Case: 1800872/2022

EMPLOYMENT TRIBUNALS

Claimant: **Ms N Montana**
Respondents: **(1) Care Quality Commission**
(2)Gill Nicholson
(3) Ian Trenholm
(4) Rebecca Lloyd-Jones
(5) Kate Terroni
(6) Alison Chilton
(7) Peter Wyman
(8) Gina Georgiou
(9) Jacqueline Jackson
(10) Kirsty Shaw
(11) Karen Burrow
(12) Sally Cheshire

AT A PRELIMINARY HEARING

Heard at: **Leeds by CVP video conferencing** **On: 2nd September 2022**
Before: **Employment Judge Lancaster**

Representation
Claimant: In person, assisted by Ms R Ward
Respondents: Mr T Brown, counsel

JUDGMENT

1. The claims of direct disability discrimination have no reasonable prospect of success and are dismissed.

2. The claims of a failure to make reasonable adjustments have no reasonable prospect of success and are dismissed.

3. The claims of harassment on the grounds of disability in respect of (1) the dismissal, (2) the alleged failure to offer anything other than vaccination within 10 days as a means of avoiding dismissal on notice, and (3) the comments at a team meeting to the effect that the Claimant would not be returning, shall proceed to a final hearing.

4. All other complaints of harassment have no reasonable prospect of success and are dismissed.

5. The claims of victimisation, subject to further clarification of which detriments the Claimant asserts that she was subjected to because she had done a protected act, shall proceed to a final hearing.

REASONS

1. This preliminary hearing was listed to determine whether the Claimant required leave to amend her claim, if so whether leave should be granted, and whether, in the context of that amendment application or generally in any event, any claims have no or little reasonable prospect of success.

2. The starting point in this exercise must always be the claim (ET1) as originally submitted. The Respondent reminds me that that document is intended to be the articulation of the claim, and not merely a starting point to be added to at will, and that it should enable the claims to be understood at first reading: Adebowale v ISBAN UK Ltd and ors. EAT 0068/15. Also where complaints under the Equality Act are pleaded the ET1 must specifically identify the necessary elements of causation if it is to be properly construed as disclosing a relevant head of claim: Housing Corporation v Bryant [1999] ICR 123.

3. It has to be said that the 33 page Particulars of Claim attached to the ET1 is not easy to follow. It is somewhat overlong, repetitive and at times irrelevant or misconceived. Also whilst the Claimant has clearly done her best to adopt what she believes to be the appropriate statutory or legal terminology it is evident that this is “not her first language”.

4. Two Employment Judges have therefore given the Claimant the opportunity to provide additional information about her claims, so that they might be better understood. The latest such document is the table prepared on the directions of Employment Judge Davies. This is itself a further 25 pages long. Unless any further specific application is to be made by the Claimant to add to it or to amend, this document is treated as the definitive distillation of all the claims that she has sought to bring within her ET1.

5. The Respondent - applying the principles in Adebowale and Bryant only concedes that two of the tabulated complaints within that document actually reflect a particularised legal claim that is contained within the ET1 itself. Mr Brown therefore submits that all other matters in fact require leave to amend.

Harassment

6. I deal firstly, therefore, with the two matters that are the subject of that concession. They are within the table dealing with harassment and are at 1(a) and 10. That is that the provision of the 17th November dismissal letter was harassment, and that two colleagues texted her to tell he that subsequently at a team meeting her line manager had disclosed that she would not be returning to work because vaccination was a condition of employment.

7. Both these events are clearly unwanted conduct as experienced by the Claimant. Also, although I have not of course heard any evidence, and the precise factual context will have to be established the surrounding circumstances are certainly

capable of being construed as relating to the Claimant's suffering from allergies, which was why, due to concerns about a possible adverse reaction, she had determined that she would not be vaccinated against Covid. It cannot, therefore , be said at this stage that these two claims have no or little reasonable prospect of success.

8. The complaint of harassment at part 1 (b) of the table, alleging a failure to offer a further opportunity to obtain a medical exemption as at 17th November 2021, is not accepted to be contained within the ET1. On balance, however, I consider that the original claim, particularly at paragraph 17, is sufficient to identify this complaint. There is a factual dispute as to whether the letter of termination did in fact purport to rule out the possibility of the Claimant still obtaining a medical exemption in the manner prescribed by her employer, as an alternative to being vaccinated, but I am not determining that dispute. If it did preclude that option then once again the surrounding circumstances are certainly capable of being construed as relating to the Claimant's suffering from allergies. If, however, it did not, then it is very difficult to see how this could possibly be harassment. At this stage, however, it cannot be said that this claim has no or little reasonable prospect of success, so it too will proceed to final hearing.

9. None of the other alleagtions of harassment are however, in my view sufficiently identified as such within the ET1. This part of the claim in its present form, as currently refenced within the ET1 prior to any amendment, certainly is so lacking in precision that it would have no reasonable prospect of success I therefore accept the Respondent's submission that leave to amend is needed to add these new particulars. On the merits I reject that application to amend. Even if I were wrong on this and allowed an amendment, or indeed if the claim was in fact already properly ascertainable from the ET1, none of these further complaints as now particularised in the table have a reasonable prospect of success. The Claimant has understandable concerns about the process by which the Respondent prescribed what it considered to be an acceptable method of asserting a medical exemption to the vaccination requirement for all those who entered care homes at this time, and whether this was in fact reasonable. These issues will have to be addressed in the context of the unfair dismissal claim, both in respect of substantive and procedural fairness, but the prescribed approach taken by the Respondent is not related to the alleged disability. The fact that the Claimant suffered from allergies is not related to her unwillingness to adopt the Respondent's methodology instead of her own preferred approach. As Mr Brown submits in relation to the reasonable adjustments claim, taking it to extremes for the sake of argument, it is not as if the forms that the Claimant was being asked to fill in contained latex or some other substance to which she was allergic so that her disability was the reason for her refusal to sign.

Direct Discrimination

10. I turn now to the claims of direct disability discrimination. Complaints under section 13 and 26 of the Equality Act 2010 are mutually exclusive. If unwanted conduct constitutes harassment, that same conduct cannot by definition also amount to being subjected to a detriment for the purposes of establishing less favourable treatment (section 212). The complaint that the dismissal was harassment is continuing to a final hearing. If the Claimant cannot on the facts establish harassment *related* to disability, it is not readily possible to conceive how she might, in the alternative, establish less favourable treatment that is actually *because* of disability.

11. Neither of the alleagtions of direct discrimination are however, in my view sufficiently identified as such within the ET1. In so far as they are mentioned in the ET1 it is solely in the context of unfairness in relation to the dismissal process. It was not originally alleged that there is any causal link between what happened and the Claimant suffering from allergies. This part of the claim also in its present form, as currently refenced within the ET1 prior to any amendment, certainly is so lacking in precision that it would have no reasonable prospect of success I therefore accept the Respondent's submission that leave to amend is needed to add these new particulars. On the merits I reject that application. Once again, even if I were wrong on that and allowed an amendment, or indeed if the claim was in fact already properly ascertainable from the ET1, neither of these further complaints have a reasonable prospect of success.

12. There is no pleaded factual basis whatsoever that the reason why the Claimant was not invited to a meeting before being served notice of dismissal, nor that the reason why she was dismissed was because she suffered from allergies. The reliance upon the two comparators is mutually contradictory. The one is a person who was declining to be vaccinated (but not presumably also seeking to claim a medical exemption) who was invited to a meeting before dismissal, and the other is a person who was vaccinated. In neither case is there any reason to suppose that the reason for the Claimant being treated differently was in fact because she out of the three is the only one who has allergies. The fact is that she had not been vaccinated, as she was entitled to choose not to be, but nor had she followed the Respondent's procedure for claiming a medical exemption which would have then removed the possibility for any sanction flowing from her choice. That total combination of factors constitutes the relevant circumstances for the point of any proper comparison, and it is not the case that either comparator is in fact alleged to be similar in all material respects.

Reasonable Adjustments

13. The claim for a failure to make reasonable adjustments is not included in the list of complaints brought under the Equality Act at paragraph 11 of the ET1. However I consider that the other references to an alleged failure to consider reasonable adjustments and to the previous adjustments that had been made, specifically in respect of the Claimant's allergy to latex, is sufficient to have alerted the Respondent to the fact that this was a claim she intended to bring. Indeed by the Respondent's letter of 25th July 2022 it appears to have been accepted that his type of complaint had been included within the ET1. Equally, though, it must be said that the ET1 does not identify any relevant provision, criterion or practice ("PCP"), nor identify any disadvantage to the Claimant, nor suggest any actual adjustment that should have been made.

14. Within the table now produced the Respondent does ,however, now take issue with the fact that the additional particulars do not disclose any reasonable prospect of success. I agree with that submission, and note again Mr Browns admittedly somewhat hyperbolic submission in this regard at paragraph 8.

15. None of the itemised PCPs in the table in fact relate specifically to disability. By way of example the refusal to accept a self-certified exemption on the form provided by her unrecognised trade union self-evidently did not place the Claimant at any disadvantage by reason of the fact that she suffered from allergies. She was not prevented by her

disability from complying with the Respondent's own requirement as to the method of asserting a proper medical exemption. And after termination she was indeed able to and did produce the documentation in the required format.

16. Other alleged PCPs are also on their face not matters of general application, but which disproportionately affected disabled people. Rather they are only specific to the Claimant, such as "the provision of *my* 17 November 2021 Notice of Dismissal letter".

17. It is possible on the papers to identify a PCP which was actually applied, along the lines of "The Respondent required inspectors either to be vaccinated against Covid by 11th November 2021 or to have established a medical exemption in a manner prescribed as acceptable by the Respondent, otherwise they would be at risk of dismissal". Even that PCP, viewed in its entirety, would not, however, have placed the Claimant at a substantial disadvantage by reason of her allergies. Whilst she could not willingly assent to being vaccinated because of the reasonably perceived risk of side effects, she was not also prevented by that alleged disability from obtaining an exemption. For the same reason not redeploying her to a position where she would not be required to attend care homes, though it is no doubt potentially relevant as to the fairness of the dismissal, is not a failure to make reasonable adjustments.

Victimisation

18. The ET1, whilst referring to victimisation complaints does not plead specifically to the necessary causation between the doing of any protected act and a consequent subjection to a detriment. Applying the well-established principles in Selkent Bus Co. Ltd. v Moore [1996] ICR 661, however I conclude that this is properly categorised as a relabelling of facts already pleaded.

19. There are two alleged protected acts under section 27 of the Equality Act 2010. The first is the submission of the exemption certificate in the format provided to her by her union, the second is her subsequent assertion on 25th October 2021 that failure to accept that Union certificate as sufficient proof of exemption could be deemed to breach the Equality Act.

20. The fact of both these alleged protected acts having taken place is clearly and specifically referenced within the ET1. It is also certainly arguable that within its narrative the ET1 makes at least an implicit connection between the doing of these acts and subsequent alleged detriments suffered by the Claimant. In this context I note, in particular, paragraphs 14.4, 24,28.32, 35 of the narrative and 10.1.2 of the claim within the ET1.

21. It is debateable whether the warning in the Union-drafted certificate that to disregard it may be an unspecified form of discrimination under the Equality Act 2010, coupled as it was with a wholly incorrect statement as to the effects of the enforcement provisions in that Act , comes within section 27 (2) c) as "doing any other thing for the purposes or in connection with this Act". This does not much matter though, because if the Claimant is correct and her subsequent communications around the 25th October self declaration of exemption amount to an express allegation that there had been a breach of the Equality A by not accepting the sufficiency of the Union-drafted certificate, that will clearly come within section 27 (2) (d).

22. I therefore allow the amendment to the victimisation claim by way of the further particularisation within the table. There will still need to be additional clarification as to which detriments in the table it is in fact alleged that the Claimant was subjected to *because* she had done either alleged protected act, and whether there are any facts that she will seek to prove from which that necessary element of causation could be inferred. That can, however be addressed either voluntarily or by supplemental case management directions as to the provision of a further clarification or by the Claimant withdrawing some allegations. There is at least a chronological chain of events which means that it is just and equitable to allow the victimisation claims to proceed to a hearing.

EMPLOYMENT JU DGE LANCASTER

DATE 8th September 2022

JUDGMENT SENT TO THE PARTIES ON

10 September 2022

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS

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