EMPLOYMENT TRIBUNALS

Claimant: Miss P O Muchilwa

Respondent: Stockport Metropolitan Borough Council

HELD AT: Manchester **ON:** 15 January 2018

BEFORE: Employment Judge Feeney

REPRESENTATION:

Claimant: Did not attend
Respondents: Rachel Wedderspoon

JUDGMENT having been sent to the parties on 27 November 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant has applied for a reconsideration of my judgment promulgated on 2 March 2017 which decided that two of the claimant's disability discrimination claims should be struck out as having no reasonable prospect of success, one in relation to flat shoes and one in relation to toilet breaks, and that her religion or belief discrimination claim in relation to the respondent's decision to refer her to the Channel panel was also struck out as having no reasonable prospect of success.

2. I note the two discrimination claims which were struck out in particular as the claimant's application documentation seemed to refer to other disability claims which were not the subject of consideration at the preliminary hearing on 17 November 2017.

3. I invited the claimant to amend in respect of the flat shoes claim as it appears that the issue was the claimant was told not to wear trainers rather than flat shoes, and I advised her to apply for an amendment to clarify her disability claim in that the

respondent failed to make a reasonable adjustment in not allowing her to wear trainers. The claimant has made that amendment application.

4. In addition I also had to consider this morning whether the claimant should be granted an anonymity order in respect of the judgment on preliminary hearing of 17 November 2017 and any further judgments.

Preamble

5. The claimant did not attend the hearing. An email was received at 9:53 on 24 November 2017 which stated:

> "I am not able to attend the above scheduled hearing today as I am not feeling well. I have been unwell for quite some time. It's affected my daily life and currently on medication.
>
> The GP has written a letter for me which I took to the university where I study part-time to make reasonable adjustments as I have been suffering from gynaecological related illnesses, headaches and chest pains.
>
> Please provide supporting documentation arguments I would have presented at the Employment Tribunal. Mr Urry has also provided a statement.
>
> The decision to adjourn the hearing is to be made by the Employment Judge. I have provided a medical letter dated 20 November 2017 which is self explanatory."

6. The claimant's doctor's letter was dated 20 November 2017. It stated:

> "I am writing to confirm that Phoebe has been seen at the Practice a number of times over the years with significant symptoms of pelvic pain and heavy bleeding relating to fibroids. She has previously been seen by gynaecology and required surgery. She has ongoing symptoms of pelvic pain and heavy bleeding for which she takes medication, including codeine, amitriptylene, and tranexamic acid. Codeine and amitriptylene can cause drowsiness and constipation and patients with fibroids may have frequency or urine and need to attend the toilet more often. Phoebe is also undergoing investigations by the Cardiology Department at Manchester Royal Infirmary for chest pain. She is awaiting a CT cardiogram and ECHC cardiogram. These may come at short notice and it is important that she attends and does not miss these appointments. She is currently taking GTN spray and isosorbide mononitrate for her symptom side effects, which include headaches. For these reasons I would be grateful if reasonable adjustments can be made to accommodate her medical appointments, treatment and symptoms. Please let me know if further information is required."

7. It was my view, on reading the claimant's email, that she was not asking me to adjourn the hearing but suggesting that might be a decision I would make myself, and I understood that she was asking me to consider the documentation and arguments she had already presented in writing, including a statement from Mr Urry.

Although her letter did not specifically say this I considered that “please provide” was possibly a mis-spelling and that she meant to say “please consider”.

8. I decided not to postpone the hearing. This was the claimant's application. She had provided considerably detailed representations. She had not provided medical evidence which showed she was unfit to attend today, and she had left it until the very last minute to apply for an adjournment when it appears she obtained the medical advice quoted on 20 November 2017. There was nothing specifically in that medical advice explaining why she could not attend today, and she did not explain in detail on 24 November 2017, or indeed indicate when she might be well enough to attend.

9. Also, it was not in the claimant's interest to postpone the hearing. The matters needed resolving particularly now as it is eight months since the strike out judgment was made. Further the claimant’s substantive hearing has been listed and that listing might be affected if this hearing was delayed.

10. Further, the claimant would be at risk of a costs award if a postponement was granted, which again is not in her interest. Accordingly I did not postpone the hearing but went ahead.

11. The respondent opposed the claimant's application for reconsideration, amendment and an anonymity order.

12. I gave my judgement and reasons on the day. The claimant had subsequently provided further information but these reasons reflect the information available on 24th November.

Issue 1 – Amendment request

The Law

13. The Tribunal has a broad discretion to allow amendments, either on its own initiative or on application by a party, under rule 29 of the Tribunal Rules. The discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly. Guidance was set out in **Selkent Bus Company Limited v Moore [1996]** regarding applications for leave to amen. Relevant factors are the nature of the amendment, the applicability of time limits and the timing and manner of the application. There is a difference also between adding a new cause of action and re-labelling an already existing claim. Further, minor factual errors can in some circumstances be corrected ex parte. The prejudice to both sides in not allowing the amendment should be considered.

