



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Mulhall

Respondent: (1) Chief Constable of Warwickshire Police; (2) Jatinder Virk; and (3) Alison Hall

RECORD OF A PRELIMINARY HEARING

Heard at: Birmingham (via Cloud Video Platform) **On:** 16 May 2022

Before: Employment Judge Choudry (sitting alone)

Appearances

For the claimant: In person

For the respondent: Richard Hignett (Counsel)

RESERVED JUDGMENT

1. Permission to amend the ET1 to include a claim for victimisation is granted.
2. The claimant's claims for harassment and discrimination arising from disability are dismissed on withdrawal. The remainder of the claimant's claims will continued unaffected.
3. By consent the claims against the Second and Third Respondents are dismissed on withdrawal.

Introduction

- (1) This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was via telephone. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
- (2) The claimant has been employed by the first respondent, according to the Claim Form, since 31 March 2003 as a HR Officer. The respondent asserts that the claimant commenced work for the first respondent on 9 July 2002. The claimant remains in the first respondent's employment. By a claim form presented on 22

September 2021, following a period of early conciliation from 17 July 2021 to 28 August 2021, the claimant brought complaints of disability discrimination – discrimination arising from disability, direct discrimination, failure to make reasonable adjustments and harassment (paragraph 2 of the Grounds of Complaint refer). The respondents deny the allegations and sought further particulars of the claims.

- (3) At a preliminary hearing on 28 January 2022 before Employment Judge Gaskell, the claimant indicated that she wished to bring a claim for victimisation. As no claim of victimisation was discernible from her existing claim, the claimant was advised that she would need to seek permission from the Tribunal to amend her claim. The claimant was ordered to provide further particulars of her claim for victimisation at the same time as she provided further particulars of her other claims. Employment Judge Gaskell ordered that the provision of these further particulars would be accepted as a formal application by the claimant to amend her claim and the matter would be listed for an open preliminary hearing to deal with the claimant's application to amend. That hearing was listed before me today.
- (4) On 25 February 2022 the claimant provided further particulars of her allegations of direct discrimination, discrimination arising from disability, failure to make reasonable adjustments and victimisation ("Further and Better Particulars"). The claimant also provided further particulars of her disabilities of anxiety, depression and stress. By an email dated 7 March 2022 the respondent conceded that the claimant was disabled by reason of anxiety and depression but not stress.
- (5) An amended Response was filed with the Tribunal on 24 March 2022. In its amended Response the respondents objected to the claimant's application to amend her claim to include a claim for victimisation due to the claimant not referring to a claim of victimisation or any protected act in her claim form; the fact that the claim for victimisation was grossly out of time and should have been issued at the same time as the Claim and the fact that the claimant's existing claim was vast and included 12 allegations of direct discrimination and 11 allegations of failure to make reasonable adjustments. As such, the inclusion of 4 further allegations of victimisation was disproportionately prejudicial to the respondent. It was also asserted that the claim for victimisation had little prospect of success.
- (6) By an application dated 3 May 2022 the respondents made an application for a strike out or a deposit order. In its application the respondent made, inter alia, the following points in relation to the claimants claims:
 - 6.1 the matters in the original claim about which no reference was made in the Further and Better particulars should be taken as background evidence only;
 - 6.2 as the claimant had failed to provide particulars of her claim for harassment as ordered by Employment Judge Gaskell there was no complaint of harassment in the proceedings;
 - 6.3 for the reasons set out in paragraph 5 above, the claimant's application to amend her claim to include a complaint of victimisation should be refused;
 - 6.4 many of the complaints were time barred;

6.5 the single complaint of discrimination arising from disability had little or no prospect of success; and

6.6 the claim for reasonable adjustments was time barred, failed to identify any PCP and the claims for reasonable adjustments from September 2020 should be struck out as the claimant was sick from this date and unable to return to work in any capacity and therefore the claimant's claim for reasonable adjustments had no reasonable prospects of success.

- (7) In its application the respondents sought an adjournment of the preliminary hearing listed before me and requested instead that the matter was listed for a preliminary hearing of one day to deal with the claimant's application to amend her claim to include an allegation of victimisation and the respondents' application for strike out/deposit order. It was felt that there was insufficient time to deal with both applications in the 3 hours allocated to the hearing.
- (8) As the parties were in attendance I determined that it was appropriate for the application to amend the Claim to be considered and for the case to be listed for a further one day open preliminary hearing to deal with the respondents' application for a strike out/deposit order and depending on the outcome of that application further case management orders could be issued.
- (9) As such, the matter will be listed for an open preliminary hearing before an Employment Judge sitting alone at the Employment Tribunals, **13th Floor, Centre City Tower, 7 Hill Street, Birmingham, B5 4UU**, on **Wednesday 30 November 2022**, starting at 10 am or as soon as possible afterwards to consider the respondents' application for a strike out/deposit order and, if necessary, to give case management orders.

Application to amend

- (10) At the hearing before me Mr Hignett argued on behalf of the respondents that there was a plethora of difficulties with the claimant's Further and Better Particulars. Firstly, it was not clear what factual complaints the claimant was making, Secondly, although the claimant's Further and Better Particulars attempted to group a description of events under various legal headings it made no reference at all back to the claimant's original claim form. Further, the Further and Better Particulars were unclear and did not clearly identify clearly the PCPs. Finally, in some respects the Further and Better Particulars appeared to raise new complaints not foreshadowed by the Claim Form.
- (11) Mr Hignett mapped the claimant's Further and Better Particulars to the original claim form as follows:

| | Complaint | Original POC | F&BP's |
|---|--|--------------|---|
| 1 | The amount of work she was given when she returned to maternity leave on part time hrs in October 2014 | Para 5 | Direct - see F&BP's 1 Note F&BP 1 is different to the pleaded case. It is |

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| | | | about work location and travel time. RA discrimination – see F&BP 16 |
| 2 | Alison Hall’s management of the Dean Newman situation. Failing to take action to prevent abusive emails sent by him in the period 29 March 2017 – 30 April 2019 | Para 6, 10, 11,12,13,14, 23,24, 25, 26, 63, 64, 65 | Direct – see F&BP 4 and 5, 9, 10 |
| 3 | Being forced to increase her hours in April 2018 to cope with work demands and R not decreasing her workload | Para 7 | No reference in F&BP |
| 4 | Lack of support to threats to life made by ex officer Peter Doherty | Para 15 – 18 | No reference in F&BP |
| 5 | Alison Hall not actioning her redeployment request in June 2020 save inviting C to apply for secondments | Para 18,19 | Direct - F&BP para 6 RA discrimination – F&BP 17 |
| 6 | Alison Hall not arranging a meeting to discuss the outcome of the Fairness at work Sep 2020 or following the recommendation of OH in this regard | 27, 29 | No reference in F&BP |
| 7 | Late 2020 - not completing a stress risk assessment | 30 | No reference in F&BP |
| 8 | R’s management of C’s sickness absence | 31 - 32 | No reference in F&BP |
| 9 | (From June 2020) Not following the advice of the FMA and not placing her on redeployment register | 33 – 34 | RA discrimination – see F&BP 21 and 24 |
| 10 | Not holding regular welfare attendance meetings | 35 | No reference in F&BP |
| 11 | Failing to follow the advice of FMA in March 2021 to temporarily redeploy her to another directorate outside of HR in the period 28 September 2020 to 23 October 2020 | 36/ 41/45/46/91 | Direct - F&BP 6 Arising from disability – F&BP 13 Victimisation - F&BP 30 |
| 12 | May 2021 – delay in commencing EMDR therapy as recommended by Force psychologist | 40 | No reference in F&BP |
| 13 | June 2021 - CC Tedds decision to not retain C on full pay and put her to half pay followed by nil pay on 14/09/21 C says she should have been | 39/ 42/43/44/47/48/49/ 78/ 86/87/88/91 | Direct – see F&BP 11 Victimisation – see F&BP 31 |

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| | kept on half pay because as per an FMA ruling her absence is a no fault injury in the course of duty (para 88 of POC) | | |
| 14 | Not actioning a recommendation arising out of the outcome of C's January 2021 fairness at work submission with regard to home visits | 51 – 53 | RA discrimination – see F&BP 18 |
| 15 | Alison Hall not supporting C's application for an honorarium in July 2021 | 67 – 77 | Direct – see F&BP 12 Victimisation – see F&BP 32 |
| 16 | Lack of welfare support or management communication in period since C contacted ACAS i.e. from July 2021 | 81 - 90 | Victimisation - see F&BP 33 RA discrimination– see F&BP 25 |

(12) I spent some time going through the above table with the claimant with a view to seeking clarity on her claims. The claimant confirmed the following in relation to the above table:

12.1 Complaint 1 – The claimant asserted that this was a claim for direct discrimination and also for failure to make reasonable adjustments in relation to work location and travel time.

12.2 Complaint 2 – the claimant agreed that this amounted to a complaint of direct discrimination as identified in the table above. However, the claimant asserted that it was also a complaint of failure to make reasonable adjustments and referred to paragraph 26 of the claim form;

12.3 Complaint 3 – the claimant indicated that paragraph 3 of the Further Particulars amounted to background information;

12.4 Complaint 4 – this also amounted to background information;

12.5 Complaint 5 – the claimant agreed with the summary in the table above;

12.6 Complaint 6 – the claimant did not accept that this complaint was not reference in the Further and Better Particulars and referred to paragraph 22 of the Further Particulars which is classified as a reasonable adjustments claim;

12.7 Complaint 7 – the claimant did not accept that this was background information. It was accepted that this claimant had not been mapped across into the Further and Better Particulars but the claimant expressed this complaint to be one of failure to make reasonable adjustments;

12.8 Complaint 8 – the claimant indicated that this complaint was identified in paragraphs 18 to 22 of the Further and Better Particulars. The claimant's complaint was that the advice provided by occupational health to management was not followed by the respondents in relation to stress risk assessments and communication being opened;

12.9 Complaint 9 – the claimant agreed with the respondents' assessment above.

12.10 Complaint 10 – the claimant indicated that this related to not holding regular welfare meetings for the period September 2020 to 4 May 2022 as per paragraph 18 of the Further and Better Particulars;

12.11 Complaint 11 – the claimant agreed with the respondents' assessment in the table above;

12.12 Complaint 12 – the claimant accepted that this claim was not referred to in the Further and Better Particulars but she wished to rely on this claim and identified it as being one of a failure to make reasonable adjustments;

12.13 Complaint 13 – the claimant agreed with the respondents' assessment in the table above;

12.14 Complaint 14 - the claimant agreed with the respondents' assessment in the table above;

12.15 Complaint 15 - the claimant agreed with the respondents' assessment in the table above; and

12.16 Complaint 16 - the claimant agreed with the respondents' assessment in the table above.

- (13) The claimant also confirmed that she was not pursuing a claim for harassment. After explaining to the claimant section 15 of the Equality Act 2010, the claimant also confirmed that she was not pursuing a claim for discrimination arising. As such, the claimant's only live claims before the Tribunal were that of direct discrimination and failure to make reasonable adjustments.
- (14) In relation to her application to amend her claim to bring a claim for victimisation the claimant relied on complaints 11, 13, 15 and 16. The protected acts relied on were (1) the claimant's Fairness at Work complaint made in September 2020; (2) the claimant's Fairness at Work complaint made in January 2021; and (3) contacting ACAS in July 2021.
- (15) Upon the respondent confirming that it would not make any application for costs and accepting full responsibility for all acts/omissions of the second and third respondents, the claimant also confirmed that she would be withdrawing her claims against the second and third respondents. It was agreed that the claims against the second and third respondents would be dismissed on withdrawal.

Submissions on application to amend

- (16) The claimant in support of her application to amend her claim indicated that although she had more than 20 years' experience working as a human resources officer she had never been involved in employment tribunals and therefore had no experience of the process. Furthermore when she made her application to the Tribunal she had been extremely unwell and therefore argued that her application should be allowed. She also did not accept that her claim for victimisation had not been properly permitted in the Further Particulars she had provided to the Tribunal.
- (17) Mr Hignett submitted on behalf of the respondent that the claimant had articulated clearly in paragraph 2 of the Claim Form the claims that she was bringing in the Tribunal and these did not include a claim for victimisation, although Mr Hignett accepted that this was not a complete bar to the claimant

bringing a claim for victimisation. However, victimisation was not mentioned at all not even in a non-technical sense, it was a brand new complaint. Mr Hignett also argued that the claimant had failed to provide a good explanation as to why the claimant had not included the claim for victimisation in her original Claim Form. The amendment sought was a substantial one with 3 protected acts and 4 detriments which would require the calling of an additional witness, although the respondents accepted that the second and third protected acts were protected acts. Mr Hignett also pointed to the fact that that the amendment had been presented substantially outside the time limits prescribed by statute for the presentation of the claim which had expired in August 2020. It was further submitted that the claimant would not suffer prejudice if the application was refused as she was left with substantial live claims. As such, it was not appropriate to allow the amendment.

- (18) Mr Hignett further submitted that if the claims were allowed there was insufficient clarity on the claimant's claims. Mr Hignett referred to the claimant's Fairness at Work dated 23 September 2020 which he pointed out contained complaint of discrimination nor could one be inferred.

Conclusions on application to amend

- (19) In reaching my conclusions I have carefully considered the documentation to which I have been referred, the oral submissions made on behalf of both parties.
- (20) I started by directing myself that I should apply the tests set out in **Selkent Bus v Moore [1996] I.C.R. 836** which require me to consider (1) the nature of application to amend; (2) the timing and manner of the application; (3) the applicability of time limits; and (4) the balance of prejudice. I also considered the Presidential Guidance, General Case Management issued in January 2018 which makes it clear that in deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.
- (21) I am satisfied that the amendments sought by the claimant are not major matters, they are a continuation of a theme already presented in the claim form and that they will not impact the timing or duration of the final hearing. As identified in the table above the 4 alleged acts of victimisation are already referred to in the Claim Form although not identified as acts of victimisation. Even if the application to amend had not been made or if it is not granted the respondent will need to respond to this allegations as acts of direct discrimination in the case of 11, 13, 15 above and one of failure to make reasonable adjustments in relation to 16 above.
- (22) Mr Hignett refers to the claims being out of time but it seems to me that they may amount to a course of conduct extending over a period of time. This is matter that the claimant will have to prove but that is a matter that the Tribunal will need to hear evidence on and is not one for me to determine today.

- (23) Taking into account the interests of justice and the relative hardship that will be caused by the granting or refusing the amendment, I am satisfied that greater hardship will be caused to the claimant if her application is refused. I am mindful of the fact that the claimant was unwell at the time she submitted her claim form was submitted and that it is accepted that the claimant is a disabled person by reason of her anxiety and depression. I also note that the majority of the witnesses required to give evidence in relation to the additional detriments would be giving evidence in any event and witness statements have not yet been exchanged nor has disclosure taken place. The case is at the early stages of preparation. Furthermore, it is accepted that the protected acts relied on amount to protected acts. As such, the claimant's application to amend her claim to include a claim for 4 acts of victimisation namely those set out in complaints 11, 13, 15 and 16 as set out in the table above is granted.
- (24) I set out below further case management orders in relation to the future conduct of this case.

Other matters

- (25) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (26) 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)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**
- (27) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (28) If the Tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.
- (29) The following case management orders were uncontentional and effectively made by consent. Insofar as they are not made by consent, reasons, to the extent not set out below, were given at the time and written reasons will not be provided unless they are asked for by a written request presented by any party within 14 days of the sending of this written record of the decision.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. Preparation for open preliminary hearing on 30 November 2022

- 2.1 By **16 November 2022** the following parties must lodge the following with the Tribunal:
 - 2.1.1 an updated agenda, list of issues and list of complaints by the respondent;
 - 2.1.2 two copies of the bundle(s), by the respondent; and
 - 2.1.3 an updated skeleton argument by the respondent on its application to seek a strike out /deposit order.

3. Other matters

- 3.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 3.2 Anyone affected by any of these orders may apply under rule 29 for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 3.3 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 3.4 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 3.5 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Choudry

Date 15/08/2022