



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Ms N Khodsiani

AND

The Newcastle upon Tyne Hospitals
NHS Foundation Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields

On: 9, 10, 11 and 12 January 2018

Before: Employment Judge Pitt

Members: Mr D Cartwright
Mr T D Wilson

Appearances

For the Claimant: In Person

For the Respondent: Mr Robert Gibson, Solicitor

JUDGMENT

1. The claimant's claim for direct discrimination on the basis of her sex is dismissed.
2. The claimant's claim for direct discrimination because of her pregnancy is dismissed.

REASONS

1. At the time of these events Ms Khodsiani was a student at the University of Sunderland; she was completing her degree in audiology which she had commenced in September 2014. As part of that course she had to carry out observational and practical placements at a hospital. By agreement with the respondent Sunderland University students carried out these placements at the Freeman hospital which is part of the respondent trust. The first year is an observational placement; the second year and third year are practical during which the student has to be observed and assessed on a various learning outcomes on a number of occasions culminating in a final assessment by her tutor. In order to satisfy the criteria to obtain a degree. The student is expected to complete a log book (or diary) of tasks they have undertaken and have them signed off by their mentor at the Hospital. During the last two years of placement the student is not required to complete a certain number of assessment to progress from Year 2 to Year 3 but all the assessments must be concluded during those two years
2. The claimant became pregnant with her second child at the early part of 2016; her expected confinement date being late October 2016. She commenced her year two placement in April. Her evidence was that she did struggle with the pregnancy and health problems associated with it. The respondents say that during this period they had issues with the claimant's performance, unfortunately this is not documented in any way it is all verbal. the claimant having completed her second year assessment then requested that she be allowed to work before the commencement of her third year placement which was due to commence on 31 October 2016 in order to try and catch up with work she might have missed. The claimant was intending to go into the Freeman each Friday before her confinement, however she was only able to attend on one occasion. In relation to her competence there is a document at page 138 which is an e-mail from Mr Parkin to Ms Rankin where he says:

"I have talked to about how the department was concerned you would not be able to cover all of the log book in the time left in placement and that you could not take her on indefinitely until completion goes on. I explained that the placement would cease if it was felt that she was not going to be able to complete in time especially if her attendance was not at the level you have agreed. I told her I would be regularly assessing her to help and monitor her progress to make sure she progressed to good level but it was essential that from starting the placement she would need to attend the agreed hours regardless of home or child circumstances to have any chance of completing the placement."

3. This clearly shows that there were concerns even at this early stage about the claimant's ability to complete her placement. Ms Khodsiani applied to commence her third year placement by application dated 16th September; the placement was to commence on 21 November 2016 and last until 31 May 2017. It is clear that having completed the documentation the start date was changed to 24 November as a result of other commitments that claimant had. The claimant gave birth to a premature baby on 8 October; she returned to her placement on 24 November; it was agreed she was to work 8am to 5pm Monday to Thursday and Friday 8am to 3pm. It was the Tribunal's understanding that students

usually worked a four day week working 8am to 6pm Monday to Thursday. Having returned to her placement the respondent's opinion was that she was still failing to meet the requisite standard; in particular she was not making progress and repeating the same errors. The Tribunal heard evidence from Mr Booth; the panel is satisfied that he carried out a mock assessment of the claimant's abilities His opinion was she was struggling with a number of aspects of her work and she was not achieving the required standards.

4. In December Mr Parkin was to carry out an assessment of the claimant; in preparation for that Ms McArdle carried out a full assessment of the claimant on 14 December; rather than simply using the documentation provided by the University Ms McArdle produced document (pages 185 A to I) which broke down each learning outcome into different sections. She assessed the claimant by observing her dealing with a number of patients on this day. Whilst the claimant was good in relation to some aspects in these assessments; in fact she achieved a good standard in some; Ms McArdle's opinion was that the claimant still needed to focus on and concluded she had failed the overall assessment.
5. The Tribunal formed the view that the claimant that perhaps through misunderstanding or closing her eyes to her own lack of ability focused on the fact that at the end of these documents Ms McArdle was explained that it was overall good appointment although there were areas to then focus on.
6. On 19 December Mr Parkin carried out his assessment; the claimant had to perform the same tasks as she had on 14 December. We don't have the notes from Mr Parkin for that date but we do have Ms McArdle's notes; again she used the proforma that she had previously. She concluded at the end that whilst the claimant was doing well in some areas she still needed to work on time management structuring her appointments, preparing the stock in the room, cleaning wires, tubes and batteries and various other matters. In particular when she came to dealing with one aspect using a hearing she forgot to turn the aid on before it was sited in the patient's ear. Ms McArdle tells us that this gave her concerns about the claimant's ability to complete her placement in that she would be unlikely to be able to achieve the number of required formal assessments to complete her degree course.
7. Sometime between the 19 and 22 December the claimant handed to the respondents and it is probable that it was handed to Ms Rankin a letter from her GP, page 186 of the bundle:-

"I met this lady today for her postnatal check. As you know her son is 9 weeks old. I am genuinely shocked today to hear that she has been told to return to work full time (and she sounds to be working in excess of 37.5 hours per week when her baby was only 6 weeks old, is this legal?!)

I do not understand maternity leave rules for students but find it hard to believe that she has to work like this with such a young baby. She says she has been told if she does not comply with this she will not get the qualification she is aiming for, surely she can work less hours and extend her period of training?

Please can you review this situation urgently as this is going to affect her mental health (increase her risk of post natal depression) and is not good for her baby to

be away from his mother so long every day. She did not ASK me to write this I am writing it because I am shocked you put her in this situation within the NHS organisation.”

8. On 22 December as a result of that document Ms Rankin advised the claimant to go home. It had already been agreed that the claimant would not work the Christmas period. On the same day Ms Rankin e-mailed Mr Parkin page 199 Claimant). She says:-

“I feel even with reduced hours she would not be at a stage to pass her placement by April. Ms Rankin says would you still be happy to come over first thing in the New Year when you are back at work if we arrange a meeting to discuss her options?”

9. Further e-mails were sent between the two including reference by Ms Rankin to Mr Parkin asking whether there was a possibility of extending the placement. It was her view that it could be possible to agree working mornings only and spend the afternoons with baby to stave off any depression. Mr Parkin responded in the New Year; that deferring would be an option; the placement could run to the end of August to complete the log books which would allow the claimant to graduate in November. This would be fine by the University but had implications for the Trust. He agreed to meet with the claimant and the respondent to work out a way forward but wanted to discuss the matter with the respondent's first.

10. Mr Parkin met with Ms Bossom and Ms Rankin on 9 January and made a decision to terminate the placement they then informed Ms Khodsiani of the termination. No minutes of that meeting were taken although there is a memo from Ms Rankin (page 211) which seems to have been created for the University complaint. In that she speaks of the claimant coming into work too soon after the birth of the baby, making simple mistakes in her assessments, in particular the time, time management has been a problem for the claimant she concludes with this:-

“This information was a big part in our final decision. Considering she was already struggling to achieve the required levels and putting herself under so much pressure that we could not be responsible for it effecting her health as well especially when we feel she would have had difficulties completing her log book.”

At the end she writes

“Naheed did not really listen to our concerns about her health and her current stage in development but was insistent that she would complete everything.”

The Issues

11. The issues were set out in case management orders and in a list of issues for this Tribunal as follows:-
- 1) Was Paul Parkin an agent of the respondent at any point during the claimant's student placement at the Freeman Hospital?

- 2) Was Paul Parkin given authority to relay any information to the claimant on behalf of or as an agent of the respondent?
- 3) Is the respondent liable for matters relayed to the claimant by Paul Parkin which were provided without consent and without instruction?
- 4) Did the claimant and Paul Parkin have a meeting in September 2016 for the avoidance of doubt this was approximately 4 weeks before the claimant gave birth.
- 5) If the meeting was held were the following matters relayed by Paul Parkin:-
 - (a) that Paul Parkin confirmed that the claimant could not return to work with the respondent by the end of November 2016 she could not obtain the degree she was working towards and would have to settle for a diploma
 - (b) that Paul Parkin told the claimant that if she did not return to her placement by the end of November 2016 the respondent did not want the claimant to return to her placement
 - (c) that Paul Parkin confirmed that the claimant was potentially wasting her time and that of the respondent if she did not return to her placement by the end of November 2016
 - (d) that Paul Parkin told the claimant she had enough problems with one child and with her second child there would be even more difficulties
 - (e) that Paul Parkin told the claimant she could not extend her placement as had previously been agreed because the claimant was wasting her time
 - (f) that Paul Parkin under instruction from the respondent told the respondent that the respondent did not want the claimant to return to her placement
- 6) If it is accepted that any of the above a to f were relayed by Paul Parkin to the claimant were these relayed upon instruction from the respondent or as an agent of the respondent.
- 7) If it is accepted that any of the above a to f were relayed by Paul Parkin to the claimant and if these were relayed upon instruction or as an agent of the respondent was the treatment unfavourable and was it because of her pregnancy.
- 8) Did the respondent through Pauline Bosson as an employee or Paul Parkin as an agent or upon instruction put the claimant under pressure to resume her year three placement in November/December 2016 some six weeks after the birth of her child on October 8 2016.

- 9 Did the respondent through Pauline Bosson as an employee or Paul Parkin as an agent or upon instruction place a requirement upon the claimant to attend her placement for excess of 40 hours per week.
- 10 Did the respondent through Pauline Bosson as an employee or Paul Parkin as an agent or upon instruction require the claimant to work on Fridays and or until 6pm in the evening in order to make up time lost whilst giving birth.
- 11 If proven do paragraphs 8 to 10 above constitute less favourable treatment and if so is the less favourable treatment on the grounds of pregnancy and or sex.
- 12 If proven do paragraphs 8 to 10 above constitute a detriment and if so is the detriment on the grounds of pregnancy and or sex.
- 13 Did the respondent through Paul Parkin as an agent or on instruction and or through its employees Pauline Bosson and or Katherine Rankin terminate the claimants student placement on 9 January 2017.
- 14 Was the termination of the placement on 9 January 2017 less favourable treatment if so was the claimant treated less favourably because of her recent pregnancy and or her sex.
- 15 Can the respondent show that the reason for any of the above matters were for reasons unrelated to sex and or pregnancy.
- 16 If any of the above matters are determined to be discriminatory on the grounds of sex and or pregnancy does the respondent have a defence as to why they may have acted in the manner depicted by the claimant.
- 17 Does the claimant rely upon comparators to establish less favourable treatment and if so who. If the claimant needs to rely on a comparator to establish less favourable treatment outside the protected period there must be no material difference between the circumstances of the complainant and the comparator save of that of the sex of the comparator.

The Law

12. The Tribunal had regard to the following sections of the Equality Act 2016:-

Section 4 which provides for pregnancy and maternity and sex to be protected characteristics for the purposes of the Act;

Section 18; pregnancy and maternity discrimination at work; this provides that a person discriminates against a woman if in the protected period they treat her unfavourably because of the pregnancy or because of an illness suffered as a result of it. The protected period in relation to a woman begins when the pregnancy begins and ends two weeks after the end of the pregnancy.

I mention here section 55 of the Equality Act. This is the section which gives the Tribunal jurisdiction that the claimant is entitled to bring a claim before the Tribunal because the respondent is an employment service provider.

Section 136 of the Equality Act is the burden of proof, namely if there are facts from which the court could decide in the absence of any other explanation that a person contravened the provision the court must hold that the contravention occurred but the sub section does not apply if the respondent shows that they did not contravene the provision.

Mr Gibson referred to Indigo Design and Management Limited –v- Mrs Martinez [2014] UKEAT a decision of Judge Richardson sitting alone in the Employment Appeal Tribunal; the task for the Tribunal is to determine the reason why the termination occurred.

Submissions

13. Mr Gibson on behalf of the respondent provided the Tribunal with a skeleton argument setting out the issues in the case and responses. Basically the respondent's case is the termination and other treatment if found was because of the claimant's abilities and not because of her sex. The claimant asserts the reason in particular for the termination was because of the letter from her GP, that it cannot simply be coincidence that the meeting was arranged as a result of that letter.

