# Caution required in case management:

## *Rooney v Leicester City Council* UKEAT/0064/20/DA and UKEAT/0104/21/DA

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### Introduction

1. In a recent EAT decision, HHJ Tayler considered appeals following case management of two claims brought by Ms Rooney against the Respondent, Leicester City Council.

2. The Claimant commenced employment with the Respondent in 2006 until her resignation in August 2018. Her claim form stated that "the Claimant was suffering from work-related stress [but] accepts, however, that the work-related stress she was suffering from and/or the menopausal symptoms are not sufficient to amount to a disability [within the meaning of s6 EqA 2010]" [**paragraph 4, EAT judgment**].

3. The Claimant contends that paragraph was pleaded without her permission.

4. The Claimant, acting now in person, submitted a second claim the day after her first claim was submitted. She asserted, within her second claim, that she had been subjected to disability and sex discrimination.

### The Tribunal

5. The claims were consolidated on 26 April 2019. The Claimant applied to remove the concession that she was not disabled in Claim 1. Employment Judge Butler heard the case management hearing on 22 July 2019; the Claimant was ordered to provide further and better particulars of her disability and sex discrimination complaints in the form of a Scott Schedule.

6. The Judge also decided to fix, of her own motion, a Preliminary Hearing to determine whether the disability discrimination and/or sex discrimination complaints should be struck out on the basis that they had little reasonable prospect of success (or whether deposit orders should be made) and whether the claimant was disabled by virtue of menopausal symptoms, anxiety and depression.

7. The EAT noted that it was:

   "*hard to understand why it was not possible for the employment judge, providing no more than a reasonable level of assistance to a litigant in person as would accord with the overriding objective, to ascertain the claims that the claimant wished to bring from the four paragraphs in the second claim form in which she had sought to set them out. Further, as it was thought that there was merit in requiring the claimant to provide additional information, presumably because it was thought that it could result in arguable claims being set out, I also find it a little difficult to see how it was determined before the schedule had been produced that it was appropriate to list a hearing to consider strike out, particularly in a discrimination claim. Once the listing is made the employment judge is required to determine the strike out application, absent a material change in circumstances: Serco Ltd v Wells [2016] ICR 768*" [**paragraph 12, EAT judgment**].

8. The Scott Schedule and disability impact statement were provided. On 1 November 2019 the Preliminary Hearing took place. The Respondent did not submit that any claim for disability discrimination was precluded by the concession made within the first claim. The Judge had stated to parties that he "considered the case to be one of the most interesting and difficult he had come across in a long time" [**paragraph 19, EAT judgment**].

9. The written judgment was provided to parties on 7 December 2019 (oral judgment having not been given on the day of the hearing). The Judge struck out the complaint of sex discrimination, harassment and victimisation as disclosing no reasonable prospect of success and also struck out the complaints of disability discrimination on the basis that the Claimant was not disabled within the meaning of s6 EqA 2010 in relation to any of the pleaded conditions. Brief reasons were given for the above decisions. The EAT noted that *"on an initial reading,* [the reasons] *suggest that either the judge concluded that the matter was not nearly as difficult as he had thought or, as the claimant contends, he failed to address the difficulties"* [**paragraph 21, EAT judgment**].

10. The Claimant appealed the decision of Employment Judge Butler; on 16 June 2020 Linden J determined that the appeal in relation to strike out of the sex discrimination, harassment and victimisation were arguable and permitted that ground of appeal to proceed.

11. In the intervening period, the Claimant also applied to amend her claim to add complaints of whistleblowing following disclosure by the Respondent of the proposed bundle for the Final Hearing in the original claims.

12. On 9 November 2020, the Claimant's application to amend was considered by Employment Judge Ahmed, who refused the application. The Claimant appealed that decision on 13 January 2021. On 11 March 2021 HHJ Auerbach permitted the Claimant to appeal the finding that she was not disabled. On 17 May 2021 the Claimant was permitted to appeal the decision in respect of the amendment issue.

## The EAT

13. HHJ Tayler summarised the position as follows:

> *"It appears that the disability discrimination claims were dismissed because it was held that the claimant was not a disabled person. The direct sex discrimination claims were dismissed as having no reasonable prospect of success. It is not clear on what basis the harassment and victimisation claims were dismissed. I consider it is logical to deal with the grounds in the appeals by considering the issue of disability, dismissal of the direct sex discrimination claims, dismissal of the harassment and victimisation claims and finally the amendment application. Before doing so, I shall consider the authorities the respondent relies on in both appeals about the generous ambit to be given when reading the decisions of the employment tribunal and the importance of the EAT only interfering where there is a genuine error of law"* [**paragraph 31, EAT judgment**].

<u>The disability status issue</u>

14. The EAT remarked that the Tribunal had not expressly found facts before applying the law to determine the issues and that therefore "any findings of fact that were made are to be inferred from the conclusions eventually reached" [**paragraph 42, EAT judgment**]. The EAT remitted the question of whether or not the Claimant was disabled on the basis that the Tribunal had erred in focusing on what the Claimant could do in contrast to what she could not do.

The strike out issue

15. HHJ Tayler held that:

> *"The Tribunal's analysis simply did not consider the claimant's claims as clarified in the Scott Schedule. The Tribunal did not suggest that reliance on the matters in the Scott Schedule would require an application to amend. The claims, either as set out in the claim form or as added to in the Scott Schedule, cannot realistically be characterised as being limited to the claimant being embarrassed about discussing her menopausal symptoms with men. Employment Judge M Butler had said that he considered the case to be one of the most interesting and difficult he had come across in a long time. The respondent contends that there was a detailed discussion of all of the allegations in the Scott Schedule at the hearing. However, there is simply no consideration of them or explanation of why those claims have been dismissed. The decision fails to comply with the fundamental requirement to explain to the claimant why her complaints were struck out. Accordingly, the appeal against the strike out of the discrimination sex claims must be allowed"* [**paragraph 61, EAT judgment**].

16. As no reasoning for the victimisation and harassment was given, the appeal was also permitted in respect of those allegations.

The amendment Issue

17. The application to amend was dismissed on the basis that the Claimant had not provided evidence to support the time issue. HHJ Tayler held that this was not correct and discerned that "*the claimant had given an explanation of why the application to amend was made late. She contended that she had been unaware that she had an arguable complaint until she had seen documentation provided in the tribunal bundle. This contention was not considered at all by the employment tribunal. It therefore failed to properly consider the application that had been made to amend. The claimant cannot know why her explanation for the delay in making the application to amend was rejected*" [**paragraph 64, EAT judgment**].

18. The claims were therefore remitted to a new tribunal to consider the issues afresh.

## Conclusion

19. This case is evidently fact sensitive. However, issues of amendment, disability status and strike out are well trodden in the Tribunals. It is critical that those sorts of case management issues are dealt with carefully and cautiously in order to prevent unnecessary delay and ensure effective, efficient conduct of litigation.

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