EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING BY VIDEO

Claimant: Ms M Small

Respondents: Newcastle upon Tyne Hospitals NHS Foundation Trust

Heard at: Newcastle (remotely by video) **On:** 9 August 2022

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: Ms C Crowhurst, Trade Union Representative
Respondent: Ms M Martin, Counsel

JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The claimant was granted leave to amend her claim to include a claim for harassment related to the protected characteristic of disability contrary to section 26 of the Equality Act 2010.

2. The claimant did not meet the definition of 'disabled person' contained within section 6 of the Equality Act 2010

3. The claimant's claim of harassment related to the protected characteristic of disability contrary to section 26 of the Equality Act 2010 is struck out as having no reasonable prospect of success, as the claimant was not a disabled person at the time of the alleged harassment.

4. The claimant's claim of failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 is struck out as having no

reasonable prospect of success, as the claimant was not a disabled person at the time of the alleged harassment.

5. The claimant's claims of indirect discrimination because of the protected characteristic of disability contrary to section 19 of the Equality Act 2010 are dismissed upon withdrawal.

6. The claimant's claims of discrimination arising from disability contrary to section 15 of the Equality Act 2010 are dismissed upon withdrawal.

7. The claimant's claims of unauthorised deduction from wages contrary to section 13 of the Employment Rights Act 1996 has little prospect of success and the claimant shall pay a deposit of £1,000.00 as a condition of being able to continue with the claim.

REASONS

Background and History of this Hearing

1. The claimant has been employed continuously since 3 September 2001, with a break in service between 10 July 2021 and 13 July 2021 when she retired and returned to work. The claimant is employed as an Accountancy Assistant. The claimant began early conciliation with ACAS on 8 November 2021 and received an early conciliation certificate dated 19 December 2021. Her ET1 was presented on 16 March 2022. The claimant's ET1 indicated claims of disability discrimination and unauthorised deduction of wages.

2. There was a private preliminary hearing by telephone on 30 May 2022 conducted by Employment Judge (EJ) Martin. In her case management order (CMO) dated 20 June 2022 [55-60], EJ Martin set out a summary of what the claimant had said about her claims. It was noted that neither the claimant nor her representative (who was Ms Crowhurst, as today, could outline the legal basis upon which the disability discrimination claims were put.

3. EJ Martin suggested that the claims could be discrimination arising from disability and/or indirect discrimination because of disability and/or failure to make reasonable adjustments. The claimant was ordered to provide further information about her claims, but I found that the further information provided did not assist me to identify precisely what disability discrimination claims were made.

4. Today's hearing was ordered by EJ Martin to consider the following:

    4.1. Whether any or all of the claimant's claims had no reasonable prospect of success, and should be struck out;

    4.2. Whether any or all of the claimant's claims had little reasonable prospects of success and should be made the subject of a deposit order;

4.3. Whether any or all of the claimant's claims had better than little reasonable prospect of success and should therefore be allowed to proceed to a final hearing without further condition; and

4.4. If any claims were to proceed, what case management orders should be made to best prepare for a final hearing.

Housekeeping Matters

5. The claimant was represented by Ms Crowhurst, a trade union representative who had no previous experience of Tribunal hearings. I reminded her that the Tribunal operates on a set of Rules (I have set out the link to those Rules below). Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —*
>
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*

5. The parties produced an agreed bundle of 166 pages which included the claim form [4-15], response and Grounds of Resistance [20-33], EJ Martin's case management order [55-60], claimant's disability impact statement [62-64], Details of a PCP contended for [65-66], copy GP notes [67-70], a reference from Christine Peek [71], a report from the respondent's OH provider [153-156], the claimant's grievance [157-159], the grievance outcome [160-163], the grievance appeal outcome [164-166] and various items of correspondence. Where I have referred to any documents from the bundle, I have indicated the appropriate page numbers in square brackets.

6. Ms Martin had produced a skeleton argument that was sent to the Tribunal and Ms Crowhurst on the morning of the hearing. I did not find anything untoward with the skeleton being sent on the morning of the hearing, but I gave Ms Crowhurst time to consider the document.

