



EMPLOYMENT TRIBUNALS

Claimant: Mr N Campbell

Respondent: (1) The Girls Educational Company Limited
(2) Rhiannon Wilkinson
(3) Diana Rose

PRELIMINARY HEARING

Heard at: Watford (initially in public and then in private; by CVP)
On: 7 January 2021

Before: Employment Judge George (sitting alone)

Appearances

For the claimant: Ms G Sarathy, counsel
For the respondent: Mr J Heard, counsel

JUDGMENT

1. The claims of unfair dismissal contrary to s.94 of the Employment Rights Act 1996, indirect discrimination on grounds of sex and direct and indirect discrimination on grounds of age are dismissed on withdrawal.
2. Any application for orders that the claimant pay a deposit or deposits as condition of being able to continue to advance his remaining claims is dismissed.

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 at the Employment Tribunals, **3rd Floor, Radius House, 51 Clarendon Road, Watford, Hertfordshire, WD17 1HP**, on **20 to 24 September 2021**, starting at 10 am or as soon as possible afterwards. The first half day of the hearing will be for reading-in time for the Tribunal and for any preliminary matters to be dealt

with. The parties and their representatives, but not necessarily any other witnesses, must attend by 9.30 am on that day. The time estimate for the hearing is 5 days, but it may go short, depending upon how the issues against the individual named respondents are defined. It is also based on the following provisional timetable:

- 1.1 3 hours for reading in and any preliminary matters;
 - 1.2 maximum 2.5 days for oral and other evidence on liability;
 - 1.3 a maximum total of two hours (half each) for submissions on liability;
 - 1.4 approximately 4 hours for the Tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons;
 - 1.5 One hour for the Tribunal to give judgment, with reasons if possible;
 - 1.6 Half a day for the Tribunal to deal with remedy, including hearing further evidence if appropriate, reaching conclusions and giving judgment, if the claimant succeeds in whole or part.
2. The claimant(s) and the respondent(s) **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 hearing before me

3. The hearing today had been listed as a preliminary hearing in public on the initiative of EJ Smail for consideration of whether a deposit or deposits should be ordered against the claimant on the basis that his claims or any one of them have little reasonable prospects of success. The form of remote hearing was V – by CVP, fully remotely. A face-to-face hearing was not held because it was not practicable because of the coronavirus pandemic.
4. The background to the claim was set out by EJ Smail in his record of preliminary hearing sent to the parties on 14 March 2020 and is not repeated here. EJ Smail had made directions for mutual disclosure of documents relevant to the issues set out in an agreed list of issues (which were to include the substantive issues in the case), and also for the preparation of a bundle, statements – if so advised – and skeleton arguments directed to the claimant’s prospects of success. The hearing was initially listed for 24 July 2020 but adjourned by EJ Loy on the joint application of representatives for the claimant and the respondent who had, subject to the approval of the Tribunal, agreed amendments to the timetable set by EJ Smail.
5. I understand from Ms Sarathy that the claimant complied with the order for full disclosure in March 2020. I see from the Tribunal file that the respondent’s representative’s application for postponement of the preliminary hearing (dated 22 July 2020) proposed amendment to the disclosure to provide that “the respondent to provide full disclosure of any documents to be relied on by 14 August 2020”. Mr Heard explained that his instructions were that his instructing solicitor had understood the obligation to relate to disclosure of documents to be relied on relating to the preliminary hearing only. I do not read the order of EJ Smail that way, but that is a potential interpretation of the direction proposed by the respondent on 22 July 2020. In any event, it is

clear from the correspondence that the claimant was seeking disclosure of any minutes of committee meetings at which he claims to have made the protected disclosures relied on and those would be potentially relevant to the issues at the preliminary hearing. The representatives then put their names to an "Agreement on (pre-PH) Procedure" which was forwarded to the Tribunal and the respondent by the claimant's representative on 28 July 2020.

6. In those circumstances, it is regrettable that the respondent did not comply with the revised dates. On 6 January 2021, Ms Sarathy, who was instructed for this hearing, sent in written submissions in which she informed the Tribunal and the respondent that the claimant intended to withdraw his claims of unfair dismissal (for which he lacked sufficient qualifying service), indirect sex discrimination and direct and indirect age discrimination. At the time of her submissions, there had been no compliance by the respondent with the orders of EJ Smail which had been amended by EJ Loy. In those circumstances, she argued, it was not proportionate to list a further preliminary hearing to determine whether a deposit order should be made.
7. Her submissions apparently crossed with the service on 6 January 2021, the working day before the open preliminary hearing, by the respondent of a bundle of documents running to 200 pages, some 127 of which were documents upon which the respondent wished to rely in support of an application for deposit orders. The basis upon which the respondent argued that there was no little reasonable prospect of success was not articulated save for orally by Mr Heard who confirmed that it was argued on behalf of the respondent that the automatically unfair dismissal claim had little reasonable prospects of success both because there was little reasonable prospect of the claimant establishing that the protected disclosures were made and because of little reasonable prospects that causation would be shown. No explanation was advanced for what Mr Heard described as the slippage in time for disclosure of documents between August 2020 and 6 January 2021.
8. Ms Sarathy argued that the claimant was disadvantaged by having to respond to an application which EJ Smail had intended to be articulated in skeleton argument and which relied upon selected disclosure of documents – not including those which the claimant had been specifically requesting throughout the litigation.
9. I accepted the submissions of Ms Sarathy. It seemed to me that although mutual exchange of skeleton arguments had been ordered, it was important that the claimant should know why it was argued that his claim had little reasonable prospects of success. He is represented by a retired solicitor and Ms Sarathy at the hearing. There had not been the disclosure ordered by EJ Smail; including of documents which the claimant believes would support his claim. For both those reasons, my view is that the claimant would be prejudiced in having to respond to an application, notwithstanding the advantage of representation by competent counsel. Given the time that has already passed I do not think it proportionate simply to adjourn consideration of any application for deposit orders although, strictly speaking, no such application had been made. I therefore decided to dismiss any application for

deposit orders and convert the preliminary hearing to case management. The hearing then entered a private session.

10. Among the orders which I made was one for general disclosure of documents by the respondent. As forewarned in her written submissions, Ms Sarathy argued that this order should be made on an unless basis because of what she alleged to be a history of unexplained failure to comply with previous orders. Mr Heard, who had the disadvantage of not having been provided with the previous case management orders of EJ Smail, EJ Loy and the correspondence which led to the postponement of the 24 July 2020 open preliminary hearing, argued that his solicitor had, perhaps erroneously, been under the impression that disclosure relevant to the preliminary hearing was all that had been required and that he would need to take instructions upon the reason for the failure to comply with orders for disclosure prior to 6 January 2021.
11. I was mindful of the need not to penalise the respondents if the matter had been the subject of some previous misunderstanding by their solicitor. The respondents' solicitor's application for a postponement did suggest that she was submitting to an order for disclosure of documents to be relied upon at the preliminary hearing only (although my view is that the order of EJ Smail was not so limited). Notwithstanding that, as at this hearing, the default between 14 August 2020 and 6 January 2021 is entirely unexplained. I therefore decided to make an order for the respondents to show cause why the order for disclosure should not be made on an unless basis.

Order to show cause

12. The respondents are, **no later than 4.00 p.m. on 15 January 2021**, to show cause why the order for disclosure set out in the case management order at paragraph 6 below should not be made on an "unless" basis. By an "unless" basis is meant that unless the respondents disclose to the claimant all documents relevant to the substantive issues in the case by 29 January 2021, they will be debarred from defending the claim and may only play such part in the final hearing as is directed by the Tribunal. The response to this order to show cause should be sent to the claimant and to the Tribunal both at WatfordET@justice.gov.uk and at ukcourt.skype.0893@ejudiciary.net.
13. The email address ukcourt.skype.0893@ejudiciary.net is only to be used as directed in this order and is not to be used for general communication with the Tribunal. If a document is sent to this address other than as expressly directed it will not amount to valid compliance with a Tribunal order or direction.

The issues

14. The issues between the parties which potentially fall to be determined by the Tribunal have been set out in a draft List of Issues which is to be finalised following as directed below.
15. In particular, the present draft List of Issues does not explain how the claim is put against the Second and Third Respondents. Mr Heard argued that a claim of automatically unfair dismissal could only be brought under s.103A of the Employment Rights Act 1996 (hereafter the ERA) against the employer itself. Personal liability of another worker is provided for by s.47B(1A) of the ERA and that may include personal liability for the dismissal of an employee as a detriment: Timis v Osipov [2019] ICR 655 CA. Mr Heard pointed out that the List of Issues as presently drafted does not include a detriment claim. A direct sex discrimination claim could be brought against a named respondent under s.110 of the Equality Act 2010. At present, it is not clear what the claim is against the Second and Third Respondents.
16. Furthermore, on 12 October 2019, the Tribunal wrote to the parties at the direction of EJ Lewis asking whether the claimant intended to proceed against the Third Respondent; the date of the summary dismissal was 2 July 2019 and early conciliation in her case took place between 18 June 2019 and 27 June 2019 prior to the issue of the second claim on 27 June 2019. The respondent have taken the point that some or all of the claims are out of time in their grounds of response.
17. In the circumstances, I directed that the claimant provide specific limited particulars which is not an invitation to expand on the claim but to identify the alleged unlawful acts of the named respondents.

Other matters

18. 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-practice-directions/
19. 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.**
20. 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.
21. The following case management orders were largely made by consent. Insofar as they are not made by consent, reasons, to the extent not set out below, were given at the time and written reasons will not be provided unless

they are asked for by a written request presented by any party within 14 days of the sending of this written record of the decision.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Judicial mediation

- 1.1 The parties are referred to the “*Judicial Mediation*” section of the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/. If the parties are interested in judicial mediation, they must inform each other and the tribunal of this as soon as possible.

2. Complaints and issues

- 2.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

3. Further information

- 3.1 No later than **12 February 2021**, the claimant is to write to the respondent
 - 3.1.1 Explaining how the claim is put against the individual named respondents by stating:
 - 3.1.1.1. The act or acts of each of the second and third respondents which are said to be unlawful;
 - 3.1.1.2. The date of each act relied on;
 - 3.1.1.3. Under which section of the ERA or EQA the act is said to be unlawful;
 - 3.1.1.4. In which paragraph of the claim forms in Case Nos: 3319013/2019 & 3319735/2019 the act is referred to.
 - 3.1.2 Specifying the particular dates on which the alleged protected disclosures referred to in paragraphs 4.3 of the draft Agreed List of Issues were made;
 - 3.1.3 Specifying any specific statutory duties which the claimant alleges his disclosures of information tended to show had been broken.
- 3.2 The respondent is to write to the claimant no later than **5 March 2021** stating whether they accept that the claim as then understood is set out in

the claim forms or whether they are of the view that an application needs to be made to amend the consolidated claim.

4. List of Issues

- 4.1 No later than **12 February 2021** the claimant is to provide to the respondent a streamlined draft List of Issues incorporating amendments which were agreed upon at this preliminary hearing and the above further information.
- 4.2 No later than **5 March 2021** the respondent is to reply to the revised draft List of Issues either agreeing the document or specifying the extent of any outstanding disagreement. This document is to be copied to the Tribunal at the usual address and to ukcourt.skype.0893@ejudiciary.net marked for the attention of EJ George.

5. Applications

- 5.1 Any application to amend the consolidated claim is to be made no later than **19 March 2021**. It is to be made in writing, with reference to the guidelines on applications to amend the claim set out in the Presidential Guidance on Case Management referred to above, and is to enclose a copy of the draft Agreed List of Issues clearly showing the proposed amendments.
- 5.2 The respondent is to reply to any such amendment application by **2 April 2021**.
- 5.3 Any application to amend and any written reply are to be copied to the Tribunal at the usual address and to ukcourt.skype.0893@ejudiciary.net marked for the attention of EJ George.
- 5.4 Any such contested application to amend will be decided on the papers not before **2 April 2021**.

6. Documents

- 6.1 On or before **29 January 2021**, the respondent must send the claimant copies of all documents they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy.

7. Final hearing bundle

- 7.1 By **16 April 2021**, 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 ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case that won't be in the remedy bundle 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 bundle, 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 bundle 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 bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

8. Remedy bundle

- 8.1 On her initiative, Employment Judge George orders that the claimant must prepare a paginated file of documents (“remedy bundle”) 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 **9 August 2021**. The documents must be arranged in chronological or other logical order and the remedy bundle must have an **up to date schedule of loss** at the front of it.

9. Witness statements

- 9.1 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 **9 August 2021**. 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 bundle(s); 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.

10. Final hearing preparation

- 10.1 ***Five working days immediately before the first day of the final hearing*** the following parties must lodge the following with the Tribunal:
- 10.1.1 Electronic copies of the bundle and remedy bundle by the respondent and the claimant respectively;
- 10.1.2 Electronic copies of the witness statements, by whichever party is relying on the witness statement in question;

- 10.1.3 Electronic copies of an agreed neutral chronology and case list by the claimant.
- 10.2 On the working day immediately before the first day of the final hearing by 12.30 pm (but not before that day), unless otherwise ordered by the Tribunal, the following parties must lodge the following with the Tribunal:
- 10.2.1 four copies of the bundle and remedy bundle, by the respondent and the claimant respectively;
- 10.2.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question;
- 10.2.3 three hard copies of the a neutral chronology, 'cast list', and a reading list.

11 Other matters

- 11.1 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.
- 11.2 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.
- 11.3 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.
- 11.4 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.
- 11.5 Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 11.6 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 George

7 January 2021

Sent to the parties on:

22.02.2021

.....

For the Tribunal:

J Moossavi

.....