



EMPLOYMENT TRIBUNALS

Claimant

Miss F Mubayiwa

v

Respondent

Cygnnet Health Care Ltd

PRELIMINARY HEARING

Heard at: Watford

On: 22 June 2017

Before: Employment Judge Bartlett

Appearances:

For the Claimant: In person

For the Respondent: Mr A McArthur, Solicitor

JUDGMENT

1. The claimant made an application for summary judgment in her case.
2. The respondent submitted that there was no power for the Employment Tribunal to make such an order. I considered Rule 28 and Rule 37 of the Employment Tribunal Rules of Procedure. Rule 28 sets out a dismissal of a response. Rule 28(1)(a) sets out the following:

“The tribunal send a notice to the parties setting out the judge’s view and the reasons for it.”
3. The tribunal has not carried out that step and therefore I consider that this Rule is not applicable to the present case.
4. In relation to Rule 37, this sets out grounds on which a response may be struck out. I considered that none of these grounds have been made out. In particular it cannot be said that the respondent’s response is scandalous, vexatious or has no reasonable prospects of success. Its defence is rational, submitted in time and may or may not succeed at the final hearing.

REASONS

5. The appellant made an application to amend her claim form to include claims of indirect discrimination. At the hearing I read s.19 to the appellant and set out that a provision, criterion or practice must be present. The appellant stated that her claim of indirect discrimination was based on recruitment processes which allow discrimination to happen. After some discussion it was agreed that this was properly categorised as a culture of a lack of diversity or that a culture existed that permitted discrimination to be carried out. It seemed that this was more of a supporting claim to that of direct discrimination and it could not properly be characterised as indirect discrimination. Therefore the appellant withdrew her application to amend her notice of claim in this respect.
6. The respondent made an application under Rule 29 of the Employment Tribunal Rules of Procedure 2013 that the claimant be ordered to pay a deposit as a condition of continuing to advance the allegations she sets out in her ET1.
7. The claimant's ET1 sets out a claim for the following grounds:
 - 7.1 Direct discrimination on the grounds of age; and
 - 7.2 Direct discrimination on the grounds of race.
8. The claims before me, which I must consider for the Deposit Order were as follows:
 - 8.1 Did the respondent reject the claimant's job application because of her race, ie direct race discrimination; and
 - 8.2 Did the respondent reject the claimant's job application because of her age, ie direct age discrimination?

The law

9. Rule 39 of the Employment Tribunals (Constitutional Rules of Procedure) Regulations 2013 sets out that two issues must be considered in relation to Deposit Orders, namely:
 - 9.1 A claim must have little reasonable prospect of success; and
 - 9.2 Reasonable enquiries must be made into the paying party's ability to pay the deposit.

Evidence

10. The appellant's evidence was that she was a single mother to three children. She did not receive Child Support. The ages of her three children are 21, 15 and 9 years old. In respect of the eldest child, he is at university and therefore the claimant continues to assist him. In the financial year ending on 6 April 2017 the appellant's P60 for her employment in bank work as a nurse set out that she received an income of approximately £17,000. The claimant clarified that during

that year she had another commitment and that usually she would receive approximately £24,000 to £25,000 gross annual income. I asked the appellant if she had any onerous financial commitments and she referred to the above.

11. In very brief summary the claimant's claim is that she applied for a role with the respondent and her application was rejected at 7.13am the day after she submitted her application form. This rejection was less than nine hours after she had submitted her application. Her claim is that as a result the respondent must have acted on a race and/or age discriminatory basis in rejecting her application.
12. In very brief summary, the respondent's case is that the role for which the appellant applied was only open to candidates who had previously been shortlisted. The respondent accepted that it was possible that the job application advert did not say this when the claimant applied. However, these were the criteria applied by the respondent and therefore the appellant and approximately 19 other applications were rejected automatically as not being on the shortlist. The respondent had not initially accepted the job application did not include a statement that it was only available to candidates who had previously been shortlisted.
13. The respondent submitted a spreadsheet which set out extremely brief details of all the applications it received for the role for which the claimant applied. The only details recorded about characteristics of the appellants on whether they had disabilities and their ethnic origins. The list sets out that a number of applicants were from black or black British ethnic background, one was from Asian or Asian British background, and a number were from white British and three were from other white ethnic origins. No record of age is made.
14. I asked the appellant if she had completed an online application form in which she had to put her age. She stated that she had not but she had submitted her CV which included her age.
15. I must make it clear that the test set out in Rule 39 is very different from that required for a case to succeed or fail at a full hearing. This preliminary hearing is not designed to deal with all of those issues and nor can it.
16. I find that there is little prospect of the appellant's claim of direct discrimination on the grounds of age succeeding. There is no record of the respondent recording the ages of applicants. Many individuals do not put their ages or date of birth on their CVs. The claimant may well have chosen to do so but many other applicants may not have done so. In these circumstances there is little more than the vaguest of assertions that can support a claim of direct discrimination on the grounds of age.
17. In relation to the claimant's claim of direct discrimination on the grounds of race, I note that the spreadsheet of applicants submitted by the respondent sets out racial background and that candidates from many racial backgrounds, including white backgrounds, were rejected. I note that the two successful candidates were white British. I consider this to be a very marginal case. The claimant has little more to support her claim than the fact that her application was rejected and rejected quickly. I have given consideration to the respondent's defence that any

individual who had not previously been shortlisted was automatically rejected. I note that this is not an argument that requires consideration of the subtle behaviours that can give rise to discriminatory conduct. If this argument succeeds the respondent's defence will succeed and the claimant's claim will fail. If the respondent's defence fails on this point the claimant's claim will no doubt succeed.

