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EMPLOYMENT TRIBUNALS

Claimant		***Respondent(s)***
Mr D Edwards	**AND**	Win Technologies (UK) Ltd and Others

Heard at: London Central **On**: 24 September 2018

Before: Employment Judge J S Burns

Representation

For the Claimant: Ms M Dimitrova, Friend
For the Respondent: Mr N Roberts, of Counsel

PRELIMINARY HEARING

REASONS

1. The Claimant appears with his friend Ms M Dimitrova and the Respondent is represented by Mr N Roberts, of Counsel. The purpose of the Hearing was to determine whether or not the Claimant was disabled at the relevant time and/or whether his claims of unfair dismissal, direct sex discrimination and failure to make reasonable adjustments to him as a claimed disabled person should be struck out or made the subject of a Deposit Order on the grounds of their limited prospect of success.

2. I heard evidence from the Claimant who had produced an impact statement in relation to his claimed disability. I was taken to documents in a substantial joint bundle and I was also handed a written skeleton argument from the Respondent and I received oral submissions from both sides and during the oral submission stage I engaged in a fairly lengthy and direct conversation both with the Claimant and with Ms Demitrova to ensure that all points were covered.

3. The matter had been the subject of previous Hearing before Judge Glennie on 18 July 2018 when today's Hearing was set up. Judge Glennie identified what the issues and claims were and are and it was in relation to those claims and issues that the parties have been preparing for today and have made their arguments.

4. There were two applications by the Claimant which I have had to deal with:

Application to Amend POC

5. The ET1 insofar as unfair dismissal was concerned takes the form of some short allegations in Section 15 of the form which include the following insofar as they can be construed as references to the claimed unfairness of the dismissal *"prior to the appeal I was informed that no further evidence could be put forward limiting my defence and failure to appoint an impartial Director to Chair the Appeal Hearing, Fatima Dodds, Respondent number two was heavily involved prior and during the disciplinary procedure".*

6. Attached to the ET1 claim form was a document which is entitled "*Appeal Notice against termination of employment by reason of sexual harassment and inappropriate conduct as a Manager,*" dated 27 November 2017. It contains headings on the first page under 'Ground One and Ground Two' which contain various complaints that the dismissal was substantively unfair but there are also some points which can be construed as complaints about procedural unfairness.

7. The Claimant had produced a document containing further allegations and assertions and claims in a document entitled "*Particulars of Claim/Further Information*" which he signed on 15 July 2018 (misdated as 15/7/2017) and served it on the Respondent.

8. On receipt the Respondent's solicitor had written to the Claimant and his friend and said that if they wanted to add to the unfair dismissal claim or any other part of the claims then a formal application should be made which would be opposed. So, the Claimant was fully on notice of the requirement to make a proper application but none was made at the Hearing before Judge Glennie on 18 July.

9. The Claimant applied before me at the hearing on 24/9/2018 to add the allegations in the 15 July 2018 document to his claim.

10. I have applied the principles in the Selkent case to the application. The application has been made very late with no explanation put forward for the delay. The application should have been made before Judge Glennie at the earlier hearing, at the very latest. Ass this was not done, Judge Glennie identified the claims as then made and referred those matters for consideration at the public preliminary hearing which is now before me.

11. In my view it is disproportionate and unreasonable to make such a late application to add such a considerable amount of additional material. Accordingly I refused the application to amend.

Application to adjourn

12. The Claimant also applied to adjourn the whole Hearing today to some unspecified later date (which would probably have to be at least two months hence) to allow the Claimant to obtain an expert's report about his claimed dyslexia.

13. Judge Glennie by paragraph 2 of the Order of 18 July had ordered the Claimant by 17 August to send copies of his medical records and reports relevant to the condition of dyslexia and a signed impact statement.

14. No application was then made for leave to adduce an expert's report. Nothing was done then in that regard although the Claimant and his friend must have been fully aware then of the state of the medical evidence appertaining to his claimed dyslexia, and very little appears to have been done subsequently.

