sb

EMPLOYMENT TRIBUNALS

Claimant ***Respondents***

Ms R Nnabuife **AND** St Bartholomew's Hospital NHS Trust

Heard at: London Central **On**: 13 December 2018
In Chambers 9 January 2019

Before: Employment Judge Glennie
Members:

Representation
For the Claimant: In person
For the Respondent: Ms L Gould, Counsel

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is as follows:

1. The following complaints are struck out on the grounds that they have no reasonable prospect of success.

1.1 The complaint of unlawful deduction from wages.

1.2 To the extent that such a complaint has been made in the original claim form, the complaint of indirect discrimination.

2. The Claimant's application to amend the claim is allowed in respect of allegation 15.4 under direct discrimination and allegation 16.4 under harassment, but not otherwise.

3. The following further case management orders are made:

3.1 The parties shall by 21 February 2019 give mutual disclosure of any further documents that are relevant to the issues in the case, providing a list with copies attached.

3.2 The parties shall by 28 February 2019 agree on the contents of a single joint bundle of documents for use at the hearing. The Respondent is to be responsible for providing the necessary copies of the bundle, sending one copy to the Claimant and bringing 5 copies to the hearing for use by the Tribunal.

3.3 The parties shall by 11 March 2019 exchange signed, written statements from all witnesses to be called at the hearing. The Claimant herself is a witness and should provide a statement. The statements should contain all of each witness's evidence in chief, as further oral evidence will not be allowed without the express permission of the Tribunal. Each party should bring 5 copies of their witnesses' statements to the hearing for use by the Tribunal.

4. A further preliminary hearing by telephone with a time estimate of 30 minutes will take place before an Employment Judge at a time and on a date to be notified to the parties.

REASONS

1. The Claimant presented her claim to the Tribunal on 22 July 2018. In box 8.1 of the claim form the Claimant ticked complaints of discrimination on the

grounds of sex (including equal pay) and for arrears of pay. She also indicated a claim of victimisation, relying on a grievance in relation to her pay. In box 8.2 the Claimant explained that her complaint was that she did and was still doing the same duties as her male comparator IK, and that she was employed on Band 2 Grade and he was employed on Band 3. The Claimant referred to her grievance and the outcome of that. She wrote:

> "My request is that I would like to be put on the same band as my male comparator for doing the same work. I have also lost earnings as a result of not being put on the right band given I had already done five years with the NHS".

And later

> "As I am still undertaking the same duties till date and not getting the same pay, I see this as continued discrimination".

2. The Claimant then referred to victimisation in terms of being cut out of group emails; being told that if she did not undertake work that would otherwise would have been done by IK while he was on leave it would be recorded on her file; and not being sent on a training course as was IK.

3. The factual basis of the Claimant's claim was therefore clear. She complained that she was doing the same duties as a male comparator but was employed on a lower band, and complained that as a result of raising a grievance about this she had suffered unfavourable treatment.

4. The Respondent by its response disputed the claim.

5. Thereafter the Claimant sent further documents elaborating her complaint. On 26 September 2018 the Claimant sent a witness statement of 37 paragraphs. On about 7 October 2018 the Claimant sent an agenda for Case Management which stated that her complaints were of direct sex discrimination; indirect sex discrimination; victimisation; and harassment. There was an email of the same

date in which the Claimant gave some further explanation of this document. Then on 22 October 2018 the Claimant sent further and better particulars of her claim, this document being 21 paragraphs in length.

6. A Preliminary Hearing for Case Management took place on 20 November 2018 before Regional Employment Judge Potter. In the Orders made at that hearing Judge Potter recorded the heads of claim identified by the Claimant and recorded that the Respondent disputed the Claimant's characterisation of the case and said that it was a claim for equal pay and victimisation. Judge Potter listed the present Preliminary Hearing, identifying the issues to be decided in the following terms:

1. Strike out applications by the Respondent in respect of claims of direct and indirect sex discrimination and unlawful deduction from wages.
2. The Claimant's application to amend her claim to add new allegations of sex discrimination, victimisation and harassment.
3. The appropriate duration and listing of the Final Hearing and consequential Case Management Orders.

7. Judge Potter also made case management orders for the purposes of this Preliminary Hearing, including an order for the Respondent to produce an amended list of issues demonstrating how the claims the Claimant seeks to add to the case would add to its scope.

8. The Respondent duly produced such a list, colour coded so as to show the status of the issues that had been identified. On comparing this list with the pleadings and the additional documents provided by the Claimant I was satisfied that the Respondent's amended list fairly represented the various issues arising. The issues that are material to the matters that I have to decide are those shown in red (indicating that the Respondent applied to strike out these issues on the grounds that they have no reasonable prospect of success); and underlined and in red, these being the issues that the Respondent identifies as requiring permission to amend if they are to be included in the claim.

9. At the hearing on 20 November 2018 Judge Potter also directed the Claimant to clarify by 4 December 2018 whether she accepted that her existing main claim should proceed as one of equal pay, this following discussion of the inter-relationship between complaints of equal pay, of discrimination and of unlawful deduction from wages. On 30 November 2018 the Claimant sent an email stating that she wished to pursue claims for equal pay, unlawful deduction from wages, sex discrimination, victimisation and harassment. The Claimant continued in this email as follows:

> "I am doing this because my further and better particulars highlight the fact that I have suffered all the above, as we can see from paragraphs 7 and 8 from my further and better particulars of claim, the issues listed clearly shows allegations of sex discrimination which is wholly separate from the claim of equal pay. It would be unjust for me not to be given the opportunity to pursue these heads of claim when the events clearly happened".

10. Given the above it was not entirely clear to me from this email whether the Claimant was or was not accepting the proposition that her existing main claim should proceed as one of equal pay only, as she referred to allegations of sex discrimination which were wholly separate from the equal pay complaint.

11. For the purposes of the present preliminary hearing the Claimant prepared a witness statement which was 54 paragraphs in length. I noted the following points about the existing main claim in this witness statement.

1. In paragraph 6 the Claimant described her complaint as being one of "unequal banding" i.e. that while she was on Band 2, IK was on Band 3 and they were doing essentially the same work.

2. In paragraph 8 the Claimant said, "IK and myself were treated as equals in respect of the responsibilities of the jobs and both took turns to attend important meetings to do with the administrative side of the clinic".

3. In paragraph 10 the Claimant said "it was on 01/12/2016 that I first brought the issue of unequal pay for doing equal work and I stressed … that I was more experienced; even took on extra duties in the department like scheduling of patients on the clinic list which IK could not do; being he had not worked in the NHS before. I also said … that not putting me on the same pay band constituted sex discrimination as it shows I was being treated less favourably than IK.

4. In paragraph 29 the Claimant said "I was not happy about the Trust not putting me on the same banding with IK for doing equal work and I stress that making me do IK's work seemed unfair; reason being that I had my own work load to contend with.

5. In relation to indirect sex discrimination in paragraph 42 the Claimant said this "… the females on the QE2 Block C and myself are on Band 2, while the males around us – IK and J in Vicary Ward were put on higher bands. As a result of being placed on a Band 2 (and have seen from earlier evidence, that KH would only allow me to do work shadowing in another Band 2 department, leading to career regression)".

12. Ms Gould had prepared a skeleton argument for the purposes of this hearing. I noted that the arguments in that Miss Gould sought to raise went beyond those identified by Judge Potter, in that it was additionally contended that the equal pay complaint should be struck out as having no reasonable prospect of success, as in recent years the Claimant had been paid at least the same as, and recently more than, IK. I decided that this was a new point that had not been listed for determination at this Preliminary Hearing and that the Claimant should have notice of it if it were to be argued and decided. I held that at this hearing I would determine the issues identified by Judge Potter only.

The Respondent's application to strike out the existing complaints of direct and indirect discrimination and of unlawful deduction from wages

13. This application related to issues 7.1 and 7.2 in the Respondent's list with regard to direct discrimination. So far as issues 8 to 13 inclusive in the same list, which concern indirect discrimination, are concerned, Ms Gould submitted that these were not to be found in the original claim form and that the Claimant required permission to amend in order to include these. I found this submission to be correct, but if I am wrong about that, my findings in this regard in relation to the amendment application would be applicable to an application to strike out a complaint of indirect discrimination.

14. In relation to the issues:

1. Issue 7.1 was recorded in the following terms "being paid less money for performing like work to her comparator, IK".

2. Issue 7.2 was recorded as "being placed on a lower pay band or by IK being placed on a higher pay band and consequently being paid less money for performing like work to her comparator, IK".

15. Rule 37 of the Tribunals Rules of Procedure makes the following provision about striking out.

> (1) … a Tribunal may strike out all or part of a claim or response on any of the following grounds –
> (a) That it … has no reasonable prospect of success

16. The test of "no reasonable prospect of success" does not mean that a claim is more likely to fail than to succeed nor, at the other extreme, does it mean that there is absolutely no prospect at all that a claim might succeed. It means that a claim has no reasonable prospect of success. It is not obligatory that a Tribunal strike out a claim that it considers has no reasonable prospect of success; there is a discretion to do so, which discretion must be exercised judicially.

17. I have no doubt that the complaint of unlawful deduction from wages has no reasonable prospect of success. Section 13 of the Employment Rights Act 1996 makes the following provision about the right not to suffer unauthorised deductions.

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) The deduction is required or authorised to be made by virtue of … a relevant provision of the worker's contract.

18. There is no dispute that the Claimant was paid at all times according to the terms of her contract. The complaint under s.13 therefore cannot succeed as the "deduction" (meaning the alleged underpayment) was authorised by the Claimant's contract. There would be no purpose in allowing this head of claim to go forward and I find that I should exercise the discretion to strike it out.

19. So far as the allegations of direct (and if arising at this stage) indirect discrimination are concerned, Ms Gould's submission was essentially that the complaint about pay or banding clearly fell within the equal pay provisions of the Equality Act 2010, and that those provisions created a separate regime to that prohibiting discrimination (including on grounds of sex) in Chapters I and II of the Act.

20. Section 66 of the Equality Act provides as follows about a sex equality clause:

> (1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
>
> (2) A sex equality clause is a provision that has the following effects –
>
> (a) If a term of A's is less favourable to A then a corresponding term of B's is to B, A's term is modified so as not to be less favourable;
>
> (b) If A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.

21. The Equality Act contains the following further provisions:

70 Exclusion of sex discrimination provision

(1) The relevant sex discrimination provision has no effect in relation to a term of A's that –
  (a) Is modified by, or included by virtue of, a sex equality clause or rule …
(2) Neither of the following is sex discrimination for the purposes of the relevant sex discrimination provision –
  (a) Inclusion in A's terms of a term that is less favourable as referred to in s.66(2)(a);
  (b) The failure to include in A's terms a corresponding term as referred to in s.66(2)(b).

71 Sex discrimination in relation to contractual pay

(1) This section applies in relation to a term of a person's work –
  (a) That relates to pay, but
  (b) In relation to which a sex equality clause or rule has no effect.
(2) The relevant sex discrimination provision (as defined by s.70) has no effect in relation to the term except in so far as treatment of the person amounts to a contravention of the provision by virtue of s.13 or 14.

22. I find that this element of the claim is most obviously put under the equal pay legislation, for the reasons advanced by Ms Gould. The complaint is on its face about equal pay, and it relates to the contractual pay received by the Claimant.

23. It seems to me that, put as a complaint of direct discrimination because of sex, this complaint may have little, or even no reasonable prospect of success. I put my finding in that way because, ultimately, I have concluded that it is not necessary for me to decide that question. This is because, even if I were to find that there is no reasonable prospect of success, I would not as a matter of

exercise of the discretion under rule 37 strike out that complaint, for the following reasons:

23.1 I am reluctant to oblige the Claimant to argue her case in a particular way.

23.2 The factual basis of the claim remains the same whether it is put as a complaint of equal pay or of direct discrimination.

