CASE NO: 2602326/19

EMPLOYMENT TRIBUNALS
At an Open Attended Preliminary Hearing

Claimant: Miss L Gordon

Respondent: Boots Management Services Ltd

Heard at: Nottingham

On: Monday 16 December 2019

Before: Employment Judge P Britton (sitting alone)

Representation
Claimant: Mr L Mann, Solicitor
Respondent: Ms S Bowan of Counsel

JUDGMENT

1. The claim of non-payment of wages is dismissed upon withdrawal.

2. The Respondent's application for a strike out or deposit order in relation to the remaining claim of disability discrimination is dismissed. Directions are hereinafter set out.

3. Notice of a resumed case attended case management will follow.

REASONS

Introduction

1. Following upon the direction to that effect of my colleague, Employment Judge Hutchinson, sitting at a case management hearing on 9 November 2019, I am today to determine the Respondent's application that the claim either be struck out or a deposit ordered.

2. I have had before me a bundle of documents prepared by the Respondent. I observe that this was with the Claimant's solicitor about a fortnight ago, and albeit some text messages may have come in from the Respondent, which were

at the back of the bundle of recent time, on the other hand, it is of concern to me that there were no additional documents put before me until the eleventh hour in this case by the Claimant.

3. As it is, a document of the most crucial importance to this case was thereby put in by her, and that is her very detailed e-mail that she sent to the person hearing the final stage in the Management for Attendance Process (MAP) in this case and who decided to dismiss the Claimant. That meeting took place on 7 June 2019. The Claimant did not attend, but as to why is so obvious from this very detailed email. It set out her case in terms of why she considered that she was being discriminated against by reason of disability.

4. The disability in question is in fact anxiety and depression. It is important that I stress that no disability is pleaded on the basis of long-standing problems with a cyst and its reoccurrence.

5. For the avoidance of doubt, albeit I can see that there is going to need to be significant clarification of the pleadings in this case, I would not be prepared to grant any amendment to include, if it was being sought to be deployed now, reliance upon the cyst as a disability.

6. My overview of this case could be summarised thus. There is no doubt in my mind, albeit the Respondent apparently wants to see the medical evidence[1], that this Claimant has long-standing mental health issues focusing on depression and anxiety. That is referred to in the OH reports that I have seen, albeit it is not stated as to whether or not she could be considered as a disabled person for the purposes of the Equality Act 2010 (EqA). On the other hand, I do not know if the referrals from Boots asked the occupational health specialist to give an opinion to that effect.

7. Having said that, from looking at the texts at the back of the bundle and the Claimant's communications with her line manager (Alice), combined with the meetings from certain April onwards, viz return to work, between the Claimant and her line managers, then adding in the occupational health reports and their reference to the history in her condition, I think that the Respondent may have an uphill struggle to try and argue that this lady is not a disabled person by reason of depression and anxiety pursuant to section 6 and schedule 1 of the Equality Act 2010. Of course, it is the underlying reason by and large for her problems in terms of attendance and lateness.

8. So, what is my take on this case, taking the Claimant's case at its highest? I wish to make it clear that it has dramatically changed once I read that email. It is a pity that it was not placed in the bundle by either firm of solicitors, particularly bearing in mind that the Respondent put in that final capability review meeting minutes of 7 June but did not put in the email that the Claimant sent in by way of her submissions to Floss Walton-Bateson. What deeply concerns me, and I do not have the dismissal letter in the bundle, is that the minutes of that meeting

[1] Having so observed, no such direction has been requested to date and I was not asked to make one today. Doubtless if the respondent is still requesting the claimant's medical notes it will now formally make that request.

makes absolutely no reference to the Claimant's detailed email and the submissions therein.

9. So, what does this all mean to me? It means essentially that on the paperwork that I have up to circa 13 May, the Respondent had been doing its utmost to make reasonable adjustments for the Claimant's disability and its impact upon her ability to get to work on time. Thus, it is absolutely crystal from the communications between her and Alice, and in particular to which see bundle page 93, that far from, as pleaded in the ET1, the Respondent being resistant to any change at all to the required start time of 9 am, that in fact as of 4 October 2018 it was making plain that the problem that she had in getting into work by that time was "*not a problem*" and furthermore that Alice, as her line manager, did not have a problem with the Claimant coming in by 10 am:

> "… j*ust wanted to say that being late really isn't a problem for us – you could do 10 – 6 if that worked out easier.*" (Bp[2] 134)

10. The same theme can be seen as being present in the return to work meetings taking place with the Claimant, such at Bp 90 – 91 and thence 13 February (Bp 101) and the return to work meeting on 6 March 2019 with Mr Gray (Bp 107) and finally, that of 4 April 2019 namely the MAP(management for attendance) meeting.

11. The whole theme is that the Respondent was working in with the occupational health recommendations, which I have read, to try and adjust for the Claimant's problems in terms of being flexible with start times. The problem of course was the level of absences which were very high relative to the length of period of the employment, which had only started on 5 April 2018.

12. I also would add in that if the Respondent was about discriminating against the Claimant by reason of a disability as alleged, then why did it extend the probation period twice and then in fact confirm her permanent employment?

13. If I not seen the email of 4 June I would have concluded that the Claimant's case was hopeless. However, by 23 May, which was the meeting for the purposes of the next stage of the MAP process and which led to a final written warning, the Claimant was making clear that the problem was that as she was not allowed a flexible start time of between 8 and 10, then the fears she had that she would not be able to achieve a fixed time, was impacting upon her anxiety and depression levels. So, she would not be able to achieve it. That is a short summary of a much more lengthy explanation. There is a difference in approach by Floss Walton-Bates compared with those who went before, in terms of the meeting on the 23 May encapsulated at Bp 128 "…*Do not believe the 8-10 am flexible adjustment can be done on a permanent basis the role dealing with customer queries …*"

14. She was only prepared to offer a temporary change to assist rehabilitation. In effect, the first two weeks of the RTW being 8 – 10 am but building up over a 6 week period so that by the end of it, the Claimant would be on a permanent 9

[2] Bp = bundle page.

am start. Yes, she did leave open the prospect that the Claimant could make a flexible working request but I have to read into that, potentially from the mind of the Claimant, the fact that it had previously been said in the same extract that she did not consider flexible working could be achieved on a permanent basis given the nature of the role, would I can see lead the Claimant to have no hope that she would achieve it. I bear in mind her fragile mental state.

15. Of course, what then happens is that the Claimant therefore does not attend the meeting on 3 June because of that but sends the email, to which I have referred and which is not mentioned by Floss Walton-Bateson at the meeting on 7 June and thus in her decision thereat to dismiss.

16. The final point I ought to make is of course the Claimant has a problem in one sense, which is that the last period of absence, which seems to have started on 13 May, was because of the recurrence of the cyst problem. The Claimant says that she sent in sick notes for this period. The Respondent says she did not and that it has none. Therefore, of course the Respondent was working in that sense, it could be argued, on the basis that as the cyst absence was continuing post the final written warning and still present on 7 June, thus of course the restriction on absences and a requirement to attend, which was underlining the requirements apropos the MAP having not been achieved, therefore the dismissal was on capability grounds relating to the cyst.

17. The problem there is that if, as the Claimant says, the reason she did not attend on 4 June is because she needed to have the reasonable adjustment to which I have referred and the Respondent was not prepared to give it in the way that she wanted it, and if part of the reason for the dismissal is in fact the disability related absences, and I do not have the dismissal letter, then of course it could be seen to be causatively flowing through.

18. What it means is that I have now concluded, particularly relying upon the 4 June email, that there is a triable case. Therefore, and in particular having in my mind the seminal authorities in ***Anyanwu and Other v. South Bank Student Union*** followed by ***Balls v Downham Market High School & College***, I am therefore not prepared to strike this claim out.

19. By the same token I am not prepared to order a deposit because I could not say that this part of the case has only little reasonable prospect of success.

20. The final point I ought to make is that the Claimant has already had one bite of the cherry in putting her pleaded case in order. I expect that her solicitors, albeit they operate somewhat at arms length, being based in Somerset and her being based in Nottingham, to make sure that they hold a detailed conference with her. The pleading it seems to me needs to be restructured. In particular they need to think through as to whether the first part of this case is really tenable. I am talking about in particular October running all the way through into April. Why do I say that? If the Claimant persists to run that part of her case with the obvious impact upon time in a case where I understand that there are no less than 3 lever arch files of documents, then I only flag up to the Claimant that if my prognosis as it is now turns out to be right, then she would of course be in that sense conducting the case unreasonably. I am not making a deposit in that

respect because it means unscrambling that part of the case from the remains of the rest of it in a situation where it is clear to me that there is at present a chronic need by the Claimant and her instructing solicitors to get their house in order.

21. What does it mean? It means that I am going to order a further attended case management hearing in this case on the first available date five weeks hence. The agenda will be to consider the then pleaded state of play, and thence to consider time limits and to make appropriate directions.

22. For the purposes of fixing that hearing, the clerks will please ensure that within 7 days of today, the availability of Ms Bowen[3] in particular is obtained before listing the said hearing with a time estimate of 3 hours. If possible, given this Judge has sat so long today, I direct that I will hear the case management discussion.

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Employment Judge

Date: 14 January 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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[3] Now received as is that of Mr Mann.