Issue

14. The claimant asserted that the respondent told her she could not wear flat shoes. The respondent said the criticism was of the claimant wearing training. The claimant says that she has to wear trainers because of a disability and therefore this was disability discrimination. I invited the claimant to amend to replace ‘flat shoes’ with trainers.

Conclusion

15. I allowed the amendment in respect of the trainers. There is no prejudice to the respondent. The words "flat shoes" should simply be replaced by "trainers". It adds little extra time to the hearing. The facts have already been made clear.

Issue 2 – Anonymity Order

16. Rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 states that:

> "(1) A Tribunal may at any stage of the proceedings on its own initiative or on application make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the convention rights of any person, or in the circumstances identified in section 10A of the Employment Tribunals Act.
>
> (2) In considering whether to make an order under this rule the Tribunal shall give full weight to the principle of open justice and to the convention right to freedom of expression.
>
> (3) Such orders may include –
>
> (a) an order that a hearing that otherwise be in public be conducted in whole or in part in private;
>
> (b) an order that the identities of specific parties' witnesses or other persons referred to in the proceedings should not be disclosed to the public by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;
>
> (c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;
>
> (d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.
>
> (4) Any party or other person with a legitimate interest who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged either on the basis of written representations or if requested at a hearing.
>
> (5) Where an order is made under paragraph 3(d) above –
>
> (a) It shall specify the person whose identity is protected and may specify particular matters of which publication is prohibited as likely to lead to that personal identification;

(b) It shall specify the duration of the order;

(c) The Tribunal shall ensure that a notice of the fact that such an order has been made in relation to those proceedings is displayed on the notice board of the Tribunal with any list of the proceedings taking place before the Tribunal and on the door of the room in which the proceedings affected by the order are taking place; and

(d) The Tribunal may order that it applies also to any other proceedings being heard as part of the same hearing.

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998:

The Tribunal has to conduct an appropriate balancing exercise before making a decision on making any of the orders. The Tribunal is balancing the convention rights of any person which is likely to include article 6, right to a fair trial, but more particularly article 8, the right to respect for private and family life. These rights are balanced against the principle of open justice and the convention rights of freedom of expression in article 10."

17. In **F v G [2012] EAT** it was said that:

"The best starting point is to consider whether restrictions on reporting and/or an anonymisation of the record are required in order to protect the rights of a party or other affected person under article 8 paying full regard to the importance of open justice; and if so to consider the extent of the necessary measures. It will be necessary to consider not only what restrictions are proportionate but for how long they need to remain in place. Permanent protection may or may not be appropriate."

18. In **BBC v Roden [2015] EAT** a Judge had granted a permanent anonymity order to protect the claimant's identity because the case contained unproven serious allegations of a sexual nature, and if his name was published the public would conclude he was guilty of the allegations. On that basis the EAT said the Judge's reasons were invalid. The EAT noted that in the context of criminal investigations into sex abuse public interest and open justice is regarded as outweighing the article 8 rights of the individual concerned, and the public has accordingly become accustomed to the early identification of such persons and it is trusted to distinguish between an allegation and a finding of guilt.

19. A stricter approach should have been made due to the fact that these were allegations and unproven. Further, clear and cogent evidence was required in order to derogate from the public interest in full publication of a substantive judgment and the anonymity order was set aside. However anonymity was granted to the wife of a defendant in case where the court said that what is of interest to the public is not necessarily in the public interest. This was a case which was brought for "revenge" there was not discernable interest in revealing the identity of the wife of the alleged wrongdoer (**EF & another v AB & another [2015] EAT**).

Claimant's Submissions

20. The claimant here appears to be asking for an anonymity order permanently. Her case appears to be that her family and herself are at risk, here and in Kenya, as a result of her name being associated with a Channel referral.

Respondent's Submissions

21. The respondent submitted that the claimant had made a conscious choice to bring a claim in a public forum and there would always be the possibility of adverse publicity whether or not the matter was published on the internet. The claimant had not identified any vulnerable third parties with any detail who could be affected by the publication of the judgment, and any such third parties were irrelevant to the judgment and would not actually be named in the judgment; that the Channel panel referral was only an allegation, in fact that claim had been struck out and therefore save for an appeal that would be the end of that matter in any event.

22. In respect of disability, the claimant had provided no details of what aspects of her disability would cause embarrassment or reputational damage

23. Further that the claimant has a website, olesi.com, which is very detailed and includes private matters relating to the claimant and the claims she has made against the respondent. It is widely accessible to the public and the claimant is soliciting assistance through this website. She has herself placed extracts of previous judgments on the website.

Conclusions

24. I concluded that the claimant had not provided enough information for an anonymisation order to be made. The points the respondent make were valid and legitimate and the claimant was sent the email, including these points, on 20 October 2017 but has not specifically replied to them. The claimant has provided no evidence of any danger to her family in Kenya.

