Case Numbers: 2304945/2019
2304946/2019

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mrs D Gullett (C1) Mr R Gullett (C2)	v	Otford Builders Merchants Ltd

PRELIMINARY HEARING

Heard at: **via CVP** On: **31/3/2021**

Before: **Employment Judge Wright**

Appearances
For the Claimant: Mr T Fancett - solicitor
For the Respondent: Ms G Rezaie - counsel

JUDGMENT OPEN PRELIMINARY HEARING

1. The first claimant's (herein referred to the claimant for the purposes of this Judgment) application to amend this claim to include further allegations (or in the alternative to rely upon further particularised allegations) failed. The respondent's application for costs was successful and the sum of £2,980 plus vat was awarded.

2. The claim was presented on 16/11/2019 and a case management preliminary hearing took place on 20/10/2020. At the time the claim was presented, the claimant was unrepresented. The respondent drew her attention to the need for further information in respect of the claims of unlawful discrimination contrary to the Equality Act 2010 (EQA) in its response to the claim on 30/12/2019.

3. Eight days before the preliminary hearing, the claimant instructed solicitors. The solicitors said they were focusing on a prospective amendment to include sex discrimination and the case management agenda. In fact the claimant had suggested she intended to make an application to include a claim for sex discrimination on 21/4/2020 and she was informed on the same date when discussion the fact the preliminary hearing had been postponed by the respondent that:

> ' ,,,any application to amend should be detailed in advance of the (relisted) Preliminary Hearing…'

4. Notwithstanding that, no amendment application was made at the preliminary hearing and no particulars were provided. The case management agenda for the preliminary hearing recorded, at box 2.3 (has necessary further information been requested):

> 'The Respondent has requested further and better particulars in respect of Mrs D Gullett's claim of race discrimination. Specifically, she should confirm:
>
> - Whether she is claiming that she has been directly discriminated against under section 13(1) of the Equality Act 2010, and, if so, which facts amount to less favourable treatment and who the appropriate comparator is.
>
> - Whether she is claiming that she has been indirectly discriminated against under sections 9 and 19 of the Equality Act 2010, and, if so, what the relevant provision, criterion or practice is and how this put her at a particular disadvantage.
>
> - Whether she is claiming that she has been harassed under section 26(1) of the Equality Act 2010 and, if so, the relevant unwanted conduct.
>
> - Whether she is claiming that she has been victimised under section 27(2) of the Equality Act 2010 and, if so, the protected act in question and conduct related to the same.'

5. The preliminary hearing noted the claimant relied upon the protected characteristic of race. She referred to her nationality as Venezuelan and makes some generalised allegations. Beyond that, the claims under the EQA were not sufficiently particularised.

6. There was no mention made of a separate application to amend in respect of the claim of race discrimination.

7. The claimant was directed to provide further particulars of the EQA claim, by reference to the matters pleaded in the ET1 only. She was informed the prohibited conduct relied upon and the complaint would need to be identified.

8. After the hearing, the respondent wrote to the claimant pointing out that an application to amend should have been made at that hearing. As a result of the claimant's failure to do so, the claimant was put on notice of costs.

9. On 10/11/2020 the claimant sent to the respondent an amended ET1. The prohibited conduct was identified as direct discrimination (s. 13 EQA) and harassment (s. 26 EQA). For direct discrimination, the comparator was Anne Shakespeare or in the alternative a hypothetical comparator in the same or not materially different circumstances, who was British.

10. The claimant then set out eleven allegations, which she contended were direct discrimination or in the alternative harassment.

11. The respondent objected the following day. The respondent took the view the claimant had gone beyond the Order as it had expanded the allegations beyond what was pleaded and had included new allegations. Of the eleven allegations, the respondent said that on a generous interpretation, 2, 3, 5 and 11 were possibly

contained in the ET1. The claimant was invited to withdraw the remaining allegations and to properly particularise the remaining four. The respondent pointed out that if it was necessary to make any application in respect of this matter, it reserved its position on costs.

12. The claimant disagreed with the respondent's view and there was also correspondence consequential upon the directions which followed the 10/11/2020 and the action the parties needed to take in order to comply with the directions.

13. That led to the claimant making a formal application to amend the claim to the Tribunal on 17/11/2020. The application was objected to by the respondent and the respondent applied for a short hearing to address this and made a costs application.

14. The Tribunal heard from both parties in respect of the application to amend (or in the alternative that further particulars had been provided). The Tribunal was referred to and considered the relevant principles and Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT in which guidance as to how to approach applications to amend.

15. The EAT in Vaughan v Modality Partnership EAT 0147/20 confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

16. The Tribunal must therefore consider the resulting injustice in allowing or refusing the application. It must also apply the overriding objective and dealing with the case justly and fairly and to ensure a fair hearing.

17. The claimant proposed that as she had attempted to particularise some of her claims, she was worse off, than if she had just making a bald statement that she was claiming race discrimination. It was also stated that English is not the claimant's first language. That was not accepted. The claimant had been able to explain her allegations in a few sentences and she was clearly capable of doing so.

18. The claimant's claim was defective in that there was a significant delay in making the application to amend and no explanation was provided for that. The result was the that the proposed amendments were significantly out of time. The only explanation provided was that the solicitors were instructed eight days before the hearing, at which the claimant was represented by counsel. The claimant had said she had been advised that her claim should include a sex discrimination claim in April 2020 and yet no further action had been taken in respect of this. She was also informed by the respondent at the time that any amendment needed to be particularised. It is also relevant that it is clear, to any professional representative reading the claimant's claim form, that her claims of race discrimination were defective and needed further information providing.

