EMPLOYMENT TRIBUNALS

Claimant: Mr S Zerehannes

Respondent: Asda Stores Limited

PRELIMINARY HEARING

Heard at: Nottingham (in public) **On:** 28 January 2019

Before: Employment Judge Camp (sitting alone)

Appearances
For the claimant: Dr R Ibakakombo, lay representative
For the respondent: Mr A MacMillan, counsel

REASONS

1. These are the written version of the Reasons given orally at the hearing for: refusing the claimant's amendment application; making a deposit order. Written reasons were requested by the claimant's representative at the hearing. The two parts of these Reasons were given at different points during the hearing and not at the same time, one straight after the other.

Amendment

2. I am dealing now with the Claimant's amendment application to add a complaint under section 80H of the Employment Rights Act 1996.

3. That application appears originally to have been raised as a possibility not by the claimant but by Employment Judge Britton at the previous preliminary hearing which took place on 25 September 2018. In other words, it was the Judge's idea. That doesn't make it a bad or a good thing. Its significance is that the earliest date at which one could say this application surfaced was 25 September 2018. Employment Judge Britton effectively suggested to the claimant that he should decide whether or not he wanted to make a claim under section 80H and that if he decided he did, he needed to put one forward. The claimant eventually did so in the Scott schedule that Judge Britton ordered him to provide, submitted around a month after the hearing.

4. The date on the Scott schedule (which may not be the date when it was actually submitted), which I take to be the date of the amendment application itself, is 26

October 2018. The application is set out at internal pages 125 to 126 of that Scott schedule document and I refer to what the claimant says there.

5. Before me, Dr Ibakakombo, who represented the claimant, submits that the application is really a relabelling of facts that are already there, that there would be no hardship to the respondent's side by allowing the amendment because the evidence that would have to be given would be exactly the same, and that the proposed section 80H claim relates to harm being done to the claimant that is continuing.

6. In deciding whether or not to allow an amendment, I obviously have in mind the well-known Selkent guidance. What I am actually applying, though, is the overriding objective, but I don't see any conflict between the Selkent guidance and the overriding objective. I need to take all factors into account – all relevant circumstances. A particularly important, but not necessarily determinative, matter is time limits.

7. There is a relatively recent decision on whether, if the tribunal allows an amendment, time 'relates back', as it were, so that if I were to allow an amendment that would effectively mean that the section 80H claim which I have permitted the claimant to add by way of amendment would be deemed to have been presented at the time the original claim was presented. That decision of the EAT – Galilee v The Commissioner of Police of The Metropolis [2017] UKEAT 0207_16_2211 – was to the effect that there is no 'relation back'. I happen to think that decision is wrong and there is a question mark as to whether or not it is binding on me because it may be *per incuriam* and contrary to other authority. But I make my decision on a neutral basis so far as concerns whether it is right and/or binding on me. In other words, my decision would be the same either way. What I am looking at is time limits, amongst other things, and time limits are in any event important, even if they are not determinative.

8. The claim is, then, about a flexible working request of a kind and the allegation in the claim form and the allegations which have been added by way of amendment permitted by Employment Judge Britton all relate to that flexible working request. Essentially, the claimant's case is that he applied for flexible working in order to be able to accommodate his wife's disability; that the application was not granted and was dealt with badly; and it not being granted and being dealt with badly, including the appeal against it and so on, are acts of, variously, direct race discrimination, direct disability discrimination, and, potentially, victimisation as well, at least in relation to the later acts.

9. Is the proposed section 80H claim just a relabelling? I don't think it is, because I think the claimant misunderstands what the relevant sections of the Employment Rights Act 1996 ("ERA") are all about.

10. There isn't actually any appellate authority on this that I am aware of, but the relevant provisions of the ERA were changed in accordance with the Children and Families Act of 2014 and there were some flexible working regulations introduced as well. There were various reasons for those changes and new provisions. One of them was to try and make things a little bit simpler. What we have been left with is section 80G(1)(a), which states: "*An employer to whom an application under section 80F is made shall deal with the application in a*

reasonable manner". A debate which I have had many times during hearings is what dealing "*with an application in a reasonable manner*" means and whether it goes to the substance or is merely about procedural matters. My present view on that is that it does not mean "*shall deal with the application reasonably*". I emphasise the word, "*manner*". In other words, it is geared, if you like, to the way in which the application is dealt with rather than the merits of dealing with the application. So it is not, "is the employer's decision reasonable?", because if that's what it meant, that is what it would say.

11. This application to amend is to make a claim under sections 80G(1)(a) / 80H based on the request for flexible working not having been dealt with reasonably, rather than it not be dealt with in a reasonable manner. If it is were altered so as to as to be a true application under those sections and deal with procedural matters, the problem would then be that the complaint being added would be quite different from what is already in the claim. It would not, in other words, just be a relabelling.

12. Because it is not just a relabelling exercise, time limits become much more important than they would otherwise be. I start with when time limits would run from. In accordance with section 80G(1)(b), the decision period applicable to an employee's request under section 80F is the period of 3 months beginning with the date on which the application is made, or such longer period as may be agreed by the employer and the employee. That is, in turn, referred to in section 80H, the relevant dates being the date the employer notifies the employee of the employer's decision or, if the decision period applicable to the application under section 80G(1)(b) comes to an end without the employer notifying the employee of the employer's decision, the end of the decision period.

13. There are, then, two possible limitation periods there. In this case, on the facts, I think the true limitation period would have to be 3 months from when the original application was made. If we assume that the application is a valid application under section 80F, something I will come back to, the application was made on 29 April 2017. So the time limit would run from 28 July 2017. It isn't suggested by the claimant or on his behalf that there was any agreement to extend the period. Indeed, one of the claimant's complaints is that the application was not dealt with properly and in time. To the extent it was dealt with, it was dealt with late but there was no agreement with the claimant or his representative to this.

14. However let us assume for present purposes that time actually runs from the decision date. Again there is a question mark over that, because I can't actually see a formal decision being made anywhere. There is no bit of paper. But it seems to me the latest date it can have been made is 16 September 2017, which is the date of a meeting that was held with the claimant and his representative. This was the day before the claimant appealed against the decision, referring in his appeal to a decision of the fourteenth. So let's say, being as generous to the claimant as I possibly can, that time runs from 16 September.

15. The claimant went through early conciliation from 12 December 2017 to 9 January 2018, so the latest date within which the claimant could have made this flexible working claim without an extension of time, if it had been a freestanding

claim, would have been 8 February 2018. In fact, as I have already mentioned the application is first mentioned at all on 25 September 2018 and isn't actually made until the back end of October 2018. So if we are looking at time limits it is very significantly out of time. It is also a "*not reasonably practicable*" time limit. Given that the claimant mentioned in his claim form section 80F, albeit just as background, there is no discernible reason why it was not or might not have been reasonably practicable for him to present this claim at the same time as he presented his original claim form. Therefore it would be very significantly out of time were it being presented as a freestanding claim.

16. If there is 'relation back' and that recent decision of the EAT is wrong then I would effectively be destroying a valid defence that the respondent would have to limitation were I to permit the amendment.

17. If there is no relation back, what would be the point in allowing the claimant to amend in order to bring a claim which is doomed to failure on limitation grounds?

18. Either way, it seems to me that limitation, in the particular circumstances of this case is by itself determinative of this application. I cannot see any good reason why I should allow a claim which is manifestly out of time to proceed by way of amendment and in those circumstances I decline the amendment application.

19. I should add another thing – the thing I said I would go back to. It seems to me that there was actually no request under section 80F in the first place. The thing which is relied on by the claimant as the application under ERA section 80F is a letter and an "*informal*" request form, which appear at pages 217 to 219 of the bundle. I refer to them.

