



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Ms K Breed

v

Network Rail Infrastructure Limited

**Heard at:** Bedford

**On:** 15 November 2018

**Before:** Employment Judge Ord

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr T Adkin, Counsel

## JUDGMENT ON PRELIMINARY HEARING

1. The claimant's complaints of detriment relating to protected disclosures and the complaint that she was unfairly dismissed contrary to section 103A of the Employment Rights Act 1996, are out of time. It was not reasonably practicable for them to be presented in time and the claimant presented them within a reasonable time thereafter. Time is extended to allow those claims to proceed.
2. No orders are made on the respondent's application for strike out of the claimant's claims or for the making of deposit orders.
3. By consent, the case proceeding under case number: 3302838/2018 is stayed pending the final hearing in case numbers: 3401026/2016 and 3324918/2018, (already consolidated). Case number: 3302838/2018 will be considered for case management purposes along with the equal pay elements raised in cases numbered: 341026/2016 and 3324918/2018, (those claims were previously stayed), at the conclusion of the hearing of this consolidated action.

## REASONS

1. This matter came before me today following previous preliminary hearings, including a, 'ground rules' hearing, to determine the following matters:
  - 1.1 Whether the claimant requires leave to amend in the light of the further and better particulars provided by her;
  - 1.2 If so, whether that leave to amend should be granted;
  - 1.3 Such further directions as are therefore necessary;
  - 1.4 The respondent's application;
  - 1.5 In so far as maintained, to strike out the claimant's complaints, and / or for deposit orders;
  - 1.6 To clarify the complaints and issues for determination at the final hearing.
2. At a preliminary hearing on 15 September 2017, Employment Judge Moore issued what was said to be a Judgement in case: 3401026/2016. He consolidated these claims and stayed the equal pay claim made in the consolidated action.
3. On that date the parties invited the Employment Judge to determine what claims had been raised by the two claim forms. He determined that in case number: 3401026/2016 there were claims for disability discrimination and unlawful deductions from wages, (as well as an equal pay claim which was stayed), whilst the claim form in case number 3324918/2017 contains a complaint of constructive unfair dismissal.
4. The claimant had issued claim number: 3401026/2016 by presenting it to the tribunal on 4 October of that year. In the claim form submitted, the claimant had ticked the box which indicated, (document item 10.1),

*"if your claim consists of, or includes, a claim that you are making a protected disclosure under the Employment Rights Act 1996, (otherwise known as a 'whistle blowing' claim), please tick the box if you want a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator, (known as a 'prescribed person' under the relevant legislation), by tribunal staff. (See guidance)."*
5. In box 8, *'type in details of claims'*, the claimant referred to breaches of... (d) *"public interest disclosure rules"*.
6. The claimant received a letter from the Employment Tribunal confirming that her claim had been accepted and a further letter regarding the reference of any whistle blowing claim to a relevant regulator.

7. The respondent in its' response to that claim, indicated that they required further information, but specifically pleaded to claims of equal pay, disability discrimination, (failure to make reasonable adjustments), and breach of contract / unlawful deduction from wages.
8. A claim form was presented under case number: 3342918/2017 on 2 June 2017. In box 8.2, (*'heads of claim'*), a number of heads of claims were set out as comprising, '*continuing events*' throughout the periods September 2014 to March 2017, (date of claimant's resignation), including discrimination on the protected characteristics of disability, age and sex; a 'breach of employer duty of care' and 'breach of human rights', as well as 'breach of contract terms' and 'breach of public interest disclosure, protections'; 'unlawful deductions from wages' and 'constructive unfair dismissal'.
9. This claim form was presented on the same day and immediately following a preliminary hearing held on 2 June before Employment Judge Sigsworth in case number: 34001026/2016, stating that the claimant's claims were of "disability discrimination" (undefined as to nature) and stating that the claimant wished to amend her claim to add complaints from the date of presentation of the original claim until the date of her resignation which was to be done by way of amendment / presentation of further and better particulars. In the light of that, the claimant presented a second claim form to, inter alia, set out in full the heads of claim which she wished to pursue.
10. Employment Judge Sigsworth had listed a preliminary hearing which was ultimately heard by Employment Judge Moore on 15 September 2017.
11. Pursuant to the order of Employment Judge Sigsworth, the claimant served further and better particulars on 14 July 2017, (3401026/16), and the respondent submitted amended grounds of resistance on 3 August 2017.
12. Thereafter, the claimant provided a further document which was said to be "consolidated further and better particulars" for both claims, which was considered by Employment Judge Moore on 15 September 2017.
13. On that day the Employment Judge issued his judgment indicating that the claims brought were claims of disability discrimination, (unspecified as to type), unlawful deductions from wages, equal pay and unfair dismissal and consolidated the two actions. He listed a further preliminary hearing to determine any necessary applications to amend.
14. The claimant says that she tried to appeal the decision of Employment Judge Moore, but did so in the wrong manner and to the wrong body. She was no longer represented and no effective appeal was lodged.

15. The hearing listed by Employment Judge Moore on 15 September 2017 to consider any applications to amend has in turn been further adjourned and comes before me today.
16. In relation to the applications to amend, I have been referred to a number of authorities in particular:
  - 16.1 Selkent Bus Company v Moore [1996] IRLR 836, (the long-standing leading authority on issues relating to amendment;
  - 16.2 Galilee v Commissioner of Police of the Metropolis [2018] ICR 634;
  - 16.3 Kuznetsov v Royal Bank of Scotland Plc [2017] IRLR 350; and
  - 16.4 Pruzhanskaya v International Trade and Exhibitors (JV) Ltd. EAT/46/18;
  - 16.5 In his judgment, Employment Judge Moore had referred to the case of Badra v Gardiner and Theobald LLP [EAT/191/10];
  - 16.6 In turn I made reference to the case of Software Box v Gannon [EAT 433/14].
17. The claimant says that having marked 'box 10' in her first claim form, having thereafter received the letters referred to from the Employment Tribunal, both acknowledging the claim and advising her in relation to the reference to appropriate regulatory authorities in relation to a whistle blowing claim, she believed that her whistle-blowing claims were proceeding. She says her belief was reinforced by the fact that her claim form had not been referred to an employment judge, nor rejected for want of particularisation.
18. The claimant suffers from Asperger's Syndrome. This in particular causes her to interpret and assess documents literally on their wording.
19. The contents of the claim form as completed by her, coupled with the correspondence from the tribunal caused her to believe, (and in the circumstances reasonably believe), that that complaint was progressing.
20. The claimant was not aware that those complaints were not progressing until 2 June 2017 when Judge Sigsworth made his case management orders. She promptly presented a further claim form on 2 June 2017. Two sets of further and better particulars were provided and it is not suggested by the respondent that there is any lacunae in the understanding of the claims which the claimant seeks to bring.
21. The most recent set of particulars was provided in September 2017. It was provided before the hearing before Employment Judge Moore. The

respondent has been aware of those claims since September 2017 at the latest.

22. In claim number 3324918/2017, the tribunal coded the claim form, (and this coding appears upon the copy sent to the respondent), as including claims for unfair dismissal, sex discrimination, disability discrimination, protected disclosures, breach of contract and deductions from wages. The respondent ought to have been alerted that those claims were, on their face, accepted by the tribunal and proceeding.
23. In the circumstances, I am satisfied that:
  - 23.1 Until the directions given by Employment Judge Sigsworth on 2 June 2017, the claimant reasonably believed that her claims relating to protected disclosures were on foot;
  - 23.2 On that day she issued a further claim form and on 14 July 2017, she gave further and better particulars of that element of her claim to the respondent;
  - 23.3 Until 15 September 2017, she held the same belief in relation to her claim to have been automatically, (constructively), dismissed for making protected disclosures as she did as regards the protected disclosures claims in the original claim form;
  - 23.4 She provided further and better particulars of that further claim in advance of the hearing before Employment Judge Moore on 15 September.
24. On that basis, and applying the principles in the case of Software Box Ltd. v Gannon, whilst I am satisfied that the claims for protected disclosure were not validly brought prior to the delivery of further and better particulars as the mere mention of the head of jurisdiction is not sufficient, (as per the reasons given by Employment Judge Moore), the claimant believed, and reasonably believed, that her claims were proceeding for the reasons set out above. As soon as she was advised to the contrary, she provided further particulars and an application to amend.
25. In those circumstances I am satisfied that it was not reasonably practicable for her to present her claims in a proper fashion before 15 September 2017, as she believed she already had. As soon as she was aware that she had not she presented them within a reasonable time thereafter.
26. Accordingly, the applications made by the claimant to amend her claim form to include the claims for detriment for having made protected disclosures and automatically unfair dismissal for having made protected disclosures are allowed.

27. In reaching this decision, I have balanced the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. In particular:
- 27.1 This is a substantial alteration pleading a new cause of action, based on the judgment of Employment Judge Moore behind which I cannot go;
  - 27.2 The new claims are out of time, but for the reasons stated I extend time because it was not reasonably practicable for the claims to be presented in time, the claimant reasonably believing that they were proceeding;
  - 27.3 There has been little delay in the application to amend, the applications were made promptly once the true position became clear to the claimant;
  - 27.4 I am conscious of the amount of hardship here. The claimant is a disabled litigant in person, (albeit she has at an earlier stage had legal assistance). Claims of discrimination, (and by analogy claims for detriment or automatically unfair dismissal on the basis of protected disclosures), should, if at all possible, be considered on their merits;
  - 27.5 The respondent has not advanced any argument that a fair trial is no longer possible. Although there may be some witnesses who are no longer employed by the respondent, the respondent has been aware of the claims for some time and will, or ought, to have taken steps to obtain their evidence and / or to keep in touch with them. No evidence has been laid before me to indicate that evidence has been lost.
28. Accordingly, I am satisfied that on the balance of hardship and injustice and for the reasons set out above, the applications to amend should be allowed. The claims and complaints which the claimant pursues are those set out in her consolidated further and better particulars.
29. The respondent has not pursued their application to strike out the claimant's complaints before me. Bearing in mind that they do not pursue any argument that a fair trial is no longer possible and accept the discrimination claims should be considered on their merits if at all possible, they have rightly not pursued any application for strike out.
30. Applications are made to strike out parts of the claimant's claims for disability discrimination relying on specified provisions, criterion and practices.

31. The claimant identifies at, 'PCP 12': *"a policy of not ensuring that medical assessments were built on previous assessments to collate information about employees"*.
32. The respondent says that this has little reasonable prospect of success as a provision criterion or practice because it appears to indicate the claimant's complaint as relating to the contents of the report and not any action, inaction or practice of the respondent.
33. During the course of today's hearing, the claimant has confirmed that what is complained of here is that the respondent relied, without question, on the contents of occupational health and other reports, but did not take any positive steps to analyse them, seek further particulars, have them changed or expanded upon. It is the respondent's reaction to, or inaction following receipt of, the reports that is said to be the issue. the PCP therefore is properly considered to be *"not acting to ensure that medical assessments built on....."*
34. The claimant identifies at, 'PCP 8' an alleged policy of providing the programme team and / or the claimant with hours considerably beyond the contractual hours, and / or approximately 65 – 70 hours of work per week, and / or failed to ensure that staff were not under pressure to perform such duties.
35. The claimant has clarified today that the complaint is that the respondent, by virtue of their giving imprecise or unclear work instructions, put those in receipt of those instructions generally at a disadvantage causing them to work longer hours than was necessary but that she, due to her condition, suffered a greater impact thus causing her to work longer and unnecessarily long hours. The PCP should therefore be *"that the respondent had a PCP of providing the programme team, including the claimant, with imprecise and unclear instructions requiring them to work hours considerably beyond the contractual hours, and / or approximately 65 – 70 hours of work per week and failed to ensure that staff were not under pressure to perform such duties. Because of the claimant's condition this had an increased adverse effect on her"*.
36. Having received that clarification from the claimant, I do not consider that those matters have little reasonable prospect of success. It is a low burden for the claimant to clear and both of the alleged PCPs and the alleged detriments arising from them will require evidential proof. The respondent's application was reasonably made based on the PCPs as drafted, but having had oral clarification from the claimant today, the true nature of the allegations and complaints has been established and has now constituted those proposed PCPs cannot be said to have little reasonable prospect of being established.

37. The respondent also sought deposit orders in relation to two minor matters which the claimant complains of. The first was a failure to provide a replacement mobile phone to her promptly. The second was in relation to the changes to dates of hearing involving the claimant, (a grievance appeal hearing and a disciplinary hearing). The respondent says that these matters were de minimis and thus there was little reasonable prospect of establishing them as discriminatory acts.
38. I do not agree. They are small matters but they are part of a much larger picture. They should not be looked at individually, but rather as part of a whole. It cannot be said that those allegations have little reasonable prospect of success and whilst they may individually be small matters, they must be considered as part of a whole.
39. The claimant's complaints of failure to make reasonable adjustments for her disciplinary hearing and in relation to adjournments may require further particularisation. If so, the respondent should make a precise request for particulars, but at this stage it would be inappropriate to make a deposit order in relation to either of those allegations.

### Summary

40. Accordingly,
- 40.1 The claimant has leave to amend her claim. The claims that will proceed to the final hearing are those set out in the consolidated further and better particulars which have been provided by the claimant;
- 40.2 No order is made on the respondent's application to strike out the claimant's complaints either in whole or in part, nor in relation to their application for a deposit order.

### Case Management Discussion

41. The parties had been unable to finally agree a precise list of issues. They were given time to do so, but in the circumstances of today's hearing, felt they needed more time. It was appropriate to give time for them to do so as both the claimant and Mr Adkin considered that based on a draft which had been prepared by the claimant's then counsel, a final list of issues could be agreed without further judicial intervention. I was content to allow the parties to proceed in that way.
42. In the event, however, that no such agreement is possible, a further preliminary hearing will be held at, **The Employment Tribunals, Cambridge County Court, 197 East Road, Cambridge, Cambs., CB1 1BA**, on **Monday 21 January 2019**, at 11:30 am to finalise the list of issues



for consideration of the final hearing of the case. A separate notice of hearing is attached.

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Employment Judge Ord

Date: ...28.12.18.....

Sent to the parties on: .....28.12.18..

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For the Tribunal Office