



EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr A Duyile

v

**The School of Oriental and African
Studies**

Heard at: London Central

On: 25 June 2019

Before: Employment Judge Lewis

Representation

For the Claimant: In person (SKYPE)

For the Respondents: Mrs Sobers, solicitor

RESERVED PRELIMINARY HEARING JUDGMENT

1. The claimant had the disability of (i) migraine (ii) photophobia and (iii) a combination at all material times.
2. It is not possible to decide the matter of time-limits prior to the full merits hearing. The final alleged act of discrimination and whistleblowing detriment is the dismissal. The dismissal is in time. It will have to be decided on evidence at the full merits hearing whether earlier events are in time.

REASONS

Claims and issues

1. The claimant brings claims for unfair dismissal; race discrimination; disability discrimination; whistleblowing; notice pay; holiday pay and voluntary severance pay.
2. The claimant says he had two disabilities at the material time (i) chronic migraines and (ii) photophobia, which he describes as physical pain if exposed to bright light. One of the issues for the preliminary hearing today

was whether each of these, taken alone or in combination, amount to a disability in law. The issues in respect of each were:

- 2.1 Did the claimant have a physical or mental impairment?
 - 2.2 Did that impairment have a substantial effect on the claimant's ability to carry out normal day-to-day activities?
 - 2.3 Was that effect substantial (ie more than trivial)?
 - 2.4 Was that substantial effect long-term?
3. The other issue for the preliminary hearing today concerned time-limits on the race and disability discrimination claims. The claim form was presented on 20 December 2018. ACAS was notified on 23 October 2018 and the EC certificate was issued on 7 December 2018.
4. The claims for direct race discrimination are that the respondent on grounds of race:
- 4.1 Rejected the claimant's applications for voluntary severance in 2015 (June-August), in 2016 (December) and in 2018 (approximately January or February).
 - 4.2 Subjected the claimant to a disciplinary procedure from about April 2018 and dismissed him on 24 September 2018.
 - 4.3 Required a Fitness for Work statement from a UK GP from April 2018 – dismissal. This is also claimed as indirect race discrimination.
5. The claims for direct disability discrimination are that the respondent:
- 5.1 Failed to adjust lighting, temperature, noise and odours in his work area in the period after the move to Senate House, ie from July/August 2016 until the end of his employment.
 - 5.2 Rejected the claimant's applications for voluntary severance in 2015 (June-August), in 2016 (December) and in 2018 (approximately January or February).
 - 5.3 Subjected the claimant to a disciplinary procedure from about April 2018 and dismissed him on 24 September 2018.
 - 5.4 Did not promote the claimant throughout his entire period of service ie from approximately 2010/11 until his dismissal.
 - 5.5 Required a Fitness for Work statement from a UK GP from April 2018 – dismissal. This is also claimed as indirect disability discrimination.
6. The claims for failure to make reasonable adjustment are that the respondent did not:
- 6.1 Adjust lighting, reduce temperature, noise and smells in the period after the move to Senate House, ie from July/August 2016 until the end of his employment.
 - 6.2 Comply with other OH requirements.
7. The claims for whistleblowing are that as a result of the alleged disclosures, the respondent
- 7.1 Failed to promote the claimant at any stage (this being the same complaint as at 6.4 above)
 - 7.2 Rejected the claimant's applications for voluntary severance in 2015 (June-August), in 2016 (December) and in 2018 (approximately January or February).

- 7.3 Subjected the claimant to a disciplinary procedure from about April 2018 and dismissed him on 24 September 2018.
8. The applicable law to the preliminary issues is set out briefly at the end of these Reasons.

Disability: fact-findings and conclusions

9. The claimant has suffered from severe migraine for most of his life. After the respondent moved to Senate House, his migraines became even more frequent and intense. He believes this is because of the conditions at Senate House. Prior to the move to Senate House, the claimant would have one or two migraines per week, lasting anything from 5 hours to a full day. After the move, the claimant was getting migraines 4 – 5 times per week.
10. When having a migraine, the claimant feels severe pain behind one eye and in his temples, which makes it hard to concentrate and makes him irritable. Migraines make him nauseous and generally he cannot eat with them, though immediately before or during a migraine he might crave chocolate and then feel ill for over-eating it. When he talks, he sometimes slurs his words. Sometimes his manager would say he was not making sense. Every little sound becomes amplified. The claimant experiences sensitivity to light and sometimes temporary loss of vision, spots and flashing lights. During 2016 – 2018 when the claimant's migraines became even worse, he would wake up in the middle of the night and feel he was being strangled because his neck was rigid.
11. For many years, the claimant has taken Propranolol as a preventative medicine and Sumatriptan when having an attack. He cannot say how much worse his symptoms would be without those drugs as he does not dare try. However, he finds that sometimes they work better than other times.
12. The claimant avoids noisy areas, smells eg colleagues wearing strong perfume, and going out in the sunlight. He prefers to stay indoors in a cold darkened flat with blinds drawn. He prefers to go out late at night when it is dark and not many people are around. If he has to go out during the day, he wears sunglasses and a hat and walks in the shade. A colleague once mentioned that it was very odd for an African to hate sunlight. His colleagues joke that he is a vampire because everyone is aware of his aversion to bright light. The claimant avoids socialising because it brings into play all the various stimuli and because of the need to explain himself.
13. The aversion to bright light is also linked to the claimant's photophobia, which he considers part of his migraine. He has particularly thin eyelids. In 2011, the claimant had a migraine episode when he went blind in one eye. He rushed to Moorfields in a panic. The expert there did tests and mentioned the possibility of photophobia. The second time he visited Moorfields he had to leave after 10 minutes in the waiting room because the lights were too bright.

14. On 27 May 2016, the claimant was seen by Dr Richard Greenwood, a consultant neurologist, at Homerton Hospital. He had been referred by his GP for chronic migraine. Dr Greenwood's report was in the trial bundle. It states that the claimant's migraine was not helped by Sumatriptan tablets which he took 6 – 7 times/month or Propranolol which he was also taking. The report says that the claimant had suffered from migraines since he was a teenager and that they were accompanied by nausea, blurred vision, photophobia, phonophobia and low energy. They had led to him giving up his work as a lawyer and to consider whether to give up his current job. Dr Greenwood observed 'His migraine is clearly impacting on his life'. He suggested he go to Charterhouse Migraine Clinic for further advice, relaxation technique and possible increases in medication. He also arranged an MRI scan to reassure the claimant there were no unexpected changes intracranially. Fortunately the MRI scan revealed no additional problems but the fact that it was commissioned is an indicator of the severity of the symptoms.
15. The claimant subsequently attended an outpatient appointment with Dr Greenwood in August 2016. Also in August 2016, the claimant was referred by the respondent to Occupational Health for 'migraines, light sensitivity'. The OH notes record 'severe migraine → headache, impairment of the vision, stiff neck, states that he cannot function have to close his eyes'. A 'response' created on 2 September 2016 states an opinion that the claimant's medical condition was a disability under the Equality Act 2010.
16. On 7 November 2017, the claimant emailed Francine Hill, the respondent's Assistant Director of Estates and Facilities, apparently in response to a survey. He told her 'I suffer from chronic migraine and the excessive lighting ensure I am permanently ill at work.'
17. The GP's notes record the claimant visiting for 'migraine' on 3 June 2015, 18 March 2016, 28 April 2016, 7 November 2016, 2 August 2017 and repeat prescriptions from August 2017 of Sumatriptan and Propranolol. There is no subsequent note of GP visits specifically regarding migraine. The claimant says this is because he was on repeat prescription and there was nothing more to say.
18. There is also a letter from Dr Nelson at the Young Again Health Centre in Nigeria dated 2 January 2018 which states:

'He has a long history of chronic daily migraine and lately an acute case of over dependence on migraine medication which has left him in a cycle of ill health and medication side-effects'.
19. Since going onto sick leave in December 2017, and taking himself out of the working environment, the claimant's migraines have not been quite as violent as in the Senate House period but he still has the general symptoms described above.

