EMPLOYMENT TRIBUNALS

Claimant: **CR**

Respondent: **(1) Ravenscourt Preparatory School**
(2) Lucy Bennison
(3) Gardener Schools Groups Limited

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (in private, by cvp) **On:** 31 October 2023

Before: Employment Judge Emery

Appearances

Claimant: Mr R Choudhury (counsel)
Respondent: Ms A Johns (counsel)

PRELIMINARY HEARING JUDGMENT

1. The claimant's application to amend her claim to include Ms Bal as a named respondent is refused.

2. The claimant's application for strike-out of the respondent's defence and/or for a public preliminary hearing to consider this application is refused.

3. The claimant's application for costs shall be considered at the full-merits hearing.

REASONS

Ms Ral

1. The reasons for adding Ms Ral as a named respondent are in the claimant's application dated 15 June 2023 (60). This argues it is not prejudicial to Ms Ral for her to be added as a respondent, but it does not give reasons why. It says it would be in the interests of justice for Ms Ral to be added as a named respondent.

2. At the hearing both the claimant and Mr Choudhury spoke to this issue: Ms Ral was the Group HR Advisor who made decisions and, regardless of her being a witness for the respondent, she ought to be identified separately as a respondent because of her actions leading to the claimant's dismissal. There would be a prejudice to the claimant if Ms Ral was not a respondent because the "findings will not bind Ms Ral".

3. Ms Johns arguments were as follows: the 1st respondent will not seek to argue that it is not responsible for any acts of Ms Ral, if any are found to be unlawful, i.e. it will not seek to argue a statutory defence under s109(4) Equality Act 2010; there is no ACAS certificate for Ms Ral, a statutory requirement (Mist v Derby Community Health Services NHS Trust [2016] ICR 543); the application was made on 15 June 2023 – after a preliminary hearing – with no reasons why it could not have been made earlier. Finally, there is no tangible benefit to the claimant and significant prejudice to Ms Ral being brought into the proceedings at this stage.

4. I considered the statute: - Schedule 1 to the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (as amended):

> "4. If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form under rule 2 in respect of each respondent…"

5. I conclude that the reasons seeking Ms Ral to be added as a respondent are weak. I concluded that the claimant may see an advantage in adding Ms Bal, but no explanation has been provided for making this application so late in the proceedings. There is no ACAS certificate for Ms Ral, and these circumstances do not fall within the limited exceptions addressed in the case law (e.g. *Mist*).

6. Given the respondent accepts it will be liable for Ms Ral's acts, if found to have occurred, and that Ms Ral will be a witness, there is no prejudice to the claimant, other than the lack of a judgment naming Ms Ral as a party.

7. I also noted that it is not alleged that Ms Ral dismissed the claimant, in fact reading the claim form it is difficult to see what allegations are made against Ms Ral. I accepted that there was significant prejudice both to Ms Ral in becoming a party and therefore being potentially personally liable for losses, and for the respondent who would have to significantly change its case and strategy.

8. For this reason the application fails.

Application to strike out the response to the claim

9. This was a private preliminary hearing by cvp. Unlike in a physical hearing centre it cannot be converted into a public hearing which would allow the public to attend, a fundamental requirement for justice. Ms John's point, that a strike-out application must be considered at a public hearing, is correct.

10. I do not accept it was proportionate or consistent with the overriding objective to list a separate Preliminary Hearing to consider a strike-out of the respondent's defence.

11. Mr Choudhury argued that there was no reasonable prospect, alternatively little reasonable prospect of the respondent's defence succeeding. The letter terminating the claimant's engagement refers to a parental complaint, but *"there is nothing in the disclosure that suggests there is one".* He argues there is no investigation, no findings, again there is *"nothing in the disclosure"*.

12. I noted that some of the evidence in the bundle suggest that the respondent had a positive impression of the claimant (see the references in the bundle, e.g. 141). I also accepted Mr Choudhury's argument that if the claim was not struck-out there would be an "escalation of costs" to prepare for the hearing.

13. In the discussion that followed, which involved the claimant and the representatives, it because clear that there are significant arguments – legal and factual – which strongly suggest a preliminary hearing to consider strike-out is not an appropriate step.

14. I accepted Ms Johns argument that even if the claimant can show there was no parental complaint, there will still be a factual dispute as to the reason why she was dismissed, it is for the claimant to show that the reason for this was 'something arising' from her disability. There are significant issues to address in the reasonable adjustments claim.

15. There followed a discussion about the 'something arising' on which the claimant relies. The claimant said that it was her issues of anxiety she had after surgery which led to an infection, and her anxiety dealing with returning to classroom. Ms Johns pointed out that the something arising was her anxiety and her behaviours, i.e. how she interacted with people – see paragraph 24.4 of the 1 July 2023 Order.

16. I concluded that the issues involved will involve contested factual evidence and complicated areas of law - why was the claimant dismissed, and was it related to her disability; was there a failure to make reasonable adjustments.

17. I determined that it was unlikely a Tribunal considering this issue at a Preliminary Hearing without the benefit of evidence would be able to determine whether the claim had no or little reasonable prosects of success. There was every prosect therefore of such a hearing being a waste of costs.

18. In making this point, on reflection and after the hearing, I have concerns about the wording of the List of Issues at 24.4. A list of issues must reflect the claim – and this wording is vague (anxiety and behaviours - how I interacted with people). While the claimant was represented at that Case Management Hearing, it appears that the claimant may have provided this answer during the hearing ("the claimant said she meant…"). There was discussion about the 24.4 wording at the hearing.

19. I conclude that the issue at 24.4 needs further clarity. The claim has a detailed narrative of issues the claimant says are disability related. The reference to the way she 'interacted' makes little sense in the context of this narrative.

20. We also discussed other issues in the list. I agreed that the claimant can provide the wording of amendments she proposes to the List of Issues, in particular from paragraph 25 onwards; along with the proposed amendments, the reasons why amendments are needed. The claimant must bear in mind paragraph 18 – the List of issues must reflect and clarify the allegations within her claim.

21. I therefore Order that by **22 December 2023** the claimant to clarify:

    1. what it is she alleges arises from her disability that led the respondent dismissing her. This must be based on the contents of her claim – she cannot now raise additional legal or factual allegations.
    2. amendments she proposes to the List of Issues, along with the reasons why they are needed.

22. Note that this date is after the date made at the Hearing, in order to allow the claimant to properly consider what this Order says. Consequential orders on the List of Issues are varied, as below.

The claimant's costs application

23. Following discussion, the claimant agreed that this application could be carried over to the full merits hearing.

Amended defence

24. The respondents have yet to send their amended defence. The claimant seeks to strike-out the respondents' defence as a consequence. It was due in June 2023 and "now its October", no additional time was sought.

25. Ms Johns pointed to a history of errors on the respondent's part. There was a change of file-handler, who left and did not hand over the file "this is not an excuse but an explanation". A compliant ET3 was sent which denies the claims.

26. I accepted there appeared to have been an unfortunate sequence of events involving the respondent's solicitors which caused the delay. There is a valid defence to the claim which denies all claims. There is little detriment to the claimant in the respondent not being able to rely on its amended defence, it is for her to prove her claim. There is a detriment to the respondent if it is not allowed to properly articulate why it is it says the claimant was not discriminated against.

27. I Ordered that the defence must be served no later than **10 November 2023**.

Further Case Management Orders

28. By **5 January 2024** the respondent may provide to the claimant and the tribunal its comments on any proposed amendments to the List of Issues; if it does not accept the claimant's proposed amendments, the reason(s) why. It would be helpful if it could at the same time provide wording which may resolve the issue.

29. By **12 January 2024** the claimant may provide to the respondent and the tribunal her comments on the respondent's proposed issues.

Hearing bundle

30. There are still disputes about the hearing bundle – see page 117 as an example. The parties are reminded that there is a continuing obligation to disclose relevant documents throughout the case; the claimant indicated she has additional documents, these should be added to the bundle if relevant to the issues. If there is a dispute about relevance, the most practical solution is to add the to the bundle and allow the tribunal to assess relevance. Documents should be in chronological order.

Witness statements

31. Unless there are exceptional circumstances, witness statements must be exchanged by 19 January 2024. The claimant has expressed significant concerns throughout the claim about delays caused by the respondent, of which their amended defence is only the latest. I agree that a failure to exchange witness statements by this date may cause unfairness to the claimant.

EJ Emery

12 December 2023

SENT TO THE PARTIES ON

15/12/2023