



EMPLOYMENT TRIBUNALS

Claimant: CR

Respondent: (1) Ravenscroft Park Preparatory School
(2) Lucy Bennison
(3) Gardener Schools Groups Limited

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (in private)

On: 1 June 2023

Before: Employment Judge J Galbraith-Marten (sitting alone)

Appearances

Claimant: Mr. R. Ross, Counsel

Respondent: Ms. A. Doble, Counsel

JUDGMENT

1. The claimant's application to amend her claim to include a victimisation complaint as set out in her application dated 30 November 2022 is accepted.
2. The claimant's application for an anonymity order is refused.

REASONS

Introduction

1. The judgment was promulgated on 2 June 2023 and the claimant requested written reasons by email dated 16 June 2023.
2. The claimant was engaged by the respondent as a supply teacher on 1 January 2022 and her engagement ended on 28 January 2022. The claimant pursues disability discrimination complaints namely, failure to make reasonable adjustments and discrimination arising from disability and a breach of contract claim. She presented her claim form on 12 June 2022. The respondent denies the claims but accepts the claimant was a disabled person at the relevant time.
3. The hearing took place by video and the Tribunal was provided with a 72 page redacted bundle. The claimant separately submitted 3 additional unredacted PDF documents, but she did not give evidence.

Issues

4. This was the third Preliminary Hearing in this matter, and it was listed to determine the following: -
 - *Whether the Tribunal has jurisdiction to consider the claimant's claim of disability discrimination and in particular whether the claimant was in "employment" as defined in section 83(2) of the Equality Act 2010 as she contends or genuinely self-employed as the respondent contends;*
 - *If appropriate to consider the claimant's application to amend her claim to include a claim of victimisation and;*
 - *If appropriate, whether to grant the claimant's application for an anonymity order.*
5. At the commencement of the hearing there was a discussion regarding the issues. The respondent conceded the claimant is a worker for the purposes of her discrimination complaints but does not concede that she was an employee.
6. The claimant suggested she was pursuing both a breach of contract claim and in the alternative a claim for statutory notice pay on the basis she had been employed for more than one month. However, she then accepted she had not been employed for more than one month. The alternative claim for statutory notice pay is not brought but the claimant continues to pursue a breach of contract claim in respect of one term's payment in relation to the termination of her engagement with the respondent on 28 January 2022 in accordance with her contract.
7. The **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 regulation 7** is engaged if the claimant was an employee so that issue remains live in the proceedings. However, the parties were not in a

position to deal with that substantive issue and both agreed the issue of whether the claimant was an employee for the purposes of the breach of contract claim should be dealt with at the final hearing and that is reflected in the Case Management Order of 1 June 2023 and issued separately.

8. Therefore, only the claimant's two applications remained. The hearing was listed as a public Preliminary Hearing and the claimant's counsel requested the hearing be converted to a private hearing pending the determination of the claimant's anonymity order application.
9. Rule 56 of the **Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1** provides that Preliminary Hearings shall be conducted in private, except where the hearing involves a determination under rule 53(1)(b) of a preliminary issue. Rule 53(3) defines a preliminary issue as any substantive issue which may determine liability. As the substantive issue of status could not be dealt with, the preliminary hearing could be heard in private, and the Tribunal agreed to the claimant's request.

Amendment Application

The Application

10. The claimant sought to amend her claim to include a victimisation complaint. This was raised by the claimant at the Preliminary Hearing on 7 November 2022 and supported by written particulars supplied on 30 November 2022. The protected act is the claimant's grievance dated 22 April 2022 and she alleges three detriments; (a) the respondent altering the reason for her termination on 29 April 2022, (b) Ms. Bal's communications with her on 22 & 23 June 2022 and, (c) the discovery of a new complaint about her within the documents supplied by the respondent as part of a subject access request that she received on 23 June 2022.

Submissions

11. The claimant submitted the Tribunal must be mindful of the "**Selkent**" principles, but they are not a checklist, and a series of factors must be considered by the Tribunal to determine the balance of injustice or hardship. Although the amendment could have been made earlier that is the case in almost all amendment applications. The Tribunal should exercise its discretion to grant the amendment given the factual and temporal connection with the existing claim. If the Tribunal did not grant the amendment the claimant would have no opportunity to enforce her statutory right and the only prejudice to the respondent would be the requirement to amend its defence.
12. The respondent offered no submissions in respect of the amendment application.

The Law

13. In relation to amendment applications, the leading authority is **Selkent Bus Company Ltd v Moore [1996] ICR 836**. In deciding whether to exercise its discretion to grant leave for an amendment, the Tribunal should consider all the circumstances and balance the injustice or hardship which would result from granting the amendment or the refusal to amend. The factors to be considered include the nature of the amendment, the applicability of the statutory time limits, and the timing and manner of the application to amend. However, this is not a checklist.
14. In **Vaughan v Modality Partnership [2021] ICR 535, EAT** the Employment Appeal Tribunal emphasised the core test in an amendment application is the balance of injustice or hardship in allowing or refusing the application.
15. In **Chaudhry v Cerberus Security and Monitoring Services Limited [2022] EAT 172**, the Employment Appeal Tribunal suggested a two-step approach to amendment applications. The first stage is identifying the amendment sought and the second stage is balancing the injustice or hardship of granting or refusing the amendment considering all the relevant factors including those referred to in **Selkent**.
16. The **Presidential Guidance on General Case Management for England and Wales** also states there is a distinction between applications to amend which add new claims essentially out of facts that have already been pleaded and applications to add new claims which are entirely unconnected with the original claim. The Tribunal must consider the entirety of the claim form.

Conclusion

17. Following the guidance in **Chaudhry** the amendment to the claim has been clearly identified and set out in writing. The claimant's application cannot be said to be unconnected with her original claims and she makes specific mention of victimisation at paragraphs 2 and 42 of her original particulars of claim. There is also specific reference to the grievance in the claim form. However, the events on 22 & 23 June 2022 the claimant relies on in relation to her victimisation complaint post-date the submission of the claim form on 12 June 2022.
18. The Employment Appeal Tribunal in **Prakash v Wolverhampton City Council EAT 0140/06** held there was no reason in principle why a cause of action that accrued after the presentation of the original claim form should not be added by amendment if appropriate.
19. In relation to time limits, the complaint regarding the grievance outcome is in time but the other two complaints are out of time. In **Ali v Office of National Statistics 2005 IRLR 201** the Court of Appeal recognised when new complaints are added by way of amendment, that are so close to the original complaint, justice requires that they are allowed even if out of time.

20. This case is still at the preliminary stage and the claimant has been unrepresented. The claimant submitted the balance of injustice or hardship would be against her if the amendment was not allowed and the respondent did not oppose the application.
21. In the circumstances and balancing the injustice and hardship, the Tribunal finds the injustice and hardship would be against the claimant if the amendment was not granted and exercises its discretion to grant the amendment.
22. In relation to the victimisation complaints that took place on 22 & 23 June 2022, and for the avoidance of doubt, the Tribunal extends time on the basis that it is just and equitable to do so.

Anonymity Order Application

Application

23. By email dated 7 November 2022 the claimant made an application for an anonymity order under Rule 50(3)(b) of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1*. The claimant's application was based on three principal reasons as follows: -

I substantiate my request, with reference to The European Convention on Human Rights, Articles 2, 3, 6 and 8.

I am a survivor of domestic abuse, known to both the Metropolitan Police and Surrey Police, and appropriate authorities and services. The cases involve not only abuse, but a substantial campaign of in-person and online stalking and harassment over some years. As a result, I have come to limit my activities, people I communicate with and continuously proceed daily life with extreme caution. I am currently selling my property to change address and have further security measures in place, as well as using a nickname publicly to minimise the possibility of 'being found'. I have no social media presence and have actively pursued removing traces of my existence from the internet.

As attached, I am still being supported by my local domestic abuse organisation, and I continue to receive medical related intervention.

The primary reason for my application is that the address of the Respondent and therefore my recent workplace, is in exceptionally close proximity to my family home in a 1 mile radius. This was an intentional move to ensure I had a support network on returning to work and closer accommodation on working days. However, I have been made aware that proceedings and reporting are now very public and traceable via search engines. By publicising my name with the Respondent, a search with my unique surname can allow my perpetrator and associates to correctly deduce I regularly remain in the area. This not only puts myself in danger, but that of the other members of my family who reside at the owned properties, including my elderly and frail grandparents.

Secondly, my claims cannot be heard without discussing the above, but also the mental and physical impact this has had - which will include incredibly sensitive, personal medical information including suicidal ideation and PTSD. There is a direct correlation to my claims and also the defence the Respondent reports to be making. It will be impossible to separate the information and still fairly administer proceedings. Furthermore, mental health is still heavily stigmatised, and history has shown that having information relating to such in the public domain, particularly with the changes this September to Keeping Children Safe in Education, will see me being discriminated further, at consideration of any applications I make for employment despite it being unlawful. It should always remain my decision as to if and when I make the admission of disability to any prospective or new employer. My claims in this case shows that asking for 'understanding' is not always listened to.

Without anonymity, I will not feel able to share full evidence or documentation, which will impede on the Tribunal's overriding objective and other Articles in the ECHR, as well as the high possibility I will experience substantial additional distress during the proceedings to due anxiety and concerns in regard to my name and my safety.

I do not consider the principle of open justice will be hindered, if reporting of the case at the very least, anonymises my name to preserve my identity and deeply personal matters from being easily accessible to those who would intentionally take advantage and cause me substantial harm or further discriminate me in moving on with my life from such painful events.

Documents

24. Your Sanctuary provided a letter dated 9 September 2022 and that was included in the bundle at page 63. Your Sanctuary confirmed in their opinion the claimant is a survivor of domestic abuse and she received support in 2015, 2016 and again from March 2022 onwards. A letter from Mind Matters dated 20 September 2022 was also included in the bundle confirming the claimant was in receipt of ongoing treatment for depression.
25. The claimant also supplied additional documentation in 3 PDF documents, and this was information from Surrey Police. The documents confirmed the claimant reported harassment involving her ex-partner, his sister and/or friends on 31 May 2015 (to the Met police), 30 July 2015 and on 15 October 2015 to Surrey Police. A further report was made on 7 August 2016 regarding the claimant being watched on social media.

Submissions

26. The claimant submitted she has been subject to a lengthy campaign of online and in person stalking and as a result has limited her activities. The claimant avoids social media, uses a nickname in public and has sought to remove all traces of herself from the internet. As the respondent's premises is in close proximity to where the claimant lives, that would provide an opportunity for those who are stalking her to track her down. There is also the potential her

name could be obtained via the court serve platform in future listings that would reveal her name and area of residence.

27. The claim also relates to sensitive information regarding the claimant's medical issues and disabilities and disclosure of that information could impede her ability to gain future employment. Furthermore, if an anonymity order is not granted, the claimant would not feel able to provide her evidence fully as she would have heightened concerns regarding her safety and those whom she lives with.
28. The claimant asserted that her article 5 and article 8 rights specifically are engaged and referred to **A v Secretary of State for Justice 2019 ICR D1, EAT and X v Stevens [2003] IRLR 415**. In the circumstances, she requested that her name is anonymised in the proceedings so that she cannot be identified.
29. The respondent offered no submissions and took a neutral stance in respect of the application.

The Law

30. **Rule 50 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1** states: -

50 Privacy and restrictions on disclosure

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person in any circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include –

(b) an order that the identities of specified parties, witnesses or other person referred to in the proceedings should not be disclosed to the public, by use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the register or otherwise forming part of the public record;

31. The **European Convention on Human Rights** provides:

Article 5 (Right to liberty and security)

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribe by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervisor his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of sound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been a victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 8 (Right to respect for private and family life)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as it in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 (Freedom of Expression)

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinion and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not

prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

These rights were incorporated into UK law by the **Human Rights Act 1998**.

32. The Employment Appeal Tribunal confirmed in **British Broadcasting Corporation v Roden [2015] ICR 985, EAT** the principle of open justice is of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice as set out in paragraphs 21 to 26 of the Judgment:

21. *An order under Rule 50 interferes both with the principle of open justice and the right to freedom of expression. The principle of open justice was considered recently by the Supreme Court in A v British Broadcasting Corporation [2014] 2 WLR 1243 in which Lord Reed said at [23]:*

“It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in R (Guardian News and Media Ltd) v City of Westminster Magistrates’ Court (Article 19 intervening) [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.”

22. *The principle of open justice is accordingly of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice.*

23. *Where anonymity orders are made, three Convention rights are engaged and have to be reconciled. First, Article 6 which guarantees the right to a fair hearing in public with a publicly pronounced judgment except where to the extent strictly necessary publicity would prejudice the interests of justice. Secondly, Article 8 which provides the qualified right to respect for private and family life. Thirdly, Article 10 which provides the right to freedom of expression, and again is qualified.*

24. *Lord Steyn described the balancing exercise to be conducted in a case involving these conflicting rights in In Re S (A Child) (identification:*

restrictions on Publication) [2004] 3 WLR 1129 (at paragraph 17) as follows:

“...What does, however, emerge clearly from the opinions are four propositions. First. Neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be applied to each. For convenience, I will call this the ultimate balancing test....”

25. The paramountcy of the common law principle of open justice was emphasised and explained in Global Torch Ltd v Apex Global Management Ltd [2013] EWCA Civ 819 where Maurice Kay LJ referred to R v Legal Aid Board, ex parte Kaim Todney [1999] QB 966 at 977 and Lord Woolf MR’s holding that the object of securing that justice is administered impartially, fairly and in a way that maintains public confidence is put in jeopardy if secrecy is ordered because (among other things):

“It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties’ or witnesses’ identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.”

26. Having referred to the question to be asked when seeking to reconcile these different rights as framed by the Supreme Court in Guardian News and Media Ltd at [52] (Lord Rodger) as ‘whether there is sufficient general, public interest in publishing a report of the proceedings which identifies M to justify any resulting curtailment of his right and his family’s right to respect for their private and family life’, Maurice Kay LJ set out the relevant passage from the Practice Guidance (Interim Non-disclosure Orders) given by Lord Neuberger including as follows:

“The grant of derogations is not a question of discretion. It is a matter of obligation..” (paragraph 11);

The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence...” (paragraph 13)”

33. The burden of proof is on the claimant, and this requires clear and cogent evidence as confirmed by the Employment Appeal Tribunal in **Fallows v News Group Newspapers Ltd** [2016] ICR 801, EAT.

34. The Employment Appeal Tribunal in **A v Secretary of State for Justice 2019 ICR D1, EAT** overturned a Tribunal's decision to revoke an anonymity order as the Tribunal had failed to properly consider the convention rights of a third-party.
35. In **X v Stevens [2003] IRLR 411** the Employment Appeal Tribunal granted a restricted reporting order overturning the Tribunal and relating to a person's transexual status. In **X v Y [2021] ICR 147, EAT** a claimant brought claims for unpaid wages and holiday pay. The Judgment referred to other highly sensitive matters including the claimant's mental health. The EAT emphasised that not all cases dealing with sensitive mental health issues must be anonymised.
36. In **A v Burke and Hare [2022] IRLR 139** the Employment Appeal Tribunal held that the principle of open justice assumes that all the details in a case should remain public unless there is some identifiable injury to the claimant's convention rights. The Tribunal must balance whether granting an anonymity order to protect the claimant's convention rights or in the interests of justice outweighs the principle of open justice and freedom of expression.

Conclusion

37. The claimant presented information relating to domestic abuse reports in 2015 and 2016. The claimant presented no evidence regarding any continuing or ongoing harassment or stalking either online or in person nor any police involvement or involvement of any other safeguarding agency that requires her identity to be protected at this time and in respect of these proceedings.
38. In terms of the disclosure of the claimant's physical and mental disabilities and her ability to gain future employment. The respondent has conceded the claimant is a disabled person and the Tribunal is not persuaded there are exceptional circumstances or other highly sensitive issues that apply to the claimant which do not apply to many claimants who pursue disability discrimination claims in the Tribunal.
39. Thirdly, the claimant provided no information as to why she would be unable to give her fullest evidence in these proceedings without an anonymity order. The claimant did not give oral evidence or present any other evidence to support her assertion.
40. In the circumstances, the Tribunal balanced whether granting an anonymity order to protect the claimant's convention rights (and specifically her article 5 and 8 rights), outweighed the principle of open justice and article 10 freedom of expression. As the claimant did not present clear and cogent evidence to justify that it was strictly necessary to derogate from the principle of open justice on this occasion, the balance is in favour of open justice and article 10 and accordingly the claimant's application for an anonymity order fails.

Case Number: 2203864/2022

Employment Judge J Galbraith-Marten

23/06/2023

SENT TO THE PARTIES ON

23/06/2023

FOR THE TRIBUNAL OFFICE