



EMPLOYMENT TRIBUNALS

Claimant: Mr I Hayes

Respondents: 1. Flextronics Manchester
2. Flextronics Global Services (Manchester) Limited

HELD AT: Manchester

ON: 1 March 2018

BEFORE: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: Mr K Boadu, Solicitor

Respondents: Mrs T Marsden, Solicitor

CASE MANAGEMENT ORDER

PRELIMINARY HEARING

Employment Tribunals Rules of Procedure 2013

Rule 53(1)(a)

At a preliminary hearing held at Manchester by way of telephone conference call, and having heard from the representatives identified above, Employment Judge Franey made the following Case Management Orders:

1. By consent the second respondent is removed from the proceedings under rule 34 but the title of the remaining respondent is amended to Flextronics Global Services (Manchester) Limited. The response form lodged by the second respondent is treated as lodged by the remaining respondent.
2. A note of the reasons for this order, and of other matters discussed in this preliminary hearing, appears as Annex A.
3. The complaints pursued and the issues which arise are set out in Annex B.
4. The timetable of steps to be taken with which the parties must comply appears in Annex C.

5. The case is listed for a final hearing on **Monday 9, Tuesday 10 and Wednesday 11 July 2018**. The hearing will be at **Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA**. It will begin at **10.00am** each day or as soon thereafter as practicable. The Tribunal will be composed of an Employment Judge sitting with non legal members. The time estimate of three days includes time for the Tribunal to read the witness statements and documents, hear oral evidence and receive submissions, deliberate and provide an oral judgment with reasons. It also includes time for remedy to be determined if it arises. An indicative timetable for this hearing appears in Annex C. The parties and their representatives will be expected to cooperate with each other and with the Tribunal to ensure that all matters are addressed within the time allocated.
6. This final hearing has been fixed taking account of availability details supplied in the standard agenda form for this hearing. However, any application to change these dates due to information about witness availability not to hand at the preliminary hearing must be made within seven days of the date upon which this Case Management Order is sent to the parties. Any such application must identify the witness or witnesses who are not available, the relevance of his or her evidence, and the reason why he or she is not available. Availability details for a three day hearing between 1 July and 30 September 2018 must be supplied. The application must be copied to the other party, which must promptly supply details of its own availability in the same period whether or not the application is opposed.
7. Any application for a postponement made more than seven days after this Case Management Order is sent to the parties will be entertained only in exceptional circumstances.

Employment Judge Franey

1 March 2018

ORDER SENT TO THE PARTIES ON

14 March 2018

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order 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.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

ANNEX A

Introduction

1. This was a preliminary hearing for case management purposes at which all parties were legally represented. Helpfully the representatives had cooperated to agree the agenda form and a draft List of Issues.

Correct Respondent

2. The early conciliation certificate obtained by the claimant was in the name of the first respondent. He issued proceedings against both respondents. The claim was accepted against both respondents but there is no early conciliation certificate in relation to the second respondent. If the claimant were to pursue his claim against the second respondent only by withdrawing against the first respondent that would potentially leave a jurisdictional issue to be determined at the final hearing, as reflected in the draft List of Issues.

3. To their credit both representatives accepted that this was a situation in which the intricacies of the early conciliation provisions should not be interpreted so as to deprive the claimant of a remedy if his legal complaints prove to be well-founded. After discussion it was agreed that the appropriate course of action was for the second respondent to be removed from the proceedings (because there was no early conciliation certificate) but for the title of the first respondent to be amended by consent into the proper corporate title. This enables the proceedings to continue against the right respondent and to be determined on their merits.

Case Summary

4. This is a brief summary of the case intended to help Employment Judges who make case management decisions in future. It is not a substitute for the full pleaded factual case on both sides.

5. The claimant was employed as a business development manager for over ten years. He was diagnosed with depression and anxiety in June 2011. He maintains that he was a disabled person by reason of those conditions, for which he takes medication. The claimant had periods of sick leave due to depression and anxiety for about three months in 2011 and a further three months in 2014.

6. In 2016 he received a first written warning for poor performance under the capability process. He was off sick with anxiety and depression between 28 November 2016 and 4 April 2017. He then returned to work on a phased basis, resuming full-time hours in early May 2017. A performance improvement process was then followed because of alleged failure to meet targets. That culminated in his dismissal at stage 3 of the procedure on 8 August 2017. He did not appeal his dismissal.