20. I accept the claimant's evidence as set out above. The respondent makes much of the fact that there is no medical report of migraine following Dr Greenwood's report in May 2016 and the GP visit on 2 August 2017. However, those medical documents indicate a chronic and serious condition. Other documents show that the claimant continued to assert that he had migraine after that. It seems highly unlikely that a lifelong condition of this kind would suddenly stop and there is no specific evidence that it did so. I find it perfectly credible that having complained to his GP over a series of visits and having been investigated by a specialist, the claimant was put onto a repeat prescription which did not require further fruitless discussions with the GP. Moreover, I found the detail and fluency of the claimant's description of his condition and its effects highly credible. Although the episodes were most acute while the claimant was working at Senate House, I am satisfied that he suffered the effects described above throughout his employment.
21. That leaves the question whether the claimant's migraine and photophobia meet the definition of disability. I find that they do, both individually and in combination.
22. Taking migraine first, I find that it is a physical and mental impairment. It had substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. During migraine attacks which occurred variously between 2 and 5 times per week, the claimant had great difficulty concentrating, working, communicating (slurring words), and eating (nausea and at other times, binge cravings for chocolate). Sometimes he woke up in pain at night. At all times, to avoid triggering further migraines, his condition had the effect of avoiding socialising and going out during daylight hours. These substantial adverse effects lasted throughout the claimant's employment and were long-term.
23. The photophobia, extreme sensitivity to light, was a physical impairment, caused by thin eyelids and also a feature of migraines. This had substantial adverse effect on day-to-day activities, for example having to keep blinds drawn at home, avoiding going out in day time, if going out having to wear sunglasses and sunhat and walk in the shade, being unable to stay in bright places without pain. This is a permanent condition.

Time-limits: fact-findings and conclusions

24. The claimant was dismissed on 24 September 2018. He notified ACAS under the early conciliation procedure on 23 October 2018 and he presented the claim within the appropriate time following the issue of the certificate. The dismissal was therefore within the primary time limit for the discrimination and whistleblowing claims.
25. Any act of discrimination or whistleblowing detriment prior to 24 July 2018 will in itself be out of time. However, the question will ultimately be whether any earlier acts of discrimination form part of a discriminatory state of affairs which continues at least to 24 July 2018. On whistleblowing, the

question will be whether any earlier detriments are part of a series of similar acts or failures, the last of which takes place on or after 24 July 2018.

26. It is not possible for me to make this judgment at a preliminary stage. It is necessary to hear the evidence to determine what is or is not connected in this way. Although some matters are very obviously connected, eg the requirement for Fit notes and the issue of work conditions at Senate House, I cannot say that the other issues are unconnected. The claimant says they are connected and certain individuals are involved throughout, as well as him making linked complaints. Without hearing and determining all the evidence, I would be guessing whether the matters can be considered in time or not. I therefore leave the issue of time-limits to the final hearing.

Law

27. A person has a disability if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. 'Substantial' means more than minor or trivial (s212). Under Sch 1 para 2(2), if an impairment ceases to have a substantial adverse effect on the claimant'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. 'Likely' means 'could well happen'. (Guidance, para C3; SCA Packaging Ltd v Boyle [2009] IRLR 746, HL.)
28. Conditions with effects which recur only sporadically or for short periods can still qualify as long-term impairments (Guidance, para C5). If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If they are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. (Guidance, para C6).
29. By virtue of Sch 1 para 5, an impairment is to be treated as having a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities if measures are being taken to treat or correct it, and but for that, it would be likely to have that effect. 'Likely' means 'could well happen'. (Guidance, para C3; SCA Packaging Ltd v Boyle [2009] IRLR 746, HL.)
30. The relevant time-limit for discrimination claims is at section 123(1) Equality Act 2010. Under section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts

31. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties using the following principles:
32. The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant. There is no presumption that the discretion should be exercised unless the tribunal can justify failure to exercise the discretion.
33. The time-limit for whistleblowing detriment is set out in section 48(3) of the Employment Rights Act 1996. Under this, a tribunal shall not consider a complaint before the end of 3 months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the 3 months.

Employment Judge Lewis : 26th June 2019

Sent to the parties on: 28th June 2019

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For the Tribunals Office