THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
MZ	**v**	**Google UK Limited**

Heard at: London Central **On**: 27-29 September 2023

Before: Employment Judge Glennie

Representation:
Claimant: In person
Respondent: Ms S Belgrove

REASONS

1. These reasons relate to the following decisions which I communicated to the parties on 29 September 2023 in private:

   1.1 Contained in the written judgment dated 5 October 2023, that the complaints in case number 2200303/2023 about a clause included by the Respondent in a draft COT3 agreement on 23 November 2022 were struck out on the grounds that they have no reasonable prospect of success.

   1.2 Contained in written Orders dated 5 October 2023, refusing the Claimant's application for a preliminary hearing to determine a preliminary issue as to whether she had mental capacity to resign.

   1.3 Also contained in those Orders, vacating and re-listing the full hearing.

   1.4 Inadvertently omitted from either the judgment or the Orders (an omission which I have now remedied by issuing a corrected version of the Orders), refusing the Claimant permission to amend claim number 2200303/2023 so as to join the Alphabet Group and/or

Alphabet Inc and to plead against them a claim that a similar clause to that referred to in 1.1 above had been proposed in the course of negotiations in July 2023.

Background

2. The Claimant has presented 3 claims to the Tribunal. Claim number 2207444/2021 was presented on 8 December 2021 and made complaints of disability discrimination under the Equality Act 2010 and unlawful deduction from wages under Part II of the Employment Rights Act 1996. Claim number 2200303/2022 was presented on 14 January 2022 and made complaints of disability discrimination which were described as amended grounds for 2207444/21. These two claims have subsequently been referred to together as "the first claim". Claim number 2200303/2023 was presented on 16 January 2023 and made further complaints of disability discrimination and victimisation. This has been referred to as "the second claim".

3. There has been a substantial procedural history to the claims. It is not necessary for the purposes of these reasons to describe this in detail. Most recently, on 26 June 2023 Employment Judge Joyce listed a preliminary hearing to determine whether the complaints in the second claim were presented within time, and if not, whether it was nonetheless just and equitable for them to be heard; the Respondent's application to strike out part of the second claim, as in clause 1.1 of the judgment above; and whether the first and second claims should be heard together. That substantive preliminary hearing commenced before me on 2 August 2023. The Claimant became unwell during the course of that day, and I adjourned the hearing to 27-29 September 2023. I subsequently added to the issues to be determined a number of further matters, including the Claimant's applications referred to in clauses 1.2 and 1.4 of the judgment above. It was not possible to conclude all outstanding matters in the course of the 3 days, and I reserved judgment on the Claimant's specific disclosure application, and adjourned the remaining issues to be determined on 30 November 2023.

The privilege issue

4. The Respondent applied to strike out the whole of the second claim on the ground that it had no reasonable prospect of success. This in turn involved the following elements:

    4.1 That the only allegation made within the applicable time limit is that contained in paragraph 37 of the Grounds of Claim;

    4.2 That paragraph 37 should be struck out because the allegation contained in it relies on reference to legally privileged material.

    4.3 Once paragraph 37 has been removed, the remaining allegations should be struck out as they are out of time.

5. I gave a separate judgment on the time limits issue in the public part of the hearing, and I have produced separate written reasons dealing with this. I will set out here the reasons for my decision to strike out paragraph 37. That paragraph reads as follows:

> "On 23rd November 2022, the Respondent in their draft COT3 agreement in preparation for Judicial Mediation added a clause which prohibited the Claimant from making any future applications to any part of the Respondent's organisation globally, as well as prohibiting any future legal claims against the Respondent in respect of those applications. The Claimant submits that this was ***unambiguous impropriety,*** and which confirmed that Google and/or DeepMind had discriminated against and victimised the Claimant in the past, and expected to do so in the future in the event that the Claimant was either contacted by the Respondent's recruiters, or applied to the Respondent's advertised roles."

6. The COT3 agreement was expressed to be without prejudice, and the whole premise on which a Judicial Mediation is conducted is that it is without prejudice and that what is said and done in connection with it cannot be relied upon if the proceedings continue after an unsuccessful mediation. It was common ground between the parties that without prejudice communications are privileged and cannot usually be relied upon in evidence. This is implicitly recognised by the Claimant in paragraph 37, as she relies on one of the exceptions to the without prejudice rule, which is that of unambiguous impropriety.

7. In **Unilever PLC v Procter and Gamble [2000] WLR 2436** at page 2444 Robert Walker LJ in the Court of Appeal expressed the unambiguous impropriety exception in the following terms:

> "…….one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"…..
>
> and added that the Court of Appeal had "…warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

8. The Claimant placed some reliance on the decision of the Employment Appeal Tribunal in **BNP Paribas v Mezzotero [2004] IRLR 508**. Here the EAT upheld the Tribunal's decision that evidence about what was said in a purportedly without prejudice conversation following the Claimant's raising of a grievance would be admissible by virtue of the unambiguous impropriety exception. The EAT's primary finding was that the Tribunal chairman was entitled to conclude that the without prejudice rule did not apply to the meeting concerned because there was no extant dispute between the parties about termination of the employment relationship (which was what the employer was proposing). In the alternative, the EAT

found that the employer's conduct fell within the ambit of unambiguous impropriety.

9. In summary, what occurred in the meeting in **Mezzotero** was that, having raised a grievance about how she had been treated in connection with maternity leave, the Claimant was told that it was not viable for her to return to work, that there was no alternative available to her, and that it would be best if she were to accept a redundancy package. I find that the situation in the present case is not at all like that. In **Mezzotero** the employer effectively announced a course of action that was blatantly discriminatory, and the Tribunal found (and the EAT confirmed) that they could not use the without prejudice label to protect themselves from the consequences of that.

10. I find that in the present case, the Respondent has done no more than put forward a basis on which they would agree to settle the current litigation. In doing so, they sought an agreement that the Claimant would not apply for positions with their organisation in the future. I do not see that, as the Claimant characterises it, as an announcement of an intention to discriminate against her or to victimise her. I find that the proposal reflects a view about what the Respondent considered to be in its commercial interests, in other words trying to avoid future engagement with the Claimant and, I imagine, trying to avoid the risk of her making further claims.

11. I find that a further, important, point is that this was no more than a proposal, potentially as part of an offer to settle the claim. The Claimant was free to decline the offer or proposal, as she did, and to continue with the litigation. Having declined the proposal, the Claimant remains uninhibited in her ability to apply for jobs with the Respondent and other members of its organisation. The proposal in the COT3 does not, in my judgement, amount to a statement of intention to discriminate against or victimise the Claimant. It represents an attempt by the Respondent to obtain something of commercial value to them (substantially, some protection against future claims or complaints), as part of a negotiation with the Claimant in which she would be attempting to obtain something of commercial value to her (a sum of money in settlement of her claims). That is very different from the **Mezzotero** situation where the Claimant was presented with an effective fait accompli and invited to accept terms for the termination of her employment.

12. I have therefore concluded that the unambiguous impropriety exception does not apply to matters pleaded in paragraph 37. The Claimant cannot therefore rely on those matters in support of a complaint to the Tribunal, meaning that this part of the claim has no reasonable prospect of success (in fact, no prospect of success at all).

13. Rule 37(1) of the Tribunal's Rules of Procedure provides that a Tribunal may strike out a claim or part of a claim on grounds which include that it has no reasonable prospect of success. A finding that a part of a claim has

no reasonable prospect of success does not automatically lead to its being struck out: the Tribunal must decide whether to do so as a matter of discretion. Although discrimination complaints are fact-sensitive and should not lightly be struck out, I find that there is no reason to allow this part of the claim to continue, and that there would be no benefit to anyone were this to occur. I have therefore struck out this part of the claim.

Preliminary hearing on capacity to resign

14. The Claimant seeks a preliminary hearing on the preliminary issue as to whether she had the capacity (meaning the mental capacity) to resign from her employment. The Respondent resists the proposal.

15. It is not entirely clear to me where the Claimant wishes to take this point. If she intends to argue (as it appears from her skeleton argument) that her resignation was invalid or of no effect because of lack of capacity (capacity being a legal concept more frequently encountered in relation to capacity to conduct litigation), and that this has certain legal consequences, this is not an aspect of the claim as currently pleaded. There would be need of an application to amend the claim and for careful consideration of how the point is put.

16. Alternatively, if this is no more than a different way of putting the complaints (which have been pleaded) that the Respondent should not have accepted the Claimant's resignation, or should have allowed her to retract it, and that these amounted to acts of discrimination or a failure to make reasonable adjustments, then it is covered by the existing pleading. There would, however, be no advantage in that case to be gained by a preliminary hearing on "capacity", since the issues would concern questions of disability, the Respondent's knowledge of the Claimant's disability, the reasons for the Respondent's actions, etc. The concept of capacity may be related to that of disability, but to the extent that it is, deciding this in isolation would not be an effective way to proceed, as it would not be determinative of any of the complaints before the Tribunal.

17. I have not therefore ordered a preliminary hearing on the question of capacity.

Vacating the full hearing

18. The full hearing was listed for 10 days commencing on 30 October 2023, just over 4 weeks from the date of the current hearing.

19. The Respondent argues that it is not practicable for the full hearing to proceed. The Claimant contends that it is, and that it would be unfair to her if it were not to go ahead as listed.

20. In deciding whether or not to postpone the hearing, I am concerned more with the practicalities as they are than with establishing precisely why we

have arrived at the point we have, or with the extent to which either party might be blamed for the situation.

21. I have in mind the overriding objective of the Tribunal's Rules, which is to enable the Tribunal to deal with cases fairly and justly. Rule 2(c) states that this involves: "avoiding delay, so far as compatible with proper consideration of the issues." Perhaps it is an obvious point, but while delay should be avoided, avoiding delay is not the Tribunal's sole objective: proper consideration of the issues is vital.

22. I have concluded that the full hearing should be postponed and re-listed, for the following reasons:

    22.1 There is a question as to whether the first and second claims should be heard together. I am satisfied that, if practicable, they should be heard together. They involve the same parties and the same disabilities. The facts of the second claim follow on from the facts of the first. If they were to be heard separately, the two hearings would inevitably take longer in terms of days before the Tribunal than were there to be a single hearing of both claims. The Tribunals hearing the claims would have to take care not to reach inconsistent findings, and the Tribunal which conducted the second hearing might find itself constrained by the findings made by the first Tribunal.

    22.2 The second claim cannot possibly be heard during the 10 days starting on 30 October. There have been no case management orders in the second claim. There would have to be disclosure of documents, agreement as to the documents to be placed in the bundle, and the production of witness statements. All of this cannot realistically be done within 2 weeks (assuming that the final step, exchange of witness statements, should take place not less than 2 weeks before the commencement of the hearing).

    22.3 If, contrary to subparagraph 1 above, the second claim were to proceed separately from the first, the hearing of the second claim would have to take place at some point in 2024, because of the need for case management and the availability of hearing dates.

    22.4 Even if the trial of the first claim alone commencing on 30 October were retained, it would be extremely difficult for it to be made ready for an effective trial. The agreement of bundles and the exchange of witness statements would not normally be compressed into a period of 4 weeks before the hearing in a substantial and complex case (and as explained above, in reality the time remaining is more like 2 weeks).

    22.5 There was a dispute as to whether the 10 day time estimate for the hearing would be sufficient even for the first claim alone. The Respondent submits that it is not. The Claimant argues that it is, but her suggested trial timetable in support of this leaves no time for the

Tribunal to deliberate and formulate its judgment. If there are 10 days of evidence and submissions, a Tribunal will usually need a further 2-3 days for deliberation and judgment. Those days would have to be found when all 3 members of the Tribunal are available, which would again be likely to push the conclusion of the hearing some way into 2024.

22.6 It might be said that this preliminary hearing alone has taken 3 days. The reality is that there have been 4 days so far, including the first day when the Claimant was unwell, and there still remain interlocutory issues to be dealt with. Taking this as a guide, and having in mind the extent of the issues, I do not now consider that 10 or even 12 days would be sufficient for the first claim alone to be heard.

22.7 The prospects for re-listing the hearing are not as gloomy as might be expected. A hearing of up to 20 days can be accommodated from the first week of September 2024 onwards. Given that splitting the two claims would leave the matter continuing some way into 2024, the delay that would follow from listing them together would not be very great.

Application to amend claim 2200303/2023 to join Alphabet Group and/or Alphabet Inc

23. The proposed amendment raises a similar question to that considered above in relation to the privilege issue and the Respondent's application to strike out the complaint in paragraph 37 of the second claim. The Claimant applies to amend the claim in order to make a similar complaint against Alphabet Group and Alphabet Inc, which are members of the same organisation as the Respondent, on the grounds that a draft settlement agreement sent to the Claimant in July 2023 contained a similar clause to that complained of in paragraph 37, although this time extending to these two additional entities.

24. My reasons for striking out the complaint in paragraph 37 are applicable to this application to amend the claim. This would be a pointless amendment, as the new complaint against the new parties would have no reasonable prospect of success for the reasons which have led me to strike out the complaint in paragraph 37.

25. I therefore refused the amendment application.

26. I have produced separate written reasons for the judgment which I gave in public on the time limits issue.

Employment Judge Glennie

Employment Judge Glennie

Dated: ……..……28 November 2023……..

Judgment sent to the parties on:

28/11/2023

…….....
For the Tribunal Office