



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms E Burgon

**Respondent:** SA Law LLP

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Watford **On:** 1 September 2020

**Before:** Employment Judge George (sitting alone)

### Appearances

For the claimant: In person

For the respondent: Mr M Salter, Counsel

## CASE MANAGEMENT SUMMARY

### Final hearing

1. The claim remains listed for final hearing with a time estimate of 5 days on the 10 to 14 May 2021, including remedy.

### Listing the claim for judicial mediation

2. The parties consent to judicial mediation. The claim is to be listed for judicial mediation to be conducted by telephone on the first available date after the 1 November 2020 avoiding the 8 to 10 December, 18 December 2020, 13 to 15, 18 to 22 and 25 to 29 January 2021.

### The issues

3. Following my judgement dismissing the claim of unfair dismissal on the basis that the Employment Tribunal has no jurisdiction to hear it, extending time for presentation of the Equality Act 2010 complaints and removing the Second Respondent as a party to the proceedings for reasons given at the time which are not now repeated, I set out the issues between the parties which potentially fall to be determined by the Tribunal. Those were agreed by them and recorded in a joint note for the preliminary hearing of 1 September 2020. Against the background of unwanted contact by email and text from Rik Patel, the claimant complains about specific allegations of unwanted conduct which she alleges to be acts of harassment for which the respondent is

liable. These were clarified by her at the preliminary hearing as set out in paragraph 6.a. below. The respondent accepts that these are particulars of an allegation made in the ET 1.

4. When preparing this record of issues, that recorded at paragraph 5.c.i. (which I transcribed from the joint note) appeared to be incomplete. I have recorded as an alleged substantial disadvantage paragraph 5.c.ii which appears in paragraph 16 of the claim form and paragraph 5.c.iii which is how the claimant explained her complaint orally at the preliminary hearing before me. Since these are changes to the agreed list of issues, I direct that the parties should provide their comments on the proposed changes in orders set out below.

*Disability*

5. It was conceded by the respondent on 24 July 2020 that the claimant was a disabled person as defined in the Equality Act 2010 (“EQA”) at all relevant times because of ulcerative colitis. The respondent’s case is that it was unaware of the extent of the symptoms from which the claimant asserts she was suffering at the relevant time, namely November 2018 to the effective date of termination.

*Reasonable adjustments: EQA, sections 20 & 21*

- a. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?
- b. A “PCP” is a provision, criterion or practice. Did the respondent have the following PCP(s):
  - i. Requiring the claimant to park her car a seven-minute walk from the office?
- c. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that
  - i. when she was suffering from a bout of ulcerative colitis and felt unwell when travelling to the office?
  - ii. When she was suffering from a bout of ulcerative colitis her condition can be very embarrassing?
  - iii. Ulcerative colitis is an unpredictable condition and she may need to leave in good time?
- d. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- e. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie

on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

- i. The use every day of the staff carpark.
  - f. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?
6. *EQA, section 26: harassment related to sex and/or sexual harassment*
- a. Did the respondent engage in conduct as follows:
    - i. In approximately April or May 2018, when the claimant was alone with Mr Patel in the office, he would ask about her “love life” and make comments such as “don’t get pregnant, will you”.
    - ii. In approximately July 2018, Mr Patel confronted the claimant in the kitchen at work and repeatedly asked why she was not replying to his messages and told her to “stop ignoring him”.
    - iii. On 17 August 2018,
      - 1. Mr Patel sent the claimant numerous emails asking who a mutual colleague was going on a date with and asking her to look at her Instagram messages.
      - 2. He then sent numerous messages on Instagram including one which said “Also, this is confidential, if you say anything, I will kick your bad foot.”
      - 3. Mr Patel approached the claimant in a park during her lunch break which made her feel uncomfortable.
      - 4. After she had returned to the office, he came into the post room, where she was working, blocking the doorway so she could not get out and repeatedly telling her not to tell anyone what had been happening.
    - iv. During the two months from 22 August 2018 onwards, RP barged into the claimant in the office and made inappropriate comments about her sex life.
    - v. On Mr Patel’s return from annual leave on 11 September 2018 he left an unwanted gift for the claimant on her chair.
    - vi. On 19 December 2018, Mr Patel ordered the claimant into the kitchen in an aggressive manner, shouted at her, behaved in an aggressive and frightening manner and repeatedly asked her about their mutual colleague. Then, once back in the main office, sat next to the claimant and repeatedly said “I just want to talk to you”.

- b. If so, was that conduct unwanted?
- c. If so, did it relate to the protected characteristic of sex and/or was it of a sexual nature?
- d. Did the conduct have the purpose of
  - i. violating the claimant's dignity or
  - ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- e. If not, did the conduct have the effect of
  - i. violating the claimant's dignity or
  - ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- f. In considering whether the conduct had that effect, the Tribunal will consider the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

*Equality Act, employer's defence*

- g. Was the anything done by Rik Patel done in the course of his employment?
- h. If so, did the respondent take all reasonable steps to prevent Mr Patel from doing that thing, or from doing anything of that description.

*Remedy*

- i. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, and/or the award of interest. Specific remedy issues that may arise and that have not already been mentioned include:
  - i. Did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A of the Trade Union and Labour Relations Consolidation Act 1992?

**Other matters**

- 7. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:

[www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/](http://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/)

8. 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)...”. **If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.**
9. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
10. The following case management orders were uncontentious and effectively made by consent save that those concerned with preparation for judicial mediation are made on my own initiative.

## ORDERS

### Made pursuant to the Employment Tribunal Rules of Procedure

#### 1. Judicial mediation

- 1.1 The parties consent to judicial mediation and the case will be listed for a mediation hearing by telephone on the first available date. I record five specific aspects of judicial mediation so that the parties have time to prepare.
- 1.2 The first is that mediation is most likely to succeed if it is approached with a realistic view of compromise, in the sense of each side assessing what, realistically, the other side is likely to agree, to achieve a settlement.
- 1.3 The second is that mediation is a voluntary process, which has been offered in this case in response to requests from both parties. Either party has the right to withdraw from mediation at any stage.
- 1.4 Thirdly, both sides have the right to choose who is present. The claimant may have a representative, and/or be accompanied by a friend, family member or some other person for support. The respondent has the right to decide who is the decision maker present on its behalf. All who attend are bound by the same rule about confidentiality (see paragraph 3.5 below).
- 1.5 Mediation usually starts with a short introduction by the mediator judge who meets everyone who has attended and summarises the ground rules for the day. After that the judge usually speaks separately to each party during the mediation and acts as the communicator between them. Mediation is sometimes conducted by telephone but the Tribunal does not usually offer mediation in the form of a round table negotiation between the parties (although, it is open to parties to do this if they choose to).

- 1.6 Finally, mediation is confidential and everything said at mediation is 'without prejudice'; this means that it cannot be repeated at the final hearing (if there is one). The employment judge who acts as mediator will play no part in the case after the mediation day, and if s/he makes notes during the mediation, the notes are not seen by the Tribunal which hears the case.
- 1.7 The respondent must ensure that a decision maker is present at the judicial mediation who has full authority to resolve matters.
- 1.8 Documents for the Judicial Mediation will be limited but must include the claim form, the response, copies of case management orders made, the schedule of desired outcomes and proposal for compromise. The respondent will ensure that a PDF copy of the bundle is emailed to the claimant and Tribunal by no later than 10.00 am on the working day prior to the date fixed for the Judicial Mediation.
- 1.9 The claimant is ordered to serve direct on the respondent no later than 14 days before the date on which the mediation is to be held a written summary of her desired outcomes from the mediation. She should state any financial sums sought by way of settlement, together with an explanation of how they are calculated. She should also give full details of any non-financial aspect of any settlement, such as a reference.
- 1.10 The respondent is ordered to serve direct on the claimant no later than 7 days before the date on which the mediation is to be held a position statement in which the respondent should make clear which parts of the claimant's schedule of desired outcomes, if any, are agreed, and which are not agreed. It should also make clear what proposals for compromise, if any, the respondent makes to the claimant in settlement of the case.
- 1.11 Before the Judicial Mediation commences the respondent shall make contact with ACAS to ensure that an ACAS officer is available and to establish how that person may be contacted

## 2. Complaints and issues

- 2.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.
- 2.2 In particulars, the parties write to each other and the Tribunal **within 14 days of the date this is sent to them** setting out any comments on or objections to the description of the wording of the issue no: 5.c.i. to iii. above.

## 3. Case Management of the preparations for final hearing

- 3.1 The claimant must provide to the respondent by **30 May 2021** an updated Schedule of Loss setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at

the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated.

- 3.2 On or before **12 February 2021**, the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.
- 3.3 By **26 February 2021**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case [that won't be in the remedy bundle referred to below] and should only include the following documents:
- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
  - documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

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 relevant 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 be simple chronological order.
- 3.4 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **26 March 2021**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. 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.
- 3.5 On the **first day of the final hearing, by 9.30 am**, the following parties must lodge the following with the Tribunal:
- 3.5.1 four copies of the bundle(s), by the respondent;
- 3.5.2 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in

accordance with rule 44), by whichever party is relying on the witness statement in question.

**4. Other matters**

- 4.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 4.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 4.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 4.4 **Public access to employment tribunal decisions**  
All judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 4.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 4.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

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**Employment Judge George**

13 October 2020

Sent to the parties on:

14 October 2020.....

For the Tribunal:

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