



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms R Killeen

**Respondent:** Guideposts Trust Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Employment Tribunal (VR) (by video) **On:** 9 December 2022

**Before:** Employment Judge Allen

### Appearances

For the claimant: The claimant was represented by her Partner Dr Gibson

For the respondent: Mr Hignett of counsel

## RESERVED JUDGMENT

### Judgment on Preliminary Issues

- (1) The application that the claims under Section 13 of the Equality Act 2010 be struck out is dismissed.
- (2) The application that the claims under Section 13 of the Equality Act 2010 that the claimant pay a deposit as a condition of continuing to advance them based on c and i as set out in the agreed issues document dated 14 October 2022 is dismissed.
- (3) The application that the claims under Section 13 of the Equality Act 2010 that the claimant pay a deposit as a condition of continuing to advance them based on issues a - b and j - k is allowed. The Claimant must pay £125 as a condition of continuing to advance each claim (£125 per claim).
- (4) The claimant's application to amend her claim in so far as direct discrimination contrary to Section 13 of the Equality Act 2010 as set out at c) and l) of the agreed issues dated 14 October 2022 is allowed.

- (5) The applications application to amend her claim in all other respects is dismissed.
- (6) The claimant will submit an amended schedule of loss with the typographical errors in the current schedule amended with 14 days of the date this preliminary judgment is sent to the parties.
- (7) A telephone preliminary hearing is to be set to address case management issues and set the matter down for a full merits hearing.

## REASONS

### Today's Hearing

Today's hearing is a continuation of the OPH conducted by EJ Moore on 20 October 2022. The issues were not completed on that day because the claimant became unwell and was unable to continue.

The issues to be addressed today are as follows:

- 1.1. To hear the Respondent's application that the claim of direct discrimination under s. 13 Equality Act 2010
  - 1.1.1. should be struck out as having no reasonable prospect of success; or
  - 1.1.2. That the Claimant be required to pay a deposit order as a condition of continuing to advance it;
- 1.2. To hear the Claimant's application to amend her claim; and
- 1.3. To set the matter down for hearing and make the necessary Case Management Orders.

### 2. Reasonable adjustments for the hearing

Given that the claimant was taken ill during the previous hearing and that the claimant is disabled by reason of depression is not disputed the consideration of reasonable adjustments for the management of this hearing was appropriate.

The claimant told me she finds the tribunal proceedings stressful and can become overwhelmed. To facilitate her participation in today's hearing I agreed that:

- 2.1. She could take breaks as needed
- 2.2. Turn off her microphone when not taking an active part in the hearing so that she could consult with her partner who was assisting her during the hearing.
- 2.3. We would address each issue to be considered today separately.

### 3. Strike out or deposit order

3.1.1. Mr Hignett for the Respondent directed me to page 292 of the draft list of issues (commencing page 286 of the bundle prepared for this hearing) which sets out the following at paragraph 21:

*21. Has the Claimant been subject to the following acts (as per further particulars dated 11/10/2021 which are identifiable in the ET1 on the first or second claim and which are not subject to an application to amend):*

- a. Failure to create a psychologically and physically safe working environment including repeatedly dismissing the Claimant's views due to stereotyping.*
- b. Failure to complete actions from the first grievance by Nicole Rolston, Justine Russell and Matt Jones.*
- c. "Protected" conversation and pressure to accept a settlement offer between 13 and 16 October 2020.*
- d. Failure to address health and safety concerns*
- e. Failure to meet with the Claimant to discuss and arrange reasonable adjustments*
- f. Verbally aggressive behaviour towards and dismissing the opinion of the Claimant*
- g. Failure to consistently complete back to work interview(s) or holding them late, including in September 2020*
- h. Failure to address concerns regarding risk assessments*
- i. Dismissal*
- j. Failure to address Health and Safety concerns related to Guideposts Trust insurance*
- k. Car key issue – wording to be determined:*
  - i. Respondent quote from the 2nd ET1 (page 91 PH Bundle) "Stating that there was only one key for the Guideposts work car, causing the Claimant distress and forcing her to work while signed off."*
  - ii. Claimant seeks to word the allegation as "Nicole Rolston dismissed the Claimant's pointing out the availability of a spare key for the work car, due to her (NR's) characterisation of the Claimant as unreliable due to a perception of the Claimant's mental health disability (around December 2020)"*

3.1.2. Mr Hignett pointed out that the above items have been characterised by the claimant as direct discrimination under S13 EA'10, they were not previously pleaded in either claim 1 or 2 and have been added without application to amend the claim.

3.1.3. Mr Hignett also argued that these are weak as complaints of grounds of direct discrimination. Taking items, a) to k) as set out above he argued:

- a) These are complaints about the working environment. The respondent asks how do these demonstrate less favourable treatment and discrimination because they are causally connected to the claimant's disability. The claimant cannot show the employer created that working environment because of her disability. That is not a direct discrimination.
- b) The claimant was unhappy with the outcome of her grievance but the respondent argues she couldn't prove that was because of her disability. The claimant would need to show the comparator had those outcomes completed.

i) Don't seek to strike that one out.

3.1.4. The common theme is her disability related absences; paragraph k) is all about the spare key which is not about disability. The Equality Act is framed 'where a person has done something'. It's too imprecise to go forward as a claim of direct discrimination.

3.1.5. The Respondent seeks strike out or deposit order in respect of all others (a-h and j-k in the list on the grounds they have no chance of success. If the tribunal finds they are weak then the respondent seeks deposit orders in respect of a-h and j-k.

3.2.1. Dr Gibson responded on the claimant's behalf again following the numbering a-k as above,

a) This is about the verbal aggression the claimant experienced at the grievance hearing. The Respondent says the grievance actions were delayed because of the claimant's disability related absences. The Respondent should have taken actions to ensure a safe working environment in terms of covid safety. The Respondent repeatedly took a dismissive attitude to the claimant's concerns because of her mental health. They felt her concerns were exaggerated because of her mental health.

b) The same argument for a) applies to point b) [the failure to complete action plan arising from the partially upheld grievance].

c) This relates to the respondent's attempts to reach a settlement agreement with the claimant and terminate her employment. This was because of the claimant's disability related absences. Nicole Rolson and Mat Jones statements set out the events. The claimant was given 1½ days to consider the offer. At Pg 280 of the bundle the judge ruled that was unreasonable pressure. No reasons have been given as to why this period for reflection was so short this was a deliberate attempt to pressure someone with a mental health issue. The meeting in which the settlement agreement was proposed was held immediately after the claimant returned from a disability related sickness absence (13/10/2020). They said they were delaying reasonable adjustments (pg. 222 item 6) whilst awaiting her response on the settlement offer. This is evidence of trying to exploit her disability to get her out of the organisation.

d) There was stereotyping of her condition and dismissed her health and safety concerns.

e) Failure to meet with the claimant. She had been asking for reasonable adjustments for many months. They held numerous other meetings not related to her disability. All disability issues went to the bottom of the pile and were not prioritised. They saw her as awkward and difficult because of her mental health issues. Meetings for reasonable adjustments were not held because of disability related absences. She suffered more

sickness because these meetings were not held. Respondent was aware that she was ill with depression and had doctor's notes supporting this and that she needed reasonable adjustments to return to work.

f) verbally aggressive behaviour towards and dismissing the opinion of the claimant. She approached the respondent about this and they dismissed them. The Respondent saw her as awkward and less tolerant of being shouted at. Ms Russell said it would be fine because JM [staff member the subject of the claimant's grievance] had not shouted at her implying that JM would not shout at somebody else and it was the claimant's fault. She was told she should be more tolerant to being shouted at in a meeting with the finance director. It was perceived as a weakness from her mental health.

g) failed to hold back to work interviews. The respondent had no problem with other meetings. One such meeting was held but it was late and recorded she was not fit to work without reasonable adjustments. Back to work interviews should be held within 24 hours.

h) Failure to conduct risk assessments because the claimant was awkward rather than genuinely unwell.

i) Not addressed as conceded by the respondent

j) failure to address health and safety concerns see d) above.

k) There was discussion with Ms Rolston about the return of various property to the respondent including the Respondent's vehicle. The claimant was being pressured to drive notwithstanding she had just started medication and had been advised not to. Respondent refused to believe there was a spare key. They were bullying her to drive. She was signed off sick but had to engage in email exchange about the key.

The who is noted in the papers about who discriminated against her. Pg 140 on in the bundle also gives dates.

