EMPLOYMENT TRIBUNALS

Claimants: **Mr Kemp and Mr Nicholls**

Respondent: **Birmingham City Council**

Heard at: **Birmingham Employment Tribunal in private and by telephone**

On: **2020**

Before: **Employment Judge Cookson**

Representation

Claimants: Both in person
Respondent: Ms Hodgetts (counsel)

RESERVED DECISION ON APPLICATION TO VARY TRIBUNAL ORDER

The decision of the Tribunal is that:

1. the order made by Employment Judge Lloyd on 12 February 2020 should be set aside. The cases of Mr Kemp in proceedings 1392217/2019 and Mr Nicholls in proceedings 1303694/2019 should not be heard together. However they should be heard consecutively by the same employment tribunal;
2. the final hearing of Mr Nicholls claim in October 2020 is adjourned; and
3. both of these cases should be listed for a joint case management hearing, to be conducted virtually if possible, or as determined by the tribunal, to consider appropriate case management and to list these cases for final hearing.

REASONS

The issues

1. Mr Nicholls and Mr Kemp have both brought claims against Birmingham City Council. Both are still employed, and both bring complaints of disability discrimination for failing to make reasonable adjustments and claim that they have been subjected to unlawful detriments for making protected disclosures. In addition Mr Nicholls claims that he has been subject to unlawful sex discrimination.
2. The respondent made two applications for the cases to be consolidated. The first application was made on 3 January 2020 resulting in Employment Judge Broughton asking for comments from all the parties in relation to his opinion that the claims should be heard together because they give rise to common issues of fact and law. Both claimants objected and Mr Kemp raised the not unreasonable objection that he found it difficult to comment because he was unaware of the details of Mr Nicholls' claim. The respondent then made a second application on 4 February 2020, essentially supporting the first, which persuaded Employment Judge Lloyd to make an order consolidating the claims on 12 February 2020 because they give rise to common or related issued of fact and law.
3. On 14 February 2020 I considered whether Mr Kemp was disabled at a preliminary hearing. At that hearing Mr Kemp, and his friend Mr Francis who is assisting him, made representations about the decision to consolidate the claims and I determined that there should be a further hearing to consider the issues he raised as an application to vary the order to hear these cases together.

Submissions

4. I have received a short, written submission from Mr Kemp which I have marked as Kemp 1 and heard oral representations from all three parties. Mr Nicholls made oral submissions objecting to the clams having been joined, although having heard Ms Hodgetts' argument he retracted his objection. I also have before me a bundle of documents prepared by the respondent in relation to Mr Kemp's claim which I will refer to as R1. There is also a bundle in relation to Mr Nicholls' claim which I will refer to as R2 but for the purposes of this decision any references are to R1 bundle unless otherwise specified.
5. In support of his application for the consolidation order Mr Kemp makes an objection about the accuracy of the chronology provided by the respondent in the applications to join proceedings. This can be found at pages 67 – 69 of R1. The respondent's second letter which is also referred to as an application is to be found at pages 76 – 78 of R1. I do not consider that to be a matter which is relevant to the issue which I am considering.
6. More substantively Mr Kemp raises the following matters:
    a. The first is that hearing his case in this way essentially risks a continuation of the very conduct he has complained about to the respondent. He was distressed that his address had been disclosed

to Mr Nicholls. Mr Kemp feels that joining the cases together will make the proceedings extremely difficult for him to participate in because he is, despite the support of his friend, a litigant in person. He suffers from a severe medical condition which is exacerbated by stress and he says that the involvement of Mr Nicholls in these proceedings will make that significantly more difficult for him because of the additional stress he will suffer. That assertion is consistent with his claim that he has been the victim of detriment and bullying by Mr Nicholls. He is also very upset about information about his medical condition being disclosed to Mr Nicholls.

b. He says he has no knowledge of the disclosures made by Mr Nicholls and he argues that the issues he raises of unlawful detriments and a failure to make adjustments are matters between him and the respondent and are separate from any concerns raised by Mr Nicholls.

