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EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Sabovikova**

Respondent: **Co-operative Group Limited**

Heard at: **East London Hearing Centre**

On: **Monday 26 March 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Mr L Sabovik, husband, lay representative
Interpreter; Ms S Svienta

Respondent: Ms S Owen, counsel instructed by Amanda Jones of Co-op legal department, Manchester

JUDGMENT

It is the judgment of the tribunal that this claim must be struck out in its entirety under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. It has no reasonable prospect of success and is misconceived.

The amendment application to include claims under Section 15 or Section 20 of the Equality Act 2010 is refused.

REASONS

1 Mrs Sabovikova and her husband work in the Co-operative Warehouse in Thurrock. I have sat before on a preliminary case management hearing of Mr Sabovik's case. Mr Lukas Sabovik has two claims proceeding before this tribunal, and Mrs Anna Sabovikova one.

2 The Saboviks have a 4 year old son and they are expecting another child. They work back to back shifts in order to cover child care.

3 The claimant was off work sick with back pain. She suffers with discopathy and more recently has developed scoliosis. Her discopathy is the main problem - aching discs in the back making her unable to lift heavy weights. It is clearly a real disadvantage in a warehouse situation, which inevitably involves lifting.

4 The claimant returned to work on 8 September with a conditional "may be fit" Med 3 sick certificate. The respondent did not allow her to return to work straight away because they said they did not have light duties for her to carry out. That seems to have been true at the time they said it. If an employer can accommodate conditions (e.g. light duties / phased return to work) set out in a conditional Med 3 fit note, they generally will try to do so. There may, additionally, be a duty under the disability discrimination legislation.

5 On a superficial assessment it seems likely, then as now, that the claimant, who has a congenital back condition, might be judged to be disabled for the purposes of Section 6 of the Equality Act 2010 but that is only half the battle in these tribunal proceedings. (My comments about disability are merely indications. I have not made a detailed assessment of the medical evidence and these are therefore not findings of fact under s 6 of the Equality Act 2010).

6 The respondent did not then let the claimant return to work. Mrs Sabovikova has now brought disability and race discrimination claims to the tribunal.

7 (There was a misconceived claim under Section 64 of the Employment Rights Act 1996, for medical suspension but that is a highly specialised section for situations involving dangerous chemicals, COSHH, and ionising radiation, none of which applies in this case).

8 The respondent held a return to work meeting on Monday 11 September 2017. It was conducted by Mr Artur Povalski. Although he was not the claimant's direct line manager he was in charge of the claimant's return to work. There followed welfare meetings between the claimant and her direct line manager Natalia Poiel.

9 The claimant, herself, at a meeting 2 days later on 13 September stated "I have to take care about my back. I can't do all my job what I have done before. I need to pay more attention when bending. Cannot twist trunk rapidly." Further, "…doctor advised me that cold temperature is contraindicated for me, does not help for my back condition, doctor said [back issue] is because I have been working too hard." The claimant mentioned working in the "sin bin" which is an area where returns from shops or undelivered items are taken back into warehouse stock. However the respondent was concerned that this would still involve lifting. It did not therefore seem a wise move.

10 An employer in such a situation as this has a strong duty of care. The legal reality behind that concept is that an employer is rightly wary of being sued by the employee for personal injuries. This respondent could easily have incurred legal liability for any aggravation of the claimant's back condition. The claimant's back condition may well be degenerative in its own right but what the respondent did not want to do was to accelerate that degeneration by giving the claimant heavy work.

11 The fit note had provided for open-ended amendment of duties without review dates as follows: "patient can provide light duties cannot carry and lift heavy items cannot twist trunk rapidly. Cold temperature contraindicated". Precisely what was meant by "cold" was uncertain then, and still is. There are three types of goods in a warehouse. There are ambient, chilled, and frozen. Clearly frozen is cold but it is not clear how "chilled" was regarded.

12 It seems the respondent acted responsibly by referring the matter to occupational health because the medical situation was unclear. The referral to occupational health stated:

> ….. ""sin bin" control involves PC-based work, handling of cages, some heavy, some light working in cold temperatures which she has been provided with the correct PPE". She also works on ambient picking which include driving manual handling equipment assembly of a row of cages, picking items for delivery between 1 and 20 kilos. She also works on security receipt duties placing items onto shelving at ground level".

The referral asked the occupational health physician to try to explain what "cannot twist trunk rapidly" meant.

13 The subsequent occupational health report dated 27 October 2017 was not optimistic about the prospect of the claimant returning to her previous duties, or in any other way apparently, as she needed to avoid lifting weights in excess of 16 kilos (2.5 stone). We discussed at this hearing that their young son is 4 years old. The claimant states she cannot pick him up. (She also stated she is also expecting another child. This is inevitably not going to help with her back condition).

14 If the claimant was kept off work, in the absence of light duties, the employer was within its rights to treat this as a period of sickness. It is not clear how much sick pay she received but her pay for some 3 months was well below what she would have been earning in her substantive role. Her annual salary is £21,000 she is claiming in the region of £1,500 calculated over three months from early September to early December. That is the basis of the claimant's claim.

15 She is also claiming £40,000 total to include injury to feelings. Ms Owen stated I should find the claim is vexatious because of that figure. I cannot do so. It is so common for inexperienced individuals to claim inflated and unrealistic amounts for injury to feelings. No harm is done or prejudice caused.

16 As a postscript, after these months of difficulty, the parties' story ends well. By an application dated 3 November 2017 the claimant applied to Steve Ravi and Steve Fry expressing an interest in the Warehouse Support Assistant role. She interviewed for that role on 21 November and was successful. She commenced working there on 8 December. It is an administrative role. Occasionally she has to open barriers to a car park, but predominantly it is sedentary screen work, answering telephones, dealing with enquiries. The job attracts exactly the same pay as she was previously earning, so the claimant has no ongoing losses.