3.3. The issue as regards dismissal i) above is straightforward. The Respondent does not challenge that dismissal is a detriment which could amount to direct discrimination contrary to S13 EQA. In the circumstances and for the avoidance of any doubt the Respondent's application to strike out this claim or impose a deposit order is dismissed.

#### 4. The law on direct discrimination (disability)

##### 4.1. **Direct discrimination**

Section 13 Equality Act 2010

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

The section covers a number of protected characteristics of which disability is one.

- 4.2. Principles to be applied in drawing inferences that unreasonable treatment was motivated by a protected characteristic.

In *Talbot v Costain Oil, Gas and Process Ltd and ors 2017 ICR D11, EAT*,

- it is very unusual to find direct evidence of discrimination
- normally an employment tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question
- it is essential that the tribunal makes findings about any 'primary facts' that are in issue so that it can take them into account as part of the relevant circumstances
- the tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference
- assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also of reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities
- where there are a number of allegations of discrimination involving one person, conclusions about that person are obviously going to be relevant in relation to all the allegations
- the tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors that point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment
- if it is necessary to resort to the burden of proof in this context, S.136 EqA provides, in effect, that where it would be proper to draw an inference of discrimination in the absence of 'any other explanation', the burden lies on the alleged discriminator to prove there was no discrimination.

- 4.3. Ineptitude, unreasonable or unfair treatment is not enough to establish that it was motivated by a protected characteristic.

In *Commissioner of Police of the Metropolis and anor v Osinaike EAT 0373/09*, the EAT overturned an employment tribunal's finding of discrimination by reason of race. Although her situation had been ineptly handled by the employer, there was no evidence before the tribunal that its decision had been made on racial grounds. Simply showing that the employer's conduct was unreasonable or unfair was not, by itself, enough to raise an inference of discrimination. The EAT acknowledged that if unreasonable conduct occurred alongside other indications that there might be discrimination on racial grounds, that would alter the position, but those indications must relate to the prohibited ground.

- 4.4. However, an alternative conclusion may be reached where the conduct was wholly unreasonable.

In *Rice v McEvoy 2011 NICA 9, NICA*, if an employer acts in a wholly unreasonable way, this may assist in drawing an inference that the employer's

purported explanation for its actions was not in fact the true explanation and that it was covering up a discriminatory intent.

- 4.5. Where treatment of the claimant is the same as the staff as a whole it is unlikely to be motivated by a protected characteristic.

In *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust EAT 0269/15* Langstaff J commented (on an obiter basis) that where there is an approach towards all which creates an equality of misery, it is unlikely to be because of a protected characteristic peculiar to only one or a few of them. However, the 'unreasonable not discriminatory' defence may be less applicable in a case in which the evidence shows that only one employee has been made miserable. In that latter case, though it remains logically right that the individual may have been the unwilling victim of a mistake or oversight, there is much greater reason to consider carefully and with particular scrutiny whether this might simply be too easy an explanation. It may call, in an appropriate case, for evidence as to how others have actually been treated who, if the explanation were true, one might expect to have been treated equally badly.

- 4.6. The absence of an explanation for the treatment of a staff member that is different from others is a relevant factor in deciding if it was motivated by a protected characteristic.

In *Milton Keynes General Hospital and anor v Maruziva EAT 0003/09* the fact that no explanation was given for the claimant's treatment was held to be a relevant factor to the question whether it was appropriate for the tribunal to draw an inference of race discrimination in that case. The EAT held that a tribunal was 'bound to conclude' that M, a black senior staff nurse, had been directly discriminated against on the ground of colour when: (a) the ward sister spoke harshly to her on more than one occasion; (b) white staff were not treated in that way; and (c) no explanation was given for M's treatment other than a denial that it happened (which was not accepted by the tribunal).

- 4.7. The respondent's explanation for treatment is a relevant factor in deciding if it was motivated by a protected characteristic.

In *Ferri v Key Languages Ltd ET Case No.2302172/04* F claimed that she had been subjected to aggressive behaviour, belittling treatment and emotional pressure on the ground of her religious belief. KL Ltd defeated her direct discrimination claim because it provided powerful and cogent evidence of F's shortcomings that explained its treatment of her. Of course, with the notable exception of age discrimination, direct discrimination itself cannot be justified. However, in this instance the employer's justification was being used to explain why no inference of direct discrimination should be drawn in the first place.