7. Mr Nicholls initially made similar objections to the consolidation of the claims but, as he says he has been persuaded by Ms Hodgetts' arguments, I have treated that as a withdrawal of his support for Mr Kemp's application.

8. Ms Hodgetts made lengthy oral submissions. In particular she highlights how the respondent says these claims are not only related, the issues are intertwined.

9. Briefly that interaction arises as follows:

a. Mr Kemp has made a large number of disclosures which he says are protected, which are related to the operation of contracts with third party contractors and in relation to health and safety concerns. Mr Nicholls was moved into the same department. He is senior to Mr Kemp and one of his senior line manager. Mr Nicholls says that he was concerned about how those whistleblowing complaints had impacted on his predecessor and that Mr Kemp also began to raise concerns about his (Mr Nicholl's) conduct. Mr Nicholls describes Mr Kemp's behaviour as unreasonable and vexatious. He says that this conduct impacted in his mental health and Mr Kemp should have been moved to another team as a reasonable adjustment or otherwise managed to stop him raising so many concerns. Mr Nicholls says that the respondent failed in its duty of care towards him by taking steps to protect Mr Kemp as a "whistle-blower" but not protecting him and by failing to stop Mr Kemp from raising concerns. As Ms Hodgetts highlighted, in terms of failure to make reasonable adjustments, Mr Nicholls places significance reliance on a stress risk assessment (included in the R2 bundle p54-59) which clearly refers to Mr Kemp in a number of the concerns raised, although Mr Kemp is not named.

b. Mr Kemp says that the concerns he raised about Mr Nicholls, in his reasonable belief, tended to show failures falling within s43B of the Employment Rights Act 1996 but more significantly he alleges that he was subjected to detriments by Mr Nicholls. These are set out in the table he produced of disclosures and detriments (p37 to 55 of R1). Four of the particular detriments he identifies relate directly to Mr Nicholls. In terms of his claim that the respondent has failed

to make reasonable adjustments he says that he should have been allowed to work from home because of the conduct he was being subjected to and the people involved in that conduct include Mr Nicholls. This means in relation to both individuals the issue of reasonable adjustments and detriment are connected to the other's case an in Ms Hodgetts submission so closely connected it they should be considered separately.

c. In terms of the concerns both individuals have raised about the other being aware of what they are saying and their medical conditions, Ms Hodgetts points out that the tribunal proceedings are public and these are matters which will be aired in the public domain in any event. I accept that submission.

d. As Ms Hodgetts highlights there is also a high degree of commonality in witnesses in the two claims. There are 6 or 7 common witnesses who include very senior managers of the respondent. Ms Hodgetts asserts that there are issues in these cases that will require findings of fact to be made which are relevant to other proceedings and that the respondent faces significant prejudice because, for example, there will be evidence in one claim which is directly relevant to the other and this will also apply to issues which are put in cross examination. For this reason Ms Hodgetts argues that hearing the cases consecutively by the same tribunal will not suffice.

e. I note that in neither of the applications to join proceedings together nor in Ms Hodgetts submissions today is there any attempt to quantify the overlap in either in terms of the amount of common evidence to be considered nor in the potential saving of tribunal time.

The Employment Tribunal Rules of Procedure

10. Consolidation in employment tribunal proceedings simply means that two or more cases either brought by different parties or by the same party at different times and raising different causes of action are combined for administrative purposes and heard together. My power to vary the case management order made by Employment Judge Lloyd is found in Rule 29 which allows me to vary, suspend or set aside an earlier case management order where it is necessary in the interests of justice and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

11. I am satisfied that it appropriate for me to consider exercising my power in Rule 29 because Mr Kemp had no information about Mr Nicholls' claim when he was asked to provide comments on the consolidation (and indeed the same is true for Mr Nicholls). I make not criticism of my judicial colleagues in that, but this is not the situation which often arises where consolidation is ordered where claimants will be fully aware of the situation of the other, because they have been dismissed for the same offence or made redundant as part of the same redundancy exercise. Accordingly I am satisfied that it appropriate to revisit the joining of these cases consolidation taking into Mr Kemp's objections now he has more detailed information

My conclusions and reasons

12. In deciding whether to exercise my power I have had regard to the overriding objective and remind myself that in exercising my power under Rule 29 I must seek to give effect to the overriding objective to enable the case to be dealt with fairly and justly including as far as practicable to ensure that the parties are on an equal footing; the case is dealt with in a way that is proportionate to the complexity and importance of the issues; that avoids unnecessary formality and seeks flexibility and which avoids delay so far as is compatible with the proper consideration of the issues, and which saves expense.

13. The arguments in this case are finely balanced. I can see significant merit in Ms Hodgetts arguments. It is clear that there is a factual overlap with these cases. Nevertheless I have concluded that they should not be heard at the same time and that instead the cases should be listed to be heard consecutively by the same tribunal. My reasons for making that order are as follows:

    a. I am concerned that given both claimants have made clear that they have mental health difficulties and that their stress is exacerbated by the involvement of the other, joining these cases together would create a significant impediment to these litigants in person being able to participate in the proceedings. Litigants in person often find proceedings difficult of course, but it seems to me that the cases being heard at the same time would increase those difficulties. Mr Kemp is disabled, and Mr Nicholls says that he is disabled by his mental health condition, although that is to be determined. I consider that requiring the cases to be heard at the same time will place Mr Kemp at a particular disadvantage compared to other claimants in consolidated cases due to the effects of his disability and it will be a reasonable adjustment for the cases to be heard consecutively to mitigate that disadvantage. I consider this to be the most important factor I have considered.

    b. I conclude that the involvement of both claimants in the same proceedings risks the issues in the case becoming more complicated, although that is not a submission which has been made to me. It is clear that Mr Nicholls takes particular exception to the disclosures which Mr Kemp made which he considers defame him. In determining whether those disclosures are protected the tribunal will be concerned about the basis of Mr Kemp's belief and whether that was held reasonably. In that sense the fact that Mr Nicholls says they are untrue is not relevant. However it seems to me that a tribunal hearing these cases together may face claimants attempting to prove or disprove the allegations against each other even where that is not relevant to the issues to be determined. I assess that risk to be a real one based on the comments made by the claimants in this preliminary hearing and the comments made by each about the other in the pleadings. That is likely to be a continued distraction in the proceedings. It is of course a matter which the employment judge at the time can address and manage, but it is something which creates a risk of a negative impact on the

conduct of the proceedings and it is an impact which can be avoided.

c. I have balanced these considerations against Ms Hodgetts' arguments about the overlap of evidence and legal issues in the cases. I accept there is a material overlap but I am not persuaded it is as quite as extensive or as fundamental as is suggested. Most of the disclosures made by Mr Kemp do not concern Mr Nicholls. Mr Kemp alleges four detriments which involve Mr Nicholls, but many of the alleged detriments do not involve him and indeed it seems unlikely that Mr Nicholls has any knowledge or interest in them at all. The disclosures which Mr Nicholls says he made were about how the respondent was managing Mr Kemp and internal whistleblowing processes generally, but I do not see how Mr Kemp being party to those arguments assists the tribunal in their determination. The complaints of both men are primarily about how the process was managed by senior managers, the particular decisions which were made about them, and how their competing interests and requests for action were managed. In examining those decisions the tribunal does not need to hear from the other protagonist employee.

d. Turning to the arguments about reasonable adjustments to be made, again I cannot completely accept Ms Hodgetts' conclusions, although I accept there are clearly some common issues of fact to be resolved. Ultimately these legal complaints are matters between each claimant and the respondent which depend on the adverse impact their individual disabilities had (if any) and the steps it was reasonable for the respondent to take to mitigate that effect. I cannot accept that the fact that these adjustments are alleged to have been required in the context of alleged whistleblowing detriments as well changes that.

e. It is argued, in essence, by Ms Hodgetts that these questions are two sides of the same coin: if Mr Nicholls successfully argues that a reasonable adjustment was not made for him, Mr Kemp's argument about detriment should not succeed and vice versa, and for that reason these matters have to be determined at the same time. These are distinct questions in relation to each claimant and will have to be considered as such. In terms of reasonable adjustments, the question for the tribunal to consider is whether the respondent met its duty to make reasonable adjustments, if each claimants' claim that that duty was engaged succeeds. The tribunal will decide if the duty to make adjustments has been breached or not, but it is not correct that the tribunal is facing a binary choice between the cases put forward by the claimants which cannot be separated.

