



EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

Heard at: Manchester Employment Tribunal

On: 9 March 2022

Before: Employment Judge Cookson sitting alone

Representation

Claimant: Did not attend

Respondent: Mr Brochwicz – Lewinski (counsel)

JUDGMENT ON A PRELIMINARY MATTER

It is the decision of the Employment Tribunal that:

1. The claimant has not shown that her partner is a disabled person for the purposes of the Equality Act 2010 and in consequence the claimant's disability discrimination claims are dismissed.
2. The claimant's other claims are not affected.

REASONS

Introduction

1. This preliminary hearing was listed by Employment Judge Leach at a preliminary hearing on 26 November 2021. The issues to be determined at this preliminary hearing were: –

- a. whether the claimant's partner had at all relevant times, a disability for the purposes of the Equality Act 2010 ("EqA")
 - b. whether the claimant is able to bring a complaint of indirect discrimination by association.
2. On 4 March 2022 the claimant made an application headed "appeal on application for a stay, and the set-aside of proceedings, on the request for a judicial review by the Equality and Human Rights Commission ("EHRC") under section 149 of the EqA. On 7 March 2022 the respondent objected to that application and argued that today's preliminary hearing should go ahead. On 8 March 2022 Regional Employment Judge Franey directed that the claimant's application would be considered at the preliminary hearing which would remain listed. That decision was sent to the parties by email at 12:02 PM. At 3:09 PM the claimant wrote to the tribunal to make an application for a postponement of the hearing on 9 March on the grounds that due to the claimant's partner's ill-health the claimant's partner is seriously unwell and too ill to participate in the hearing, as her partner's carer, the claimant's duty of care is to put her partner's health first and that affects her ability to even participate in the proceedings. That ground for postponement had not previously been identified by the claimant. This postponement application was received too late to be referred to an employment judge. The respondent objected to that application by email on the same afternoon on a number of grounds including that no medical evidence had been provided to explain the nature of the health condition and to confirm unfitness to attend.
3. In advance of the hearing I received a preliminary hearing bundle from the respondent containing 381 numbered pages. The documents in the bundle comprise correspondence between the parties and the tribunal and each other, and employment tribunal judgments and case management preliminary hearing summaries and orders.

Application of Rule 47 of the Employment Tribunal Rules of Procedure (the Rules)

4. The claimant did not attend today's hearing. My clerk made attempts to contact her by telephone and email, but this proved unsuccessful. It was confirmed that the respondent had had no further contact with the claimant following the emails of the previous day. I delayed the start of the hearing both to facilitate my reading of the bundle of documents and in the hope that we would receive some contact from the claimant. However, when no such contact was received I started the hearing and heard representations from the respondent which reflected the grounds on which it had objected to the stay of the proceedings and to the postponement set out in the letters to the tribunal.
5. In the circumstances I determined that the hearing to proceed in the absence of the claimant in accordance with my powers under Rule 47. Under that rule, *"if a party fails to attend or to be represented at the hearing, the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, that the reason for the party's absence"*.
6. I took into account the following matters. In this case the claimant's application for

postponement had not been granted and she was aware of that. Although an application for postponement on the grounds of ill-health have been made, the claimant had failed to provide any medical evidence in support of that application which appeared to have been made in response to the decision of Regional Employment Judge Franey that the claimant's application for a stay of hearing be considered at the outset of today's hearing. Her first application for a postponement was not made on the grounds of her health and it was not suggested that the claimant had fallen suddenly ill and would not have been able to get medical evidence. The claimant had offered no evidence or substantive reason why she could not attend the hearing if her partner was too unwell to attend. I also took into account that this is only the latest in a series of preliminary hearings and it is clear from the case management orders of Employment Judge Leach that there are still significant matters to be resolved which present a hurdle to the final hearing going ahead. It is particularly relevant that this case is listed for final four-day hearing commencing on 28 June 2022. The respondent had prepared for this hearing and had attended ready to deal with the matters listed in accordance with Employment Judge Leach's orders. In those circumstances and notwithstanding the prejudice to the claimant, I concluded that it was in accordance with the overriding objective to proceed with the hearing in the claimant's absence and refuse the postponement application.