15. Earlier in September an application came in asking for an adjournment of today's Hearing, which was refused on the basis that I could reconsider it today. But I found out today that even now, no expert has been finally identified as the person who would carry out the report, although apparently Miss Dimitrova has got a list of people who she might wish to instruct.

16. This is not a situation in which an expert has already been instructed and the report is awaited in the near future. No actual steps have been taken to instruct anybody.

17. Again there is no reasonable excuse and to apply now is disproportionate and unreasonable having regard to the need to deal with all cases in this Tribunal within a reasonable timescale and to avoid unnecessary delay and expense.

18. Furthermore, given my findings about any dyslexia, I did not think that adducing an expert's report would be likely to make any difference to the outcome for the Claimant in any event in relation to his claimed disability claim. Hence I refused to adjourn.

Applications to strike out/deposit

19. Dealing firstly with unfair dismissal and the prospect of success should this case go to the Final Hearing:

20. The Claimant was summarily dismissed for sending a series of emails to a junior work colleague, by the name of Miss Ninno, between 5-8 May 2018. These emails included repeated chastisement of Miss Ninno in highly personal terms, extensive and aggressive use of profanities, criticism of Miss Ninno's colleagues and the Respondent's employees also in highly personal terms, criticism of Miss Ninno's choice of romantic partners, a statement that the Claimant was uncomfortable around Miss Ninno at work, content of a sexual nature and an acknowledgment that Miss Ninno had anxiety and depression and that his emails would be "a lot to take in".

21. I have read these emails, they are grossly offensive, and wholly inappropriate for anybody to send to a work colleague and that is more so where the work colleague has asked (as Miss Ninno did) for the emails not to be repeated and where the recipient of these emails was in a junior position and is known to have emotional anxieties and depression.

22. The Claimant's response to this situation, (the emails being admitted by him) is to raise points about the procedural aspects of his dismissal and then to make a plea that in all the circumstances dismissal was not a reasonable response.

23. I do not intend to go through in these Reasons each and every one of the quasi-procedural objections which have been raised in the admissible content of the ET1, but I have discussed each one of them with the Claimant and with his representative and given him an opportunity to explain to me why they would in their view advance the unfair dismissal claim. Generally speaking I am quite satisfied that they are nit-picking points, none of which, even if resolved in the Claimant's favour, would be likely to support a finding that there was an unfair dismissal.

24. For example, one of the points taken is the claim that the Claimant was not sent a copy of the disciplinary procedure until the day before the Disciplinary Hearing. Even if it is accepted for the sake of the application that that was so, there is no legal obligation to send a copy of a disciplinary procedure at any stage to a person who is to be subjected to that procedure. What is important is whether the Disciplinary Hearing itself was carried out in a fair manner. Having read the very lengthy record of the Disciplinary Hearing and asked the Claimant about this, I am quite satisfied that the Disciplinary Hearing was fair and reasonable and the Claimant was fully aware of what it was all about, namely these grossly offensive emails which he had sent.

25. Another example of an insubstantial procedural point is the claim that Fatima Dodd the Appeal Manager was biased in some way before she started sitting on the Appeal. I gave Mr Edwards and Miss Dimitrova sometime to try to produce any scrap of evidence to demonstrate how they would try to prove this, but they were unable to do so. Furthermore an examination of the lengthy transcript of the Appeal Hearing demonstrates that this point was not even referred to or raised by the Claimant with Fatima Dodds at the time although he had raised all sorts of other lengthy arguments.

26. Really what this unfair dismissal claim boils down to is a complaint that in all the circumstances and in the context, notwithstanding the sending of the emails it was not within the range of reasonable responses to dismiss the Claimant. He says that firstly he was drunk and secondly these emails were sent when he was at home on his personal email, not at work, and thirdly that Miss Ninno had sexually harassed him by making unwanted sexual approaches to him over a period of time. He also says that Miss Ninno and possibly other woman wanted to get him out of the Respondent's employment and were carrying out a smear campaign against him.

27. None of these matters even if established in my view would assist the Claimant and allow him to escape the cold reality which is, that he in a managerial position dealing with a junior, vulnerable, single female work colleague persisted in sending grossly offensive, profane and disturbing emails to her.

28. The Claimant was not dismissed because of Miss Ninno's shortcomings, he was dismissed simply because of his wholly inappropriate emails and in my view, there is no reasonable prospect of any Tribunal concluding that his dismissal for having sent these emails fell outside a range of reasonable responses, notwithstanding the claimed mitigation which Mr Edwards is seeking to put forward.

29. If I am wrong about that and even if for some reason (which I have not been able to identify despite a Hearing in excess of three hours duration) there was a finding of unfair dismissal, there would be one hundred percent contributory fault and one hundred percent polkey deduction, so the Claimant would be left with nothing anyway.

30. For these reasons I strike out the unfair dismissal claim as having no reasonable prospect of success.

31. The sex-discrimination claim falls in to two parts, the first part is the complaint that all involved except the Disciplinary Hearing Manager were female. I have ascertained that the investigating officer was female and the appeal officer was female but the person who decided to dismiss in the first place was male. This pattern of people being male or female does not begin to establish a direct sex discrimination claim, because it does not follow that because a person has a particular gender, that they will have a gender bias. So, merely pointing to the fact that certain people have certain genders is a hopeless sex discrimination claim.

32. The second limb of the sex-discrimination claim is the complaint that as the Claimant himself had been sexually harassed by Miss Ninno, the Respondent's treatment of Miss Ninno as an actual comparator for direct discrimination purposes, should be regarded as different from its treatment of the Claimant, and thus possibly discriminatory.

33. What happened to Miss Ninno is that she put in a grievance against the Claimant for sexual harassment at much the same time as resigning, so her employment with the Respondent came to an end. Miss Ninno cannot be an actual comparator of any value because she was not around as an employee to be dismissed, furthermore she was in a junior position to the Claimant, and she had not written abusive, profane emails to the Claimant (whereas the Claimant had done sent such to her) and also, he had not raised a grievance against her whereas she had against him.

34. In so far as a hypothetical comparator is concerned I considered whether there was any evidence to suggest that if, for example a female manager in a senior position sent abusive and profane emails to a junior male employee who

then had raised a grievance and resigned in response, whether that more senior female manager would have been treated any differently to how the Claimant was treated, but I could see no a shred of evidence that that hypothetical comparator would have been treated differently.

35. Hence I saw no reasonable prospect of the sex-discrimination claim succeeding either and that was also struck out.

36. In so far as the disability discrimination claim is concerned the Claimant was cross-examined by Mr Roberts at some length.

37. The first questions is whether the Claimant has proved a physical or mental impairment. He relies on dyslexia.

38. He did not mention his claimed dyslexia to any manager or HR person within the Respondent throughout his fairly lengthy employment there, prior to the commencement of the disciplinary process.

39. He has never been diagnosed by any medical or psychiatric professional as having dyslexia, prior again to the commencement of the disciplinary process.

40. There is a letter from a GP in December 2017 which appears to have been solicited simply as part of the disciplinary process but the Claimant's own evidence now is that that GP was not qualified to express any opinion about whether the Claimant had dyslexia or not. Notwithstanding repeated requests from the Respondent's solicitors, the medical notes and any consultation information etc which may have been generated by that GP has not been produced and disclosure has been refused by the Claimant.

41. The Claimant told me that even if all his medical notes going back to when he was 12 years of age were produced there would be no mention in them of dyslexia up until possibly December 2017.

42. The Claimant has produced today a self-assessment document following the Claimant going on line very recently and answering some questions in a way which it is impossible to ascertain independently, and then printing something off at the end. I give this very little weight as it is not an independent document, it is self-serving and has been produced simply for today.

43. At work, (that is at the Respondent), the Claimant managed a team of five people. I asked him to describe his work to me, and he did so; he ran workshops, he carried out personal research into complicated technical developments pertaining to the development of new software and website systems. He summarised and communicated that information to his team members. He communicated orally and in writing extensively with his team members and took the lead.

44. I cautioned myself against placing too much weight on the evidence of my own eyes at the Tribunal Hearing and I appreciate that I, the Tribunal Judge, do not have any particular expertise in psychiatric matters but I do think that some

weight can be placed on the way in which the Claimant presented himself at the Tribunal. He spoke fluently and eloquently using a wide vocabulary, and lengthy grammatical sentences. I asked him to read a somewhat complicated extract of legalese written on his behalf by Miss Dimitrova and he read it rapidly and fluently and was then able to tell me what it meant. He is an articulate, intelligent person, and he showed absolutely no sign whatsoever of any dyslexia in so far as his appearance before me at the Tribunal is concerned at least.

45. I am not satisfied that he has dyslexia at all. I have come to the conclusion that it is more likely than not that the Claimant has invented this suggestion that he has dyslexia.

46. if I am wrong I would find that it is very mild and does not have a substantial effect on the Claimant's day to day activities. He himself when he first notified his claim of dyslexia to the Respondent in late 2017 said it was "mild dyslexia".

47. The evidence he produced in his impact statement about the impact on day to day activities is extremely limited and it amounts to very little. In fact he is describing things which many people would experience who were not disabled, for example he relies upon mispronouncing words under stress or when introducing himself to strangers. I saw no sign of it. But even if he does experience this on some occasions it is relatively common and is displayed by all sorts of people who are not disabled and who do not have dyslexia.

48. Another example was his claim that he struggles to remember birthdays of other people and lacking awareness of the date or time. Again, these are very common experiences. The Claimant went on to explain that he has to use a diary on his smart phone, this is again something which most people with smart phones do and even if he had dyslexia it is a reasonable coping mechanism and very common.

49. The Claimant has failed to show that he is substantially disadvantaged in his ability to perform day to day activities. He is also not taking any medication or other treatment at all for dyslexia and nor has he ever done so, nor when he was at work did he ever get any particular aids such as dragon software or reading or writing aids.

50. Since being dismissed by the Respondent he has managed to get another job even more highly paid and in which again he is leading a team forward in complicated technological innovative work.

51. Hence I make a finding that on the balance of probabilities that he is not disabled as defined by Employment Law.

52. Furthermore the PCPs claimed by him for purposes of his DDA claims and as identified by Judge Glennie are twofold:

53. Firstly, *failing to take account of what the Claimant had said in written statements,* (this is a reference to statements which he produced during the disciplinary process). Having looked at the evidence in the file I am not satisfied

that that would be made out any event as a matter of fact, because it appears to me that his written statements were taken in to account, but in any event even if the Respondent did not take into account his written statements this would not have been a PCP but rather something specific that allegedly happened to the Claimant.

54. The second claimed PCP is *refusing the Claimant's requests for a friend to accompany him to the Appeal Hearing*. This could mean two things: it could mean not allowing Miss Dimitrova to go to the Appeal Hearing in which case that would not be a PCP because Miss Dimitrova's presence or absence could not be regarded as a PCP but something specific to the Claimant's appeal hearing. If on the other hand it could mean not allowing a work colleague or trade union member (not being Miss Dimitrova) to attend the Appeal Hearing but in that case it would fail because in fact at the Appeal Hearing the Claimant was permitted to be accompanied.

55. Hence for these reasons I found that the DDA claim had no reasonable prospect of success and I struck it out also and vacated the Final Hearing.

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Employment Judge Burns

Dated: 23 October 2018
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Sent to the parties on:
26 October 2018
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For the Tribunal Office