EMPLOYMENT TRIBUNALS

Claimant: Dean Martyn Percy

Respondent: The Dean & Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry VIII

Heard at: By CVP **On:** 23 October 2020

Before: Employment Judge Andrew Clarke QC (sitting alone)

Appearances
For the claimant: Ms S Fraser-Butlin, Counsel
For the respondent: Mr P Oldham QC

JUDGMENT

1. The respondent's application to strike out those parts of the claims which relate to alleged unlawful discrimination on the ground of religion is dismissed.

2. The respondent's application to strike out those parts of the claims which relate to alleged detriments consequent upon the making by the claimant of alleged protected disclosures is adjourned to be heard at 2pm on 27 October 2020 via CVP.

3. The respondent's application for costs is refused.

REASONS

Background

1. The claimant brings claims of detriment arising from the making of protected disclosures, of disability discrimination and of religious discrimination. At a Preliminary Hearing on 17 February 2020, I made certain orders designed to lead to a number of preliminary issues being determined over three days on 12, 15 and 16 October.

2. Two additional issues arose in the interim and were added to the list of matters to be dealt with (and certain others were removed). Both additional issues concerned strike out applications made by the respondent. The first related to those parts of the claim relating to the protected disclosures, the second to the direct religious discrimination claim. However, I note that the three-day hearing had always been intended to deal with the issue of whether the claimant was able to establish a comparator for the religious discrimination claim.

3. Neither issue could be resolved in the three days. Hence, the hearing of both was adjourned to be heard on 23 October. I deal below with each and with the respondent's application for an Order for costs in its favour.

The Protected Disclosure Claim Strike Out

4. The intention was that the claimant would revise its consolidated statement of case and the third claim form so as to provide certain particulars, the absence of which the respondent complained of. It was anticipated that if this was done, the strike out might not need to be proceeded with.

5. In the event, the revised pleadings were provided around noon on 22 October and the respondent said that it had been given too little time to consider them.

6. In the circumstances, I agreed to the respondent's application to adjourn that application to 2pm on 27 October.

The Comparator Issue Strike Out

7. The respondent's agenda for the February PH noted, as an issue for this tribunal, to decide whether the claimant could show a comparator for his claims. In February I ordered that the three-day PH would deal with issues relating to the comparator for the religious discrimination claim (see para.4.5).

8. This led to an exchange of correspondence between solicitors. Those for the respondent noted that the relevant claim form did not identify the comparators relied upon and asked that this information be provided. The response was that "there is no need to define the comparator where a decision is made on the basis of a religious criterion". It asserted that the question was then simply why the treatment occurred. The respondent's solicitor interpreted that as saying that there was no actual, or hypothetical, comparator and none was necessary. A strike out application was then commenced. I note that the letter to the tribunal setting out that application suggested (by putting passages in quotation marks) that the claimant had expressly stated that no comparator was relied upon. In fact, the quotations were from the respondent's own correspondence and the claimant's correspondence was somewhat opaque when read in its light.

9. The skeleton arguments for the three-day hearing both included a section dealing with this comparator issue. The claimant's skeleton stated (in para.58) that "a comparator is not invariably required" and (in para.61) that "this case is a paradigm example of when no comparator is required". However, the passages from case-law cited did not support the notion that no comparator was needed, rather that where the framing of the hypothetical comparator was difficult and/or lead to disputes between the parties, the tribunal might be best advised to deal with the 'reason why' question first, as establishing that reason might necessarily establish the answer to the less favourable treatment question. As it has variously been put in the authorities, the two questions are "two sides of the same coin", or "intertwined".

10. Mr Oldham QC's submissions addressed the assertion that no comparator was necessary, in other words that the first (less favourable treatment) question could, on facts like these, be ignored entirely.

11. Given the adjournment, I told the parties that I was prepared to received supplemental written submissions. One reason for that was that I remained somewhat confused as to exactly what case the claimant was putting forward, another was to have as much as possible in writing to ensure that the hearing would be concluded in one day.

12. Supplemental skeletons were exchanged. Mr Oldham QC's dealt with the same assertion as previously. Ms Fraser Butlin's submissions changed her position somewhat. Those submissions expressly replaced the previous ones and seemed to me to make clear that she was not disavowing the need for the first question to be answered, rather she was suggesting that there were obvious difficulties in the way of framing the characteristics of the hypothetical comparator in this case. I shall say a little more about one aspect of that difficulty below. Hence, she submitted, this was a case where the tribunal should hear the evidence, address the reason why question and then allow its conclusions in that regard to dictate the answer to (or inform the answering of) the less favourable treatment question, which would include the framing (so far as necessary) of the hypothetical comparator.

13. One issue touched upon by the claimant's second skeleton and debated at this hearing was that of what might be called the impossible hypothetical. Here, the hypothetical comparator might, at first glance, seem easy to define. It could be a Dean with all the characteristics of the claimant, but not being a minister in the Church of England. However, the statutes of the respondent college provide that the Dean must be such a minister (of 6 years' standing), or something equivalent from a related church. Hence, the obvious hypothetical comparator could not hold the post of Dean. Neither counsel was aware of a previous case which dealt with such a situation. Ms Fraser Butlin maintained that such impossibility would not preclude the use of that hypothetical comparator, Mr

Oldham QC disagrees. Both put a little flesh on the bones of their respective positions, but it is not necessary to refer to that here.

14. Given that the act of alleged discrimination (itself hotly disputed) concerned the tying of the claimant's salary to those of other Deans in the Church of England (instead of to those of other Heads of House), that the Dean could be a member of another church having no equivalent posts, or no salary scales for such posts might enable a non-impossible hypothetical comparator to be framed. I also bear in mind that the claimant's case seems to me rather more nuanced than my brief summary might suggest.

15. In all the circumstances:

    a. This strike out application cannot be proceeded with and must be dismissed. It proceeded on a basis that the claimant advanced a case which he no longer advances. Indeed, it is one which, I suspect, was never really advanced, albeit that the loose language used from time to time gave rise to the view that it was.

    b. The claimant needs to make clear precisely what case is being run either by amendment to the consolidated statement of case, or by way of written particulars. This should include any positive case which the claimant advances as to the characteristics of the hypothetical comparator. This must be done by supplying a copy of the appropriate document to the respondent and to the tribunal by no later than 4pm on Monday 26 October 2020.

16. Mr Oldham QC urged me not to preclude a future application to strike out this part of the claims if a self-contained legal issue might hereafter be said to exist in relation to this comparator issue. I do not do so. Nevertheless, I am concerned that any application of that kind is likely to be met by the assertion, based on authorities, binding on the tribunal, that this is a case where disagreements regarding the hypothetical comparator should be left until after the evidence has been heard and that a tribunal could not sensibly address such arguments until it had reached its decision on the reason why question. I cannot deal with any such arguments in the abstract. However, the authorities which both parties cite seem to me to support the view that disputes as to characteristics of the hypothetical comparator cannot usually be resolved until after the reason why question has been answered.

Costs

17. The respondent seeks an order for costs in respect of the attendance of solicitor and counsel at the hearing today. The application relies upon Rules 76(1)(a) and 76(2) of the Rules of Procedure.

18. It is convenient to deal with Rule 76(2) first. The basis of the application is that the claimant was in breach of the order which I made at the February PH (para.4.5) regarding the comparator issue.

19. Mr Oldham QC characterised that paragraph as ordering the claimant to give particulars of his case on comparators. On reflection, when read in context, this characterisation of the paragraph is not accurate. Paragraph 4 describes the issues to be decided at the three-day hearing. Sub-paragraph 5 did not require the claimant to particularise his case with regard to the comparator issue. The characteristics of the hypothetical comparator was one matter which that hearing was to consider. Hence, there was no breach of an order and the application cannot succeed on that ground.

20. As regards Rule 76(1)(a) the application is put on the basis of the claimant's unreasonable conduct in setting out one case (there is no need for a comparator) and, at the last minute, changing to another (reliance on a hypothetical comparator, but with an assertion that its characteristics need not and cannot be fully set out at this stage and that the tribunal should first hear the evidence and decide the reason why question).

21. I am very sympathetic to the respondent's position. The claimant's case on this issue was confused. That confusion was the product of loose and/or opaque language in correspondence and in the claimant's first skeleton argument. The claimant's position could and should have been set out with clarity at a much earlier stage.

22. I also bear in mind that one of the purposes of the three-day hearing was to enable the issues relating to the use of a comparator to be made clear, as they have been. Subject to the claimant's position being recorded in written particulars, as distinct from oral debate, this has now happened. This could have been achieved more expeditiously, but I am aware that this is only one issue in keenly fought litigation which is factually and legally complex. It is also the case that today's hearing was intended to deal with other matters as well.

23. I accept that the respondent was unable to find time to deal with the revised consolidated statement of case and claim form so as to enable the other strike out application to be dealt with. On learning of this the claimant sensibly agreed to adjourn that matter and, hearing Mr Oldham's account of the difficulties, I agreed. However, the amendments were clearly indicated and were to address now familiar issues. Furthermore, even if the parties had agreed last night between themselves to an adjournment, they would still have had to attend today to persuade me to adjourn and to fix a new date.

24. In all those circumstances, despite considering aspects of the claimant's conduct to be unreasonable (ie, not making the claimant's case clear at an earlier stage) I decline to exercise my discretion to award costs in the respondent's favour.

_____

Employment Judge Clarke QC

Date:…26th Oct 2020……

Sent to the parties on:

26th Oct 2020

……..……..

For the Tribunal:

T Yeo

……..