EMPLOYMENT TRIBUNALS

Claimant: **Ms D. Njoroge**

Respondent: **University of the Arts London and others**

Heard at: **London Central** **On:** **29 August 2017**

Before: **Employment Judge Goodman**

Representation
Claimant: in person

Respondent: Mr P. Michell, counsel

PRELIMINARY HEARING
JUDGMENT

1 The claim that the respondent discriminated against the claimant because of sex is struck out as having no reasonable prospect of success and because it is out of time.

2 The claim that the respondent victimised the claimant is allowed in relation to her dismissal in July 2017. The claim is struck out in respect of the suspension and earlier treatment.

3 The disability discrimination claim is added insofar as it relates to the claimant's dismissal in July 2017, but struck out in respect of earlier treatment.

4 Claims against the named respondents Karen Ellis Rees, Linda Slaymaker and Nigel Hallam are struck out as an abuse of process.

5 The claim against Natalie Brett in respect of the dismissal procedure is allowed.

6 The claim against Nigel Carrington, which relates to the dismissal, is struck out because it has no reasonable prospect of success.

7 The claimant must by 17 October 2017 give full particulars of:

7.1 the complaints relied on as protected acts in the victimisation claim

7.2 whether her case is that the dismissal is discrimination because of disability, or because of something arising from disability (sections 13 and 15 Equality Act 2010)

7.3 if she says the dismissal was a failure to make a reasonable adjustment for disability, state what the employer's requirement or condition was that put her at a disadvantage and which should have been adjusted.

REASONS

1. The claimant has brought two claims against her employer and various members of its staff. The first claim was presented on 7 September 2016, and she was suspended from work soon after. The 2nd claim was presented on 7 March 2017 when she was still suspended, and had also been notified of a disciplinary hearing which might lead to dismissal. She has since been dismissed, on 24th of July 2017.

Case Progress to Date

First Claim 7.9.16

2. The first claim alleged racial discrimination, harassment and victimisation on the part of the first respondent and seven individual respondents: Pat Christie, Steven Reid, Rowan Williamson, Jayne Batch , Alice Harvey, Leo Appleton and Stephen Marshall, all employees of the first respondent. There was a preliminary hearing for case management on 9 November 2016 before Judge Auerbach when the claimant was ordered to serve further particulars of claim, which she did on 19 November 2016. He also sought to clarify with the claimant whether she used 'victimisation' in the colloquial sense of unfair treatment, or the peculiar legal sense, meaning unfair treatment because of a protected act. His recorded that the claimant did not mean the latter.

3. There was an open preliminary hearing before Judge Grewal on 15 December 2016 when she refused permission to the claimant to add a claim of disability discrimination, and refused permission also to add Karen Ellis Rees and Linda Slaymaker as respondents. A list of issues was attached to the order following the hearing.

4. The claimant later applied for reconsideration of this decision, and also asked for a claim of victimisation to be added in the light of her suspension from work. The respondent was asked to comment on this, and objected to adding a victimisation claim as this had already been extensively discussed at two case management hearings totallling 5.5 hours. Judge Grewal refused reconsideration on the grounds that no new matters were raised. As for adding a victimisation claim, it was too late in the day, there would have to be additional pleading, the claimant could have raised it before but had not.

Second Claim 7.3.17

5. The second claim is brought against 5 more people - Natalie Brett, Nigel Carrington, John Hallam, Linda Slaymaker and Karen Ellis Rees - as well as the original 8 respondents. It is for discrimination and harassment because of race, disability and sex. It also adds "victimisation as defined in the legal sense", as well as "bullying… Humiliation… Subjugation and servitude… Exploitation… Oppression and domination". She also mentions "potential unfair dismissal".

6. The respondent filed ET3, and submitted that the second claim was an abuse of process in that it repeated (unsuccessful) applications to amend the first claim, and sought to reopen matters that already had already been decided or agreed on. This related to (1) addition of respondents Karen Ellis Rees, Linda Slaymaker and John Hallam (2) the claim the disability discrimination (3) the victimisation claim. It was also pleaded that (4) claims for matters preceding suspension on 16 September 2016 were out of time (5) the sex discrimination claim was misconceived and (6) so was the disability discrimination claim. Disability was not admitted; it was denied that there was direct discrimination because, inter alia, the respondent did not know of the alleged disability.