20. First, section 80F requires an application to state that it is such an application.

    20.1 I think it perhaps needn't necessarily say, "This is an application for flexible working under section 80F", but it must say something which clearly indicates that it is a formal flexible working application and not merely an informal one, because one can make any number of informal applications for flexible working in some way, shape or form, but if it is a statutory application under the ERA you can only make one per year. There are various other significant consequences of something being a statutory application, and various hurdles which have to be gone through, and so on and so forth. This is not a merely technical detail. It's important because it affects the rights and duties of the claimant and the respondent whether or not it is actually a formal application.

    20.2 These documents relied on by the claimant don't tick that box. They don't state that it is an application and they don't say anything that indicates that it is such an application without actually referring specifically to the section.

21. The second requirement is they must specify the change applied for and the date on which it is proposed the change should be affected. The claimant's request just about states the change applied for, although not very clearly, but doesn't state what date it's to be effective from.

22. The third 'box' that has to be 'ticked' in accordance with section 80F(2) is that the application must explain what effect, if any, the employee thinks making the

change applied for would have on his employer and how in his opinion any such effect might be dealt with. Again, that isn't there at all.

23. It seems to me that this amendment application, if I were to allow it, would result in a claim doomed to failure because there was no application under ERA section 80F and it would be out of time. What would be the point in my exercising my discretion to allow the claimant to bring a claim which he is never going to win?

24. For those reasons, in all the circumstances, I refuse the claimant's application to amend.

Deposit order

25. In terms of the relevant law, I take into account, in particular, paragraph 24, part of Lord Steyn's speech, of the House of Lords' decision in Anynanwu v Southbank Student Union [2001] ICR 391 and paragraphs 29 to 32 of the Court of Appeal's decision in North Glamorgan NHS Trust v Ezcias [2007] EWCA Civ 330. When assessing whether a claim has "*no reasonable prospects of success*", the test to be applied is whether there is no significant chance of the trial tribunal, properly directing itself in law, deciding the claim in the claimant's favour. Subject to one proviso, in applying this test I must assume that the facts are as alleged by the claimant. The one proviso or qualification is that I do not make that assumption in relation to any allegation of fact made by the claimant so implausible that I think there is no significant chance of any tribunal, properly directing itself, accepting the allegation as true.

26. The law as to the meaning of "*little reasonable prospects of success*" in rule 39, which relates to deposit orders, is not as clear as perhaps it should be, but my understanding of the test I have to apply is that it is the same as that set out above in relation to "*no reasonable prospects of success*" but with the word "little" replacing the word "no" in the phrase "*no significant chance*".

27. In terms of relevant discrimination law I note first the wording of the relevant sections of the Equality Act 2010 ("EQA"), in particular sections 13 and 23. In terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. I also note the contents of paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

28. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EqA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which I adopt. One is looking, first, for "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination has taken place. Although the threshold to cross before the burden of proof is reversed is a relatively low one – "*facts from which the court* could *decide*" – unexplained or inadequately explained unreasonable conduct and/or a

difference in treatment and a difference in status[1] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

29. The claim I am looking at is an 'associative' disability discrimination claim. There is, of course, no such thing as "associative discrimination" in the EQA. In order for there to be associative discrimination of any kind what one has to do is to bring the claim as a direct discrimination claim. (Arguably, it could also be a harassment claim but we aren't concerned with that here).

30. Direct discrimination is less favourable treatment because of a protected characteristic, in this case disability. A direct discrimination claim can be an associative discrimination claim by making the allegation one that there has been less favourable treatment because of a disability, rather than because of the claimant's disability. In this case, the disability in question is the claimant's wife's disability. The claimant's wife's disability is asthma and the respondent has accepted that she is and was at all relevant times a disabled person because of asthma.

31. The claim relates to a (probably informal) flexible working application that the claimant made some time ago, in April 2017. Essentially, the claim is that it was discrimination to refuse that application and it was also discrimination to fail to deal with it and to reject the appeal against the decision refusing it. There is a long list of claims, but they all boil down to, "the respondent should not have refused this application for flexible working and it should have dealt with the applications and any appeal against it differently from the way in which the respondent did".

32. The claimant's case is that the reason why his flexible working application was denied, whereas others weren't or wouldn't have been, was because of his wife's disability. He was making his application in the context of needing to look after his children at weekends (his application was to work fewer weekends than he was obliged to do under his then existing rota) because his wife could not do so, or had difficulties doing so, by herself because of her disability. He has to be alleging that if he had made the application for some other reason, for example his wife worked at weekends, or his wife had some different disability, or his wife had caring responsibilities at weekends, then it was significantly more likely to have been allowed; and that it was, particularly, his wife's disability that was the reason for the respondent's treatment of him.

33. It is often said, and rightly so, that everyone is prejudiced; everyone has prejudices. For example, there is a cliché, also no doubt true, that everyone is

[1] i.e. the claimant can point to someone in a similar situation who was treated more favourably and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

racist and sexist (and so on) to a certain extent. I am not, though, sure that that really could be said about a prejudice against people who have asthma or people who are married to people who have asthma. That would be rather an idiosyncratic prejudice to have, but that is the prejudice which the claimant is alleging against the respondent – in fact, against a number of people working for the respondent and not just one individual.

34. To explain the evidence from which the claimant will be seeking to infer that, in fact, unusually, in this case a number of people at the respondent were prejudiced against the claimant because of his wife's asthma, the claimant has provided some information in a form of Scott schedule. This is the only information we have about this. The Scott schedule has a column for "*Reason why claimant says it is race/disability discrimination*". (There is also a race discrimination claim which we are not concerned with at the moment). What is put in there in every instance is "*No explanation was given as to whether the following people*" – and then he lists a number of people's request to care for someone (a disabled wife/husband or children) – "… *the needs of the flexible work for the people above was higher than the claimant's needs to take care of his disabled wife*". That's it.

35. What is stated is slightly peculiar in and of itself. Another of the columns in the Scott schedule is supposed to be any comparator relied on. Unlike the claim for race discrimination – which is relevant to this extent – the claimant is not relying on those individuals who are named in the column for "*Reason why claimant says it is race/disability discrimination*" as comparators.

36. The claimant relies purely on hypothetical comparators in relation to disability discrimination. The hypothetical comparator is described in the following way in the Scott schedule: "*Claimant comparison his case with colleagues in Asda with a disabled or long term sickness member of the family such as wife or husband who has been in fact granted flexible working*". That hypothetical comparator shows that the claimant's case is specifically focused on asthma, i.e. it isn't even the claimant's case, as set out in the Scott schedule, that the respondent is generally prejudiced against people wanting flexible working in order to accommodate caring responsibilities directly or indirectly resulting from someone's disability. Instead, the alleged prejudice is specifically against someone who is married to someone who has asthma.

37. For reasons which I simply cannot imagine a number of individuals at this particular warehouse of Asda's – it is alleged – dislike people who have asthma and/or people who are married to people who have asthma, as opposed to other conditions. This is not a prejudice I have ever encountered or heard of. All prejudices are irrational, but that would be a particularly peculiarly irrational one and so it would really require something quite special to generate a prima facie case for the burden of proof to reverse pursuant to section 136 of the Equality Act 2010 at any hearing.

38. What is there that might reverse the burden of proof? The answer to that is: nothing. If I take the claimant's case to be as set out in the Scott schedule, although when explaining why it is disability discrimination, he refers to other people's flexible working applications being granted and no good reason being

given for why they were granted (and his wasn't), if he is not relying on those people as comparators – and he isn't in relation to disability discrimination – then those other people's cases are irrelevant.

39. If the claimant was saying they were comparators, one possibly could argue that the lack of an explanation (and so on) was something to be relied on in relation to EQA section 136. It probably wouldn't trigger that section, but he is not even saying that. He is saying, "These aren't valid comparators; I am relying on a hypothetical comparator". Therefore, what happened to people who aren't his comparators is neither here nor there.

