EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr K Wright	**v**	**Boots Management Services Limited**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: **Nottingham** **On: Friday 16 February 2018**

Before: **Employment Judge P Britton (sitting alone)**

Appearances
For the Claimant: **In Person**
For the Respondent: **Ms C Staples, Solicitor**

JUDGMENT

1. The correct Respondent is Boots management services Ltd and the Respondent is amended accordingly.

2. By consent the claim of sex discrimination is dismissed upon withdrawal.

3. By consent the Claimant is permitted to amend his claim so as to bring the following:-

3.1 A claim for detrimental treatment by reason of whistleblowing pursuant to Section 47B (1) of the Employment Rights Act 1996.

3.2 To bring a claim of disability discrimination pursuant to the provisions at Section 15, Section 20-21 and Section 26 of the Equality Act 2010.

CASE MANAGEMENT SUMMARY

Introduction

1. The claim (ET1) was presented to the Tribunal by the Claimant on 16 November 2017. He had prepared it himself. It is a comprehensive document. He remains in the employment of the Respondent which he perhaps understandably named as Boots UK Limited but actually the employees are all these days formally

employed via Boots Management Services Limited and therefore with his leave I am amending the Respondent to read as such.

2. The comprehensive pleading in terms of the factual scenario is labelled as one of sex discrimination; and that is because inter alia one of the perpetrators of what he described as victimisation was his male line manager preventing him from collecting his daughter from school on a Friday when he had always been allowed to do that prior thereto. But as I read it what this case is really all about is the Claimant being subject as set out by him to an extensive series of what as alleged would be detrimental treatment him having made a protected interest disclosure: and in that respect pursuant to Section 43A and 43B and thence 47B (1) of the Employment Rights Act 1996 (the ERA). That this is really essentially a claim about whistleblowing was made clear in the additional detailed particularisations that he has sent in to the Tribunal, in particular the first of those documents on 6 December. He is also in terms of what happened pleading that detrimental treatment is still continuing; and of course he can extend his claim in that respect apropos the line of authority which I will label as **Prakash**. Also in the run up to today he has added that he is wishing to add a claim for disability discrimination. Finally on 13 February for the purposes of today he sent in the most comprehensive of documentation as to his claim including in scheduled format. He copied this to the Respondent's solicitors who therefore have had sight of the same.

3. So what essentially is his claim about? He remains in the employ of Boots. Since 13 January 2005 he has been employed as a corporate investigation manager. He is ex-CID. He works in a small team where his Line Manager is Alex: also I gather ex Police. I am well aware of course that in many large organisations there are such teams often known as "loss prevention". Their job is to investigate such as fraud or theft within the business. What he is pleading is that he uncovered by way of an investigation in April 2016 evidence of what would prima facie be serious wrong doing by a senior manager responsible for Boots stores I gather inter alia in the West End of London. Boots has a policy of not allowing the bulk sale out of its stores of baby milk powder. I am aware as a Judge with extensive experience that such a prohibition could be because baby milk powder can be used in the process of "cutting" illegal drugs. I am not saying at this stage that this was necessarily the case here. But it would explain the Claimant's concerns. Suffice it to say that he put together an investigation and wanted the relevant area manager suspended. Alex was opposed to that or it seems pursuing the investigation because on his long term association with the suspect manager. The Claimant was insistent the matter should proceed. Thereafter what he pleads is a chain of detrimental acts against him as a consequence of which he became seriously mentally unwell and went off sick from work in August 2017. In the context of what had happened circa that time he raised a grievance and there was an investigation by Boots and a grievance hearing on 17 October. His complaints were not upheld. Subsequently he appealed. I learnt today that recently he has had the appeal outcome and in certain aspects he has been upheld; an example being finding that some remarks made to him apropos his mental health issues should not have been made. Also some aspects of the grievance investigation have been found wanting. On the other hand the mainstream complaints he made have not been upheld. So it seems to me that now events are in that respect at an end because of course the appeal is his last internal port of call. As to his health a week or so ago he returned on a phased return to work following one of the recommendations in the appeal findings. Another was that there should be mediation between the Claimant and in particular Alex because obviously there is nowhere else for the Claimant to go within Boots given the nature of his work; thus the differences between them need to be reconciled. That mediation started has started.

4. However as to the phased return, the Claimant says that he would not have gone back to work as of yet, because he still considers himself not fully fit, but had to do so because otherwise his pay would have stopped. I gather this is because of the length of the absence and thus the kicking in of the Respondent's sick pay policy. He tells me that an aspect of the shortcomings in the treatment of him by Boots is that in the latter stages prior to is returning to work he had made detailed submissions as to why his pay should be continued and which were in effect ignored by the HR Officer who simply recorded that "Keith would like his pay to continue" rather than lobbying on his behalf which was the Claimant's understanding.. The final point he is raising in this respect is that there was no keeping in touch with him and in particular welfare visits during the months of his absence and which he says is not what usually happens. In passing I am aware that Boots like most substantial businesses has a policy for managing sickness absences including the long term. This would include a referral to OH. However the case is muddied in that respect because on his own admission the Claimant refused to cooperate with obtaining an occupational health report because he had lost "trust" in the integrity of the process and was fearful as to how it might then be used.

The claims as now clarified

5. So what I have is first a claim of detrimental treatment by reason of whistleblowing. Prima facie from what I have read I agree with the Claimant's written particularisation/submissions that what he raised to his employer would constitute a protected disclosure and in particular engage Section 43B (1) (a): In other words the information tended to show that "a criminal offence has been committed, is being committed or was likely to be committed".

6. As to disability discrimination he is relying on his being mentally unwell by at latest 15 August 2017. In the detailed documentation he has sent in he has given what I would describe as an impact statement as to how this affected him. He has set out by name the various prescription only anti-depressants and other drugs he has been prescribed. . He remains on antidepressants. So the first issue would become as to whether at the material time of events he was a disabled person within the definition at Section 6 in Schedule 1 of the Equality Act 2010 and thus as follows:-

5.1 Did he, and indeed does he still, suffer from a mental impairment?

5.2 At the time of the detrimental treatment, and in this case a chain of events presumably ending with the appeal hearing, suffer from such an impairment, which absent the beneficial effects of his medication, would have more than a minor or trivial impact on his ability to undertake normal day to day activities?

5.3 Finally as at the date of material events had this identified condition with this impact on his activities lasted or was it likely to last for more than 12 months. Well of course if it commenced circa 15 August 2017, then the Tribunal will need to determine if at say the outcome of the grievance appeal that condition was still in existence and as to whether absent his medication it would in fact continue through to circa 14 August 2018.

7. I am with the Respondent that in circumstances where they have never had an occupational health report for the reasons I have gone on to that it is a reasonable request that they have the Claimant's full medical records and so I am going to order that.

8. As to the claims, the Claimant withdraws the claim for sex discrimination because it's really all part of a claim for detrimental treatment pursuant to Section 47B of the ERA; and thus I am with the leave of the Claimant amending the first head of claim relating to the stopping him collecting his children to one, as part of a series, of detrimental treatment by reason of whistle blowing. The Respondent does not oppose.

9. The Respondent will also not stand in the way of my allowing the Claimant to add by way of amendment to his claim a claim of disability discrimination: prima facie on the scenario engaged is failure to make reasonable adjustments pursuant to Section 20-21 of the EQA; unfavourable treatment because of something arising in consequence of his disability pursuant to Section 15; and possibly harassment pursuant to Section 26 and in relation to various remarks which he has pleaded in his extensive schedule.

10. However what his otherwise extensive particularisation, and it is in schedule format, does not do is to make plain what are the acts of disability discrimination relied upon; who was the perpetrator; the date; and most important of all as to which of these sections of the EQA he is relying upon and why. He is now going to provide that additional particularisation.

11. The Claimant has supplied a schedule of loss. It is for circa £350,000. But the Claimant has suffered no loss of earnings and the Tribunal has no jurisdiction to entertain a claim of personal injury as such. In other words if the Claimant says the Respondent by its treatment of him in relation to the whistleblowing caused him to be a disabled person, then that is not a claim for this Tribunal. He must take it to the County or High Court. If on the other hand he is seeking additional compensation on the basis that having become disabled the treatment of him aggravated that disability, then usually the Tribunal would deal with that in terms of the overall award for injury to feelings. If I look at the case in that respect and taking his pleaded scenario at its highest I explained to the Claimant what is meant by the Vento bands and how they have been revised and the recent Presidential Guidance.. Suffice it to say that at present, and it's only of course a preliminary view and no more than that, I would be very surprised if this claim got outside the middle band. It certainly would not get any where near what he is claiming. Therefore I ask the Claimant to reflect upon that.

12. This is relevant in terms of expectations in that I am of the opinion that this case is suitable for Judicial Mediation. I explained, particularly for the benefit of the Claimant, what this entails.

13. The Claimant was initially reluctant to contemplate Judicial Mediation because he wants his case tried by the Tribunal. But I observed that the issues in this case will of course depend on findings of fact; and litigation is for both sides by and large in terms of outcome not assured; hence that Judicial Mediation may be a good course of action if it enables the parties to reach a settlement with which they can so to speak live with and thus avoids what would be in my opinion in this particular case a lengthy hearing and certainly considerably longer than the 3 days which are currently allocated for it as long away as December 2018.

14. So what that means is that the parties are going to think about whether or not to agree to Judicial Mediation.

15. Finally I am relisting at this stage a further Preliminary Hearing to take matters further forward post the compliance with the directions I am going to give. I am listing that hearing for 27 April 2018. It will be an attended Preliminary Hearing and because I think it will assist the parties. It may be that there will be preliminary points to address at that hearing but that will become clearer once the Respondent's been able to consider the additional particularisation and the medical notes.

16. Should any preliminary issues such as disabled or otherwise have been resolved, and if the parties have agreed to Judicial Mediation, then I would envisage that we could convert the Preliminary Hearing into a Judicial Mediation. This would only require a very short telephone case management discussion in the days prior thereto to formally confirm the parties' willingness.

17. Against that background I make the following directions.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Claimant will serve upon the Respondent a complete set of his medical notes by Friday **16 March 2018**.

2. By **22 March 2018** he will have served upon the Respondent and the Tribunal the further particularisation as to his disability discrimination claim.

3. Having received both that particularisation and the medical notes the Respondent will by Friday **13 April 2018** reply. It of course has liberty to amend the current response; and unless it goes into territory not otherwise covered by that which I have explored today then the amendments are hereby granted. Otherwise of course application will need to be made. In any event first it will need to plead as to whether the identified disclosures constitute protected qualifying disclosures for the purposes of s43B of the ERA. If it does not, it must spell out why and whether it has an application requiring determination at the preliminary hearing.

4. The Respondent will also confirm its position as to the disability and whether it is conceded as such. If not it will submit its proposals for the way forward on the matter .

5. This matter is hereby listed for a further attended Preliminary Hearing at the Nottingham Employment Tribunal, 50 Carrington Street, Nottingham NG1 7FG before a Judge sitting alone on **Friday 27 April 2018** commencing at 10:00 am. It is at present listed for 3 hours.

6. Finally the parties will inform the Tribunal as soon as possible **in any event not later than 14 days before** the scheduled second Preliminary Hearing on 27 April 2018 as to whether or not they are prepared to enter into Judicial Mediation. If they are then I envisage utilising 27 April 2018 for that purpose and extending the hearing period to one day.

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.

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Employment Judge P Britton

Date:23 February 2018

Sent to the parties on:

27 February 2018

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For the Tribunal:

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