Cases: 1803877/2021,
1803882/2021, 1804380/2021 &
1804384/2021

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mr D Horrobin**
(2) Mr V Baker
Respondent: **Kirklees College**

AT A PRELIMINARY HEARING

Heard at: **Leeds** **On: 5th January 2022**
Before: **Employment Judge Lancaster**

Representation
Claimants: Mr D Ibekwe, Brighton & Hove Race Project
Respondent: Mr P Sangha, counsel

JUDGMENT having been sent to the parties on 7th January 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, derived from the transcript of the oral decision delivered immediately upon the conclusion of the hearing:

WRITTEN REASONS

1. This is a public preliminary hearing in four consolidated claims, two each by Mr David Horrobin and Mr Vantan Baker against the same respondent Kirklees College. Mr Horrobin has attended. Mr Baker has not. Both are represented today by Mr Ibekwe.

2. The purpose of this hearing is to determine the respondent's applications that the claims should be struck out or alternatively made subject to a deposit order. Where I have made a deposit order against Mr Horrobin the reasons for that decision are recorded separately. Those complaints which I consider to have little reasonable prospect of success are of victimisation in respect to both the dismissal and any acts prior to termination, and detriment prior to termination and automatically unfair dismissal because of having made a protected qualifying disclosure. Mr Horrobin's claim of "ordinary" unfair dismissal will proceed to a final hearing in any event. There is also a third claim by Mr Horrobin which I am not concerned with today because it has only recently been served and responded to, and that will have to be further addressed in due course.

3. The claims brought by Mr Baker are of detriment for having made a protected qualifying disclosure, direct religious discrimination, harassment for a reason related to religious belief, and victimisation. Complaints of direct discrimination and harassment are of course mutually exclusive under section 212 of the Equality Act 2010.

4. The common background to this case is that the claimants were campus support officers working at the respondent college, which is a college of further education. In 2019 there was a proposal to restructure the entirety of the college function. Those proposals were largely put on hold because of the onset of the pandemic in early 2020, but implementation commenced in the Spring of 2021 with consultations with the unions.

5. So far as the two claimants were concerned the principal proposal was to replace campus support officers with facility support officers. There were to be changes of duties to some extent, most particularly so far as these claims are concerned moving on to a potential six day working pattern.

6. In the course of the individual consultations that followed on from the discussions with the unions, that proposal in relation to Saturday working was clarified as being an expectation that they would work no more than six Saturdays within the year. The negotiations continued and at the end of the negotiations in each case effectively the respondent issued an ultimatum that the claimant should accept the revised terms as then offered, after various variations and concessions had been made, or they would face dismissal.

7. In the case of Mr Horrobin that notice of termination was eventually issued on 30 July of last year giving him only two days' notice to 1 August, and that appears quite clearly - I having seen that letter- to be the effective date of termination. He was entitled however to 12 weeks' notice and was paid in lieu. That payment was made in the ordinary course of the payroll going through on or around 23 August.

8. In the case of Mr Baker he was issued with the same notice of termination but this time on 25 August, somewhat later, to take effect as of 6 September. On that date he was, however, in fact able to negotiate revised terms that accorded with his wish not to work Saturdays. He could not do that because of his religious conviction: he was a 7th Adventist.

9. So the eventual agreement that he signed up to was that he would not be required to work Saturdays at all but he would commit to working a pattern that included Sundays: and so he remains employed. His claims were issued before that date 6 September, at a point where he was still under the notice of termination.

Mr Baker

10. I shall deal with Mr Baker's claims firstly because I have decided that none of his complaints have a reasonable prospect of success and both those claims will stand dismissed.

11. The proposals having been put to the workforce I accept that Mr Baker raised objections, but I do not know the precise terms of those objections because they are

not specifically pleaded anywhere. However, that is a matter that could have been addressed subsequently either by further particulars or on sequential early service of a witness statement.

12. In so far as those objections only related to the way that the proposed restructure was being implemented, I consider that there is no reasonable prospect of that being held to constitute a protected qualifying disclosure under the Employment Rights Act.

13. The way this case is pleaded is common to both claimants, and clearly therefore had input from their representative. In the course of our discussions we have addressed issues where I disagree with Mr Ibekwe as to how the pleaded disclosures which are alleged to have been made have been formulated. And he appears to now accept that there cannot, for instance, be any legal obligation to conduct a job evaluation before proposing any changes to terms and conditions.

14. But in any event all those specific objections allegedly articulated by the claimants in respect to the process are not in the public interest. They relate solely to the personal contracts of the employee concerned.

15. In so far, however, as anything which Mr Baker may have said or written related to his religious convictions, that would be capable - depending on its precise terms - of being either a protected act under section 27 of the Equality Act 2010 or the making of a protected disclosure, because it disclosed information tending to show a breach of the legal requirement not to breach the Equality Act by discriminating against somebody on the grounds of a protected characteristic of religion or belief.

16. But the fact remains that at no stage was Mr Baker ever required to work Saturdays. As I have already indicated in my general discussion of the background the original proposal was watered down to be a maximum of six Saturdays per annum. Then, by 25 August when Mr Baker was issued with notice of termination, it had further been made clear to him that he would not in fact -even if that contract were entered into - be required to work Saturdays. That was because he would be allowed to take it as annual leave, paid out of his holiday allowance if he wished or as unpaid leave. So, although that may potentially amount to some detriment in that he be required to take his leave at set times rather than in accordance with his other wishes, it was never actually going to impact upon his religious observance. As I have said although that notice was issued it was never brought into effect because there was a further concession, which Mr Baker by that stage was prepared to agree to.

17. So the only way he could possibly have been subjected to any detriment either by way of discrimination, victimisation or “whistle blowing” (protected qualifying disclosure detriment) or of unwanted conduct in essentially the way the preceding negotiations were handled. In particular he relies, or seeks to rely upon the period of 25 August to 6 September when he was under some pressure to agree the proposed variation albeit that he would not be required actually to work on those Saturdays if, as expected, he made other arrangements. Mr Ibekwe says that is a detriment, although only for a very brief period. The claimant was, though, never going to be required to work in contradiction of his convictions such that that attendance could properly be said to have violated his dignity or otherwise created a harassing environment for him.

Nor did he in actual fact succumb to any such alleged pressure by agreeing to the new contract that nominally include Saturday working. And of course it must be observed that these proposals for restructure pre-dated the doing of any protected act or the making of a protected qualifying disclosure on the part of either claimant. It was a wide scale reorganisation of the college and in the course of that the claimants subsequently raised their objections

18. Potentially this set of facts might have given rise to an indirect discrimination claim – which would of course have been open to a defence of justification - but that is not how the discrimination is pleaded. It is specifically put as case of direct discrimination, alternatively harassment. I consider that there is no reasonable prospect of establishing an actual causal link to say that anything happened because Mr Baker was a 7th day Adventist or was related to his religion. Rather it is the other way round, that because he was a 7th day Adventist he alone considered the common proposals for potential Saturday working as a potential detriment. His personal religious belief was clearly not the reason why the respondent sought at that juncture to impose those changes, which applied to everybody.

19. In the case of Mr Baker, as I have said, ultimately he was able to negotiate a satisfactory conclusion. That means that the period from 25 August to 6 September is "bookended" by the making of concessions, clearly designed to obviate the adverse effect of timetabled Saturday working. The respondent evidently wished to seek to accommodate the claimant's religious belief, and there is not therefore any reasonable prospect, in the light of these uncontentious facts, of establishing that the reason for the issue of the ultimatum was because of his holding or expressing those convictions, nor that his religion was any significant factor in that decision. So the way the claim is actually pleaded has no reasonable prospect of success and will be struck out.

Mr Horrobin

20. In the case of Mr Horrobin he raised the same procedural objections allegedly as Mr Baker but again I conclude there is no reasonable prospect of those matters that are personal to his own contract being held to be in the public interest and therefore to amount potentially to a protected qualifying disclosure.

21. Mr Horrobin has a wife who allegedly has disabilities as has his father-in-law. Though as yet I do not think there has been any disclosure of evidence to support that nor any determination or concession, I assume for the moment they are indeed both disabled people. Mr Horrobin, though again I do not have the precise terms of any disclosure or of the doing a protected act, alleged that he would be entitled to protection by association with those with a disability. That of course under the law means that he is entitled not to be subjected to direct discrimination because of somebody else's disability nor to be subjected to harassment related to that other person's disability. It does not afford him any rights in his capacity as a carer to have particular adjustment to his hours or other variations to his working conditions.

22. I do not know the terms in which Mr Horrobin is said to have asserted that the proposed changes to working patterns, in particular the Saturday working, may

impinge upon his rights by association with disabled people. But again for my present purposes that does not matter, because even if there was in fact no such right that was likely to be infringed, provided that the assertion was made in good face it affords protection to Mr Horrobin.

23. So potentially, and again subject to clarification of what information was actually disclosed or what was actually done in relation to the Equality Act, in the course of any letters or meetings that are relied upon, that is potentially both the basis of a claim under section 27 of the Equality Act or for "whistle blowing" under the 1996 Act. However in the context where I repeat that these proposed changes pre-dated any such disclosures or doing a protected act, I consider there is little reasonable prospect of successively arguing that any alleged detriment was because he had done that. If the deposit is paid those claims will, however, go ahead. The Equality Act claim up to this point is specifically pleaded as being solely in relation to victimisation as regards his association with his father-in-law or his wife. It is not the Claimant's case that he was subjected to any detriment prior to the dismissal because his wife or his father in law were disabled (direct associative discrimination) but only that he had asserted his alleged rights as a carer (doing a protected act).

24. So far as the dismissal itself is concerned there is no reasonable prospect of Mr Horrobin establishing this was automatically unfair under section 99 of the Employment Rights Act. That relates back to section 57A which is the right to time off to care for dependants in exceptional circumstances. There is nothing on the face of these papers to suggest that the reason for dismissal had anything whatsoever to do with circumstances pertaining to the taking of time to care for dependants.

25. There are a number of instances identified where the claimant attended either with his father-in-law or his wife for various medical appointments. Those all appear to have been pre-booked. They are not the type of appointment that is ordinarily therefore covered by section 57A, which by definition is unexpected time off during normal working hours. But even if it were on any of those occasions to be properly construed as coming within the right under section 57A the fact is that there was no objection whatsoever raised to his attending on those appointments. There are no reasons to suppose that this had any bearing whatsoever on the mind of the decision maker when dismissal was finally contemplated.

26. On the face of it although it is always for the respondent to show what was the reason or principal reason for the termination, this would appear to be some other substantial reason connected with a re-organisation and the imposition of new terms and conditions across the employer's workforce. Nor therefore is there any reasonable prospect of this being brought as a claim under section 104A, the assertion of an infringement of a statutory right in relation to the time off for dependants. As I have said, on those occasions where Mr Horrobin did take time to attend appointments with those disabled people it was not objected to, so there is no suggestion that he has asserted an infringement to his right to have time off even if it were properly to fall under section 57A on those instances. There is therefore no reasonable prospect of this, rather than the reorganisation, being held to have been the principal reason for termination.

27. Although I am well aware that it is exceptional to dismiss a claim of discrimination I do consider that the alternative proposition which is raised only in the second claim, that this termination is not merely victimisation because of having done a protected act or asserting his right not to suffer detriment because of his association with disabled people but it is itself an act of direct associated disability discrimination is an allegation which simply has no reasonable prospect of success. There is absolutely no factual context in which the actual disabilities of these people can be said to have now become a material reason why the dismissal was brought into effect.

28. In the content of this case there is nothing whatsoever which I can identify which could be put before the Tribunal in due course as a fact from which it could conclude that that a contravention of the Equality Act was in fact a reason for termination in these circumstances. He was clearly not dismissed because either his wife or his father-in-law are disabled.

29. There is therefore no good basis for letting the matter go to a hearing "in case something turns up" which may assist the Claimant's case, where that "something" is at present wholly unidentifiable. The Claimant has been given the opportunity, firstly in writing and then at the hearing, to make representations as to how this claim may be made out and has not done so. He has merely asserted the Respondent's knowledge of the alleged disabilities by reference to the unobjected taking of leave to attend appointments, and apparently also purported rights as a carer to adjust his hours. The power under rule 37 is therefore properly exercisable in this case.

Philip Lancaster

EMPLOYMENT JU DGE LANCASTER

DATE 24th January 2022

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