EMPLOYMENT TRIBUNALS

Claimant: Ms E. Thompson

Respondent: Vale of Glamorgan Council

HELD AT: Cardiff **on:** 28th July 2022

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mrs C. Thompson (the claimant's mother)
Respondent: Ms B. Criddle QC
Welsh Interpreter: Ms N. Davies

CORRECTED RESERVED PRELIMINARY HEARING JUDGMENT

The judgments, and decision in respect of the disclosure application, of the Tribunal in respect of the claimant's following applications are respectively:

1. Applications of 2nd September 2021 and 9th May 2022 to amend the claim to include claims of direct disability and race discrimination, and detriment (both by NASUWT and by the respondent against NASUWT members) (including all further such applications made or referred to, either directly or indirectly, in correspondence to date):

    1.1. The application to amend the claim to include a detriment claim against NASUWT was withdrawn; it is dismissed;

    1.2. All other applications to amend the claimant's claims are refused and dismissed. The issues proceeding to further hearing are those remitted by the EAT in its judgment of 17th May 2021 ("the remitted issues", and "the EAT judgment").

2. Application of 10th October 2021 and all subsequent references, and applications, to date to strike out the respondent's response to the claimant's claims (including all further such applications made or referred to, either directly or indirectly, in correspondence): these applications fail; they are dismissed.

3. Application of 13th March 2022 to add three additional parties (SA, GM, and EM): this application was withdrawn; it is dismissed.

4. Application for disclosure of documents relating to her pay: this application was withdrawn; it is dismissed.

REASONS

The background:

1. The claimant (C) was dismissed on 29th April 2016 and presented a claim of Unfair Dismissal and disability discrimination by way of harassment, direct discrimination, and a failure to make reasonable adjustments. The respondent (R) contested all the claims but acknowledges that C is a disabled person.

2. Following a hearing in November and December 2018 the Tribunal, chaired by Employment Judge S.J. Williams, dismissed all the claims.

3. The claimant appealed that judgment and the EAT, His Honour Judge Shanks and members, allowed the appeal only in relation to the "reasonable adjustments" claim and in so far as that may have impacted on the Tribunal's rejection of the Unfair Dismissal claim. The EAT remitted the matter on those narrow grounds to be heard by a different panel. The hearing of the limited remitted issues is listed to be heard on 12th – 16th December 2022.

4. C has been represented by Mrs Thompson and R by Ms Criddle throughout this litigation.

5. Prior to the hearing I had the benefit of access to the correspondence file and a 994-page electronic bundle; I was allocated a day's preparation time. I pre-read the key correspondence including the claimant's various applications to be considered today and the respondent's skeleton argument for this hearing along with relevant case management preliminary hearing minutes and Orders. At the hearing I received two further bundles from C and when reference was made to those bundles, I took time to read the pages being referred to by the parties. At the hearing I heard C's oral applications during the morning session, and in the afternoon, I heard R's submission, and then finally C's response to that.

6. After a brief organisational delay at the start, we commenced with an introduction at 11:32 and we finished for the day at 15:40 (having had a one lunch break from 13:00 – 14:00 but with an actual resumption at 14:08). I periodically, and with apologies, interrupted the respective representatives for clarifications, to slow down the flow of argument, and to re-cap on points made; I read out my notes aloud and slowly at regular intervals to the parties to check them for accuracy and to explain what I understood was being contended for by each party; I am content that when I did so my eventual note was an agreed one; both parties and

I had a known, clear and mutual understanding of what had been said, was intended, and its relevance.

The issues:

7. Having withdrawn certain applications C pursued applications to:

   7.1. Strike out the response to all claims because:

      7.1.1. The response has no reasonable prospects of success and

      7.1.2. R failed to update its capability procedure in line with the Equality Act 2010 and WGCT and/or

      7.1.3. Failed to apply the principles of the Equality Act and WGCT in effecting the policy in relation to C (such as, and this is a non-exhaustive list of examples (the ones that in my opinion Mrs Thompson made most often and emphatically) given orally in and in writing by Mrs Thompson when allegedly: “all OH advice was ignored”, C was not referred appropriately to OH, no adjustments were made, R ignored the “egg-shell skull” principle, R failed to account for the full effect of a road traffic accident upon C’s disabling conditions, not allowing C a “bedding in period”, R threatened C with dismissal such that she did not at one stage take time off work, her role was advertised and filled before the capability procedure appeal was heard, R did not ask about or offer support, R acted inappropriately in reliance on the fact that at a particular stage C had support and representation from NASUWT), and/or

      7.1.4. Because of the way it reported and handled the report by R of the capability procedure outcome in relation to C to the EWC (allegedly in not giving EWC a full, detailed and accurate report, not informing EWC that C was a disabled person, and that because of R’s report to EWC, which R refused to rescind, C was denied the prospect of judicial mediation).

      7.1.5. Because it has no defence to C’s claims and has caused her hardship for all these years.

   7.2. To amend her claims substantively to include claims of Direct Disability and Race Discrimination, a failure to make reasonable adjustments and Trade Union detriment:

      7.2.1. In relation to R’s reporting the outcome of the capability procedure to EWC (a claim of Direct Disability Discrimination where C says she did not know of the report or at least that a forewarned report had been actioned, the report was incomplete as said above, that C faces a further EWC hearing and has been denied the opportunity to mediate, and in R failing to rescind the report, amongst the other matters mentioned or referred to by **Mrs** Thompson in this context both orally and in writing, all of which I took into account);

      7.2.2. R reducing the amount of teaching time for Welsh at the school in which C taught (referred to as BCS) over a period of years from 1998

(the year before C joined the staff there) until at least C's dismissal, amongst the other matters mentioned or referred to by **Mrs** Thompson in this context both orally and in writing, all of which I took into account (a claim of Direct Race Discrimination);

7.2.3. R Arranging and carrying out teaching observations using an Observer who was not "a specialist trained in second-language Welsh" (claims of a failure to make reasonable adjustments and Direct Race Discrimination).

7.2.4. R targeting NASUWT members by its actions (a claim of detriment on the grounds of Trade Union membership and/or activity).

The Law:

8. Strike out: by virtue of Rule 37 ETs (Constitution & Rules of Procedure) Regulations 2013 a Tribunal may, at any stage of the proceedings, either on its own initiative or on the application of a party, strike out all or part of a response on any of the following grounds:

8.1. that it is scandalous or vexatious or has no reasonable prospect of success;

8.2. that the manner in which the proceedings have been conducted by or on behalf of the respondent has been scandalous, unreasonable or vexatious;

8.3. for non-compliance with any of these rules or with an order of the Tribunal;

8.4. that it has not been actively pursued;

8.5. that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the response.

9. Where a response is struck out, the effect shall be as if no response had been presented, and C would then be entitled to a judgment under Rule 21 in default.

10. Amendment:

10.1. a party to proceedings may apply for amendment at any time on due notice and the other party must be given opportunity to make representations; this includes when a claimant wishes to add additional claims or clarify existing claims.

10.2. in dealing with an application to amend the tribunal is guided by the overriding objective, namely, to deal with cases fairly and justly. The Tribunal's guiding principle is in all cases the interests of justice.

10.3. The parties are familiar with the Selkent principles namely:

10.3.1. The Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing it, where an unexhaustive list of relevant circumstances include:

10.3.2. the nature of the amendment, whether it be a correction, additional factual details being added to existing allegations, or the addition or substitution of other labels for facts already pleaded, or indeed the making of an entirely new factual allegation;

10.3.3. the applicability of time limits such that where a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable law;

10.3.4. the timing and manner of the application. Delay alone is not sufficient reason to refuse an application as there are no time limits for the making of an application to amend; such an application may be made at any time. Delay however is a “discretionary factor". It is relevant to consider why an application was not made earlier and why it is being made at the time it is made.

10.3.5. The paramount consideration remains the relative injustice and hardship involved in refusing or granting the amendment and this would include consideration of the possibility of postponing a listed hearing, delay, and additional cost.

10.4. General principles:

10.4.1. I am not determining facts, analysing the law, and applying that law to facts that I find so as to determine the substantive merits of the claimant’s claims. This is a preliminary hearing only, and my remit is limited to the Notice of Hearing. I say limited however it has been agreed that because of the many and varied references to strike out by C’s representative I ought to consider the strike out application as one that has itself been amended and expanded upon and is comprehensive to include all C’s relevant correspondence to date. I consider that this approach to the strike out application accords with the overriding objective of the tribunal and the factors listed In Rule 2. My decision and judgment is comprehensive in dealing with all such applications that were extant at close of C’s reply to R’s submissions at the hearing.

10.4.2. Mine is not an appellate jurisdiction. I cannot reconsider the judgment of Employment Judge Williams or His Honour Judge Shanks, nor can I rule on any objection by either party in respect of any part of those judgments.

10.4.3. In a similar vein I am not able to reconsider, or revoke case management orders made to date by Regional Employment Judge Davies, albeit I could make updated case management orders according to a revised preparatory timetable if that were applicable and appropriate.

10.4.4. It follows from the above, and the general law, that where there has been a judicial determination as to fact, and the application of law to those facts, then those issues have to all intents and purposes been

resolved subject only to the remission of certain limited issues by the EAT. C is estopped from re-arguing issues that have already been determined save only in respect of the remitted issues. The issues that have been remitted relate to reasonable adjustments and any impact that a failure to make reasonable adjustments, if there was such, may have had on the decision to dismiss C. Insofar as C now seeks to reintroduce issues that have already been determined, she is estopped from doing so, as explained to and understood by the parties (in fact this is in part relied upon by R, and was so argued).

10.4.5. Where a party to litigation knows of certain alleged facts and issues which could be litigated, litigates but omits those matters, then it is an abuse to litigate them later; the other party, knowing such matters have been omitted, may take it that they are not being pursued. This goes to the principle of the need for certainty in litigation and the unfairness and prejudice caused by uncertainty. The same principle applies as regards attempts at repeated litigation of decided issues.

Application of law to facts:

11. Strike out:

11.1. In large part C's application for strike out is based on the alleged lack of merit in the response. Mrs Thompson gave a detailed analysis of C's case pointing out her alleged strengths and R's alleged weaknesses. That said, a considerable amount of her time was taken in re-arguing matters that were already before the Tribunal chaired by Employment Judge Williams, and before the EAT and His Honour Judge Shanks. In summary Mrs Thompson said that the claim should be struck out because "we say there is no case for the respondent and there has been hardship for the claimant".

11.2. It has not been suggested, and I see no evidence to suggest, that R's defence to the claims is scandalous or vexatious or that the manner in which they have conducted proceedings has been scandalous, unreasonable, or vexatious. I do not consider that there has been significant non-compliance with the Rules or with an order of the Tribunal. The response to the claims has been actively pursued. I consider that it is possible to have a fair hearing in respect of the remitted issues.

11.3. I am persuaded by the findings of the Employment Tribunal and the judgment of the EAT that R's response to the remitted issues has a reasonable prospect of success; in all the circumstances I will say, so too has C's claim. I am confident that if R's response had no reasonable prospect of success, then the matter would not have been remitted by the EAT. It is likely that the EAT would have upheld the appeal, or otherwise disposed of the matter at the appeal stage, such as by substituting its judgment, without the need for remission.

11.4. The application to strike out the response is refused. The matter will proceed to a hearing of the remitted issues.

12. Amendment:

12.1. Amendment applications in relation to R's report to EWC, and all matters pertaining thereto: this matter has been on C's litigation radar for several years. She has complained and claimed in relation to R's report and handling of the report before and throughout this litigation. C Was dismissed on 29th April 2016. As pointed out by R, C has already pursued a direct disability discrimination claim with regard to the EWC matter and that claim failed. She is estopped from presenting the same claim again or pursuing it by amendment. A finding of fact has been made that the report was in compliance with a statutory obligation; it cannot therefore be argued that failing to withdraw an obligatory report was discriminatory. I refuse the application to amend with regard to all matters pertaining to R's report to EWC. Such an amended claim lacks merit in any event in view of previous findings and would likely fail; the balance of hardship would be against R having to prepare to answer a further claim which might involve postponing the listed remission hearing, causing significant delay and cost before the matter came before a Tribunal, as well as causing further cost and inconvenience. On the other hand, C has been partially successful on appeal in that certain matters have been remitted for hearing and I consider there is no hardship to her in not being able to argue a further claim that is weak and that would necessitate delay and additional preparation.

12.2. Amendment applications in relation to a reduction in the amount of Welsh language teaching at BCS: Evidence in relation to the reduction in Welsh teaching was before the Tribunal on the last occasion but C chose for her own reasons not to make a claim of direct race discrimination as she does now. There is an established principle that if a party to litigation is aware of facts that could amount to a claim when a claim is commenced, then they ought to include that as an allegation; they should put before a respondent to a claim all relevant issues known to them. C claims direct race discrimination by amendment. She was aware, on her own case, that from the date of her appointment to the date of her dismissal the amount of time spent in Welsh language teaching was reducing; this was an issue for her at the time; I do not know when she first became aware that the alleged reduction commenced in the year prior to her appointment. Bearing in mind that the effective date of termination was 2016 this application is very late. I do not consider that it would be appropriate to extend time under the just and equitable principle in all the circumstances, notwithstanding the submission that the claimant has suffered hardship. Such an amended claim lacks merit in any event and I take the point raised by R in submissions that it is impossible to understand how the reduction in the amount of Welsh language teaching at BCS (the start of which predated her appointment) is reasonably likely to amount to less favourable treatment of C because of her race; it would likely fail; the balance of hardship would be against R having to prepare to answer a further claim which might involve postponing the listed remission hearing, causing significant delay before the matter came before a tribunal, as well as causing further cost and inconvenience. On the other hand, C has been partially successful on appeal in that certain matters have been remitted for hearing and, as above, I consider there is no hardship to her in not being able to argue a further claim that is weak and that would necessitate delay and additional preparation. This application is refused.

12.3. Trade Union detriment (s.146 Trade Union & Labour Relations Act 1992): I see from Employment Judge Williams' judgement that C's application to amend the claim to include a claim that members of NASUWT were put on the capability procedure because of their union membership was considered and rejected. It does not appear to me that this rejection formed any part of C's appeal. In so far as it is not an already decided matter and C raises any other detriment allegation then the claim is very late and out of time. It was clearly reasonably practicable for the claimant to have presented the claim in time as she has presented a detailed claim, given evidence in relation to union membership and the part played by the fact of her membership and trade union representation in the capability procedure, and has pursued an appeal; this litigation commenced in 2016. For all the reasons previously stated it is not in the interests of justice to allow this amendment and the balance of prejudice would weigh heavily against R more than any injustice C in her not being able to pursue it at this stage. this application is refused.

12.4. Applications in respect of lesson observations (Direct Race Discrimination and failure to make reasonable adjustments): I accept that the parties agreed a list of issues for determination by the Tribunal in 2018 (that is the date of the tribunal and I do not know the date agreement was reached). There was a claim at that stage of failure to make reasonable adjustments based on the contention that R should have ensured the observations were carried out by someone with experience in the Welsh language, and not as C seeks now to finesse the wording by reference to teaching Welsh as a second language. The reasonable adjustments claim including in relation to lesson observations is a remitted matter. Bearing in mind the fact of the agreed list of issues the first time around, findings of fact, determination of the claim which has been subjected to appeal and a detailed EAT judgment with remitted issues, it would not be in the interests of justice to move "the goalposts" at this late stage (to borrow a cliché from R's submissions, but one that was in my mind too). C can argue her case at the remission hearing on the basis it was argued initially and has been considered both by the Tribunal and by the EAT; I have already commented that her case must have a reasonable prospect of success. The balance of hardship would therefore be against R if I was now to interfere with what are effectively the ground rules for the remission hearing, or rather the ground issues. C would effectively be arguing a different case and one that would require further consideration by R, potentially with additional witness (perhaps an expert witness) evidence. It is likely that such amendment would lead to postponement of the hearing with consequential work, cost and delay. For all these reasons and the reasons stated above, such as lack of merit where it is hard to see that the amended wording makes the claim anything to do with C's disability, this application is refused.

13. In summary, having read and heard both parties' submissions (C's correspondence being taken as submissions on the relevant applications in addition to Mrs Thompson's comprehensive oral submissions) I find that R's submissions better address the issues before me both on strike out and amendment. R's skeleton argument contains reference to the applicable law and, to my mind, applies that law correctly to the matters before me. For all the reasons stated above and in R's stated opposition, I refuse all C's applications;

they are dismissed. The matter will proceed to the listed hearing of the issues remitted by EAT only.

Employment Judge T.V. Ryan

Date: 02.08.22

JUDGMENT SENT TO THE PARTIES ON

3 August 2022

S Griffiths

FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.