Appeal No. UKEAT/0132/19/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 17 September 2019

Before

HER HONOUR JUDGE KATHERINE TUCKER

(SITTING ALONE)

C APPELLANT

D RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANDREW WATSON (of Counsel) Instructed by: JE Solicitors St Mary's Chambers, 59 Quarry Street Guilford Surrey GU1 3UA
For the Respondent	MR DANIEL NORTHALL (of Counsel) Instructed by: Respondent

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SUMMARY

PRACTICE AND PROCEDURE

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Appeal against a refusal to allow amendments to add claims of harassment and reasonable adjustments. General observations made which discourage the use of 'narrative' style Claim forms and Response documents

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HER HONOUR JUDGE KATHERINE TUCKER

1. This appeal arises out of a refusal to allow two amendments to the Claimant's claim. I will refer to the Appellant as the Claimant as she was, and will be, before the Employment Tribunal.

The facts

2. On 21 December 2017 the Claimant lodged a claim with the Employment Tribunal ("the ET"). In it she made claims of constructive unfair dismissal and discrimination on grounds of disability and sex.

3. The Particulars of Complaint attached to that application ran to 37 paragraphs over six pages. In express terms, they referred to the protected characteristics of disability (paragraph three), and sex (paragraph four). However, whilst they also set out a lengthy and detailed narrative of alleged events, they did not set out clearly which facts related to which protected characteristic, or the particular type of discrimination she asserted had occurred, or, the statutory provisions relied upon in respect of those factual allegations.

4. The Respondent lodged a Response. The Response was also in a narrative style. It asserted that the Claimant had failed to properly set out, or to particularise her claim. The Respondent stated that it would request her to do so at the Case Management Preliminary Hearing (CMPH). The Respondent also served a Request for Further and Better Particulars of the Claim.

5. Shortly thereafter, the CMPH took place on 23 March 2018. An Order was subsequently produced. The summary of the Case Management Orders made recorded that, although the Particulars of Complaint were very detailed, they did not clearly identify the statutory claims pursued or the facts relating to them. The Order recorded that this would be remedied by the provision of further particulars and then by an agreed List of Issues being produced. As I have mentioned above, a Request for Further and Better Particulars had already been served on 19 March 2018. The Response to that request was served on 3 May 2018, and a draft List of Issues was served by the Claimant on 4 May 2018. The Response to the Request for Further and Better Particulars of Claim provided that further details of the claim would be set out in the List of Issues. At that point, the trial had been listed to take place on 21 October 2019 for some eight days. (The importance of this was that in May 2018 there was still some 17 months before the final hearing would take place.)

6. The Respondent objected to the List of Issues produced by the Claimant and asserted that the document raised new claims and new facts. It stated that it would oppose any proposed amendment. That position is, in broad terms, set out by cross reading between annotated notes on the draft List of Issues and in correspondence, not something which made for easy reading.

7. The application to amend was listed to be heard, initially, in the late autumn of 2018, but, due to lack of judicial resource, was in fact only heard at a Preliminary Hearing on 8 February 2019. The Employment Judge, Employment Judge Baron, reserved his decision and then sent a written decision to the parties on 11 February 2019 (the first decision). Subsequently, after both parties requested clarification of that which had been decided, a further Note was sent to the parties by the Employment Judge on 26 February 2019.

The grounds of appeal

8. There are two grounds of appeal; first, that the Judge erred by failing to allow the claims of disability harassment to proceed. Secondly, that the judge erred in refusing to allow a claim pursuant to Section 20 of the **Equality Act 2010** in respect of a failure to make adjustments regarding two matters: (i) 'aggressive horseplay', which was said to have taken place in the Respondent's office and, (ii) the manner in which the grievance procedure was conducted.

9. Before considering each of those separate grounds of appeal I consider that it may be helpful to set out some observations of more general application.

Narrative Claim Form and Response

10. As I have set out above, the Particulars of Complaint (PC) which were attached to the Claim Form were in a 'narrative' format. I use that phrase to describe a document in which there is a detailed explanation of factual events, in some ways, not dissimilar to that one would expect to see in a witness statement. Like a witness statement, the PC sets out a detailed narrative of factual events. In my judgment, on a fair reading of the document, all that could be reliably discerned from it about the specific statutory claim asserted within it, was that the Claimant was making claims of disability discrimination, sex discrimination and constructive unfair dismissal. I recognise that some language was used within the document which was consistent with allegations of direct discrimination (paragraph 37) and also, although less clearly, 'because of something arising in consequence' of disability, contrary to Section 15 of the **Equality Act 2010**. In respect of the allegation of direct discrimination, paragraph 37 makes express reference to conduct 'because of' the relevant protected characteristics. In respect of Section 15, at paragraph 25, it was stated that the Claimant had been treated differently as a 'consequence' of her mental health issues.

11. I do not encourage parties, particularly lawyers, to engage in that type of 'narrative' pleading. I would encourage legal representatives, in particular, to adopt a more succinct and clear drafting style. Whilst I do not suggest that the employment tribunal is a forum in which meticulous or unnecessarily pedantic pleading points should be raised, I do consider that, increasingly, there is a need to refocus on the purpose of a claim form, a formal document which initiates legal proceedings.

12. A claim form sets out a legal claim. It is not a witness statement (although in this case both the Claim Form and Response in this case bear many similarities to a witness statement). Ideally, in a Claim Form, the author should seek to set out a *brief* statement of relevant facts, and the cause of action relied upon by the Claimant. The purpose of doing so is to allow the other side to understand what it is that they have done or not done which is said to be unlawful. It should be clear from the document (Claim Form) itself, within the brief summary of the relevant factual events, which facts are relevant to which claim, if more than one is advanced. The Respondent can then properly respond to that claim or claims. The Respondent can admit, not admit, or deny the facts and claims asserted by the Claimant and, where appropriate, set out a brief summary of the relevant facts the Respondent asserts occurred. Lawyers will, or should, understand, that each of the phrases 'admit, not admit, or 'deny' have a particular meaning in this context. The task in hand, when setting out a Claim or Response (certainly for an instructed lawyer) is to distil the relevant factual matters to their essential or key component parts. Doing that effectively will often be more difficult, and take more time, than simply reciting lengthy facts and then listing a series of claims. It is often, however, time well spent. Different considerations obviously apply where parties represent themselves and the documents are prepared by people who are not lawyers. However, the basic principle remains good: the

Claim form should set out what the claim is and a brief summary of the facts relevant to each particular claim.

13. This case in my judgment, is a paradigm example of that which can occur when a claim is not set out with sufficient legal precision. Valuable time can be lost. Costs can increase. There may be a delay in the case being heard, because the parties are not clear precisely what issues are in dispute or consider that they have inadequate time to meet the case that is advanced against them, once they have understood it.

14. Regrettably, I consider that some criticism must be levelled in this case at the manner in which the Claim and Response were set out. I am also well aware that the parties and representatives in this case have adopted a style many choose. A narrative style of Claim Form and Response appears to now be more the norm than the exception. I can understand where the temptation for adopting it has come from: a fear that a relevant fact might not be included and fear that a witness might be challenged in a hearing because a detail was not included within the claim. That can be managed: a document can make it clear that it sets out key facts; requests for further details of factual matters can be made; parties and representatives can remember that the purpose of the Claim Form and Response is not to exhaustively set out factual detail in the way a witness statement does, but to set out the claim.

15. The narrative style of pleading makes the task of Employment Judges who need to case manage the case more difficult: it takes more time than may be available to properly identify the issues. Defuse documents do not necessarily assist a Judge seeking to do that. This case would have benefitted from more rigorous case management at an early stage, through which the Judge ensured that both the parties and the Tribunal knew what the claims were and which

factual allegations were relied upon in respect of each of those claims at the outset. I suspect that one of the obstacles to that taking place may have been the length of the Claim Form and Response.

16. Further, once it became clear that an application to amend needed to be determined, that should only have proceeded to be heard once it had been established what that proposed amendment would look like, whether it was opposed, and if it was opposed, the basis upon which it had been opposed. There was ample time for these issues to have been clarified by the parties, both of whom had the benefit of legal representation.

17. I recognise that all this is said with the benefit of hindsight, and I do not underestimate the workload facing those dealing with this case in its early stages. Nonetheless, looking back now, and with the objective of establishing better outcomes in the future, I consider that it is appropriate to recognise that had any one of those steps been taken in this matter, significant time and cost may well have been saved.

Medical evidence

18. A further point arose in this case. Before the Employment Judge at the hearing in February 2019 when the application to amend was considered, there was evidence from the Claimant regarding her health which, on the information I have been provided with today, appears to have been unchallenged by the Respondent. That evidence set out information regarding the Claimant's mental health, not only during her employment but also during an important point of time (having regard to case preparation and the application to amend) after her employment had ended in 2017, up until the point at which she lodged her claim. The evidence consisted of three documents: a letter from the Claimant's GP; an expert report; and, a statement from the Claimant. It is unclear whether those documents were expressly referred to

during the hearing. Both parties agreed today that it appeared likely that the Judge had had regard to it because he made a Rule 50 Order in order to protect the Claimant's daughter's identity, and the medical evidence was part of the material that was relied upon for the purposes of that Order.

19. As I have set out, that evidence concerned the Claimant's mental health, not only during her employment but also in the key point of time after her employment had ended in 2017 up until the point at which she lodged her claim. That evidence set out that the Claimant suffers from depression. At the period between September and December 2018 she was assessed as suffering from a severe depressive episode and from PTSD. Furthermore, the claimant's daughter is autistic and exhibits challenging behaviour. The Claimant stated that she has been assaulted by her daughter, seriously, and suffered a skull facture. The evidence was that after the Claimant's employment had ended there was a deterioration in her mental health to the extent that she was invited to consider treatment as an in-patient. The Claimant's unchallenged evidence was that she struggled to talk about significant or traumatic events because of the impact of the stress of doing so upon her PTSD.

20. It is factually accurate to state that there was no medical evidence before the Tribunal which specifically stated that the Claimant was not able to give clear or adequate instructions during that period in time to her instructed lawyers. However, there was evidence of the matters I have set out in paragraphs 18 and 19 above before the Tribunal when the application to amend was considered. There was also medical evidence supporting the Claimant's suggestion that there had been a marked deterioration in her health. The expert did not appear to have been specifically asked to report on the Claimant's ability to give instructions to her solicitors.

21. Within the documents I have read from the Employment Judge there was simply no evaluation of the weight or the impact of these matters upon the Claimant's ability to give instructions to her lawyers regarding the issues which then arose about the claim or how that might have impacted consideration of the application to amend.

The Grounds of Appeal

Ground One

22. The first ground of appeal related to an amendment in respect of a claim of harassment. In the Further and Better Particulars of her claim, the Claimant responded to a request to provide further particulars of her allegation that on her return to work, which appears to have been in 2016, she was not:

> **"12 …. treated with respect and [was] subjected to taunts and conversations about her mental health and her required seating arrangements which she found distressing….".**

23. The particulars provided were set out in five paragraphs, paragraphs 10 to 14 of the further and better particulars. Again, they are in somewhat narrative terms, however, they clearly set out the following:

(i) That comments were made in a telephone conversation by E suggesting that security clearance for a particular client (Client A) was tight, and that "mental health issues" were viewed as badly as "being a paedophile or a murderer". The Claimant was said to have complained about this matter to another member of stuff.

(ii) That the member of staff to whom the Claimant spoke about (i) above, was said to have denied that E had or would have said this, because he was not like that.

(iii) That a third member of staff had said that the reason that the Claimant could not work at Client A's site was because of her mental health. The Claimant asserted that she subsequently found or believed this not to be the case.

(iv) That a conversation took place with an HR official about that which had been said, and that the Claimant was encouraged to 'let it go over her' even though it was 'not right'.

(v) That colleagues would engage in 'aggressive horseplay', which she explained she found distressing because of her PTSD.

(vi) That F (one of the Claimant's work colleagues) openly discussed the Claimant's PTSD symptoms in the workplace.

(vii) That the Claimant believed that her colleagues engaged in horseplay to deliberately undermine her.

(viii) That on one occasion two colleagues engaged in such horseplay, and, because of the level of her anxiety the Claimant was publicly incontinent.

(ix) That thereafter the Claimant was taunted by her colleagues about that incident: for example, sticky notes left on her cabinet stating, "Caution: wet drawers"; she would be asked if she needed to use or had been to the toilet at the start of a meeting; that others would be asked to check not to sit on the Claimant's wet chair.

(x) That the Claimant was characterised as the character 'Beaker' from The Muppets. The Claimant believed this carried the connotation of being a 'mad muppet'.

24. The Employment Judge allowed an amendment to plead to an allegation of harassment related to disability in respect of the first of those 10 factual allegations only. His reasoning

appears in both paragraph 16 of the first decision, and paragraph 3 of the Note. Paragraph 16 is in my judgment somewhat opaque. It appears to suggest that this amendment was not one of substance. The judge stated:

> **"16 … The only point of any potential substance is the allegation that other members of staff interfered with the adjustment put in place by the Respondent relating to the Claimant's desk….".**

Implicitly, therefore, it would appear that he considered that the other particulars of harassment were not points of substance. Furthermore, in the Note, the Judge recorded that his note of the submissions made to him was that the particulars 'added colour' to what had been already pleaded. The Judge allowed the amendment in respect of harassment, but only allowed the Claimant to rely on the first out of the 10 particulars of harassment.

Ground One: Submissions

25. In respect of this ground of appeal the Claimant made five points. First, it was asserted that there was no need to amend because all that had occurred was that the Claimant had, in response to a request from the Respondent, provided particulars properly so-called in respect of her allegation that she was subjected to taunts and conversations about her mental health. Secondly, that the assertion that she was called 'Beaker', (a character from The Muppets), was already expressly referred to in the Particulars of Complaint. Third, that if an amendment were required, the extent of the amendment was relatively minor because it required a legal relabelling of an assertion that was already present on the facts of the Particulars of Complaint. Fourthly, that the Tribunal had erred in saying, without more, that there was no good reason for the delay. Finally, that the Judge had failed to provide adequate reasoning for the decision.

26. The Respondent drew my attention to the fact that the Judge had correctly and accurately set out a summary of the relevant law; further, that when considering other parts of

A the amendment application, the Judge appeared to have applied a multi-factorial analysis to each of the issues that arose. The Respondent drew my attention to the fact that on a number of occasions the Judge had stated that the pleadings were not good enough, and had criticised the way in which the Claimant had set out her case.

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27. The Respondent asserted that the rationale for the decision made in respect of this amendment could be 'read in' or discerned from other parts of the Judge's reasoning. The Respondent submitted that this amendment involved the introduction of a new head of claim, "harassment" and new facts, neither of which were expressly identified in the original pleading. The Respondent submitted that it is clear from the approach adopted by the Judge that if there was a reference to the underlying facts in the original pleading he was more likely to allow the amendments than if there was not. Furthermore, it was submitted that the Judge had implicitly rejected the submission made that the particulars given in the further and better particulars merely 'added colour' to that which had gone before.

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28. In response to a question as to why the Judge may have allowed the amendment in respect of the facts set out at paragraph 23(i) above, which allowed an amendment to advance both a new head of claim and a new factual allegation, but not the other facts recorded at 23(ii) to (x) above, it was submitted that it could be seen that the Judge had determined that particulars (ii) to (x), did not come within the description of either a 'taunt or conversation' about the Claimant's mental health which the Claimant had found distressing.

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29. The Respondent also submitted that the allegation about being called 'Beaker' involved the Claimant putting, essentially, her interpretation of a fact, which was that she had been described as Beaker in a particular document, and to deduce from that that it was a taunt about

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her mental health. The Respondent also submitted that the comments asserted to have been made following the Claimant's episode of incontinence were not about her mental health, but were related to incontinence.

Conclusion in respect of Ground One

30. I have no hesitation in preferring the submissions of the Claimant. In my judgment, the reasoning set out by the Judge for his decision and the reasons for it was scant. The summary set out by the Judge of the relevant legal principles was, without doubt, correct. However, the explanation as to how those legal principles applied to the facts of this case and the application to amend was, in my judgment, inadequate, even taking account of the high hurdle that must be overcome when seeking to appeal case management decisions. It would be inappropriate for an appellate court to reverse or otherwise interfere with a case management decision of the Tribunal unless it was plainly wrong/ outside the generous ambit within which reasonable decisionmakers may disagree. I consider that this is a case where that level of criticism can be levelled against the decision.

31. The Tribunal Judge erred because he failed to provide any, or any adequate, reasoning for the decision that was made. There is simply a lack of cogent explanation for the decision, yet the decision which was actually made, needed to be explained. The Judge allowed an amendment to plead disability harassment, but allowed only one out of 10 specific factual allegations to be relied upon, even when some of those events were said to have taken place at the same time as the first one, or in the same context as the first one.

32. I have not been able to discern, or 'read in', a rational basis for limiting either the subject matter or temporal relevance of the particulars set out by the Claimant. I do not accept that I can 'read into' the decision of the judge that he determined that either the events relied

upon in allegations 2 to 10 did not occur on the Claimant's return to work, or, alternatively, were not taunts about her mental health or conversations about her mental health. If that were the case, then, in my judgment, it was necessary to explain clearly why that view was taken. The Judge failed to do so. I consider that the decision that was made, as it stands, is a perverse one.

33. The Judge failed to address the medical evidence regarding the impact of the Claimant's illness at the time that the claim was lodged. He also failed to address the significance of the passage of time from when the claim was lodged to the date upon which the list of issues was provided. That matter then needed to be set in context of the overall risk of prejudice, given that the trial was not going to take place for some significant time, and, in any event, the fact that the Respondent had recorded that there was not any specific prejudice to the Respondent in allowing the amendment, save for the fact that they would have to meet additional claims. The Judge did not weigh those matters with or against the prejudice to the Claimant of not being able to pursue those allegations.

Ground Two: reasonable adjustments

34. The second ground of appeal concerned a refusal to allow an amendment to plead a failure to make reasonable adjustments in two regards. First, regarding the management of what the Claimant described as colleagues' 'aggressive horseplay', which was said to have taken place in her presence. The second was the management and the handling of her grievance, which the Claimant asserted was delayed and caused her additional anxiety.

35. Those detailed allegations appeared for the first time in the Claimant's Response to the Request for Further and Better Particulars. In the Particulars of Complaint themselves there was no express reference to this statutory claim. There was, however, an allegation at

paragraph 12 that the Claimant was not supported to 'fit in' to work on her return from a period of absence; further that she was not supported to integrate in the team; and, that she was not treated with respect. Particular details were set out about difficulties the Claimant said she encountered regarding her chair.

36. It became clear during the course of submissions that there was in fact a connection between that which the Claimant said about her chair and the allegations made about 'aggressive horseplay'. The Claimant asserted that she needed a chair to be placed in a position so that no one could stand behind her and that this was specifically in order to assist her in managing her PTSD. It also became clear, relatively quickly, that both this, and the assertions made about witnessing or seeing aggressive horseplay, (such as colleagues holding each other in headlocks and loud shouting) presented similar problems for her: the Claimant stated that she finds it distressing/ difficult if someone stands behind her because of PTSD. Similarly, she finds witnessing that type of aggressive horseplay difficult because of PTSD. If her chair was placed in a position so that this could not take place behind her, that assisted her in managing her PTSD.

37. The Tribunal Judge allowed an amendment to plead a failure to make a reasonable adjustment in respect of her chair. However, he did not allow any amendment in respect of regulation or management of 'horseplay' within the office, nor, in respect of the length of time it took to resolve the grievance. In respect of the horseplay and the grievance the Employment Judge concluded that both amounted to new heads of claims and both relied upon new facts.

Ground Two: submissions

38. The Claimant asserted that, in respect of the grievance, the facts relied upon by the Claimant were set out in the original Particulars of Complaint, namely, that there was delay in dealing with the grievance, and that it was badly managed; that that had a deleterious effect on her health; and, that the occupational health advisors advised that it should be completed as soon as possible in order to minimise the deleterious effect on her health. On that basis the Claimant submitted that even if there were a need to amend the claim, it was a mere relabelling exercise of the facts which were already set out in the claim. It was submitted on behalf of the Claimant that the balance of hardship should have been resolved in favour of the Claimant.

39. The same submissions were made in respect of horseplay, save that the facts did not appear in the Particulars of Complaint.

40. The Respondent submitted that the application to amend in respect of the horseplay was clearly hopeless. It was submitted that the factual allegations had not previously been made, and nor had the legal head of claim. Furthermore, in respect of the grievance, the Respondent disagreed that the facts replied upon in respect of the proposed claim were there within the Particulars of Complaint.

Ground One: Conclusions

41. Again, I prefer the Claimant's submissions. In respect of 'horseplay' it was not clear that the Judge had understood the common factors between that claim and the claim for adjustments in respect of the chair. In any event, he did not explain his rationale other than to say that the allegation raised a new head of claim and a new fact. He did not appear to consider the fact that, in respect of the chair, he had allowed an amendment to be made, and he did not

explain why that should succeed when this did not. Furthermore, this ground of appeal may gain strength when considered against the background that the first ground of appeal has succeeded: if the amendments in respect of the allegations of harassment were permitted those facts would be before the Tribunal.

42. The Judge did not appear to consider the significance of paragraph 12 of the Particulars of Complaint and how the allegations that the Claimant had not been given support to fit back into the workplace or to integrate, and that she had not been treated with respect may have been relevant. In addition, as regards the grievance, I accepted the submissions made by the Claimant that each of the three matters relied upon in respect of the adjustments claim were set out within the documents and the paragraphs I was taken to. In those circumstances, the amendment would have become one of relabelling facts that were already before the Tribunal, and, again, the Judge should have grappled with the balance of hardship, the medical evidence before him, and the reasons for the delay.

43. My conclusion, therefore, is that I allow the appeal.

44. I will now hear submissions as to disposal of the appeal.