23.3 Allowing the claim to be put in this way would not add substantially to the hearing or the burden of preparation for it. The Respondent's evidence would remain the same. There would be an additional legal argument, but this would not greatly increase the length of the hearing.

23.4 Section 71(2) of the Equality Act was not discussed at the preliminary hearing: it is at least possible that an argument may be available to the Claimant to the effect that this allows for a complaint of direct discrimination.

24. I have therefore decided not to strike out the complaint of direct discrimination. The Claimant would, however, be well advised to engage with the issues as to equal pay. As I have said, this is clearly the most natural formulation of her complaints. It may well prove to be the case that the Respondent's argument is upheld and that a complaint of direct discrimination is found not to be viable.

The Claimant's amendment application

25. The principles to be applied in considering an application to amend the claim were set out in the well-known case of **Selkent Bus Company v Moore [1996] IRLR 661**. Giving the judgment of the Employment Appeal Tribunal, Mummery J stated that the paramount considerations were the relative injustice and hardship involved in refusing or granting an amendment. The Tribunal

should consider all of the circumstances of the case, the following of which are likely to be relevant:

(1) The nature of the amendment
(2) The applicability of time limits
(3) The timing and manner of the application

26. The complaints of direct discrimination that the Claimant seeks to add by amendment are shown at issues 7.4, 7.5, 7.7. 7.8 and 7.9. All of these, with the possible exception of issue 7.8, were matters that had already occurred by the time that the Claimant presented her claim to the Tribunal and would all be out of time under the primary time limit if presented on 26 September 2018, when the application was made.

27. I have said that issue 7.8 is a possible exception to this, but this is only in the sense that this is a continuing failure said to have operated between 11 January 2017 and some point in November 2018, i.e. after the claim had been presented.

28. Section 123 of the Equality Act includes the following provisions about time limits:

(3) For the purposes of this section –
  (a) …
  (b) Failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –
  (a) When P does an act inconsistent with doing it, or
  (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

29. Ms Gould submitted that the anticipated regime was one of appraisals every six months and that, allowing some margin for error, the period within

which the Respondent might reasonably have been expected to carry out an appraisal would have expired at some time in the second half of 2017. Even if I were to assume (in the Claimant's favour) that the appraisals might have been held annually, the same reasoning would lead to the relevant period expiring at some point in the first half of 2018. This would mean that issue 7.8 was also something that had crystallised by the time the Claimant presented her claim to the Tribunal and would be out of time if presented on 26 September 2018.

30. Allowing these amendments would expand the factual issues in the case beyond those originally identified concerning pay and banding. Although the Respondent did not produce any evidence of specific prejudice, I am satisfied that the general effect of the passage of time on individuals' ability to recollect matters would be likely to have a prejudicial effect if out of time complaints were to be allowed in by amendment at this stage. In general terms, the degree of prejudice would be greater or lesser depending on the age of the particular allegations. The scope of the claim and therefore the length of the hearing would be increased.

31. There would of course be prejudice to the Claimant if I refuse the amendment because she would not be able to bring these particular complaints. I find that this prejudice is mitigated by the fact that her main claim would still proceed. The timing of the application to amend is also relevant. The Claimant could have included all of these complaints in the original claim form. In this connection, the Claimant said that she had not wanted to put too much in the ET1 because she feared that the Respondents would try to "shift the goal posts and cover their tracks". She said that she wanted to reserve everything for her witness statement.

32. The Claimant also said that she was still working for the Respondent and did not at the time want to make her position any worse. This explanation did not in my judgment assist the Claimant's position. She made a choice not to include these matters in the original claim form, and subsequently decided that she wished to add them. There is no question of the Claimant having discovered new facts or having been given advice that changed her view of the case. Her

position seems to be that she took a decision not to include some matters when she presented her claim, and has now decided that she wishes to include them after all.

33. In those circumstances I find that the prejudice to the Respondent in allowing the amendment would outweigh the prejudice to the Claimant in not allowing it.

34. In relation to indirect discrimination issue 8 was recorded in the following terms "the Claimant (it appears) seeks to rely on the following PCP; the Respondent having in place a pay band provision from 05/05/2015 (it is understood this may mean placing IK on a higher pay band than C)". Issues 9-13 then set out the questions that would arise in the event that that PCP were established.

35. I find that the proposed complaint of indirect discrimination has no reasonable prospect of success. I accept Ms Gould's submission that the Claimant's complaint about pay and banding is a matter that is personal to her as compared to IK. The claim form does not assert a complaint that the pay scales were themselves inherently discriminatory. As the Respondent's drafting of the list of issues reflects, it is difficult to discern the provision criterion or practice (PCP), which is essential to an indirect discrimination claim, on which the Claimant could rely. I cannot see how the operation of a system of pay bands would in itself be indirectly discriminatory. The complaint is about a comparison of the Claimant's position with that of IK.

36. I agree with Ms Gould's further submission that it would not be helpful to the parties or to the Tribunal to allow by way of amendment a further formulation of the complaint which does not realistically reflect the nature of the complaint itself and which cannot add anything to the Claimant's prospects of success. I do not therefore allow the amendment to complain of indirect discrimination.

37. My reasoning would equally lead me to strike out a complaint of indirect discrimination in these terms if, contrary to what I have decided above, this has already been made in the original claim form.

38. The complaints of victimisation which require permission to amend in order to be included in the claim are at issues 15.4 and 15.7 to 5.10. Issue 15.4 appears to overlap with, or to be an elaboration of, issue 15.1. As such I consider that there is little, if any, prejudice to the Respondent in allowing the amendment, and that it would not add significantly to the time taken out the Hearing. I therefore give permission for that amendment to be made.

39. Issues 15.7, 15.8 and 15.9 concern the same factual allegations as issues 7.7, 7.8 and 7.9 respectively. Therefore, for the same reasons as given in relation to those issues, I refuse the application to amend.

40. Issue 15.10 concerns delay in holding a grievance hearing in early 2017. This could have been included in the original claim form but was not and would be out of time if presented now. It would add an issue which goes beyond the questions of pay and banding. For the reasons that I have already given in relation to the complaints of direct discrimination I do not allow this amendment.

41. With regard to the proposed complaints of harassment, issues 16.1, 16.2 and 16.3 all pre date the presentation of the claim form and could have been included if the Claimant chose to do so. They would all be out of time if presented now. They all concern factual matters which extend beyond the issues as to pay and banding. Therefore, for the reasons I have already given in relation to direct discrimination, I do not allow these amendments.

42. Issue 16.4 falls in to a different category, being a complaint that Rebecca Keefe failed to respond to the Claimant within the time indicated, namely four to six weeks from around 12 July 2018. The Claimant complains that as at 22 October 2018 she had not received a response. Arguably this failure was ongoing at the time the Claimant presented her claim, and so would not be subject to the same point or at least not in such strong terms as to the failure of the Claimant to include it in the original claim.

43. I take Ms Gould's point that there is no obvious reason why this failure to respond within the time indicated should be related to the Claimant's sex. It is, however, a fairly short and self-contained point and there should not be any great

prejudice to the Respondent in dealing with it. On balance therefore, I allow this amendment.

44. I have made further case management orders as set out above. These have been made without hearing the parties on them, and are therefore open to variation if necessary. The parties may agree on variations without involving the Tribunal so long as these do not affect the date for the hearing.

45. A further preliminary hearing by telephone for case management will take place on a date to be notified to the parties. The main hearing is currently listed for 3 days commencing on 25 March 2019: if it is not feasible to retain this listing, the parties should be ready to discuss alternative dates. Although I originally indicated that the telephone hearing should be before me, I have directed that it may be heard by any Employment Judge, as I am shortly to begin a period of several weeks' absence from the Tribunal.

…….
Employment Judge Glennie

Dated:. 12 February 2019

Judgment and Reasons sent to the parties on:

12 February 2019

…….....
For the Tribunal Office