Case Number: 1803624/2019

EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms A Wright	v	**The Governing Body of St Stephen's CE Primary School**

PRELIMINARY HEARING

Heard at: Leeds **On: 12 November 2019**

Before: Employment Judge JM Wade

Appearance:

For the Claimant: **Mr Mugliston (counsel)**

For the Respondent: **Mr Menham (solicitor)**

JUDGMENT

The claimant's representative on the record (the NASUWT) shall pay wasted costs of preparation and attendance at this hearing summarily assessed at £708 plus VAT.

REASONS

1. By a claim form presented on 3 July 2019, the Claimant brought complaints of unfair dismissal, discrimination arising from disability and a failure to make reasonable adjustments. The Respondent defended the claims. In essence the Claimant is a disabled person and was dismissed by the Respondent, it contends, due to ill health on 26 February 2019. The claimant's representative at all times on the Tribunal's record is her union, the NASUWT. The claimant commenced ACAS conciliation on 24 May, only a day before the time limit for dismissal related complaints expired; a certificate was issued on 10 June.

2. At a case management hearing on 28 August 2019 the Employment Judge identified that the dismissal related complaints were in time, but limitation was in issue in relation to the reasonable adjustment complaints. He also said this:

   "*Nothing in this note should be taken as a finding of fact.*

   The purpose of the note is to assist a subsequent Tribunal and the parties.

The Respondent concedes that Claimant had or has a disability falling within section 6 of the Equality Act 2010 namely she suffers from PTSD and/or vertigo and/or a knee injury.

It is conceded that the material time for the purposes of disability discrimination is from 3 September 2018 until the completion of the internal disciplinary proceedings.

The Respondent concedes that it knew or ought to have known the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time and that she was put at a disadvantage.

I have concerns as to how the Claimant has cast her case both in respect of the "something" in relation to the complaint under section 15 of the Equality Act 2010 and also in respect of the PCPs in relation to the complaint of a failure to make reasonable adjustments contrary to section 20/21 of the Equality Act 2010.

As I explained to the parties it is not for the Tribunal, particularly where a Claimant is professionally represented, to seek to recast such matters. How a case is pleaded may make the difference from a claim succeeding or failing. I say no more on the issue."

3. He made case management orders including disclosure by 16 September 2018 and listed a hearing from 2 to 6 December 2019. That was within the six months period in which the Tribunal seeks to hear Equality Act and unfair dismissal complaints.

4. I was told today that on 9 September the claimant's representative took advice from the union's solicitors. Quite properly I cannot know the nature of that advice. The chronology then is that on 30 September 2019 an application to amend the claimant's particulars was presented by her representative. It was quite properly set out in track changes and accompanied by a revised list of issues.

5. On 1 October 2019 the respondent opposed the application setting out the Selkent principles and the well known Chandok principle: "The claim, as set ou in the ET1 is not something just to set the ball rolling as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so……".

6. The response addressed in detail each of the Selkent factors and made reference to the Presidential guidance. As to prejudice it said. "should the application be granted (and the respondent strongly objects to the same) then the respondent will seek its costs of attendance at the preliminary hearing; repleading its response form and grounds of resistance; a further meeting with witnesses; time incurred in a further disclosure exercise; and amending or revising witness statements (to the extent these have to be revised)." The respondent said: it would be inequitable for the respondent (a school in inner city Bradford) to be placed at such significant further disadvantage [that is costs] (having already suffered the prejudice detailed above) as a result of the clear faults of the claimant's representatives. There was no response to that opposition or comment on it from the claimant's representative.

7. The Employment Judge directed a hearing to decide the applications and that was before me today. I decided the following having heard submissions on behalf of the parties:

Nature of the amendments

8. As to the section of the particulars headed “Facts”, the amendments were further details likely to have been confirmed on disclosure and unlikely to be in dispute, or, for example, assertions as to the claimant’s expectations and feelings, likely to have been included in her witness statement in any event and therefore the subject of further instructions, whether contained in an amendment or not.

9. The new matters relied upon as grounds of unfairness in the dismissal were likely to have been examined by the Tribunal in any event as part of the overarching circumstances, particularly in light of the Section 15 complaint about dismissal, and existing reasonable adjustment complaints, or were additional facts of the kind referred to above.

10. The amendments to the section 15 complaint were a helpful focus on the dismissal case and in effect a withdrawal of complaints earlier in the chronology.

11. The proposed amendment to the reasonable adjustment complaint was not consistent with the overriding objective, and in my judgment amounted to a representative acting unreasonably by failing, on a second attempt, to set out in a revised pleading the components of a reasonable adjustment complaint: the provision, criterion or practice (“PCP”) relied upon, and how it is said that PCP put the claimant at disadvantage in comparison with people who are not disabled.

12. As the Employment Judge on the last occasion noted, it is not for the Tribunal to undertake a pleading task for a professionally represented party; with litigants in person Employment Judges will seek to identify from lay pleadings the components relied upon in a reasonable adjustment case, but it is not in the interests of all the users of the Tribunals for this to be undertaken in a case such as this.

13. The relevant components had been put in the revised list of issues by the representative, but there was no application before me today to address that in yet another amendment. It was also the case that the respondent’s solicitor, as early as August, before the preliminary hearing, had asked the claimant’s representative in the clearest terms to identify the missing element of the reasonable adjustment complaint (relative disadvantage).

Time Limits

14. The application in relation to reasonable adjustments is made more than a year after the start of events relied upon (the start of the school year in 2018). Dismissal and appeal took place in February and May of 2019 and therefore changes to those complaints are less stale. Happily the time limit issue is not as indicative against amendment in the complaints about dismissal, and not decisive in relation to the reasonable adjustment complaints.

Timing and manner of the application

15. There is nothing surprising or unjust about a post disclosure amendment application, and some of the above are those. The respondent pointed to the delay to the end of September, when an application is specifically invited in the case management agenda and could therefore have been made at or before the August hearing. Having re-assessed matters after that hearing, it is not inordinate delay for the claimant to give instructions and for matters to be addressed by 30 September, but as to the manner of the application, particularly in reference to the reasonable adjustment amendment, I repeat again the comments above.

16. I also consider that the dismissal complaints were only just in time; the representative left matters to the last minute to plead this case at all. This application is perhaps addressing matters that were dealt with in haste in the first place.

17. As to prejudice, and extra cost to the respondent, the respondent's case about the reason for dismissal mirrors the claimant's Section 15 amendment as to reason (or the "something"); there can be no added cost or prejudice in an issue being narrowed. Similarly although different legal frameworks apply (Section 15 and section 98 ERA), the factual territory will have to be examined in the round in both in any event. I consider the balance lies with the claimant on these matters and I exercise my discretion to permit those amendments.

18. As to the reasonable adjustment complaint amendment, the prejudice to the claimant is little; she already has pleaded reasonable adjustment complaints and has had the opportunity to seek to improve them, by applying at the case management stage; it is not in the interests of justice to permit a second, and defective attempt to properly plead this complaint, today. She and her representatives may reflect and decide what of the existing complaints to pursue at the hearing, but neither the Tribunal nor the respondent ought to bear the further cost and expense of clarifying this complaint further. Being a school this is all public purse expense. For all these reasons I do not exercise my discretion to permit that amendment.

19. The respondent's application for wasted costs must be addressed pursuant to Rule 80. The representative has had the opportunity to comment on the application because it was included in its correspondence above. The fact that there was no comment from the representative union before today, nor any agreement between the parties is regrettable. Today, having his opportunity to make submissions, Mr Mugliston says he cannot do other than surmise whether the responsibility for the pleadings issues have arisen because of the representative union's actions, or solicitors instructed by the union, or the claimant's actions, or otherwise. He also says to deal with it today would not be fair. If I am against him, he seeks to make submissions on both causation, in relation to the schedule of loss, and quantum.

20. It being convenient to hear from him on those matters, and from my own observations I consider the proportionate grade of fee earner on summary assessment is a grade B; that rate is £177 per hour; I consider, again, that the costs, other than attendance today, have not yet been incurred and may not be, or may have been incurred anyway given many of the matters concerning dismissal would expect to be covered by the claimant's witness statement and be the subject of further instructions. I do consider that that the unreasonable conduct above

concerning the reasonable adjustment pleading has resulted in this hearing to adjudicate the matter (without that it would in all likelihood have been capable of being addressed on the papers); some of the preparation has undoubtedly been occasioned by that. A proportionate summary assessment of what has reasonably and necessarily been occasioned by the unreasonable conduct, then, is four hours to include preparation, attendance and travel, at the grade B rate, namely £177.

21. Coming to the overarching fairness, compliance with the overriding objective, and proportionality; the representative union has had notice that the application would be made as early as 1 October and has had the opportunity to inform its client; it has had the opportunity to comment or to re-visit its application, or to seek to make representations; it has not done so save for instructing Mr Mugliston to make oral submissions today. An application is not being pursued against the claimant; and indeed if that were the case, the matter would have to be adjourned. I consider I can take judicial notice, based on dealings with litigants in person and representatives, that the unreasonable conduct I have identified is unlikely such that I can find it is not that of the claimant teacher, in drafting her complaints; but the conduct of the representative on the record. It is not in the interests of justice for reasons of proportionality to have this matter come back for a further hearing at further expense for all. If it is in fact the conduct of solicitors not on the record, but who were instructed by the respondent union, then that is a matter the union can resolve with those solicitors. I will direct that this Judgment and reasons be sent also to the claimant in compliance with Rule 82, albeit I am sure her union will have made her aware of the application contained within the respondent's letter of 1 October.

Employment Judge JM Wade

Date: 12 November 2019

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Judgment sent to the parties on:

13 November 2019