



EMPLOYMENT TRIBUNALS

Claimant: Miss A Neal

Respondent: Ministry of Defence

HELD AT: Manchester

ON:

1 May 2018

BEFORE: Employment Judge Sharkett

REPRESENTATION:

Claimant: In person

Respondent: Ms R Levene of Counsel

JUDGMENT ON PRELIMINARY HEARING

PRELIMINARY HEARING

Employment Tribunals Rules of Procedure 2013

Rule 53(1)(a)

1. This is a preliminary hearing ordered by Employment Judge Rostant in a case management hearing of 9 February 2018 to consider the following:

- (1) Applications to amend the ET1 and ET3;
- (2) Applications for strike out or deposit orders;
- (3) Applications to strike out as out of time;
- (4) The issue of disability if this remains disputed;

The respondent makes the applications on the basis that the claimant's claims are presented out of time and/ or they have no prospects of success. The respondent also objects to the claimant's application to amend her ET1 to bring a new cause of action not currently pleaded.

2. The respondent is represented by Ms Levene of Counsel, the claimant appeared in person. In preparation for the Hearing the parties have produced a bundle of documents consisting of 425 pages. All references to page numbers in this Judgment are references to pages in the bundle unless otherwise stated.

3. At the beginning of the Hearing Ms Levene, confirmed that the respondent now concedes, that in addition to the diagnoses of Post Traumatic Stress Disorder (PTSD), the arthritis from which the claimant suffers is also a disability for the purpose of s6 of the Equality Act 2010 (the Act).

4. The claimant confirmed her intention to withdraw allegations, **5, 8, 15, 16, 17 and 22**.

5. Having established that the claimant did not intend to give oral evidence and Ms Levene did not seek to put questions to her, I then heard oral submissions from Ms Levene, who also produced a written skeleton argument. I had already advised the claimant that I would adjourn the Hearing at the end of Ms Levene's submissions so that she would have an opportunity to reflect on the same before making submissions of her own. When the Tribunal reconvened, the claimant withdrew allegations. **1, 2, 3, 4, 6, 13, 19 and 20**. The withdrawal of the of the allegations made by the claimant today are recorded in a separate Judgement

6. The allegations set out below are the only remaining allegations contained in the Scott Schedule that require determination by this Tribunal in respect of the respondent's application. I have numbered them as they appear in the claimant's Scott Schedule as that is the way in which they have been referred to by the parties in submissions today.

Allegation 9 – claims under s15 and s26 of the Equality Act 2010 (the Act), and relates to a meeting with the claimant on 21 April 2017.

Allegation 10 – claims under s15 and s26 of the Act and relates to a meeting of 24 April 2017.

Allegation 11 - claims under s15 and s26 of the Act and relates to the same meeting of 24 April 2017 whereby it is alleged the claimant was not given sufficient time to find someone to support her at the meeting.

Allegation 12 – claims under s15 and s26 of the Act that relate to the same meeting of 24 April 2017 where it is alleged that the claimant was subjected to unwanted physical contact by her line manager.

Allegation 14 – claims under s15 and s26 of the Act that relate to 25 April 2017 when the claimant not told of the reason why she was not allowed to attend work and forced to take disability leave.

Allegation 18 – claim under s26 of the Act and relate to an allegation that on 2 June 2017 the respondent contacted the claimant via her home email address to invite her to a capability meeting, notwithstanding the fact that she had been in the office all day.

Allegation 21 – claim under s15 and s26 of the Act that on 7 August 2017 the respondent failed to investigate the claimant's complaint of bullying and harassment.

Allegation 23, - claim under s20 and s15 of the Act in that on 29 August 2017, the respondent chose to dismiss the claimant instead of imposing an alternative sanction under the Managing Unsatisfactory Attendance Policy.

Allegation 24 – claim under s13 and s26 of the Act in that on 22 September 2017, the appeal officer made derogatory comments relating to the claimant's disability.

Allegation 25 – claim under s26 of the Act in that on 22 September 2017 the appeal officer failed to consider the complaints raised by the claimant before upholding the decision to dismiss.

7. In addition I am required to consider the respondent's application in respect of the claim of unfair dismissal which I will turn to first.

8. Miss Levene accepts that the claimant has ticked the box on the ET1 indicating that her claim includes one of unfair dismissal but asks that the Tribunal consider making a deposit order in respect of this claim on the basis that the claim has little prospect of success.

9. In respect of this claim I note that the Respondent relies on the potentially fair reason of capability, in that the claimant had a prolonged record of sickness absence. However, merely being able to show that there was a potentially fair reason for dismissal under s98 of the Employment Rights Act 1996, ('the Act'), does not render a dismissal automatically fair, nor does it result in a claim having little prospect of success. It seems to me that whether the dismissal is fair or unfair is dependent upon the requirements of s98(4) of the Act. That determination will require consideration of the key aspects to a fair dismissal for long term illness or absence, having regard to the requirements of s98(4) and the relevant case law. On that basis it cannot be said that the claim has little or no reasonable prospect of success and I find it would not be appropriate to strike out the claim or make a deposit order on the basis of application made today.

10. I now turn to those claims of unlawful discrimination that the respondent claims are out of time and without merit. These are allegations 9-18. It is the claimant's case that these allegations all form a course of conduct on the part of the respondent and are therefore not out of time. Mr Levine for the respondent submits that these are all one off individual acts which lack merit. Ms Levine submits that it is only if the employer is responsible for an ongoing situation that a continuous course of conduct will be established whereas in this case these are unconnected or isolated incidents. Having considered the evidence before me and the submissions of both parties I reach the conclusion that the acts complained of by the claimant all arise as a result of her absence from work during a relatively narrow time period. There is a clear link between each of the alleged complaints and to a large extent all involve the same members of management. On that basis having had regard to the relevant case law, I am satisfied that the acts complained of are part of a continuing course of conduct which continued up to the date of the termination of the claimant's dismissal and are therefore not out of time.

11. In respect of whether any or all of the allegations should be struck out as having no reasonable prospects of success. The claimant was dismissed because of

her sickness absences from work and the fairness of the same remains to be considered by a Tribunal at a substantive hearing. I have carefully considered the submissions in respect of each of these allegations from both the respondent and the claimant. Having done so I consider that the claimant may have an arguable case and that her claims should be considered on the basis of a Tribunal hearing all the evidence. For this reason I consider it would not be appropriate to strike out the claims or require the claimant to pay a deposit to continue with her claims.

12. In respect of Allegations 21, 24 and 25, these claims are brought in time and I am not persuaded by the respondent's submissions that they are without merit. That conclusion can only be reached by a Tribunal having heard all the evidence. For those reasons I do not consider it appropriate to strike the claims out or require the claimant to pay a deposit to continue with her claims.

13. In respect of allegation 23, the respondent maintains that this is a new allegation which is out of time and has no merit. The claimant was aware that the policy did not allow for relocation or downgrading of staff, and Ms Levene maintains that any attempt on the part of the respondent to relocate or downgrade would go against the policy and would be unreasonable. In respect of the section 15 claim Ms Levene maintains that the actions of the respondent in following the policy was merely upholding standards of attendance at work. The claimant maintains that given the size and organisation her request to move was not unreasonable and would have resolved the attendance issue.

14. In accordance with the principles of **Selkent** I turn first to whether this is a new matter upon which the claimant seeks to rely or whether it is a relabeling of facts already stated in the ET1. In the claimant's ET1 she records the following:

- “(18) On 7 August I submitted an internal complaint under the MOD's harassment and bullying complaints procedure. To date this complaint has not been finalised. The last correspondence I received was on 3 November advising that an independent investigation of the complaints had been commissioned. On 22 August I attended a Manging Unsatisfactory Attendance meeting and received the outcome of this meeting on 29 August informing that I was being dismissed. I appealed the decision on 30 August 2017. I received a letter on 11 September 2017 inviting me to an appeal meeting on 22 September.
- (20) In this meeting the CEO, Mr Andrew Stafford, commented that he might also think that I was not right in the head. He also advised that he would not consider my formal complaint or any of the information contained within it for the purposes of reconsidering the decision to dismiss.
- (21) My absences were caused by severe bullying, harassment and discrimination of the protected characteristic. Had my complaint been investigated within a reasonable timeframe the department could have taken reasonable action in either changing my management chain or move me to a different role, which would have resolved the absence

issue. Therefore I am claiming that I was unfairly dismissed as a result of absence caused by discrimination of a protected characteristic.”

15. Insofar as it being just and equitable to extend time in respect of allegation 23, the claimant maintains that she has not had a lawyer’s training and it was her intention that this was stated in her ET1 and she believed that she had stated this.

16. In reaching my decision on this matter, I am satisfied that the facts relating to this claim are contained within the ET1 and that they are matters that have been known to the respondent throughout. The evidence that will be required to hear this claim will be similar to that needed to establish whether or not the dismissal was fair or unfair as will be attendance of the respondent witness who is likely to give evidence on the dismissal. On balancing the hardship of the parties I find that the balance falls firmly in favour of allowing the amendment as to refuse to do so would cause undue prejudice to the claimant

17. In conclusion the respondent’s applications are refused for the reasons given above.

18. Because of lack of court time on the day of this hearing Ms Levene agreed that the parties would now agree a of issues to be sent to the Tribunal and the Tribunal could then make further case management orders.

Employment Judge Sharkett

Date 6 July 2018
JUDGMENT SENT TO THE PARTIES ON

18 July 2018

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