



## EMPLOYMENT TRIBUNALS

**Claimant**

**Miss Kerry Hughes**

**Respondent**

**v Network Rail Infrastructure Limited**

## OPEN PRELIMINARY HEARING

**Heard at: Watford**

**On: 10 May 2018**

**Before: Employment Judge Alliott**

**Appearances:**

**For the Claimant: In Person**  
**For the Respondent: Miss A Carse (Counsel)**

## CASE MANAGEMENT SUMMARY JUDGMENT

1. This open preliminary hearing was listed pursuant to the Order of Employment Judge D Moore made on the 31 March 2017. The issues to be determined are:-
  - (i) Whether the claim, or any part of it, should be struck out on the ground that it was presented outside the statutory time limit.
  - (ii) To hear the claimant's application to amend (if pursued) and the respondent's corresponding application to amend.
  - (iii) If the claim survives, to conduct a further Case Management discussion (closed preliminary hearing) to identify the issues, give Case Management Orders and list.
2. That Order was made by Employment Judge Moore prior to Case Number 3400042/2017 (which I shall refer to as the first claim) being consolidated with Case Number 3325087/2017 (which I shall refer to as the second claim). However, in the second claim the respondent has taken time points and, by agreement, I shall deal with that issue in relation to the second claim.

3. The respondent maintains its position that the allegations on the face of the first and second claim forms are prima face out of time. However, the respondent has indicated before me today that it does not pursue an argument that it is not just and equitable to extend time in the circumstances. Consequently, even if I were to undertake an exhaustive investigation into the issue as to whether the allegations form part of a continuous stream of events and even if I concluded that any factual allegations were out of time, the respondent does not object to time being extended.
4. As it happens, having read the files, my preliminary view is that in both cases the complaints made do form part of a chain of events culminating within the three month period prior to the claim forms being issued. Consequently, in my judgment, it is not necessary for me to extend time for the bringing of any of the claimant's claims. For the avoidance of doubt, in so far as an extension of time is required, then I grant it.
5. I now turn to consider the application to amend the claim form in the first claim. The claimant has helpfully provided her amended details of complaint with tracked changes. Having gone through the proposed amendments, in my judgment they are no more than labelling exercises in relation to facts already pleaded apart from paragraph 26 which flows into paragraph 27.6 and paragraphs 27.7, 27.8 and 17 which flows into paragraph 27.9. However, all four of those issues are live issues in the second claim and in my judgment it would be somewhat artificial to exclude the claimant from relying upon them in the first claim. This is especially so as an important factor in the exercise of my discretion whether or not to allow an amendment is whether or not the claim is in time. Given the respondent's stance on it being just and equitable to extend time, then that removes one of the principal objections to an amendment.
6. Consequently, I allow the claimant's application to amend her claim form in the form as sent to the tribunal on the 20 of April 2017.

## CASE MANAGEMENT SUMMARY

### Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing of these claims would be completed within **six days**. It has been listed at **Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP** to start at 10.00am or so soon thereafter as possible on the **14 January 2019**. The parties are to attend by 9.30 am. The hearing may go short, but this allocation is based on the claimant's intention to give evidence and possibly call one further witnesses and the respondent's to call six witnesses. The time will be used as follows:-

- 1.1 Half a day for tribunal pre-reading;
- 1.2 Claimant's evidence one day;
- 1.3 Respondent's evidence two days;
- 1.4 A maximum total of two hours (half each) for submissions on liability;
- 1.5 Approximately one day for the tribunal to determine the issues which it has to decide and reach its conclusions.
- 1.6 Day six for the tribunal to deliver its decision and reasons if possible. The balance of the day to identify issues relevant to remedy, hear further evidence if appropriate and reach its conclusions in respect thereof, if the claimant succeeds in whole or part.

### **The complaint(s)**

#### 2. The first claim

By a claim form presented on the 20 January 2017, the claimant brought complaints of pregnancy/maternity discrimination and sex discrimination. The respondent defends the claims. In essence, the claims relate to the claimant's treatment having been seconded to the position of Senior Procurement Manager before and after her maternity leave.

#### 3. The second claim

By a claim form presented on the 28 June 2017, the claimant brought complaints of pregnancy/maternity discrimination, sex discrimination and unfair dismissal (constructive). In essence they arise out of the same factual nexus as the first claim in conjunction with how the claimant's grievance was dealt with by the respondent.

### **The issues**

4. I now record that the issues between the parties which will fall to be determined by the tribunal are as follows:

#### 5. **Unfair dismissal claim**

5.1 The claimant resigned her employment on the 2 March 2017. Her case is that the receipt of the respondent's formal grievance appeal conclusion outcome on the 2 March 2017 was the last straw in a series of events that the claimant alleges meant that the respondent was in breach of the implied contractual term of mutual trust and confidence.

5.2 Was the respondent in breach of contract?

- 5.3 Was the breach of contract fundamental in that it was sufficiently serious such that the claimant was entitled to terminate it without notice by reason of the employer's conduct?
- 5.4 Did the claimant resign within a reasonable time of any such breach?
- 5.5 Did the claimant resign because of any such breach of contract?

I record that the respondent's case is that the claimant would have resigned in any event due to her relocating.

- 5.6 Was the dismissal fair?
- 5.7 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?
- 5.8 In the event that the dismissal is found to be procedurally unfair, does the respondent prove that if he had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?
- 5.9 Has either party unreasonably failed to follow the guidance set out in the ACAS Code of Practice for Grievance Procedures.

6. Direct discrimination because of sex and/or pregnancy and maternity discrimination.

- 6.1 Has the respondent subjected the claimant to the following alleged treatment?
- 6.2 The respondent's refusal to award the claimant Band 2 benefits in her secondment role;
- 6.3 The respondent's failure to follow its own secondment process;
- 6.4 The respondent's failure to offer the claimant equal terms of pay and benefits in the secondment role;
- 6.5 The respondent's failure to provide written confirmation of the claimant's secondment, objectives and an agreed way of measuring the claimant's performance;

- 6.6 Requiring the claimant to do more than one role causing her undue stress and workload;
  - 6.7 The respondent's failure to confirm the claimant's SPM role;
  - 6.8 The respondent's decision to demote the claimant to her substantive role whilst on maternity leave;
  - 6.9 The respondent's failure to pay Enhanced Maternity Pay at the SPM Band 2 rate of pay;
  - 6.10 The respondent's decision only to grade her as "good" during her absence on maternity leave;
  - 6.11 The respondent's failure to inform the claimant of organisational changes and job opportunities during her maternity leave;
  - 6.12 The respondent's failure to follow the respondent's own time limits within the grievance procedure;
  - 6.13 The respondent's failure to provide the claimant access to Well Being Managers and Occupational Therapy support during the investigation of the claimant's grievance;
  - 6.14 The respondent's failure to carry out a risk assessment regarding the claimant's excessive workload whilst pregnant.
7. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparator:-
- 7.1 Richard Harries and/or hypothetical comparators.
8. Has the respondent treated the claimant as alleged unfavourably because of the pregnancy and/or because she is on maternity leave and/or because she was exercising her right to maternity leave?
9. If so has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

- 9.1 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

10. **Section 19: Indirect discrimination in relation to sex**

11. Did the respondent apply the following provision, criteria and/or practice generally, namely?

11.1 Not extending a secondment contract or confirming in a permanent role for employees who are absent from work due to maternity leave and/or;

11.2 Only awarding a "good" grade to employees who are absent from work due to maternity leave;

11.3 Does the application of the provision put other women at a particular disadvantage when compared with persons who do not have this protected characteristic?

11.4 Did the application of the provision put the claimant at that disadvantage in that;

11.5 Her secondment contract was not extended;

11.6 She was not confirmed in a permanent role;

11.7 She only received a "good" grade which could impact the claimant's promotion prospects and/or bonus pay;

11.8 Does the respondent show that the treatment was a proportionate means or achieving a legitimate aim? Any facts in relation to this issue will be set out in the respondent's amended response.

12. **Remedies**

12.1 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

12.2 There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination,

recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

### Judicial mediation

13. I raised the possibility of this case being considered for an offer of judicial mediation. The respondent has indicated that it is not interested.

### Other matters

14. If the tribunal determines that the respondent has breached any of the claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A of The Employment Tribunals Act 1996.
15. I made the following case management orders by consent.

## ORDERS

### Made pursuant to the Employment Tribunal Rules 2013

#### 1. Amended response

- 1.1 The respondent is ordered to present a draft amended response, marked for my attention, so as to arrive with the tribunal and the claimant on or before **4.00pm 31 May 2018**. The amended response will set out the respondent's factual assertions in connection with the claim as now understood in the claimant's amended claim form and leave will be granted if it does this.

#### 2. Disclosure of documents

- 2.1 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **4.00pm 12 July 2018**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 2.2 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.
- 2.3 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.

- 2.4 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.

**3. Statement of remedy/schedule of loss**

- 3.1 The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before **4.00pm 31 May 2018**, a properly itemised statement of the remedy sought (also called a schedule of loss).
- 3.2 The claimant is ordered to include information relevant to the receipt of any state benefits.

**4. Bundle of documents**

- 4.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 4.2 To this end, the claimant is ordered to notify the respondent on or before **4.00pm 2 August 2018** 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.
- 4.3 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **4.00pm 16 August 2018**.
- 4.4 The respondent is ordered to bring sufficient copies (at least five) to the tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

**5. Witness statements**

- 5.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 5.2 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.
- 5.3 The facts must set out in numbered paragraphs on numbered pages, in chronological order.
- 5.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

5.5 It is ordered that witness statements are exchanged so as to arrive on or before **4.00pm on 27 September 2018**.

**6. Other matters**

6.1 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.

6.2 The respondent is ordered to prepare a short, neutral chronology for use at the hearing.

6.3 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.

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**Employment Judge Allott**

22 / 5 /2018

Sent to the parties on:

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For the Tribunal:

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