18. I note that the role for which the claimant applied was a trainee management position and the information before me is that her experience is on the practical nursing side rather than management.
19. Taking all of these factors into consideration I consider that there is little prospect of the appellant's claim of direct discrimination on the grounds of race succeeding.
20. Limited information was provided to me about the claimant's financial means. I made the enquiries that I could from the claimant. The evidence from the claimant in respect of this is set out above. I have decided to make a Deposit Order in respect of both claims in the amount of £75.00. That is a total of £150.00. This amount is to be paid by the claimant within 30 days of today's date, which is Monday 31 July 2017.
21. I make the following order:

DEPOSIT ORDER

1. The Employment Judge considers that the claimant's allegations or arguments that she has suffered direct race and age discrimination have little reasonable prospect of success. The claimant is ordered to pay a deposit of **£150.00** not later than **31 July 2017** as a condition of being permitted to continue to advance those allegations or arguments. The judge has had regard to any information available as to the claimant's ability to comply with the Order in determining the amount of the deposit.
2. The respondent made an application to amend its response. The amendments were marked in blue underlined ink in the response. After carefully considering the amendments I considered that they were of a factual nature and mainly amounted to a concession that the job application as it was when the claimant made her application for the job may not have included a reference to only being open to shortlisted candidates. I consider that the arguments the claimant made at the preliminary hearing were arguments that went to the merits of the defence. I do not consider that the acceptance of the amendments would put the claimant in an adverse position such that she would incur unnecessary time or expense in responding to the defence. It is common practice that claims evolve during the run up to a full hearing and I consider the respondent's amendments to be of factual and not legal nature. Therefore, I permitted the respondent's amendments to be made.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within **one day**. It has been listed at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP to start at 10.00am or so soon thereafter as possible on **20 October 2017**. The parties are to attend by 9.30am. The hearing may go short, but this allocation is based on the claimant's intention to give evidence and the respondent's intention to call two witnesses.

The complaint

2. The claimant brought complaints of direct race and age discrimination. The respondent defended the claims.

The issues

3. I now record that the issues between the parties which will fall to be determined by the tribunal are as follows:
4. **Section 13: Direct discrimination on grounds of age and/or race**
 - 4.1 Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:
 - 4.1.1 Rejecting the claimant's job application submitted on 7 March 2017.
 - 4.2 Has the respondent treated the claimant as alleged less favourably than it would have treated a comparator?
 - 4.3 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
 - 4.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Disclosure of documents**
 - 1.1 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **1 September 2017**.

1.2 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

1.3 The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

2. **Schedule of loss**

2.1 The claimant is ordered to provide to the respondent and to the tribunal, so as to arrive on or before **1 September 2017**, a properly itemised statement of the remedy sought (also called a schedule of loss).

2.2 The claimant is to provide an updated schedule of loss at the final hearing.

3. **Bundle of documents**

3.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

3.2 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **22 September 2017**.

4. **Witness statements**

4.1 It is ordered that the parties must prepare typed witness statements in respect of all witnesses.

4.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.

4.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

4.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

4.5 It is ordered that the witness statements are exchanged so as to arrive on or before **6 October 2017**.

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 Bartlett

Date: 14 August 2017

Sent to the parties on:

14 August 2017

For the Tribunal:

.....

**PRELIMINARY HEARING
NOTE ACCOMPANYING DEPOSIT ORDER**

Employment Tribunals Rules of Procedure 2013

1. The Tribunal has made an order (a “deposit order”) requiring a party to pay a deposit as a condition of being permitted to continue to advance the allegations or arguments specified in the order.
2. If that party persists in advancing that complaint or response, a Tribunal may make an award of costs or preparation time against that party. That party could then lose their deposit.

What happens if you do not pay the deposit?

3. If the deposit is not paid the complaint or response to which the order relates will be struck out on the date specified in the order.

When to pay the deposit?

4. The party against whom the deposit order has been made must pay the deposit by the date specified in the order.
5. If the deposit is not paid within that time, the complaint or response to which the order relates will be struck out.

What happens to the deposit?

6. If the Tribunal later decides the specific allegation or argument against the party which paid the deposit for substantially the reasons given in the deposit order, that party shall be treated as having acted unreasonably, unless the contrary is shown, and the deposit shall be paid to the other party (or, if there is more than one, to such party or parties as the Tribunal orders). If a costs or preparation time order is made against the party which paid the deposit, the deposit will go towards the payment of that order. Otherwise, the deposit will be refunded.

How to pay the deposit?

7. Payment of the deposit must be made by cheque or postal order only, made payable to HMCTS. Payments CANNOT be made in cash.
8. Payment should be accompanied by the tear-off slip below or should identify the Case Number and the name of the party paying the deposit.
9. Payment must be made to the address on the tear-off slip below.
10. An acknowledgment of payment will not be issued, unless requested.

Enquiries

11. Enquiries relating to the case should be made to the Tribunal office dealing with the case.
12. Enquiries relating to the deposit should be referred to the address on the tear-off slip below or by telephone on 0117 916 5015. The PHR Administration Team will only discuss the deposit with the party that has been ordered to pay the deposit. If you are

not the party that has been ordered to pay the deposit you will need to contact the Tribunal office dealing with the case.

✂-----

DEPOSIT ORDER

**To: HMCTS
 Finance Support Centre
 Spur J, Government Buildings
 Flowers Hill
 Brislington
 Bristol
 BS4 5JJ**

Case Number _____

Name of party _____

I enclose a cheque/postal order (*delete as appropriate*) for £_____

Please write the Case Number on the back of the cheque or postal order