Discussion and conclusions

14. Turning to the list of issues; it is agreed by both parties that Mr Parkin was not the agent of the respondent, however the Tribunal did consider this issue as it was unclear if the claimant understood the legal concept of an agent. The Tribunal concluded that Mr Parkin's role was that of facilitator, he was obliged to obtain placements for his students and then to liaise between the University and the student and support the student throughout. Ultimately it was his assessment of the student as to whether or not they had completed the placement satisfactorily therefore Mr Parkin was not an agent nor was he given authority by the respondent to relay information to the claimant as if he were an agent, although the respondent would be aware that Mr Parkin was liaising with the claimant they cannot be held responsible for the manner in which he did so relate.
15. A comment here about Mr Parkin. Mr Parkin came to the Tribunal as a result of a witness order. He presented as a thoughtful and caring university lecturer who wanted to support his student and ultimately ensure that they passed their assessments and their degree course. Having heard evidence from him over the course of two hours on the first day of this hearing the Tribunal concluded that threats were not the way in which Mr Parkin would work to the meeting in September. The Tribunal do not consider that Mr Parkin would have told the claimant that if he didn't return to her placement by the end of November that she

could not obtain the degree and was working towards her diploma or that if she did not return by the end of November that the respondents did not want her to return or that in relation to other matters that the Tribunal concluded that Mr Parkin probably discussed with the claimant her situation as a mother of two children trying to undertake a degree course that she was attempting to be supportive and discuss with the claimant all the options that she had available to her. These would include suggestions such as not completing the placement and having a diploma, deferring her degree for a year and undertaking the placement when her child was slightly older or even extending the placement for a period of time. The Tribunal do not accept that any time Mr Parkin threatened the claimant that if she did not return the placement would be withdrawn or that the respondents did not want her to return. In any event if we look at the issues it matters little what Mr Parkin said to the claimant because these were his views and his opinions and not those of the respondent, although it has been said that this respondent clearly had concerns about the claimant's ability to complete.

16. Dealing with Issues 1, 2, 3, Mr Parkin was not an agent. Issue 4 there was meeting sometime around 16th September; Issue 5 whilst Mr Parkin may have said those words at a, c, d it was said in the context set out above.
17. Therefore as Mr Parkin was not an agent and on the facts the Tribunal did not consider the burden had shifted there was no unfavourable treatment of the claimant on the grounds of her pregnancy,
18. Turning to issues 8, 9, 10; the Tribunal is not satisfied that the claimant was put under pressure to resume her year three placement in November or December just six weeks after the birth of her child. As already noted the claimant completed her paperwork to recommence her placement on 21 November as early as 16 September approximately three weeks before the birth of her child. There is no evidence that prior to that there was any pressure put upon her to return at that time. In relation to the claimant attending in excess of 40 hours; the evidence the Tribunal heard was that the respondent could not require a student to attend at any times; usually students attending four days per week 8am to 6pm with lunch during that period. That equates to a 40 hour per week. If a person did not attend the University would be informed and the University could take action. However it was the student who would loose from this as it was their placement and they needed to get the best out of it. In any event, however, the evidence we have heard is that the claimant had agreed that she would attend five days a week, four days 8pm until 5pm and on the Friday 8am until 1pm.
19. If a clinic finished at 4 it was the student's responsibility to ensure that they occupied their time usefully in order to ensure that they brought themselves up to the requisite standard and pass their placement. On no occasion did the respondents require the claimant to stay until 6 pm to make up for lost time. As noted above it was expected that if a clinic had finished that the claimant should find other work to observe or become involved in and if necessary simply catch up on reading manuals and the like. Therefore there was no requirement for the claimant and it was reiterated on more than one occasion that the placement is in fact voluntary and the person gets out what they put in. the respondents couldn't require somebody be there, they had no authority over them. The Tribunal's

conclusion being that the claimant was not forced to work until 6 or five days a week.

20. As the Tribunal does not accept that the claimant was forced to do anything of the things alleged there is no unfavourable treatment nor any detriment to the claimant therefore these claims are not made out.
21. The remaining issues are concerned with the termination of the placement. It is clear on the evidence that the Tribunal heard that as early as July of 2016 the claimant in the opinion of the respondent was suffering as to that the Tribunal have not made its own decision on whether or not the claimant was failing because of her inability in relation to the termination it is the opinion of the respondent that is relevant. However, having said that we have looked at whether or not that is an opinion that was reasonable and genuine for the respondents to hold and on the evidence we have seen in relation to in particular the 14 and 19 December and the assessments carried out by Mr Booth the Tribunal are satisfied that this a belief that the respondents could properly hold.
22. Further Mr Parkin had indicated he would be regularly assessing Ms Khodsiani and monitoring her progress and on 16 November, prior to the placement commencing, Ms Rankin sent an e-mail to Mr Parkin in which she says:

“I have said we will try to timetable in some mock former assessments for you to observe her during the week of 19 December and I think if we can arrange with Paul to come over as well it would be useful to see what stage she is at by then”.
23. Clearly the respondents at this stage wanted to assess the claimant and discuss the way forward although there is at this time no suggestion that there would be a formal meeting.
24. On 14 December Ms McArdle carried out a mock assessment. She tells us that in relation to this she wanted to ensure that the claimant had the best opportunity to pass her formal assessment with Mr Parkin. On the evidence we have heard however, it is clear that the claimant has looked at the conclusion of each assessment and determined that overall a good appointment meant that she should have passed rather than recognising that there were failings that she needed to concentrate on. The same can be said in relation to 19 December when Mr Parkin was observing in particular because of the length of time the claimant took over her first appointment it was not possible to observe her further as no other patients could be seen because of it.
25. Things were left there and the claimant was actually allowed to work solo in the fitting department as an assistant on 20 and 21 when she was let go for Christmas.
26. Turing to the crux of the matter the termination; as indicated earlier there is not a minute of that meeting simply a memo provided by Ms Rankin. We heard evidence from Ms Pauline Bossom who is the head of services about this and her evidence was clear and cogent.

27. On the basis that the claimant was not achieving and not progressing as the respondent believed she should; in particular that the chances of her completing her log book in time for a formal assessment with Mr Parkin were few and in light of the letter from the general practitioner that she need to work even less hours than she had been prior to Christmas Ms Bossom concluded that it simply would not be done.
28. If the Tribunal was simply to look at the sequence of events it would have the appearance that the decision to terminate was a result of the letter being received by the respondents and this may well be an attractive argument. Indeed the Tribunal is satisfied that the claimant has established sufficient evidence that for the burden to shift from her to the respondents.
29. The Tribunal have to first of all consider the hypothetical comparator. The comparator in this case would be a male with the same level of competence as the claimant who also had the same number of absences from the placement as the claimant and a male would have produced medical evidence to suggest that the training as described by Ms Khodsiani was having an adverse effect upon their health.
30. The question therefore that the Tribunal has to ask itself would the respondents have treated a male in that situation differently to the claimant. This is a vexed question. If one reads the letter from the GP it is an extremely emotive letter filled as it is with question marks and exclamation marks using phrases such as genuinely shocked, shocked she is in this situation within the NHS. The concern for the panel the Tribunal was whether or not the respondent reacted to the letter and its emotive content on an emotional level rather than looking at it in more logical frame. However, the impact of it is that there was to be reduction in the time. The evidence of Ms Bossom was threefold. The claimant was already failing, she had lost time and she was not going to in her opinion complete the course on the hours she was currently working. Second, it was a waste of the claimants and the resources for the Freeman which was already under pressure. Third, that it would create stress within her own department for her own members of staff because she felt that they would attempt to work additionally with the claimant and put pressure upon themselves to ensure that the claimant ultimately achieved her goal of passing her assessments.
31. Taking those factors into account, even on the hours that were being worked the claimant was not going to be able to complete her placement successfully. In light of the letter and the reduction of hours; in the opinion of Ms Bossom this was not simply a numerical question, it was a question of practicality and the quality of the placement the claimant would receive that by reducing the hours further; in effect she concluded the claimant was simply unlikely to complete the log book in sufficient time.
32. The claimant points to the fact that she did in fact complete her log book placement with another University Hospital within 9 weeks; however as the Tribunal have already said it was the opinion of the respondent that was important and whether or not that was an opinion that they could hold and we

have already said that it was. The fact therefore that the claimant did manage to complete her training course whilst giving some weight to her argument does not take away from the fact that the respondents opinion genuinely held that she would not pass.

33. The Tribunal concluded that the claimant's placement was not terminated because of her gender.

34. The claimant's claims are dismissed.

EMPLOYMENT JUDGE PITT

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

6th February 2018