17 The claimant brought a written grievance under the Co-op's grievance procedure. There was a meeting with Stephen Fry (the day shift manager) on 5 October. The

claimant's 5- point grievance was not upheld. Mr Fry considered Artur Pavloski had not misused his powers in sending the claimant home. He stated clearly they did not have the roles at the time to transfer her into. (The role she is now in was not available then). The claimant appealed. That was subject to a grievance appeal meeting on 21 December with Ms Janet John the Operations Manager. An outcome letter was sent on 30 January rejecting the grievance appeal, on all 5 points. A third appeal under the contract is currently ongoing she appealed that by a letter of 6 February 2018.

The claim

18 On 7 November the claimant referred the matter for ACAS early conciliation. The conciliation period was 7 November to 7 December 2017. Her ETI claim form was presented to the tribunal on 1 January 2018 and was literally the first claim to be registered in this region this year. In the claim she made it clear she was claiming victimisation because of her husband's claims to the tribunal. Boxes are ticked to state the claimant was claiming disability discrimination and marriage or civil partnership discrimination (which is unusual and odd). The main passage in the claim says:

> "Artur misuse his power sending me home that was an act of victimisation and bossing against me because my husband sue the company to the tribunal and also he found out that I am disabled and I am covered by Equality Act 2010."

It also states:

> … "after two months of my sickness absence during return to work progress I inform team leader Artur Pavolski about my medical condition, medical certificate which was not accepted by team leader, certificate confirmed that I am fit to work with amended duties but Artur Pavolski did not accept it and said I had to continue sickness".

Marriage / civil partnership

19 In box 9.2 which is the box for compensation she claims £40,000 and she reiterates that the company:

> … "treated me badly because my husband complained about the discrimination." Further, "my husband put many grievances 2014, 2015, 2016, 2017 against the company is discrimination, bullying, harassment related to his disability, victimisation started 2015 against me. The Equality Act 2010 makes it unlawful to discriminate unfairly because they are in a marriage or in a civil partnership … "

The claimant is claiming that her being married to a complaining employee is a protected characteristic. This is not what marital status discrimination truly is under section 8 of the Equality Act 2010. It is the married status *per se* which is the protected characteristic, not the fact that one's husband happens to be complaining to a tribunal. The claim is therefore misconceived in the true sense of the word and has to be struck out.

Amendment

20 Because somebody says they are making a claim of discrimination does not mean

that every form of that sort of discrimination for that protected characteristics is part of the tribunal claim. The claim needs to set out in writing in itself what the detail of the alleged discrimination is. If it does not, either actually or inferentially, as here, then a formal amendment is required. The tribunal is always reluctant to take a "pleadings" point particularly against an unrepresented claimant with her partner acting for her. However, the rules are the same for all parties, legally represented or not.

21 I am satisfied on the basis of these passages of the claim form that if a claim was to be brought under section 20 for reasonable adjustments or Section 15 of the Equality Act 2010 they would have to be brought by way of amendment. No application has been made to amend to date. One of the *Selkent* criteria is to see if the application to amend (which inferentially has to be today) would itself be out of time relative to the cause of action. Today it is 26 March. The cause of action ceased on 8 December when the claimant started work as warehouse support assistant.

22 I consider the merits of a putative claim before deciding whether I should allow an amendment. If this were a jurisdictional time-limit point, this is clearly not a continuing act claim because the claimant has been working continuously and successfully in the gate house since 8 December 2017. I would only allow an out of time claim if it was just and equitable under s 123 of the Equality Act 2010. The merits of any claim are relevant to that consideration (see the case of *Hutchison v Westward Television Ltd [1977] IRLR, 69, EAT*). I need to make an assessment of the merits of such a claim can and that should inform the exercise of the discretion to allow a late claim to proceed.

23 I do not consider that an amendment application should succeed where an out of time claim would not in respect of the same cause of action.

Victimisation

24 Victimisation is a misconceived claim. Section 27 of the Equality Act 2010, (to which the claimant clearly alludes in the ETI claim form), is framed by reference to person A and person B. Person A is the discriminator, person B is the person discriminated against. Person B has to be the same person who has done the protected act under s 27 (1)(a) or (b) and is victimised. You cannot have one person being victimised for the protected act of another person, even if it is the claimant's husband. Like marital status above, it is also legally misconceived in the true sense of the word. The victimisation claim is struck out.

S 20 reasonable adjustments, and s 15 Equality Act 2010

25 Claims under Section 15 and Section 20 (which would not be misconceived and would fit the allegations of this case better), nonetheless appear to have no reasonable prospect of success in themselves, based on the merits. Even if they had been allowed as amendments it is very hard to see what else the respondent could have done in this situation. The claimant is not advancing any evidence or argument which comes close to challenging the respondent's main contention about keeping the claimant off work when they had no duties which were safe for her to carry out.

Preliminary Hearing

26 Ms Sabovikova needs to understand that today I have been doing a preliminary hearing about legal points, technical amendments, and prospects of success. I am not deciding the main case on the evidence (for instance looking at a comparator's conditional sick note in this case Aneshka Svienta currently a colleague of the claimant in the gate house). This is a preliminary hearing (although it is one that is fatal for the claimant's claim).

27 I should not have to spell out the difficulties with amendment because I myself listed a two day hearing on 6 and 7 March 2018 which Mr Sabovik attended. That was largely to do with amendments. The same counsel represented the Co-op for that hearing as well.

28 For all the reasons above the claimant's claims are struck out in their entirety.

Employment Judge Prichard

31 May 2018