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

JUDGMENT

The claimant's application dated **23rd September 2022 (as amended on 24th September 2022)** for reconsideration of the judgments sent to the parties on **7th and/or 10th September 2022** is refused.

REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. Following a public preliminary hearing on 2nd September 2022 two judgments were issued. The first dated 2nd September 2022 was sent to the parties on 7th September 2022. The second, which was a reserved decision, is dated 8th September 2022 and was sent to the parties on 10th September 2022.

2. The Claimant's application for reconsideration reads, however, as if she is unaware of the first judgment. A re-statement is therefore attached to this decision[i].

Judgment of 2nd September 2022

3. The grounds for dismissing the claim of automatically unfair dismissal under section 104 of the Employment Rights Act 1996 are entirely self-explanatory within the terms of the judgment itself. Additional reasons

are, therefore, neither required nor proportionate under rule 62 of the Employment Tribunals Rules of Procedure 2013.

4. The complaints of indirect discrimination were unequivocally withdrawn at the hearing on 2nd September 2022 and consequently dismissed. Under rules 51 and 52 of the Employment Tribunals Rules of Procedure 2013 that claim has come to an end.

Judgment of 8th September 2022

5. The application is long and somewhat repetitive and confused. Reconsideration under rule 70 of the Employment Tribunals Rules of Procedure 2013 is only applicable in respect to the judgment dismissing parts of the claim. Applications for further case management directions, for variation of orders or case management decisions, or for costs are addressed separately.

6. The preliminary hearing was listed by the Tribunal expressly for consideration of:
   1. 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.
   2. 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.

7. It was , therefore, abundantly clear to the Claimant that she would be required to address the substance of her claim both by reference to the content of her original ET1 and also to the merits of the claims sought to be brought, either in the original claim or subsequently. To address these issues in respect of all claims except unfair dismissal and the failure to make reasonable adjustments, the Claimant had submitted a 15 page document in advance of the preliminary hearing.

8. The Respondent's oral submissions on these issues were all specifically by reference to the Claimant's own document dated 29th August 2022, the tables prepared in compliance with the further directions of Employment Judge Davies. This was the Claimant's explicit formulation of her claims which was being subjected to scrutiny, and she cannot have been taken by surprise as to the focus of the argument.

9. Counsel for the Respondent did refer in submissions to 2 authorities, both of which are identified in the Judgment at paragraph 2. These are, however, support for uncontroversial propositions of law as to the relevant context for assessing an application to amend. The essential issue was whether the claim as originally pleaded was in fact properly construed as containing the alleagtions now identified within the Claimant's tables of 29th August. This analysis did not depend upon the Claimant or her friend being given opportunity to argue the legal principles identified on the authorities.

10. I now accept that it would have been preferable had the authorities been disclosed in advance, but I am satisfied that there is no realistic prospect of the decision being varied if I were now to reconvene the hearing to

allow the Claimant to address me on these authorities, which as I say I consider to be non- controversial.

11. The Respondent's counsel was permitted to make submissions uninterrupted by the Claimant. That is the usual courtesy, particularly on a CVP hearing where it is not possible to hear two people speaking at once. The Claimant was afforded the same courtesy. I am satisfied that the Claimant had ample opportunity to address me on the substance of the preliminary issues, for which she had prepared in advance, and that I was fully appraised of the arguments on both sides. This was then, of course, a reserved decision to permit further consideration of the relevant documentation. I am therefore satisfied that here would be no reasonable prospect of a different decision being reached if I were to reconvene the hearing to allow additional representations.

12. The determination of the preliminary issues to date was confined to the complaints under the Equality Act as delineated in the tables of 29th August. If there is an application to add further issues, either because the original ET1 contained identifiable complaints that are not refenced in the tables, or because there is an application to amend to add fresh complaints, those matters will be subjected to the same exercise of ascertaining whether leave to amend is in fact required and whether the complaints have reasonable prospects of success. Any such added claims are not intended to be covered by this judgment, but in respect to all those matters that are currently delineated within the tables it is definitive. That is to say that any subsequent arguments or decisions as to the addition of other claims, whether or not under the same heads of discrimination, does not affect this reconsideration application in respect of the matters already determined. The protected disclosure and health and safety detriment or dismissal claims are awaiting further decisions at a preliminary hearing, and the ordinary unfair dismissal complaint will proceed in any event.

Direct disability discrimination.

13. This determination was made for present purposes on the assumption that the Claimant is disabled. That is, of course, not accepted by the Respondent and if that is right then this claim must fail in any event.

14. It could not be any clearer that the reference in paragraph 10 of the Judgment is to that part of section 212 of the Equality Ac 2010 which reads: ""detriment" does not… include conduct which amounts to harassment".

15. The fact of the dismissal is pleaded as both harassment and direct discrimination. It cannot be both. There is no reasonable prospect of my reversing the decision that, in the event of the harassment claim in this regard not succeeding, the potential alternative claim of direct discrimination has no reasonable prospect of success. There is no identifiable pleaded basis whatsoever for asserting that the Claimant's alleged disability, of itself, formed any material part of the reason for dismissal. The alleged comparator, being someone who had had the vaccine, is not appropriate because that is self- evidently a material difference their circumstances.

16. The further complaints if direct discrimination are not also pleaded as harassment, but do rely upon comparisons which have no reasonable prospect of being held to be appropriate or material, or where there is similarly no identifiable pleaded basis whatsoever for asserting that the Claimant's alleged disability, of itself, formed any material part of the reason for the alleged detrimental treatment.

17. A mere difference in status and a difference in treatment is not enough to found a discrimination claim, there must be a causative connection. The Claimant has still identified no such possible link.

18. If my assumption that the first alleged comparator had not also asserted a clinical exemption was wrong it would not affect the decision on the lack of any identified causal link. In any event the totality of their respective material circumstances would have to be not materially dissimilar, and not merely those selective examples given by the Claimant. That is that the comparator would have to have had engaged in the same or similar series of interaction with the Respondent evidencing their settled disagreement with the prescribed process for claiming a clinical exemption, prior to the point of the face-to-face meeting before termination. It is not so far as I can see suggested that the meeting avoided the issuing of the notice of dismissal in any case, so there is a further issue as to whether not also being given such a meeting is could reasonably be construed as a detriment to the Claimant, but the central point remains that there is no identified basis whatsoever for asserting that the Claimants allergies were any material factor in the decision not to invite her to such a meeting.

Harassment

19. The reference to paragraph 1(b) of the table rather than 2(b) – thereby meaning to particularize the second of the two allegations contained in that section – is an error but it is clear in the context what is referred to and it is not necessary to correct the original judgment itself rather than acknowledge the mistake now.

20. Three specific alleagtions of harassment shall proceed to final hearing. In circumstances where the Claimant expressly accepts that the Respondent's choice of procedure was not related to the alleged disability, there is no reasonable prospect of my varying decision to strike out the other harassment complaints which all concern this choice of procedure. It is the Respondent's unwanted conduct which must relate to the disability, and it is not sufficient to assert that although it was not so related, the Claimant perceives that there were (unspecified) consequential implications in relation to her allergies.

Failure to make reasonable adjustments

21. It is right to observe that as at 25th July 2022 the Respondent's solicitor had indicated that at the preliminary hearing the Respondent would apply for strike out and/or deposit orders in respect of all claims except those for unfair dismissal and failure to make reasonable adjustments. I accept that Mr Brown, as appeared in the course of the hearing when I drew his

attention to it, was unaware of this letter.

22. I nonetheless permitted submissions that the disclosed case as now identified in the tables disclosed no reasonable prospects of success. That because on the face of it it clearly did not do so. The position up to that point, and prior to 25th July 2020, in respect of the reasonable adjustments claim had been extremely unclear. As set out in paragraph 13 of the original Judgment the claim in the ET1 was to be inferred rather than being explicitly made and was not properly particularized. In the first attempt to provide further particulars under the direction of Employment Judge Knowles, the Claimant produced a further document on 23rd May 2022. This again did not include any sub-heading of "Failure to Make Reasonable Adjustments", but did make purely generic references to such an alleged failure with the section titled "Enforcement remedies and procedure". It is only within the tables that there is for the first time any attempt to articulate properly a claim under sections 20 and 21 of the Equality Act 2010.

23. I accept with hindsight that it would have been more appropriate to have adjourned this argument , as the Claimant had not been expecting to have to address this issue. I note however that irrespective of whether or not the Respondent was taking the point, as at any preliminary hearing had I considered the claim to have little reasonable prospect of success I could have made a deposit order in any event: rule 39 Employment Tribunals Rules of Procedure 2013 . At the very least I consider that this was the position.

24. On the face of the pleaded case as delineated in the tables the claim is however even weaker. There is no properly identified provision , criterion or practice applied in the workplace but which as between all those to whom that CP is applied puts a disabled person at a disadvantage in comparison to persons who are not disabled. As set out in the original Judgment I accepted the Respondent's submissions in this respect, and referenced Mr Brown's "hyperbolic" argument at paragraph 9 (not paragraph 8 as incorrectly cross-referenced later in the decision).

25. Even if I were now to reconvene to allow further representations from the Claimant there would, however be no reasonable prospect of the decision being different. That is because the Claimant "agrees that her disability or allergies in and of themselves did not directly prevent her from complying with the Respondent's procedure for exemption" and "the disability of allergies itself did not prevent the Claimant from obtaining the medical exemption, instead it was the notable risk issues with the NHS Covid Pass Medical exemption assessment process, that for many did prevent exemptions from being obtained". That concession is fatal to the claim of failure to make reasonable adjustments as pleaded

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Employment Judge **Lancaster**

Date 4th October 2022

[i] JUDGMENT

1. The claim of automatically unfair dismissal under section 104 of the Employment Rights Act 1996 is dismissed because it has no reasonable prospect of success: the alleged right asserted under "the Care Home Regulations 2021" (SI No. 891 2021) is not a relevant statutory right as defined by section 104 (4).

2. The complaint of indirect discrimination because of disability is dismissed upon withdrawal.