant's line manager was Tim Wall who was Senior Finance Manager and who became Deputy Head of Finance in February 2022.
19. He contacted occupational health prior to the Claimant's return to work and emailed his own line manager, Hazel Childs, Head of Finance, on 26th November 2021 to make her aware that he was intending to put steps in place regarding equipment ready for the Claimant's return. Hazel asked him to link in with Peter Parr, Head of Financial Management, as he would be responsible for the procurement of equipment.
20. Mr Wall spoke to the Claimant on 30th November 2021 and she consented to the OH referral. She said that she would not be returning as planned as she had some setbacks in her recovery. She was referred on 1st December 2021.
21. The OH appointment was scheduled for 10th January 2022 and the report was dated 17th January 2022. The OH consultant, Dr Ravirajan said that the Claimant was fit with the following adjustments:

- a. A phased return
 - b. Avoiding prolonged walking or sitting.
 - c. Regular breaks.
 - d. Additional breaks if she had a flare up of back pain.
 - e. Time off for medical appointments.
 - f. An ergonomic chair with good back support.
 - g. A display screen risk assessment.
22. As an adjustment Mr Wall permitted the Claimant to work from home for the foreseeable future.
23. Mr Wall was concerned by the recommendation for an ergonomic chair as he felt it was too general and requested OH to be more specific. This was reasonable in the circumstances. He therefore asked the Claimant to ask her treating consultant for one. Her consultant set out his recommendations for the chair that the Claimant should have on 6th February 2022. The Claimant forwarded this to him on 7th February 2022.
24. Mr Wall then forwarded this on to Peter Parr and Simon Hooton, Senior Finance Manager on 3rd March 2022 to ask for advice on how to place the order. In his witness statement he said that he did not do this until then because he was on annual leave. He took annual leave from 15th to 17th February and from 23rd to 25th February 2022 which was just over a week and co-incided with half term. The 25th February was a Friday. He would have been back on 1st March. His evidence was that he was busy at that time doing the budgeting for the following financial year, that he was doing the job of 3 people and that he had month end work spilling over into the start of the month so that may have been why he had missed the Claimant's email and didn't send it until 3rd March 2022.
25. We find it more likely than not that the delay was caused by an oversight of an email. Having heard evidence of Mr Wall's proactivity prior to the OH referral we did not consider that this omission was deliberate. He gave evidence that there were some operational reasons which led to the delay together with Mr Wall's annual leave, which was just over a week. It would have been helpful if he could have forwarded that email sooner but it would not have made a significant difference to the overall delay and on the whole we found that he acted reasonably.
26. On 16th March 2022 Peter asked Mr Wall to contact Paula Daly, Executive Assistant, to get the chairs ordered and gave him a cost code to charge the order to. Peter apologised for the delay in responding. He said that he had needed to speak to Simon. In response to Peter apologising for the delay the Claimant said 'thank you for this and no worries at all'. We did not find that unreasonable period of delay.
27. On 17th March 2022 Mr Wall asked the Claimant to liaise with Paula Daly directly. On 21st March 2022 Paula Daly responded to let the Claimant and Mr Wall know that she had requested Brenda Boakye, Finance Receptionist, to

help with the smart order. The Claimant then contacted Brenda to ask which companies were on the catalogue so that she could choose the right one.

28. Brenda provided the Claimant with a catalogue on 30th March 2022. From the catalogue from the supplier she would place the order for the equipment using the Trust's Smartorder System and input the cost code. On 4th April the Claimant let Brenda know that she didn't have login details for the system and so Brenda placed the order on 7th April 2022. On 21st April 2022 Brenda emailed to let the Claimant know that the address that she had provided could not be found and the Claimant replied immediately to say that her address was flat 3 but showed on the internet as flat c sometimes. The Claimant provided Brenda with a contact number.
29. The Respondent acted reasonably during this period of time.
30. The Respondent did not order two chairs as it was understood at that time that Mina Hari had a chair identical to the one ordered by the Claimant and as she was leaving the Trust the Claimant could use this. The primary focus for us was on the first chair as the Claimant was working from home at this time and that chair was for her home use.
31. On 3rd May the Claimant came into the office to use Mina's chair and reported to Mr Wall that this caused her back pain. We found that the Respondent acted reasonably in arranging this. The Claimant had wanted to do this because she had been experiencing discomfort at home on her old chair. The Respondent wanted to assist her.
32. The Respondent conducted some investigation and realised that the chair that Mina had, which was identical to the Claimant's chair, was in fact at Mina's home. Having become aware of this, Tim Wall advised Ayse to order another chair through Brenda. The Claimant was disappointed with this response as she felt that there was not much urgency in resolving the issue. However we do not consider that this was unreasonable as there was little else that the Respondent could have done at this time.
33. On 9th May the Claimant emailed Brenda to chase the progress of her chair for home but also requested if she was able to order her the same chair for the office. The Claimant says that Brenda didn't answer her query about the second chair. The Claimant chased her again about this on 12th May. Later that day Brenda emailed to say that the office chair could take up to three weeks at least.
34. There was some communication about delivery of the first chair on 9th May, but that did not happen as the Claimant was not going to be available.
35. The Claimant was on annual leave between 16th and 20th May.
36. The Claimant was then signed off sick on 21st May. The Respondent remained under a duty we find at that point. We do not consider that the substantial disadvantage ceased because the Claimant was off sick.

