EMPLOYMENT TRIBUNALS

Claimant: Miss Gray

Respondent: The Care Quality Commission

Heard at: Leeds (by video) **On:** 25 July 2022

Before: Employment Judge Knowles

Representation
Claimant: In person
Respondent: Mr T Brown, Counsel

RESERVED JUDGMENT UPON PRELIMINARY ISSUES

The Judgment of the Tribunal is that:

1. The Claimant's application for leave to amend to add labels of direct belief discrimination, pregnancy discrimination and indirect sex discrimination to her original claim form is allowed.

2. The Claimant's claims of direct belief discrimination, pregnancy discrimination and indirect sex discrimination are however struck out under Rule 37 of the Employment Tribunals Rules of Procedure 2013 because they have no reasonable prospect of success.

3. The Claimant's application that the Respondent's response be struck out under Rule 37 of the Employment Tribunals Rules of Procedure 2013 is refused.

4. This Judgment does not affect the Claimant's remaining claim of unfair dismissal which shall proceed to a final hearing.

5. There shall be a telephone preliminary hearing for case management on the next available date with an estimated length of hearing of 90 minutes in order to make orders to prepare the unfair dismissal claim for a final hearing.

RESERVED REASONS

Issues

1. The issues before me are as follows:

    a. Whether or not the Claimant shall need to apply for leave to amend her claim and if so, whether or not to grant leave to amend.

    b. Whether the Claimant's claims or any of them have little or no reasonable prospects of success. Should the Claimant be required to pay a deposit before she may continue with any of her claims, or should any of them be struck out.

2. In a letter to the Tribunal dated 19 June 2022 the Claimant also set out a number of issues that she states are inaccuracies in the Respondent's grounds of resistance to her claim and requests that the Respondent's response be struck out. I will deal with that application as well.

Evidence

3. This hearing was undertaken by video using HMCTS's Cloud Video Platform.

4. The Respondent had produced a bundle of documents for use at today's hearing. References to number in brackets are to page numbers in that bundle unless otherwise stated.

5. I heard submission from both parties concerning the issues. No evidence was given under oath and no witness statements were produced.

Background

6. This is a case which involves the vaccination requirements to enter a care home under the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021. These were laid before parliament 22 July 2021 and came into force 11 November 2021.

7. As was well publicised at the time, Government announced its intention to repeal those changes on 31 January 2022 and they were repealed 15 March 2022.

8. The Claimant was employed by the Respondent as an Inspector. From time to time her duties would require her to enter care homes. Her employment commenced 4 January 2018.

9. The Respondent gave notice to the Claimant terminating her employment on 11 November 2021 with an effective date of termination 10 January 2022, which was before the regulations were repealed.

10.

11. Early conciliation began on 27 January 2022 and a certificate was issued by ACAS on 31 January 2022.

12. The Claimant presented a claim form to the Tribunal 28 February 2022.

13. More details about the claim form are set out below. The Claimant had ticked the boxes in Section 8 to indicate claims of (1) unfair dismissal, (2) discrimination on the grounds of pregnancy or maternity and (3) discrimination on the grounds of religion or belief.

14. The Claimant attached a document setting particulars of her complaint.

15. It was clear from the opening paragraph that the Claimant was claiming not only unfair dismissal under Section 98(4) of the Employment Rights Act 1996 but also an automatically unfair dismissal for having made a protected disclosure under Section 103A of that Act.

16. This was followed by a narrative form description of events up to and after her dismissal.

17. That narrative is in the form of numbered paragraphs setting out matters in chronological order. There are matters contained in the chronology preceding the Claimant being given notice of dismissal, matters concerning her dismissal, and after dismissal. The post termination matters relate only to the contact the Claimant made after the Secretary of State for Health and Social Care announced that the Government intended to the revoke the relevant amendments to the regulations.

18. The Respondent sent a response form to the Tribunal with attached Grounds of Resistance dated 7 April 2022.

19. The Respondent denied the claims of unfair dismissal asserting that the reason for dismissal was that the employee could not continue to work in the position which she held without contravention of a duty or restriction imposed by or under an enactment (Section 98(2)(d)) or in the alternative some other substantial reason (Section 98(1)(b)).

20. The Respondent denied the discrimination complaints noting that the Claimant had not alleged any discrimination in relation to any protected characteristic and noting that the Claimant had not asserted that she was pregnant at the time of her dismissal nor had she included any details of any religion or belief.

21. The matter was listed for a preliminary hearing for case management before me on 25 April 2022.

22. The Claimant had submitted an agenda form in which she had stated that her claim concerning a protected disclosure had been withdrawn and that her complaints included (along with those listed in paragraph 11 above) a complaint of indirect sex discrimination. The complaints concerning pregnancy and belief were each expressed by the Claimant in the agenda form to be complaints of direct discrimination only. Both direct discrimination complaints were expressed to be complaints concerning detriments during employment, concerning her dismissal and concerning matters occurring after dismissal.

