



EMPLOYMENT TRIBUNALS

Claimant

Mrs S Solomon

Respondents

- 1. University of Hertfordshire**
- 2. Mr P Hammond**

PRELIMINARY HEARING

Heard at: Watford

On: 24 March 2017

Before: Employment Judge Manley

Appearances:

For the Claimant: Mr C Ameadah, Husband

For the Respondents: Mr A Ohringer, Counsel

JUDGMENT

1. I refuse the application for me to recuse myself.
2. The application to amend the claimant's claim to include a complaint of disability discrimination is refused.
3. The matter remains listed for the full merits hearing between **24 April and 2 May 2017** as previously listed in September 2016. Case management orders are made at the end of this judgment for preparation to ensure that hearing can be effective.

REASONS

Introduction and issues

1. This case has had a number of preliminary hearings. The ET1 was presented in October 2015 and the first preliminary hearing was on 9 December 2015; the second was a short preliminary hearing on 16 March 2016 and a more

substantive one was held on 26 September 2016 which considered the Scott Schedule the claimant had prepared. Orders from those hearings made reference to the claims and issues which I will come to later.

2. The claimant expressed concern following the preliminary hearing on 26 September before me and wrote by email of 13 October asking for the orders to be revoked, taking issue with the list of issues and a number of other matters. By email of 20 October she also made an application to amend the claim to include "*further particulars – disability discrimination*". Within that document were details of the alleged disability discrimination and a (second) Scott Schedule with respect to that purported complaint. The respondent objected to that application and asked that unless orders to be made. There was further correspondence and it became necessary to list for a further preliminary hearing to consider the claimant's application to amend to include a complaint of disability discrimination. I rejected the respondent's application for any unless orders at that stage.
3. By email of 7 February 2017 the claimant made application for me to recuse myself from the hearing to determine the amendment application "*on the basis that the judge has pre-judged the application*". Eventually the matter was listed for today therefore to determine a number of matters as follows:
 - 3.1 The claimant's application that I recuse myself;
 - 3.2 The claimant's application to amend the claim to include a complaint of disability discrimination;
 - 3.3 The claimant's objection to the current list of issues for the final hearing as set out in the summary of 26 September 2016 PH; and
 - 3.4 Any further case management matters.

The hearing

Application for Employment Judge Manley to recuse herself

4. At the commencement of this preliminary hearing, which had been listed for three hours, we agreed that the above issues were those which were to be determined. I reminded the parties that it was listed for three hours although the claimant and her representative appeared to believe that it had been listed for one day so we checked with the notice that it had been listed for three hours. The claimant and the respondents' representative had submitted written representations which I had read before the hearing. The respondents had also prepared a bundle of documents and a bundle of the relevant cases referred to in their skeleton argument. I read these documents shortly before the parties came into the room.
5. Initially, the claimant and her representative indicated that they did not wish to add to those written documents and I therefore heard from the respondents' representative who went through the written submissions, briefly referring to the points already made in writing. In summary, the respondents do not accept that I should recuse myself as there has been indication of bias.

6. The claimant and her representative then made some further points. In summary, they expressed concern about the list of issues contained in the summary of 26 September 2016 PH, particularly the way in which the issues had been grouped. The claimant's representative made reference to the discussion that had taken place at the preliminary hearing on 26 September about the possibility of an amendment being made on that day to include a complaint of disability discrimination. He stated that the claimant had agreed not to pursue that matter when he was absent from the room but, as I told the parties, there is no record of that in my handwritten notes of that hearing, nor do I have any such recollection.
7. I indicated to the parties that I would decide the recusal application first because, if I did decide to recuse myself, another judge would need to be found to deal with the other matters. I then gave my judgment orally and in summary form.

Conclusion on recusal application

8. Questions of bias and when it would be right to consider recusal are given guidance in the cases produced by the respondents' representative and understood by me to be leading cases on this area as follows:- Ansar v Lloyds TSB Bank plc 207 IRLR 211; Dobbs v Tridos Bank NV [2005] EWCA Civ 468; and Hussain v Nottinghamshire Healthcare NHS Trust UK EAT 80 2016. In summary, I must ask myself whether a fair minded and informed observer, having considered the facts, would conclude there was a real possibility of bias. I have a duty, as a judicial office holder, to hear and determine cases which have been allocated to me. I cannot pick and choose and nor can parties. In this case, I was conducting a relatively limited preliminary hearing on 26 September 2016 but the principles remain the same. The circumstances where a conflict of interest might be perceived to be present are not present in this case.
9. I have declined the application to recuse myself. The claimant has put forward no grounds whatsoever for the stated belief that I have any prejudice with respect to her case. Of course, I understand that the claimant has brought forward concerns about what happened at the preliminary hearing last September. I also accept that litigants in person can often find trying to draw up a list of issues, in a relatively complex case, a rather difficult process. However, I can see no reason for the claimant to believe that I was in any way prejudiced against her or that I would be so prejudiced now or into the future. At that preliminary hearing, the claimant made an application to amend to include matters which appeared in her Scott Schedule which did not, on the face of it, appear in her originating application. The respondents objected to that amendment and I gave it careful consideration and decided in the claimant's favour. The respondents had also indicated that they wished to pursue an application for costs with respect to a judicial mediation and I did not determine that matter. I cannot accept that a fair minded and informed observer would have perceived any possibility of bias. This is not a case in which it is right for me to recuse myself.

Application to amend

10. The claimant and her representative expressed dissatisfaction with the decision which I gave on recusal but it was necessary for me to then consider the application to amend. Again, having indicated I had read the skeleton arguments with respect to that, I then went on to clarify the claimant's case on the amendment application. I asked the claimant and her representative a number of direct questions in an attempt to understand where they said the allegation of disability discrimination was first either raised or made clearly as a complaint.
11. The claimant accepts that the box for disability discrimination on the original ET1 was not ticked but says that there are references in that ET1 to health matters. The final paragraph (paragraph 34) of the ET1 particulars of claim, which are detailed and contain clear references to the language of the relevant legislation, reads:- *"I claim compensation for unfair dismissal, racial, sex, pregnancy and maternity discrimination. I also claim compensation for the loss of opportunity to apply for the post of senior auditor as a result of a discriminatory change in team structure in June 2012 and for effectively working as a senior auditor but not having been paid at that level. I am also claiming for damages for injury to feelings and interest"*.
12. In preparation for the preliminary hearing on 9 December 2015 the parties prepared an agenda with the claimant putting in the list of claims at box 2.1 along with unfair dismissal, sex discrimination, race discrimination, pregnancy and maternity discrimination and harassment and victimisation;- *"disability discrimination"*. She also included an *"amended ET1"* which included a reference to disability discrimination.
13. The hearing on 9 December 2015 was before Employment Judge Smail who ordered that a further preliminary hearing would take place in March. It records this: *"For the time being the details contained in the Claimant's original claim form represent the claims before the Tribunal."* It goes on as follows: *"By 12 February 2016 the Claimant is to serve on the Respondents and the Tribunal a schedule of the acts of discrimination she relies upon. It is hoped that these will be limited to the Claimant's most important claims and workable in number. The headings in the Schedule should include: date; person(s) involved; allegation of less favourable treatment/detriment; protected characteristic; and type of discrimination (direct, indirect, etc.)."* and *"Insofar as the schedule contains allegations not contained in the original claim form, an application to amend will need to accompany the schedule. The application should be based around the original claim form showing tracked changes representing any addition or alteration. The application should contain an explanation why the allegation was not in the original claim form and briefly why it has prospects of success."*
14. Although the phrase "Scott Schedule" did not appear in that written outcome it appears that is what the claimant believed she should prepare and by letter of 4 February she asked for a three week extension to prepare that document. The Scott Schedule was sent by attachment to an email of 24 February and was a document with some 38 separate allegations, all of which are said to be for the protected characteristics of either, and/or, sex, race, pregnancy and maternity. With that was included an application to amend the original ET1 and here there were six separate matters with no reference to a protected characteristic but in

broad terms appear to relate to pregnancy and a white male comparator. There is no mention of the protected characteristic of disability in those documents.

15. There was then a preliminary hearing on 16 March 2016 at which the claimant was represented by Ms White of counsel. It appears that that hearing concentrated on listing the matter for a judicial mediation but one of the orders made was as follows: "*The claimant will serve a refined list of issues by 8 April 2016. Insofar as leave to amend is required for any of the issues, that application will be dealt with in the event the mediation is unsuccessful.*" The mediation was indeed unsuccessful and a list of issues prepared by the claimant and her representative was then handed in to the tribunal at the commencement of the hearing on 26 September.
16. I recall, and I can see I have made a note to the effect on my copy of that list of issues, as follows. "*This cannot be used as it includes a number of matters not raised before and it is not specific – all matters in Scott Schedule will be included (unless unnecessary)*". It is true to say that that list of issues prepared and sent by the claimant does appear to include reference to disability discrimination. It also refers to "*protected acts/disclosures*". We progressed with the preliminary hearing on 26 September which lasted for best part of the day. I cannot keep an absolutely accurate note of everything that is said given that it is a difficult task trying to deal with matters which are themselves already fairly complex. I have recorded and I do recall that the question of disability discrimination was raised and that I commented that no formal application had been made. My recollection is that I asked the claimant and her representative about such an application but my record shows that they made reference to the list of issues they had prepared. I also suggested they might wish to write down the application they wished to make. There was a break, and, when the parties returned, this is the note that I have: "*App to amend disability/not pursued*". My note then indicates that I went on to the other application to amend which was whether to include the six matters raised on the Scott Schedule after the first 38. The respondents objected to those amendments.
17. We then had further detailed discussion during the course of the afternoon on the preparation for a list of issues for the hearing. It seems there might have been comment later in the preliminary hearing about a further application to amend which I indicated should be made in writing. I am not sure whether that is a reference to an application to amend to include disability discrimination or something else. Because I did not complete matters with the parties until 3.45pm, I reserved my judgment with respect to the application to amend which I was dealing with and, as I have said earlier, found in the claimant's favour with respect to that.
18. In essence, the claimant and her representative believe that they had raised the issue of disability discrimination at an early point of these proceedings and that they had added it to the first December 2015 preliminary hearing agenda and their draft list of issues in September 2016 and therefore believed that it was proceeding. They appeared to accept that no formal application to amend has been made. The claimant says that it will cause hardship to her if the disability discrimination complaint is not allowed to proceed and gave me details of the

difficulties it has led to her in her personal life. She believes the tribunal will not get a full picture of matters without the disability discrimination element.

19. I heard submissions from the respondents' representative and a number of other points raised by the claimant and her representative. The claimant pointed out that she had been waiting for details from a subject access request before she could present a complaint of disability discrimination and she received the information on 26 October 2015. They also expressed serious disappointment with the legal representation which they had secured with two specialist employment barristers and the difficulties that they had faced with the process.

Conclusion on the application to amend to include a complaint of disability discrimination.

20. To determine this matter, I have to take account the accepted principles with respect to amendment applications. I am of course bound by Cocking v Sandhurst (Stationers) Ltd [1974] ICRT 650 and Selkent Bus Company v Moore [1996] ICR 836. I must take into account the delay in making an application to amend and the reasons for any such delay as well as considering what prejudice would be caused by me granting or not granting the amendment. I also consider whether it is a re-labeling exercise or whether it is an application which includes an attempt to add a new head of claim. I must consider if the matter raised is within time.
21. HHJ Serota, QC in British Gas Services Ltd v Basra [2015] ICR 25 said this- *"In exercising the discretion to grant an amendment, the tribunal should take into account all the circumstances and should balance injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. A significant matter will be whether the applicant seeks to add a new claim especially one that is out of time in which greater scrutiny and reluctance to agree may be applied rather than allowing an amendment which rises out of facts already pleaded. When considering an application for leave to amend a claim the employment tribunal is required to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. Although delay itself is not a ground for refusing an amendment, it is always highly relevant.*

When an application for amendment is made closer to the hearing date it will usually call for an explanation as to why it was being made then and was not made earlier particularly when the new facts alleged must have been within the knowledge of the applicant at the time he presented his originating application".

22. I thought it would be useful for my own considerations to make a list of factors that go in favour of granting the application to amend to include this complaint and what tends to go against it. I consider that this is an application to amend to include a new head of claim. A disability discrimination claim has significant differences from sex, race or pregnancy and maternity discrimination cases. Not least, it requires initial consideration of whether the claimant did in fact, at the

material time, have a disability. This claimant is seeking to bring a complaint of failure to make reasonable adjustments and that is a cause of action which does not apply to the other protected characteristics.

23. I consider the following factors are in the favour of granting the amendment. First, the claimant did mention the possibility of disability discrimination to the respondent during the internal processes and that is confirmed in their ET3. Secondly, she put it in the agenda for the preliminary hearing on 9 December and included an amended ET1 with some details and thirdly, she included it in the list of issues which she presented at the preliminary hearing on 26 September. Fourthly, she has now made a formal application.
24. On the other hand, I consider the following factors are in favour of refusing to grant the amendment application. First, this disability discrimination complaint is clearly not made out in the ET1. Not only is the box not ticked but there are only short references to ill health and it is certainly not contained in the final paragraph where the complaints are clearly set out. Secondly, no application was pursued on 9 December 2015 and there was a clear instruction there that an amendment would be needed if the schedule of discriminatory acts included things not in the claim form. Thirdly, there was no mention of disability discrimination in the Scott Schedule which had 38 separate allegations nor in the amendment application that was included with it. Fourthly, the matter was not pursued at the hearing on 26 September although it was mentioned and fifthly, the claimant still did not make a formal application in writing until 20 October 2016, over one year after the ET1 was presented.
25. This is a new and significant complaint. The claimant has prepared lengthy and detailed documents. She and/or her husband appear to have considerable knowledge about the sorts of claims that can be brought. They have used technical legal language in a number of the documents presented by them. I appreciate that this language may have been learned over the course of them presenting this claim rather than being experts in the area, but I cannot accept that they did not know how to make an amendment application in writing and in unambiguous terms. When they did make the application in October 2016, it is a clear application to amend. It is of course now way out of time.
26. I do not accept that putting the words "*disability discrimination*" in an agenda for a preliminary hearing which then goes on to make it clear that the case will proceed on the matters in the claim form, is in any way bringing a claim at that point. When discussing cases like this at some length at a preliminary, a number of matters might be raised but that is not presenting a claim. The claimant has had numerous opportunities to make it clear that she wished to bring this disability discrimination complaint and did not do so until much later October, more than a year after the claim form was presented and after the matter had been listed for the hearing which is due to take place in the near future in April. Because of the pressures of time on the tribunal it has not been possible to list this matter until today's date and the hearing date would therefore be in jeopardy if this amendment was allowed. It would cause significant prejudice to the respondents to allow this out of time claim to proceed. I accept that it does cause some prejudice to the claimant if she cannot pursue this head of claim. However, she has other claims to bring and they are ready to be heard towards the end of April.

What is more, during the course of the final hearing, she may refer to her alleged ill health with respect to the unfair dismissal complaint. If she succeeds in her claim, she will also be able to make reference to the ill-health which she says is a consequence of the respondent's treatment of her with respect to remedy. I do not accept that the prejudice for her not being able to bring a separate disability discrimination complaint is a significant one. In any event, it is outweighed by the prejudice to the respondents and the long further delays which it would lead to given the fact that this is a matter which began in 2015. I refuse to allow the amendment to include a complaint of disability discrimination.

Case management

27. Having given that judgment to the parties but without the reasons which I have now set out above, the claimant's representative expressed his unhappiness and initially suggested that he did not wish to continue with the hearing. However, we did continue with the hearing and I tried to resolve some of the concerns the claimant had with the list of issues in the document from 26 September PH. I was able to deal with some of those concerns and amendments have been agreed with respect to them. The list of issues contained in the summary of the preliminary hearing of 26 September is therefore amended as follows:

27.1 At Item 10 - victimisation, I have agreed to the following now being the question for the final hearing: *"Did the claimant carry out protected acts when she raised (a) complaints about her flexible working requests; and (b) complained about the comment about her being a "dog with a bone" around 19 March 2015?"*

27.2 At Item 6 - "Undermining performance/denial of career progression" to add at (iv): *"alleged deletion of internal auditor role"*.

28. By the time this was completed we had gone somewhat over the three hours which had been allocated and I still needed to complete the written reasons so that they could be with the parties before the final hearing. The claimant and her husband raised a number of further matters. In particular, they wished me to re-visit the list of issues which they had drawn up before the hearing last September. I made it clear that we could not go back to that list of issues having worked hard to prepare the one which was in 26 September PH summary as now amended. They appeared to be raising matters which had not been agreed to be complaints that had been in the originating application, nor had there been any applications to amend. I therefore moved on to making orders, by agreement where possible, for the hearing which is in April as follows:

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The respondent will send a draft bundle of the documents it has which are relevant to the issues to the claimant by **31 March 2017**.

2. The claimant will add any documents which she has which are relevant to the issues to that bundle by **7 April 2017**. They should be added at the end of the bundle so that witness statements can be prepared.
3. Both parties are to prepare written witness statements which should concentrate entirely on the facts arising from the issues as set out and these should now be exchanged by **18 April 2017** at the very latest.
4. The respondents will prepare a chronology for the hearing which will be sent to the claimant for her to be able to comment at the commencement of the hearing if necessary.

CONSEQUENCES OF NON-COMPLIANCE

1. 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.
2. 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.
3. 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.

Employment Judge Manley

Date: 30 March 2017

Sent to the parties on: 30 March 2017

For the Tribunal: