EMPLOYMENT TRIBUNALS

Claimant: Ms A. Gordon
1st Respondent: Karen Fyffe
2nd Respondent: Sumaiyah Siddiq
3rd Respondent: Birmingham City Council

Heard at: **Midlands West Employment Tribunal**
On: **18 January 2024**

Before: **Employment Judge Murdin.**

Representation

Claimant: In person
Respondents: Mr Beever (Counsel).

JUDGMENT

Page numbers within this Judgment and/or Order are references to the agreed, paginated bundle used by the parties at the CMPH, which runs to 186 pages.

1. The Claimant's application to amend is granted.

2. The Respondents' application to strike out the claim is dismissed.

3. The Respondents' application to for a deposit Order is dismissed.

The Complaints

4. By Claim Forms dated 10th March 2023 (pages 8 – 25) and 19th March 2023 (pages 27 – 38), the Claimant made a number of detailed, complex and overlapping complaints, which did not fit easily within the statutory framework. This is not a criticism of her – she is not a lawyer, and these matters are not straightforward.

5. The 3 Respondents defended the above complaints through 2 undated Response Forms, and duplicate Grounds of Resistance (pages 49 – 61, and 70 – 84 respectively). The matters were listed together by EJ Flood on 14th September 2023 (page 85), and EJ Broughton conducted a PCMH on 19th September 2023 (page 86 – 92).

The 19th September 2023 hearing

6. EJ Broughton clearly spent a considerable amount of time endeavouring to identify the nature and details of the claims. Those efforts resulted in the issues that had been distilled being set out at paragraphs 25 – 36 of EJ Broughton's Order.

7. Consequent to that hearing and the Order at page 91, the parties made the following applications, which I heard today:

   (i) The Claimant made an application to amend her complaints;
   (ii) The Respondents made an application to strike the claims out and/or for the imposition of a deposit Order.

8. The Order of EJ Broughton set out obligations on both parties, essentially requiring them to provide greater specificity of their respective claims and applications. Pursuant to that Order, the Claimant made an application to amend her claims to the document at page 98. The Respondents made a an application to strike out the claim and/or alternatively for the imposition

of a deposit Order at page 101, to which the Claimant responded at page 113.

9. The background to the dispute is well-known to the parties and set out in detail within the documentation. I do not propose to rehearse it at this juncture.

The Claimant's application to amend

10. The Claimant's application to amend her claim can be found at page 98 of the bundle. It was opposed by the Respondents as part of their application to strike out and/or a deposit Order at page 100.

11. The Claimant begins by helpfully confirming that EJ Broughton's Order largely sets out her claims at paragraphs 7 – 32 of that Order. Of note, and in summary, it is recorded therein that:

    (i) there can be no claim for defamation in this jurisdiction;
    (ii) the claim for unfair dismissal has been dismissed for wont of the necessary length of service;
    (iii) there is no claim for direct and/or indirect age discrimination;
    (iv) she was potentially bringing a claim on the basis that the effects of the menopause amounted to a disability;
    (v) she was potentially bringing a claim for discrimination on the basis of religion and/or belief;

12. Moreover, the Claimant went on to aver that she wished to bring the following claims:

    (i) a claim for harassment, bullying and discrimination on the grounds of health; EJ Broughton had previously explained that there can be no claim for bullying save within the context of harassment and/or discrimination.

When taken together with the subsequent paragraphs, it is clear to me that the Claimant is seeking to bring a claim for disability discrimination, where the effects of the menopause amount to a disability.

13. I further note, that within her response to the Respondents' objections to her application, she effectively concedes that she has decided no longer to pursue a claim for discrimination arising out of religion and/or belief (page 113) as she has realised that it would be difficult to prove. I have regarded that decision as an acknowledgment that she is no longer pursuing any claim for discrimination arising from religion and/or belief.

14. In doing so, I have not only taken into the contents of page 113 into account, together with the Claimant's admission that she has chosen not to address this claim, but also Ms Gordon's failure to engage with the list of questions at page 93 in this regard.

15. I also note with concern, that Ms Gordon now appears to challenge EJ Broughton's recordings that the Claimant conceded that the informal capability process was not discriminatory (page 87) and that there were no performance issues which arose from her disability (page 88).

16. I note that EJ Broughton's notes of those concessions have not previously been challenged. It is vital to the efficient administration of cases of this nature, that parties' concessions are carefully and accurately noted, as this process is central to the Tribunal's attempts to narrow and focus the issues. I have no doubt that EJ Broughton's notes were recorded in just such a way. It is not open to parties to simply change their minds and reverse course.

17. Should the Claimant wish to challenge EJ Broughton's notes and summary, that must be done through an application. Given there has been no such application, I regard those concessions are definitive.

18. In all the circumstances, and taking into account the contents of the Claimant's application itself, her response to the EJ Broughton's list of

questions, and her response to the Respondents' reply, it appears that the only claims that the Claimant is now seeking to bring are as follows:

(i) a failure to make reasonable adjustments pursuant to sections 20 & 21 of the Equality Act 2010;
(ii) a claim for harassment pursuant to sections 26 of the Equality Act 2010;

In both claims, it is alleged that the effects of the menopause on the Claimant amount to a disability.

Taking into account the Claimant's previous concessions, and her responses to the Tribunal, it is expressly recorded that there are no other claims within this litigation.

19. The Respondents' written response to the Claimant's application can be found within their own application at pages 101 – 108. They helpfully remind the Tribunal of the well-known authorities of *Selkent Bus Company v Moore [1996] ICR 836*, and *Vaughan v Modality Partnership [2020] UKEAT 0417 20 BA(V).*

20. Their specific objections are set out at paragraphs 9 and 10.

21. Having considered the *Selkent* principles, I take into account the fact that the Claimant is a litigant in person, and she has produced lengthy and detailed complaints within this litigation. I also remind myself that the proposed claims in respect of the extension of the capability plan, and switch to a fixed-term contract were both conceded before EJ Broughton.

22. The claim in respect of the failure to refer to OH is not objected to.

23. The failure to provide a reference is objected to on the basis that it is a weak claim, and is said to be contingent upon the claims surrounding dismissal, which are no longer proceeding. I note that the Respondents do not raise

any issues of hardship and/or prejudice in this regard, nor do they allege that fresh areas of enquiry would be necessary. Taking all the circumstances into account, I allow this amendment.

24. The final amendment sought by the Claimant relates to a claim that the Respondents were dismissive of her symptoms arising from the menopause, and wrongly labelled them as mental-health issues. The Respondent avers that this is a new claim, that it should and could have been included within the ET1, and that it is now out of time (September 2022).

25. Again, I note that the Respondents do not raise any issues of hardship and/or prejudice in this regard, not do they allege that fresh areas of enquiry would be necessary. In those circumstances, taking into account the *Selkent* principles, and reminding myself that the Claimant is a litigant in person, I also allow that amendment.

The Respondents' application to strike the claims and/or for a deposit Order

26. The application is set out in detail at pages 101-108, and that application was expanded upon by Mr Beever in his helpful submissions. It is said by the Respondents that the Claimant's claim enjoys prospects of success which are so low that, notwithstanding the high bar in respect of discrimination claims, it should be struck out.

27. In the alternative, a deposit Order should be made.

28. I disagree with the Respondents. Strike out is the most severe sanction, and is generally inappropriate in discrimination cases. It is certainly inappropriate in all but the clearest of cases. I remind myself that a discrimination claim should only be struck out if, taking the case at its highest, it enjoys no reasonable prospects of success.

29. Given that it is inappropriate to conduct a mini-trial at a preliminary hearing, and/or for the Tribunal to make findings after a quick assessment of the evidence, I cannot fairly conclude the Claimant's prospects of success are so low as to merit the claims being struck out pursuant to Rule 37 of the Employment Tribunal Regulations 2013.

30. This is a claim which will turn on the evidence, and how the Tribunal at the final hearing assesses the respective witnesses, before making findings of fact. There are factual disputes between the parties, which can only be fairly resolved after the serving and hearing of factual evidence. Accordingly, I dismiss the application.

31. The threshold for the making of a deposit Order is a little lower than that required for a strike-out, in that the Respondents are required to show that the claim has little rather than no reasonable prospects of success under Rule 39 of the Employment Tribunal Regulations 2013.

32. Again, I do not accede to that assertion. I take into account the factors that I have set out above, as well as the fact that the Claimant is a litigant-in-person bringing a complex discrimination claim, which has proved challenging to codify. That does not reflect on the claim's prospects of success, which I do not find satisfies the test set out within Rule 39 of the Employment Tribunal Regulations 2013.

Conclusion

33. In relation to the respective issues, my conclusions are as follows:

    (i) The Claimant's application to amend is granted;

    (ii) The Respondents' application to strike out the claim is dismissed;

    (iii) The Respondents' application to for a deposit Order is dismissed;

34. In the circumstances, I make the following case management Orders:

(i) The claim be listed for a further 1-day CMH, at which the issue of time-limits and case management through to trial can be considered. Although raised by the Respondents, in my view, they were unable to fairly address this issue until they were aware of the precise nature of the claims;

(ii) Should the Claimant wish to apply for any extension to the time-limits in respect of either claim, she is set out that application in writing by no later than 14 days prior to the next hearing;

(iii) The relisted hearing is to be listed via CVP.

Employment Judge Murdin

11th March 2024

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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