7. The hearing was conducted remotely by video with the agreement of the parties.

8. After outlining the overriding objective and the purpose of the hearing, I advised the parties of the order in which I intended to deal with the case. I asked Ms Crowhurst for some clarity on the disability discrimination claims. She confirmed the following:

8.1. The disability that the claimant bases her claim of disability discrimination upon was anxiety. The claimant had other disabilities, but these were not relevant to the claims that the claimant was making;

8.2. The claimant had produced extracts from her GP notes that covered the period 6 December 2000 to 24 October 2001 [67-70]. It was confirmed that these were the only medical notes that the claimant had that referenced anxiety;

8.3. The claimant had produced a letter from AXA Insurance to Forest Hall Medical Group dated 18 February 2004 that appeared to be about a refusal of an insurance claim made by the claimant. The letter included the sentence "Miss Small also disclosed on her application form that she had suffered anxiety/stress in 2001." Ms Crowhurst agreed that a plain English reading of the sentence was that the claimant's anxiety/stress had been limited to 2001.

8.4. The claimant had produced an email dated 3 July 2022 from Christine Peek. Ms Peek's email address had been redacted. The email indicated that the claimant had attended groups since 2010 to alleviate anxiety and stress. There was no indication of any medical or other qualification held by Ms Peek or what the nature of the treatments were.

8.5. Ms Crowhurst confirmed that the three documents referred to above taken together with the claimant's impact statement were the entirety of her evidence on disability.

9. We the discussed the claims that the claimant was bringing. Ms Martin's skeleton argument reminded of the decision of HHJ (His Honour Judge) Tayler in the Employment Appeal Tribunal decision in Cox v Adecco UKEAT/0339/19/AT (V) that, *'Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.'*

10. After some discussion, Ms Crowhurst confirmed that:

10.1. The claimant was making a complaint of failure to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010. The provision, criteria or practice (PCP) applied by the respondent was the requirement to wear facemasks in non-Covid-Safe areas of its premises. The date of the event was 30 July 2021. The substantial disadvantage caused to the claimant was her anxiety caused by the requirement to wear a face mask. The claimant says that the reasonable adjustment that the respondent should have made was to disapply the requirement to wear a facemask to her;

10.2. The claimant was making a number of complaints of harassment related to the protected characteristic of disability contrary to section 26 of the Equality Act 2010. The incidents were detailed in a document submitted to the Tribunal on 27 April 2022 [34-46] as follows:

10.2.1. On 3 August 2021, Amanda Randall of the respondent to the claimant that she had to wear a face mask [36-37];

10.2.2. On 4 August 2021, Dr Keira McDowell of the respondent's OH providers, concluded that the claimant had to wear a face mask [37];

10.2.3. On 13 August 2021, Lee Winship of the respondent told the claimant that it was in her contract to follow Trust policy and that it was Trust policy to wear a mask [37];

10.2.4. On 16 August 2021, Amanda Randall of the respondent tried to "push" the claimant into wearing a mask [38]; and

10.2.5. On 8 October 2021, the conduct of the respondent's officers in the grievance meeting was harassing of the claimant on the issue of wearing a face mask [39-40].

10.3. Ms Crowhurst confirmed that the claimant was not pursuing claims of indirect discrimination or discrimination arising from disability and that these claims could be dismissed. I have dismissed the claims in this Judgment.

10.4. The claimant's claim of unauthorised deduction of wages is for the wages she has lost by not attending work since the compulsory wearing of masks was imposed.

10.5. Ms Crowhurst confirmed that there were no other claims.

11. Ms Martin submitted that the claimant would require leave (permission of the Tribunal) to bring a harassment claim, as it was a new matter that was out of time.

12. The claimant adopted her witness statement, but was asked no questions about it.

13. I then heard closing submissions from Ms Martin, followed by closing submissions from Ms Crowhurst. At the end of the submissions, it was 12:05pm so I asked the parties to return at 14:00pm to hear my decision on the strike out/deposit applications. After I delivered the decision, I went on to make case management orders for the remaining claim of unauthorised deduction of pay.

Relevant Law

14. I was mindful of the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal's wide case management powers under Rule 29.

15. Rules 37 and 39 deal with Strike Outs and Deposit Orders:

Striking out

37.—(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 prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(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.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

Deposit orders

39.—(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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

16. The consequences of a Deposit Order on a claimant who goes on to contest the claim are set out in Rule 76 (I have only reproduced the relevant part) – the claimant who loses is treated as having acted unreasonably in pursuing the claim:

When a costs order or a preparation time order may or shall be made

76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …

17. I found Ms Martin's summary of the law in her skeleton argument to be an accurate one and reproduce it here, with minimal editorial input from me. The definition of disability is set out in section 6(1) of the Equality Act 2010. This provides that a person, has a disability if he or she "has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities".

18. Schedule 1 of the Equality Act 2010 sets out factors to be considered in determining whether a person has a disability. There is also 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' issued under s6(5) ("The Guidance").

19. In **Goodwin v Patent Office** [1999] ICR 302, the EAT gave tribunals guidance on the proper approach to adopt when applying the law that predated the Equality Act 2010 on disability discrimination, though it is equally relevant in interpreting the meaning of section 6. There are four different questions (or 'conditions', as the EAT termed them):

    19.1. did the claimant have a mental and/or physical impairment? (the 'impairment condition');

    19.2. did the impairment affect the claimant's ability to carry out normal day-today activities? (the 'adverse effect condition');

    19.3. was the adverse condition substantial? (the 'substantial condition'), and

    19.4. was the adverse condition long term? (the 'long-term condition').

20. Guidance in cases involving mental impairment was given in **J v DLA Piper UK [2010] ICR 1052.** Underhill (P) stated:

> *"42. The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at para 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or -if the jargon may be forgiven - "adverse life events". We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians - it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod and Dr Gill in this case - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most lay people, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at para 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common sense observation that such reactions are not normally long-lived."*

21. This passage was tailored to cases involving stress in **Herry v Dudley Metropolitan Council** 2017 ICR 610, EAT. HHJ David Richardson stated:

> *"56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment*

Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess."

22. The focus must be on what the claimant cannot do, or can only do with difficulty, rather than on the things the Claimant can do (para B9 of The Guidance). Normal day to day activities are activities carried out by most men or women on a fairly regular and frequent basis (EHRC Employment Code, Appendix 1). It does not include activities which are normal only for a particular person or group of people e.g. those performing a skilled or specialised task at work.

23. The inability to perform a certain task at work does not meet the definition of normal day to day activities unless there was also an impact in the Claimant's daily out-of-work life (The Guidance at para D3).

24. "Long term" is defined in paragraph 2 of Schedule 1 as something that "has lasted or is likely to last for at least 12 months or the rest of the person's life." "Likely" means "could well happen" (**SCA Packaging Ltd v Boyle** [2009] ICR 1056). Whether an impairment is long term is to be judged at the date of the alleged discriminatory act (**Tesco Stores Ltd v Tennant** EAT 0167/19). Medical evidence is usually required to demonstrate something is likely to recur (**Sussex Partnership NHS Foundation Trust v Norris** EAT 0031/12). Events after the alleged discriminatory act before the tribunal hearing should be disregarded (**McDougall v Richmond Adult Community College** [2008] ICR 431, CA).

Findings

Amendment of Claim

25. I find that it would be just and equitable to give leave for the claimant to add claims of harassment to her claim. I make that decision because the claimant was not professionally represented and set out the scope of the harassment claims in the document pages 36 to 46.

Disability Claims

26. I find that the claimant did not meet the definition of 'disabled person' at any time during which the events that the claimant says happened are alleged to have taken place. I make that finding because:

    26.1. I find that the claimant's evidence did not meet the required standard of proof (the balance of probabilities) to show that she had the mental impairment of anxiety at the times that are relevant to this case;

    26.2. The only medical document that the claimant produced was an extract of 3 pages from 2000-2001 which noted "anxiety" as an ancillary condition to

Tenosynovitis on 9 May 2001 and 24 July 2001. The claimant confirmed that she has never received any medical treatment from her GP for the condition. She confirmed that this is the only mention of "anxiety" in her entire medical record;

26.3. I found the claimant to be evasive in answering the questions I put to her, which put her credibility in some doubt;

26.4. The claimant's impact statement [62-64] says little about the effect that anxiety has had on her ability to carry out day-to day activities. It is an essential part of the section 6 test that a claimant links the disability with the substantial long-term adverse effect on their abilities to carry out activities. I find that the claimant fell well short of the evidential burden;

26.5. I find that the claimant's evidence taken with the GP notes are insufficient to show that she met the definition of 'disabled person' in 2001. I make that finding because the AXA letter records the claimant herself as stating that she had anxiety in 2001 only. Her GP records only show a diagnosis from 9 May 2001 to 24 October 2001. It is impossible that the claimant could have had anxiety for a continuous period of 12 months;

26.6. The claimant describes various self-help and group activities as treatments, but gives no evidence of how these help or any factual evidence about how her condition is without the interventions;

26.7. The claimant describes the effects as insomnia, not wanting to go out, not answering the phone, having low self-esteem, feeling weepy and being argumentative. Of those 'effects' only the first three and the last one are substantial effects on her ability to carry out day-to day activities. Having low self-esteem and feeling weepy are symptoms;

26.8. I find that "not wanting to go out" is not the same as being unable to go out;

26.9. I find that the claimant's argument is weakened by the documented history of this case. I have mentioned the GP notes and AXA Insurance letter. I can give very little weight to the email from Christine Peek dated 3 July 2022, as it has no details and absolutely no provenance. Ms Peek did not provide a witness statement or appear as a witness;

26.10. I find the claimant's case to be similar to that described by Underhill P (as he then was) in **J v DLA Piper UK**, which I have set out above;

26.11. The respondent's OH report by Dr McDowall dated 4 August 2021 [153-156] also damages the credibility of the claimant in a number of ways:

26.11.1. The report notes in the second bold headnote [154] that the claimant said she was prevented from wearing a mask because of a non-disclosed medical condition. I find it is not credible that the claimant would not have told the respondent that the reason she would not

wear a mask was because of the disability of anxiety, if that was the real reason;

26.11.2. The report notes on its second page that the claimant told Dr McDowell that wearing a face mask leads to anxiety, dizziness, skin issues and concerns regarding her breathing. Dr McDowell did not report that the requirement to wear a face mask triggered or exacerbated the disability of anxiety;

26.11.3. The report mentions physical impairments that Dr McDowell considered would bring the claimant within section 6, but the claimant does not rely on either of them as the basis of her disability discrimination claims;

26.11.4. In this hearing the clamant clearly and mistakenly extrapolated the fact that she has physical impairments that may mean that she meets the definition of disabled person to mean that she was automatically able to refuse to wear a mask;

26.12. I find that in her further information about her claim [36-46] and in the record of the grievance process that the claimant never told the respondent that the reason she was not able to wear a mask was anxiety;

26.13. I find that it weakens the claimant's credibility that in paragraph 10 of her impact statement [63] describes the effect of having to wear a face mask as:

26.13.1. A restriction on her breathing;

26.13.2. Being hot and uncomfortable;

26.13.3. Raising her heart rate; and

26.13.4. Causing her severe distress;

There is no mention of anxiety or an exacerbation of an existing condition of anxiety.

26.14. I find that it also weakens the credibility of the claimant that at paragraph 12 of her impact statement, she devotes an entire paragraph to hypoxia and the allegation that no person has the right to deprive her of oxygen;

26.15. I find that the claimant's evidence on the long-term nature of her anxiety condition falls short of the standard of proof required to show that it had subsisted for 12 months or was likely to do so. On my findings, the claimant has not shown that she has had an anxiety condition other than for a few months in 2001. The claimant cannot rely on the effect of this action on her mental state as it post-dates the alleged discriminatory acts;

26.16. I have found that the claimant did not meet the definition of disabled person, so do not need to address the question of whether the respondent

knew or ought to have known she was disabled. As a matter of record, I find that prior to the issue of these proceedings, the respondent did not and could not have been expected to know that the claimant was a disabled person because of an anxiety disorder. I make that finding because the claimant's witness evidence and the documents show that she never disclosed the disability now relied upon until after these proceedings were issued. In that regard, I rely on the claimant's further information [41 and 46] and the OH report.

Unauthorised Deduction from Wages

27. The claimant's claim in respect of unauthorised deduction of wages is that she was asked to wear a face mask in a non-Covid-Safe area of the hospital on 13 July 2021. She has not returned to work since. She has been deemed to have been on unauthorised absence and has not been paid.

28. I find that the dispute between the parties is largely evidential. The respondent says that it could not accommodate the claimant at work if she did not wear a mask. The respondent says it offered the claimant the opportunity to work from home in her existing role or alternative work in another role. The claimant says that the offers were never followed up.

29. I find that the claimant's claim has little reasonable prospect of success because I find the respondent's case to be much more credible than the claimant's given my findings as to her credibility elsewhere in these Reasons.

Amount of Deposit

30. I find that the claimant has substantial savings. She would not disclose how much she had. I therefore order her to pay £1,000.00 as a depot to be able to continue with her unauthorised deduction of wages claim.

31. I made case management order in a separate document.

Employment Judge S A Shore

Date 11 August 2022