Case No: 2601371/2018

EMPLOYMENT TRIBUNALS

Claimant — **Mr D Pulford** **v** **Respondent** — **University of Lincoln**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: Nottingham **On:** Tuesday 25 September 2018

Before: Employment Judge P Britton (sitting alone)

Appearances
For the Claimant: In Person
For the Respondent: Ms S Ashberry, Solicitor

JUDGMENT

1. The claim of sex discrimination is dismissed upon withdrawal.

2. The claim for outstanding holiday pay is dismissed upon withdrawal the sum outstanding having been paid.

3. For the avoidance of doubt the claims that proceed are:-

3.1 Age discrimination.

3.2 Detrimental treatment and thence automatic unfair dismissal by reason of having engaged in trade union activities.

3.3 'Ordinary' unfair dismissal pursuant to the provisions at Sections 95 and 98 of the Employment Rights Act 1996.

4. The Claimant needs to clarify whether he is also claiming for detrimental treatment and dismissal by reason of whistleblowing as to which see subsequent directions hereto.

CASE MANAGEMENT SUMMARY

Introduction and scenario

1. The Claimant was a senior lecturer at the University of Lincoln in the faculty of Fine and Performing Arts. He had been employed by the university since 8 September 2008. He was summarily dismissed for alleged gross misconduct by the Respondent on 11 July 2018.

2. On 15 June 2018 he presented the original ET claim (ET1) to the Tribunal. He had ticked the boxes for age discrimination and sex discrimination. His date of birth is 8 May 1955 and so by then he would have been aged 63. The sex discrimination element of his claim related to the treatment by him of the principle of the department Dr Karen Savage (KS). What he was saying was that she favoured younger and newer members of staff when it came to work and such as promotions and that she marginalised the older employees in the faculty and "particularly the men". So on the face of it a claim for both sex and age discrimination. At the time that he brought that claim he was in a disciplinary process and it is clear that he foresaw that he was likely to be dismissed. What he was essentially saying was that this was primarily because he had raised the matters to which I have referred and wider issues of concern within the faculty and that he had done this in his capacity as a trade union officer, namely a branch officer of UCU, obviously for the purposes of representing colleagues within the union within the University of Lincoln. Now of course if correct, prima facie this would be detrimental treatment and come within the provisions to be found commencing at Section 146 of the Trade Union and Labour Relations (Consolidation) 1992 (TULCRA).

3. This claim was in due course fully replied to by the Respondent. By now the dismissal had occurred. It was made plain that this summary dismissal for gross misconduct followed a thorough process which I would observe would pass muster in terms of ACAS code of practice compliance. It set out a history of the Claimant raising a grievance against KS in October 2017 which was not upheld. That he then engaged improperly under the aegis of alleged trade union protection in lobbying colleagues by way of supporting a continuing complaint against Karen Savage. This led to members of the faculty, who presumably were lobbied, complaining. This in turn led to a further investigation, the upshot of which is that he was suspended. A feature of this case is that as pleaded by the Respondent, in the compass of that investigation the branch chair for the UCU at the university, namely Mr McCaffrey, was canvassed and disowned the activities of the Claimant. If so an issue will be of course as to whether or not the Claimant was engaging in trade union activities. I should make it plain that in response to the ET3 and by way of detailed submissions that the Claimant has put into the Tribunal, he would argue that he would still be protected in what he was doing and he cites legal authority for that proposition.[1] It seems by now the Claimant raised a second grievance presumably about what was going on and in June 2018 this was not upheld. But by now of course there were the concerns which I have raised and which also link back into his behaviour in terms of allegations he made against Karen Savage and which led to the disciplinary process to which I have referred and his summary dismissal which I learnt today has been upheld on appeal.

4. On 19 July the Claimant submitted a second ET1 claiming interim relief on the basis that the reason for his dismissal was being engaged in trade union activities. But it had been presented out of time and therefore my colleague Employment Judge Camp made plain that he had to reject it. When the Claimant made further submissions about why it was presented out of time Employment Judge Camp repeated that he had no option but to still refuse jurisdiction because he was bound by the tight wording of the relevant statutory provision.

5. However apropos the line of authority as per **Prakesh v Wolverhampton City Council EAT 1040/06** he directed that the second claim be treated as an amendment to the first.

[1] Furthermore at 2 October 2018 he has sent in the amended statement of Barry Turner and that of Geoffrey Adams. Both are UCU accredited representatives at the University and both support strongly his case..

6. Of course, we already by now had the response which had pleaded to the dismissal as well as the alleged detrimental treatment prior thereto.

7. Shortly before today the Claimant had brought an application that a post dismissal meeting between him and a member of the university's HR team should be admitted on the basis that it should be permitted and thus adduced in evidence under the 'iniquity' principle. The Respondent objects on the basis that the discussion was protected by way of legal privilege. I pointed out to the Claimant the comprehensive judgment of Her Honour Judge Eady on not only protected discussions pursuant to Section 111A of the Employment Rights Act 1996 (the ERA) but also in terms of legal privilege discussions in **Faithorn Farrell Timms LLP v Bailey** UK EAT/0025/16/RN. I referred him in particular to her paragraph 33 and the summarisation of the seminal jurisdiction on the topic. Prima facie I then observed that this discussion clearly therefore would be covered by legal privilege as it was an attempt to settle an extant dispute and that nothing as recited by him and in the reply thereto, and from the discussion today, revealed the kind of serious impropriety apropos the jurisprudence. He therefore needs to consider whether he wishes to proceed with this application as prima facie it is misconceived at law.

8. As to the sex discrimination claim, he had already written into the Tribunal by way of an amendment to his claim on 18 June and by which it seemed that he was withdrawing his sex discrimination based claim. But I needed to be sure that he was. After discussion today he made plain that he had intended to withdraw the same by way of that application and which was granted by Employment Judge Milgate. It follows that the claim of sex discrimination is dismissed upon withdrawal.

9. That leaves in terms of the Equality Act 2010 (the EqA) what appears to be a s13 direct discrimination claim. What is self-evident is that further and better particularisation is still required. An example is what is the age group that the Claimant puts himself in? Who was in that group? How were they disadvantaged? And conversely who are the comparators that he relies upon in a younger group and in terms of how were they advantaged.

10. Also he needs to give further and better particularisation of the trade union activities issues.

11. On both fronts I therefore order that the Respondent serve him requests for further and better particulars.

12. There was a claim for outstanding holiday pay but It has been paid. So the Claimant now withdraws that head of claim.

13. Finally of course there is a straightforward so to speak claim for 'ordinary unfair dismissal' and this of course brings in the provisions at Section 95 and 98 of the ERA. Of course the Respondent will have to show the Tribunal the reason it genuinely believed in ie misconduct. This not usually an onerous hurdle to surmount. The core issue the Tribunal will then have to determine, applying the range of reasonable responses test is as to whether the employer having regard to its size, nature and administrative resources, equity and the substantial merits of the case, acted fairly within the range of reasonable responses in dismissing the Claimant.

14. The final point I need to make is that the various pleadings and other documentation sent in by the Claimant make references to whistleblowing. But he never ticked the box as such in either the ET1 claims to signify he was bringing such a claim. So, is he? If so he will need to make an application to amend the current claim

and he will have to spell out how he engages Section 43B of the ERA, and whether he is then as a consequence claiming detrimental treatment pursuant to Section 47B and also automatic unfair dismissal pursuant to Section 103A; and in each case why. He is receiving what is obviously competent quasi legal advice from a colleague member of CU, Mr Turner, who clearly backs his side.

15. The claim is currently listed for three days of hearing at Lincoln. Given the issues, I am extending that to five days. Liability will be first determined and then remedy if applicable. Furthermore because of logistics in terms of utilising Lincoln as a Tribunal hearing centre, with the leave of the parties I have transferred it to Nottingham. Given the amount of documentation there is likely to be and the possible number of witnesses I have decided that **the first morning will be a reading in period for the Tribunal. The parties will not therefore need to be in attendance before 2:00 pm** when there will be a prompt start in the giving of the live evidence of the Claimant obviously in the context of this case giving his evidence first. Finally the Claimant indicated he might want to call some witnesses in the employ of the Respondent and that it's probable that they would be unwilling to come without a witness order. If that is the case, then he will need to make application bearing mind the university Christmas vacation and that the trial of this matter is of course to commence on 14 January next year. Against that background I make the following directions.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The Respondent will serve upon the Claimant the request for further and better particulars by **12 October 2018**. The Claimant will reply thereto by **26 October** and when so doing make plain as to whether or not he is claiming detrimental treatment and/or dismissal by reason of having made public interest disclosures (PIDs). If so he will need to fully particularise how that is engaged and what it is he says were the PID's.

2. Obviously if the Claimant does want to amend to include whistleblowing he must make that plain to the Tribunal by that deadline. The Respondent then has liberty to reply thereto.

Preparation of the trial bundle:-

3.1 By way of first stage discovery the Respondent will send the Claimant its proposed trial bundle index, double spaced. This will be by **9 November 2018**.

3.2 The Claimant will reply thereto by **Friday 16 November** setting out by brief description in the appropriate place any additional document he requires in the bundle. If he has the document he will send a copy to the Respondent's solicitor for inclusion in the trial bundle. If he does not have the document but believes it to be in the custody or control of the Respondent, that it is relevant and necessary to the issues he will make that plain to the Respondent's solicitor and that he requires it in the trial bundle.

3.3 By not later than **30 November 2018**, a single bundle of documents is to be agreed. The Respondent shall have the conduct for the preparation of the bundle for the hearing. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;

- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should not be sent to the tribunal in advance of the hearing.

Witness statements.

4. By not later than **19 December 2018**, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

The Hearing

5. For the purposes of the reading in period via the Respondent, there will be delivered to the Tribunal at least one working day before the commencement of the hearing in triplicate, the following:-

5.1 Trial bundle.

5.2 Combined indexed witness statement bundle.

5.3 Chronology.

5.4 Cast list.

5.5 Proposed reading in list.

6. Finally, **this case is transferred from Lincoln to Nottingham. It will be heard at the Tribunal Hearing Centre, 50 Carrington Street, Nottingham NG1**

7FG. It is extended so that it will now be heard over the 5 days between 14 to 18 January 2019 inclusive. The first morning will be a reading period for the tribunal. The parties must ensure that they attend in good time for the live hearing starting at 2pm

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 Britton

Date: 4 October 2018

Sent to the parties on:

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For the Tribunal:

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