EMPLOYMENT TRIBUNALS

Claimant: Miss Keilley O'Driscoll

Respondent 1: Milton Keynes Q-Academy Limited
Respondent 2 Ms Maria Lewis

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Watford by CVP **On:** 5 May 2022
Before: Employment Judge Alliott (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr Kuldeep Chehal (Senior Litigation Consultant)

JUDGMENT

1. Ms Maria Lewis is joined as a respondent.

2. The claim against Milton Keynes Q-Academy Limited is dismissed.

REASONS

1. This open preliminary hearing was directed by Employment Judge Tynan on 25 September 2021 to determine the following issues:

    1.1 Whether at the relevant time the claimant was a disabled person for the purposes of s.6 Equality Act 2010 and, if not, whether her claim should be struck out pursuant to Rule 37 of the Employment Tribunals Rules of Procedure.

    1.2 Whether Maria Lewis should be added as respondent to the proceedings.

2. I do not have the file in this case and have not been provided with all of the documents. The claimant tells me that pursuant to case management orders she sent an impact statement and documents relevant to the disability issue to the tribunal on or before 11 June 2020. However, all emails over a year old are deleted from the system here and the claimant has not put any document before me. Accordingly, I am in no position to deal with the disability issue.

3. As far as the addition of parties is concerned, Rule 34 provides:-

> "Addition, substitution and removal of parties
>
> The tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the tribunal which it is in the interests of justice to have determined in the proceedings;

4. By virtue of Rule 29 that power can be exercised at any stage.

5. As far as discrimination cases are concerned the employer and the alleged employee perpetrator are jointly liable.

6. The addition of a party is the exercise of a discretion by myself. Exactly the same principles apply to an amendment to add a party as to any other sort of amendment. As per Selkent Bus Co Limited v Moore I have to take into account the nature of the amendment, the applicability of time limits, the timing and manner of the application and all the other circumstances of the case. I need to undertake a balance of hardship and injustice test.

7. I have not seen but I have been told that the Acas early conciliation certificate specifically named Ms Maria Lewis as the respondent.

8. The claim form names Ms Maria Lewis at paragraph 2.1 as the person against whom she was making a claim.

9. The nearest I can get to how it came to be that Milton Keynes Q-Academy Limited was named as respondent is contained in the record of a preliminary hearing heard on 14 May 2020 by Employment Judge Tynan who recited:-

> "However, it seems that on the tribunal's initial review of the claim form, the correct respondent was identified as Milton Keynes Q-Academy Limited."

10. The summary goes on to state:-

> "The claimant confirmed to me that she was employed by Milton Keynes Q-Academy Limited albeit that she regards Ms Lewis as having been responsible for the company's treatment of her…. In any event the claimant told me she wished to pursue complaints against them both."

11. Employment Judge Tynan went on to state the following:-

> "I am minded to permit the claimant to amend her claim by naming Ms Lewis as a second respondent to her discrimination complaint. However, before I do so I shall allow Ms Lewis an opportunity to make written representations to the tribunal if she has any objections to that course of action. I shall direct the tribunal to write to Ms Lewis, giving her 14 days in which to make any written representations as to why she should not be joined as a second respondent to the claim. Pending any decision in relation to Ms Lewis it would not be appropriate to make substantive case management orders in this case or to list the case for a final hearing."

12. On 11 June 2020 the employment tribunal wrote to Ms Lewis as follows:-

> "Following a case management hearing on 14 May 2020, the tribunal is considering whether you should be added as a second respondent to the claimant's claim against Milton Keynes Q-Academy Limited, on the basis the claimant alleges you were responsible for the company's alleged discriminatory treatment of her, namely the termination of her employment on grounds of her disability. If you have any objections to being added as a second respondent you should write to the tribunal within 14 days of the date of this letter setting out your objections. A copy of the claimant's claim form is enclosed."

13. On 18 June 2020 Ms Lewis responded as follows:-

> "In response to a letter dated addressed to myself, Maria Lewis, on 11 June 2020 I object to the tribunal adding me as a second respondent to the claimant's claim of disability discrimination.
>
> The decision to remove the claimant's post as Bar Manager was made at a board meeting on 17 January 2019 whereby the company's four directors, which includes myself and the claimant were present. The rationale for removal was discussed and recorded in the minutes which are attached. The decision was made by vote and whilst I was present I did not vote as I was chairing the meeting. Therefore, I cannot have made any discriminatory decision or be responsible for the alleged discriminatory act namely, the termination of the claimant's employment on grounds of her disability."

14. Thus, it came to be that this open preliminary hearing was directed in the letter dated 25 September 2021. Quite why there was such a long delay Is not known.

15. As far as Milton Keynes Q-Academy Limited is concerned, no response was filed and consequently judgement pursuant to Rule 21 was issued by Employment Judge Ord on 4 February 2020. However, the respondent was dissolved on 13 October 2020 and, as no legal entity exists, the claim against it must stand to be dismissed.

16. The claimant claims she was disabled by reason of endometriosis and/or fibromyalgia. She told me that she suffered form endometriosis for about a year prior to February 2019 and had symptoms of fibromyalgia prior to February 2019. She accepts that she was only diagnosed with fibromyalgia on 12 February 2019.

17. Ms Lewis points to the board meeting minutes from 17 January 2019 wherein two other directors voted to remove the claimant from the bar manager's position and consider a supervisor's role for her. As such, Ms Lewis says that, given that the diagnosis of fibromyalgia was only made and communicated to her on 12 February 2019, the decision to remove the claimant's position as bar manager cannot have been because of the fibromyalgia.

18. I was taken to a text message of 25 January 2019 where in the claimant stated that she was not going to do hours in the club under the supervision of someone else as that was insane. I was taken to a text dated 13 February 2019 wherein Ms Lewis pointed out that the decision to dismiss the claimant as redundant was taken before her diagnosis with fibromyalgia.

19. In addition, I was taken to the grievance report wherein the claimant is concerned that the decision to make her redundant came two days after her diagnosis and is recorded as saying that it could have been a coincidence but that they might have used it.

20. I express no opinion on the merits of either party's case. However, it is well known that discriminatory conduct can be hidden by seemingly innocuous management decisions. In the circumstances it is recognised that discrimination claims are particularly fact sensitive and a claimant is entitled to have their case examined and tested by an Employment Judge and non-legal members hearing the evidence.

21. I consider the factors I need to do in the exercise of my discretion. The nature of the amendment is to include a new party to this claim. I take into account that inevitably that will create hardship for Ms Lewis in having to defend a claim years after the events it deals with.

22. The timing and manner of the application**: I** find it is of particular relevance that the claimant named Ms Lewis in both the Acas early conciliation notification form and in the initial claim form. I find that the claimant has always intended to bring an action against Ms Lewis. The application to include Ms Lewis was only really made at the preliminary hearing on 14 May 2020. That is approximately one year after the three-month time limit for bringing her claim would have expired. Nevertheless, given that the claimant always named Ms Lewis as a respondent and it would appear that Milton Keynes Q-Academy Limited was named as her employer and the respondent was on the initiative of the employment tribunal, I consider it to be just and equitable to extend time for the claimant to bring her claim against Ms Lewis out of time.

23. Against the hardship identified as far as Ms Lewis is concerned, the balancing exercise involves me contemplating a case where the claimant loses her claim against anyone because the employer has now dissolved. If I were to decline to join Ms Lewis the claimant would be potentially left with no remedy.

24. Consequently, in my judgment the interests of justice require Ms Lewis to be joined to this case and I so order.

25. The claim against Milton Keynes Q-Academy Limited must be struck out.

Date: 24 May 2022

Employment Judge Alliott

Sent to the parties on:

30 May 2022

For the Tribunal: