



EMPLOYMENT TRIBUNALS

Between:

Miss Jackie Harrison

and

Ms Jean Fox T/A Café 24

Claimant

Respondents

Record of a Closed Telephone Preliminary Hearing at the Employment Tribunal

Held at: Nottingham

On: 15 December 2021

Before: Employment Judge P Britton (sitting alone)

Representation

For the Claimant: In person

For the Respondent: No attendance but see explanation set out below

JUDGMENT

1. The claim for unfair dismissal pursuant to Section 98 of the Employment Rights Act 1996 is dismissed for lack of qualifying service.
2. The remaining claim of disability discrimination pursuant to s15 of the Equality Act 2010 will proceed.
3. Orders for the future conduct of these proceedings are set out hereinafter.

CASE MANAGEMENT SUMMARY

Introduction

1. The claim (ET1) was accepted by the Tribunal following an initial rejection on 14 July 2021. It is quite clear that it is a claim against Jean Fox trading as Café 24, as Café 24 is not a legal entity. This is not challenged in the response (ET3) to which I shall come. It is ACAS early conciliation complaint and in time.

2. The Claimant set out that the period of her employment working at the café for Jean Fox as a Café Manager was between 11 May 2021 and her dismissal by the Respondent, which is not in dispute, on 18 June 2021. Prior to the opening of the café and the Claimant commencing her paid employment, she provided assistance in setting the same up to Jean Fox; but that is not a claim in itself.

3. In the ET1, the Claimant first ticked the box for unfair dismissal. Cross referencing to the ET3 and having listened to her today it is quite clear that this is not a claim for unfair dismissal under the Employment Rights Act 1996 (ERA) and because the Claimant does not have the necessary 2 years qualifying service. She accepts that, and therefore I am going to dismiss that claim upon withdrawal.

4. Second she ticked the box denoting disability discrimination essentially relating to the dismissal. She cites her disability as being fibromyalgia, and essentially that she was dismissed because the condition meant that she couldn't return to work at the end of a pre-planned holiday because her Doctor issued her with a sick note to the effect that her condition had deteriorated and indeed he had had to prescribe her morphine. She pleads that the fibromyalgia condition was exacerbated because whilst on holiday she received emails and replied to them from Jean Fox, who it seems wanted her to do more hours whereas the Claimant couldn't cope with that because of her condition. And the correspondence worried her which is why it exacerbated the fibromyalgia and which is why she genuinely couldn't come back to work. On the face of it, the dismissal if it was because she couldn't come back to work because she genuinely had a worsening of her fibromyalgia and that condition is found by the Tribunal to be a disability, would constitute unfavourable treatment because of something arising in consequence of her disability which brings in to play Section 15 of the Equality Act 2010 (the EqA). The Claimant has no knowledge of employment law; hence my analysis as to what is engaged in terms of the EqA.

5. The claim (ET3) was served out in the usual way upon Café 24 on 22 July with a requirement to file a response with a deadline date being given. Now the Claimant points out that Jean Fox is present at the café every day and therefore must have got the claim. And in that respect she would therefore have had notice of this and the main hearing because they all went out at the same time. And I can safely observe that she must have got them because on 10 August 2021 a

response (ET3) was filed on her behalf by Andrew Burke of Absolutely Employed Law.com.

6. As it is neither he, if he is still acting, or otherwise Jean Fox, have attended on the telephone for this hearing today. At my behest a clerk were able to contact Mr Burke by telephone and who explained that he was at Heathrow and that he wasn't aware of the hearing. That is not on the face of it a satisfactory explanation because how was he unaware of the hearing if he had service of the proceedings by way of them being sent to him by Mrs Fox in order that he could file a response on her behalf? It follows that I require a fuller explanation and to that end am making an UNLESS Order as hereinafter set out.

7. The next point to make is that since her dismissal the Claimant has suffered further deterioration to her health by reason of first the fibromyalgia and second from what she has told me possibly depression given the medication she tells me she is on. As a consequence, she been awarded a personal independence payment (PIP) and a disability living allowance (DLA) by the Benefits Agency which means that she has been assessed as unable to work. That obviously would have a knock-on effect if she was seeking to claim for future loss of earnings, and she told me that because she has received those benefits, she hasn't actually really lost any money in that sense because of the loss of her employment. Thus were she to succeed compensation is likely to be confined to an award for injury to feelings. I discussed with the Claimant a schedule of loss because she hasn't served one yet although that was covered by the original standard directions in this matter which were issued upon service of the proceedings together with notice of both this hearing and the main hearing. By those orders she was required to serve a schedule of loss by 2 September 2021, but it was clear today that she doesn't understand at all what that meant. And so, in accordance with the overriding objective I told her that essentially her claim would be on two fronts one for the loss of earnings and two for her claim to injury to feelings. I have already observed that there may not be a claim for loss of earnings. As to injury to feelings I explained what is meant by Vento and that she could inform herself of the same by going on the internet and accessing the Presidents of Employment Tribunals for England and Wales, and Scotland, the latest guidance on Vento. Having done so she will therefore be able to state where she places her claim for injury to feelings in terms of the Vento Bands. I would observe, and it is no more than that, that in the circumstances the claim is unlikely to get above the top of the lowest Vento band, but I might of course be wrong.

