



EMPLOYMENT TRIBUNALS

Claimant: Mr R Wilson

Respondent: Warrington & Halton Hospitals NHS Foundation Trust

HELD AT: Liverpool

ON: 19 December 2017

BEFORE: Employment Judge Robinson

REPRESENTATION:

Claimant: Ms R Levene of Counsel

Respondent: Mr G Powell, Counsel

JUDGMENT

The judgment of the Tribunal is:

1. The application by the respondent to have the claimant's claim relating to sex discrimination struck out on the basis that it is scandalous, vexatious and/or has no reasonable prospect of success fails and is dismissed.
2. The respondent's second application for the claimant to pay a deposit in order to proceed with his sex discrimination claim also fails and is dismissed.

REASONS

1. This is a preliminary hearing to deal with an application by the respondent that Mr Wilson's sex discrimination claims against it should not proceed because they have no reasonable prospect of success, or that Mr Wilson should pay a deposit in order to allow him to proceed because they have little reasonable prospect of success. I have taken no oral evidence but I have been referred extensively to two bundles of contemporaneous documents. I have considered the precedents to which I have been referred contained in the third bundle.
2. Mr Powell urges me to strike out this part of the claimant's claim because it is his submission that this case is one of those very exceptional discrimination cases

where the claim of sex discrimination is made scandalously, vexatiously and has no reasonable prospect of success and is an obvious and clear case where I should exercise my discretion and only allow the claimant's constructive unfair dismissal claim to proceed.

3. On the other hand Ms Levene urges me not to do so. She reminds me that I must follow the two stage process:

- (1) Has the respondent shown the claims have no or little reasonable prospects of success; and
- (2) If I get to that point then should I exercise my discretion to do so?

4. The principles upon which I have relied are, firstly, that I have the power to strike out claims but I must exercise that power to strike out with reason, relevance, principle and justice. I must give the claimant the opportunity to make representations to counter the respondent's application. I must establish what Mr Powell's grounds are for striking out. They are those contained in rule 37(1)(a) of the 2013 Regulations. I noted that there are special considerations when considering a strike out in a discrimination case. They are fact sensitive and usually require a full examination of all the issues and evidence to make a proper determination.

5. I considered the judgment in **Ezsias v North Glamorgan [2007]** (Court of Appeal). The Court gave an example of where a discrimination case might be struck out, namely where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

6. I reminded myself that the test is not whether the claim or claims are likely to fail. I noted that a cautious approach should always be taken by Tribunals before striking out discrimination cases generally. I therefore asked myself this question: are there crucial facts in dispute between the two parties?

7. Applying those principles to the submissions I have heard and also after reading the documentation I concluded as follows.

8. I agree with Ms Levene that I should not indulge in a mini trial on the documents without hearing oral evidence. The allegation by Mr Wilson, put in a nutshell, for both his constructive unfair dismissal claim and discrimination claims, is that senior positions within the respondent are held by women and, because of that, those women protect each other. He will say that he was treated less favourably than three women, Mel Pickup, who is the Chief Executive of the Trust, Pat McLaren, the Director Community Engagement and Corporate Affairs, and Andrea Chadwick, Director of Finance.

9. The claimant will also give evidence that he was less favourably treated than Sharon Gilligan, the Chief Operating Officer. She was not taken through a disciplinary process, despite very serious allegations being made against her of bullying. He will say she was allowed to leave the Trust's employment and "paid off".

10. At the final hearing, if I allow Mr Wilson's sex discrimination claim to proceed, he will seek to compare himself with a hypothetical comparator as well as the four individuals that I have named.

11. It seems that the claimant was taken through a disciplinary process, although he resigned before he was found guilty of gross misconduct. The three allegations against the claimant were:

- (1) Whilst employed with another Trust he played a major part, and I stress that, in making payments to an employee where it was alleged those payments were inappropriate;
- (2) Whilst employed by the respondent Trust, he managed three termination payments when the Trust had no compliant procedure in place;
- (3) There were matters which suggested he had lost the respondent's trust and confidence.

12. The claimant resigned on the basis that it was he who had lost trust and confidence in the respondent.

13. I have considered what would happen at a final hearing. The claimant will allege that three of his comparators, Pickup, Chadwick and McLaren, also had a responsibility to make sure termination payments to employees were properly made by this Trust. Most of the allegations are about that one issue. There is much to consider, both with regard to the issue of constructive unfair dismissal and whether he has been treated differently from senior female colleagues.

14. The Tribunal will have to consider whether there has been subconscious discrimination and whether inferences can be drawn from the facts which tend to show that the claimant has been treated differently from his comparators. There will have to be a consideration as to whether other employees were "fit and proper persons" for the purposes of the 2014 regulations to which I have been referred, and was it right to single out the claimant to be taken through a disciplinary process? I do not know what the outcome will be. I cannot see that the facts the claimant seeks to establish are inconsistent with the documentary evidence I have seen. This is not an exceptional case where it is clear there is nothing in the sex discrimination allegations. I recognise that the claimant's sex need not be the only reason for the treatment of him. However if the treatment of him is tainted by discrimination then there is the potential for him to win some or all of his claims.

15. I have to take, at this stage, the claimant's case at its highest and act cautiously. I cannot strike out the claimant's claims of direct sex discrimination, nor do I feel that it is appropriate, in these circumstances, to make him pay a deposit. All his claims must therefore be aired before a full Tribunal so that all the facts can be considered.

16. The final Tribunal should consider the material evidence, in particular, with regard to the comparators and those considerations are better exercised by a full panel hearing all the evidence rather than me making a decision which can only be made with part of the story before me. Applying the test set out in paragraph 3 above Mr Powell has not persuaded me that the claims have no or little reasonable prospects of success. I, consequently, refuse both applications.

Employment Judge Robinson

10-01-18

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 January 2018

FOR THE TRIBUNAL OFFICE