



EMPLOYMENT TRIBUNALS

Claimant: Ms M Rooney

Respondent: Leicester City Council

Heard at: Leicester **On:** Friday 1 November 2019

Before: Employment Judge M Butler (sitting alone)

Representatives

Claimant: Ms A Pitt of Counsel

Respondent: Ms V Brown of Counsel

RESERVED JUDGMENT

The decision of the Employment Tribunal Judge is that:

1. The claims of constructive unfair dismissal, non-payment of holiday pay, outstanding expenses, unpaid overtime and reimbursement of a university course fee are not struck out or made subject to a deposit order.
2. The Claimant's alleged medical conditions of anxiety and depression and menopausal symptoms do not amount to a disability for the purposes of the Equality Act 2010 ("EQA") and are dismissed.
3. The claim of sex discrimination has no reasonable prospect of success and is struck out pursuant to rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.
4. The claims of harassment and victimisation are dismissed.

REASONS

Background

1. By a claim form submitted to the Tribunal on 24 January 2019 through the first firm of solicitors instructed by the Claimant (the first claim), she claimed constructive unfair dismissal together with the other financial claims referred to in the judgment above. She cited a number of incidents dating back to 19 January 2017 upon which she relies in claiming that the Respondent's conduct amounted to a fundamental breach of the implied term of trust and confidence. The final matter upon which she relies is being invited to attend a meeting on 29 August 2018 for which her Line Manager, Mr Tingley, refused to give any further details. It subsequently transpired that the reason for the

meeting was to suspend her pending an investigation into an allegation that she made comments on social media defaming the Council and its officers.

2. On 25 January 2019, the Claimant acting herself issued a further claim under claim number 2600243/19 (the second claim) claiming sex and disability discrimination. Her sex discrimination claim is one of direct sex discrimination and her disability discrimination claim is made under section 13 EQA (direct discrimination), section 15 EQA (discrimination arising from disability) and harassment and victimisation under sections 26 and 27 EQA respectively.

3. The claims were consolidated and a full merits hearing listed for 22 to 24 June 2020.

4. After the submission of her first claim, the Claimant instructed a second firm of solicitors in respect of the first claim and, at the telephone Preliminary Hearing before Employment Judge V Butler on 22 July 2019, they represented the Claimant and she represented herself in respect of the second claim. By the time of this Preliminary Hearing on 1 November 2019, she had dispensed with the services of both firms of solicitors.

5. At the previous Preliminary Hearing, the Claimant confirmed that her outstanding holiday pay had been paid by the Respondent for 2018 but she continued to claim 330 hours for a period before 2018.

Issues

6. The issues before me are set out in Employment Judge V Butler's case management summary and are:

(i) Whether under rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the rules"), the Claimant's claims for constructive unfair dismissal, disability discrimination and sex discrimination should be struck out on the basis that they have no reasonable prospects of success;

(ii) whether the Claimant should be required to pay a deposit under rule 39 as a condition of continuing to proceed with these claims; and

(iii) in the event that the claim is not struck out, whether for the purposes of section 6 EQA the Claimant is a disabled person on the grounds of her menopausal symptoms, anxiety and depression.

The law

7. Rule 37 provides:-

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds -

(a) that it is scandalous or vexatious or has no reasonable prospects of success;

- (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.”

8. Rule 39 provides:-

“(1) 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.

.....”

9. Section 6 EQA 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.”

10. Section 1 EQA provides that sex is a protected characteristic. Section 13 EQA 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.”

The Claimant’s Evidence

11. There was an agreed bundle of documents running to 212 pages and an additional page, being the Respondent’s response to the Claimant’s appeal against a warning for sickness absence, was admitted into evidence.

12. The bundle contained, inter alia, the pleadings, the Claimant’s impact statement, her medical records, occupational health reports, the Claimant’s health and wellbeing passport and various policies of the Respondent.

13. The Claimant gave evidence and was cross-examined.

14. References to page numbers in this judgment are to page numbers in the bundle.

15. By way of background, the Claimant said she was still receiving treatment for menopausal symptoms and sees a consultant every four months. She has been taking medication for these symptoms since August 2017. She is 48 years old.

16. She has two boys aged 7 and 12 with her partner who had surgery for cancer of the knee. Subsequently, when playing football with the boys, he broke his leg in two places and is on crutches. Her mother was mugged as a result of which her hip was fractured and the Claimant cares for her by cooking, shopping and cleaning. The Claimant has rented out her house in Leicester and moved in with her partner and children in Nottingham. Her mother lives in Leicester.

17. Her menopausal symptoms started in August 2017 and were constant until August 2018. She told occupational health about these symptoms in April 2018 but they did not explore them further or in detail. On 19 April 2018 she told her then Line Manager, Ms Harvey, that she was experiencing menopausal symptoms and Ms Harvey said she knew what it was like because she was going through it herself. On 25 April 2018 she told her Line Manager, Mr Tingley, that she was going through the menopause.

18. When the Claimant attended an appeal hearing against being given a warning for sickness absence in August 2018, she said she had an underlying medical condition but felt uncomfortable discussing it in front of the five men who were in the room.

19. The Claimant's impact statement is at page 109. She says that her work related stress began in 2017 as a result of having to work excessive hours, sometimes travelling long distances, lack of managerial support, bullying, harassment and intimidation which led to her going off on sick leave on 6 December 2017. She said her symptoms were, inter alia, insomnia, fatigue, low mood, irritability, anxiety, heart palpitations, memory loss, confusion, concentration problems, low self-esteem and confidence and headaches/migraines.

20. She states that her menopausal symptoms included, inter alia, hot flushes and sweating, palpitations and anxiety, night sweats and sleep disturbance, fatigue, poor concentration, urinary problems and headaches.

21. Specifically, she said that her symptoms led to her forgetting to attend events, meetings and appointments, losing personal possessions, forgetting to put the handbrake on her car and forgetting to lock it, leaving the cooker and iron on and leaving the house without locking doors and windows. She also spent prolonged periods in bed due to fatigue/exhaustion. She further refers to dizziness, incontinence and joint pain.

22. She states at page 121 that the symptoms "significantly affect my quality of life and has (sic) had a significant effect on my presentation, and personality".

23. The medical records which appear in the bundle from page 128 do not entirely support the Claimant's impact statement. Her GP records suggest her husband was diagnosed with bone cancer in his knee in January 2015 and on Christmas day in 2014 her mother suffered a broken hip as a result of being mugged. At page 134, it is noted that she first consulted her GP about stress at home on 21 January 2015. This diagnosis was noted again in February 2015, April 2015, August 2015 and October 2015. No medication was prescribed although fit notes were given by her GP on a number of occasions.

There is no record of the Claimant mentioning her menopausal symptoms to her GP until February 2017 and in between October 2015 and December 2017 there is no reference to stress at home. In December 2017 she gives her medical problem as stress at work and this was again discussed with her GP in January 2018, March 2018 and August 2018. She was referred for counselling for stress at work but was not prescribed any other medication. There is no reference to anxiety and depression until 29 August 2018.

24. I note that at her consultation on 29 August 2018, the Claimant said she goes to the gym, swims and runs.

25. I also note the contents of the occupational health reports at pages 136 and 141. On 19 April 2018 (page 138) the report states "in my clinical opinion Ms Rooney is fit to continue in her current role". The summary on the same page notes that the Claimant reported "stress and anxiety perceived to be related to circumstances at work". At this time, there had been no diagnosis or discussion with her GP about anxiety. At page 139, the report states "the terms of the Equality Act 2010 are unlikely to apply to her recent ill health".

26. At page 141, the occupational health report states "She felt that stress, anxiety, depression and symptoms around her menopause were not taken into consideration in the workplace. I relay this information as it has been relayed to me. However I am not able to make any comment".

27. Currently, I note that the Claimant has moved back to Nottingham to live with her husband and children. She is not currently working but, because of her husband's football injury, she will be looking after the family. She also states she is the carer for her mother, who lives in Leicester, and spends time in Leicester each week to look after her.

28. I also had regard to the very long particulars of claim submitted on behalf of the Claimant in the first claim for constructive unfair dismissal. Paragraph 71 states, "The Claimant was suffering from work related stress caused by the Respondent's conduct. The Claimant accepts, however, that the work related stress she was suffering from and/or the menopausal symptoms are not sufficient to amount to a disability in accordance with the definition under section 6 of the Equality Act 2010 which may have given rise to a separate disability discrimination claim". Notwithstanding the contents of this paragraph, on the very next day, the Claimant submitted a claim for disability and sex discrimination.

29. In the light of these matters, I treat the Claimant's evidence with some circumspection.

Submissions

30. For the Respondent, Ms Brown referred to her skeleton argument. In relation to disability, she submitted the Claimant was not disabled at the material time. Even if she was, the Respondent had no knowledge of the alleged disability. The Claimant had presented insufficient evidence of any substantial adverse effect on her ability to undertake normal day to day activities.

Her impact statement largely contains lists of symptoms without any particulars as to how they affected her. The Respondent's occupational health service did not consider that the EQA would apply. In relation to sex discrimination, the Claimant was not saying she was treated in a discriminatory way because of her sex and in relation to victimisation and harassment she had not provided a protected act in relation to victimisation and had not presented any facts that amounted to harassment.

31. For the Claimant, Ms Pitt made long and detailed submissions. She submitted that the failure to refer the Claimant to occupational health after a period of absence for stress was discriminatory. Recommended adjustments were not maintained and she was given a heavier case load on her return from sickness absence. She made the point that the Claimant has acted as a litigant in person in relation to her discrimination claims and clearly suffered from a mental impairment from 2015 until her resignation. She had suffered an adverse effect on her ability to carry out normal day to day activities. "Substantial" must be more than trivial and her symptoms should be considered cumulatively and included spending long periods in bed, forgetting to lock the door to her house and other matters referred to in her impact statement. The effects were long term and the Respondent knew the Claimant was struggling with her mental health from 2015. The failures of the Respondent to complete the Claimant's health passport and refer her to occupational health constitute direct discrimination. This was a classic fact based case and there was sufficient evidence to allow it to continue.