5. Having considered the law and applied it to issues a-h and j-k I have drawn the following conclusions:

- 5.1. The respondent accepts that dismissal is a detriment which could be motivated by the claimant's protected characteristic. The fact of dismissal is set out in claim 2

and the claimant's disability is not disputed. In the circumstances amendment of the claim in this regard is allowed.

5.2. As set out in *Commissioner of Police of the Metropolis and anor v Osinaike EAT 0373/09*, above it is not enough for the claimant to demonstrate ineptitude, unreasonable or unfair treatment; she must also point to factors from which the tribunal can conclude this was motivated by her protected characteristic. I also take into account *Rice v McEvoy 2011 NICA 9, NICA*, where the employer's conduct and purported explanation was a relevant consideration in establishing that the real reason was the claimant's protected characteristic.

5.3. The treatment of others is an essential element of the claim as the claimant asserts the respondent failed to address a toxic working environment which impacted on her mental health. What she has not done is set out whether this was a toxic environment for her exclusively or for the staff as a whole as set out in *Kowalewska-Zietek v Lancashire Teaching Hospitals NHS Foundation Trust EAT 0269/15* and *Milton Keynes General Hospital and anor v Maruziva EAT 0003/09* above.

5.4. As her case stands at present it has little reasonable prospect of success given that she has failed to establish that she was singled out for this treatment because of her protected characteristic. Nor has she demonstrated that others were not treated in this way. The issues highlighted by Dr Gibson include being shouted at during a grievance hearing and by others including JM and the finance director (a) and (f), having her concerns about health and safety dismissed (a),(d) (f) and (j), failing to implement actions when her grievance was partially upheld (a), failing to meet with the claimant to agree reasonable adjustments or complete back to work interviews in a timely manner (e) and (g), failing to conduct risk assessments (h), demanding the immediate return of the company car upon termination of her contract and not believing the claimant when she asserted that there was a spare key for the vehicle (k).

5.5. I cannot say with certainty that the claimant would not resolve these issues in the pre-hearing preparation. In the circumstances I apply EJ Moore's deposit order approach and order the claimant to pay a deposit of £125 in respect of each of the issues set out above at a-b, d-h and j-k. I was not told that her financial circumstances had changed in anyway following EJ Moore's comprehensive investigation at the last hearing.

5.6. Being put to undue pressure in respect of a proposed settlement agreement c) was dealt with in large part by EJ Moore at the last hearing although not in the context of S13 EQA. It is in my view a significant factor in light of the ultimate dismissal and since the claimant appears to have been in a redundancy pool of 1 is unlikely to have been applied to others. Following EJ Moore's approach and the reasons for it the claimant shall not be prevented from referring to it in her S13 EqA claim as regards dismissal and her application to amend her S13 EqA claim in that respect is allowed.

6.1. On 20 October 2022 EJ Moore made the following deposit orders sent to the parties on 26 October 2020:



- 6.1.1. To advance the claims for failure to make reasonable adjustments based on PCPs 1-4, and 7-10 the Claimant must pay £125 as a condition of continuing to advance each claim (£125 per claim).
  - 6.1.2. To advance the claims for indirect disability discrimination based on PCPs c, e, and f of the List of Issues the Claimant must pay £125 as a condition of continuing to advance each claim (£125 per claim).
- 6.2. Shortly after 26 October 2020 in an undated document the claimant applied for reconsideration of the deposit order regarding PCP 10.

Before the hearing I made enquiries as to the outcome of this application and obtained a copy of EJ Moore's judgment dismissing the application sent to the parties on 6 December 2022 which they confirmed they had not yet received.

As regards the remaining deposit orders the claimant told me that she has not made the deposit payments because she decided not to. She also said and I paraphrase 'We chose not to; it was a pragmatic decision. We understood that the judge was telling us that we were wasting the courts time. The phrasing of the PCP was more important than the actual discrimination and whether the mental health charity behaved in a morally repugnant way. I felt there was a pressure to reduce the volume of the case. We put in amendments in November and the first thing the judge did was give us 10 minutes to consider if we wanted to pursue the amendments.'

I also heard from Mr Hignett who asserted that this was not a fair characterisation of what the judge said and had the judge behaved improperly he would have intervened.

In the circumstances those claims are struck out in accordance with Rule 39(4).

As regards the deposit order in respect of PCP 10 given that the claimant was unaware of EJ Moore's judgment on the application to reconsider the time for payment of the deposit order is extended to 17 February 2022.

7. Application to amend the claim as set out in the claimant's document dated 22 November 2021.

7.1. In today's hearing the claimant removed the following paragraphs of that document and need not be considered today.

Para 3-5 removed- relating to the WTR claim which has been withdrawn

Para 10-12 removed - relating to 47B ERA protected disclosures

Para 16-25 removed - Failure to provide a contract and unfair dismissal for asserting a statutory right.

Para 26 - 38 - S13 EqA Direct Discrimination.

The issues regarding direct discrimination are dealt with at paragraph 5 above with the exception of Paragraph 30.2. which the claimant removed and need not be considered today.

Para 39-51 removed - Indirect discrimination contrary to section 19 EqA.

Para 52 deals with typographical errors and the claimant accepts they do not materially affect the claim. In the circumstances this paragraph is also removed and need not be considered. The claimant is ordered to produce an amended statement of loss with the typographical errors corrected.

Para 53 removed - relates to the remaining claims to which no strike out/deposit order has been made.

- 7.2. The following paragraphs of the same document are in fact further and better particulars of claim and so were not considered today as part of the amendment application.

Para 6 - 9 The claimant has described this in the document thus:

*The existing claim is unclear with regards to which subsection of Section 100 the claim is based on and the basis by which that applies. We therefore respectfully request that the following be added to the particulars of claim.*

.....

*No claim is made under Section 100(1)(b), (d) or (e) of the Employment Rights Act*

Para 13 - 15 The claimant describes this in the document thus:

*The Respondent has stated in their request to strike out that no pleadings have been made for this claim and the alleged breach has not been identified. In fact, the breach is stated in the existing ET1 claim form where it is stated that "Guideposts forced the claimant onto Garden leave, despite the garden leave being damaging to the claimant's mental health and not being a part of the claimant's employment contract." In the interests of clarity, we respectfully request to amend the particulars of claim to make clear the breach of contract .....*

Following today's hearing the below is the current state of the first and second claims:

#### First Claim

- 1 Detriment due to health and safety concerns: s44 Employment Rights Act 1996 ('ERA');
- 2 Detriment due to whistleblowing (s47B ERA);
- 3 Automatic Unfair Dismissal due to health and safety concerns (s100 ERA (a) and (c) only no claim is made in respect of (b), (d) or (e) claimant's application to amend document 22/11/21 paragraph 6-9);
- 4 Automatic Unfair Dismissal due to whistleblowing (s103A ERA);
- 5 Failure to make reasonable adjustments (ss 20-21 Equality Act 2010 ('EqA'));

- 6 Disability discrimination; the Claimant confirmed to EJ Welch that this was section 13 EqA (direct discrimination) [Dismissal and undue pressure to reach a settlement agreement. All other issues are subject to deposit orders]. section 19 EqA (Indirect discrimination). The claimant made a pragmatic decision not to pay the deposit orders ordered by EJ Moore only the following issues remain PCPs 5, 6 and 11 and PCPs a,b,d,g. As to PCP 10 the claimant was unaware on 9/12/22 that her application to reconsider had been refused and so time for payment is extended.

Second Claim

- 7 Breach of contract;  
8 Detriment, discrimination, failure to make reasonable adjustments – re: disability;  
9 Failure to provide a contract of employment or a written statement of any subsequent changes to those terms;  
10 Failure to provide a pay statement;  
11 Detriment or dismissal for health and safety reasons (ss 44, 48, 100, 105, 08-109, 111 ERA);  
12 Detriment or dismissal for making a protected disclosure (ss 47B and 103A ERA);  
13 Unfair Dismissal for asserting a statutory right (s104 ERA); Struck out 20/10/22  
14 Unfair Dismissal (s94-98 ERA);  
15 Unlawful deductions from wages (s13 ERA).

Given the complexity of the claimant's case there was insufficient time to address case management orders and set this matter down for a full merits hearing. This can be dealt with at a telephone hearing. The usual case management template will be sent to the parties and a date set for the telephone hearing.

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Employment Judge Allen

Date: 19 January 2023

Sent to the parties on:  
25 January 2023

For the Tribunal Office: