EMPLOYMENT TRIBUNALS

Claimant: Mrs H Findik

Respondent: Secretary of State for Justice

RECORD OF A PRELIMINARY HEARING

Heard at: Bury St Edmunds (by CVP) **On:** 21 October 2022

Before: Employment Judge K J Palmer (sitting alone)

Appearances
For the Claimant: Ms Ibbotson, Counsel
For the Respondent: Ms Cummings, Counsel

JUDGMENT
Pursuant to an Open Preliminary Hearing

Discussion

(1) This matter came before me today listed as an Open Preliminary Hearing by Employment Judge Hyams pursuant to a Preliminary Hearing that took place on 11 July 2022.

(2) The Claimant originally presented a claim to the Watford Employment Tribunal on 20 August 2021. The Claimant at that time was unrepresented and the claim was home made. She ticked the box for disability discrimination and holiday pay.

(3) The claims were essentially put in a single page in what can best be described as a very homemade fashion, which often just consisted of putting the briefest of bullet points to illustrate the part or aspect of the factual matrix which went to make up her claims.

(4) The Claimant refers to three conditions in that ET1: Misophonia, which is acute sensitivity to noise; slipped discs, essentially in her neck; and Fibromyalgia.

(5) The thrust of her claims, on ordinary reading of the ET1, relate to what she sees as a failure of the Respondents to provide reasonable adjustments to her to enable her to undertake her work as an Administrative Officer at the Ministry of

Justice. She remains employed. The thrust is that she should have been given the correct equipment to enable her to work at home, which had been recommended as a result of her conditions. Some attempts were made to accommodate this, but other adjustments were subsequently removed and she alleges she was pressurised to work back in the office.

(6) There is a further claim due to the employer conducting an absence review meeting following periods of sickness and the issuing of a written warning for attendance. The Claimant says that the warning amounts to discrimination arising from a disability. Whilst direct disability discrimination is mentioned in passing, the ordinary natural meaning of the reading of the words of the ET1, of the home made claim, is that it is a claim for discrimination arising from a disability. This being the issuing of the warning in March 2021. This is therefore a claim under Section 15 of the Equality Act 2010 ("EqA").

(7) The other claim is a claim for a failure to make reasonable adjustments where required. That is a claim that would fall under s.20 and 21 EqA 2010. On the face of it, some or all of the reasonable adjustments claims may be out of time.

(8) The matter was listed for a Preliminary Case Management Hearing at the Watford Employment Tribunal on 11 July 2022. This was some 11 months after the claim was originally presented. It was listed before my colleague Employment Judge Hyams at the Watford Employment Tribunal and was conducted by Employment Judge Hyams by telephone. I have before me a copy of Employment Judge Hyams Hearing Summary.

(9) Just before that Hearing, the Claimant instructed Solicitors who produced further and better particulars which are before me in the Bundle. I have a Bundle running to some 731 pages in front of me. The document I am referring to being a document produced by those then instructed by the Claimant being further and better particulars, runs to some 23 pages.

(10) Employment Judge Hyams made some pertinent observations about what appeared to be the considerable amendments sought and referred to a number of relevant Authorities. He then listed the matter for a one day Open Preliminary Hearing to be heard by Cloud Video Platform (CVP) to determine the following:

10.1 Whether the Claimant was suffering from at least one impairment that was a disability under s.6 and Schedule 1 of the Equality Act 2010;

10.2 To decide whether to grant the Claimant's Application to Amend her claim as put in the further and better particulars provided by the Claimant's newly appointed Solicitors; and

10.3 To make such further Case Management Orders as were appropriate for the further process of the case.

(11) Employment Judge Hyams indicated, quite correctly, that if one disability was either conceded or found to exist then the issue of the other two disabilities could be left over to the Full Merits Hearing to be determined. He gave time for the

Claimant to further consider the precise nature of any Application to Amend, but he made it clear that no point would be taken as to further delay in respect of the period between 11 July 2022 and today.

(12) That Hearing occurred today and is of course before me. Ms Ibbotson of Counsel appeared for the Claimant and Ms Cummings of Counsel appeared for the Respondent.

(13) I am pleased to say that Ms Cummings was able to confirm that one disability is conceded by the Respondents and that is that the Claimant was disabled for the purposes of s.6 and Schedule 1 EqA 2010 by virtue of three slipped discs in the neck. That means today there is no further need to consider the other two alleged disabilities and these can therefore be dealt with at the Full Merits Hearing of this matter.

(14) That leaves, therefore, just the Application to Amend. This is advanced on the basis of the 23 page further and better particular document. The meat of the Application runs from pages 56 to 64 in the bundle before me where the claims are cited. There was included a fresh claim for harassment under s.26 EqA 2010 and a more detailed exposition of the claims under s.15, 20 and 21 EqA 2010.

(15) I heard detailed and lengthy submissions from both Counsel.

(16) The legal position on Amendment is that Employment Judges have a discretion to allow or refuse amendments to a claim form. There is considerable guidance in this respect provided by Authority. In the case of Cocking v Sandhurst (Stationers) Limited and Anr. [1974] ICR650, Sir John Donaldson stressed that in making use of their discretionary power to amend, Tribunals should seek to do justice between parties having regard to all the circumstances of the case. The key principle in that case was that the Tribunals must have regard to all the circumstances and in particular to any injustice or hardship which would result from the amendment or the refusal of the amendment.

(17) This was approved in what is often regarded as the leading case on amendment, the case of Selkent Bus Company Limited v Moore [1996] ICR836. Selkent and Moore tells us that in considering any Application, the Tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused by granting or refusing the Application. Relevant factors are the fact that applications range from simple corrections of clerical and typing errors to the addition of factual details to existing allegations and the additional substitution of other labels to facts already pleaded, to on the other hand the making of entirely new factual allegations that change the basis of the existing claim. The Tribunal has to decide whether the amendments sought are minor or substantial. The Tribunal may have to consider whether a new claim is out of time. The Tribunal should consider whether there has been a delay in making the Application. This is not an exhaustive list.

(18) The more recent case of Vaughan v Modality Partnership [2021] ICR535, is significant in that it confirmed that the core test in considering any amendment is the balance of injustice and hardship in allowing or refusing the amendment between the relative parties.

(19) I have also considered the case of Abercrombie & Ors. v Aga Rangemaster Limited [2014] ICR209, on the basis of that brought to my attention by Ms Ibbotson that it is relevant to consider where an amendment is of new facts, whether those facts would involve undertaking substantially similar or wholly different areas of factual enquiry as posed by the existing claim.

(20) Also in respect of Lord Justice Underhill's comments that permission to amend might be given without, at the time, determining any time issues and that those can be left for the Full Merits Hearing.

(21) I have very carefully considered these Authorities and the submissions that were put before me.

(22) As to delay, there was a significant delay in the lodging of this Application between August 2021 and July 2022. However, balanced against that was the fact that the Claimant was not represented at the outset, nor was she until relatively close to the Hearing on 11 July 2022. That delay is of, in my judgement, of minimal prejudice to the Respondents in light of the claim already ventured in the ET1, being those claims under s.15, 20 and 21. They knew that such claims were part of the original claim and in fact pleaded to those claims in their ET3.

(23) Interestingly, they also pleaded on the basis of a direct discrimination claim which we now know is not advanced by the Claimant, albeit that direct discrimination was mentioned in the ET1. Therefore that was not surprising.

(24) Turning then specifically to the s.15 claim and the Application to Amend that claim before me, the Application includes a further allegation of unfavourable treatment on top of the giving of the written warning. The unfavourable treatment relied upon is the refusal of the Appeal against that written warning.

(25) Carefully applying the tests above, it is my judgement that the Appeal against the warning is closely factually aligned to the warning itself and therefore, whilst as Ms Cummings says it may not add much to the claim, it would be wrong and duly harsh of me to refuse it. The prejudice of allowing it is non-existent to the Respondents in my judgment.

(26) The clarification of the 'something arising' relied upon is also just that a clarification of the existing claim.

(27) Applying the Selkent and Vaughan tests, the Application to Amend the s.15 claim must be allowed and I do allow it.

(28) Turing to the reasonable adjustments amendments sought, paragraph 76 is a detailed explanation of the auxiliary adjustments the Claimant argues the Respondents should have made as part of its duty to make reasonable adjustments.

(29) Ms Ibbotson asked me to accept that this is just a fleshing out of what has already been pleaded. I accept that, it is a fleshing out of what is already in the ET1, albeit it was very vaguely expressed in the ET1. The new facts are just additional details and there is little or no prejudice in my judgement to the Respondents in my allowing them.

(30) The same principle must apply to 76.2, 76.3 and 76.4. Albeit that the reference to "Dragon" was not previously mentioned, it is part of the detail of a factual matrix which is flagged up in the ET1. I allow them. I also allow the substantial disadvantages set out as an amendment at 78, 79 and 80. 81 is also allowed as it is merely background explanation. 81.2 is allowed.

(31) As for the PCPs, none were put in the ET1, but that is not surprising. Rather like citing the substantial disadvantages, it is a legal subtlety required by the Act and best understood by lawyers. It is not uncommon in pleadings before these Tribunals for Claimants 'in person' not to know or understand such legal concepts. I see nothing in paragraph 82 which should come as a huge surprise to the Respondents and therefore they are not on balance unfairly prejudice and those amendments are allowed.

(32) 83 puts the substantial disadvantage and for the same reason as above, that is also allowed.

(33) The whole of 84 is allowed. There is nothing here that is not in my judgement an addition of detail on matters touched upon or put in the ET1. They are allowed.

(34) I therefore allow all of the amendments sought in the claim for reasonable adjustments.

(35) I have not considered time limits on the principle previously cited and raised by Employment Judge Hyams with which I agree. The Claimant may have considerable issues on time with respect to her claims under s.20 and 21. These can and will be ventilated and dealt with at the Full Merits Hearing.

(36) Turning to the claim in harassment, this is a wholly new claim. I agree with my colleague Employment Judge Hyams that this raises the claim to a new level of complexity. Whilst some of the factual allegations in support of this new claim could be termed facts that have already appeared in the ET1, the harassment claim is entirely new. It was not raised until 11 months after the claim was presented. Applying the tests in the Authorities cited above and conducting the careful balancing exercise that I am required to do, I consider that the prejudice to the Respondents of having to deal with a wholly new claim in harassment, previously unmentioned, is greater than depriving the Claimant of the claim.

(37) The Claimant's claim in s.15, 20 and 21, if well founded, will result in potential compensation which would be equivalent to, or very close to that awarded if an additional harassment claim were to succeed.

(38) The harassment claim is very likely to lengthen and complicate the trial of this matter. I therefore refuse the amendment to add a harassment claim in its entirety.

Further Case Management

(39) Pursuant to the above decision on the Application to Amend, we discussed then how best to move matters forward. It was felt sensible in the current climate to list the matter for a Full Merits Hearing today and for the parties to then produce final pleadings before having a further telephone Preliminary Hearing Case Management discussion to consider further directions between that date and the Full Merits Hearing.

(40) Accordingly, I make the below Orders.

Other Matters

(41) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at: *www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/*

(42) 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) …*" **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**.

(43) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.

(44) If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

(45) The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to Rule 53 of the Employment Tribunal Rules of Procedure

1. Full Merits Hearing

That the matter be listed to be heard by way of a Full Merits Hearing on **8, 9, 10, 11 and 12 January 2024** before an Employment Judge sitting with Members, in the **Watford Employment Tribunal**, **Radius House, 51 Clarendon Road, Watford, Herts., WD17 1HP**. The Hearing will take place by Cloud Video Platform (CVP). The parties should attend on the first day of the Hearing to enable matters to proceed at 10am.

2. Claimant's Amended Claim

That pursuant to the above decision, the Claimant's do produce an amended particulars of claim and serve the same on the Respondents and the Tribunal, on or before **4 November 2022.**

3. Respondent's Leave to Amend ET3

That pursuant to the Claimant's amended claim above, the Respondents do have leave to file an amended ET3 to deal with the Claimant's amended pleadings, such document to be filed and served, on or before **25 November 2022.**

4. Further Preliminary Hearing Case Management Discussion

4.1 That there be a two hour Preliminary Hearing to discuss case management matters, before a Judge sitting alone, to take place by Telephone, on **20 January 2023**, at 2pm. Two hours will be allowed. That is notionally listed in the **Watford Employment Tribunal**, but is by Telephone therefore can be dealt with anywhere within the Region.

4.2 At that Hearing, the Claimant's will have finalised their pleadings and should attend with an appropriately completed Case Management Agenda and Draft List of Issues, to enable directions to be finalised to take place between that Hearing and the Full Merits Hearing listed above.

5. Judicial Mediation

5.1 That the Claimant did express at the end of today's Hearing, a willingness to enter into a Judicial Mediation. The Respondents indicated that they would seek instructions. I encouraged them both to discuss that possibility, should the Respondents be prepared to contemplate it. I explained that it is likely that the Tribunal would be happy to consider Judicial Mediation at any point. The parties indicated they would attempt to discuss it going forward and if it became a possibility then they would contact the Tribunal.

5.2 The parties are referred to the "*Judicial Mediation*" section of the Presidential Guidance on 'General Case Management', which can be found at:

www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/.

6. Complaints and Issues

The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and / or incomplete in any important way.

7. Other Matters

7.1 The above orders were made and explained to the parties at the Preliminary Hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

7.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.

7.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the Tribunal's permission except that no variation may be agreed where that might affect the Hearing date. The Tribunal must be told about any agreed variation before it comes into effect.

7.4 **Public access to Employment Tribunal decisions**

All Judgments and Reasons for the Judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

7.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

7.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and / or (d) awarding costs in accordance with rule 74-84.**

Employment Judge K J Palmer

Date: 4 January 2023

Sent to the parties on: 5 January 23

For the Tribunal