



EMPLOYMENT TRIBUNALS

Claimant: Miss S. Younis

Respondent: United Colleges Group

Heard at: London Central (in private by CVP)

On: 12 February 2024

Before: Employment Judge J. Galbraith-Marten

Appearances

For the claimant: In person

For the respondent: Mr. W. Steed, Solicitor

JUDGMENT ON PRELIMINARY HEARING

1. The claimant withdraws the following complaints of direct discrimination, and they are dismissed upon withdrawal.
 - 1.1 That the grievance was not properly investigated and that it was an act of discrimination because of race and sex (*subject to a £100 deposit order*).
 - 1.2 The way in which the appeal was conducted was an act of discrimination because of race and/or sex (*subject to a £100 deposit order*).
 - 1.3 The claimant's dismissal was an act of discrimination because of race and/or sex and/or religion or belief (*subject to a £100 deposit order*).
2. The claimant's application to amend her complaints is granted to include the following:

2.1 The grievance was not properly investigated and that was an act of victimisation.

2.2 The way in which the appeal was conducted was an act of victimisation.

- 3. The Respondent's application for a deposit order in relation to allegations 2.1 & 2.2 above is refused.**
- 4. The deposit paid by the claimant in sum of £300 in respect of the complaints she withdraws at 1.1, 1.2 & 1.3 above are refunded to the claimant as it cannot be said that the complaints have failed for the reasons given in the Deposit Order dated 30 June 2023. For the avoidance of doubt, the other deposit order in respect of the claimant's complaint of victimisation in respect of her dismissal remains in place as that claim continues to be pursued.**
- 5. Some directions required revision and further case management orders were made by consent and are set out below. Otherwise, earlier case management directions remain as ordered.**

REASONS

1. This is the fourth Preliminary Hearing in this matter, the other hearings having taken place before Employment Judge Glennie on 4 April & 30 June 2023 and before Employment Judge Norris on 30 October 2023.
2. This case is listed for a full merit hearing between 16 and 19 April 2024. It was listed today to determine an application from the claimant sent by email on 2 November 2023. The parties prepared an agreed 170-page bundle for today's hearing.

Background

3. It is helpful to set out the previous judgment and orders to understand the claims and issues and the context of the claimant's application dated 2 November 2023.
4. At the first Preliminary Hearing on 4 April 2023 the claimant identified eight potential heads of claim across the three separate claims she had submitted. Employment Judge Glennie ordered the claimant to provide further particulars in relation to those heads of claim. The claimant's response was included in the bundle at pages 86 to 96.
5. A second Preliminary Hearing took place on 30 June 2023 to determine any applications arising from the claimant's further particulars and to provide further case management. At that hearing the respondent applied to strike out the claimant's complaints in their entirety and that was refused save for the ordinary

unfair dismissal claim as the claimant did not have the necessary service. In relation to the other heads of claim, Employment Judge Glennie permitted the claimant to amend certain aspects of her claim, refused permission to allow certain claims to proceed and made deposit orders.

6. Deposit orders in the sum of £100 each were made in respect of the following complaints:

- *The handling of her grievance was an act of discrimination because of race and/or sex.*
- *The handling of her grievance appeal was conducted was an act of discrimination because of race and/or sex.*
- *Her dismissal was an act of victimisation.*
- *Her dismissal was an act of discrimination because of race and/or sex and/or religion or belief.*

7. At the third Preliminary Hearing on 30 October 2023, Employment Judge Norris clarified the claimant's complaints as follows:

45.1 *Direct discrimination about the following:*

45.1.1 *Mr. Daley refusing to allow her to use a printer in October 2021. When the claimant approached Mr. Daley about using the printer, she was accompanied by a student who was wearing a headscarf. The claimant believes that Mr. Daley refused to allow her to use the printer because of her (the claimant's sex and/or race, and/or because of the student's religion (Muslim).*

45.1.2 *Mr. Daley refusing to allow the claimant to use a printer on 5 May 2022. The claimant was not accompanied by a Muslim student on this occasion and relies on the protected characteristics of sex and/or race (not religion).*

45.1.3 *Mr. Clark failing properly to investigate the claimant's grievance.*

45.1.4 *The way in which the appeal against Mr. Clark's findings was conducted.*

45.1.5 *The claimant was dismissed with effect from 1 September 2022. She says this was because of sex, race and/or religion.*

45.2.2 *The claimant says that she was dismissed because she did a protected act (or more than one), in the alternative to her claim that her dismissal was because of the protected characteristics of sex, race and/or religion.*

8. Following the Preliminary Hearing on 30 October 2023, and having reviewed her claims, the claimant emailed the Tribunal on 2 November 2023 seeking to amend her claim. Her application is set out below.

Amendments to Protected Acts

I kindly request the following amendments to the protected acts in my original claims:

1. **Withdrawal of Complaints:** *I would like to withdraw the following complaints from my original claims:*
 - *That the grievance was not properly investigated and that it was an act of discrimination because of race and sex.*
 - *The way in which the appeal was conducted was an act of discrimination because of race and/or sex.*
 - *The claimant's dismissal was an act of discrimination because of race and/or sex and/or religion or belief.*
2. **Retained Complaints:** *I am proceeding with the complaint that the dismissal was an act of victimisation.*
3. **Amendment to a Complaint:** *I would like to amend the way in which the grievance and appeal were conducted and lacked further investigation as an act of victimisation.*
4. **Refund for withdrawn complaints.** *Could you please provide me with clear instructions on the process and the necessary steps to obtain a refund for the following deposit orders each valued at £100.*

Claimant's Submissions

9. At today's Preliminary Hearing the claimant submitted that she found Employment Judge Norris very helpful in assisting her understand the claims she is bringing. The claimant has dyslexia and understanding the terminology and legal tests in relation to her complaints has been a learning experience for her and accessibility during the process has at times proved difficult. However, following the Preliminary Hearing chaired by Employment Judge Norris, and upon receipt of the order, the claimant took the opportunity to reconsider her complaints and wishes to refine her claims as set out in her email of 2 November 2023.
10. Furthermore, the claimant submitted she is not legally qualified, and she understood direct discrimination and victimisation to be the same type of complaint. The claimant made no submissions in respect of hardship if the Tribunal did not provide her with permission to amend. She also seeks a refund in respect of all four of the deposit orders made by Employment Judge Glennie despite proceeding with her victimisation claim in relation to her dismissal.

Respondent's Submissions

11. The respondent submitted the claimant has had multiple opportunities to clarify her claim up to this point and even at this hearing she is still not clear what her case is.
12. Mr. Steed submitted the claimant has been clear throughout that she was bringing direct discrimination complaints and not victimisation claims in respect of the grievance and appeal complaints. He also referred to paragraph 23 of Employment Judge Glennie's judgment of 30 June 2023 which sets out the claimant on that occasion believed those complaints to be acts of direct discrimination because of race and/or sex. There was no mention of victimisation.
13. Although the claimant is not legal qualified, the claimant has demonstrated that she understands that victimisation is something distinct to direct discrimination and Mr. Steed pointed to the claimant's summary of her complaints regarding the grievance and appeal included at pages 87 of the bundle. Again, there is no mention of victimisation in relation to those matters, but the claimant does refer to victimisation separately at page 96 of the bundle when describing the events leading up to her dismissal but does not include the grievance or appeal in that section.
14. Mr. Steed stated the claimant cannot both withdraw complaints and amend them simultaneously. The respondent's position is the victimisation complaints in respect of the grievance and appeal are new claims which are out of time. He further submitted there is also no protected act upon which the claimant can found her victimisation complaint regarding the handling of her grievance and as such it has no prospects of success. A new deposit order should be made if the Tribunal grants the amendments sought as the victimisation complaints are weaker still than the direct discrimination complaints regarding these matters.
15. The parties have paused their preparation of the final merits hearing pending the outcome of the claimant's application. Documents have not yet been disclosed, the bundle has not been finalised and witness statements have not been exchanged.
16. In terms of prejudice, and if the Tribunal did grant the claimant's application, the respondent would incur the hardship of additional costs. The respondent did not assert the hearing listed would be placed in jeopardy.

Claimant's reply to the respondent's submissions

17. The claimant further submitted that she has mentioned victimisation throughout these proceedings. She repeated she is not legally qualified and can't afford legal representation and she has been learning how to conduct these proceedings from google searches to understand what direct discrimination and victimisation mean and it has been very difficult for her.
18. She has not worked since her dismissal save two days of temporary work and she has accounted for this in her schedule of loss included in the bundle at

page 157 of the bundle. In terms of her means, the claimant is in receipt of Universal Credit and her financial position remains very difficult. Finally, she does now understand her claim and she has the evidence to prove her complaints.

The Law

19. 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 and should not be treated as such.
20. The Employment Appeal Tribunal in **Remploy Ltd v Abbott and ors EAT 0405/14** commented, *“if fresh points can properly be considered to be particularisation of an allegation already pleaded, a more liberal approach may be taken in considering whether to grant permission to amend, than in cases where the point is a “new” point, or will require the parties to produce further evidence or disclosure and prejudice the timetable set for the proceedings or cause further delay.”*
21. The Court of Appeal held in **Abercrombie and ors v Aga Rangemaster Ltd [2014] ICR 209, CA** that in respect of amendment applications, the focus should be on the extent to which a new amendment would be likely to involve different areas of enquiry.
22. 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.
23. 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**.
24. The **Presidential Guidance on General Case Management for England and Wales** 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

25. Following the guidance in **Chaudhry** the amendment to the claim has been clearly identified and set out in writing by the claimant.

26. Considering the entirety of the claim form, in her first claim form submitted on 22 August 2022 the claimant referred to the grievance and appeal outcomes and included them within her form that was included in the bundle at pages 1-20. In her second claim form dated 19 October 2022, the claimant again referred to her appeal not being upheld, and she stated, "*I believe I am being victimised due to bringing an Employment Tribunal claim and raising complaints of discrimination in the past*". This was included in the bundle at page 39. In her third claim form dated 17 November 2022 at page 60 of the bundle, the claimant stated, "*I appealed the dismissal on all claims of discrimination. My appeal was not upheld. I believe I am being victimised due to reporting two incidences of micro aggressions of racism on 5 May 2022 which was dismissed and because of this I have been dismissed from my role for raising these complaints of discrimination in the past*".
27. Therefore, the claimant's application to amend cannot be said to be unconnected with her original claims. She has been clear from the outset that she is complaining about the handling of her grievance and appeal. However, the claimant now seeks to substitute a different label in respect of those facts i.e. victimisation.
28. The Tribunal accepts the proposed amendment attaches a new label to facts already pleaded and therefore does not amount to an entirely new claim. The grievance outcome was provided on 13 June 2022 and the appeal outcome on 14 July 2022 and the first claim having been submitted on 22 August 2022, these complaints are in time.
29. Mr. Steed stated the claimant's proposed victimisation amendment in respect of the conduct of the grievance should be refused as there was no protected act upon which to found that complaint and therefore it is without merit. In respect of the merits of the complaint regarding the conduct of the appeal, Mr. Steed relies on Employment Judge's Glennie' reasoning at paragraph 26 of his judgment of 30 June 2023 in which he decided that complaint as an act of direct discrimination has little reasonable prospect of success and made a deposit order accordingly.
30. The claimant confirmed the protected acts she relies on are those outlined by Employment Judge Norris at paragraph 45.2.1 of her order i.e. the grievance itself on 5 May 2022 and her first employment tribunal claim on 22 August 2022. The respondent submitted the claimant cannot rely on the grievance as a protected act and that it was not properly investigated is victimisation. The Tribunal does not agree with the respondent's submission and the respondent did not refer to any authority to support its contention.
31. Turning to the timing of the application and although it was made at a later stage in the proceedings, and heard two months before the final merits hearing, the claimant was clear that it was the assistance of Employment Judge Norris on 30 October 2023 that enabled her to take stock of her complaints and she made her application to amend within 3 days of that hearing taking place. The Tribunal

accepts the claimant's submissions as to why her application was submitted when it was.

32. The Tribunal also accepts the respondent will incur additional costs if the amendment is granted as it will be required to produce evidence in respect of the grievance and appeal. However, and as these were extant complaints with a different label, this will not open a whole new area of enquiry for the respondent. The Tribunal was mindful the respondent did not submit the granting of the claimant's application would jeopardise the final hearing that is currently listed.
33. Taking into consideration all the circumstances outlined above, applying **Remploy** and having balanced the hardship and prejudice of granting or refusing the amendment, the Tribunal finds there would be greater injustice to the claimant if the amendment was refused than there would be to the respondent if it was allowed. The prejudice to the claimant in not being able to pursue these matters is greater than the hardship to the respondent who will experience additional costs. In the circumstances, the interests of justice require the amendment to be granted.

Deposit Order

34. The Tribunal was also asked to consider whether a deposit order should be made in respect of the two amended victimisation complaints if the claimant's application was granted.

The Law

35. **Rule 39 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, Schedule 1** provides:

- (1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
- (2) *The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
- (3) *The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

36. The test of little reasonable prospects of success is less rigorous than no reasonable prospect of success and the Tribunal has more leeway to make such an order. However, it does not necessarily follow the Tribunal must make a deposit order if it finds an allegation has little reasonable prospects of success, it can exercise its discretion to do so as set out in **Hemdan v Ismail and another [2017] ICR 486**.

Conclusion

37. To succeed with a claim of victimisation the claimant must establish she was subjected to a detriment because she did a protected act, or the employer believed she had done or might do a protected act. If there was no detriment or if there was detrimental treatment the employer can establish another reason for, a victimisation claim will not succeed.
38. The respondent accepts the grievance and the first claim form amount to protected acts as set out in their response form included in the bundle at page 80.
39. The detriments in issue relate to the handling of the grievance and the appeal. If as the claimant asserts the respondent did not properly investigate or consider her grievance and appeal, the Tribunal will need to ask why. Albeit neither were upheld, it cannot be said these complaints have little reasonable prospects of success. In the circumstances, the threshold in rule 39 is not met and the respondent's application for a deposit order in respect of these complaints is refused.

Employment Judge J Galbraith-Marten

19 February 2024

SENT TO THE PARTIES ON

19 March 2024

FOR THE TRIBUNAL OFFICE