32. Due to the length of the submissions, the two foregoing paragraphs are a summary only and I have considered in full the submissions made on behalf of the parties.

Conclusions

33. In relation to constructive unfair dismissal, I cannot say that the Claimant's claim has no reasonable or little reasonable prospects of success. There may be issues as to whether the Respondent's conduct amounted to a fundamental breach of the implied term of trust and confidence and whether or not the Claimant affirmed any such breach by delaying tendering her resignation. However, these are matters of evidence and there are clearly questions of fact which should be determined by a Tribunal.

34. In relation to sex discrimination, I do find that this claim has no reasonable prospects of success. As far as I can make out, the Claimant relies on her embarrassment at discussing her menopausal symptoms with men. This manifested itself in her requesting, at a late stage, to see a male doctor at a referral to occupational health and her embarrassment at not being able to discuss her menopausal symptoms in front of five men in her appeal against a warning for a sickness absence. No comparator has been suggested, real or hypothetical, and the claim appears to me to be an "add on" without any substance. It is therefore struck out under rule 37 as having no reasonable prospect of success.

35. In relation to disability, the issue is whether the Claimant was disabled at the material time. Arguments submitted by Ms Pitt in relation to recurring medical conditions are not relevant if I find the Claimant is not disabled.

36. The Claimant did have a mental impairment. As far as I can see, she does not rely on the physical symptoms associated with the menopause. If she does rely on such symptoms, nothing in the evidence before me suggests that they are physical impairments which are long standing and have or had a substantial adverse effect on her ability to carry out day to day activities.

37. She relies on what she describes as anxiety and depression and menopausal symptoms. She says the anxiety and depression was made worse by the menopause. In reviewing the medical records, I note that anxiety and depression is not mentioned until her consultation with her GP on 29 August 2018. It is mentioned in the report from her occupational health consultation in a letter dated 10 October 2018 (page 141) but it is also noted that anxiety and depression seem to have been self-diagnosed by the Claimant and is not confirmed by the occupational health practitioner. Her GP records show that she suffered from stress at home and then work related stress. Of course, I bear in mind that the cause of a medical condition which constitutes a disability is not relevant to the question of whether the person suffering from the medical condition is disabled.

38. The Claimant suffered from a mental impairment which is stress related and exacerbated by menopausal symptoms. It is long term. The real issue is whether it had a substantial adverse effect on her ability to carry out normal day to day activities as set out in section 6 EQA.

39. In the EAT judgment in **J v DLA Piper UK LLP** UK EAT/0263/09 the Court stressed the importance of analysing the effect of the employee's condition rather than focussing on a medical diagnosis. I must also consider the effect of the condition without medication. That is not difficult in this case because, as far as I can see, apart from counselling, the Claimant was prescribed no medication at all for her stress.

40. The EQA guidance refers to normal day to day activities as:

"In general, day to day activities are things people do on a regular or daily basis, and examples including shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities."

41. Throughout her evidence and in her impact statement, the Claimant did not suggest that she had any difficulties with any of these normal day to day activities. Indeed, she worked three days a week when not on sickness absence and looked after her mother in Leicester for whom she said she undertook cooking and cleaning activities and would also have spent time with her family in Nottingham.

42. But in **Leonard v South Derbyshire Chamber of Commerce** [2001] IRLR 19 the EAT said the statutory guidance should not be used too literally. It said the focus should be on what the employee cannot do or can do only with difficulty and not on what they can do easily. It is established law that the effects of an impairment must be more than minor or trivial. I consider matters such as

forgetting to lock the house or engage the handbrake on her car to be fairly trivial considering the day to day activities she undertook for her mother and, obviously, with her husband incapacitated, her family. Her husband did not attend to give evidence in support of the alleged difficulties the Claimant had in carrying out such activities.

43. In relation to medication, paragraph 5(1) of schedule 1 to the EQA states that an impairment will be treated as having a substantial adverse effect on a person's ability to carry out normal day to day activities if:

- “(i) Measures are being taken to treat it or correct it and;
- (ii) But for the measures, the impairment would be likely to have that effect.”

44. The only treatment the Claimant seems to have had in relation to her stress related symptoms is counselling but there was no evidence before me from a Counsellor, how many counselling sessions she attended, if any, or whether not attending would have made her symptoms substantial.

45. Considering all of the above circumstances in the round, the evidence does not support the contention that the Claimant is disabled for the purposes of the EQA.

46. For completeness sake, I find that, for reasons already outlined above, the Claimant's allegations of victimisation and harassment must be dismissed.

47. This case will now go forward to a full merits hearing in relation to the claim of constructive unfair dismissal and the various financial claims that have not already been settled. A further order will be made in relation to that hearing and is attached to this judgment.

Employment Judge M Butler

Date 28 November 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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