



EMPLOYMENT TRIBUNALS

Claimant: F

Respondent: Met Office for and on behalf of the Secretary of State for Business, Energy and Industrial Strategy of the United Kingdom of Great Britain and Northern Ireland

Heard at: Exeter

On: 09 January 2024

Before: Employment Judge Housego

Representation

Claimant: None

Respondent: None

RECONSIDERATION

1. Of his own volition the Employment Judge reconsidered the Case Management Order made on 02 August 2023 that a litigation friend must be appointed.
2. The Employment Judge revokes that Order.

REASONS

1. Rule 70 of the Employment Tribunal Rules of Procedure 2013, *contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* provides that:

“Principles

70. A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party,

reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again."

2. Having reflected at length upon this case I have decided that the order that a litigation friend be appointed was not the correct order in the circumstances.
3. The Claimant appeared before me on 02 August 2023 in person. She is clear and lucid in her presentation, and plainly fully understood what I was saying to her. She is intellectually highly capable. The issue is whether she has mental capacity to give instructions in her case. There are two medical reports (see below) indicating that the Claimant has unresolved mental health issues which preclude her from doing so.
4. However, her position is absolutely clear. She accepts that she had and has mental health issues. She attributes these to the fact that she cannot pursue her sole working life ambition, which is to work for the Met Office as a meteorologist and scientist.
5. Her position is that if she were to work for the Met Office her mental health would improve – precisely because in her view her mental health issues are because she is not in that employment. This is not illogical. It does not become illogical because the Respondent says that they will not re-employ her. It means that a logical position may be incapable of realisation. It does not become illogical because of the severe impact on her of the Met Office's decision.
6. The Claimant fully understands that the Respondent declines to make good its offer to reinstate her because her mental health does not permit her to return to work.
7. This is an unsolvable state of affairs, as the Claimant accepts. She says she will improve if she is permitted to return to work, but not otherwise, and the Met Office say that she must improve before they can consider her returning to work.
8. The Claimant fully accepted that an Employment Tribunal may make a reinstatement or re-engagement order only if there is a reasonable likelihood of the employment being successful, and so there are issues with such an order being made as part of the remedy decision.
9. The Claimant also accepted that an Employment Tribunal cannot compel a Respondent to employ someone. The Respondent is adamant that it will not re-employ the Claimant. If such an order were made, the consequence of the Respondent not complying with it is an increase in unfair dismissal compensation.

10. As the claim for disability discrimination succeeded and there will be an injury to feelings award and a loss of earnings award it may be that the overall difference in the award made is not going to be greatly different whether an order of reinstatement is made or not. The Claimant clearly understood all this in the hearing.

11. The medical evidence is:

11.1. A report of 22 June 2022 from Dr W Badenhorst, a consultant psychiatrist, commissioned by the Met Office. This concluded that the Claimant was not fit to return to work (and it is on this report that the Met Office rely in declining to re-employ the Claimant). What is not redacted is a careful analysis of the Claimant with which she does not disagree. Large parts of the report are redacted at the Claimant's request, which does make it difficult to judge whether the parts unredacted are reflective of the entire opinion. However, there is nothing in that report to indicate that the Claimant is unable to conduct litigation.

11.2. The report of Dr S Adelman, another consultant psychiatrist, of 13 June 2023. This sets out at length the Claimant's wish to be re-employed by the Met Office, and the effect on her of this not occurring. Dr Adelman concludes:

"The combination of depression and underlying emotional instability, has had a significant impact on her level of functioning and has resulted in multiple incidents including suicidal threats and attempts. As such, it is my opinion that her mental disorder is of a severity that would justify overturning the automatic presumption of mental capacity."

The doctor does not explain how it is that the sometimes extreme distress suffered by the Claimant makes her unable to conduct litigation. It is the effect on her of the litigation that is the issue. It might be that the Claimant could be so affected by the distress that she is incapable of conducting litigation. That was not how she presented in the hearing. She was composed and logical.

11.3. The supplemental report of Dr S Adelman of 21 July 2023. This states that:

"I assessed [F] on 8 June 2023 in relation to whether she had capacity to conduct the litigation of her employment dispute with The Met Office. It was my professional opinion that at the time of my assessment and on balance of probabilities, [F] lacked mental capacity to litigate in these employment proceedings."

It does not say why the doctor so concluded.

12. The statutory guidance to the Mental Capacity Act is the Mental Capacity Act 2005 Code of Practice Issued by the Lord Chancellor on 23 April 2007 in accordance with sections 42 and 43 of the Act. It states that:

“Section 1 of the Act sets out the five ‘statutory principles’ – the values that underpin the legal requirements in the Act. The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives. It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability to make decisions, or to participate in decision-making, as far as they are able to do so.

The five statutory principles are:

- 1. A person must be assumed to have capacity unless it is established that they lack capacity.*
- 2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
- 3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
- 4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*
- 5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”*

It also states:

“People have the right to make decisions that others might think are unwise. A person who makes a decision that others think is unwise should not automatically be labelled as lacking the capacity to make a decision.

13. The Guidance also states:

“Principle 1: ‘A person must be assumed to have capacity unless it is established that he lacks capacity.’ (section1(2))

2.3 This principle states that every adult has the right to make their own

decisions – unless there is proof that they lack the capacity to make a particular decision when it needs to be made. This has been a fundamental principle of the common law for many years and it is now set out in the Act.

2.4 It is important to balance people's right to make a decision with their right to safety and protection when they can't make decisions to protect themselves. But the starting assumption must always be that an individual has the capacity, until there is proof that they do not. Chapter 4 explains the Act's definition of 'lack of capacity' and the processes involved in assessing capacity."

14. Understandably, given Dr Adelman's reports, Mishcon de Reya did not feel able to continue to represent the Claimant (although were good enough to attend the hearing on 02 August 2023).
15. Since the hearing the Claimant has been unable to find someone to act as litigation friend.
16. It is the responsibility of the Judge to decide whether someone has mental capacity to litigate, after paying full attention to medical evidence.
17. It is not evidence of lack of mental capacity to litigate for a claimant to have unrealistic ideas about the remedy they seek. It is not evidence of lack of mental capacity to persist in seeking a remedy (or to pursue a case) which has little or no chance of success (although that may have consequences in costs). It is not evidence of lack of mental capacity to litigate if the process makes a party become severely mentally ill, where those consequences are extreme distress, and not an inability to think logically or to become delusional.
18. It seems to me that the medical reports of Dr Adelman wrongly conflate the distress and mental illness the situation is causing the Claimant with an inability to make informed decisions about the case, of which I see (and previously have seen) no sign.
19. The Claimant may be unrealistic about her wish to be re-employed by the Met Office (I make no decision or give any pre-judgement on the point), and it may be that (in the context of Dr Badenhorst's report) the Met Office's decision not to re-employ the Claimant is logical reasonable and inevitable (again, I make no decision nor give any pre-judgement). It is the case that not being re-employed by the Met Office has caused and continues to cause the Claimant great mental distress, to the point of severe illness. None of that means that she is incapable of making decisions about the case, wise or otherwise.
20. Given this reassessment of the position and giving full weight to the statutory principle that people should be considered to have mental capacity unless the reverse is clearly shown, I consider that I was wrong to accede to the

submission of the Met Office, not opposed by the solicitors acting (pro bono) for the Claimant, that the Claimant did not have capacity to litigate this claim.

21. I therefore revoke that Order, and the case will be listed for a directions hearing as soon as possible.

22. I emphasise that I am in no way critical of the Met Office or the solicitor for the Claimant (who I hope will again represent the Claimant). It is not their responsibility to decline to accept the report of the consultant psychiatrist. It is mine.

Employment Judge Housego
Dated 09 January 2024

JUDGMENT SENT TO THE PARTIES ON
22 January 2024

FOR THE TRIBUNAL OFFICE