



EMPLOYMENT TRIBUNALS

Claimant:
Ms S Morriss

v

Respondent:
Home Office

PRELIMINARY HEARING

Heard at: Reading

On: 27 June 2017

Before: Employment Judge S Jenkins

Appearances

For the Claimant: Mr A Worthley (Counsel)

For the Respondent: Mr D Massarella (Counsel)

JUDGMENT

1. The Claimant's claim of indirect discrimination on the ground of disability is dismissed on withdrawal.
2. No other order is made in relation to the Respondent's applications.

REASONS

Issues

1. The issues for me to address at the hearing were set out by the Respondent in paragraphs 4 to 8 of its amended ET3 and arose from the Case Management Order of Employment Judge Vowles, issued following a hearing on 1 December 2016, in which he required the Claimant to provide further and better particulars of her claims, in the form of a Scott Schedule, by 9 January 2017. The Claimant provided such a schedule but the Respondent contended that the schedule was not compliant in a variety of ways.
2. Looking at the particular points raised by the Respondent in paragraphs 4 to 8 of its amended ET3, although not in the precise order set out there, the issues were as follows:-
 - 2.1 In paragraph 4, the Respondent sought clarification that the tribunal did not have jurisdiction to consider a personal injury claim, with the Respondent accepting that compensation for personal injury can be pursued as part of compensation for a claim of discrimination. The

Claimant's representative clarified that that position was accepted and that it was understood that the references to personal injury within the claim form were only relevant for the purposes of compensation with regard to any successful disability discrimination claim.

- 2.2 The second half of paragraph 7 noted the Claimant's statement in the Scott Schedule that any claim for indirect discrimination was to be discontinued or subsumed into the failure to make reasonable adjustments claim and the Respondent asked, as a consequence, for the indirect discrimination claim to be dismissed. The Claimant's representative confirmed that there was no objection to the claim of indirect discrimination being formally dismissed on withdrawal.
- 2.3 In paragraphs 5 and 6 of the amended ET3, the Respondent contended that there had been failures by the Claimant to comply with the Case Management Orders of Judge Vowles. That contention could be broken down into three separate sections:-
 - 2.3.1 Failure to provide sufficient further information in the terms required by Judge Vowles.
 - 2.3.2 Failure to limit to 15 the number of events on which the Claimant relied as giving rise to her complaints, as directed by Employment Judge Vowles, with his Order having noted that the Schedule should comprise individual events and not a list of events.
 - 2.3.3 Attempts to add new allegations which should not be considered until properly brought as new claims or by way of amendment to the original claims.
- 2.4 In paragraph 8 of the amended ET3, the Respondent contended that certain of the events complained of by the Claimant had been brought outside the time limit set out within section 123 of the Equality Act 2010.

3. The issues outlined at sub-paragraphs 2.1 and 2.2 above being uncontentious, it was considered appropriate to deal with the issues set out at sub-paragraph 2.3 first before moving on to consider the issue set out at sub-paragraph 2.4.

Submissions on sub-paragraph 2.3

4. The Respondent's representative contended that, in several areas, the Scott Schedule did not adequately specify the particular type of discrimination claim that was pleaded and also that, in several areas, the particular requirements set out by Judge Vowles in his Order regarding the particularisation of the claims had not been complied with. The Respondent's representative also contended that the 15 issues covered too broad a range, to the extent that the Schedule ultimately contained

more than 15 listed events, and that the Schedule had raised additional causes of action.

5. The Claimant's representative contended, with regard to the specification of the claims and the assertion that additional causes of action had been included, that either the claims had been adequately specified within the Schedule, or, if not, that any deficiency would be able to be remedied by way of an application to amend under Rule 29 of the Employment Tribunals Rules of Procedure 2013, with such an amendment amounting only to a "relabelling" of issues already pleaded. He also observed that the guidance provided by the case of Fairbank v Care Management Group (UKEAT/0139/12/JOJ) required only that a summary of the essentials of claims were to be pleaded, and he noted Employment Judge Vowles' direction that other aspects could be included within the claim form by way of background or context.
6. With regard to the lack of particularisation, the Claimant's representative appeared to broadly accept that there were areas of lack of particularity but contended that these could all be easily addressed, some very straightforwardly and swiftly, although others would need a short period of time within which further particularisation could be provided.
7. Finally, with regard to the number of events listed in the Scott Schedule, the Claimant's representative contended that, of necessity, compliance with the particular Order would involve reference to other events and that this should not be taken against the Claimant in terms of compliance with the Order. Concessions were however made in relation to some of the listed issues which could be confined to a most recent example rather than the several examples that had been included in the Schedule.

Conclusions on sub-paragraph 2.3

8. In terms of my conclusions, I dealt with matters not quite in the same order as identified above. I first dealt with the issue of whether the Claimant's claims had been adequately specified within the Scott Schedule and/or if the Schedule raised additional causes of action to those initially pleaded, and, if not, whether it would be appropriate to allow amendments in that regard.
9. I noted the Claimant's reliance on the Fairbank case and the guidance on the essential matters that were to be included in pleadings. However, that said, Judge Vowles did issue an Order seeking further particularisation of the claims and, I noted the direction in the case of Serco v Wells [2016] ICR 768 that it was not for me to interfere with the decisions of a fellow judge unless it was necessary for me to do so in the interests of justice.
10. I was not satisfied that that was the case here. It seemed to me that Judge Vowles' Orders needed to be complied with. I was not satisfied that they had, in fact, been fully complied with, as it was not entirely clear from the Schedule which factual allegation was considered to relate to which claim. However, I was not satisfied that it would be in furtherance of the

overriding objective to take any further action at his stage in respect of the deficiencies in relation to specification.

11. I noted the guidance in the case of Selkent Bus Company v Moore [1996] IRLR 661, and indeed the parts of the Presidential Guidance on General Case Management relating to amendments to claims dealt with in paragraphs 6 to 8 of that Guidance.
12. Paragraph 6 of the Guidance notes that tribunals can draw a distinction between amendments which seek to add or substitute a new claim arising out of the same facts and those which add a new claim entirely unconnected with the original claim. The Guidance describes, in paragraph 8, the substitution of new claims arising out of the same facts as “relabelling”, and the indications both from the Guidance, and from the Selkent case, were that applications to amend which involve relabelling are more likely to be acceptable than those which seek to add entirely new claims. I noted however, the particular guidance provided in the Selkent case that I should take into account all the circumstances and balance the injustice and hardship of allowing or not allowing the amendment in both cases.
13. In this case, I was satisfied that the balance in this regard lay in favour of the Claimant. It seemed to me that all but one, to which I refer further shortly below, of the issues pursued by way of claim were included in the original claim form, and what we were looking at therefore was, in virtually all cases, a relabelling of the particular head of discrimination claim to properly categorise those particular claims, e.g. to confirm that particular circumstances were alleged to give rise to a reasonable adjustment claim as well as a disability discrimination claim. In the circumstances, I did not consider that the Respondent would suffer any particular prejudice in that regard.
14. The one area which did cause me to consider it closely was item 7 in the Scott Schedule which related to a comment allegedly made by a Mr Dan O’Mahoney in a meeting on 19 January 2016. There was no direct reference to this within the claim form although the Claimant’s representative contended that it could potentially be discerned from broader references to the Respondent’s behaviour.
15. I was not satisfied that this particular issue had been included, even by implication, within the claim form. Ultimately, however, I could see that Mr O’Mahoney is also referred to in one of the earlier allegations in relation to a substantive action taken by him at that particular point and therefore I did not think that the Respondent would be particularly prejudiced by needing to put forward evidence, whether in the form of Mr O’Mahoney or otherwise, regarding the comment alleged to have been made, in the 19 January meeting.
16. Overall therefore I was satisfied that the amendments being sought by the Claimant should be allowed.

17. With regard to the Respondent's assertion that there had been failures to limit the particular issues to 15, again I noted Judge Vowles' Order and the particular requirements that he set out there. I was also conscious however that case management of discrimination cases is not a rigid process and that there may be occasions where a certain latitude is needed. I also noted in this particular case that, in relation to some of the listed areas, the Claimant made concessions during submissions that focus would be made on one named individual as opposed to the several that were listed within the particular document.
18. In the circumstances, I was satisfied that the listing of the 15 issues within the Scott Schedule broadly complied with the directions of Employment Judge Vowles and that it would be in furtherance of the overriding objective for me to allow matters to proceed on the basis set out there, subject to better particularisation of those issues, which I have ordered separately.
19. Finally, with regard to the lack of accurate particularisation of the claims. I noted that the Claimant's representative accepted that there was a lack of particularity in certain areas and, in particular, that there needed to be better cross-referencing of the specific heads of claims to the 15 listed issues. I therefore ordered that to be remedied by way of further particularisation as specified separately.

Submissions on sub-paragraph 2.4

20. The final issue for me to determine was the question of whether the Claimant's claims, or any of them, had been brought within the appropriate timeframe. It was clarified by both parties that I should confine my consideration to whether all or any of the events which took place prior to 4 May 2016, the date of termination, should be struck out or should be allowed to proceed for consideration at a full hearing on evidence.
21. I noted that the claim form was issued on the last possible day following the ACAS early conciliation extension, and therefore that anything prior to 4 May 2016, i.e. the effective date of termination of employment, would be out of time unless such acts fell within the scope of section 123(3) Equality Act 2010 which notes that conduct extending over a period is to be treated as done at the end of the period. Therefore, unless the events prior to dismissal were part of that course of conduct extending over a period, they would, on the face of it, seem to have been out of time unless it was appropriate to apply the just and equitable discretion to extend time.
22. In that regard, the Claimant's representative accepted that, in his words, "all his eggs were in the one basket", in that the Claimant's position was that all her claims formed part of a continuing act, and that if the decision was otherwise then there would be difficulties in applying the just and equitable extension to any events occurring prior to the effective date of termination, which would then leave just the events of that day effectively the Claimant's dismissal to be considered by the tribunal.

23. The Respondent's representative contended that, whilst there were some groups of similar allegations within the 15 listed items in the Scott Schedule which could arguably be said to be connected, where that occurred, the last event in any such group always took place some time before 4 May 2016 and therefore each such group was out of time. He further contended that there was, in any event, no overall connection between the allegations.
24. The Respondent's representative also contended that several allegations related to decisions with regard to the Claimant made by different individuals and that it would be inappropriate to connect them together to form a course of conduct.
25. The Claimant's representative contended that the case was always presented as a continuing act with the Claimant having raised concerns about her treatment arising from her disability through at least four grievances going back to 2013, and indeed earlier than that, and that all related to the same pattern of behaviour. The Claimant's representative further contended that of the 15 events listed in the Scott Schedule, all but four were directly connected to the dismissal decision, and the four which were not directly connected nevertheless had relevance for the ultimate dismissal. By way of example, the first contention in the Schedule related to a poor performance rating which was argued to lead to a perception over the Claimant's capability which ultimately led to her dismissal.
26. The Claimant's representative also drew my attention to the comments in the dismissal letter and the appeal letter which made reference to issues having existed, since 2013 in the former case, and, over the past few years, in the latter case.

Conclusions on sub-paragraph 2.4

27. The principal authority for me to address in relation to the issue of time was that of Commissioner of the Police of the Metropolis v Hendricks [2002] IRLR 96, with the Court of Appeal in that particular case having noted that it would not be appropriate for a tribunal, when considering whether or not there had been a course of conduct, to look for the application of a policy or scheme, but instead that the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated less favourably.
28. Considering that test, I was satisfied that the events going back to 2013 in this particular case had the potential to be considered to form part of a course of conduct extending over a period and which could then be treated as being done at the end of that period, i.e. on 4 May 2016, such that they were potentially in time. I found the references in the Respondent's own letters, referred to at paragraph 26 above, to be compelling in that regard. I confirmed that it was not my place, having heard no evidence on the points, to consider whether the acts complained of did amount to discriminatory treatment and that that was a matter which will be left to the

tribunal ultimately considering this case. However, I was satisfied that that was indeed a matter which merited further consideration by that tribunal.

Employment Judge S Jenkins

Date: 11 July 2017.....

Sent to the parties on: ..12/08/2017.

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For the Tribunals Office