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EMPLOYMENT TRIBUNALS

Claimant: Miss G Dowokpor
Respondent: London Borough of Waltham Forest
Heard at: East London Hearing Centre
On: 7-9 & 13 November 2018
Before: Employment Judge Ross
Members: Mr T Burrows
Mrs B K Saund

Representation

Claimant: Ms Robertson (Counsel)
Respondent: Michell Springer (Solicitor)

WRITTEN REASONS FOR THE CASE MANAGEMENT DECISION (MADE ON 8 NOVEMBER 2018)

1. This application to adduce further evidence was made after the Claimant closed her case and Mr. Andrews had completed his evidence. It was made on the second day of the hearing at 13:45 today.
2. The application of the Respondent was:
 - 2.1 To adduce further evidence in the form of the diary of Mr. Andrews and recall him to give evidence, particularly an allegation that he was on holiday from 11 September 2017 to about the end of September 2017, and then his first one-to-one with Lorna Lee was on 4 October 2017. We have looked at the diary of Mr. Andrews.
 - 2.2 To adduce further evidence in the form of the electronic diary of Ms. Lee and adduce evidence from Ms. Lee on this.

It was argued that these diaries will show dates and times of meetings and that this is highly relevant.

3. We considered the Overriding Objective at Rule 2, ET Rules of Procedure:

“The Overriding Objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.”

4. Under fairness, we have considered the chronology:

4.1 On 20.4.18, a Claim was presented. A response was filed.

4.2 On 6.6.18, a case management order was made.

4.3 On 16.7.18, a Preliminary Hearing (Closed) took place identifying issues.

4.4 On 22.8.18 Disclosure was due under the case management order.

4.5 On 15 October 2018, there was to be witness statement exchange.

5. It was fundamentally unfair to the Claimant to admit the documents and evidence sought because:

5.1 The timing of the application. This was an attempt to adduce further evidence after close of the Claimant's case and after Mr. Andrews completed his evidence. It would be an opportunity to give Mr. Andrews a second bite of the cherry in terms of the timing issues. The Claimant relies on the alleged inconsistency of the Respondent's case that the decision to terminate was made in mid-September 2017 and the Claimant was not informed until 3 November 17, after her managers were informed of the pregnancy on 9 October 2017.

5.2 In breach of disclosure order, there has been a failure to disclose these documents. Fairness and ensuring the parties are on equal footing is maintained by compliance with orders and rules.

5.3 There is no mention of the matters now referred to in the witness statement of Mr. Andrews. The case management order directed exchange of witness statements.

5.4 There is no mention in the ET3 nor in the evidence of Mr. Andrews of the holidays or meetings now sought to be relied on. Mr. Andrews confirmed in evidence he had assisted in completion of the ET3.

6. We considered whether there would be unfairness to the Respondent in refusing the application:

6.1 It was accepted by the Claimant that the evidence is relevant: but not so relevant that it should be admitted at this late stage.

6.2 Relevance is determined by the pleaded case: there is no mention of holidays in the pleaded case nor in the witness statements, nor of any meeting on 4 October 2017 (between Ms Lee and Mr. Andrews).

- 6.3 There is a mixed effect on the Respondent's case if admitted: Mr. Andrews said he had a meeting with Ms. Lee in following week after email from Rohan Robinson at 8 September 2017, but now it is submitted that he was on holiday then.
 - 6.4 Checking diary of Mr. Andrews, this suggests he was on holiday only from 18 September 2017 to 26 September 2017. So on the face of the diary, this document is of marginal relevance.
 - 6.5 In respect of both the electronic diary evidence of Ms. Lee and Mr. Andrews' hard copy diary, it is accepted that these do not include any minutes of meetings. The relevant factual issue is what was decided by whom and when. Mr. Andrews gave oral evidence about this and was cross-examined on it. Ms. Lee can give oral evidence and be cross-examined on it.
7. Refusing to admit the evidence is proportionate to the complexity and importance of the case. The issues are factual issues, to be determined from oral and documentary evidence that we have.
8. We have taken into account the factors of avoiding unnecessary formality and seeking flexibility.
- 8.1 We decide that refusing this application is necessary in this case to maintain fairness and to maintain necessary formality – so each party can know case it faces and prepare accordingly after disclosure and witness statements.
 - 8.2 Flexibility does not involve endorsing egregious breaches of directions of the Employment Tribunal.
9. Admission of the evidence would delay conclusion of case, which would be unfair to the Claimant but also to Respondent. The case is listed for hearing liability and remedy if necessary. There would be a delay in the form of:
- 9.1 Consideration of the documentary evidence by the Claimant and the Tribunal.
 - 9.2 Recall of witness Mr. Andrews for further examination in chief.
 - 9.3 Cross-examination of Mr. Andrews.
 - 9.4 Additional evidence from Ms. Lee – her electronic diary was not even available so could not be given to Counsel for Claimant at the Tribunal today.
10. It is likely that, if the application were permitted, the Tribunal would not be in a position to conclude all parts of the case (including remedy if necessary) on Tuesday 13 November.

11. For all those reasons, we refuse the application.

Employment Judge Ross

18 January 2019