19. As set out in the Order of 20/10/2020, there is a family relationship behind any employment issues. Although the claimant has (still) not set out the complaint, it is not clear how the claimant, her husband and children attending a family Christmas dinner at Mr Sparrow's home (Mrs Sparrow being the claimant's sister-in-law (the claimant's husband's sister) in 2016, can amount to a complaint which falls within s.

39 EQA. The first two amendments (i and ii) were rejected for that reason; there was no nexus asserted to link the incident with the claimant's employment.

20. No explanation was provided why the third allegation (iii) could not have been included in the original claim form, summarised in at least a couple of sentences; similarly allegation (iv). They were both specific events which could have, but were not, previously referred to. There was also the limitation issue, which had not been addressed.

21. The sixth (vi) and seventh allegations (vii) by contrast were very generalised 'on many occasions' and lacked specificity. The eighth allegation (viii) made no reference at all to the claimant's race. Allegation nine (ix) referred to 'others' and 'sarcastic comments'. This was an application to amend, which would then require further particularisation. The tenth allegation (x) appears to be an allegation made by Ms Williams and the claimant does not set out how it related to her. Finally, the eleventh allegation (xi) pleaded that the dismissal was an act of direct discrimination (not harassment). The claimant's comparator would be a British employee, accused of misconduct and who was dismissed. It is difficult to see how this would transfer the burden to the respondent to provide a non-discriminatory explanation.

22. The only allegation which was found in the original claim, was the fifth one (v) which referred to a work dinner on 27/10/2018. There is a limitation issue and it has not been further particularised, other than to say the prohibited conduct is direct discrimination or in the alternative it is harassment related to race. The claimant says she was told or her husband was told that she is rude as she is from Venezuela.

23. As a result of the outcome, the respondent restated its costs application. There was very little time left in the hearing and all the parties could do was to briefly summarise their respective positions.

24. The respondent pointed out the claimant was professionally represented. In correspondence the respondent had offered a solution which would avoid the need for a further hearing (in fact the claimant would have been better off accepting the respondent's proposal as the respondent was prepared to agree that allegations (ii), (iii) (v) and (xi) were referenced in the original claim). In short, the respondent said the conduct of this aspect of the claim was unreasonable.

25. The claimant took issue with the sum claimed of 7.9 hours for a Senior Associate of £1,580 pus vat (at a rate of £200 per hour). Counsel's fees in the sum of £1,925 plus vat were claimed (although according to the fee note this is incorrect). The claimant was asked to comment upon the sums claimed in email correspondence by return; however no response was received.

26. The Tribunal has the power to make a costs order under Schedule 1 Rule 75 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. A Tribunal may make a costs order where it considers that a party or a party's representative has acted unreasonably in the conduct of proceedings. The ability to pay may be taken into account, although no representations were made on this aspect of the application. Cost awards in the Tribunal are the exception rather than

the rule, but that does not mean they should not be applied for or granted in the proper circumstances. Costs are compensatory, rather than punitive.

27. The claimant's amendment application was defective and as already observed, if it had been granted, it would have required a direction that further particulars were provided. The claimant had already had the opportunity to provide further particulars. As observed by the respondent, the correct time to make an application to amend (whether that was to include a claim for sex discrimination or to make further allegations based upon race) was at the previous preliminary hearing. Furthermore, the respondent had taken an entirely proper and reasonable stance in attempting to resolve this matter in correspondence, prior to bringing it before the Tribunal.

28. In Chandhok v Tirkey 2015 ICR 527 the EAT made it clear that the ET1 is not an initial document free to be augmented by whatever the parties subsequently choose to add or subtract. It sets out the essential case to which a respondent is required to respond:

> '[A] system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.'

29. On this occasion, the Tribunal was persuaded to exercise its discretion to make an award of costs against the claimant. It found the threshold was met that the conduct had been unreasonable. The claimant had an appropriate opportunity to make an application to amend and did not do so. The application made was not capable of being granted. The respondent has been put to additional cost in addressing this matter. In reality, the amendment application should have been withdrawn and had the claimant done so, that would have avoided the need for the hearing and the respondent's additional cost.

30. The Tribunal therefore awards solicitor's fees of £1580 and counsel's fees of £1,400, totalling £2,980 plus vat.

31. As per the respondent's suggestion, the directions are varied as follows:

List of issues – 30/4/2021

Disclose of documents - 14/5/2021

Bundle – 11/6/2021

Exchange of witness statements – 13/8/2021

32. Due to the Covid-19 pandemic, the format and requirements of the final hearing may change; please see the Presidents' road map of 31/3/2021. The parties' attention is also drawn to the Presidential Practice Direction and Guidance in respect of remote and in person hearings of 14/9/2020:

https://www.judiciary.uk/wp-content/uploads/2021/03/ET-road-map-31-March-2021.pdf

https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PD-Remote-Hearings-and-Open-Justice.pdf

https://www.judiciary.uk/wp-content/uploads/2015/03/Presidential-Guidance-ET-Covid19.pdf

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Employment Judge Wright

7 April 2021

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.

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.

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has been moved online. All judgments and written reasons since February 2017 are now available online and therefore accessible to the public at: https://www.gov.uk/employment-tribunal-decisions

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.