25. The claimant is free, of course, to renew her application for an anonymity order providing evidence and a more cogent explanation, including in particular she needs to explain in detail why it would be appropriate to issue an anonymity order in the Tribunal when details of the Tribunal proceedings had been put by herself on her own website.

Reconsideration request

Law on reconsideration

26. Reconsideration of judgments is contained in rule 70 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. It says that:

> "(70) A Tribunal may, either on its own initiative or on the replication of a party, reconsider any judgment where it is necessary in the interests of

justice to do so. On reconsideration the decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

(71) Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing within 14 days of the date on which the written record or other written communication of the original decision was sent to the parties, or within 14 days of the date when the written reasons were sent out (if later) and shall set out why reconsideration of the original decision is necessary."

Claimant's struck out claims

(1) Channel referral

27. The claimant claimed direct religious discrimination when she was referred to the Channel panel part of the Prevent programme to discourage radicalisation. The respondent referred her because she had allegedly shown a video of someone being decapitated to a colleague. She says it was a video of an accident involving her brother and that the referral was a gross overreaction and direct religious discrimination in relation to an assumption she was at risk from Islamic terrorism. I found that on legal grounds the claimant had no reasonable prospect of success because the claimant was a Christian and was known to be on her own evidence.

28. Further than the programme and the referral was not related to any particular religion but to radicalisation.

29. The submissions the claimant provided for this hearing refer at times to racial discrimination.The claimant however was bringing a religious discrimination claim.

Claimant's Submissions

30. The claimant relies on the respondent's failure to set out the Channel referral policy or to provide her with any details at all about the process by which she was referred, including any discussions with the police officer involved. She provided a 23 page policy and procedure for the Channel panel on 20 October. The claimant sets out a number of factual disputes regarding what happened in respect of the referral

31. The claimant submits that as ISIS/Daesh is a muslim terrorist organisation that suspected her of involvement with them or sympathy with their aims is religious discrimination.

Conclusion

32. The policy provided by the claimant makes no difference to my original conclusions. The policy is neutral in respect of the religion, race or political beliefs of individuals referred to it. It does not specifically target religious radicals, and as I pointed out before it could encompass neo Nazi radicalisation as well, which is a growing issue.

33. The claimant might argue that her referral was linked to a perception that she is Muslim, but she has not referred in her representations to any basis for making

such an assertion as she has always stated she is a Christian and was known to be a Christian. The claimant has put forward no further evidence to suggest that the respondent perceived her as Muslim, and therefore there is no cogent reason for reconsidering my earlier decision on direct discrimination.

34. I have considered the claimant's claim at its highest which is on my understanding that 'the respondent thought I was vulnerable to Islamic terrorist radicalisation because of this video.' The claimant says the video was referred to as suggesting Isis style issues/activities, and that is as far as the respondent having relied on a link with any Islamic organisation is asserted by the claimant. To be direct discrimination the respondents action has to be because of the claimant's religion but again she is a Christian and therefore they have not thought she was vulnerable to radicalisation because of her religion but because of the video. Would the respondents have treated say an atheist or a Buddhist any differently ? there is no evidence they would.

35. The claimant has not argued that the referral was made because of her race, or colour, or because of her nationality (the claimant is from Kenya a predominantly Christian country in any event) or because of doing a protected act.

36. The claimant has now made a passing illusion to indirect discrimination but had previously stated that she was not pursuing an indirect discrimination claim when I asked her specifically at the 17 November preliminary hearing, I have considered this i.e. whether the claimant theoretically has grounds to bring an indirect religious claim.

37. Section 19 of the Equality Act 2010 states the definition of indirect discrimination is as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion of practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purpose of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies or would apply it to persons with whom B does not share the characteristic;
>
> (b) It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;
>
> (c) It puts or would put B at that disadvantage; and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

38. Therefore the claimant has to establish a provision, criterion or practice ("PCP") was applied to her; presumably it would be that she has referred to the Prevent programme/Channel. This PCP must have a disparate impact on one

religious group; in this case for argument sake assume that it could have a disparate impact on Muslims. However, for an indirect discrimination claim the claimant would have to that establish that she shared the relevant characteristic i.e. being Muslim, and the claimant cannot do that.

39. Therefore it appears to me that the claimant would have no basis for pursuing an indirect discrimination claim either. The claimant has provided no evidence of disparate impact in any event but I have assumed it for reasons of argument.

40. Accordingly the claimant has no reasonable prospect of success with her reconsideration request in relation to the Channel referral.

(2)Disability claim regarding toilet break

41. The claimant has provided no new argument regarding this matter. In my original decision I stated there was no evidence of any issue with the claimant taking toilet breaks but there was with the claimant talking to other members of staff, and the respondent produced cogent documentary evidence to support this at the preliminary hearing. There is no reason, therefore, to change that conclusion, and the claimant's reconsideration request fails in respect of this issue also.

Employment Judge Feeney

Date 30th January 2018

REASONS SENT TO THE PARTIES ON

2 February 2018

FOR THE TRIBUNAL OFFICE

[AF]