



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mrs. M. Hugkulstone

RC Diocese of Southwark

PRELIMINARY HEARING

Heard at: London South, Croydon

On: 30 January 2017

Before: Employment Judge Sage (sitting alone)

Appearances

For the Claimant: Ms. Nichol Consultant

For the Respondent: Mr. A. Burrow of Counsel

JUDGMENT

1. The email dated the 1 March 2016 was privileged and should not be referred to in evidence in these proceedings.
2. The Claimant's claim for direct age discrimination has no reasonable prospect of success and is struck out.
3. The Claimant's application to amend to add a new claim pursuant to the Public Interest Disclosure Act 1998 (for detriment and dismissal) is out of time.
4. The Claimant is ordered to pay to the Respondent costs incurred in respect of attendance at this hearing of £450 plus VAT by reason of their unreasonable conduct of the case.

REASONS

1. This preliminary hearing was listed by the order of Judge Baron on the 12 September 2016 to consider whether the Claimant was seeking to rely on without prejudice communications and if so should an exception be allowed for those documents to be admitted in evidence. Judge Baron initially flagged up his views that the evidence relied upon in support of the claim for age discrimination could not result in an inference being drawn of unlawful discrimination and was reliant upon reference to without prejudice communications; he therefore invited the parties to give their representations as to why the claim should not be struck out by a letter dated the 15 August 2016. The Claimant objected to the matter being struck out by a letter dated the 9 September 2016 (see page 60 of the bundle) and called for the matter to be listed for a preliminary hearing to be held in person.

2. This hearing was also listed to deal with a disputed application for disclosure of documents and the Claimant's application to amend the claim form to add a claim for whistle blowing.

Submissions on the issue of privilege and the effect on the Claimant's claim for age discrimination.

3. On the first issue in relation to whether the documents the Claimant seeks to rely upon are privileged, the Respondent's position was that the documents referred to in the bundle at pages 109-113 were privileged and only dealt with matters in relation to compromising the claim and this was the initial view of Judge Baron communicated to the parties on the 15 August 2016 (see page 51 of the bundle). The Respondent stated that the document dated the 2 March 2016 was entirely irrelevant. The Claimant's claim for age discrimination rested entirely upon the contents of privileged communications; there was no other evidence that was remotely relevant to this head of claim. There was no suggestion that there was any other evidence that would support claimant's claim for age discrimination. The Respondent stated that this head of claim was misconceived and the letter is privileged and does not shift the burden of proof. The respondent stated that he understood how difficult it was get discrimination cases struck out, but he relied on the case of *Chandhok v Tirkey* [2015] IRLR 195 referring specifically paragraphs 17 to 20. The respondent stated that this was a claim that should be struck out also stated that this was not the case where a deposit order was appropriate as the claim had no reasonable prospect of success.
4. The claimant's response to this submission was to take the tribunal to pages 30 and 60 of the bundle, the first being Ms. Daymond's email to the Respondent and the Tribunal dated the 24 June 2016, confirming that the claimant was pursuing a claim for age discrimination and confirming that she was relying upon the contents of the without prejudice communication. The second letter dated 9 September 2016, this time from Ms. Nichol, again indicating that the claimant wished to pursue her claim for age discrimination and placing weight on the fact the correspondence was not specifically marked 'without prejudice' and stated that Ms Wood (for the respondent) refused to enter into further negotiations for what she described as "**inappropriate and discriminatory reasons**". It was her contention that the respondent had refused to negotiate a higher settlement on the grounds that the claimant could draw her state pension at age 62. Ms. Nichol then took the Tribunal to the without prejudice communications at page 109 to 112 and stated that the correspondence was a mixture of settlement and non-settlement issues. She stated that the contents of these communications extended beyond dealing with the claimant's losses and therefore showed the correspondence went beyond "mere settlement". She stated it was the refusal of the respondent to accept the claimant's intention to stay on in her role until the age of 67 and refusing to consider negotiating a higher settlement was based on what was described as an "irrelevant factor" relating the date that the Claimant could draw her state pension.
5. The respondent pointed out in replies to this submission that at the date the communications were produced, the claimant was 64 years old and this issue was a matter raised by the claimant's representatives in their emails. Ms. Wood's evidence to the Tribunal in her statement at paragraphs 6 and 8 confirmed that her only reference to the Claimant's state pension age was to correct a factual error in Ms. Daymond's letter, this was not a matter raised by her.