The claimant's application for stay of these proceedings

7. The first matter I considered was the application for a stay of the proceedings on the grounds set out in the claimant's 21 page letter of 4 March 2022. The terms of that application not entirely clear. The claimant says "I request permission for intervention from the EHRC into a number of failures to comply with the public sector equality duty under section 149 EqA" and "I request permission to appeal for a judicial review under section 30 Equality Act 2006 based on failures to comply with the public sector equality duty in ways that breach the EqA, the Human Rights Act 1998 and European Convention rights." It is not clear what steps, if any, that the claimant has taken in order to pursue these matters. It is also not clear if this request for permission is addressed to the tribunal but, for the avoidance of doubt, these are not matters over which this tribunal has any jurisdiction. The claimant goes on to say that she "does not consider that it will be in the interests of justice to herself and her partner for the hearing of 9 March 2022 to proceed until these matters dealt with" but it is not clear why she says that.
8. In the letter the claimant goes on to refer to the powers which the EHRC has to assist an individual who is bringing proceedings and under the heading "Claims" identifies some 21 matters which she says are claims to be brought on behalf of herself and her partner. The claimant does not identify what if any steps she has made to approach the EHRC for assistance and/or funding or to raise any of the other issues. I note that at previous hearings it has been explained to the claimant and her partner that the tribunal has a limited and specific jurisdiction to deal with disputes which arise from and relate to the workplace and does not have jurisdiction to deal with wider matters which are the jurisdiction of other courts .
9. After considering the claimant's correspondence and the respondent's submissions, I concluded that that it would not be in accordance with the overriding objective for the stay of proceedings sought to be granted. There is no suggestion

that legal proceedings in any other jurisdiction have been issued. In any event I see nothing in the claims she has referred to which would suggest that a stay in these proceedings is required or appropriate. For example, it is not suggested that if the employment tribunal hearing is to go ahead there is a danger of an employment tribunal panel making findings which could embarrass a judge in a higher court and I see no reason for such a risk arising.

10. The overriding objective requires that I deal with cases fairly and justly so far as practicable to ensure that the parties are on an equal footing; to deal with cases in a way which is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and to seek flexibility in the proceedings; to avoid delay, as far as is compatible with the proper consideration of the issues; and to save expense. If the stay in these proceedings sought is granted it is inevitable that there will be a significant delay before the case can come to final hearing. The claim in this case was issued on 11 September 2020. It is a case which involves allegations of unlawful discrimination, detriment on various grounds including that the claimant has raised protected disclosures as well as allegations of breach of contract and other matters. There are clearly significant factual disputes between the parties which will have to be resolved by the employment tribunal and any further delay will inevitably impact on the veracity of that evidence. Further the respondent will face costs and expense in addition to that already incurred in the course of the various hearing to date. In short I concluded that I should not stay this case.

Determination of whether the claimant's partner is a disabled person

11. The respondent made submissions to me that I should proceed to determine the preliminary matters in accordance with the orders made by Employment Judge Leach. In particular counsel for the respondent explained in some detail the chronology of orders and hearings which had led to the hearing today which he argued was relevant to my considerations. I agree that chronology is significant. In brief terms the most significant matters are as follows.
12. The claim was issued on 11 September 2020 and the response was filed on 28 October 2020. On 26 January 2021 there was a case management preliminary hearing before Employment Judge Ord, held by CVP. The claimant was required *"to use her best efforts to provide of her partner's state of mental health, heart condition and any other details she thinks fit in order to support her claim of disability discrimination."* On 9 March 2021 time for complying with that order was extended to 23 March 2021.
13. On 22 April 2021 the respondent explained why it did not concede disability.
14. The claimant raised concerns about her partner's privacy and on 4 August 2021 Regional Employment Franey acknowledged the sensitivity of this matter and ordered that there should be a private preliminary hearing in private to determine a number of matters including the practical arrangements which are appropriate to enable the respondent to have access to sufficient information about the claimant's partner's disability to confirm whether that point is conceded or still in dispute and whether there was an alternative way to approach the matter to avoid disclosure at this stage.

15. This hearing went ahead on 8 September 2021. Employment Judge Holmes made the following point “... *the claimant must now make a choice. If she maintains her associative disability claims, she must provide this medical and other evidence. If she, and her partner (against whom she could technically an order if she refused to co-operate, though this seems unlikely), remain unwilling to provide this evidence, the claimant will have to accept that her associative disability claims can proceed no further. She has to be in a position to establish her partner’s disability, and with this evidence she will be unable to do so.*” He made an unless order for the claimant (a) to disclose to the respondent all relevant medical records, notes, and any other evidence of her partner’s disability, or disabilities, relied upon by her for her associative disability claims; and (b) to disclose to the respondent an impact statement made by her partner setting out the relevant details of the mental and/or physical impairments that are relied upon by the claimant as amounting to any disability, and their effects upon their day to day activities, together with any supporting documents, her claims of associative disability discrimination will stand dismissed without further order or hearing.
16. On 6 October 2021 the claimant disclosed some medical information to the respondent but sent that under a covering letter to the tribunal, copied to Sarah Calderwood of the respondent’s solicitors which says this “*today I sent medical evidence and an impact statement for the attention of only Sarah Calderwood from Slater Heelis solicitors to prove disability*”. Although it is unnecessary to go into detail here, the context of this is relevant in that there had been a previous issue about the disclosure of sharing of the claimant’s partner’s medical information with the respondent. The respondent sought the permission of the claimant and her partner to share the information with counsel and the wider legal team. Those requests were not replied to.
17. In any event the medical evidence disclosed and the impact statement were heavily redacted so that it is not possible to confirm that the information provided relates to the claimant’s partner. Names, addresses, dates of birth, NHS numbers and the names of doctors were all redacted. The respondent wrote to the tribunal on 8 November 2021 to request that the original documents be brought to a preliminary hearing for inspection on 2 November 2021 which had been listed to determine the issue of the claimant’s disability, amongst other matters.
18. On 5 November 2021 Employment Judge Holmes considered that the unless order had been complied with and made an order that the claimant provide to the tribunal a bundle of documents for use at the preliminary hearing for the purpose of determining the issue of the claimant’s partner’s disability by 19 November 2021.
19. The preliminary hearing on 26 November 2021 was conducted by Employment Judge Leach. His record of the hearing says this:
- “10. The respondent told me they had not received a bundle of documents. The claimant’s position was that the respondent had received a bundle of documents, namely those documents which had been sent to Sarah Calderwood. Further, the respondent’s partner had also sent by email those same documents to the tribunal. The bundle comprised those documents. As it was, I did not have those documents but managed to find that they had indeed*

been sent by email but without a case number reference and had not been matched to the Tribunal file. The claimant should note that every item of correspondence sent to the Tribunal must include a case reference number.

11. The claimant told me that it should have been obvious to the respondent that the information provided could have been considered by solicitors (not just Sarah Calderwood) at SH as well as counsel for the purposes of preparing for this hearing. I disagree. It was not clear from the correspondence between the parties that this permission had been given. The position was confusing. Consequently, Ms Quigley [counsel for the respondent] had not seen the impact statement and medical records. The respondent had not seen them either.

12. Ms Quigley told me that SH had emailed the claimant to ask for permission to send the documents to Ms Quigley. The claimant did not respond, and SH sent a further email on 25 November 2021 but again there was no response.

13. I reminded the claimant of the duty to cooperate in the conduct of these proceedings and asked the claimant if (as the claimant now says) it was obvious that the SH had permission to provide a copy to Ms Quigley, why she did not simply respond by saying "of course" or something similar? The claimant's explanation was that she had been sent too many emails for her to be able to deal with.

14. Given where the parties and the Tribunal were, I decided that it was in the interests of justice to postpone the determination of Issue One until the next preliminary hearing (it was clear that there would need to be one anyway). There were more than enough agenda items remaining to take up the remainder of today's hearing.

15. I note, for the avoidance of any doubt (and having gone through all of these points at the hearing):-

(1) The documents disclosed by the claimant are in the possession of SH.

(2) SH (not just Sarah Calderwood) may access the documents for the purposes of these proceedings.

(3) The respondent itself may also access the documents but only for the purposes of these proceedings.

(4) SH and Ms Quigley have said, recognising the sensitivity of the documentation, that they intend disclosure to just one individual at the respondent, namely [redacted]

(5) It will assist the parties and the Tribunal at the next hearing, if page numbers are applied to these disclosed documents and impact statement, whether as a new bundle or an addition to the existing bundle.

16. Later in the hearing we discussed the disclosure of unredacted medical

records but it is appropriate that I record those discussions here. It is understood that the records have been heavily redacted. Ms Quigley said that there was concern that it may not even be apparent that the disclosed documents are the medical records of the claimant's partner. A straightforward solution to this is for the claimant and her partner to have unredacted copies available for inspection by the respondent's solicitor and/or counsel at the next hearing. I told the claimant that a room could be made available in the Tribunal building so that inspection could take place in a private setting. That might be by allowing access to the Tribunal room itself prior to the commencement of the hearing or another room.

17. The discussion then moved to how many unredacted copies needed to be disclosed. The claimant's partner had proposed one page. I told the claimant and her partner that ultimately that was a matter for them. I had tried to find a pragmatic solution to this and various other issues in this preliminary hearing but I was not in a position to say what would or would not amount to adequate inspection of documents that I had not at that stage seen. Ultimately it was for the claimant to prove that the claimant's partner had a disability for the purposes of the Equality Act 2010. If the respondent decided that there had been insufficient disclosure and inspection and/or they were not satisfied with the authenticity of the documentation then they may well make representations on that basis at the next hearing. The Tribunal will then decide whether the claimant had proved that her partner had a disability, taking into account the respondent's submissions."

20. It can be seen that Employment Judge Leach approached this issue fairly and pragmatically. It was necessary to postpone the issue of the determination of disability to this hearing, but he took steps to find a way forward which could satisfy the concerns of both parties and which could ensure this matter should and could be determined at this hearing. He also made a number of case management orders as follows:

1. Additional information

1.1 The claimant must provide to the respondent and the Tribunal on or before 28 January 2022, the additional information required from her by the instructions at various places in the Annex attached.

1.2 The respondent must provide to the claimant and the Tribunal on or before 28 January 2022, the additional information required by the instructions at 9.7, 10.7, 11.6 of the Annex attached.

2. Final List of issues

2.1 The parties must cooperate with each other so that they provide to the Tribunal at least 7 days before the preliminary hearing on 9 March 2022, a final, agreed list of complaints and issues.

2.2 In the event that it is not possible to reach agreement then each party should provide to the Tribunal at least 7 days before the preliminary hearing, its written explanation as to why agreement has not been possible. These written

explanations should make clear what is agreed and what is not agreed.

3. Preparation for preliminary hearing on 9 March 2022

3.1 Each party shall provide the other on or before 23 February 2022, with written legal arguments on the indirect discrimination by association issue. That written legal argument shall include either a copy or a library reference to all legal authorities the party intends to refer the Tribunal to, relevant to this issue.

3.2 Each party shall also provide a copy of their written legal argument to the Tribunal in advance of the preliminary hearing on 9 March 2022.

3.3 The parties shall provide an agreed agenda and bundle of documents for the preliminary hearing:-

2.3.1 The respondent shall provide the claimant with a draft bundle and agenda on or before the 2 March 2022;

3.3.2 The claimant shall either confirm her agreement to the draft bundle or agenda or, where she does not agree, shall explain why and work with the respondent to ensure an agreed bundle of documents and agenda are available on 9 March 2021.

21. The claimant wrote to the tribunal to explain that she and her partner had been unwell in December 2021. On 3 February 2022 Employment Judge Leach extended the time for the claimant to comply with the order for provision of additional information until 17 February 2022 and also said this “The claimant will no doubt understand the need to ensure all remaining case management and preliminary issues are dealt with at the preliminary hearing on 9 March 2022.”

22. The respondent wrote to the claimant to suggest a revised timetable. On 18 February the claimant wrote to the respondent, copied to the tribunal to say that she had been very unwell, was recovering but still not completely well and “find I must ask permission for a few more days to complete” the information required by Employment Judge Leach for the hearing on 9 March. From the tribunal file it would appear that there is no further correspondence from the claimant until her application for a stay and postpone of today’s hearing on 4 March, two weeks later.

23. The claimant has not complied with the orders made by Employment Judge Leach. I am satisfied that, insofar it was able in light of the claimant’s non-compliance, the respondent did comply with the orders.

24. In the covering email to the letter of 4 March 2022 the claimant said this “I wish to apologise to the Employment Tribunal in my timing, due to the breakdown of my health”. I have sympathy for the claimant if she was unwell but there is some force to Mr Brochwicz–Lewinski’s submission that the claimant has failed to offer any explanation for why her health prevented her from complying with Employment Judge Leach’s orders to provide further information but those health reasons did not prevent her from writing a long and detailed letter running to 21 pages which raises a wide range of legal issues and cross refers to many different legislative provisions. The claimant’s failure to comply with the orders must in seen in that context and in circumstances where she has failed to produce any medical evidence in relation to health matters which she suggests have prevented her

compliance with orders over several months.

25. I accepted Mr Brochwicz–Lewinski’s submission that in circumstances where the claimant had failed to provide any medical evidence to support her contention that she could not either comply with orders or attend today’s hearing it is proportionate and appropriate for me to determine the issue of disability on the basis of the evidence available in the preliminary hearing bundle (page 84-93 in the preliminary hearing bundle).
26. If I were to adjourn this hearing and relist this for a further preliminary hearing it is inevitable that the final hearing will have to be adjourned and significantly the claimant has offered no suggestion that her partner is willing to disclose unredacted medical evidence at any future hearing or indeed that the claimant would wish to seek to compel such disclosure (and I would find it surprising if she did). In other words I have no reason to believe that if I were to postpone the determination of the disability issue to another day with the consequential implications for the listing of the final hearing, that at the next hearing an employment judge would not face exactly the same position that Employment Judge Leach and I have faced and indeed the same objections that were raised before Employment Judge Holmes. The claimant and her partner are entitled to decline to disclose medical evidence but that should not be the cause of further delay in the proceedings. Delay cannot be in the interests of either party. Disability is only an element of the claimant’s case. By determining the issue today, I could seek to avoid further delay.
27. I have balanced the prejudice this will cause to the claimant and the prejudice to the respondent if this matter remains unresolved. The respondent faces significant allegations which it is rightly keen to have resolved. I am informed that it has incurred very significant legal costs to date and, in light of the number and complexity of the hearings in this matter, that seems entirely plausible. I concluded that the balance of prejudice on this occasion fell in favour of the respondent.

Disability

28. I have considered such evidence that I have about disability carefully. I did not reject the evidence simply because the claimant’s partner had not appeared before me to swear her evidence or be cross examined or because some of it was redacted.
29. However, I accepted the respondent’s submission that it is not raising idle or inconsequential concerns about the documents presented by the claimant. Given the significance of the redactions made, it is impossible to find that the evidence in the preliminary bundle relates to any particular individual or indeed that it all relates to the same individual. It is too heavily redacted to be sensibly interrogated. I cannot reasonably conclude that it relates to the claimant’s partner. As the respondent points out some of the name redactions appear to suggest that the name redacted must be much shorter than what we understand the claimant’s partner’s name to be. There may, of course, be a straightforward explanation of that, but none has been offered by the claimant. The consequence is that the evidence before me falls short of meeting the evidential burden the Equality Act places on the claimant to show that her partner has the protected characteristic of

disability under s6 of the Equality Act 2010. The claimant has not shown that her person has *“a physical or mental impairment, and that the impairment has a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.”*

30. Accordingly, I have concluded that the claimant has not shown that her partner is a disabled person. In consequence all of the disability discrimination claims must be dismissed. Her other claims will continue.

31. I have made case management orders for the final hearing which will be sent to the parties separately.

Employment Judge Cookson
Date 10 March 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

14 March 2022

FOR EMPLOYMENT TRIBUNALS