



EMPLOYMENT TRIBUNALS

Claimant: Mr D Brigham

Respondent: DX Networking Services Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Sheffield in private; On: 29 June 2020

Before: Employment Judge Rostant (sitting alone)

Appearances

For the claimant: Ms F Almazedi, solicitor

For the respondent: Ms M Maguire, solicitor

CASE MANAGEMENT SUMMARY

Final hearing

- (1) All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting with Members.
- (2) The method of hearing and date will be determined once the parties have complied with Order 2 below.
- (3) At that point the matter will be referred to a judge who will Order the method of hearing and make appropriate Orders for final preparation.
- (4) The time estimate for the hearing is 5 days, based on the claimant's intention to give evidence and call two short further witnesses and the respondent's to call four witnesses.
- (5) The claimant and the respondent must inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The claim

- (6) The claimant brought a claim to the Tribunal and they came before EJ Jones at a Preliminary Hearing on 2 April.
- (7) The claims contained in the claim form are repeated here for ease. They are:
 - a. Unfair constructive dismissal under general principles, for having made protected disclosures and/or bringing attention to health and safety issues;
 - b. Disability discrimination: breach of the duty to make adjustments;
 - c. Being subject to detriment for bringing attention to health and safety issues;
 - d. Being subject to detriment for having made protected disclosures;
 - e. Victimisation;
 - f. Harassment.

The issues

- (8) At the April hearing EJ Jones made Orders that the claims be particularised.
- (9) The claimant responded with Further and Better Particulars.
- (10) The respondent's amended response asserted that the particulars provided lacked clarity. I agree with the respondent and have sought to clear up with the claimant's solicitors the areas of doubt.
- (11) The claimant has listed no fewer than 26 separate detriments. I pointed out that in a number of instances proving the link between making the disclosure and the treatment complained of was likely to prove difficult. A number of the detriments complained of are in fact complaints that the respondent has failed to investigate or otherwise respond to the claimant raising concerns. Whilst it can readily be seen why they might be breaches of the contract or contribute to a breach so as to found a complaint of constructive dismissal it is much more difficult to see how they can be caused (in the sense of be motivated by) the fact of the disclosures.
- (12) The annex to this document now contains the agreed detriment claims. They are the product of the discussion at this hearing in the context of the particularisation already provided. The annex is agreed to amount to a definitive setting out of the matters complained of by the claimant as detriments.
- (13) They are claims brought on the basis that the claimant made a protected disclosure (or more than one) concerning health and safety matters (which disclosure also satisfies the conditions of S44(1)(c)(i) ERA.

- (14) The detriment claims are entirely duplicative of each other.
- (15) The particulars contained no mention of victimisation and today the claimant confirmed that that claim was not proceeded with.
- (16) The remaining claims are described in the main body of this document below.

Constructive unfair dismissal & wrongful dismissal

- (i) Was the claimant dismissed, i.e. did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)? If the claimant was dismissed, they will necessarily have been wrongfully dismissed because they resigned without notice.
- (ii) The conduct the claimant relies on as breaching the trust and confidence term is:
 - a. All of the matters relied upon as detriments except v and w.
- (iii) If the claimant was dismissed: what was the principal reason for dismissal?
- (iv) The claimant will say that the reason for the conduct which caused him to resign was the fact of his having made disclosures and that the dismissal was therefore automatically unfair.
- (v) The claimant will say that even if the conduct was not caused by that it was nevertheless which breached the term of mutual trust and confidence and since the respondent cannot show a fair reason for the conduct the dismissal is unfair by reason of S98(1).

Disability

- (vi) Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the impairment of asthma?
- (vii) The respondent does not concede this issue or the issues of knowledge (required for the claim Under S20).

Reasonable adjustments: EQA, sections 20 & 21

- (viii) Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?
- (ix) A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP(s):
 - a. Requiring the claimant to carry out his contractual obligations.
- (x) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that the claimant was required to work in dusty conditions which exacerbated his asthma?
- (xi) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- (xii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
 - a. Allowing the claimant to undertake alternative work
 - b. Issuing the claimant with appropriate PPE (namely a mask with filter)
- (xiii) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

EQA, section 26: harassment related to disability.

- (xiv) Did the respondent engage in conduct as follows:
 - a. Those matters set out in the annex as detriments a., c., d., e., g., l., m., and s?
- (xv) If so was that conduct unwanted?
- (xvi) If so, did it relate to the protected characteristic of disability?
- (xvii) Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, section 27: victimisation

(xviii) This claim is withdrawn.

Other matters

- (17) The attention of the parties is drawn to the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practicedirections/
- (18) The parties are reminded of rule 92: “Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise) ...”. If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.
- (19) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (20) The following case management orders were made

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Judicial mediation
 - 1.1 The respondent does not wish this case to be the subject of a mediation.
2. Method of hearing
 - 2.1 I explained the listing situation to the parties. I explained the requirements for a CVP hearing.
 - 2.2 By not later than 13 July both parties will advise the Tribunal as to whether they and tier clients and witnesses can engage with a CVP hearing and, if not, why not.
3. Further information

- 3.1 By not later than 20 July the claimant will identify in writing to the Tribunal and the respondent, by date and manager concerned, any written disclosures he would wish to rely upon in addition to his grievance and the verbal disclosures described in the Annex to this document.
 - 3.2 By the same date the claimant will advise the Tribunal and the respondent of the names of the colleagues referred to in detriment i.
 - 3.3 By the same date the claimant must supply a full disability impact statement to the respondent.
 - 3.4 By not later than 10 August the respondent shall produce and amended response with a copy to the Tribunal and the claimant.
4. Documents
- 4.1 On or before 7 September the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so by 14 September.
5. Final hearing file
- 5.1 By 28 September, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“file”), and provide the claimant with a ‘hard’ copy of the by the same date. The file should only include documents relevant to any disputed issue in the case [that won’t be in the remedy file referred to below] and should only include the following documents:
 - the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the file, in chronological order, with all the other documents after them;
 - documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.
- In preparing the file, the following rules must be observed:
- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the file
 - the documents in the file must follow a logical sequence which should normally be simple chronological order.

6. Remedy file

- 6.1 The claimant must prepare a paginated file of documents (“remedy file”) relevant to the issue of remedy and in particular how much in compensation and/or damages they should be awarded if they win their claim and provide the respondent with a ‘hard’ and electronic copy of it by 19 October. The documents must be arranged in chronological or other logical order and the remedy file must have an up to date schedule of loss at the front of it.

7. Witness statements

- 7.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before 19 October.
- 7.2 No additional witness evidence will be allowed at the final hearing without the Tribunal’s permission. The written statements must: have numbered paragraphs; be cross-referenced to the files; contain only evidence relevant to issues in the case. The claimant’s witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

8. Final hearing preparation

- 8.1 Orders for a final hearing preparation will be made once it is known whether the case will be dealt with remotely or face to face.

9. Other matters

- 9.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 9.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 9.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal’s permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 9.4 Public access to employment tribunal decisions

All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

- 9.5 Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge ROSTANT

Dated: 29 June 2020

Sent to the parties on:

29 June 2020

For the Tribunal: