



EMPLOYMENT TRIBUNALS

Claimant: Ms B Washington

Respondent: Swindon Borough Council (1)
Governing Body of EOTAS (2)
Mr E James (3)

Heard at: Bristol via CVP

On: 20 July 2023

Before: EJ Brady

Representation

Claimant: In Person

Respondent: Mr T Shepperd (Counsel)

JUDGMENT

- 1. The Claimant's claim for Victimisation has no reasonable prospect of success and is struck out.**
- 2. The Claimant's claim for Failure to Make Reasonable Adjustments is out of time and is dismissed.**
- 3. The Claimant's claim for Pregnancy and Maternity Discrimination is out of time and is dismissed.**
- 4. The Claimant's claim for the unauthorised deduction of wages in respect of her progression to UPS 1 from 1 September 2021 is out of time and is dismissed.**

REASONS

1. By a Claim Form dated 10 February 2022 the Claimant brought claims against Swindon Borough Council, The Governors of EOTAS and Mr E James. The Claimant had been employed as a teacher and her employment had commenced on 19 April 2021.
2. The Claim came before DJ Livesey on 26 October 2022 and identified the Claims to be Disability Discrimination, pregnancy/ maternity Discrimination and sex Discrimination and detriment claims on the grounds of health and safety and additionally on the grounds of pregnancy. EJ Livesey set out a List of Issues that was agreed by the Claimant and the respondent.
3. It was also recorded that the Claimant had indicated that she wished to add a Race Discrimination Claim and a Whistleblowing Claim. On 1 November the Claimant indicated that she no longer wished to seek to amend her Claim so as to include a race-discrimination claim or a whistle blowing claim and confirmed that none of the other matters raised in that November 2022 document were intended to

add more claims save in one respect in relation to the unlawful deduction of wages claim.

4. The Claimant said that she was asserting that she is being underpaid contrary to the Employment Rights Act 1996 every month and so her loss is an ongoing one. That is denied by the Respondent. It was agreed that rather than continue to have applications to amend and /or the Claimant initiate new claims it is understood that the unlawful deduction of wages claim continues to accrue and no further amendment applications will be required so as to bring the total claimed up to date. The parties understand that the claim under this head will be calculated as at the date of final determination.
5. At a hearing on 10 January 2023, Employment Judge Self struck out all the claims pursuant to section 44 of the Employment Rights Act 1996 a having no reasonable prospect of success.
6. All harassment claims were considered to have little reasonable prospects of success and a Deposit Order was made. The Deposit was subsequently not paid and those claims were struck out.
7. The Case was listed for a further Open Preliminary hearing today to consider:
 - a. Whether or not the remaining claims have been brought within the respective statutory time limits and if not whether time should be extended to the statutory test.
 - b. Whether the meeting on 14 July 2021 and discussions therein were without prejudice and if so whether the without prejudice privilege should be lifted and if not whether the victimisation claims have no or little reasonable prospects of success.

Without Prejudice Discussions in meeting on 14 July 2021

8. Mr Shepperd for the Respondent argued that the meeting that was held on 14 July 2021 was a “protected meeting” and therefore falls within the “without prejudice” communications. He referred to page 216 of the bundle which states that there will be a “protected conversation” with Ms Washington and to the hand written notes that are on page 219 of the bundle which refer to a “protected conversation” and on page 216 a follow up email which refers to “our protected conversation”.
9. Ms Washington accepted that the meeting was an attempt at settlement, but she says that it was always intended that the contents of the protected meeting would be relayed to her as the Union could not settle on her behalf. She then said that the fact that her Union representative was told that unless she accepted the offer and went quietly she would be subject to two disciplinaries – one in respect of data breach, the second in respect of a grievance, amounted to victimisation and harassment and was an “unambiguous impropriety” and an exception to the “without prejudice” rule.

The Law

10. The “without prejudice” rule is that “any communications between parties for the purpose of negotiating a settlement or resolving a dispute cannot generally be subject to an order for disclosure”.
11. In order to fall within this rule the purpose of the communications must be considered. The “without prejudice” rule only arises and when the parties are in dispute with one another and the communication was genuinely aimed at settling.
12. There is an exception to the “without prejudice rule” in that it may be removed in cases where the rule would otherwise serve as a cloak for “unambiguous impropriety” In the case of Woodward v Santander UK plc 2010 IRLR 834 words that “could be” discriminatory should not be excluded from the “without prejudice” rule but only those that were “unambiguously” discriminatory should be excluded from the “without prejudice rule”.

Decision

13. Ms Washington accepts that the meeting was for the purpose of settlement and I therefore find that the meeting was a “without prejudice” communication which falls within the rule. However, Ms Washington says that her union representative was present when threats of disciplinary hearings were made. I do not find this to be an “unambiguous impropriety”, there was no clear direct discrimination, it may be that it was a factual description of the next steps rather than a threat. I therefore find that the conversations held in the meeting dated 14 July 2021 is without prejudice and cannot therefore form part of disclosure.
14. As this is the only part of the claim detailed in the case management order of 10 January 2023, I accept the Respondent’s submissions that there is no longer any reasonable prospect of success for the Victimisation claim and it is struck out.

Time Limits

15. The remaining claims are as follows:
- a. Pregnancy and Maternity Discrimination and/or detriment.
 - b. Reasonable Adjustments
 - c. Unauthorised Deductions of Wages.

Time Limits for the Unauthorised Deduction of Wages.

16. The claimant complains of the following deductions:
- a. Unpaid pay progression from 1 September 2021
 - b. Half pay from 12 December 2021 followed by nil pay in June 2022.
17. The second of these claims is in time and therefore I will deal with the Unpaid pay progression from 1 September 2021.
18. The Claimant was employed as a teacher, she was on the standard pay spine. In order for her to progress to the Upper Pay Spine she would have had to have made an application. She did not do so. Had she made the application and successfully satisfied the criteria, her pay would have been payable from 1st September 2021. The “act” complained of is the decision not to move her onto the upper pay spine from 1 September 2021. Ms Washington’s claim in respect of this was therefore made out of time as it was not submitted until 10 February 2022. While I accept that Ms Washington was caring for her young child at this time, I do not accept that it was not reasonably practicable for her to complete the form within the time frame. The claim was not made within a reasonable period and is struck out.

Time Limits for claims under the Equality Act

Reasonable Adjustments

19. There is a factual dispute between the parties as to whether or not the Reasonable adjustments were implemented and when. Mr Shepperd states that the reasonable adjustments were in place by 21 May 2021 which was also the Claimant’s last day in work. She also had a meeting with Mr James on 25th June 2021, the notes from which are at page 202 of the bundle. In that it is confirmed that she will be given a room to change her cannula and other adjustments. Ms Washington says that there was then a change of location for her work place and the room that she was given in the new location did not have a window. She accepts that at this time she was working from home in any event.
20. The Respondent argues that as Ms Washington finished work in May 2021 that was the time that the claim crystallises, however the fact that Ms Washington may have returned to work had the reasonable adjustment been made to her satisfaction means that the clock could continue to run.

21. Ms Washington's baby was born on 17th September 2021, so her maternity leave started on that day. Mr Shepperd argues that at that point the reasonable adjustments claim must have crystallised.
22. Ms Washington says that the reasonable adjustments were not satisfactorily implemented until after January 2023 when a blind was installed on the window in the room.
23. Following the case of *Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170, CA*. I find that the duty to make the reasonable adjustment arose when Ms Washington raised the issue of needing a room to insert her canula and when she raised the issues relating to her disability in the risk assessment letter dated May 24th 2021. The failure to implement those adjustments therefore runs from that date. By June 2021, the Respondents believed that they had implemented the reasonable adjustments. That is the date by which it was reasonable for them to have done so. I therefore find that the Claimant's claim is in the first instance out of time.
24. I then have to consider whether it is just and equitable to extend the time limits in this circumstances. I have to consider the likely prejudice to both parties and I also refer to the case of *Robertson v Bexley Community Centre 2003* which says that "there is no presumption that the tribunal should (extend the time limits) unless they can justify failure to exercise discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces that it is just and equitable to extend the time. So the exercise of discretion is the exception rather than the rule."
25. The claimant said that due to the summer holidays, and then the birth of her child, she was unable to make her claim at an earlier date. However the claim was actually submitted in February 2022, 5 months after the birth of her child, and 9 months after the alleged failure to make reasonable adjustments. It is conceivable that she could have submitted the claim earlier. I have taken into account the costs to both parties of continued litigation and the merits of the claim and I do not consider that there are sufficient grounds to convince me that it would be just and equitable to extend the time limits in this case.

Pregnancy and Maternity Discrimination (Equality Act 2010) – Time Limits

26. With regard to this claim, the last act took place on 1st September 2021, which was the failure to progress the Claimant to UPS1 on 1st September 2021. This means that this claim is also out of time. For the reasons above, I do not consider it just and equitable to extend the time limits in this case.
27. The only remaining claim is the unauthorised deduction of wages claim. That claim will be listed for a one day final hearing before an Employment Judge sitting alone on **19th September 2023.**

Directions:

28. The Claimant to file an up-to-date schedule of loss for the Unauthorised Deductions of Wages Claim by **20 August 2023.**
29. The Claimant and Respondent to file witness statements dealing with the Unauthorised deductions of the Wages claim only for half pay by 30 August 2023.

Case No: 1400565/2022

Employment Judge Brady

20th July 2023

**JUDGMENT & REASONS SENT TO THE PARTIES
ON**

27th July 2023

FOR THE TRIBUNAL OFFICE