Case Number: 2301430/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MJ Downs (sitting alone)**

BETWEEN:

Claimant

Ms Ivy Corlis

-and-

Respondent

London Borough of Southwark

ON: **29th August 2018**

APPEARANCES:

For the Claimant: **Mr H Edwards (Lay Representative)**

For the Respondent: **Miss D Gilbert (Counsel)**

JUDGMENT

The judgment of the Tribunal is that:-

(i) The breach of contract claim is dismissed upon withdrawal.
(ii) The Tribunal finds that the Claimant is disabled at the relevant time within the meaning of the Equality Act 2010 as a result of the effects of sciatica; depression and stress-related anxiety; and incontinence.
(iii) The application on behalf of the Claimant to amend the claim to include dyslexia as a disability is refused
(iv) The application on behalf of the Claimant to amend the Claim to add a claim of direct disability discrimination as pleaded is allowed
(v) The applications on behalf of the Respondent that the claims shall be struck out is refused
(vi) The applications on behalf of the Respondent that the Clamant shall pay a deposit is refused.

REASONS

Introduction

1. On 16th July 2018 EJ Martin listed this matter for a public preliminary hearing on 29th August 2018 to address the following:
   (i) Any application to amend the claim to include dyslexia as a disability (concomitant with that are contentions about the failure to make reasonable adjustments in the dismissal process)
   (ii) Whether the Claimant is a disabled person as defined by the Equality Act 2010?
   (iii) Whether the claim should be struck out as it has no reasonable prospects of success?
   (iv) Whether the Claimant should pay a deposit as a precondition of continuing her claim on the basis that her claims have little prospects of success?

2. Employment Judge Martin identified the claims and the issues within them with great particularity with the assistance of the parties. The tribunal also made directions – the purpose of which was to concentrate the minds of the parties as to the claim for breach of contract and unlawful disability discrimination.

3. In the course of the hearing it was agreed that the breach of contract claim had been resolved (i.e. it would appear that the payment had been received) and that it could be dismissed upon withdrawal and the Judgment of the Tribunal reflects this.

The Claim

4. The claim was brought by way of an originating application received by the Tribunal on 19th April 2018. The Claimant sought compensation for unfair dismissal, breach of contract (unpaid notice pay) and failure to make reasonable adjustments for the Claimant. The Claimant's claim form relates that she has a disability in that she suffered depression and stress on the death of her husband as well as sciatica and the effects of a hysterectomy.

5. The Claim is resisted by the London Borough of Southwark who maintain that they dismissed the Claimant by reason of capability (after reasonable adjustments were made). The ET3 denies the unfair dismissal and maintains that the Claimant is not disabled within the meaning of the Equality Act 2010 and states that the Claimant is put to strict proof of the same. The Respondents complained that the claim was not fully particularised.

6. The Respondents invited the Tribunal to either strike out the Claimant's claims or alternatively to make a deposit order as a condition of

continuing with them. They relied upon a very thorough skeleton argument from Heather Platt of Counsel which Miss Gilbert spoke to.

The competing contentions

7. The Claimant contends that she is disabled within the meaning of the Equality Act. In addition to the matters set out in her ET1 and referred to by EJ Martin in her case management order, the Claimant seeks to amend her claim so as to rely upon a mental impairment of dyslexia as a disability.

8. The Claimant (who now has the support of Southwark Law Centre) seeks to amend the ET1 so as to rely upon a mental impairment of dyslexia as a disability (causing illiteracy) - with this comes allegations that the Respondent failed to make reasonable adjustments to the disciplinary/ capability hearing process and relies on fresh evidence of the Respondent's knowledge of this disability. It was conceded that the Claimant has not been diagnosed with dyslexia but those who represent her rely on the fact that she cannot read and has to rely on other family members to help her with this.

9. In order to evaluate the merits of the claim it was necessary, so far as possible, to establish its parameters with as much precision as possible.

10. Southwark Law Centre sent an admirable Note setting out what they seek about a week before the hearing. This included a request to add an additional cause of action pursuant to Equality Act 2010 section 15 – namely a claim of direct discrimination because of her disability as an alternative to the pre-existing claim under section 20. The Claimant had submitted a draft of the amendment as follows:
The Claimant's dismissal was an act of direct discrimination contrary to s.15 EA 2010. This is because:
i) The dismissal itself was unfavourable treatment; and
ii) The dismissal was because of the:
    a) The difficulties the Claimant had performing the tasks set for her due to her disabilities.
    b) The fact that the Claimant was not Fit for Work for certain periods due to her disabilities.

    The Claimant will rely on the following facts, among others, to establish that this unfavourable treatment was not a proportionate means of achieving a legitimate aim:
    a) Reasonable adjustments suggested in the last Occupational Health report were not considered (pg.72 of the Bundle).
    b) No risk assessments were conducted to establish whether her disabilities made particular sorts of tasks dangerous for her or not.
    c) No alternative roles were as such properly considered for the Claimant.

11. This is put as being a reframing of the existing case and it was pointed out that it overlaps with the issue of whether or not the sanction of dismissal was within the reasonable range of responses for the employer in the Unfair Dismissal Claim and was not therefore likely to add greatly to the length of the trial.

12. In a very moderately argued reply (set out in a letter of 24th August 2018), the London Borough of Southwark conceded that there might be some merit in the contention that what was being sought was a re-labelling of a pre-existing claim and adopted a broadly neutral position.

13. The Tribunal concluded that the claim of direct discrimination was indeed a re-labelling of contentions to be found in the ET1 by way of an alternative way of putting the claim and that as such the Respondents would not be put at a particular disadvantage and that such an "amendment" would be in the interests of justice.

14. Additionally, having read the correspondence and heard the representatives of the parties, it was apparent that the Claimant had identified as a PCP, "the Respondent's requirement that employees achieve an acceptable standard of performance in her duties".

15. Further the Claimant identified two further reasonable adjustments that were relied upon

    a) give her an alternative post with different duties and

    b) give her more comfortable shoes than she had at the time of her dismissal.

    These amendments to the case management summary (pursuant to *Parekh v London Borough of Brent* ([2012] EWCA Civ 1630) were approved.

The Claimant's Disability

16. The Claimant submitted detailed evidence about suffering from Sciatica/Lower Back Pain ("LBP") from 2013 with more recent references being to its long-standing nature. Additionally the Claimant suffered from a bereavement in December 2015 and was prescribed Diazepam for anxiety issues. The evidence is that this has had to be repeated frequently over the operable period. The evidence was that these conditions had had a marked effect on her. The Tribunal accepts this evidence.

17. The Claimant's incontinence would appear to have deteriorated after surgery in mid-2015 and the Claimant has to sleep on plastic bedding from 2015 due to the involuntary passing of urine and has to wear pads as can be caught short. The Claimant has attended an incontinence clinic between 2016 and 2018. The Tribunal accepts this evidence.

18. The principal arguments by the Respondents against the contention that the Claimant's sciatica, depression and incontinence are disabilities is that they are not long-lasting. This is belied by the medical evidence.

Inability to read

19. Originally it was asserted on behalf of the Claimant that she has a mental impairment of having an inability to read which meets the statutory definition of 'disability' (s.6 EA 2010). It was noted that reading has been held to be a routine or day-to-day activity (*Paterson v Comr of Police of the Metropolis* [2007] IRLR 763 para.66) [albeit that the Tribunal and the EAT had been principally concerned by the Claimant's dyslexia] and the Claimant's total inability to read must mean that this impairment is 'substantial' enough to constitute a 'disability.'

20. In the skeleton argument filed for the hearing the Claimant accepted that a simple inability to read is not a 'mental impairment.' The thrust of Cl.'s application is though that it is strongly arguable at this stage that her inability to read arises from a mental impairment. The Claimant has been informed that to seek a full diagnosis would require a report from an educational psychologist which would cost her £400.

