



EMPLOYMENT TRIBUNALS

Claimant

Mrs Louise Hyrcak

v

Respondent

Milton Keynes Preparatory School (1)

Mrs Hilary Pauley (2)

PRELIMINARY HEARING

Heard at: Cambridge

On: 18 January 2018

Before: Employment Judge K J Palmer

Appearances:

For the Claimant:

Mr J Bryan (Counsel)

For the 1st and 2nd Respondent:

Mr A Korn (Counsel)

RESERVED JUDGMENT ON A PRELIMINARY ISSUE AND CASE MANAGEMENT DISCUSSION

1. This matter came before me today listed for a Case Management Discussion to isolate the issues and for me to make an Order for directions and set the case down for final hearing.
2. The Claimant, who presented a claim to the Employment Tribunal on 15 September 2017 pursues claims for constructive unfair dismissal, disability discrimination under Section 39(2)(c) of the Equality Act 2010 and a failure to make reasonable adjustments under Sections 20 and 39(5) of the Equality Act 2010.
3. The Claimant was employed as Bursar at the First Respondent between 1 August 1991 and 4 July 2017.
4. In her ET1 the Claimant cited two Respondents, Milton Keynes Preparatory School and Mrs Hilary Pauley, the Proprietor and former Headmistress of the First Respondent.

Preliminary Point

5. Both the Claimant and the Respondents were represented by Counsel who indicated to me that there was a preliminary point for me to deal with concerning the Second Respondent, Mrs Hilary Pauley.
6. The point at issue was that the Claimant presented her claim against the First and Second Respondent in her Tribunal claim but her Early Conciliation Certificate reference number R155044/17/52 referred only to a claim against the First Respondent. In addition, it is the Second Respondent's case that none of the allegations ranged in the ET1 are made against the Second Respondent. This point is disputed by the Claimant.
7. The principal point for me to decide concerns the ACAS Early Conciliation and the relevant sections 18A and 18B of the Employment Tribunals Act 1996, Regulations 4 and 5 of the Employment Tribunals (Early Conciliation Exemptions and Rules of Procedure) Regulations 2014 and the Employment Tribunals (Early Conciliation Exemptions and Rules of Procedure) (Amendment) Regulation 2014 SI2014/847. It is established and accepted by both parties that a claim under the Equality Act 2010 can be brought against an individual employee. This is clearly set out in Section 110(1) of the Equality Act 2010. This is not disputed.
8. The relevant regulations referred to above set out the basis upon which early conciliation must be undertaken by a prospective claimant prior to them presenting a claim to the Tribunal.
9. Regulation 8 of the 2014 Regulations make it clear that an early conciliation certificate must contain the name and address of the prospective respondent.
10. The Amendment Regulation states at inserted Regulation 4:

“ if there is more than one prospective Respondent the prospective Claimant must present a separate early conciliation form under Rule 2 in respect of each Respondent or in the case of a telephone call made under Rule 3 must name each prospective Respondent”.
11. It is common ground that there is no Early Conciliation Certificate which relates to the Second Respondent and no attempt at any process was initiated in respect of the Second Respondent.
12. I had written submissions in front of me from both Counsel for the Claimant and the Respondent and I heard additional oral submissions. I was referred to a recent line of authorities where the operation of the relevant statute and regulations relating to early conciliation have in various respects been considered and examined. These are **Mist v Derby Community Health Services NHS Trust UKEAT/0170/15**, **Drake International Systems Limited v Blue Arrow Limited UKEAT/0282/15**, **De Mota v ADR Network and Anr UKEAT/0305/16** and **Chard v Trowbridge Office Cleaning Services Limited UKEAT/0254/16/DM**.
13. Copies of the Judgments in **De Mota** and **Chard** were handed up to me.

14. Mr Korn for the Second Respondent pointed out that in this case only one ACAS Early Conciliation Certificate was produced and that was in respect of the First Respondent. No certificate was issued in respect of the Second Respondent and therefore as a matter of fact, there was no compliance or any attempt to comply with the early conciliation process as against the Second Respondent.
15. Mr Korn goes on to distinguish the case of De Mota as being a consideration of a different factual matrix. In that case there was a single certificate issued to cover two Respondents and an attempt was made to argue that the certificate was invalid for that reason. That was rejected by His Honour Judge Richardson. Mr Korn says that H H J Richardson at paragraph 42 acknowledged that Rule 4 in the Amendment Regulations is in mandatory terms. He goes on to say that it should not be relevant that the Second Respondent is the proprietor of the First Respondent, a suggestion Mr Korn indicates is put forward by those representing the Claimant with the implication that a complaint against the First Respondent should be deemed to be a complaint against the Second Respondent. He points out that Regulation 4 is mandatory in its terms and a complaint against an individual is substantively a separate legal complaint. He says this is not a case where the two are indistinguishable.
16. He goes on to say that he acknowledges that the EAT had thus far in the line of authorities taken a fairly liberal interpretation to those provisions where there has been an amendment to the claim and where the Respondent has been wrongly identified or an incorrect address has been given. He points out that this is not the case here.
17. He submits that the Tribunal has no jurisdiction to determine the complaint against the Second Respondent and the claim against the Second Respondent should be dismissed.
18. He says there is no discrimination complaint in fact made out against the Second Respondent in the Claimant's ET1 and for that reason alone the Second Respondent should be dismissed from the proceedings.
19. The Claimant's argument was put by Counsel Joseph Bryan. On the point about jurisdiction Mr Bryan submits that in taking what he describes as a technical point under the early conciliation provisions the Second Respondent is litigating precisely the kind of satellite issue which the EAT has recently deprecated and in this respect he refers me to the De Mota case. He says the point is a technical one because there has been an early conciliation ('EC') process in which R2 was surely closely involved. He said she provided the only statement for the Claimant's grievance which dealt with the essential matters raised in the claim. She must have known about the Claimant's complaints all along and it therefore must be little surprise to her to be named in the claim.
20. He says the point is academic because following **Mist v Derby Community Health Services NHS Trust 2016 ICR 543**, even if the Tribunal had rejected the claim against the Second Respondent for failure to comply with the EC rules the Claimant could simply have applied to add the Second Respondent as a party without the need for a further EC certificate. There was no injustice to the Second Respondent, such an application would have been granted.

21. He goes on to say that the Claimant has complied with the requirement under Section 18A(1) of the EAT 1996 to provide to ACAS the prescribed information in the prescribed manner about the matter which he says is broad enough to encompass different people and cites **Drake International Systems Limited v Blue Arrow Limited [2016] ICR445**.
22. He says the Second Respondent's reliance on **Giny v SNA Transport Limited EAT 22 May 2017** is misplaced. Giny concerned the naming of the wrong party on the ACAS certificate and is not relevant to a case such as the present in which both the company and one of its directors can legitimately be sued. Giny did however reaffirm that judgments as to whether an error is minor within the meaning of Rule 12(2)(A) are quintessentially fact sensitive.
23. He then refers me to the case of **Chard v Trowbridge Office Cleaning Services Limited EAT 4 July 2017**. There, the naming of a natural person instead of a private limited company was deemed to be a minor error. He refers me to paragraph 62 and paragraph 68 where the Honourable Mr Justice Kerr states:

“to put the point another way minor errors are ones that are unlikely to be such that it will not be in the interests of justice to reject the claim on the strength of them”.
24. He says that on the facts of this case it was a minor error not also to name the Second Respondent to ACAS. The Second Respondent was the Headmistress of the First Respondent and was the principal subject of the Claimant's grievance. She was the most likely to deal with ACAS on the First Respondent's behalf.
25. Mr Bryan says that in her Response the Second Respondent relies on all the same factual and legal matters as the First Respondent and she will be the First Respondent's main witness in any event so there is no prejudice to her being a party. He asked me to consider that it would not be in the interests of justice to reject the claim.
26. Dealing with the Second Respondent's potential personal liability under these proceedings he said that it is perfectly possible that she may be held personally liable for the reasonable adjustments claim. He cites Section 110(1) of the Equality Act 2010. He says that it was the Second Respondent who was ultimately responsible for making and failed to make the reasonable adjustments relied upon by the Claimant. He refers me to paragraphs 3, 5, 6, 15, 17, 22 and 25 of the Particulars of Claim in the ET1. He says it cannot be said that there are no claims for which the Second Respondent can be held personally liable. If the Claimant succeeds in her claims against the First and Second Respondents the Claimant will be entitled to ask the Tribunal to make any award for compensation on a joint and several basis.

Conclusions

27. It is a matter of fact that the Claimant has pursued claims against both the First and Second Respondent having not cited the name of the Second Respondent when proceeding through the early conciliation process set out in the

Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014 accordingly when the ACAS Conciliation Certificate was issued it referred only to the First Respondent.

28. This is clearly a breach of paragraph 4 substituted into those Regulations by the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) (Amendment) Regulations 2014.
29. The claim was then issued against both Respondents and it was not rejected by the Tribunal.
30. In the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013; Rule 12 it deals with the question of rejection of an application.
31. Rule 12(2)(A) specifies:

“The claim or part of it shall be rejected if the Judge considers that the claim or part of it is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.”

32. The paragraph (f) referred to is under Rule 12(1)(f) and reads:

“one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the Early Conciliation Certificate to which the early conciliation number relates.”

33. There is no doubt that in this case an error has occurred. No early conciliation was initiated in respect of the Second Respondent. However, the Claimant issued against both Respondents and the claim against the Second Respondent was not rejected.
34. It is my Judgment that the Claimant's ET1 sets out in detail circumstances in respect of which there may well be a valid claim for failure to make reasonable adjustments against the Second Respondent. Mr Korn accepts that in law under the relevant legislation there would be no bar to such a claim being pursued against the Second Respondent as an individual.
35. I am not persuaded by Mr Korn's argument that on the face of the pleadings no specific claim is advanced against the Second Respondent. I accept Mr Bryan's submissions that it clearly is. The paragraphs I have been referred to by Mr Bryan make it plain that the Second Respondent is the principal protagonist at the First Respondent and is at the heart of the Claimant's claim. The Second Respondent is the proprietor of the First Respondent and was, at the material time, Head Teacher of the Respondent. The Claimant's claims for disability based upon an unmanageable workload are specifically targeted at the Second Respondent.
36. Therefore, but for this issue relating to early conciliation process, there is no question in my judgment that the Claimant could proceed against the Second Respondent.

37. The question is whether the failure to cite the Second Respondent when initiating early conciliation precludes this claim from proceeding against the Second Respondent.
38. I have carefully considered the various authorities which have been laid before me. All have a different factual matrix to this one. They also all have different factual scenarios from each other.
39. I am drawn to the Judgment of The Honourable Mr Justice Kerr in the case of **Chard v Trowbridge Office Cleaning Services Limited; 4 July 2017** and in particular his examination of Rule 12(2)(A) of the Employment Tribunal Rules at paragraphs 67 and 68. He rejects the assertion in light of the Tribunal's overriding objective that 12(2)(A) sets out a two stage test. He says 12(2)(A) must be read in conjunction with the overriding objective and the risks of causing injustice. He reads 12(2)(A) as indicating that the interests of justice part of the Rule is a useful pointer to what sort of errors ought to be considered minor. He says to put the point another way minor errors are ones that are likely to be such that it will not be in the interests of justice to reject the claim on the strength of them.
40. He goes on to say at paragraph 69 that the question of which errors are not minor is always a question of fact and degree.
41. Each case is therefore different and fact specific.
42. It is my Judgment that in this case it would not be in the interests of justice to consider the error to be anything other than minor. I am construing Rule 12(2)(A) in conjunction with the Tribunal's overriding objective which is Rule 2 of the Employment Tribunals Rules.
43. The Claimant's claim is so inextricably entwined in both Respondents that it would not be in the interests of justice to preclude her from proceeding against both Respondents.
44. For that reason I reject the Respondents' application as set out in their letter of 18 October 2017 and ventilated and illuminated further by Counsel before me.
45. In my Judgment the claim must proceed against both First and Second Respondent.

Case Management

46. I have before me at the hearing an agreed List of Issues which subject to one tweak the parties were happy to endorse. I repeat these below.

List of Issues

Unfair (constructive) dismissal

1. Did the First Respondent, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship between the First Respondent and the Claimant? In particular the Claimant relies on the following matters, whether taken individually or cumulatively:

- a. the alleged bullying by the Second Respondent from 2009-2014, as described at paras. 5, 9,10, 13,14 and 16 of the Particulars of Claim;
 - b. the alleged unmanageable workload and the First Respondent's failure to make reasonable adjustments, as described at paras. 17, 18, 22, 24 and 25 of the Particulars of Claim;
 - c. the alleged events in 2017 leading to the Claimant being signed off with extreme stress, as described at paras. 27, 30, 31, 33, 34, 35, 36, 37, 38, 40 and 42 of the Particulars of Claim; and
 - d. The First Respondent's alleged failure adequately to address her legitimate and serious grievance about the treatment she had received, as described at paras. 44- 46 of the Particulars of Claim.
2. If so, did the Claimant resign in response to that breach or those breaches without affirming the contract?

Disability

3. Did the Claimant at all material times (namely, from, or from around. 2014 until, and including, her alleged dismissal) have the mental impairment of stress, anxiety and depression?
4. If so, did that impairment have a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities?

Failure to make reasonable adjustments

5. Did the First Respondent and/or the Second Respondent know, or could it/she/they have reasonably been expected to know, that the Claimant had a disability and was likely to be placed at the disadvantage referred to below? If so, when?
6. If so, did the First Respondent and/or the Second Respondent operate the provision, criterion or practice of requiring or pressuring employees to work beyond contracted hours in order to complete all tasks within a job role?
7. If so, did that PCP put the Claimant at a substantial disadvantage in relation to employment by the First Respondent in comparison with persons who are not disabled?
8. If so, did the First Respondent and/or the Second Respondent take such steps as it was reasonable to have to take to avoid the disadvantage? The Claimant contends that it would have been reasonable to adjust her workload.
9. Has this complaint been presented out of time? If so, is it just and equitable to extent the time limit?

Discriminatory (constructive) dismissal

10. If the First Respondent and/or the Second Respondent failed to comply with a duty to make reasonable adjustments, was the Claimant entitled, because of

First Respondent and/or the Second Respondent's conduct, to terminate her employment without notice, pursuant to s. 39(7)(b), EA 2010?

11. Has this complaint been presented out of time? If so, is it just and equitable to extend the time limit?
12. If so, did the Claimant resign in response to such conduct without affirming the contract?
13. If so, was a significant part of the reason for the Claimant's dismissal the First Respondent and/or the Second Respondent's failure to make reasonable adjustments?

Remedy

14. If any of the Claimant's claims succeed, should the Claimant be awarded compensation for:
 - a. loss of her employment;
 - b. injury to feelings; and/or
 - c. injury to her health going beyond injury to feelings?
15. Should any compensation awarded to the Claimant be reduced for contributory fault for the reason set out in paragraph 21 of the grounds of resistance?
16. Should any compensation awarded to the Claimant be uplifted by 25% or such other amount as the Tribunal considers to be just and equitable if the Tribunal concludes that the First Respondent has unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?
17. Should any compensation awarded to the Claimant be reduced by 25% or such other amount as the Tribunal considers to be just and equitable if the Tribunal concludes that the Claimant has unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance procedures by reason of her delay in raising a grievance and/or her failure to appeal against the outcome of her grievance?

ORDERS

Made pursuant to the Employment Tribunal Rules 2013 Schedule 1 Rule 53

Schedule of Loss

1. That the Claimant do provide a Schedule of Loss to be served on the Respondents with a copy to be sent to the Tribunal by **30 March 2018**.

Disclosure

2. That there be mutual disclosure by list on or before **16 April 2018**. That parties should disclose to each other all documents that are relevant to the issues in this

case even those that may harm their case. Copies of such documents should be provided upon request by the **23 April 2018**.

The Claimant's claim in Disability Discrimination

3. That in support of her claim that she is a disabled person under the Equality Act 2010 the Claimant should disclose medical records and an impact statement by **16 April 2018**.
4. The Respondent should then advise both the Claimant and the Tribunal if disability is admitted or still disputed by **7 May 2018**.
5. If not admitted then the parties should write to the Tribunal with suggested directions as to the gathering of medical evidence in respect of the Claimant's need to prove her disability.

Witness statements

6. That statements of all witnesses who intend to give evidence at the Full Merits Hearing of this matter including the Claimant be mutually and simultaneously exchanged between the parties on **25 June 2018**.

Chronology

7. That the parties seek to agree a chronology to be lodged with the Tribunal by **10 September 2018**.

Judicial Mediation

8. That if the parties are mutually interested in judicial mediation the parties should write to the Tribunal on or before **30 March 2018** indicating that they would like to pursue judicial mediation. The file will then be referred to the Regional Judge for consideration.

Full Merits Hearing

9. That the matter be set down for a Full Merits Hearing for **5 days** from **24 September 2018** to take place on **24, 25, 26, 27 and 28 September** at the **Cambridge Employment Tribunals, Cambridge County Court, 197 East Road, CAMBRIDGE, Cambridgeshire, CB1 1BA**. The parties should arrive on **24 September** ready to commence at **2 p.m.** The morning will be allowed for reading in. The hearing of 5 days is to allow a hearing on liability and remedy where appropriate.

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.

27 March 2018

Employment Judge Kevin Palmer

Sent to the parties on:

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For the Tribunal:

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