f. I am satisfied that tribunals are familiar with resolving the common workplace difficulty for employers where employees seek competing reasonable adjustments or make allegation and counter allegations of detriment. The respondent's witnesses will no doubt refer to the other claimant in giving evidence in this matter, but I do

consider on balance that that necessitates both claimants being involved in proceedings at the same time. Cases involving these issues of competing or balancing interests often come to tribunal and they rarely require the presence of both the competing disabled or disadvantaged employees in the tribunal room for the tribunal to conclude whether the respondent has acted lawfully or unlawfully. If it is appropriate, the respondent can seek a witness order against the other claimant if their evidence is essential to the determination of particular issue. That in itself does not mean the cases have to be joined. It may be quite unusual for two such cases involving related the competing claims to arrive at the tribunal at the same time, but the actual scenario is not that novel or difficult and this argument does not tip the balance in favour of maintaining the consolidation of the cases when the prejudice to the claimants, and Mr Kemp in particular, is taken into account.

g. Finally the fact that the same witnesses are involved is not determinative. The same witnesses may be involved because they are the key decision makers in relation to the sort of issues involved here and because the department is involved, but the claimants do not rely on the same protected disclosures, they do not rely on the same detriments and each has been subject to distinct internal procedures. Very significant elements of each case appear to be unrelated to the other claimant's case. Any saving to the respondent in terms of time and cost if the cases are considered together must be viewed in the context of the time which would be spent on matters which do not involve both claimants. I am concerned that each claimant will spend considerably longer in the tribunal than they would otherwise need to if their claims are considered separately. It is significant in my view that the respondent has failed to make any attempt to suggest what saving of time joining these cases will offer. In ensuring that the claimants are placed on as equal footing as possible with the respondent, a very large public authority, I consider that it would be unfair and unjust for the advantage of achieving some convenience for the respondent through saving an unquantified amount of witnesses' time and other litigation expenses in joined proceedings, to be at the expense of litigants in person.

h. If the respondent had demonstrated to me that most of the issues to be determined for these claimants would follow from common findings of fact and law and suggested an actual substantive and quantifiable saving in time or indicated a quantifiable overlap in evidence I may have found that the balance of the argument was in the respondent's favour. For example in *Courage Ltd v Welsh and ors EAT 93/91*: six beer delivery men who were dismissed on the ground of fraudulent conduct brought separate claims for unfair dismissal and the hearings were set down for a variety of dates. The employer applied for all the cases to be heard together but its application was refused. On appeal, the employer pointed out that 90 per cent of the relevant evidence applied to each of the claimants and that, if heard separately, each case would take five days

whereas if heard together the single hearing would take ten days. The EAT accepted these points and ordered that the cases be consolidated. Some attempt to quantify the overlap in a similar way here would have assisted me. However although points of overlap in facts and evidence were identified to me no attempt was made by the respondent to explain the significance of the very significant apparent differences between the pleaded cases. Whilst there is clearly some overlap, that is only an element of each case and there are a number of issues which on their face fall outside the scope of the overlap. In light of the concerns I have about prejudice to the claimants I cannot ignore this apparent discrepancy in the assertion of the claims giving rise to common or related issue of fact and law. These claims also appear to give rise to distinct and unrelated issues of fact and law such that in all the circumstances the joining of these cases does not appear to be consistent with the overriding objection.

14. Accordingly my conclusion is that the order consolidating these cases should be set aside. Instead the of being considered together they should be heard consecutively by the same tribunal. That will save time in reading and preparation and will mean there is a consistency in approach. This means that the final hearing in Mr Nicholls' case must be adjourned to enable it to be listed consecutively with Mr Kemp's. A further case management hearing will be required but it will be appropriate for that hearing to be arranged once the open preliminary hearing in Mr Nicholls has been concluded and the issues involved in that determined.

Employment Judge Cookson
Dated 8 June 2020