21. The Respondent has contended that they had no knowledge of her acute difficulties reading but the Claimant states that she would be able to provide evidence that it was raised on her behalf by her Trade Union Representative at the relevant time.

22. The Claimant would say that the Respondent would not be prejudiced by any amendment in this regard because they had been put on notice through the disciplinary proceedings that she felt she had not been given enough time to digest the documents she was provided with and given the importance of that process it is most likely that these documents were preserved. The Trial has not, as yet, been listed, and this argument would not greatly add to the list of existing issues (indeed it largely overlaps with them).

23. The Claimant relies on the Equality Act 2010 *Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability*, para.A3 on pg.8 to the effect that, 'It is not necessary for the cause of an impairment to be established, nor does the impairment have to be the result of an illness.'

24. The Respondents argued that this was a wholly new cause of action based upon facts not asserted in her original claim form. The alleged failures relate to the capability hearings in July and November 2017 where the primary limitation period would have expired in circumstances in which it could have been raised in the original claim form and there is an absence of an explanation for this failure. There is merit in this contention.

25. Moreover, the Respondents would say that illiteracy does not fall within the legal definition of disability in the Equality Act as it is a lack of a skill as opposed to a mental impairment. There is also a paucity of evidence about the Claimant's abilities in this area – particularly as to whether her inability to read or write is a mental impairment. The Respondents would say that they did not know she was illiterate – only that she might have been a bit dyslexic.

Deposit application

26. The Respondents assert that this is a weak claim and will cost the Respondent, a public body, a significant amount in time and legal fees to defend it which will not be recovered.

27. The Respondent appreciates that the tribunal would have to take account of the Claimant's means but would say that even if she was not in a position to pay a deposit order of circa £100 per allegation, the Respondent will argue that a nominal deposit order of £1 per allegation should be paid.

28. The Respondents made detailed submissions on the merits of the claims advanced by the Claimant. The Respondents contended that the Claimant had already been placed on an adjusted regime of work (with the lightest duties available) and that the adjustments that are now relied upon are either (i) not properly reasonable adjustments; (ii) are contrary to OHP advice or (iii) would not avoid the substantial disadvantage to the Claimant. Further, they maintain that the cost of an assistant would be as much as the Claimant's own salary and would duplicate work.

29. As concern unfair dismissal, the Claimant was dismissed for the potentially fair reason of capability (section 98(2) ERA 1996) and that procedural unfairness was not alleged here. Rather, the complaints were a duplicate of those in the unlawful disability claim.

30. In response the Claimant argued that this case involved disputed facts and – most especially – inferences (*Kwele-Siakam v The Co-Operative Group* UKEAT/0039/17/LA para.24) and it would be inappropriate for a deposit order to be made on the basis of generalized prediction of merits of the case; and there has to be 'proper basis' for such an order (*Hemdan v Ismail* [2017] ICR 486. para.12).

31. The Claimant would say that the Tribunal is being invited to make findings of fact as to the unlawful disability discrimination claim – most especially as to the proportionality of dismissal when it should have been possible to alter the Claimant's duties. Similarly, with unfair dismissal, the Tribunal would be invited to decide whether alternative employment

had been considered properly – most especially because of the size and administrative resources of the Respondent

The Applicable Law

32. The Tribunal had regard to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Rule 37(1) which provides that a tribunal may make a judgment or order –
(a) striking out or amending all or part of a claim or response on the grounds that it is scandalous, or vexatious or has no reasonable prospect of success.

33. Rule 39(1) of Schedule 1 of The Employment Tribunals Rules 2013 states:
Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

34. The Respondents very fairly alerted the Tribunal to the significance of cases such as *Abegaze v Shrewsbury* [2009] EWCA 96 which would tend to show what a rare measure it would be to strike out a discrimination claim. In turn this was based on the House of Lords case of *Anyanwu v South Bank Students' Union* [2001] IRLR 305, where famously Lord Hope of Craighead stated (at para 37):

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence."