Decision

6. The decision of the tribunal on the issue of whether the communications relied upon by the claimant were without prejudice, the tribunal took into account the largely unchallenged evidence of Ms Wood, who told the Tribunal that she was in no doubt that the communications were produced as part of their discussions to reach a settlement. I also took into account the submissions of the parties above at paragraphs 3-5. The tribunal conclude that the discussions as recorded in the documents at pages 109 to 112 were produced only with the intention of settling the claim and included detailed discussions as to quantum. It would be contrary to public policy to allow documents, although not specifically marked without prejudice, but clearly produced for that purpose, to be disclosed in the course of litigation. The only route to the lifting of the cloak of without prejudice is by the route of unambiguous impropriety and no such conduct of that description has been referred to by the claimant in this case. Although the claimant stated in oral submissions that in her view, the correspondence went beyond dealing with issues that were relevant to the settlement of the case, there was no evidence before the tribunal that the contents of the written communications went beyond settlement discussions. The tribunal accepts the evidence of Ms. Wood that the reference to the state pension age was to correct Ms. Daymond's assertion that the Claimant would reach state pension age at 67 when in fact it had already been reached at the time the negotiations were conducted; this was a statement of fact. Discussions in relation to losses and quantum are an integral facet of settlement negotiations. It is concluded for that these documents are without prejudice and must not be referred to in these proceedings.
7. Turning to the second and related matter of the merits of the claim for age discrimination, it is concluded on the evidence before the Tribunal that the only reference to age discrimination is contained within these without prejudice documents. The claimant has not taken the tribunal to any other evidence that supports the claim for age discrimination. In the absence of any evidence to support the claim for age discrimination that could move the burden of proof, it is concluded having been referred the case of *Chandhok v Tirkey* [2015] IRLR 195, more especially at paragraph 20 of the case, that what we have is a mere assertion of age discrimination without any credible evidence to support the claim. The tribunal had the benefit of hearing the evidence of Ms Wood who was clear that the only reference to age was in relation to clarifying the state pension age, it was not put to her that she discriminated against the Claimant because of age or that a comparator of a different age would have been treated more favourably. It is therefore concluded that in the absence of any evidence to support this claim this is one of the very rare cases where it would be appropriate to strike out on the grounds that it has no reasonable prospect of success.

The Claimant's application to amend the ET1 to add a claim for whistleblowing (detriment and dismissal).

8. The tribunal then turned to the next issue which was whether the claimant should be allowed to amend the claim form to add a complaint for whistleblowing (detriment and dismissal). The Claimant's application proceeded on the basis that the claim form itself made reference to the complaint that she now wishes to rely upon as it makes reference to the disclosure and the less favourable treatment.

She stated that it was essentially a relabelling exercise and does not seek to introduce a new cause of action. The claimant submitted that this should be added to the list of issues because the respondent has been aware throughout of the claimant's whistleblowing claim and Ms. Daymond had made it clear that this was a claim she intended to pursue. Ms. Nichol referred to several documents in the bundle where whistleblowing was referred to including page 80, page 92, 95 and 98 which were produced in relation to the Claimant's grievance, appeal and appeal outcome. Ms. Nichol was asked by the Tribunal why it had not be reasonably practicable to put the claim in in time and she replied that she dealt with it "as soon as she could".

9. The respondent's submissions in reply referred the tribunal to page 44 of the bundle which was Ms. Nichol's letter dated 6 July making an application to amend the claim form where she stated that the claim was submitted "**without specific reference to an alleged claim in respect of the Public Interest Disclosure Act 1998 and that this was not specifically referred to at the recent casement management discussion**". He stated that from the wording adopted in this letter, the Claimant was clear this was not a simple relabelling exercise as this head of claim was not referred to in the claim form and it was not raised in the case management discussion. The Respondent referred the tribunal to the minutes of that case management discussion where Ms Daymond clarified that the claimant was not claiming unfavourable treatment because of a protected act (see page 40 of the bundle). The respondent responded to the Claimant's application on 7 July 2016 (see page 45-6 of the bundle) stating that the claim was out of time by 38 days and there was no evidence that it was not reasonably practicable to put the claim in within the time limit. The respondent stated that although the Claimant's representative had taken the tribunal to all the documents that show that the claimant was aware of her claim for whistleblowing throughout, this made the application all the harder. He referred to the letter of 27 January 2016 at page 94 of the bundle where the Claimant made specific reference to whistleblowing, having taken advice. The Claimant could have put in a claim for whistle blowing, but she did not and is not entitled to an extension of time by the tribunal.

Decision on the Claimant's application to add a claim for whistleblowing.

10. The decision on this point is as follows: Having been taken to the claim form at pages 14 -15 of the bundle, it was noted that the claimant referred to complaining about an issue and thereafter being treated differently by Father Jesmond. The claim form made no reference to a complaint of whistleblowing. It was also noted that in a subsequent preliminary hearing held on 3 June 2016, the claimant's representative, Ms Daymond confirmed to the tribunal that the Claimant was not pursuing a claim for detriment because of a protected act. Even though this clarification had been given by her representative, the tribunal saw that a subsequent application was presented by Ms. Nichol to add a claim for whistle blowing in relation to detriment and dismissal. The written application confirmed that the claim was submitted "**without reference to an alleged claim..**" for whistleblowing and she also conceded that it was not referred to in the hearing. The Tribunal conclude from the written submission made at the time and from the wording of the claim form that this was not simply a relabelling exercise of the facts relied upon in the claim form, it introduced a new cause of action which was known to the claimant at the time. It was also noted that at that time, the claimant

had the benefit of legal assistance. The time limit for the presentation of a claim for whistleblowing was the 27 May 2016. The application to amend was dated 6 July 2016 and therefore it is considerably out of time.

11. As this is a new claim that is out of time, the tribunal must first consider whether it was reasonably practicable to present the claim in time. Firstly, it was noted that the Claimant was able to present her claim for unfair dismissal (and age discrimination) in time, therefore it is concluded that it was feasible to present this claim in time. No evidence has been provided as to why the claimant failed to present her claim within the primary time limit and as no evidence has been produced to show that it was not reasonably practicable to do so. It is concluded that time should not be extended to allow a claim to be presented out of time. Although Ms. Nichol has submitted that she dealt with the matter as soon as she could, it was noted that Ms. Daymond had conduct of the case at that time and it has not been submitted to the tribunal that had been any impediment either taking instruction from the Claimant or submitting the application in time. As the claim is out of time and the Claimant has failed to show that it was not reasonably practicable to present her claim in time, the claimant's application is out of time and is refused.

12. Having dealt with the above issues, it was confirmed by the tribunal that the claimant's only remaining claim was for constructive unfair dismissal which would be heard by a Judge alone (and not by a full Tribunal sitting with members).

Disputed Disclosure

13. The tribunal then went on consider the issue of disputed documents. The tribunal dealt with only the documents that were outstanding between the parties in relation to the issue of unfair dismissal:
 - a. document 3 was discussed which was a document identified as an authorisation provided by Father Jesmond to pay Ms. Totts. This appeared to be relevant to the issues before the Tribunal and the Tribunal ordered that, if this document is in existence, it is to be disclosed.
 - b. The Claimant made an application in respect of documents referred to in paragraphs 13-14. It was concluded by the tribunal that this request was too wide and amounted to a fishing expedition. The tribunal then considered the request at paragraph 18, in relation to what described as the Decree which was dated "on or around October or November 2015"; the Claimant asked for a copy of the manuscript document that was marked in red by Father Jesmond. It was concluded by the tribunal after discussing this matter with both parties, that this document, if still in existence, was relevant to the issues between the parties and should be disclosed.
 - c. The Claimant then referred to her application at page 78 of the bundle at paragraphs 79,80, 84-5. It was noted that those were generic requests for email chains between three or four people. The claimant could not identify why the documents were relevant to the issues in the case. It

was submitted by Ms. Nichol that she would not know if they were relevant until they had been provided. However, this seemed to be precisely the concern expressed by the Respondent and shared by the Tribunal that this was another example of a fishing expedition where a request was made to see if any of the documents may be relevant to the case. This request was therefore refused.

The Respondent's costs application

14. The respondent then made an application for their costs of today and took the Tribunal to their costs warning on pages 53 and 63; their costs were set out on page 64 for £2,500 plus Counsel fees of £600. The respondent stated the unreasonable conduct in respect of today's hearing was that the claimant was given an opportunity to withdraw her claim as referred to in the letter from Judge Baron, had she done so it would have obviated the need for an oral hearing. The respondent emailed the claimant on the 30 August 2016 (page 57 of the bundle) stating that if the claimant's claim for age discrimination was struck out the hearing should be listed to consider the respondent's costs application. The respondent stated that because of the vexatious nature of the claim and Judge Baron's clear warning and the costs warnings given by the respondent, they claim the brief fee for today of £450 plus VAT. The Respondent stated it was reasonable to be reimbursed due to the weakness of the claims being pursued.
15. The claimant responded that they objected to the application as there have been numerous issues dealt with at the hearing today. They had been able to deal with the disclosure matters and they stated that their disclosure request been outstanding for some time. The claimant stated that it would not be proportionate to award costs in this case as a hearing was needed in any event.
16. The respondent responded to the last point stating that it was proposed by the tribunal that all matters could have been dealt with by a telephone hearing had the claimant properly withdrawn the claim for age discrimination. As this was not done the matter had to be dealt with in a hearing in person and this is a case where costs should be awarded.

Decision on Costs

17. The tribunal's decision is that this is a case where costs should be awarded. The unreasonable conduct of this matter is the claimant's decision not to withdraw her claim for age discrimination despite the clear and obvious concerns raised by Judge Baron as referred to above, and then the clear costs warning given by the respondent also echoing their concerns about the weakness of the claim for age discrimination. Had the claimant withdrawn claim for age discrimination after giving proper consideration to the issues identified by Judge Baron and the views expressed by the Respondent, this matter could have been dealt with in a short telephone hearing, the effect of the unreasonable conduct was that the hearing was listed for a three-hour hearing in person.

18. The respondents had been put to the time and expense of instructing counsel deal with this matter in the hearing in person today and those costs were incurred as a consequence of the unreasonable conduct. The Tribunal conclude that this is a case where costs should be awarded.
19. The tribunal then considered the amount of costs claimed and it was concluded that the application to limit the costs application to Counsel's fees of attending the hearing was reasonable and proportionate to the unreasonable conduct. The Tribunal therefore orders the Claimant to pay to the respondent their costs of £450 plus VAT.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within **5 days** to consider liability and remedy. It has been listed at London South Employment Tribunal, Croydon to start at 10am or so soon thereafter as possible on **20 November 2017**. As the parties did not have dates to avoid for November both have liberty to apply should any of their witnesses be unable to attend on these dates.

The issues

2. These have been agreed and for the avoidance of doubt, the only claim before the Tribunal is that of Constructive Unfair Dismissal. It is also confirmed that Judge Sage who has had sight of without prejudice communications between the parties, will not be listed to hear the case.

Judicial mediation

3. I raised the possibility of this case being considered for an offer of judicial mediation. I explained how the process operates and provided a note giving a full explanation of the judicial mediation scheme. I emphasised that this was just an enquiry as to whether the parties would be interested in the Regional Employment Judge considering whether the case would be suitable for an offer of judicial mediation.
4. The parties were given 7 days to consider this.
5. Both parties will receive further notification from or on behalf of the Regional Employment Judge.
6. I made the following case management orders by consent. [*Insofar as they are not made by consent, reasons were given at the time and are not now recorded.*]

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Disclosure of documents

- 1.1 The parties are ordered to give mutual disclosure of any documents thus far not disclosed that are relevant to the issues identified above by list and copy documents so as to arrive on or before **13 February 2017**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 1.2 Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 1.3 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 1.4 The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

2. Statement of remedy/schedule of loss

- 2.1 The claimant is ordered to provide to the respondent and to the Tribunal, so an amended itemised statement of the remedy sought (also called a schedule of loss) 14 days before the Hearing.
- 2.2 The claimant is ordered to include information relevant to the receipt of any state benefits.

3. Bundle of documents

- 3.1 It is ordered that the Claimant has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 3.2 To this end, the Respondent is ordered to notify the Claimant on or before **14 September 2017**, of the documents to be included in the bundle at their request. These must be documents to which they intend to refer, either by evidence in chief or by cross-examining the respondent's witnesses, during the course of the hearing.
- 3.3 The Claimant is ordered to provide to the respondent a full, indexed, page numbered bundle to arrive on or before **11 September 2017**
- 3.4 The respondent is ordered to bring sufficient copies (at least three) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

4. Witness statements

- 4.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 4.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 4.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 4.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 4.5 It is ordered that witness statements are exchanged so as to arrive on or before **30 October 2017**.

5. Other matters

- 5.1 The respondent is ordered to prepare a cast list, for use at the hearing. It must list, in alphabetical order of surname, the full name and job title of all the people from whom or about whom the Tribunal is likely to hear.
- 5.2 The claimant is ordered to prepare a short, neutral chronology for use at the hearing.
- 5.3 These documents should be agreed if possible.

CONSEQUENCES OF NON-COMPLIANCE

1. 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.
2. 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.
3. 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.

Employment Judge Sage

31 January 2017