EMPLOYMENT TRIBUNALS

Claimant: Mrs A Mahmood

Respondent: Santander UK Plc

Heard at: Leeds Employment Tribunal (in private; by video)

On: 17 December 2024

Before: Employment Judge Armstrong

Appearances
For the claimant: Mr Mahmood (claimant's husband)
For the respondent: Mrs P Magar (solicitor)

CASE MANAGEMENT DECISIONS having been sent to the parties on 18 December 2024 and a request having been made in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the Tribunal provides the following

REASONS

1. At the Case Management Hearing on 17 December 2024, I dealt with a number of case management issues and applications from both sides. Decisions were given orally on each issue as the hearing proceeded. Written reasons are set out below in relation to each decision made.

(1) Evidence relating to ACAS conciliation communication

2. The claimant sought to place before the court a number of references to the content of communications between the parties as part of the ACAS conciliation process. It was submitted on her behalf that these were relevant to other applications and case management issues before the Tribunal, as evidence of undue influence by the respondent, its conduct and attitude to the proceedings. In particular, this evidence said to be relevant to the respondent's application for an extension of time to submit its response, and to submit amended grounds of response. The claimant submitted that the correspondence was admissible because it fell within the 'unambiguous

impropriety' exception to the general rule regarding the inadmissibility of without prejudice communications (*BNP Paribas v Mezzoterro* [2004] IRLR 509 (EAT)).

3. At the outset of the hearing I alerted the parties that I had noted that the claimant sought to adduce evidence of ACAS communications but that I had not (as yet) read any of the information referred to. I raised that I would need to deal with the question of the admissibility of that evidence as a preliminary issue.

4. The parties agreed that the appropriate way forward would be for me to determine as a preliminary issue whether communications via ACAS could in principle be subject to the *Mezzoterro* exception. If not, I would proceed without reading those parts of the evidence. If they could in principle be admissible, I would then proceed to read the communications referred to and determine their admissibility. If admissible, I could proceed to deal with the other issues. If I determined they would not be admissible, at that point I would have to recuse myself from the proceedings and the matter would be adjourned.

5. I heard submissions from both parties regarding the relevant tests.

6. I concluded that the communications through ACAS were not admissible for the following reasons:

7. The 'without prejudice' doctrine is a common law doctrine. It has been developed through case law. The case of *BNP Paribas v Mezzoterro* [2004] IRLR 509 (EAT) sets out the established principles and exceptions, including the 'unambiguous impropriety' exception which the claimant seeks to rely on.

8. However, the common law exception does not apply to communications via ACAS. ACAS communications are protected by statute – see section 18(7) Employment Tribunals Act 1996 which provides:

   'Anything communicated to a conciliation officer in connection with the performance of his functions under any of sections 18A to 18C shall not be admissible in evidence in any proceedings before an employment tribunal, except with the consent of the person who communicated it to that officer.'

9. The claimant sought to adduce information communicated to a conciliation officer in connection with the performance of his functions under the relevant provisions. The respondent communicated that information and did not consent to it being admitted in evidence before the Tribunal.

10. The exceptions of unambiguous propriety and imbalance of power as established at common law do not apply to ACAS communications because of the statutory provisions. There are good public policy reasons for that. Firstly, all such communications are via ACAS which mitigates the danger of impropriety or misuse of power. Secondly, it is an important public policy principle that communications through ACAS remain unambiguously

confidential, in order that parties can openly use their best endeavours to resolve disputes. Finally, it avoids Employment Tribunal proceedings being obstructed by the type of satellite litigation to which these arguments would lead.

11. Any evidence regarding communication with ACAS is not admissible in these proceedings and will be removed from the Tribunal file, and must not be included in any evidence placed before the Tribunal in future.

12. The following documents were identified with the parties for removal from the main Tribunal record in accordance with the above direction: (i) claimant's second amended particulars of claim; (ii) claimant's second amendment application; (iii) claimant's objection to the respondent's application to extend time to respond; (iv) Attachment 1 to the claimant's objection to the respondent's application to extend time.

13. These documents will be removed from the electronic file and placed under a separate 'without prejudice' tab, not to be read by any Employment Judge at future hearings.

(2) Set aside of previous order

14. The claim was presented to the Tribunal on 3 April 2024. On 6 June 2024 the Notice of Claim together with the claim form and a Notice of Hearing were sent to the respondent at Unity Place, 200 Grafton Gate, Milton Keynes, MK9 1UP ('Unity Place'). The respondent accepts that this is the address provided to the claimant by them for service of these proceedings.

15. On 4 July 2024 the claimant submitted an application to amend her claim. On 13 August 2024 she submitted additional evidence.

16. On 20 August 2024 the claim was re-sent to 2 Triton Square, Regent's Place, London, NW1 3AN (the respondent's registered office). This was undertaken of the Tribunal's own motion, following consideration at Rule 21 stage. No response had been received and the Tribunal noted that the claim had not been served at the respondent's registered address. Documents were therefore sent to this address although it appears not all the required documents were sent.

17. By an undated letter sent by the Tribunal to the claimant and the respondent on or around 21 August 2024, the Tribunal sent the amendment application to the respondent at their registered address, and also invited the claimant to email the respondent with her amendment application and amended particulars of claim in advance of the preliminary hearing, which was at that stage listed for 4 October 2024.

18. On 30 August 2024 the claimant sent the documents to the respondent as requested by the Tribunal. The same day the respondent contacted the Tribunal by email stating they had received an ET1 and Tribunal letter from

the claimant but nothing direct from the Tribunal and requesting a copy of the claim and associated documents.

19. On 17 September 2024 the Tribunal sent to the respondent by email documents including the particulars of claim and ET1.

20. On 27 September 2024 the respondent made an application for an extension of time to respond to the claim. They accept that the claim was validly sent to the address at Unity Place on 6 June 2024. However, staff did not open the claim because it was addressed simply to 'Santander UK Plc' rather than a named individual. The respondent accepts that this is a failure in its internal processes. Following the receipt of the email from the claimant as outlined above, it commenced a search to identify the documents and the original notice of claim and ET1 were opened on 24 September 2024. They accepted they had validly received the documents from the Tribunal by email on 17 September 2024. The respondent therefore requested an extension of time to respond to 15 October 2024 (28 days after receipt of the notice of claim from the Tribunal on 17 September 2024). No draft ET3 was provided. The respondent stated that this was due to the volume and complexity of the claims, and the time required to consider their response.

21. Also on 27 September 2024 the claimant submitted a further application to amend her claim (see further below).

22. The case was referred to EJ Davies on 25 September 2024. The referral pre-dates the respondent's application for an extension of time, and was made on the basis of the respondent's email request for documents dated 30 August 2024. EJ Davies made an order on 25 September 2024 but it was not drawn and sent to the parties until 1 October 2024.

23. The order of 1 October 2024 directs that the claim form, particulars of claim, notice of claim, notice of hearing, amendment application and re-service correspondence '*be sent to the respondent straightaway as it appears that when the claim was re-served the relevant documents were not included.'* She extended the time for the respondent to respond to 24 October 2024, and directed that the preliminary hearing listed on 4 October 2024 be postponed.

24. On the same date, the claimant emailed the Tribunal to request *'an urgent review'* of the order of EJ Davies.

25. Rule 29 Employment Tribunal Rules of procedure 2013 (as in force at the time of the hearing) provides that:

    'A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.'

26. It is apparent, and the parties agree, that on 25 September 2025 when EJ Davies made her order, which was drawn 1 October 2024, she was under the

mistaken impression that the respondent had not been validly served with the proceedings when they were first sent to its address at Unity Place. EJ Davies would have been unaware of the respondent's application for an extension of time submitted on 27 September 2024, and the chronology set out therein. The respondent accepts that it was validly served at the Unity Place address as it was the address given by them to the claimant for service.

27. Furthermore, the claimant did not have an opportunity to make representations before the order was made.

28. I am therefore satisfied that it is necessary in the interests of justice to set aside the order of EJ Davies dated 1 October 2024.

(3) Application for Extension of time to submit response

29. On 27 September 2024, the respondent made an application for an extension of time to respond to the claim, as set out above.

30. On 24 October 2024, in compliance with the order of EJ Davies then in force, the respondent submitted an ET3 and grounds of response. The grounds of response run to 15 pages and set out the background of issues between the parties. The respondent denies the claim but largely reserves its position and requests a stay pending the conclusion of internal grievance proceedings (which have now completed) and pending clarification of the claim by the claimant.

31. Having set aside the order of EJ Davies, I therefore have to consider the respondent's application for an extension of time to respond to the claim. The claimant opposes the application. I considered both parties' written and oral representations.

32. Rule 20 of the ET Rules 2013 (as in force at the time of the hearing) provides:

'(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.
(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.
(3) An Employment Judge may determine the application without a hearing.
(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.'

33. I considered the guidance of HHJ Auerbach as set out in *Thornley Golf Centre Ltd v Reed* [2024] EAT 96, applying *Kwik Save Stores Ltd v Swain and ors* [1997] ICR 49, EAT.

34. Starting with the extent of the delay, considering that the more serious the delay which necessitated the application, the more important it is for the respondent to have a satisfactory explanation for it: The delay from the original expiration of the time limit on 4 July 2024 (28 days from the sending of the claim on 6 June 2024) and the application on 27 September 2024 is some 10-11 weeks. This is a significant delay.

35. The respondent acted promptly on becoming aware of the claim on 30 August 2024. There was a moderate delay of some ten days between receiving the documents from the Tribunal on 17 September 2024 and submitting the application on 27 September 2024.

36. There was also a delay between the submission of the application on 27 September 2024 and the submission of the ET3 and grounds of response on 24 October 2024. However, I take into account that from 1 October 2024 the respondent was acting in accordance with the order of EJ Davies. I also accept that practically speaking, once the respondent's legal advisers had in fact had sight of the claim, given its length and the volume of claims and allegations, they would require substantial time to draft a response.

37. The respondent's reason for the delay is that there was an error by staff at the address to which the claim was sent by the Tribunal, leading to the claim being lost in the respondent's post room. There were then some internal delays in communication. This is not a good reason, but I am satisfied that it is an error rather than a deliberate obstruction of the claim.

38. The claimant invites me to find that the respondent deliberately delayed responding to the claim in order to put pressure on the claimant and to complete their internal processes. I am not satisfied that this is a credible explanation for the delay. I do not consider it likely that the respondent would deliberately risk a 'default' judgment under rule 21 in such a significant and wide-ranging claim. I find that it is more likely that the delay was due to incompetence and error on the respondent's part.

39. Turning next to the balance of prejudice.

40. The prejudice to the claimant: if I allow the application, there will be a significant delay to the resolution of her claim as compared to a judgment being issued in default of a response under rule 21 ET Rules 2013. There is also a lack of clarity in the respondent's submitted response – it largely reserves its position pending the outcome of a grievance appeal. The claimant not unreasonably points out that had she delayed submitting the claim pending a grievance appeal outcome, the case law is clear that she would have been unlikely to be granted an extension of time. However, if the application is allowed, she will still be able to proceed with the claim.

41. On the other hand, the prejudice to the respondent of refusing the application is that a judgment would be entered in this complex and wide-ranging claim, relating to allegations covering a 16 year period. The respondent would not

be able to provide a response to the allegations or to resist the claim. Although the response is in some respects in outline, it does appear to have some merit and if successful would likely provide a defence to the claim.

42. I am satisfied that it would be unconscionable to prevent the respondent from responding to this complex and wide-ranging claim as a result of the delay. Although the reason for the delay is not a good one, the respondent has acted relatively promptly once it in fact became aware of the claim. The prejudice to the respondent of refusing the application far outweighs the prejudice to the claimant of allowing it.

43. Time for presenting the response is therefore extended to 24 October 2024.

(4) Application to amend the claim

44. The claimant applied on 4 July 2024 and 27 September 2024 to amend her claim to include matters post-dating the presentation of the claim, including the conclusion of a grievance appeal process and re-investigation. At the hearing, the claimant clarified that the application made on 27 September 2024 supersedes the previous application and she sought to pursue an amendment as set out in this later application.

45. The respondent does not object to this application and I granted it. It is not opposed and relates to matters arising after the submission of the claim form but relating to the same issues.

46. For the reasons set out above, reference to ACAS correspondence included within the application of 27 September 2024 is not admissible. Directions have therefore been made for the claimant to submit a final version of the amendments removing the paragraphs identified in the course of the hearing to be inadmissible.

(5) Application for permission to file amended response

47. The respondent sought permission to file an amended response now that the appeal and re-investigation of the claimant's grievance have been completed. A full response to the claim was not submitted on 24 October 2024 because the respondent reserved its position pending the outcome of that further investigation.

48. The claimant did not oppose the application to file a response to the claimant's amended particulars of claim but opposed permission to the respondent to provide a full response, submitting that they should not be permitted to simply reserve their position pending the outcome of the re-hearing.

49. I have granted permission to the respondent to file one amended response dealing with the full claim in its amended form.

50. In making this decision I took into account the Presidential Guidance on General Case Management (Guidance Note 1 – Amendment of the Claim and Response) and the principles in *Selkent Bus Company Ltd v Moore* [1996] ICR 836 (EAT).

51. There was no draft of the proposed amendment so the details of the proposed amended response are not clear, however the nature of the proposed amendment is to provide a full response to the claim following conclusion of internal procedures and an amendment to the pleaded claim. The time for presenting a response has now passed, having been extended to 24 October 2024. However, since then an amendment to the claim has been permitted and the internal procedures have been completed.

52. In terms of the timing and manner of the application, there is no issue regarding the application to file a response to the amended claim. However, the claimant makes a valid point that she would not have been permitted to delay the submission of her claim pending the outcome of internal procedures and therefore the respondent should have provided a full response on 24 October 2024. Within the response the respondent sought a stay of proceedings, which is no longer pursued and which I would not have granted pending the outcome of the internal procedures.

53. Turning to the balance of hardship and injustice: I am satisfied that it is entirely appropriate that the respondent provides a response to the amended claim, including the issues surrounding the further investigation and grievance appeal. It would be artificial and prejudicial to tie their hands in preventing them from setting out how that outcome informs their response to the original substantive claims. Overall, there are an extremely extensive number of claims and allegations extending over a 16 year period and it would be inequitable not to permit the respondent to respond fully.

54. I take into account the issue of delay. However an amended response is unlikely to add to the delay in proceedings. A further preliminary hearing is required in any event and the amended response can be provided in good time before that hearing.

55. Therefore, the respondent has permission to file and serve an amended response to the claim as now set out, by 21 January 2025.

56. After this decision was given, the claimant suggested that the decision to allow an amended response should be postponed pending the public preliminary hearing and decisions as to whether any claims are struck out at that hearing. I am satisfied that it is necessary for the respondent to respond in advance of that hearing in order that their position can be taken into account in determining whether any claims should be struck out.

(6) Further application to amend the claim to include indirect discrimination

57. The claimant's representative raised at the hearing that following further information being provided by the respondent she sought to amend her claim

to include a further claim for indirect maternity discrimination. She submitted that this claim has arisen within the last three months.

58. The determination of an application to amend to include this claim was potentially premature. A direction was made for any application to amend the claim to include a claim for indirect maternity discrimination to be submitted by 31 December 2024 so that this can be dealt with at the further preliminary hearing.

(7) Case Management Directions

59. Directions were made at paragraphs 11-17 of the order for further evidence and documents in order that the case can proceed to a further public preliminary hearing to deal with the issues at para 17. These are the next issues which need to be dealt with in order for the claim to progress.

Employment Judge Armstrong

Date: 15 January 2025