



THE EMPLOYMENT TRIBUNALS

Claimant: Mr R Moore
Respondent: Secretary of State for Justice
On: 4 August 2022
Heard at: Norwich (by CVP)
Before: Employment Judge M Warren
Representation
Claimant: Mrs J Duane, Counsel
Respondent: Mr T Kirk, Counsel

PRELIMINARY HEARING (OPEN) SUMMARY

JUDGMENT

1. The Claimant's claim number: 3313778/2020 is dismissed upon having been withdrawn, (claim number: 3312463/2020 claiming disability discrimination alone, continues).
2. No Order is made as to Strike Out and Deposit Order.

REASONS

Background

3. The Claimant was employed by the Employment Agency Brook Street and placed with the Respondent as an Enforcement Officer between 1 April 2012 and 19 August 2020.
4. The matter came before Employment Judge Kurrein at a Preliminary Hearing on 15 September 2021. Not all the papers on the case were

before the Employment Judge on that occasion.

5. EJ Kurrein made an Order requiring the Claimant to show cause why his claims should not be struck out. The Claimant, through his Solicitors, did so.
6. EJ Kurrein subsequently directed this matter be listed for a half day Open Preliminary Hearing to consider whether on its merits, case number: 3312463/2020 should to be Struck Out or the subject of a Deposit Order.
7. For reasons that are not apparent to me, both cases were listed for a Preliminary Hearing today with a time estimate of one day, with the Notice of Hearing dated 18 March 2022. In a subsequent letter of 22 March 2022, the Tribunal confirmed that the purpose of the hearing was to consider Strike Out or Deposit Order on both claims.
8. A letter to the parties from the Tribunal written on the instructions of EJ Kurrein dated 8 January 2022 stated,

“Case number: 3313778/2020 has been struck out because the Claimant has failed to show cause why it was not an abuse of the process”.
9. A strike out would have required a Judgment, no such Judgment has been issued. Further, the Claimant had withdrawn the second claim by letter dated 9 September 2021.
10. The Claimant’s solicitors have written to the Tribunal a number of times to suggest that the Tribunal should direct an issue for today’s Open Preliminary Hearing be whether or not the Claimant was a disabled person as defined in the Equality Act 2010 at the material time. Unfortunately, that correspondence does not appear to have been dealt with.
11. The Respondent has suggested that the Open Preliminary Hearing should also deal with the question of whether or not the Respondent knew or ought reasonably to have known the Claimant was a disabled person.

Hearing today

12. For today I had the following papers:
 - 12.1. A Bundle prepared by the Respondent which contained three witness statements, namely that of Mr Moore and statements from Ms Kiddell and Ms Stannard for the Respondent;
 - 12.2. A draft List of Issues from Mrs Duane and emailed to me during the hearing, a further version of that draft bearing Mr Kirk’s observations; and

- 12.3. A skeleton argument from Mrs Duane.
13. In discussion with the representatives, we agreed that it would be inappropriate for me today to consider the merits and the options of a Strike Out or Deposit Order.
14. We agreed that an Open Preliminary Hearing to determine the question of disability is appropriate and proportionate. We agreed that has to be decided before any consideration of the Respondent's knowledge. We agreed that I could not deal with that issue today as no directions had been given for medical evidence or an Impact Statement.
15. It was agreed that there should be a further Open Preliminary Hearing and at the same time as listing that and in order to avoid further delay, I should list the case for a Final Main Hearing, which can always be vacated if the case does not proceed beyond the Open Preliminary Hearing.
16. There was disagreement as to whether at the next Open Preliminary Hearing, it would be appropriate for the Tribunal to consider the question of the Respondent's knowledge.

Open Preliminary Hearing and the issue of knowledge

17. Mr Kirk submitted the issue of knowledge ought to be dealt with at the next Open Preliminary Hearing, in summary, making the following points:-
 - 17.1. To do so would be in accordance with the overriding objective and in particular, proportionate and would save expense.
 - 17.2. The parties were prepared today to be able to deal with the point but for the fact that both sides acknowledged the Tribunal first has to decide whether or not the Claimant was disabled.
 - 17.3. There is a substantial overlap in terms of evidence on the question of whether or not Mr Moore was disabled and the Respondent's knowledge. He cited the case of Seccombe v Read in Partnership Limited UKEAT/0213/20, in particular quoting from paragraph 33 thereof.
 - 17.4. In circumstances where there is a potential knock out point, it is right to deal with this as a preliminary issue.
18. I decided that the question of knowledge should be considered at the final main Hearing and not at the next Open Preliminary Hearing, for the following reasons:-
 - 18.1. Although Mr Kirk says that the parties were ready to deal with the issue today, I have to say that having read the witness statements and looked at some of the documents, I would have been

uncomfortable attempting to deal with it. My view is that the consideration of knowledge in this case ought to be in the context of the overall factual matrix of what was going on at the time. That might include evidence from the one other witness Mr Kirk mentioned might be giving evidence at the final hearing in addition to Ms Kiddell and Ms Stannard.