7. There was a case management hearing on 20 June 27 before Employment Judge Tayler. He listed this hearing for the respondent's applications to strike out or make deposit orders. He ordered the parties to agree a bundle for this hearing and to exchange written submissions on the disputed issues by 23 August.

8. On 5th of August 2017 the claimant made a written application to amend her claim to add wrongful and unfair dismissal, victimisation and further acts of discrimination. She also asked for the final hearing to be heard in private. The Respondents have since agreed to an amendment of claim to add claims arising from the dismissal on 24th of July 2017, namely unfair dismissal and wrongful dismissal.

Conduct of the Hearing

9. The claimant had not prepared a written submission, and it appeared that she had not read the respondent's written submission either. Indeed, she had refused permission for it to be emailed to her, saying that was harassment. It had been posted instead. She said she had received this in the post at 7.30 this morning, but had not read it, nor had she read a copy given to her before the hearing started. She rejected a proposal that the tribunal should adjourn to give her time to read it. The employment judge therefore directed counsel to the tribunal to go through the written submission orally, to ensure that in fairness to the claimant she was aware of the scope of the arguments. At times in the hearing the claimant objected to the respondent doing so, and the employment judge explained why he had been asked to do this. After counsel traversed the general matters, the specific submissions on various parts of the claim were broken up so that each party made a submission on a particular claim before proceeding to the next claim. The claimant had prepared her own bundle for the hearing, which had some elements of duplication.

10. This process proved time-consuming, and lasted from 10 am until 5pm, with a 35 minute break at lunchtime, reduced at the claimant's request from the customary longer adjournment. There was a mid-morning and late afternoon

break at the claimant's request. At 5 p.m. judgement was reserved for want of time; the tribunal then spent a further hour on case management, for which there is a separate written record.

Factual summary

11. This is based on the chronology of events filed by the claimant at the tribunal 30th of January 2017, supplemented by the first respondent's letters to her about disciplinary proceedings from September 2016 onward. The Tribunal has not heard evidence and these are not findings.

12. She started work for the first respondent on 23rd of October 2011, as a Sunday librarian, term time only. In 2014 she made a number of applications for posts, without success. In 2015 there were a number of incidents is to conflict with her line manager Jane Batch, and about a recent starter Sunday librarian, Jane Palmer. In March 2015 some students complained about her. It was a disciplinary investigation about the defendant's conduct with recommendation there was a case to answer, but respondent closed the investigation without proceeding further in June 2015. The claimant made further job applications, internal and external without success. The claimant made a formal complaint on 27 October 2015 about her lack of success and about the behaviour of colleagues. As a result she was to be given training on interviewing techniques, and black and minority ethnic member on the interview panel, and also to have a stress risk assessment. In April 2016 an external investigator prepared a report on the grievance. There was a formal stage III grievance meeting in June 2016. The Vice Chancellor heard her appeal against the findings in August 2016.

13. She then filed the first claim with the employment tribunal which the tribunal sent to respondent on the 27th September. Meanwhile, on 12 September 2016 the she was suspended from duty. The suspension letter sent on 29th of September gave the reason for the suspension allegations of significant breakdown in working relationships between her and her colleagues which amounted to a breach of the mutual trust and confidence. Specific incidents were a student complaint 15th of March 2016 about rudeness, a complaint about excluding students on 20th of March 2016, a complaint about abuse of staff privileges in that she had 57 items on loan which she kept renewing so denying students access, persistent failure to follow management instructions about reducing her book loans, not following sickness reporting procedures and failing to report for duty or claiming to pay hours not worked due to being late (March 2016) ; she had refused to participate in the mid year review with her line manager Alice Harvey. She had not followed procedures about return to work meetings. She had refused to discuss the findings of two separate stress risk assessments in May 15 and in 2016 she had made untrue accusations about Rowan Williamson and Jane Batch. She had refused to make up missed contact hours (September 2016). There was to be an investigation meeting on 11 October 2016. Further investigation meetings are carried out during the autumn and the report concluded around 22nd of December 2016 when it was sent to the claimant.

14. A disciplinary hearing was set for February 2017, on 7 of the 10 matters found by Leo Appleton, the investigator. The claimant did not attend the hearing because she was signed off as not fit to work. By June 2017 the respondent decided to go ahead with the procedure because the recent

occupational health report advised that she would remain unfit to attend any meeting until the conclusion of the employment tribunal process, and as that might last another 6 to 12 months, it was not feasible to wait. A new hearing was set for 20 July 2017. There was now an additional charge that she had taken up secondary employment with the London School of Hygiene and Tropical Medicine while she was suspended from duty on full pay by the respondent, and without informing the first respondent, in direct breach of the contract. Further, although she had submitted medical certificates that she was not fit to work between 3 January and 30 April, the reason for not attending the disciplinary hearing on 3 February, she had worked at the London School of Hygiene on Sunday, 5 February 2017.

15. The claimant attended the disciplinary hearing, following which she was dismissed for gross misconduct with effect from 27 July 2017. She has not appealed.

Strike out and deposit orders – relevant law

16. A tribunal has power under rule 37 to strike out a claim that has no reasonable prospect of success. In discrimination and whistleblowing claims, which can be particularly fact sensitive, tribunals are strongly discouraged from striking out a claim on this basis before evidence has been heard - North Glamorgan NHS Trust v Ezsias (2007) EWCA Civ 330; Anyonwu v South Bank University. Only if, taking the claimant's pleaded case as established on the facts, it would not amount in law to a claim, can a claim be struck out as having no reasonable prospect of success, all – ED and F Man Liquid Products Ltd v Patel (2003) EWCACiv 472, the facts the claimant sought to establish were "totally and inexplicably inconsistent with the undisputed contemporaneous documentation".
17. A tribunal also has power under rule 39 to order a claimant to pay a deposit as a condition of proceeding with a particular claim or argument if it considers that a claim or argument has little reasonable prospect of success. The deposit may not exceed £1000. The tribunal should make reasonable enquiries as to the paying party's ability to pay when deciding the amount. The real bite of these orders lies in the costs power in rule 39 (5): if the tribunal decides the specific allegation argument against the paying party for substantially the same reasons given in the deposit order, the paying party shall be treated as having acted unreasonably for the purpose of rule 76. This means that if the claimant against whom a deposit orders is made decides to pay the deposit and carry on, but then loses the point, the claimant is deemed to have acted unreasonably and may become liable to pay the respondent's costs of pursuing that claim or argument. The Tribunal can summary assess costs of up to £20,000, and can order a detailed assessment costs in an unlimited sum.

Amendment of claims – relevant law

18. Although tribunals are not bound by rules as strict as the courts when it comes to pleadings, it has been made clear that "the tribunal should not make findings of unlawful discrimination in respect of any matter which was not in the originating application or the subject of the subsequent amendment (**Bahl v the Law Society**) and in **Chandhok v Tirkey(2015) IRLR 195**, the EAT president set out why the claim form must contain the essential case to which the respondent has to respond, not as subsequently elaborated in a witness

statement or further document, so that "a degree of informality does not become unbridled licence".

A party may apply to amend or add a claim, and the tribunal must decide the application in accordance with the principles set out in **Selkent Bus Company v Moore**. It must consider whether this is a mere detail, or relabelling of any matter already described, or a new claim; it must consider whether allowing the amendment would deprive the respondent of a limitation defence otherwise available because the amendment is made out of time, and it must consider how substantial the amendment is. The tribunal must balance these factors to consider what is in the interests of justice.

19. Once a Tribunal has made formal decision, to try to revive it without good reason may be an abuse of the process, because of the general principle that there must be finality in justice. Decisions can be reconsidered under the rules, or appealed if they disclose an error of law. Other than the application to Judge Grewal to reconsider, there have not been any appeals or reconsideration applications.

Sex discrimination

20. The first claim argued that the claimant's lack of success in applying for other posts was because of race discrimination. In the second claim she argues that the lack of success was because she was a woman. This was not mentioned in her grievance either. The claimant says she only realized there was sex discrimination when in January 2017 an email was disclosed to her. It is from a manager to another on 30 March 2016 and asks if a man called Jaimin who had interviewed well for two posts without success could be given an upcoming post without interview. It is not known if he *was* given a job without interview. The claimant says this shows men could be given jobs for which she may have applied.

21. The respondent had prepared tables of the jobs for which the claimant had applied - there are 18 of them. In 6 cases she was interviewed but unsuccessful. 5 of the successful applicants were women, and the 6 is not known. In 6 cases she was not shortlisted for interview. For the successful candidates were women and to one man. In 5 cases she started to complete an application form but did not submit it. In another case she applied but withdrew. In the other cases where the application was not submitted not proceed, the men succeeded, one was not known, and the rest were women. They have analysed the interviewing panel. None of the named respondents was on the panels appointing men.

22. In the hearing the claimant said there were 8 or she complained the respondent was going into too much detail). Her table of applications was also in the bundle.

23. The claimant said she did not complain about who got the jobs, but about the people interviewing her.

24. The respondent argues that this part of the sex discrimination claim is both misconceived and out of time. The claimant did not apply for posts after suspension in September 2016. She the claim in March 2017, 2 months after

seeing the email disclosed, further, the pattern of female success indicates a reasonable prospect of establishing that she was unsuccessful because she was a woman.

25. The tribunal finding is that sex discrimination claim in relation to job applications has no reasonable prospect of success. Most of the successful candidates were also women. All the male appointments preceded the October 2015 grievance, which did not complain about men's being successful, only white people. She made no mention of sex discrimination in the detailed case management discussions. The email she saw in January 2017 is a slender thread on which to hang a sex discrimination claim, as it deals with an appointment when she was still working and would have known about it, if it occurred. Further, it is made out of time, and puts the respondent at a disadvantage if it is allowed. The email, which is the excuse for a late application, does not reveal a preference for men. It is irregular in asking for a departure from the competitive process, but not shown that this is what happened, or even, if it did, that rules were not bent for women too. The claimant has other substantial claims based on the lack of success in job applications. It is not in the interests of justice to allow the addition of this claim.

26. The other part of the new sex discrimination claim is about handling of complaints about staff. She said the handling of her grievance was less favourable than the handling of a complaint about a male Saturday librarian, Peter, said to have been making comments about colleagues online. In June or July 2016 he had been given a letter of warning about his current actions, but not suspended, as the claimant was in September 2016.

27. This is something which would have been in the knowledge of the claimant from the time she was suspended in September 2016, but she did not mention it in either of the detailed case management hearings that autumn, or at all until March 2017. It is out of time. The email about Jaimin is said to have opened the claimant's eyes to sex discrimination. This is even more slender a thread than for the complaint of sex discriminatory job applications. One obvious difference about the claimant's case is that there were a large number of different complaints by staff and students going back many months. Of itself this may account for suspension pending investigation.

28. This sex discrimination claim has no reasonable prospect of success for that last reason. In addition, no good reason s shown why it is made out of time. The balance is against allowing the amendment.

Victimisation

29. In the ET1 of the 2nd claim as the claimant is asking for "victimisation as defined in the legal sense", but the 19 paragraphs of the grounds of claim in the 2nd claim do not mention victimisation or a protected act, explicitly or by allusion.

30. The possible protected acts are the grievance of October 2015, and the first employment tribunal claim in September 2015.

31. The October 2015 grievance twice uses the word "discriminate", but careful reading of the long document shows no suggestion that this is about race or

any other protected characteristic. Context is all; it is possible that an investigation of the grievance the claimant was more explicit, and the tribunal has not been taken to the investigation report, and I have not found it in either side's bundle. The claimant elaborated today that not being successful in job applications was because she had "the impertinence to complain in her October 215 grievance". This is troublesome because at least nine of the 12 applications she actually pursued precede the October 2015 grievance, and another two were made on the same date as it was typed. The assertion of victimisation in this respect appears rhetorical rather than related to the facts.

32. At the time the claimant was suspended, the employment tribunal had not yet sent the respondent the claim, and the tribunal will have to decide how they knew about it, if asked to decide that this was the reason for the suspension. Speculatively, it is possible that the claimant approached ACAS for early conciliation, and there may have been a conversation between ACAS and the respondent.

33. I am well aware from conducting case management hearings and trying to find out what "protected act" is relied on how difficult laypeople find it to understand the legal sense of victimisation, meaning protection of complaints of discrimination, even when explained in ordinary language, with examples. In ordinary speech victimisation seems to means no more than unfair treatment, or being picked on, without going into whether there was any reason for this. But it is hard to understand how in 2 ½ hours of case management discussion with Judge Auerbach and another 2 hours of discussion with Judge Grewal the claimant should not have grasped this, and still said that she did not pursue victimisation in the legal sense. I am aware she was not legally advised, but it was being explained to her in a neutral and unconfrontational way. She tried to change her mind in the application to reconsider which added victimisation, but was refused by Judge Grewal. Trying to add it again by bringing a second claim is an abuse of process unless there was a fresh act of victimization, or it could be said that there was act extending over a period. As to this, suspension is a distinct act. It does not extend over a period, although its consequences may. The claimant has already identified the suspension as an act of race discrimination, and that claim will be heard.

34. What is lost by allowing a Tribunal to consider whether it was victimisation in the alternative? It will require a detailed response to be drafted and filed. It will add to the hearing time by requiring detailed examination of whether the grievance was indeed a protected act (as it did not, at least at the outset, mention race at all), and about knowledge of the Tribunal claim, and decision making on this.
35. It is in the interests of justice to claims and hearings within limits, not allowed to proliferate over time. This will already be a long hearing.

36. The application to add a victimisation claim is not allowed because (1) it is out of time (2) it has already been refused (3) no good reason is shown why it is brought out of time (4) the actions complained of will be considered among the complaints of race discrimination (5)balancing these factors against the importance of protecting complaints about discrimination, and the possibility that the claimant did not by December 2015 still understand what victimisation was, it is not in the interests of justice to allow the amendment.

37. The sole exception is a claim that the dismissal was act of victimisation, as set out in the claimant's email dated 5 August, paragraph 3. Here she says the complaints were of discrimination because of race, gender and disability. The Tribunal must consider to what extent she made such complaints, and the claimant must make a list of the complaints she made which in her view caused the respondent to dismiss her. This amendment is in time. It relates to an event which occurred after the refusal of her earlier application.

Disability Discrimination

38. first claim did not include disability discrimination but stated she had clinical depression. When given further particulars after the first case management hearing, the claimant said she wanted to add a claim disability discrimination and included 5 paragraphs, referring to "malicious commentary" about her health and missing time from work and to the suspension matter complaining that she would not discuss her health of managers, and that she was asked to make up time lost through sickness. She also mentions that her mental health got worse after she was accused of making anti-Semitic remarks. This may be a complaint that the damage was caused to her house by other discrimination, rather than disability discrimination of itself. This application was refused by Judge Grewal, who also rejected an application to reconsider that decision.

39. In the 2nd claim, paragraph 8, the claimant says "I have suffered from clinical depression for many years and have and been able to cope just fine until I started experiencing bigotry at UAL in the last 2 years" and she never wish to rely on this disability "in relation to the issues surrounding my suspension", health been mentioned in the suspension matter. She added she had been "harangued" and treated since 2014 "partly due to my disability".

40. All this rehashes the same material as was before Judge Grewal. The disability discrimination claim in the 2nd claim for is cowed as an abuse of process. It simply seeks to revive a matter which has already been decided by the tribunal.

41. If the claimant meant that discrimination had caused her mental health to get worse, that is a remedy issue if her race discrimination claim succeeds.

42. The Claimant tried to say that she was making a fresh claim because it was not till December 2016 or January 2017 that someone tried to explain to her that she had anxiety as well as depression, but she then referred to a medical report of January 2014. If anxiety is a crucial distinguishing feature, I note only that it is not mentioned in either claim form.

43. 5 August email seeking to amend the claim following dismissal mentions "further incidents of discrimination" without stating the relevant protected characteristic; then mentions complaint about disability as the basis of victimisation. It is not explicit that she considered the dismissal to be discrimination because of disability, or related to something arising from disability, or a breach of the to make a reasonable adjustment. In today's hearing she clarified that the invitation to a disciplinary hearing in December 2016, the start of the process that led to her dismissal in July 2017, included her disability because of the accusations of failing to engage with discussions stress risk assessment and sickness reporting procedures. Anything in the

discussion indicated that there was a breach of the duty to make reasonable adjustments in relation to the disciplinary process; speculatively it could include holding a meeting when she was certified unfit for work, though if it is right that she was working at the London School of hygiene and tropical medicine while certified, it might be held reasonable to go ahead despite the sick note.

44. A claim that the dismissal was disability discrimination is therefore allowed, but the claimant must give particulars. Complaints of the suspension and matters occurring before that date are not allowed as amendments.

Additional respondents

45. The respondent subject to the claimant seeking treatment Linda Slaymaker and Karen Ellis Rees because Judge Grewal has already made an order refusing this. She was asked what happened since then to justify their involvement in this claim. The claimant said she had appeared as a witness at the disciplinary hearing. The same question was asked of Linda Slaymaker. It was said that how information recorded in the investigation led to the invitation to the disciplinary meeting, though the respondents of this particular allegation dropped. The claimant then added “she has influenced the decision even if it was dropped”.

46. It is hard to see how giving evidence could be viewed as an act of discrimination; the invitation to disciplinary process was initiated by the first respondent, as the employer. The first respondent does not rely on statutory defence in respect of any of the named respondents proposed named respondents. Hendrix police Commissioner, it was suggested that adding individual respondents added to the complexity and expense of the case, was a stricter delay reduce the prospect of settlement increase the length of the hearing and the risk of errors. The claimant herself has complained that the hearing will involve a “mob” of respondents. It is likely that these individuals will have to give evidence to the tribunal. Naming them as respondents adds little. If not named they can be excluded from parts of the hearing so alleviating the claimant’s distress.

47. The claims against Karen Ellis Rees and Linda Sleeman taken the 2nd claim dismissed as an abuse of process, given judge Grewal’s decision. An application to name them as responsible for discrimination in the matter of the dismissal is refused as disproportionate and having no reasonable prospect of success.

48. The claimant seeks to add Natalie Bret in respect of the conduct of the hearing and Nigel Carrington, the Vice Chancellor, who was asked formally to approve the final decision that the claimant should be dismissed. Natalie Brett was said to have scolded the claimant in the hearing and to have been “reined in” by her colleague. She said that the claimant was aggressive and in that way she was ascribing to her features associated with a stereotype of African people. Nigel Carrington “allowed their oppression”.

49. It is clear that by conducting a procedural behalf of the employer Natalie Brett was acting with ostensible authority and first respondent is liable to actions if

she was discriminating or harassing the claimant because of race. Clearly she will have to be called to give evidence. It is not clear that adding as a named respondent adds anything to the claim. Having regard to the issues and to the number of respondents already involved, the tribunal is concerned that nothing is served but as the claim relates to alleged harassment of the claimant in the procedure it is not struck out.

50. The allegation against Nigel Carrington is particularly weak, as he only took a formal decision on behalf of the first respondent. It is not proportionate to add him as a named respondent either.

51. The claimant indicated in November 2016 that she did not name John Hallam as a respondent, as he had not discriminated, but she now seeks to join him. It is not explained why she has changed her mind. Nothing suggests that any action of his is in time. The claim against him is dismissed because out of time.

N**ote**

52. During the course of the hearing the claimant stated that if the matter was decided against her today she would frustrate that by bringing a third claim. The claimant should reflect that if she does so there is the difficulty that the matter has already been decided, so it may be an abuse of process. It would then have to be decided at a further preliminary hearing. Fortunately this would be unlikely to lead to a postponement of the final hearing listed in March.

53. It is to be hoped that at that point the claimant's claims can be properly heard and decided. It is puzzling that when the case was listed for March the claimant declared "that's just not going to happen", as it suggested she does not want her claims to be decided, preferring proceedings to be drawn out.

Employment Judge Goodman on 1 September 2017