35. In *North Glamorgan NHS Trust v Ezsias* [2007] [2007] ICR 1126; [2007] IRLR 603 Maurice Kay LJ said (paragraph 29):

"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation."

36. In *Pillay v Inc Research UK Ltd* UKEAT/0182/11 Richardson J stated:

"Anyanwu and Ezsias represent the law and reflect not only the sensitivity and public importance of discrimination and whistleblowing claims but also the limits of a prehearing review, which is not an appropriate forum for carrying out a mini-trial of the issues. It is therefore always helpful, and an aid to good decision-making, if employment judges who are asked to strike out such claims because there are no reasonable prospects of establishing relevant facts keep Anyanwu and Ezsias in mind and if they consider it appropriate to strike out the claim say how why they consider the claim to fall within the type of case where a strike out is appropriate."

37. In *Hemdan v Ismail* [2017] ICR 486 Simler J at para.13 stressed that, "If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is heard and tested."

38. The Tribunal had regard to Equality Act 2010 section 6 which states that:

(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.

…

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

(6) Schedule 1 (disability: supplementary provision) has effect.

39. Schedule 1 to the Act specifies

Para 2.

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

40. The Equality Act 2010 Guidance on matters to be taken into account in determining questions relating to the definition of disability states as follows:

A3. The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the

impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.
A4. Whether a person is disabled for the purposes of the Act is generally determined by reference to the **effect** that an impairment has on that person's ability to carry out normal day-to-day activities. An exception to this is a person with severe disfigurement

Application of Facts to the Law

41. The Tribunal find that the Claimant is disabled at the relevant time within the meaning of the Equality Act 2010 as a result of the effects of sciatica; depression and stress-related anxiety; and incontinence – most especially when all the conditions above were taken together (i.e. the effects of lower back pain and sciatica, effects of incontinence and depression / stress). The evidence would tend to show that the Claimant was disabled during the applicable period namely, January 2016 to November 201 that they were the result of a physical and or mental impairment and the effects were substantial and long-term.

42. The Claim of unfair dismissal and unlawful disability discrimination was well drafted and understood (most especially after the assistance given by EJ Martin) and centred on the Claimant's dismissal. Even the amendment granted above as to the claim for direct disability discrimination was centred on the same step taken by the Respondent. It might be argued that the claim was not strong (because of the reasonable adjustments put in place hitherto, the contents of the OHP advice and the ambition of the adjustments sought) but the claim was arguable. The Respondents appropriately and realistically concentrated their energy on their deposit rather than their strike out application. Nevertheless, even the latter would require the Tribunal to make findings of fact as to the proportionality of the dismissal process which would be inadvisable at this stage.

43. The amendment to add the contention that the Claimant was disabled by reference to a mental impairment which had the effect of making her illiterate was more problematic. It is accepted that reading is a day-to-day activity, that the Claimant's problems in this regard are long-term and the effects substantial.

44. The problem really rests with section six of the 2010 Act – as to whether the Claimant has a mental impairment that has the effect of making her unable to read. The representative of the Claimant has argued with skill and charm that the Tribunal could surmise that it is likely that the Claimant has dyslexia (or a similar condition) but the evidence for the same is largely absent. A person can be illiterate for a number of social, historical and educational reasons. Opportunity and inclination may also play their part. Reading is an acquired skill – it is not innate. It must

therefore be required that there is some evidence that the Claimant has a mental impairment. That is absent here.

45. Additionally, in contrast to the claims set out, defined and analysed above, the addition of a claim based on the Claimant's inability to read would add a new dimension to the case – namely the issue of what reasonable adjustments would be required that would concern periods of time prior to that considered above. Further, the Tribunal would be concerned that this additional claim is not meritorious.

Employment Judge M. J. Downs

Dated 13th December 2018