8. By the ET3 Jean Fox seems to not accept that the Claimant does have the condition of fibromyalgia. Furthermore, she pleads that she never knew that the Claimant had any such condition and indeed that she hadn't told her own granddaughter who also works in the café. Thus, Jean Fox found it more than coincidental that the Claimant put in a sick note at the end of the holiday she had taken and therefore concluded that this was to wrongly avoid returning to work. Furthermore, that the Claimant had been bullying two new members of staff in the small workforce at the café. This was why she dismissed the Claimant.

9. But the Claimant told me today that she and Jean Fox had been friends for many years. Furthermore, they have lived on opposite sides of the same street for at least 10 years. And Jean Fox has always known that she suffered fibromyalgia since its diagnosis and indeed used to joke about the fact that the Claimant couldn't therefore celebrate at events they might be together at because she can't take alcohol because of her medication. Also the Claimant's granddaughter and indeed all members of her family have always known that she suffered fibromyalgia since the diagnosis. And says the Claimant she made plain to Jean Fox when they were discussing the hours that she could cope with it seems both before and possibly during the communications whilst the holiday was being taken, that the fibromyalgia meant she couldn't do the hours that Jean Fox now wished her to do. So, the Tribunal will have a major conflict to resolve.

10. Going back to the issue of disability or not, the Claimant of course will have to satisfy the Tribunal pursuant to Section 6 and Schedule 1 of the EqA, that at the date of her dismissal she had a physical or mental impairment, or possibly both, that had a more than minor or trivial impact upon her ability to undertake normal day to day activities. As to what those are is perhaps self-evident, but it would include being able to get up the stairs, wash and dress, cook, get about, go to for instance the shops. The Claimant has told me today that her life has been impacted upon in all those respects and that her condition means that she has to wear wrist supports because she has damaged the tendons in her arms and ligaments in her shoulders by trying to get herself up the stairs. Via Occupational Therapy (OTh) who have assessed the property in which she lives, she is going to be provided with a stairwell lift and a wet room for the purposes of bathing as she cannot sit in a bath. If that be correct, then of course it would indicate that the Claimant is most certainly disabled now; and the issue becomes as to whether when she was dismissed in June the condition was such that it had lasted or was likely to last as a disabling condition for more than 12 months.

11 If of course the Respondent does not comply with my Unless Order and the Tribunal are left with assessing compensation, then given what the Claimant has told me the need for her medical notes and probably a report from OTh and an impact statement may not be necessary.

12. The final point to make before I come to my directions is that the main hearing of this matter is currently listed to take place over 3 days before a full Tribunal panel commencing on Monday 24 April 2023. There are already standard directions issued which should have meant exchange of documents on 28 October and the Respondent preparing the bundle by 9 December. This has not happened. Exchange of witness statements is scheduled for 17 February 2022, but in the light of my orders and what I have now rehearsed I am going to stay that order.

13. Finally this case is suitable for Judicial Mediation. I explained to the Claimant what that entails.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Unless by not later than 21 days from the issuing of these orders** the Respondent provides a satisfactory explanation for why there was no attendance at this Case Management Hearing today the Response **will be struck out**.
2. By **the same deadline** the Claimant will in any event provide a schedule of loss.
3. If the Respondent provides a satisfactory explanation by the due deadline, then I order that the Claimant will **not later than 28 days thereafter** do the following: -
 - 3.1 Obtain and serve on the Respondent and the Tribunal a complete set of her medical notes; the Occupational Therapy Recommendation; and the decisions of the Benefits Agency viz her PIP and Disability Living Allowance.
 - 3.2. Send to the Respondent and the Tribunal an impact statement. In it she will set out when she first began to suffer from what was diagnosed as fibromyalgia. When it was diagnosed? How it affects her ability to undertake day to day activities. She will also address the impact on her mental health. She will set out what medications she has been prescribed from time to time both at the time of the dismissal and prior thereto and subsequently; the beneficial impact of the medication and what happens if she doesn't take it.
5. Having received the same the Respondent will **not later than 21 days thereafter** inform the Tribunal, copying the Claimant, as to whether or not she agrees that the Claimant is a disabled person as per the EqA and if not why not and her proposals for the way forward on that issue.
6. I hereby list a further telephone case management hearing to take matters forward. It will include discussing whether the parties are prepared to agree to Judicial mediation. Given my involvement to date it will take place before me. It will take place by telephone **on Wednesday 4 May 2022 at 2.15pm. It has been given a time allocation of 1 hour.**
7. To take part in the Case Management Hearing you should telephone **0333 300 1440** on time and, when prompted enter the **access code 2744001#**. Please note that if you intend to dial into the telephone hearing from a mobile phone, higher rates apply, and you may wish to check the call rate with your service provider first.

Employment Judge P Britton

Date: 21 December 2021

Notes

- (i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.
- (ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- (iii) The Tribunal may also make a further order (an “unless order”) providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- (iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’:
<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>
- (v) The parties are reminded of rule 92: “*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of “cc” or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so*”. If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Case No: 2601426/2021

Judgment and Order sent to Parties on
7 January 2022

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