37. On 21st May the Claimant emailed Mr Wall to say that over the last week she had been suffering from a significant flare up and that she had felt that she was back to square one with regards to her healing. The Claimant's GP referred her for physiotherapy which was then extended to 17th July 2022. The Claimant informed Mr Wall that she felt that her flare up could be due to longer working hours and no ergonomic chair.
38. In her letter dated 17th June 2022 to Mr Wall the Claimant stated that she had visited a back specialist/osteopath who had said the reason for the flare up was that her nerves were irritated. She said that prior to surgery her right side was affected and her left side had had to compensate. She went on to say that a big thing was the lack of chair.
39. She didn't say at that point in her letter that the Respondent was in any way to blame at that point. She was disappointed that the chair had taken so long to arrive but said that she stated that she knew Mr Wall was chasing it up over email for her and thanked him.
40. On 17th June 2022 the Claimant emailed Brenda to ask whether there was any update on the chairs.
41. On 21st June 2022 Brenda enquired whether the Claimant had still not received the chair to which the Claimant said that she had still not received the chair at home.
42. On 23rd June the Claimant chased Brenda again and she forwarded the response from the company apologising for delays. The Claimant re-iterated that there should be two chairs, one for the office and one for working from home. Brenda informed the Claimant that the second chair had not been ordered.
43. On 23rd June the Claimant sent an email to Mr Wall asking for a response to the email that she had sent on 17th June. She didn't get a response so chased. He then responded on 23rd saying that it had been manic and mentioned the physio reimbursement but not the chairs.
44. Posturite informed the Respondent after Brenda had chased the whereabouts of the first chair that the chair was on back-order.
45. On 24th June 2022 the Claimant emailed Mr Wall expressing her distress and frustration and informing him of the impact that this was having on her recovery including her mental health. It appeared to us from this evidence that she was affected at this point in time and had felt that the Respondent was not complying with the duty.
46. We make a finding that Mr Wall could have done more to address her communication at that point, in particular in relation to her enquiries about the chair. His evidence was that Brenda was dealing with the chair. He does not address the Claimant's concerns head on about the chair and the way that

she is feeling. This was not a finding about reasonable steps but was a finding about Mr Wall's manner of communication.

47. On 24th June 2022 the Claimant chased Brenda, expressing the urgency and asking whether she had ordered the second chair. She said that she was experiencing back pain due to the delay.
48. On 28th June 2022 the Claimant chased Brenda again asking if she had a number for the warehouse so that the Claimant could chase herself.
49. On 29th June 2022 Brenda emailed the Claimant with a message from the supplier saying that she would be contacted within the next 72 hours to arrange delivery (message from Karl).
50. On 5th July 2022 the Claimant emailed Brenda to say that the supplier had still not been in contact with her regarding the delivery. Brenda continued to chase.
51. On 11th July 2022 Posturite confirmed to Brenda that the reason for the delay was because the Trust's account with Posturite had been placed on hold due to some overdue invoices.
52. On 12th July 2022 the Claimant asked Brenda if she had now ordered her a second chair for the office. Brenda confirmed that she was awaiting the return of Mina's chair from home for Ayse.
53. On 13th July 2022 the Claimant raised a formal grievance. The Claimant's position in evidence was that the delay became unreasonable at that point in time.
54. The first chair was delivered to the Claimant on 19th July 2022. The Claimant's fit note was extended to 15th August 2022.
55. Mina's chair was returned to the office in mid-August 2022. The Claimant came into the office to check that it was suitable and confirmed that she was happy with it.
56. We find that there was a delay from the supplier end but that the Respondent didn't have any obligation to go behind what the supplier had said to them at that time that the chair was on back order and that they were entitled to take that comment at face value. The Respondent did not know about the unpaid invoices until 11th July but the chair was in any event delivered 8 days later. We do not consider that there was anything that the Respondent could reasonably have done to expedite the delivery.

Conclusions

57. In terms of time limits we find the Claimant's position on the evidence was that the Respondent ought to have done something by 24th June. Therefore the

date by which the Claimant ought to have contacted ACAS would have been 23rd September. She in fact contacted ACAS on 13th September.

58. Overall we find that the Respondent's delay was not so unreasonable that there was a failure to make reasonable adjustments. The respondent took such steps as were reasonable to take to provide the auxiliary aid. We found that the main delay was owing to there being a supply issue but the Respondent was not under any special obligation to investigate that as it could accept what the supplier had told them at face value, which was that the chair was on back order. It continued to chase the supplier, which was reasonable in the circumstances. If there were some delays in actioning at the start they were not unreasonable in the circumstances. The claim is dismissed.

Employment Judge A Frazer
Date: 12 March 2024