



EMPLOYMENT TRIBUNALS

Claimant: Miss J Slade

Respondent: East Kent Hospitals University NHS Foundation Trust

Heard at: London South Employment Tribunal
On: 14, 15, 16 May 2024

Before: Employment Judge Curtis
Mrs N Christofi
Mr R Singh

Representation

Claimant: In person
Respondent: Mr A Ross (Counsel)

JUDGMENT having been sent to the parties on 30 May 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The Claimant brings the following claims:
 - 1.1 Direct discrimination on the grounds of disability (s.13 Equality Act 2010 ('EqA 2010'))
 - 1.2 Discrimination arising from disability (s.15 EqA 2010)
 - 1.3 Failure to make reasonable adjustments (ss.20/21 EqA 2010)
 - 1.4 Victimisation (s.27 EqA 2010)
 - 1.5 Breach of contract

2. The claims relate to an application for employment made by the Claimant to the Respondent in the latter part of 2021. The Claimant was offered the role, but the offer was withdrawn due to the Claimant's absence record with her previous employer. The Claimant alleges that the withdrawal of the offer was an act of direct discrimination or because of something arising in consequence of her disability and/or was a breach of contract, The Claimant also alleges that the Respondent refused to allow her to attend an Occupational Health ('OH') appointment on the day the offer was verbally withdrawn (25 November 2021); she alleges this was a further act of direct discrimination.

3. The reasonable adjustment claims relate to the withdrawal of the offer and the occupational health appointment. The Claimant relies on PCPs of:
 - 3.1 Applying the Employee Sickness policy
 - 3.2 Relying on only two years' of sick leave information, rather than five years
 - 3.3 Refusing access to Occupational Health before a job offer is withdrawn.
4. On 9 December 2021 the Claimant made a complaint of discrimination via email. The Respondent accepts that this was a protected act for the purposes of s.27 EqA 2010. The Claimant claims she was victimised by:
 - 4.1 Mrs Smith lying in her response to the Claimant's complaint
 - 4.2 The Respondent failing to respond to an email from the Claimant on 19 January 2022
5. The Claimant lodged her claim on 4 May 2022, after completing early conciliation between 23 February 2022 and 5 April 2022.
6. The issues were set out in the case management order of Employment Judge Rice-Birchall following a preliminary hearing on 29 November 2023. That order recorded that the Claimant required permission to amend her claim in order to bring a reasonable adjustment claim based on the PCP set out at paragraph 4.1.4 of the list of issues; that application for permission to amend was refused on 21 March 2024 by Employment Judge Wright.
7. The issues for the tribunal to consider were discussed and agreed at the start of the hearing. They are as recorded in the Case Management Order of EJ Rice-Birchall, with the deletion of paragraph 4.1.4 **[58-61]**

Documents and evidence heard

8. We had witness statements from the Claimant, Sam Mason (the Claimant's partner), Nicola Smith (Office Manager of the Rainbow Centre) and Louise Goldup (Head of Strategic Resourcing at the material time). We heard oral evidence from Miss Slade, Mrs Smith and Ms Goldup. The parties agreed that as we were dealing with liability only at this hearing, it was not necessary to hear evidence from Sam Mason.
9. We were provided with a bundle containing 375 pages

Fact findings

10. Most of the facts are not in dispute and are as follows.
11. The Claimant applied for the role of LAC/Adoption Team Medical Secretary in late 2021. She was interviewed on 2 November 2021 and the Respondent sent an offer of employment on 5 November 2021.
12. The offer stated:
 - 12.1 It was an unconditional offer of employment
 - 12.2 The offer was made on the basis of the information provided by the Claimant to date. If the pre-employment checks were unsatisfactory then the Respondent reserved the right to withdraw the offer.
 - 12.3 The Claimant must not commence employment until she received a confirmation letter confirming she had obtained all satisfactory pre-employment clearances

- 12.4 The Claimant may wish to render her resignation with her current employer
13. On 8 November 2021 the Claimant's then current employer provided a brief reference, confirming dates of employment and role
 14. On 11 November 2021 the Claimant completed an OH questionnaire.
 15. On 12 November 2021 there was email correspondence between the Claimant and Nicola Smith, employed by the Respondent as Office Manager of the Rainbow Centre. Mrs Smith was the Claimant's main point of contact. In this email the Claimant made Mrs Smith aware that she had an occupational health appointment. This would not have been a surprise to Mrs Smith, as it was the Respondent's standard practice for all potential employees to go through OH screening before commencing employment.
 16. On 17 November 2021 Mrs Smith emailed the Claimant and said, amongst other things, that the Claimant should not hand in her notice with her current employer as the Respondent was still waiting for pre-employment checks to be completed.
 17. On 19 November 2021 the Respondent asked the Claimant's employer for the Claimant's sickness record. An email response was provided the same day which said *"In the last 2 years [the Claimant] has had 5 occasions of sickness absence with 40 days of sickness"*
 18. That level of absence was a concern to Mrs Smith. This was particularly so as the role offered to the Claimant was in a team of two. One of the team had been off on long-term sick leave, leaving only one in the team. That individual had given notice of retirement. The team had not been able to cover the sickness absence of the ill member due to financial constraints and due to the specialist knowledge required in the role. It was therefore particularly important for Mrs Smith that the person recruited into the role would be able to maintain a high level of attendance.
 19. There was a conversation between the Claimant and Mrs Smith on 23 November 2021 in relation to the sickness absence in the Claimant's previous role.
 20. There was a further telephone call on 25 November 2021; in that call Mrs Smith told the Claimant that the offer was being rescinded. That was confirmed in a letter on 26 November 2021.
 21. On 9 December 2021 emailed the Respondent's employee relations team, making a complaint that she was being discriminated against. The Claimant received a short outcome in relation to that email on 12 January 2022. On 19 January 2022 the Claimant asked about raising it as a formal complaint; there was never any response to that.

The Law

22. Section 6(1) EqA 2010 provides:

- (1) A person (P) has a disability if-
- (a) P has a physical or mental impairment, and
 - (b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities
23. In this context, "Substantial" means "more than minor or trivial".
24. Schedule 1 EqA 2010 defines "long term" at paragraph 2(1). The effect of an impairment is long-term if it has lasted for at least 12 months, is likely to last for at least 12 months, or is likely to last for the rest of the life of the person affected. In this context "likely" means "could well happen".
25. Statutory guidance on the question of disability is set out in "*Guidance on matters to be taken into account in determining questions relating to the definition of disability*"
26. Section 13(1) EqA 2010 deals with direct discrimination. It provides:
- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others
27. Section 15 EqA 2010 deals with discrimination arising from disability. It provides:
- (1) A person (A) discriminates against a disabled person (B) if-
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim
 - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability
28. In this context, the "something arising" must have a more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it.
29. Sections 20 and 21 EqA 2010 deal with the duty to make reasonable adjustments. The relevant parts of section 20 provide that where A has a provision, criterion or practice which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled then A has a duty to take such steps as it is reasonable to avoid the disadvantage.
30. Schedule 8 EqA provides that the duty does not apply if A does not know and could not reasonably be expected to know that B has a disability and is likely to be placed at the relevant disadvantage.
31. Part V of the EqA 2010 Section 39 EqA 2010 sets out who can bring claims in respect of work. The relevant parts of s.39 provide:
- (1) An employer (A) must not discriminate against a person (B)-
 - (a) In the arrangements A makes for deciding to whom to offer employment;
 - (b) As to the terms on which A offers B employment
 - (c) By not offering B employment
 - (2) An employer (A) must not discriminate against an employee of A's (B)-

- (a) *As to B's terms of employment;*
 - (b) *In the way A affords B access, or by not affording V access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
 - (c) *By dismissing B;*
 - (d) *By subjecting B to any other detriment*
- (3) *An employer (A) must not victimise a person (B) –*
- (a) *In the arrangements A makes for deciding to whom to offer employment;*
 - (b) *As to the terms on which A offers B employment;*
 - (c) *By not offering B employment*
- (4) *An employer (a) must not victimise an employee of A's (B)-*
- (a) *As to B's terms of employment*
 - (b) *In the way A affords B access, or by not affording V access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;*
 - (c) *By dismissing B;*
 - (d) *By subjecting B to any other detriment*
32. From the above, it can be seen that employees have wider protection than job applicants, as employees come within subsections (2) and (4), whereas job applicants come within sections (1) and (3) unless or until they are 'employees'
33. Section 136 EqA 2010 sets out the burden of proof provisions. If the Claimant proves facts from which the tribunal could decide, in the absence of any other explanation, that discrimination has occurred then the burden shifts to the Respondent to prove that discrimination did not occur.
34. Article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 entitles former employees to bring breach of contract claims against their former employers. The tribunal has jurisdiction where the claim arises from, or is outstanding on, the termination of employment.

Analysis and Conclusion

Disability (paragraph 1.1 of the list of issues)

35. The first issue for the tribunal to determine is whether the Claimant was disabled at the material time.
36. There are five conditions relied upon by the Claimant as amounting to a disability, either as individual conditions or taking all of the effects together and considering them cumulatively. The conditions are:
- 36.1 Anxiety
 - 36.2 Depression
 - 36.3 Stress
 - 36.4 Fibromyalgia
 - 36.5 ADHD
37. We have to assess the question of disability at the time of the acts complained about. Those dates are:
- 37.1 The withdrawal of the job offer on 25/26 November 2021, and the non-attendance at Occupational Health on 25 November 2021; and

- 37.2 The two-year period of November 2019 to November 2021, that being the period covered by the Claimant's sickness absence with her previous employer
38. By way of general point, the Claimant's statement provided to deal with the question of disability was not particularly helpful to the tribunal. It is written mostly in the present tense, so addresses the symptoms as they were after the period we are concerned with. There is little evidence about the conditions at the material time.
39. The Claimant's medical records also provide very limited evidence about the conditions at the material time as the Claimant has chosen to provide records which post-date the material time and not the records which evidence the position at the material time.
- Mental impairments – anxiety, depression, stress, ADHD*
40. The first three conditions are anxiety, depression and stress. We have considered these conditions together with the other mental impairment of ADHD, to look at the cumulative effect of the conditions and see whether that amounts to a disability.
41. A key element of the statutory test of disability is whether there is an impairment on the Claimant's ability to carry out day to day activities. We have carefully considered the evidence we have heard and the documents we have had our attention drawn to, to see what evidence there is of an impact on day to day activities. There is very little.
42. We have taken into account the Claimant's account that she had a history of depression, for which she took medication between 2014 and 2019. That has not been helpful in determining whether there was an impact on her day to day activities during the window of November 2019 and November 2021.
43. We have been provided with a number of documents which post-date the relevant window for assessment by the tribunal (November 2019 to November 2021). They do not shed any light on what impact there was (if any) during the relevant window.
44. In our judgment there are only two matters that evidence the impact of mental health conditions.
45. The first is the absence of 20 working days (or 26 calendar days) in July and August 2021. We heard that at that time the Claimant had significant stressful life events: her grandfather was ill and there were significant difficulties with a potential house move. At the time the Claimant attributed her absence to "personal stress" rather than any underlying condition, and that is what she told her employer. We find that the Claimant's absence was a reaction to adverse life events rather than part of any underlying mental impairment.
46. The only other piece of evidence on the impact during the material time is contained in the Occupational Health questionnaire which the Claimant completed following her being offered the role. We do not have an exact date for this but it would have been between 5 November 2021 and 11

November 2021. In that document the Claimant is asked how her mental health issues affect her normal activities of daily life. She states:

- 46.1 Can't remember experiences/conversations. Daydreaming
 - 46.2 Sometimes difficulty concentrating and focusing which slows me down, but probably only because I know I'm not focussing well so am making sure the job is done right
 - 46.3 Sometimes down without motivation to do things
 - 46.4 Sometimes start the day a little down but that changes once I have something to focus on
47. In our judgment these answers are vague, lacking in specifics and do not particularly assist us with understanding what the impact of the Claimant's conditions were on her ability to carry out day to day activities.
48. The Claimant bears the burden of proving that there was a substantial impact on day-to-day activities at the material time. The information the Claimant has provided does not meet that standard. In our judgment there is not sufficient evidence to satisfy us that there was an impact which is more than minor or trivial. This is due to the lack of any detail in the evidence provided by the Claimant.
49. We therefore find that the Claimant was not disabled by reason of any mental impairment, as the Claimant has not demonstrated sufficient evidence of which day to day activities (if any) were impacted in a substantial way.
- Physical impairment – fibromyalgia/osteoarthritis*
50. We now turn to consider the physical impairment. It is labelled as fibromyalgia in the Claimant's claim; it was initially diagnosed as osteoarthritis by the Claimant's medics in January 2021, and the diagnosis was changed to fibromyalgia in June 2022. We are not particularly concerned with the label being applied; we are concerned with whether there is a physical impairment and what the effect of that impairment was.
51. Again, we find that there is limited assistance from the Claimant's disability impact statement and medical records.
52. We found the Occupational Health Questionnaire to be of more use. It was completed between 5 and 11 November 2021. In the questionnaire the Claimant explained that she could not stand for long, that she requires a support cushion for her chair, that she needs an opportunity to move around and that she cannot lift heavy items from the ground. We find that the matters in the occupational health questionnaire were truthfully recorded by the Claimant and the answers she gave represent the effect of her impairment at the time the questionnaire was completed.
53. We are satisfied that being able to stand for a period of time, sitting in a chair and lifting heavy items from the ground are all day to day activities.
54. We find that at the material time the Claimant's ability to undertake those day to day activities was substantially impaired.

55. We also find that that this was a long-term condition. The Claimant has had stiffness in knees and others joints since childhood (e.g. [69]), and it was classed as Osteoarthritis from January 2021. Further, the Claimant commenced naproxen towards the end of 2021 in relation to the symptoms being caused by this impairment.
56. We find that there had been a substantial adverse impact on the Claimant's ability to carry out day to day activities on a long-term basis. The condition the Claimant had was likely to last for at least 12 months in light of the diagnosis and in light of the fact that there had been some symptomology since childhood. On the balance of probabilities the substantial adverse effect had probably lasted 12 months prior to the material time for these claims.
57. We are therefore satisfied that the Claimant was disabled by reason of Osteoarthritis/Fibromyalgia at all material times, namely November 2019 to November 2021.
58. The next issue in the list of issues is the Respondent's knowledge. We did not reach a conclusion on the extent of the Respondent's knowledge of disability in light of our findings below.

Direct discrimination (paragraphs 2.1 - 2.3 of the List of Issues)

Withdrawal of job offer

59. The first allegation, at 2.1.1 of the list of issues, is that the withdrawal of the job offer on 25/26 November 2021 was an act of direct discrimination on the grounds of disability.
60. The job offer was withdrawn and that is clearly less favourable treatment, The real question is whether the reason for the treatment was the Claimant's osteoarthritis/fibromyalgia.
61. We have considered how a hypothetical comparator would have been treated. For these purposes we consider that a hypothetical comparator would be an applicant for the same role who had 40 days of sickness absence over 2 years, but whose absences were caused entirely by non-disability related matters.
62. We are wholly satisfied that a hypothetical comparator would have been treated the same as the Claimant. Mrs Smith's concern was about the level and frequency of absence, not the cause of the absences. The Claimant has not proved facts from which we could conclude that there was discrimination.

Occupational Health appointment on 25 November 2021

63. The second allegation is failing to allow the Claimant to attend the Occupational Health appointment on 25 November 2021.
64. We find that:
 - 64.1 The Claimant filled out an Occupational Health
 - 64.2 The Claimant was offered an appointment by OH
 - 64.3 The appointment due to take place on 25 November

- 64.4 Prior to the appointment taking place the Respondent withdrew the job offer
 - 64.5 The Respondent did not cancel the OH appointment
 - 64.6 The OH clinician called the Claimant at the appointed time on 25 November.
 - 64.7 This was due to be the OH appointment
 - 64.8 The Claimant told the OH advisor that the offer had been withdrawn
 - 64.9 The Claimant and the Occupational Health adviser agreed that the full OH assessment would not take place
65. We find that the appointment was cancelled with the Claimant's agreement. The Claimant has not proved that the Respondent failed to allow her to attend the OH appointment; the Claimant did attend the appointment but the assessment did not go ahead, with the Claimant's agreement.
66. The direct discrimination claims therefore fail.

Discrimination arising from disability (paragraphs 3.1 – 3.4 List of Issues)

67. The unfavourable treatment relied upon is the withdrawal of the job offer. It is accepted that the withdrawal of the job offer was unfavourable treatment.
68. The next issue is whether the withdrawal of the job offer was because of something which arose in consequence of the Claimant's disability. The thing said to arise in consequence of the disability is the sickness absence record with the previous employer of "5 occasions of sickness absences with 40 days of sickness in the previous 2 years".
69. As set out under the heading "Disability" above, we found that only the osteoarthritis/fibromyalgia amounted to a disability at the material time, and that the other conditions did not amount to a disability. The Claimant's oral evidence was that two of the absences with her previous employer were disability related: 20 days for anxiety stress and 3 days for musculo-skeletal.
70. The 20 days for anxiety/stress did not arise out of the Claimant's disability.
71. Of the 40 days of sickness absence, three days arose from the Claimant's disability. Of the five occasions of disability absence, one arose from disability.
72. Based on those findings, our conclusion is that the disability was not the 'something' that caused the unfavourable treatment. In our judgment it did not have a significant influence on the unfavourable treatment. The disability related absence of three days was nothing more than a trivial influence on the withdrawal of the job offer.
73. We find that the concern of Mrs Smith was the number and duration of absences, and that the three days of absence for osteoarthritis related matters would have made no difference at all to the withdrawal of the job offer.
74. For those reasons the claim of discrimination arising from disability fails. We have not gone on to consider the legitimate aims defence.

Reasonable adjustments (paragraphs 4.1 – 4.5 of the list of issues)

75. There are three PCPs relied on.

First PCP

76. The first is that the Respondent applied the Employee Sickness Policy. There was a dispute as to whether this policy applied to the Claimant or not. Mrs Smioth's oral evidence was that she used the triggers contained in the policy as a guideline when considering the Claimant's level of absence and whether it was acceptable or not when considering whether to offer the Claimant the job.

77. We do not accept the evidence of Mrs Smith on this point; we find that she did not use the triggers in the policy as a guideline. The reason is that the triggers within the policy are based on a 6- or 12-month rolling period, whereas the information Mrs Smith had about the Claimant's absences were over a 2-year period. There was no obvious way in which she could have applied the policy. Mrs Smith was also somewhat vague in attempting to answer questions about what level of absence would have been acceptable or unacceptable. If she had in fact relied on the policy as a guideline then we would have expected her to say that absences in line with the policy would have been acceptable, or that absences above the policy would not have been acceptable.

78. Our conclusion based on those findings is that the sickness policy was not in fact applied to the Claimant in this case. We find that the first PCP was not applied to the Claimant.

Second PCP

79. The second PCP is relying on 2 years' sick leave information. We find that this was the Respondent's general practice; we accept the oral evidence we heard on this point.

Third PCP

80. The third PCP relied upon is refusing access to Occupational Health before a job offer has been withdrawn. We have set out above under "Direct Discrimination" why we find that in this particular case the Respondent did not withdraw or prevent the access to OH, but in fact the assessment was stopped with the Claimant's agreement. We find that this PCP was not applied to the Claimant in this case. Further, we did not have evidence as to the general practice of the Respondent; as such we would have found that it was not a PCP of the Respondent.

81. The fourth PCP in the list of issues does not fall for consideration, as it was the subject of an amendment application which was refused by the Tribunal on an earlier occasion.

Substantial disadvantage

82. The next issue is whether the PCPs applied in this case put the Claimant at a substantial disadvantage compared with persons who do not have her disability.

83. We find that the application of the second PCP (relying on 2 years' sick leave information) is not something which puts disabled people at a substantial disadvantage generally. There is no logical basis for us to

conclude that people with osteoarthritis are prejudiced by a sickness absence window of 2 years rather than some other period (whether that be 5 years, or 4 years, or 1 year, or any other period).

84. In our judgment, an individual with osteoarthritis/fibromyalgia is equally likely to be disadvantaged by being asked for absences over a 5-year period as being asked for absences over a 2-year period, as different individuals will experience absences at different times.
85. The Claimant asserts she was disadvantaged in this particular case as her absences were towards the end of the 2-year window. However, when we looked at the evidence we noted that there were musculoskeletal-related absences in earlier years: a three day absence in March 2018 and a one day absence in July 2018 for back problems.

Adjustments

86. Even if we had found that people with the Claimant's disability were put at a disadvantage then we would have found that the adjustment contended for was unreasonable. The Claimant contended that a reasonable adjustment would have been to request a larger period of sick leave. In our judgment that would not be reasonable as there were logical and sound reasons to look at the most recent two years. Looking at current and recent health position is a good indicator of future likely attendance; whereas looking more historically is unlikely to be helpful as an indicator of likely future attendance.
87. For all of those reasons the claims of failure to make reasonable adjustments fails.

Victimisation (paragraphs 5.1 – 5.4 list of issues)

88. During this hearing the Respondent accepted that the Claimant's email of 9 December 2021, in which she alleged she was discriminated against, was a protected act.
89. During the hearing I raised a concern with the parties that the Claimant may not be able to bring the victimisation claim under the relevant parts of Section 39 EqA 2010. I allowed them time to consider their respective positions and to make further submissions on the point.
90. The parts of s.39 which apply to non-employees are ss.39(1) and 39(3). Those sections provide protection from discrimination that relates to whether or not someone is offered a job, how someone is picked to be offered a job, and the terms on which they are offered a job.
91. They do not cover the complaints the Claimant makes at 5.2 of the list of issues, which is whether Mrs Smith lied in response to a complaint and whether the Claimant's email in January 2022 was ignored. As such, the Claimant would not have protection under the relevant parts of s.39 unless she was an employee of the Respondent at the time of the alleged victimisation.
92. It is possible to be an employee before starting the first day of work with a prospective employer: if an offer of employment is made with a start date

set then one can be an employee for these purposes. That requires that there be a contract of employment in place. It requires offer and acceptance which contains certain essential terms, including a start date as a minimum.

93. In our judgment there are a lack of key terms in the offer letter to the Claimant, including the start date. We find that there was no contract of employment in place.
94. We find that the Claimant does not have protection from the acts she complains of as victimisation, as she was not an employee at the time the matters occurred (December 2021 and January 2022). She was an applicant who had had an offer of employment withdrawn.
95. We also considered whether the Claimant had an overarching employment contract with NHSBSA, as argued by the Claimant. In our view the contractual documents we have seen are clear: the employer is the individual trust and not any other organisation.
96. For those reasons the victimisation claims fail.

Breach of Contract (paragraphs 6.1 and 6.2 of list of issues)

97. At 6.1 the first question is whether the Claimant is an employee of the Respondent. For the same reasons as set out in the paragraphs above, we find that the Claimant was not an employee of the Respondent at the time that the offer was withdrawn.
98. Even if we were wrong on that, the Respondent's offer contained a right to rescind the contract if the references were not satisfactory to the Respondent. Had we found that there was a contract then we would have found that the Respondent was entitled to rescind the contract in the circumstances of this case, as the references were not satisfactory to the Respondent and the offer expressly provided for rescission in those circumstances.

Employment Judge **Curtis**

Date 13 June 2024 _____