7. The claimant says that this was an unfair dismissal and discrimination arising from disability which cannot be justified. The respondent says that it was a fair dismissal for capability, and that there was no breach of the Equality Act 2010. The

respondent does not admit that the claimant was a disabled person at the material time.

Complaints and Issues

8. We discussed the complaints and issues briefly and Annex B sets out the legal issues based on the draft list helpfully provided by the representatives.

9. It should be noted that there is a dispute about the “something” on which the claimant relies under section 15. He says that the dismissal was because of his sickness absence, which arose in consequence of his disability. The respondent says the dismissal was not because of his sickness absence but rather because of his poor performance when at work.

Time Limits

10. The response form raised an issue about time limits but after discussion it was agreed that the claim was within time. It appeared that the time limit issue was a consequence of the early conciliation point, since if there had been no valid early conciliation with the second respondent the claim would be out of time against that respondent. Time started to run on 8 August 2017 and early conciliation against the respondent began on 19 October 2017. The early conciliation certificate was issued on 19 November 2017, meaning that the claim was presented on the last day for doing so, 19 December 2017.

Remedy

11. The claimant has not yet found other work. If he wins his unfair dismissal complaint he seeks compensation, not re-employment. Details will be contained in the Schedule of Loss which should also indicate the amount sought in respect of injury to feelings. There will be pension loss but it was a defined contribution scheme and therefore the Tribunal can take a simple approach of using the lost value of the employer’s contributions as the measure of loss.

Disabled Person?

12. This is presently disputed and a timescale was agreed for the claimant to provide a disability witness statement and accompanying documents. The parties were agreed that if this remains in dispute it should be addressed at the final hearing, since a preliminary hearing would not save any time given that the unfair dismissal complaint will proceed come what may.

Estimated length of hearing

13. The claimant will give evidence himself and also call his wife who was present at some of the relevant meetings. The respondent will call the dismissing officer, Richard O’Mahoney, and the Human Resources adviser, Emma Jackson. After discussion we agreed that a three day time estimate was appropriate based on the indicative timetable recorded in Annex C.

14. The parties have a window of opportunity after this Case Management Order is issued in which to apply for the hearing dates to be changed.

Dispute Resolution

15. Both sides are represented by employment lawyers so judicial assessment would not be appropriate.

16. The claimant is interested in judicial mediation but the respondent will need to see the Schedule of Loss before confirming its position. If the respondent is interested in judicial mediation it should confirm that to the Tribunal by 4.00pm on **Thursday 29 March 2018**. It is likely the Tribunal will then offer judicial mediation. If that is the case it might be appropriate to delay the case management timetable to allow the mediation to take place before both sides incur further significant cost. That can be considered when the respondent confirms its position on judicial mediation. If the claimant can serve his schedule of loss quickly and the respondent confirm its position promptly thereafter, it is more likely that an early mediation can be convened.

17. In the meantime ACAS remains available to help the parties resolve their differences if appropriate.

Complaints and Issues

Unfair Dismissal – Part X Employment Rights Act 1996

1. Can the respondent show that the reason or principal reason for dismissing the claimant was a potentially fair reason on relating to the capability of the claimant for performing work of the kind which he was employed to do?
2. If so, was dismissal fair or unfair under section 98(4)?

Discrimination arising from disability – Equality Act 2010

3. At the material time was the claimant a disabled person by reason of anxiety and depression?
4. If so, can the respondent show that it did not know and could not reasonably have been expected to have known that the claimant had that disability?
5. If not, are the facts such that the Tribunal could conclude that:
 - (a) In dismissing the claimant the respondent treated him unfavourably because of sickness absence; and that
 - (b) His sickness absence arose in consequence of his disability?
6. If so, can the respondent nevertheless show that it did not contravene section 15, whether because dismissal was a proportionate means of achieving its legitimate aim (of ensuring that the business won enough new work to continue to operate) or otherwise?

Remedy

7. If any of the above complaints succeed, what is the appropriate remedy? Issues likely to arise include:
 - (a) The basic award for unfair dismissal;
 - (b) The compensatory award for unfair dismissal, whether the claimant took all reasonable steps to mitigate his losses, and whether there should be any reduction pursuant to the principle in **Polkey v A E Dayton Services Limited [1988] ICR 142**;
 - (c) The appropriate award for injury to feelings, financial losses and interest if disability discrimination succeeds; and
 - (d) Whether any award should be reduced by up to 25% on account of an unreasonable failure by the claimant to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 in his failure to pursue an appeal against dismissal.

ANNEX C

*Note: References to **Guidance Notes** are references to the Notes attached to the Presidential Guidance on General Case Management issued on 22 January 2018. Reading that Guidance will help someone unfamiliar with Employment Tribunal procedures understand how to prepare the case. It is available at*

<https://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/>

1. By 4.00pm on **Thursday 15 March 2018** the claimant must have provided to the Tribunal and to the respondent a schedule setting out the losses for which compensation is sought should any of the complaints succeed, together with details of any other remedy sought in these proceedings. The claimant must at the same time send to the respondent copies of all documents showing the claimant's income since employment ended (earnings and state benefits) and copies of any documents showing what steps have been taken to find alternative employment. Further information about remedies can be found in **Guidance Note 6**.
2. By 4.00pm on **Thursday 12 April 2018** the claimant must have provided to the respondent a witness statement setting out all the facts on which he relies in support of his contention that he was at the material time a disabled person by reason of depression and anxiety, accompanied by copies of all medical reports, records and other documents on which he relies in support of that contention.
3. By 4.00pm on **Thursday 12 April 2018** each party must have provided to the other a list and copies of all the documents in its possession or control relevant to the issues in the case. This includes documents that are relevant to remedy only. A document must be included whether it supports or hinders a party's case. A party must make a reasonable search for documents not immediately to hand. Further information about disclosure can be found in **Guidance Note 2**.
4. By 4.00pm on **Thursday 19 April 2018** the respondent must have confirmed in writing to the Tribunal and to the claimant whether it now accepts that the claimant was a disabled person at the material time, or whether it continues to dispute it (and, if so, why). If disability remains in dispute and either party considers that further medical evidence would assist the Tribunal, a proposal must be made as to the directions appropriate to enable medical evidence to be jointly obtained. The other party must respond promptly to any proposed directions and these will be considered by an Employment Judge on paper without a further preliminary hearing unless either party considers a further hearing would be appropriate.
5. By 4.00pm on **Thursday 19 April 2018** the respondent must have provided to the claimant a draft index to the bundle of documents for the final hearing. That bundle must be agreed, and one copy supplied by the respondent to the claimant by 4.00pm on **Thursday 26 April 2018**. Further information about hearing bundles can be found in **Guidance Note 2**.

6. By 4.00pm on **Thursday 3 May 2018** each party must have provided to the other a written statement from every person (including a claimant or an individual respondent) that it is proposed will give evidence at the final hearing. The witness statements must be typed in numbered paragraphs and signed by the witness. They should set out in logical order the facts about which the witness wishes to tell the Tribunal. Where reference is made to a document the page number from the hearing bundle must be included. Unless the Tribunal hearing the case directs otherwise, the witness statements will be read by the Tribunal and stand as the evidence of each witness before that witness is questioned by the other parties. For the avoidance of doubt this order does not require simultaneous exchange of witness statements, but the parties are free to proceed on that basis if they so wish. However, any witness statements disclosed after this date may not be relied upon at the final hearing without permission from the Tribunal. Further information about witness statements can be found in **Guidance Note 3**.

7. Not less than three working days before the first day of the final hearing the respondent must have provided the claimant with a draft cast list and chronology of events in neutral terms. These must be agreed prior to the final hearing.

8. By 9.30am on the first day of the final hearing (so they can be brought on the day not sent in advance) the claimant must have provided to the Tribunal five copies of the claimant’s witness statements, and the respondent must have provided five copies of the respondent’s witness statements and the agreed hearing bundle, together with the cast list/chronology. These copies are for the use of the Tribunal, the witness table and (if appropriate) any members of the public who attend the final hearing.

9. Subject to the discretion of the Tribunal hearing the case, the anticipated timetable for the final hearing appears below. Further information about what happens at a hearing can be found in **Guidance Note 5**.

Day	Morning	Afternoon
1	Initial discussion/reading/start claimant’s witnesses	Finish claimant’s witnesses
2	Respondent’s witnesses	Respondent’s witnesses/submissions
3	Deliberations	Judgment and (if it arises) remedy