23. The Claimant also listed detriments in her agenda form, but it was not clear at that stage whether or not these were matters set out in the narrative of her particulars of claim or were additional or new matters. It was simply not feasible for the two documents to be reconciled within any reasonable amount of time.

24. At the preliminary hearing for case management on 25 April 2022 a further issue was that the Claimant served a late agenda form which had not been linked to file.

25. The Respondent acknowledged that it had received a copy but stated that they had had insufficient time to consider the information set out in the agenda form against the information contained in the claim form.

26. I saw the agenda form for the first time during our hearing.

27. The Respondent considered that there are many items included in the agenda form which are not contained within the claim, and may therefore require the Claimant to amend her claim if those matters are to be considered.

28. The Respondent noted that at that stage there was a preliminary issue concerning the protected period i.e. the matters referred to in the claim appear to have occurred outside of the protected period as set out in the Equality Act 2010.

29. The Claimant also stated at the previous preliminary hearing that her asserted philosophical belief is bodily autonomy, specifically the right to choose whether there would be interventions to pregnancy only if they were of benefit to her and necessary. She asserts that vaccination was not of benefit to her or necessary during her pregnancy or conception.

30. The Respondent stated that none of this was set out in her claim and in their view these matters would require her to apply to amend her claim.

31. In summary whilst the Claimant had ticked the boxes indicating claims of unfair dismissal, discrimination on the grounds of religion or belief and discrimination on the grounds of pregnancy the narrative which followed in her particulars of claim was a chronological list of events. None of those events were tied to any particular claim. Indirect sex discrimination was not expressly mentioned in the particulars of claim, but for that matter nor was direct discrimination. The Claimant had simply not specified any particular type of prohibited conduct.

32. I ordered that the Claimant provide the following further information about her complaints on or before 20 June 2022:

a. Identifying the passages of text within her claim form which correlate to the detriments listed in her agenda form for today's hearing. If there is no reference in the claim form to the detriment set out in the agenda form then the Claimant shall say so.
b. Specify the protected belief relied upon and set out where those matters are referred to in the claim form (or if they are not, state that they are not).
c. Identify where the Claimant's claim of indirect discrimination is set out in the claim form, or if it is not, state that it is not.

d. Identify each head of claim (i.e. the type of complaint referred to) and each detriment referred to in the Claim form.

33. I listed the hearing for today.

34. The Claimant responded to my order concerning further information 15 June 2022 (page 35).

35. The matter came before me again this morning.

The further information provided by the Claimant on 15 June 2022

36. Regrettably the further information provided by the Claimant in answer to the 4 questions I set out above amounted to 18 pages of single-spaced small font type and is voluminous.

37. The Claimant has however attempted to meticulously do what she was asked to do and cannot be criticised for the volume of information. I also note, because it is not common in requests for further information or requests to link claims to matters referred to in the claim form, that the Claimant has attempted to link everything to where it appears in her original particulars of claim.

38. I will attempt to set out a summary of the further information as it is not practicable to copy the 18 pages into my reasons.

39. The Claimant has listed the detriments that she set out in her case management agenda form and set out where those matters appear in her particulars of claim as follows:

a. *The claimants letter dated 5th November to Ian Trenholm (Chief Executive) and Peter Wyman (Chair) was ignored. This is noted in point 9 of the claimants ET1 form.*
b. *The claimant's grievance dated 2nd November 2021 was not responded to. This is noted in point 8 of the claimants ET1 form.*
c. *The respondent did not follow guidance and no policy was provided throughout the implementation of SI 2021 No. 891. For example, information was not provided in a timely manner, meetings were not in line with timeframes laid out by the respondent. See points 4, 5, 6, 7, 8 of the claimants ET1 form.*
d. *The claimant was repeatedly threatened with dismissal. This is not made clear on the ET1 form, however, is not a claim from new facts. It is within the documents provided by the respondent in points 5 and 6 of the claimants ET1 form.*
e. *The claimants line manager pre-prepared the team for the claimant's dismissal before the claimant had knowledge of this in the presence of the claimant. This is point 10 of the claimants ET1 form.*
f. *On the day of the claimant's dismissal, during a call with the claimant, Ian Trenholme noted 'he did not care about the process' or words to that effect. After notice of the claimant's dismissal when the claimant was next due to start work their account had been disabled without any warning. This is documented on point 12 and 13 of the claimants ET1 form.*
g. *The respondent did not follow a fair appeals process. This is point 14 and 15 of the claimants ET1 form.*

40. The Claimant therefore helpfully linked her list of detriments to her claim form numbered paragraphs and explained one (d. above) which she says was not made clear in the claim form. I did however note that the claimant had referred to "pressure and coercion" in the third unnumbered paragraph preceding her numbered paragraphs in her particulars of claim.

41. The Claimant acknowledged that her "belief" had not been set out in the claim form but reiterated what I had recorded at the earlier hearing, as follows:

> *The claimant has a strong philosophical belief regarding their right to bodily autonomy during conception and pregnancy. Specifically, only consenting to interventions which are necessary and of benefit to them and their unborn child, limiting any interventions wherever possible.*

42. The Claimant states that paragraph three of her particulars of claim contained her claim of indirect discrimination. This is the third unnumbered paragraph I referred to above. It set out:

> *"The only medical exemptions CQC informed they would accept was the covid pass which is an unfair, untransparent system with no appeals process. As CQC were obstructive with answering any questions surrounding the legality of this, it was extremely difficult to understand if I would be medically exempt or not. Covid-19 medical exemptions proving you are unable to be vaccinated stated MAT Bl Certificates could be used to show medical exemption, however these are not issued typically until 20 weeks of pregnancy. As a person trying to conceive, and potentially pregnant at numerous points throughout this ordeal, I found myself in a 'grey area' and overwhelmed by pressure and coercion from CQC. The manner in which CQC treated me throughout this period impacted my health and as soon as I was no longer subject to the stress of this ordeal, I became pregnant."*

43. The Claimant sets out that her claims of direct discrimination because of belief relate to all 7 asserted detriments (page 36) and in relation to post-termination (page 40) refers to the refusal to reinstate which was set out in the original particulars of complaint.

44. The Claimant relies on all of the above detriments (set out in relation to belief discrimination) again in relation to pregnancy discrimination (pages 41-46). She acknowledges that many of the matters occurred before her pregnancy. I note here for convenience that at the end of her further information (page 52) and during the hearing the Claimant stated that her date of pregnancy was 31 December 2021. It is also clear however from the further information provided by the Claimant (page 42) that the Claimant is suggesting her protected period began on 24 November 2021 when she states she notified the Respondent that she was attempting to become pregnant. However the only detriment relating to after the protected period began was the failure to reinstate. The Claimant acknowledges that she did not inform the Respondent of her pregnancy during the process in which she sought reinstatement after the amendments to the regulations were announced as being revoked (page 46).

45. The Claimant set out (page 47) that the application of the regulations had a disproportionate adverse effect on women. She sets out that she was

disadvantaged because she was in the early stages of pregnancy. In effect she lists the same detriments, including the failure to reinstate.

The Claimant's application for the Respondent's response to be struck out.

46. This is set out in the bundle at pages 53-54, and was sent to the Tribunal in a letter dated 19 June 2022.

> *I, the claimant, would like to note the following factual inaccuracies on the respondents ET3 response.*
> *· Point 8. The respondent claims the claimant was invited to a meeting 29th September 2021 which they declined. This is incorrect. The claimant was invited to a meeting on 28th September 2021 which was to take place the same day. No information about vaccination had been provided to the claimant by the respondent until this date and was not provided before the meeting. The claimant suggested the meeting take place after they had sight of the information, otherwise how could they participate constructively, so this was rescheduled by the respondent to the following morning at 9am. After sight of the information, the claimant felt this was not sufficient time to review it or gain representation should they choose to. The respondent attempted twice to meet with the claimant without appropriate notice or information, against ACAS code of practice. After raising these concerns, the meeting was held 6th October 2021. The meeting was never declined as the respondent claims, rather the respondent tried to railroad the claimant.*
> *The respondent claims the claimant had been subject to informal consultation from July 2021 onwards. This is inaccurate. No consultation took place. The respondent was only interested with the limited questions of a) are you vaccinated b) are you planning on becoming vaccinated. The respondent never attempted to consult with the claimant any more than this. This was beyond their narrow view of vaccination or dismissal. They would not provide relevant information or discuss alternate options including redeployment. The respondent threatened the claimant with dismissal on numerous occasions without providing any accurate information or process. The first and only meeting which took place was 6th October 2021.*
> *· Point 10. The respondent claims support was provided for the claimant's anxiety. No support was provided.*
> *· Point 11. The respondent claims the claimant was provided a policy. policy was never provided. The respondents HR department informed the claimant on 6th October 2021 a process was being developed in relation to unvaccinated staff, but this was never provided.*
> *The outcome of the only meeting held by the respondent was that information regarding a process was being developed and the claimant was awaiting this. However, the only communication the claimant received following this, despite multiple attempts by the claimant to seek information, was the claimants notice of dismissal.*
> *· Point 12. The respondent claims the claimant declined a formal meeting on the 9th November 2021. This is factually inaccurate. The claimant declined the specific date and time and provided a full explanation for the reason for doing so. At this point the claimant had a number of concerns with how their line manager and HR were dealing with the issue,*
> *including not following the process for the meetings, and so a grievance was raised. The respondent decided to ignore this.*

· Point 13. The respondent claims in point 7 and 11 self-exemption was allowed, yet in point 9 say this needs to be supported by a clinician. This is contradictory. Additionally, this is not the information provided by the respondent in a meeting 6th October 2021 and in emails following this where the respondent claimed only the covid pass system would be allowed as proof of medical exemption. They therefore did not act reasonably in allowing the claimant to put forward medical exemption. They also failed to provide accurate information about medical exemption.

