Case No: 2601225/18

EMPLOYMENT TRIBUNALS

Between:

Ms S Bishop	**and**	Boots Management Services Ltd
Claimant		**Respondent**

At an Open Attended Preliminary Hearing

Held at: Leicester

On: Tuesday 2 October 2018

Before: Employment Judge P Britton (sitting alone)

Representation

For the Claimant: Mr N Bidnell-Edwards of Counsel
For the Respondent: Mr S Fennell, Solicitor

JUDGMENT

1. BY CONSENT, having now heard the evidence today, the Respondent now admits that the Claimant was at the material time an employee for the purposes of her unfair dismissal claim pursuant to the provisions of the Employment Rights Act 1996.

2. The application to amend the discrimination based claim so as to include additionally a claim of direct discrimination by way of associated disability and within the provisions of section 13 of the Equality Act 2010 is granted.

3. As to the application to amend the claim to also include one of breach of contract (failure to pay notice pay), this is withdrawn.

REASONS

Introduction

1. The claim (ET1) in this matter was presented to the tribunal on 1 June 2018. The Claimant pleaded, via her solicitors who had drafted the claim, that she had been employed by Boots as a sales assistant at its small store in Oadby, Leicestershire. She gave the dates of her employment as being between 1 February 2004 and 10 January 2018. In terms of the scenario, she claimed that she was unfairly dismissed and that in any event there was no redundancy explored, and that she was not on a zero hours contract as alleged; and that given that she had childcare commitments, it therefore was to be seen as a sex discrimination claim as well as one of unfair dismissal. She pleaded both direct and indirect sex discrimination.

2. Curiously at her paragraph 22, the PCP alleged was one which "*placed the Claimant at a substantial disadvantage in relation to non-pregnant person …*". For reasons which I shall come to, that could not possibly engage in the circumstances of this case.

3. Suffice it to say that I thoroughly explored the facts having heard the Claimant at some length under oath and Mr A Mistry (the Manager at the time of the dismissal) of Boots. I considered some documents. Over lunch, additional documents were provided at my request by the Respondent. Suffice it to say that it became clear that the Claimant was in fact an employee per se and that the zero hours contract argument in that respect could not engage for reasons I need not go to. To turn it around another way, the employer conceded that she was actually an employed person with continuity of service for the purposes of the unfair dismissal at the material time. The Respondent had already conceded at the beginning of the hearing before me today that she was in any event also otherwise a worker as defined at section 83(2) of the Equality Act 2010 (the EqA) and thus was in any event entitled to bring her sex discrimination claim.

4. What then emerged before me was that the Claimant's pleaded claim is much more focussed on alleged discrimination by way of associated disability. Suffice it to say that she has a seriously disabled 7-year-old, namely George. He was diagnosed with very severe heart problems in December 2011 when he was about 10 weeks old. Ever since he has been subject to repeated heart operations; fitting of pace makers and matters of that nature. Furthermore, in the context he has had a stroke and a serious cardiac arrest. I understand that he is now wheelchair bound and requires special needs help at school. Indeed, during the case this morning, the Claimant had to leave the room when the assistants to her child at school rang because of further concerns. In other words, it seems to me pretty obvious that he is a disabled person. So, what the Claimant's pleaded claim is more than anything about is that post the complications with the pregnancy and then the heart defect of George being diagnosed and her thus having to have an extended time before return to work, that when she was able to contemplate a return she had a discussion with her then line manager who agreed that she could return to work just working

Mondays rather than her previous 5 day a week, 37 hours shift and because on that first day of the week George's half sister could care for him instead of her.

5. Post the second serious round of heart complications and ie the stroke which appears to have been at the end of 2016, the Claimant also could no longer use the half sister as she now had a job, hence there were further adjustments made whereby she was going to work 2 days a week between 10 am and 2 pm. This appeared to work quite well for that first period but then to put it at its simplest, over the last months of the employment, the then manager was not accommodating her working pattern. This maybe for reasons to do with the operation of the store, I do not know as he has not given evidence today. Finally, we come to Mr Mistry who made the decision, having only just been appointed to manager, to discuss with the Claimant whether she could in fact be more flexible in terms of the hours that she could offer because of the need to, for instance, cover whole day working if somebody was off on holiday or ill. As the Claimant made clear, self-evidently she could not do this because of the need to care for George. The Claimant was dismissed in January the stated reason being because the business needs were such that it did not require somebody who only worked the limited hours she could offer.

6. To put it at its simplest what was therefore applied for today by Counsel for the Claimant was to allow an amendment to the claim to thus bring the disability based section 13 EqA direct discrimination claim. This was opposed by the Respondent. I therefore applied the well-known guidance apropos Mr Justice Mummery (as he then was) in ***Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT***.

The nature of the amendment

7. This is not just a substitution of other labels for facts already pleaded. It is in part an entirely new factual allegation but it is not wholly such. That is because in the Claim Form at paragraph 3 of the statement of case, inter alia pleaded was "*… due to the Claimant's inability to work specified hours despite this being due to her childcare responsibilities as to the Claimant's child suffers with heart complications*".

8. At paragraph 6 more particulars were given about this, namely the diagnosis of the heart condition and the open heart surgery in 2011/2012 and the cardiac arrest in December 2015, to which I have already referred, and then the reference to numerous complications … "*Thus the Claimant could no longer commit to working during the week and instead had to care for her child …*".

9. However, it was not pleaded that this continued up to the end of the employment. But as of course is now plain from the eloquent evidence of the Claimant this morning, the problem continued in terms of the caring for George and remained just as acute as before.

10. Therefore, I see this as a hybrid and the advocates do not disagree with me. It is in part the addition or substitution of other labels for facts already pleaded. It is also in part the making of an entirely new allegation. It would in the latter respect be out of time; it would not in respect of the former part.

11. As to what is just and equitable in terms of my decision, if the failure to plead this head of claim at the outset and thus save exposure to an out of time issue was the lawyer's fault, it is not fatal but of must be considered in terms of what is in the interests of justice.

12. The Respondent is not prejudiced in the sense that it can no longer obtain and deploy the evidence in relation to this matter. It seems to me that it is still very much going to focus on the reasoning, that is to say what was in the mind of Mr Mistry when he made the decision to dismiss the Claimant.

13.I do not accept that the case has very little merit; I think there are clearly triable issues.

14. Accordingly having considered the various factors and weighed them in the balance, I conclude that it is in the interest of justice to grant the amendment.

The breach of contract claim

15. The breach of contract amendment application has been withdrawn.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant will now file an amended particulars of claim by **Friday 19 October 2018**.[1]

2. The Respondent will reply thereto by **Friday 9 November 2018**.

3. The existing directions are varied as follows:
    - 3.1 Exchange of lists **23 November 2018**.
    - 3.2 Respondent's preparation and service of trial bundle **14 December 2018**.
    - 3.3 Exchange of witness statements **18 January 2019**.

The hearing

4. It is already listed for the three days commencing 1 April 2019 at Leicester. The parties agree this is sufficient. The tribunal will have a period of reading in on the first morning of the hearing, namely 1 April up to **12 noon**. Therefore, via the Respondent there will be delivered to the tribunal in triplicate at least one working day prior to the hearing, the trial bundle and a combined indexed witness statement bundle. The parties must be in attendance in good time for a **12 noon** start on the live hearing when the Claimant will start with her evidence.

[1] This has occurred as directed.

5. As to whether a chronology or cast list is needed, I leave to the solicitors.

Notes

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so".* If, when writing to the Tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Britton

Date: 22 November 2018

Order sent to Parties on

24 November 2018