40. Because I have to put the claimant's case at its reasonable highest, I shall assume that actually he is saying they are comparators. Are they valid comparators? I have my doubts.

41. The claimant has limited English and doesn't otherwise speak the same language as his representative and is going to need an interpreter at the final hearing. (I checked with his representative whether we could go ahead with this hearing without an interpreter and he said that we could and so I have done so). I am concerned that language difficulties between the claimant and his representative mean that there may have been miscommunication and misunderstanding there. Perhaps more to the point, it seems to me inherently highly unlikely that all of these people who are named – and there are maybe 9 or 10 names given – can possibly be valid comparators in accordance with EQA section 23. To be valid comparators they would have to be people who made comparable flexible working applications – not just any flexible working application, but a flexible working application to reduce weekend working like the claimant's – and that they were not making that application because of the need to look after children because of their partner's asthma-related difficulties.

42. Again, let's be generous to the claimant. Let's assume that notwithstanding what is put in the Scott schedule, in fact this is a claim made on the basis that people's flexible working application would have been granted had it been for something that wasn't a long term health condition like asthma. It is very unclear to me, to say the least, that these people are valid comparators even if I stretch the claimant's pleaded case to this extent – beyond breaking point.

43. More importantly still, even if there are one or two valid comparators – and it seems improbable – we would still not be looking at something from which an inference of discrimination could be drawn, because all there would be was a difference of treatment and a difference of protective characteristic. In other words, the tribunal at trial would be drawing a comparison between people whose partners didn't have a long term health condition and the claimant whose partner did. That they were treated differently would not be enough, in accordance with the case law I have referred to.

44. There is a logical reason why it's not enough that sometimes people don't appreciate. I tried to illustrate it in submissions by discussing an age discrimination claim. Everyone has protected characteristics and at least one protected characteristic of everyone is different, namely age. If it were enough for an inference of discrimination to be drawn for there to be a difference in treatment and a difference in protected characteristic then every time anyone

was treated differently from anyone else in the work place they would have a prima facie age discrimination claim. They don't and they don't on authority and the reason is that there has to be more; there has to be more as a matter of logic and a matter of law than a difference of treatment and a protected status in order for the burden of proof to reverse.

45. I checked with the claimant's representative during submissions whether there was anything else and he did not suggest that there was. The claimant is purely relying on a difference of treatment and a difference in status.

46. If that is all there is then the claim is bound to fail, it seems to me.

47. In this case we have two factors pointing against the claimant's chances of succeeding in this disability discrimination claim. One of them would also apply to the victimisation claim and, to an extent, to the race discrimination claim, but they are not before me. I do record, though, that I have concerns about the viability of those other claims as well.

48. The two factors that apply in this case are:

    48.1 first, the inherent unlikelihood of there being this idiosyncratic prejudice against asthmatics and/or those married to them. The claimant will have to try and persuade the tribunal at trial that something which is inherently very unlikely is actually what happened. The claimant starts at least one step back from the starting line, as it were;

    48.2 you then add to that the question, "what material will the claimant have from which the tribunal could draw an inference that discrimination had taken place?" and the answer, "nothing" (on the claimant's pleaded case) or, at best, potentially (if the pleadings are inaccurate), "a difference of treatment and a difference of status", which is not enough.

49. What you are left with is a disability discrimination claim which I think has negligible chances of success. I can see the respondent thinking that that ought to mean that I strike out the claimant's case. But I am not going to do that. I have umm-ed and ah-ed about this, but I am obliged to err on the side of caution. (There is plenty of legal authority saying I am bound to do that). I am by the narrowest of margins not satisfied by the respondent that this particular set of complaints – this claim of associative disability discrimination – has no reasonable prospects of success.

50. But the respondent has definitely established to my satisfaction that it has at best little reasonable prospect of success. Accordingly, subject to any submissions as to the amount of the deposit order and any information the claimant wishes to provide about his financial means, I am proposing to make one or more deposit orders in relation to this claim.

[Further submissions were then made and some information about the claimant's means was provided]

51. Further to my decision that in principle I thought a deposit order should be made, I have now had submissions on how much and how many deposit orders should be made.

52. The original suggestion made by respondent's counsel was that there should be one deposit order for each of the claimant's complaints of disability discrimination. I don't accept that submission and I think ultimately respondent's counsel has back-tracked from that a little bit.

53. In another case it might be appropriate to make separate deposit orders, but the advantage in principle of making separate deposit orders for separate complaints is that the claimant could win on one and lose on another, and potentially the deposit orders would still 'bite'. In this case, the reason why I am ordering one and not more deposit orders is that I don't think the claimant will be able to establish a prima facie case of discrimination in relation to any of his complaints. I do not think there is any evidence or will be any evidence from which an inference of discrimination can be drawn. If the claimant overcomes that hurdle, whether he wins or loses the claim, no deposit orders will bite. Equally, if he doesn't get over that hurdle, then all deposit orders (if I made more than one) would bite. I cannot envisage a scenario in which the claimant gets over the deposit order hurdle at the final hearing in relation to one disability discrimination complaint but not in relation to another. Either he's going to establish a prima facie case of discrimination or he isn't. Making one deposit order therefore seems to me to be appropriate.

54. Turning to the amount of the deposit order, respondent's counsel has understandably asked for the maximum amount. The suggested figure that has been put forward by Dr Ibakakombo on the claimant's behalf is £500.

55. It appears the claimant currently has savings of £4,000. He also has some equity in a property. He bought the property for £157,000 last year and the mortgage was £131,000 so there is £26,000 at least in that property, albeit it might be quite difficult to get at that equity in practice.

56. The claimant has effectively taken a break from working for Asda for a bit. That may be subject to negotiation, but in any event he is working in a self-employed capacity, and has been since the end of November, earning £500-£600 a week. He has outgoings. I accept that things are tight, although he has hasn't suggested to me that he has no money to spare at the end of each week once his essentials have been paid. He has not been in receipt of any benefits, presumably because there has been no basis for him receiving benefits. He has also received some payments from the respondent for, I think, accrued holiday pay and backdated sick pay, although those are probably relatively small amounts.

57. I understand the claimant has plans for his savings. People generally do have plans for their savings. He may have to change those plans if I order a deposit order of more than £500. When I asked Dr Ibakakombo why it should only be £500 and not £1,000, he said the claimant can "*easily*" pay that amount [£500]. If the claimant can easily pay the amount then it's not enough for a deposit order. The point of a deposit order is two-fold. The first purpose of a deposit order is to make the claimant think twice about whether or not he or she wishes to pursue their claim, in circumstances where an Employment Judge who has no axe to grind (in this case me) has decided that that claim is very unlikely to succeed. It is not in anyone's own interests to carry on with a claim if they are going to lose

at the end of the day and a deposit order really needs to be enough to make them think about that.

58. The second purpose is, of course, effectively to change the position on costs from what it usually is and put the claimant at risk on costs and make him think twice about carrying on that way.

59. If the claimant is just thinking, "I can easily afford to pay this amount of money, so that's the amount of money I want to pay", that is not the right approach and that would not serve the purpose of a deposit order.

60. I see no good reason, given the information I have been provided with about the claimant's financial means, why it shouldn't be the maximum amount of £1,000. He has £4,000 in savings and has a choice. Either he uses £1,000 out of those £4,000 savings to pay a deposit and carry on with a claim which I think he is almost bound to lose, or he decides to let that claim go and keep his £1,000 to do with whatever he wants to. That's the choice which I am presenting him with. I am making a deposit order in the sum of £1,000.

Employment Judge Camp

25 March 2019

Sent to the parties on:

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For the Tribunal:

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