The respondent has not provided a response to the following points in their ET3 response, as such the claimant seeks to ask the judge to consider if the respondents response should be struck out or required to pay a deposit.
1. Why the respondent failed to respond to the claimant's grievance.
2. Why the respondent failed to respond to the claimants' concerns raised in the letter to Ian Trenholme and Peter Wyman dated 5th November 2021.
3. Why the respondent did not follow ACAS code of conduct in respect to a fair appeals process.
4. Why the respondent did not hold a meaningful consultation process.
5. Why the respondent failed to follow any policy or process relating to the claimant's dismissal.
6. Why the respondent failed to consider reinstating the claimant in their role when the legislation was revoked.

Submissions

47. The Respondent submitted that the Claimant had submitted more words which do not appear to clarify matters. The Respondent summarised the application briefly and submitted in conclusion that the Respondent does not accept that the Claimant should have permission to proceed with the amended claims.

48. The Respondent made a number of points concerning the detriments. These were:

a. In relation to "*the claimants letter dated 5th November to Ian Trenholm (Chief Executive) and Peter Wyman (Chair) was ignored. This is noted in point 9 of the claimants ET1 form*". The Respondent acknowledges that the Claimant did not get a response but the Claimant needs to identify the detriment, the protected characteristic and causation. The Claimant does not say this was because of a protected characteristic, nor does she suggest it formed a practice of the Respondent's.
b. In relation to "*the claimant's grievance dated 2nd November 2021 was not responded to. This is noted in point 8 of the claimants ET1 form*". The Claimant is not suggesting a reason, nor does she suggest this is a practice.
c. In relation to "*the respondent did not follow guidance and no policy was provided throughout the implementation of SI 2021 No. 891. For example, information was not provided in a timely manner, meetings were not in line with timeframes laid out by the respondent. See points 4, 5, 6, 7, 8 of the claimants ET1 form*". The Claimant is

referring to policy and guidance but this is too vague to understand and is not tied to a protected characteristic.

d. In relation to "*the claimant was repeatedly threatened with dismissal. This is not made clear on the ET1 form, however, is not a claim from new facts. It is within the documents provided by the respondent in points 5 and 6 of the claimants ET1 form*". The Claimant accepts that she had not made this clear in her particulars of complaint. She refers to correspondence.
e. In relation to "*the claimants line manager pre-prepared the team for the claimant's dismissal before the claimant had knowledge of this in the presence of the claimant. This is point 10 of the claimants ET1 form*". There is nothing linking this to a protected characteristic, nor is any practice asserted. The Claimant did not tick the sex discrimination box. The further information does not set out how they are disadvantaged.
f. In relation to "*on the day of the claimant's dismissal, during a call with the claimant, Ian Trenholme noted 'he did not care about the process' or words to that effect. After notice of the claimant's dismissal when the claimant was next due to start work their account had been disabled without any warning. This is documented on point 12 and 13 of the claimants ET1 form*". This is not linked to a protected characteristic, and no practice is asserted.
g. In relation to "*the respondent did not follow a fair appeals process. This is point 14 and 15 of the claimants ET1 form*". This is not linked to a protected characteristic and is nothing that would amount to discrimination. The Claimant has not ticked the sex discrimination box.

49. The Respondent submitted that the Claimant does not in her claim form contend that she was pregnant nor does she claim that she was ill because of pregnancy.

50. The Respondent submitted that the Claimant had not pleaded a protected belief. The belief now articulated is not a protected belief in law, it is just what the Claimant believes should have happened to her.

51. The Claimant submitted that she had nothing to add to her further information.

52. In relation to prospects of success, the Respondent submitted that the Claimant didn't indicate what her belief was in the claim form. An expression of a belief relating to the Claimant personally and any unborn child is not a philosophical belief. The Claimant was expressing what they are going to do or not do. Under Grainger and Nicholson the test isn't about what you will do yourself. The tests are genuinely held which the Respondent accepts. It must be belief not opinion, but in the Claimant's case this is opinion. There is no framework for that belief, no reference to medical science. It has to be weighty or substantial, but in this case it relates only to the Claimant. It must attain cogency and seriousness, but the Claimant does not meet that standard. The Claimant is relying on her own belief. The belief expressed is divorced from any framework. The Respondent does not say that the Claimant's expressed belief is not worthy of respect. Not all of the criteria are met. The Claimant has no prospect of showing protected belief.

53. In relation to pregnancy discrimination the Respondent notes that the Claimant is not saying she was pregnant. Protection begins with conception.

54. The Respondent submitted that indirect sex discrimination isn't pleaded. The Claimant would need to show practices applied which disadvantaged women. Pregnancy is not protected for indirect sex discrimination. The Claimant could only rely on sex. Take for example the Claimant's stated detriment of her line manager pre-prepared her team for her dismissal, it is impossible to see how she was disadvantaged due to gender.

55. The Respondent noted that these points are relevant in relation to both whether or not to allow the amendment and to whether or not to strike out the claim. The Respondent noted that if they have little prospect of success, then there should be a deposit order.

56. The Respondent noted that they are a public authority.

57. The Claimant submitted in response that her vaccination status was because of her belief and her pregnancy. Her pregnancy began on 31 December 2021. She notified them that she was trying to conceive on 14 November 2021 at the appeal hearing. The Respondent has, as she put it, pulled apart her writing skills but it is very clear all of the information is in the documents. The Claimant submitted all of the information is there for her to clarify those points.

The Law

58. The Tribunal's power to consider amendments to a claim is set out in the Employment Tribunal Rules 2013 which are contained in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules". The overriding objective of the Rules is set out as follows:

> *"2. Overriding objective*
>
> *The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.*"

59. The specific rules which contain the powers are Rule 29 which permits the Tribunal to make case management orders and Rule 41 which allows the Tribunal to regulate their own procedure in the manner they consider fair, having regard to

the overriding objective set out above. Amendments are thus a matter of judicial discretion.

60. Guidance given by Mummery J in ***Selkent Bus Company Ltd v Moore [1996] ICR 836*** at the time when he was President of the EAT is frequently quoted as the key test for determining an application to amend a claim. These were the key points made:

> *"(1) The discretion of a Tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance: Regulation 13. See Cocking v. Sandhurst Ltd [1974] ICR 650 at 656G - 657D. That discretion is usually exercised on application to a Chairman alone prior to the substantive hearing by the Tribunal.*
>
> *(2) There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground that the discretion to grant leave is a judicial discretion to be exercised in a judicial manner ie, in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.*
>
> *(3) Consistently with those principles, a Chairman or a Tribunal may exercise the discretion on an application for leave to amend in a number of ways:*
>
> *(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the Tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the Appeal Tribunal that the Industrial Tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable Tribunal, properly directing itself, could have refused the amendment. See Adams v. West Sussex County Council [1990] ICR 546.*
>
> *(b) If, however, the amendment sought is arguable and is one of substance which the Tribunal considers could reasonably be opposed by the other side, the Tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the Tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this Tribunal on one or more of the limited grounds mentioned in (a) above.*
>
> *(c) In other cases an Industrial Tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the Industrial Tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made.*

The disappointed party may then appeal to this Tribunal on one or more of the limited grounds mentioned in (b) above.

(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If 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 statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

61. ***Ladbrokes Racing Limited v Traynor [2006] EATS 0067/06*** highlights that an application to amend must include details of the amendment sought in precise terms. They draw my attention to paragraph 20:

"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it

considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier. These principles are discussed in the well known case of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661."

62. In ***Scottish Opera Limited v Winning [2009] EATS 0047/09*** it was held at paragraph 5 that "*clear and accurate pleadings are of importance in all cases, but particularly in discrimination claims. It is essential that parties seeking permission to amend to introduce such a claim formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim; and tribunals should ensure that the terms of any such proposed amendments are clearly recorded.*"

63. ***Chief Constable of Essex Police v Kovachevic [2013] UUKEAT/0126/13/RN*** warns of the dangers of an Employment Judge engaging with the application to amend. At paragraph 21 it is stated:

> *"It is quite plain that the Employment Judge wrongly engaged with the application to amend in this case. Before even turning to the question of the right test, it is fundamental that any application to amend a claim must be considered in the light of the actual proposed amendment. The Employment Judge did not have before him, reduced to writing or in any form, the terms of the amendment being proposed. It might be, … that in certain circumstances (e.g. where a very simple amendment is sought or a limited amendment is asked for by a litigant in person) that an Employment Judge may be able to proceed without requiring the specifics of the amendment to be before him in writing. But this was a case in which the Claimant was being represented by a professional representative whom he had selected and recently instructed. The Employment Judge plainly could, and should, have required the representative to reduce the application to writing before considering it on its merits. The dangers of doing otherwise are obvious and are made manifest by what happened in this case."*

And at paragraph 23:

> *"One of the dangers of permitting an amendment without seeing its terms is that, having been given the green light to draft an amendment, a party may go beyond the terms which the Judge was led to understand might be included in the amendment he was permitting. In this particular case, the schedule later drawn for the Claimant in response to the Judge's order sets out a very large number of allegations and incidents which span a period of many years and involve many different individuals and occasions."*

64. In the case of ***Vaughan v Modality Partnership [2021] ICR 535*** it was held that:

> *"This judgment may serve as another reminder that the core test in considering applications to amend is the balance of injustice and hardship in*

allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly.

The balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off.

An Employment Judge may need to take a more inquisitorial approach when dealing with litigants in person."

65. In ***Office of National Statistics v Ali [2004] EWCA Civ 1363***, the Court of Appeal held that *"the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference in the particulars to an event (as in Dodd), particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in Dodd, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet."*

66. In ***Baker v Commissioner of Police of the Metropolis EAT 0201/09***, where the EAT upheld a tribunal's decision that a claim form did not include a complaint of disability discrimination, despite the fact that the Claimant had ticked the box indicating that he was bringing that complaint. The rest of the form contained no particulars about any claim of disability discrimination. The EAT found that although a claimant could explain and elucidate a claim made in an ET1 by way of further particulars, the claim itself still had to be set out in the ET1. The EAT did however find that the tribunal in that case should have gone on to consider whether or not to allow an application to amend the claim to include a claim of disability discrimination.

67. The merits of a claim may be a matter to be taken into account when determining an application to amend ***(Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06***) but there are limits to how far they may be relevant and it should be envisaged that further evidence may be required to be served (***Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12***).

On time limitations

68. Time limits are not the determinative factor in an application to amend but are part of the consideration in determining the balance of prejudice in allowing the amendment compared to not allowing it.

69. Section 123 of the Equality Act 2010 contains the following provisions concerning time limits:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

70. In ***Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170 CA*** the Court of Appeal considered the application of time limits in cases involving alleged failures to make a reasonable adjustment. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice that may be caused could be, to a certain extent, alleviated by the tribunal's discretion to extend the time limit where it is just and equitable to do so. Sedley LJ added that 'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is obtained that no point will be taken on time for as long as it takes to address the alleged omission'.

71. The onus is on the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit (***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 Court of Appeal***).

72. Case law has made it clear that the Tribunal may be guided, in making a determination on time limits, by matters such as the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for

information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Cases have also made it clear that lists such as these are only a guide and in some cases some of those factors may not be relevant. Case law has also suggested that the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) are almost always relevant.

73. In all cases the Tribunal should take into account the balance of prejudice between the parties in granting or refusing an extension of time.

74. In cases involving one-off acts where there is no assertion of any continuing act, it will be usual for the tribunal to make a final determination on time limit, and determine whether or not time will be extended, within its judgment on the application to amend.

75. This approach might not be suited to a case in which the discriminatory act is alleged to be a continuing act. In such cases, given that they are fact sensitive, the issue of time limit may be reserved to the final hearing even if the amendment is allowed. That is because a determination of the issue of whether or not an act is a continuing one would require the hearing of evidence and substantive determination.

76. In ***Reuters Ltd v Cole EAT 0258/17*** the EAT held that it was only necessary for the claimant to show a prima facie case that the primary time limit was satisfied (or that there were grounds for extending time) at the amendment application stage.

On striking out a claim

77. Rule 37 of the Employment Tribunals Rules of Procedure 2013 sets out the Tribunal's right to strike out a claim or response.

78. This provides

> *37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*
>
> *(a) that it is scandalous or vexatious or has no reasonable prospect of success;*
>
> *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
>
> *(c) for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> *(d) that it has not been actively pursued;*
>
> *(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

79. Tribunals must be mindful of the burden of proof in considering striking out discrimination claims (***A v B and anor [2011] ICR D9***).

80. In ***Mbuisa v Cygnet Healthcare Ltd EAT 0119/18***, a case involving an unrepresented Claimant, the EAT found that although a poorly pleaded case presents difficulties for the tribunal, striking out the claim is rarely the answer. The proper course of action would be to record how the case was being put, ensure that the original pleading was formally amended so as to pin that case down, and make a deposit order if appropriate.

81. Also in relation to unrepresented Claimant's, in ***Cox v Adecco and ors [2021] ICR 1307*** the EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: "*Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is*".

82. In ***Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391***the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

83. In ***Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*** the Court of Appeal upheld a decision of the EAT (Elias J, sitting alone) which had allowed a claimant's appeal against an order of an Employment Tribunal striking out his unfair dismissal claim. Maurice Kay LJ said at paragraph 29:

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

Conclusions

Are amendments necessary?

84. In my conclusion amendments are necessary in the Claimant's case.

85. The bringing of a complaint of unfair dismissal and belief and pregnancy discrimination is not simply a tick box exercise (***Baker***).

86. Whilst the Claimant has ticked those boxes, to simply present a lengthy and detailed chronology afterwards is in itself manifestly insufficient.

87. This is not intended as a criticism of the Claimant, who is acting for herself and is not a lawyer.

88. However, it is up to the Claimant to set out her claim in a manner which can be answered and responded to by the Respondent.

89. If the Respondent does not know which of the asserted facts set out in particulars of claim relate to which claim the claims cannot be answered or responded to without a great degree of supposition.

90. The problem, if not addressed, would be compounded if the matter were allowed to proceed to a final hearing without these issues being addressed.

91. Put plainly, the Claimant might then arrive at a final hearing to find that both the Respondent and the Tribunal have different views to hers as to which part of her narrative relate to which claim. The process would become chaotic.

92. There is also in the Claimant's case the issue of indirect sex discrimination which has not featured in her claim form or particulars of complaint in any express manner.

Should leave to amend be granted?

93. Whilst in her further information the Claimant has added further factual circumstances and set out further submissions in support of her claim, I take into account that these are her elaborating on the paragraphs in the original claim form. She has set out which facts set out in the claim form relate to which complaint. In my conclusion where she has explained further facts and made further submission in her further information, these are simply the Claimant attempting as best she can to explain her case as a lay person in what are, even for experienced employment lawyers, not easy issues to navigate.

94. Because the Claimant has linked each of her claims to specific paragraphs in her original particulars of claim, I conclude that she is asking now (because she has been told it is necessary) to place labels on the factual issues that she originally raised in her claim form.

95. I do not treat the Claimant's further information as her setting out the amendment she seeks. I treat it as her explanation of why she should be allowed to place claim labels on the factual matters she has set out already in her particulars of claim.

96. I note that the Claimant indicated that she wished to bring complaints of unfair dismissal, belief and pregnancy discrimination by ticking those boxes in her claim form but did not tick the sex discrimination box.

97. But my conclusions above apply equally in relation to the application to amend to add a claim of indirect sex discrimination. The Claimant says that claim is set

out in unnumbered paragraph 3 of her particulars of claim. That being the case, what she is applying for is again to attach a label to the factual matters she has already set out in her original particulars of claim.

98. I conclude that the Claimant's application to amend is a relabelling exercise.

99. That would lean towards granting leave to amend the claim.

100. Time limits are not an issue in relation to dismissal or matters occurring after dismissal in this case. The effective date of termination in this matter was 10 January 2022. Early conciliation began on 27 January 2022 and ended 31 January 2022. The claim was submitted to the Tribunal by the Claimant 28 February 2022.

101. In terms of pre-dismissal matters, the only paragraph which appears potentially outside of a time limit is paragraph 4 which relates to matters throughout the year prior to the regulation being passed 22 July 2022. However, this reads as background context and looking at the list of detriments, the Claimant is only utilising this information linking it with later in time issues concerning failing to provide information or a policy. It appears to me that the issues are being linked over a period of time as a continuing act and their description is apt for that provision. I do not read any of the Claimant's complaints as outside of the time limits for bringing such claims.

102. Time limits in terms of the amendments are not in my conclusion an issue and this would tend to lean me towards granting the application for leave to amend.

103. I do not see any great issue in the timing and manner of the application. The Claimant felt and still feels that all of the information needed was set out in the particulars of her claim as included with her original claim form.

104. The Claimant has made the application because the Respondent submitted at the preliminary hearing for case management she would be required to do so.

105. I conclude that the balance of prejudice would fall more heavily on the Claimant if the amendment application is not allowed.

106. The facts have already been pleaded and were responded to by the Respondent.

107. The labels are matters that the Respondent been able to address easily in submissions today; it is simply a matter of legal argument around facts that were already in the litigation.

108. They would, subject to the issue below, need to provide an amended response but again this will be a relatively simple exercise for a well-resourced Respondent with access to quality legal advice which they have.

109. Set against this to refuse the amendment would mean that a litigant in person who has attempted to set out her claims and provide significant factual information about them would be, as the Claimant puts it, pulling apart her writing skills and, as I would put it, failing to put the parties on an equal footing.

110. In my conclusion it is in the interests of justice to allow the Claimant to add the labels to her particulars of claim that she has applied for.

Do any of the claims or does the response have little or no reasonable prospect of success?

111. I heard no submissions on the claim of unfair dismissal and I do not believe that is within the ambit of the strike out and deposit order application.

112. It would not be appropriate to strike out or order a deposit in relation to the unfair dismissal claim. The Claimant has clearly set out matters in her claim form which go to whether or not the Respondent acted reasonably in treating the statutory provisions as sufficient a reason for dismissal. She raises issues about whether or not they had reasonable grounds for their belief and concerning the process they followed and their fairness. Those matters appear to me to be reasonably arguable without suggesting that means that they would succeed at a final hearing. I cannot conclude that they have little or no reasonable prospect of success therefore I am not prepared to make either order.

113. I do conclude that the Claimant's claim of pregnancy discrimination has no reasonable prospect of success and should be struck out.

114. None of the claims concerning matters prior to dismissal fall within the protected period. Unless the unfavourable treatment took place within the protected period, those claims cannot succeed.

115. In relation to the dismissal on 10 January 2022, I note that the determination of the dismissal was earlier by giving notice on 11 November 2022. The decision is outside of the protected period commencing 31 December 2022 and the effective date of termination is within the protected period.

116. In relation to the post termination matter, which is the failure reinstate after dismissal, in note that this is within the protected period.

117. But whether one is considering the effective date of termination or the failure to reinstate, the Claimant concedes that she never advised the Respondent at these times that she had become pregnant on 31 December 2021.

118. In those circumstances there is no prospect at all of the Claimant establishing that the unfavourable treatment which occurred within the protected period was because of the pregnancy.

119. For those reasons, the claim of pregnancy discrimination has no reasonable prospect of success.

120. I conclude that the Claimant's claim of direct belief discrimination has no reasonable prospect of success and shall be struck out.

121. I conclude that the Claimant has raised a reasonably arguable claim that bodily autonomy may constitute a belief for the purposes of the Equality Act 2010, particularly given the right to integrity and free and informed consent to medical treatment. That is a point which I would consider could only be determined at a final hearing.

122. However there is I conclude a more fundamental issue in this part of the Claimant's claim.

123. The Claimant is not relying on any specific comparator and her case will be determined on the basis of whether or not she was treated worse than a hypothetical comparator would have been treated.

124. The Claimant and the comparator must have no material differences with the Claimant other than the protected characteristic.

125. The Tribunal would therefore, at any final hearing, be required to consider whether or not the Claimant was treated worse than a person who was unvaccinated and could not avail themselves of a medical exemption from the requirement to be vaccinated.

126. The fundamental and determinative factor in the Claimant's case, evidenced by her particulars of claim (unnumbered paragraph 2, page 14) which sets out clearly the Claimant's view that the Respondent would terminate the employment of anyone unvaccinated by choice.

127. A person unvaccinated by choice (not holding the Claimant's potentially protected belief) would on any reading of the Claimant's case have been treated the same. They would be the Tribunal's hypothetical comparator.

128. Therefore the Claimant's claim of belief discrimination would be bound to fail.

129. That claim has no reasonable prospect of success and shall be struck out.

130. I conclude that the Claimant's claim of indirect sex discrimination has no reasonable prospect of success.

131. In any claim of indirect sex discrimination, the Tribunal is concerned with the provision, criterion or practice applied by the Respondent.

132. It is clear that this claim concerns the criterion of requiring a vaccination to work in a position involving entering care homes.

133. The Tribunal will need to address several issues concerning this complaint by the Claimant, including whether or not that criterion was applied to the Claimant, whether it was applied to men, and did it put women at a particular disadvantage when compared with men. The Tribunal will go on to decide whether or not the criterion put the Claimant at that disadvantage.

134. However, the tribunal will finally ask whether or not the criterion was a proportionate means of achieving a particular aim.

135. In my conclusion, the weight of justification for the vaccination requirements which were brought in under the amendment to the regulations has already been the subject of rigorous judicial consideration.

136. It makes no difference that they were subsequently revoked. The implementation of the amendments to the regulations and their revocation were different decisions reached at different time on different evidence.

137. See for example ***Vavřička and others v Czech Republic [2021] ECHR 116***.

138. See also ***Peters and Findlay v Secretary of State for Health and Social Care and the Joint Committee for Vaccination and Immunisation CO/3118/2021 and CO/2652/2021***.

139. For those reasons, the Claimant's claim of indirect sex discrimination has no reasonable prospect of success and shall be struck out.

140. I turn finally to the Claimant's application that the Respondent's response to the Claimant's claim be struck out because of inaccuracies and the failure to address certain points in her claim.

141. I do not consider that the Respondent's response has no reasonable prospect of success.

142. The Response form read in isolation presents a reasonably arguable defence.

143. The matters raised by the Claimant in her letter of 19 June 2022 to the Tribunal appear to me to be:

a. Factual matters of dispute which can only be determined at a final hearing at which all of the evidence is heard, or

b. Matters of opinion concerning facts which can only be considered through hearing submissions from both parties having heard all of the evidence at a final hearing.

Employment Judge Knowles

18 August 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

18 August 2022

FOR THE TRIBUNAL OFFICE