



EMPLOYMENT TRIBUNALS

Claimant: Ms S Dos Santos

Respondent: The Governing Body of Lark Hall Primary School

Heard at: LONDON SOUTH

On: 31 August 2017

Before: Employment Judge Siddall

Representation

Claimant: In person

Respondent: Ms S Bowen of Counsel

JUDGMENT

1. The claim was not struck out with effect from 30 June 2017 on grounds that there was a material failure to comply with the Unless Order dated 6 June 2017.
2. The Claimant is given leave to amend her claim to include a claim of harassment related to the protected characteristic of disability, in relation only to the events of 5 September 2016 involving a person named 'Sabira K'.
3. The application to amend the claim to include allegations against the deputy head teacher Victoria Bassett is refused.
4. The claims are in time.
5. The application to either strike out the claims as having no reasonable prospect of success, or to order the Claimant to pay a deposit, are refused.
6. A wasted costs order pursuant to rule 80 of the Employment Tribunal Rules of Procedure 2013 is made against the Claimant's former representative Brown and Co solicitors who are ordered to pay the Respondent the sum of £2842.

REASONS

1. This preliminary hearing was called to consider a number of matters identified by Judge Baron in his order dated 28 July 2017.
2. The first matter related to whether the claim had been automatically struck out for a failure to comply with the Unless Order dated 6 June. Having considered the further particulars supplied by the Claimant on 6 June I reached the decision that

there had been material compliance with the Unless Order, as the particulars, although lacking in some detail, could be substantially related both to the Request for Further particulars and to the matters set out in the Claim Form.

3. I then turned to the Respondent's argument that some of the matters raised in the Further particulars amounted to new claims, for which an application for amendment would be required, and which the Respondent argued should be refused.
4. In item 3 of paragraph 8 of the employment tribunal claim form, it states 'on 5 September 2016 the Claimant raised a grievance into the disability related harassment she had experienced'. The Claimant confirmed in her further particulars dated 6 June that this alleged harassment related to an incident with another employee, 'Sabira K' on 5 September 2016. The claim form is ambiguous about whether the reference to harassment is intended to be a free standing claim. Item 5 of paragraph 8 on the claim form refers to claims of 'discrimination because of disability and victimisation'. In the request for further particulars, the Respondent asked a specific question about whether the Claimant was only claiming direct discrimination and victimisation. In the further particulars dated 6 June the Claimant's legal representative confirmed that these were the 'totality' of the claims. However in the same document the Claimant had included details of the incident on 5 September and during the course of the hearing today she confirmed that she wanted to pursue this as a separate and free standing claim of disability related harassment.
5. The pleadings set out in paragraph 8 of the claim form are poor: they are unclear and lacking in detail (hence the request for Further particulars). However item 3 of the claim form must have put the Respondent on notice that the matters which led to the Claimant's grievance would be raised during the course of any proceedings, either by way of background or as a specific head of claim.
6. I agree with the Respondent that in light of the solicitor's confirmation that the only claims being pursued were claims for direct discrimination and victimisation, if the Claimant wishes to pursue a claim for disability related harassment she will have to do so by seeking an amendment to her application.
7. I will grant that application. I have taken into account the principles set out in the **Selkent** case. I have considered the nature of the amendment being sought. I have noted that the specific allegation of harassment is identified in the claim and further particulars were provided on 6 June. This is not so much a new allegation as an allegation, contained in the claim form, that is now identified as a separate head of complaint. I find that the Claimant is effectively seeking a reclassification of the claims being sought. I have also considered whether the claim for harassment is made out of time. I take the view that it would be possible to interpret the claim form as including the harassment claim, save for the solicitor's statement that only direct discrimination and victimisation were being claimed. However if the claim is treated as including an allegation of harassment on the 5 September, that claim was sought in time. Taking all the circumstances into account I take the view that the Respondent cannot be surprised by the allegation of harassment relating to events on the 5 September. They will not be prejudiced if it is included in the claim as they will have to deal with what happened on that date in evidence in any case. Overall it is in the interests of justice to allow the Claimant to proceed with a claim for disability related harassment relating to the events on 5 September.
8. I do not allow an amendment in relation to a new allegation made against Victoria Bassett included in the particulars of 6 June 2016. There is no allegation made against the Ms Bassett, who is I understand the deputy headteacher, in the

original claim form and nor have details of the allegations made against her been included in the Particulars dated 6 June.

9. In relation to the Respondent's submission that the claims are out of time, Ms Bowen identified an incident referred to in the further particulars as taking place on the 10th of February 2016. During the course of the hearing today the Claimant confirmed that this allegation relates to an outcome of the grievance investigation, which was that she and Sabira K should not be required to work together. As the grievance was raised on 5 September 2016, the grievance outcome could not have been issued in February 2016. The Claimant believes she made an error in referring to the year, which should be 2017. The Claimant undertook to check this. On the assumption that a mistake has been made, it would appear that this allegation is not out of time.
10. I have decided whether to strike out any of the claims or make a deposit order. This claim is in essence very simple. The Claimant says: 'I was harassed because of a disability. I raised a grievance. I was badly treated as a result. Eventually my contract was extended for only a very short period and then terminated. I have suffered harassment followed by direct discrimination and/or victimisation'.
11. On the basis of that account I cannot say with any certainty that the claims have no reasonable prospect, or little chance of success. It will be necessary for evidence to be heard in relation to the complaints made before a proper view can be taken on the merits. The Respondent's applications are refused.
12. I turn to the application for wasted costs made by the Respondent against the Claimant's former solicitors Brown and co-solicitors. Mr Winston Brown was invited to attend the hearing today or to make written representations in response to that application. He replied with a letter dated 26 August 2017 and copies of communications between himself and the Claimant. At the start of the day I was concerned that Mr Brown had disclosed privileged information, without the client having waived privilege. He indicated in his letter that she had refused to do so. There was some discussion about this issue at the start of the hearing today. The Claimant was initially reluctant to agree to what she saw as a breach of confidentiality. However it was explained to her that the Respondent had made cost applications against both her and against Mr Brown. She was advised that it would be possible to draw inferences from a refusal to waive privilege. After some discussion the Claimant agreed that I should read the letter from Mr Brown and the enclosures to understand what had happened between them. I took the view in any case that, as Mr Brown had been invited to make written representations, it was appropriate for me to read these and to take his points into account in considering the application for wasted costs.
13. I have noted that Judge Sage ordered that replies to the request for further and better particulars be provided by the Claimant by the 9 May 2017. It seems that Mr Brown sent the request to his client. In his letter dated 26 August 2017 he states that he did not chase the Claimant until 11th May 2017 by which point the time for compliance with that order had already expired. In the meantime, a preliminary hearing had been listed for 18 May 2017 (having been adjourned to allow for time for the further particulars to be supplied). I see from copies of emails supplied by Mr Brown that on 11 May the Respondent's representative wrote to Mr Brown to state that they would make an application for a postponement of the preliminary hearing at 5:30 PM that evening if further particulars were not supplied. Mr Brown replied that he was at a hearing and would attend to the matter that evening. In light of that the Respondent's representative agreed that they would not make the application until 9:30 on 12 May. There was then a rather astonishing email from Mr Brown to the Claimant

dated 8:22 PM on 11 May (which appears to be the chasing email he refers to) asking for her response by 9:30 the following morning. She replied the next morning to say that she was tired and busy and had not sent the questions, but that she would do so. At that point Mr Brown appears to have made no effort to contact the Respondent's representative to discuss his predicament and perhaps agree either an extension of time for serving the further particulars or a joint approach to the tribunal in relation to the preliminary hearing fixed for 18th May. The Respondent's representative then applied to postpone the hearing fixed for 18th May on the basis that the further particulars were not available. The application was copied to Mr Brown, but he made no comment on the application. The tribunal, in the absence of any response from the Claimant's representative, postponed the hearing fixed for 18th May on the afternoon of 17th May at which point the Respondent had already briefed counsel and incurred the full brief fee.

14. Even if Mr Brown had contacted the Respondent's representative on 12 May, after the application to postpone had been made, it is possible that a way forward could have been agreed (possibly by Mr Brown consenting to a postponement and proposing a new deadline for service of the particulars in light of the problems that he was having) and that counsel's costs could have been avoided (although that of course does not take into account the Respondent's costs in chasing receipt of the further particulars and making their application for postponement).
15. I have taken into account the submissions of the Respondent in support of the application for wasted costs. Rule 80(1)(a) states that a wasted costs order may be made against a representative where costs have been incurred 'as a result of any improper, unreasonable or negligent act or omission on the representative'. The Respondent does not argue that the legal representative has acted improperly or unreasonably, but argues that there has been negligent conduct. Ms Bowen submits that 'negligence' in this context should be considered in the non-technical sense of the word, as in a failure to act with the competence reasonably expected of an ordinary member of the profession (proposed with reference to guidance contained in IDS handbook).
16. I have taken into account the letter from Brown and co-solicitors dated 26 August and their argument that the delay was not due to them, arguing that it was difficult to get instructions out of the Claimant. They allege that she does not have good English, making communication difficult (although I note that she has been able to conduct the hearing mostly in English today with some assistance from a portugese interpreter). However, the communications with the Claimant that Mr Brown has produced give some cause for concern. There seems to have been no effort to contact the Claimant between sending her the request for further particulars and the 'chasing' email on 11 May. The Claimant's evidence today is that her legal representative was not providing her with sufficient assistance, despite requests from her to meet with him to discuss the case. We note that when she did provide a response, her words were simply cut and pasted into the particulars provided. I find that it was completely unreasonable to contact the client late in the evening of 11 May asking for her response to a complex document by 9:30 next morning.
17. Ms Bowen has referred me to the principles to be considered upon a wasted costs application set out in ***Ratcliffe Duce and Gammer v Binns UKEAT/100/08*** and I have taken these into account.
18. I accept that as a result of the negligent conduct of Brown and Co solicitors, the Respondent has incurred unnecessary costs relating to correspondence chasing the provision of further particulars sought by the court, an application for a postponement and unnecessary counsel's fees. I have considered the Schedule

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of Costs produced and find that it is reasonable in relation to the actions that the Respondent's representative were forced to take. In all the circumstances of this case I have reached a decision that it is just to order the Claimant's former legal representative to compensate the Respondent for the costs sought in the amount of £2824.

Employment Judge Siddall

Date 31 August 2017