- 18.2. There may be issues as to credibility of what Ms Kiddell and Ms Stannard knew or ought reasonably to have known and the more information a Tribunal has to hand to assist it in assessing credibility, the better. The Tribunal having heard all of the evidence at a final hearing is better equipped to assess credibility than a Tribunal that has heard evidence on a discreet issue.
 - 18.3. Assessing what an employer ought reasonably to have done on a given set of facts is just the sort of question the Members of a Tribunal can give valuable input on. Members can be appointed to sit on an Open Preliminary Hearing, but the additional cost of doing so is one small matter to bear in mind as compared to Members sitting on the final hearing, when their presence will be required anyway.
 - 18.4. Following Serco Limited v Wells [2016] ICR768 and EVX, L & Z UKEAT/0079/20/RN, if I direct the issue of knowledge is to be dealt with at the Open Preliminary Hearing the Employment Judge at that Open Preliminary Hearing will have to deal with it even if he or she finds that for some reason or other, he or she thinks the point would be best left to the Final Hearing.
 - 18.5. There is the possibility as suggested by Mrs Duane, that actually, if one were to combine the question of disability and knowledge, one day might not be enough. I do not think it would be. One would then be taking up more time and the cost benefit of a knock out blow becomes diminished.
19. For these reasons I conclude that, having regard to the overriding objective and the relative prejudice to the parties, it is in the interests of justice that the question of knowledge be left to be resolved at the Final Main Hearing.

Issues

20. Mrs Duane prepared a Draft List of Issues for today. Mr Kirk prepared a document suggesting changes. I agreed with the various points which he made, as did Mrs Duane. Counsel agreed that they would today liaise with each other to agree a final version of the List of Issues and file the same with the Tribunal. The Employment Judge at the Open Preliminary Hearing will need to double check that this has been done.

Listing

21. I noted and discussed with the parties that the Respondent's witness Ms Kibble, is Operations Manager for Norfolk, Essex and Suffolk Crown Courts and is located in the Norwich Combined Court at Bishopgate, the building immediately adjacent to the Magistrate's Court Building in which the Employment Tribunal for Norwich is located. There is the potential for embarrassment. After discussion, we agreed that the Final Main Hearing should be by CVP so that it can be allocated to an Employment Judge who is not permanently located in Norwich, (at present that is myself and Employment Judge Postle), or a fee paid Employment Judge who does not sit regularly in the Norwich Tribunal.
22. In discussion we agreed upon a time estimate of one half a day for the Open Preliminary Hearing, (on the basis that we dealt with the List of Issues, the Final Listing and Case Management Orders today) and four days for the Final Main Hearing, to include Remedy if appropriate.
23. In the presence of the parties and on the basis of their dates of availability, I made arrangements with the Listing Team for the case to be listed for an Open Preliminary Hearing with a time estimate of three hours before an Employment Judge sitting alone to commence at 10am on 5 December 2022. The matter was further listed for a Final Main Hearing by CVP before a full Tribunal on 2 – 5 May 2023. The Final Main Hearing will of course be vacated if the Tribunal decides that Mr Moore was not a disabled person at the Open Preliminary Hearing.

Case Management Orders

24. In discussion with the parties and with their agreement, I made the Case Management Orders set out below.

ORDERS

Made under the Employment Tribunals Rules of Procedure 2013

OPEN PRELIMINARY HEARING

1. This matter has been listed for an Open Preliminary Hearing to be conducted by Cloud Video Platform (CVP) before an Employment Judge sitting alone, with a time estimate of 3 hours to commence at 10am on **5 December 2022**. The issue to be determined will be whether or not, at the material time, the Claimant was a disabled person as defined in the Equality Act 2010.

MEDICAL EVIDENCE AND IMPACT STATEMENT

2. By no later than **29 September 2022** the Claimant is to disclose his relevant medical records and provide to the Respondent an Impact Statement explaining the effect his medical condition has had on his ability to carry out day to day activities and the duration of such effect.
3. By no later than the date **14 days from** the Respondent receiving the Claimant's medical records and Impact Statement, the Respondent shall confirm to the Claimant and the Tribunal whether or not it accepts that the Claimant was a disabled person at the material time.

EXPERT EVIDENCE

4. The parties have leave to jointly instruct and rely upon the evidence of a medical expert, if so advised. In that event, the Representatives are to agree the identity of such expert, the content of the letter of instruction and any follow up questions which may arise after delivery of the experts report. The Representatives are expected to co-operate in accordance with the overriding objective. Such expert's report is to be made available to the parties and the Tribunal by **21 November 2022**.

BUNDLE FOR THE OPEN PRELIMINARY HEARING

5. The Claimant is to prepare an agreed Bundle containing the documents both parties wish to rely upon relevant to the issues for the Open Preliminary Hearing in PDF format with Optical Character Recognition in accordance with the President's Directions. The Bundle is to be filed with the Tribunal's Document Upload Centre by no later than **21 November 2022**.

THE ISSUES

6. The parties representatives are to liaise today and agree on a final list of issues which is to be filed with the tribunal by no later than **11 August 2022**.

AMENDED GROUNDS OF RESISTANCE

7. The Respondent has leave, if so advised, to file and serve by no later than **13 October 2022** amended grounds of resistance as may be occasioned by the clarification of the case arising out the agreed list of issues.

UPDATED SCHEDULE OF LOSS

8. On or before **13 March 2023** the Claimant shall send to the Respondent a "schedule of loss", i.e. a written statement of what is claimed, including a breakdown of the sums concerned showing how they are calculated.

DISCLOSURE OF DOCUMENTS

9. On or before **9 January 2023** each party shall send to the other a list of the documents in their possession or control relevant to the issues in this case, whether they assist their case or not.
10. If either party requests a copy of any document on the other party's list, that other party shall provide a clear photocopy within 7 days of the request.

BUNDLE OF DOCUMENTS

11. By **13 February 2023** 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 and should only include the following documents:
 - 11.1. 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;
 - 11.2. Documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.
12. In preparing the bundle the following rules must be observed:
 - 12.1. 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
 - 12.2. The documents in the bundle must follow a logical sequence which should normally be simple chronological order.
13. Where an electronic bundle is provided in PDF format:
 - 13.1. The case number(s) should be clearly identifiable.
 - 13.2. Pages in a PDF bundle must be numbered so that they correspond to the automated PDF numbering system.
 - 13.3. Any additional or late submitted documents should be numbered sequentially at the end of the PDF file and not inserted between other pages.

- 13.4. The parties may choose to send the bundle index or table of contents as a separate PDF file.
- 13.5. Where possible documents should appear the right way up in portrait mode.
- 13.6. Images of text must have been subjected to Optical Character Recognition.

WITNESS STATEMENTS

14. On or before **13 March 2023** the parties shall exchange written witness statements (including one from a party who intends to give evidence). The witness statement should set out all of the evidence of the relevant facts, set out in chronological order, which that witness intends to put before the Tribunal. The Claimant's statement should contain evidence relevant to the remedy claimed, including financial claims and losses. Such statements should consist of facts only and should not consist of argument, hypothesis or supposition.

A failure to comply with this order may result in a witness not being permitted to give evidence because it has not been disclosed in a witness statement; or in an adjournment of the hearing and an appropriate order for costs caused by such adjournment.

15. The statement should be typed if possible and should be set out in short, numbered paragraphs. If reference is made to a document, it should include the relevant page number in the agreed bundle.

HEARINGS

16. This matter has been listed for hearing by CVP before a full tribunal with a time estimate of 4 days on **2 to 5 May 2023** inclusive. This time estimate has been arrived at after discussion with the parties, to include the time needed for considering the oral and written evidence; the party's closing statements; the consideration and delivery of the fully reasoned Judgment of the Tribunal on liability and evidence, consideration and Judgment on remedy, if arising. The parties are expected to ensure that they prepare the case in such a way that it may be concluded within that time frame. The date of the hearing has been set on the basis of dates of availability provided by the parties and therefore any application for a postponement will only be granted in the most extenuating of circumstances.

Public access to employment tribunal decisions

The parties should note that all judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

President's guidance

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/

Other matters

(a) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(b) Under rule 6, if this Order 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.

(c) You may apply under rule 29 for this Order to be varied, suspended or set aside.

Dated: 20 September 2022

Employment Judge M Warren

ORDERS SENT TO THE PARTIES ON

03.10.2022

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J Moossavi

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FOR THE TRIBUNAL OFFICE