



EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant Miss E James, in person.

Respondent The Secretary of State for Justice

Represented by Mr T Kirk of Counsel

Employment Judge Ms A Stewart (sitting alone)

Held at: London Central by CVP **on:** 23 January 2023

JUDGEMENT

1 The Respondent's application, under Rule 37 in Schedule 1 of The Employment Tribunals (Constitution and rules of Procedure) Regulations 2013, that the Claimant's claim be struck out in its entirety, is refused.

2 The Claimant's application to amend her Claim, so as to add one complaint of disability discrimination under section 15 of the Equality Act 2010, is granted, as follows: that she was treated unfavourably by having her performance and duties heavily criticised, in particular at two performance reviews and by way of a written warning for poor performance, because of something arising in consequence of her disability, namely anxiety and depression.

3 The Claimant today withdrew her application to further amend her claim by adding a complaint of indirect disability discrimination under section 19 of the Equality Act 2010.

ORDERS

1 It is Ordered that, by 6 February 2023, the Respondent will send to the Claimant, copied to the Tribunal, a slightly amended (already agreed)

List of Issues and an amended Response, so as to take account of the section 15 amendment to the claim which is set out in the above Judgment.

2 It is also Ordered that, by 6 February 2023, the parties will inform each other and the Tribunal whether or not they are willing to take part in a Judicial Mediation as a means of settling this dispute without the need for a Full Merits Hearing.

3 It is Ordered that on or before 20 February 2023 the parties mutually exchange witness statements. UNLESS the Claimant sends her witness statement to the Respondent on or before 20 February 2023, her entire claim will be struck out, without further consideration or hearing.

4 The Claimant's witness statement should contain all of the evidence which she wishes the Tribunal to hear. It should be set out in chronological order, double spaced, in short numbered paragraphs, and be dated and signed. Any documents referred to in the statement must give their page numbers in the agreed Bundle of documents.

5 A Full Merits Hearing of this case will take place over 7 days, from 18 to 26 July 2023, inclusive, before a full Tribunal panel.

6 Tribunal directions for the preparation of this case for a Full Merits Hearing have already been carried out, as ordered at previous Preliminary Hearings, except for service of the Claimant's witness statement, as ordered above.

Signed: Employment Judge A Stewart

Employment Judge

Date 25 January 2023

Judgment sent to the parties on

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FOR THE TRIBUNAL OFFICE

THE EMPLOYMENT TRIBUNALS



Claimant Miss E James, in person.

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REASONS

1 This litigation has an unfortunate history, including 4 previous Case Management Preliminary Hearings (28 September 2020, 18 October 2021, 5 January 2022 and 13 June 2022, followed by amended Tribunal Orders dated 28 June 2022) and a twice vacated 7 day Full Merits Hearing (18 October 2021 and 13 June 2022) the latter having been converted to a PH partly due to the Claimant's indisposition and partly because there was a lack of Judicial resources for the hearing, in any event.

2 Since the last PH in June 2022, the Respondent, commendably, has desisted from further steps in order to allow the Claimant time to recover, until today's hearing. However, the Respondent's application for strike out of the Claimant's claims argued before me today was in fact lodged with the Tribunal on 23 May 2022.

Strike-out application

3 The application to strike out is made under **Rule 37** of the Tribunal Rules on the following alternative grounds:

- (i) that the Claimant has deliberately and persistently conducted these proceedings in an unreasonable manner;
- (ii) that there has been inordinate and inexcusable failure on the Claimant's part to actively pursue her claim, entailing a substantial risk to a fair trial of this case within a realistic trial window, or at the very least causing substantial prejudice to the Respondent;
- (iii) the Claimant's continual failure to comply with Tribunal Orders at times even when she was well enough to do so.

4 Alternatively, the Respondent seeks an unless order, compelling the Claimant to fulfil the final Tribunal Order with which she has not yet complied,

namely; to serve/exchange her witness statement. Otherwise, this case is trial-ready.

5 The Claimant, who is a litigant in person, today apologised for her failure to comply with Tribunal Orders in the past but resisted the application to strike out her case, on the basis that she had suffered a long three year period of ill-health, entailing three periods of hospitalisation (in November 2020, October 2021 and May 2022) which entailed traumatic events in her personal life as well as serious illness. She states that she has been suffering from periods of stress-induced psychosis and mental health issues which she was, during that long period, unable to control. She says that she still has PTSD, is suffering from stress and remains on medication, but is in a much better frame of mind now than she has been for a long time. The Respondent has already conceded that the Claimant is disabled by virtue of her mental condition, within the terms of **section 6 of the Equality Act 2010**.

6 I concluded, on all the material before me today, that it would be a draconian step, unwarranted in all the circumstances, to strike out the Claimant's claim today, despite the delay of 3 years and 9 months between the events which are the subject matter of the claim, and the Full Merits Hearing listed above, for the following reasons:

6.1.1 I was satisfied that the Claimant's incapacity through illness had not been limited to the periods which she spent in hospital but had extended through periods of build up and recovery, both before and after these hospitalisations. A hospital Consultant, for example, certified that the Claimant would be unable to conduct litigation or work for a period of at least 2 months after leaving hospital on the last occasion. I was also satisfied that the Claimant's illness had affected her ability to function, prioritise and make strategic decisions regarding her litigation over an extended period, not limited to her periods in hospital, and that she had therefore felt herself overwhelmed by life circumstances during considerable periods of time. It was also clear, however, that she had managed to engage at various times, when well enough to do so, and had managed to comply with a number of Tribunal Orders, albeit often late, and had sporadically at those times shown a determination to pursue her case.

6.1.2 I was therefore not satisfied that the Claimant's conduct of her case had been deliberately unreasonable, nor that her failure to pursue her claim at times had been inexcusable nor that her failure to comply with Tribunal Orders had been contumelious. I formed the view that the Claimant's capacity to conduct this litigation has been affected by the state of her mental health, which the Respondent concedes constitutes a disability under the **Equality Act 2010**.

6.1.3 I was satisfied from today's hearing that the Claimant has now reached a much more stable and improved frame of mind. She showed considerable insight into the potential unfairness to the Respondent of such a long period of delay during this case and a clear intention and determination to act accordingly.

6.1.4 The case is now trial-ready, with disclosure, bundle and the Respondent's witness statements already prepared and lodged with the Tribunal. The Respondent does not therefore suffer the prejudice of having to review documents and prepare witness statements over 3 years after the events in question. It remains only for the Claimant to serve her own witness statement. She has not had the unfair advantage of having seen the Respondent's witness statements before preparing her own. The chances of a fair hearing, listed for July 2023, are therefore good.

6.1.5 On balance, the prejudice which would be suffered by the Claimant in being struck out and unable to pursue her claim, far outweighs the prejudice caused to the Respondent by the delay in bringing this matter to trial, especially given the state of preparation set out in 6.1.4 above.

7 Accordingly I refused the Strike out application.

Unless Order

8 The Claimant did not object to the Respondent's application for an unless order today, having had its meaning and consequences explained to her. In fact she said that she would welcome it, as such a strict deadline would help her to comply and to face the realities of the situation. She offered a period of 2 weeks for compliance. However, counsel for the Respondent wisely proposed 4 weeks, in order to allow time for the Claimant to receive and consider the final Response and List of Issues to be sent in 2 weeks time.

9 Accordingly, an unless order was made as set out above.

Amendment of the Claim

10 The Claimant's proposed amendment by the addition of a claim under **section 15 of the Equality Act 2010** was firmly grounded in the factual matrix set out in the Claimant's original pleadings in relation to disability discrimination in general and the alleged failure to make adjustments for her disability, although legal labels were not specified, this being a narrative claim lodged by a litigant in person without legal knowledge.

11 The Respondent resisted the amendment on the grounds that it was a new claim and out of time. It was accepted by the Respondent, however, that the main facts were there, but contended that a causal relationship had not been pleaded.

12 I concluded that this was largely no more than a relabeling exercise; that all of the factual ingredients were there and that the Respondent was not taken by surprise by new factual allegations. It is not to be expected that a litigant in person will formulate their claim as would a lawyer. The state of mind of those acting on behalf of the Respondent at the material time will be under scrutiny in relation to the existing complaint of direct discrimination, in

any event, to which may be added the alternatively alleged state of mind relevant to **section 15**.

13 Accordingly, the amendment relating to **section 15** is allowed.

14 The proposed **section 19** indirect discrimination amendment is a different matter. As the Respondent pointed out, it entails pleading an alleged provision, criterion or practice on the Respondent's part, the particular and general disadvantage caused to the Claimant and those of the relevant disabled class and the Respondent would need to show that the PCP was a proportionate means of achieving a legitimate aim. None of those elements were contained in the original pleadings. Further, the Respondent strongly resisted it as being an entirely new claim, one that would entail considerably more work to prepare and one that was being proposed more than three years outside the normal time limit for bringing such a claim.

15 The Claimant, having had the legal meaning of indirect discrimination explained to her and having understood the matters set out in paragraph 14 above, said that she did not wish to pursue it and withdrew her amendment application as it related to **section 19**.

Judicial Mediation

16 The Claimant said that she had always wanted to try to settle this claim but that in the earlier stages the Respondent had said that it was not willing to partake in a Judicial Mediation.

17 I suggested that it would be advantageous for both parties if this matter could be resolved without further delay and without recourse to a trial on the merits. Counsel for the Respondent said that he would take further instructions, in this current situation. The above order was accordingly made, by consent.

Employment Judge - Stewart

Date 25 January 2023

Reasons sent to the parties on

26/01/2023

FOR THE TRIBUNAL OFFICE

NOTES

(1) Any person who without reasonable excuse fails to comply with this Order shall be liable on summary conviction to a fine of £1,000.

- (2) Further, if this Order is not complied with, the Tribunal, may (a) make an Order for costs or preparation time against the defaulting party under Rule 76(1) or (2), or (b) strike out the whole or part of the claim, or, as the case may be, the response, and, where appropriate, direct that the Respondent be debarred from responding to the claim altogether.
- (3) You may make an application, upon notice to the other parties, for this Order to be varied or revoked.