EMPLOYMENT TRIBUNALS

Claimant: Miss Prabha Pankhania

Respondent: Leicester City Council

Heard at: Leicester

On: 19 October 2019

Before: Employment Judge Ahmed (sitting alone)

Representation
Claimant: Mr H Sood of Counsel
Respondent: Ms D Masters of Counsel

JUDGMENT

The judgment of the tribunal is that:

1. The application for an amendment of the claim is refused.

2. The allegations that The Respondent failed to allow the Claimant to work full-time from June 2015 to July 2016 when the Claimant started a period of long-term sick leave is not struck out.

3. The allegations that from 1997 until July 2016, Ms Alison Saxby of the Respondent refused the Claimant training, support, supervision, appraisals and marginalised the Claimant by isolating her, giving her menial tasks and excluding her from participating in tasks with the rest of the team as complaints of race, age and disability discrimination and less favourable treatment by reason of being a part-time worker are all struck out.

4. The allegation that a decision was made to reprimand the Claimant, to isolate and ignore her or to bully and harass her for "copying in" the Black Workers Support Group to an email dated 26 November 2015 and given menial tasks and excluded from tasks is not struck out nor is a deposit ordered as a complaint of race and age discrimination.

5. The allegation that the Claimant was discriminated against by reason of her age or race in that she was not given an opportunity to apply for two full-time appointments or given the opportunity to increase her hours when the opportunity

arose in 2017 is not struck out as complaints of direct age or direct race discrimination or as a complaint of less favourable treatment by reason of being a part-time worker nor is a deposit ordered in respect of that allegation.

6. The complaints of disability discrimination are struck out in their entirety.

REASONS

1. This preliminary hearing was convened to deal with two matters. Firstly, the Claimant's application to amend (which began at the previous preliminary hearing but not concluded) and secondly to consider whether any of the Claimant's complaints should be struck out as having no reasonable prospect of success or whether they should be the subject of a deposit order.

2. The Claimant presented her ET1 on 31 October 2017. She brings complaints of direct race discrimination, direct age discrimination, disability discrimination and detriment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

3. The Claims and allegations were set out clearly or coherently in the Claim Form. The Respondent has produced a summary what they believe they are. In a letter from the Respondent's in-house solicitor to the Tribunal of 15 June 2018, and copied to the Claimant, they identified at paragraph 1(a) – (e) on the second page of that letter what they believed the allegations to be. Mr Sood for the Claimant accepts that this letter accurately records all the allegations being brought by the Claimant. He has nothing further to add. I therefore take that letter to amount to an accurate representation of the Claimant's allegations in these proceedings, subject to what I believe is one further allegation which I have identified below.

4. The allegations as set out at paragraph 1(a) – (e) of the aforementioned letter are as follows:

4.1 A failure to allow the Claimant to work full-time from June 2015 until July 2016 when she began a period of long-term sick leave.

4.2 That from 1997 until July 2016, Ms Alison Saxby (of the Respondent) refused the Claimant training.

4.3 That from 1997 until July 2016, Ms Saxby refused the Claimant support.

4. 4 That from 1997 until July 2016, Ms Saxby refused the Claimant supervision.

4.5 That from 1997 until July 2016, Ms Saxby refused to undertake appraisals for the Claimant.

4.6 That from 1997 until July 2016, Ms Saxby marginalised the Claimant by isolating her, giving her menial tasks and excluding her from participating in tasks with the rest of the team.

4.7 That Ms Saxby, or the Respondent in general, made a decision to reprimand the Claimant for "copying in" the Black Workers' Support Group to an email dated 26 November 2015.

4.8 That Ms Saxby, or the Respondent in general, made a decision to isolate and ignore the Claimant for "copying in" the Black Workers' Support Group to an email dated 26 November 2015.

4.9 That Ms Saxby, or the Respondent, made a decision to bully and harass the Claimant for "copying in" the Black Workers' Support Group to an email dated 26 November 2015 (i.e given menial tasks and excluded from tasks).

5. At this hearing, I identified what appears to be an allegation which is not set out above (which I will refer to as allegation number 10 following the list at paragraph 4 above) and which is clearly apparent from the claimant's claims. It may be described as follows:

"The Claimant discovered the fact that two people had been appointed to full-time roles in June 2017 (the "appointment exercise"). She was not given an opportunity to apply for those roles. The Claimant alleges that she was discriminated against because of her age or race in that she was not considered/or given an opportunity to apply for two full-time appointments or an opportunity to increase her hours when the opportunity arose in April 2017."

6. For the avoidance of doubt the only extant *legal* complaints in these proceedings are of direct race discrimination, direct age discrimination, disability discrimination and detrimental treatment under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

7. The application for an amendment is opposed. The application for a strike out or a deposit order is made on the basis that the allegations are out of time and therefore has little or no reasonable prospect of success.

THE LAW

8. Section 123 of the Equality Act 2010 deals with time limits and states:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable."

9. Rule 37 of The Employment Tribunal Rules of Procedure 2013, so far as is material, states.

"(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;"

10. Rule 39(1) of the 2013 Rules deals with deposit orders and, so far as is material, states:

> *" Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."*

11. Employment Tribunals are generally discouraged from striking out discrimination claims at preliminary hearings before proper findings of facts are made on the basis of long-standing authority. For example, Lord Steyn in **Anyanwu v South Bank Students' Union** [2001] IRLR 305 (at paragraph 24) said:

"*For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.* …"

12. At paragraph 37 of **Anyanwu,** Lord Hope made similar observations:

"I would have been reluctant to strike out these claims, on the view that discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence. …"

13. In **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126, Maurice Kay LJ in the Court of Appeal said:

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. … It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

14. The test for ordering of a deposit is that the Claimant has *little* reasonable prospect of success. It is clear that this means applying a lower threshold than striking out. In **Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames** UKEAT/0096/07 the EAT, Elias J (as he then was) observed:

"27. … the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

15. In relation to dealing with time points at hearings other than final hearings, Mummery LJ in **Arthur v London Eastern Railway Limited (2006) EWCA Civ 1358,** (at paragraphs 33 -35) said this:

"In my judgment, it is preferable to find the facts before attempting to apply the law. I do not think that this is a strike out situation in which assumptions have to be made as to the truth of the facts in order to decide whether there is a cause of action……..

In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period."

16. At paragraph 39 of the judgment, Lloyd LJ (at paragraph 43) agreed with the approach of Mummery LJ:

"It is not helpful or sensible, in the present case, to try to decide on a preliminary basis without evidence whether a number of acts, or failures, do or do not constitute a series of similar acts, so that the complainant can claim for detriment suffered by him as a result of those which happened more than 3 months before the issue of his proceedings. This is the equivalent of a striking-out application. It seems to me that this is rarely likely to be a sensible approach in relation to a discrimination claim."

CONCLUSIONS

Application to amend

17. The application was originally made by the Claimant when she was a litigant in person. She now has the benefit of legal representation from Mr Sood of Counsel. At the previous preliminary hearing on 26 June 2018, the Claimant was also represented by Mr Sood but the application could not be dealt with then and was adjourned to a later date. It is listed to be considered today.

18. Since the above preliminary hearing the Tribunal has been sent a schedule by the Claimant which purports to be the amendment application. It cross-refers to various other documents rather than setting out in simple and straightforward terms what is being sought to be amended. There is no draft amended Grounds of Claim which is often helpful though not in my view essential.

19. The document setting out the proposed amendment is however almost impenetrable. It is difficult to identify what is being sought to be amended from what was there in the original ET1. The process of ascertaining what new allegations the Claimant is raising is practically impossible unless one was to engage in a careful dissection of documents which would take several hours if not several days. It is a document which the Claimant has prepared herself even though she now has legal representation. It requires the Tribunal to cross-refer to several documents before any allegation can be identified. Even then the end result is open to debate as to what the Claimant is seeking to add from what was there already. The exercise of trying to make sense of it was attempted at the commencement of this hearing but was found to be unworkable. Ms Masters sets out the difficulties in trying to decipher the document in two pages of her skeleton arguments. I will not repeat her observations here except to say I agree that the application has not been made in a form which is comprehensible.

20. In coming to my decision on the amendment application I have taken into account the guidance in **Selkent Bus Company v Moore** [1996] IRLR 661. I must consider the nature of the amendment, in particular whether it is a re-labelling exercise for example, the applicability of time limits and the timing and manner of the application. In doing so I must take into account all of the circumstances weighing up the balance of hardship to the respective parties in refusing or granting the amendment.

21. This is clearly not a re-labelling exercise. In addition to adding or seeking to add a breach of contract claim, it now proposes to add a victimisation complaint and possibly an indirect discrimination complaint though the latter is far from clear. The Claimant is seeking to add new causes of action. It is not a minor amendment by any means.

22. In relation to time limits some of the allegations go back to 1999. There is no explanation as to why the amendment application could not have been made earlier. Most if not all of the additions are potentially out of time and by some distance.

23. The timing and manner of the application is relevant. The Claimant has had plenty of time and opportunity to put her application in a sensible order but has not done so even with the benefit of legal advice. The last hearing was adjourned to allow her the opportunity to do so. This is a second hearing when the Claimant has failed to get her act together, with assistance or otherwise. The application to amend is poorly presented, late and imprecise to a point where it is practically unintelligible.

24. For those reasons the application to amend is refused.

Application to strike out or order a deposit

25. I do not understand the application to strike out to be made on the grounds that it lacks merit and unlikely to succeed but if it is I would refuse it on the basis of the guidance given in **Anyanwu** and **Ezsias**, namely that it is not appropriate to strike out where central core facts are in dispute. There is certainly a core of disputed facts.

26. In relation to the time point, there has been no oral evidence at this hearing and therefore there are no findings of fact which can be made or are made. I do not think it would be appropriate to take evidence now, as I am invited to do by Ms Masters, without any prior exchange of witness statements or any prior indication that oral evidence would be taken. The parties have not prepared for it. No order for witness statements was sought by either party when this hearing was listed though the Rules permit evidence to be heard on strike out and deposit applications.

27. Having said that it seems to me that what is appropriate is to draw a distinction in relation to time issues between those allegations in this case which are relatively recent and those which are very historical. That is there are allegations where a tribunal may conceivably extend time and those where there is no realistic possibility that it might do so.

28. In relation to the first allegation set out above (at paragraph 4.1), this relates to comparatively recent factual issues. It does deal with an allegation some 3 - 4 years ago but I understand that Ms Saxby is still employed by the Respondent and thus there can be direct evidence from her. It is conceivable that a Tribunal may exercise its discretion to extend time under just and equitable principles. There are likely to be email exchanges and contemporaneous notes so it is not all dependant on witness memories which might have faded. It is right and proper that the tribunal considers the question of whether time should be extended at a full hearing after hearing all of the evidence. The first allegation shall not therefore be struck out nor a deposit ordered.

29. In relation to allegations 2 – 6 inclusive, these cover very historical matters which allegedly happened some 19 years ago. Here it seems to me that it is highly unlikely that a tribunal is likely to conclude that time should be extended. There is no reported case I have been referred to where time has been extended for allegations stretching back 19 years. There are likely to be serious problems with memories fading and documents destroyed or lost after such a passage of time. I therefore strike out allegations 2 – 6 as having no reasonable prospect of success.

30. Allegations 7 - 9 are basically one 'act' arising out of the same series of events with three separate allegations flowing from it. The alleged act occurred almost 2 years before the Claimant brought proceedings. However, it is a matter on which the tribunal will need to hear evidence before it can determine the just and equitable issue. It will not therefore be struck out nor a deposit ordered.

31. I have 'added' what I refer to as allegation 10. It seems to me upon a fair reading of the ET1 that this is adequately pleaded. What the Claimant is complaining of is that in June 2017 she discovered that two employees, who were on temporary contracts, were made full-time employees in an appointment exercise. The Claimant had wanted to become a full-time employee for some time. Both the successful candidates were of the same race as the Claimant although younger. There is no race discrimination complaint in respect of the appointment but there is of age. The Claimant argues that there was a history of less favourable treatment by Ms Saxby in relation to her and that this extended to the appointment exercise. The Claimant also alleges that she was treated less favourably because she was a part-time worker. There are no time issues in relation to this allegation and thus no issue of strike out or deposit arises.

<u>Disability discrimination</u>

32. The Claimant relies upon four disabilities. They are Anxiety/Depression, Psoriasis, Temporomandibular Joint Disorder (TMJ) and Gallstones.

33. It is clear from the Claimant's own impact statement that the anxiety disorder began in 2017. There are GP notes in the bundle from 2002 but more importantly, and arguably carrying greater weight, is a more detailed medical report obtained by the Claimant herself from a Consultant Psychiatrist, Dr Latif, in June 2018. That report deals in particular with an incident in April 2016 relevant to the condition.

34. It is also clear from Dr Latif's report that there was no incident or act of any note between April 2016 and the Claimant going off on long term sick in July 2016. The Claimant will therefore have great difficulty in establishing that there was any act of disability discrimination during the relevant period.

35. The Claimant's Psoriasis began in April 2016 as did the TMJ disorder. She began to suffer from Gallstones in May 2017. There were no incidents at work which could amount to discrimination in the short period between April 2016 and July 2016.

36. The Claimant's complaint of disability discrimination simply cannot succeed because she has been on long term sick leave since July 2016 and there are simply no incidents which can form the basis of disability discrimination in relation to those conditions which either predate the conditions or were around the same time as her going on long term sick leave. The complaints of disability discrimination, whether direct, discrimination arising from disability or other type of disability discrimination are therefore struck out as having no reasonable prospect of success.

Claim under the Part-time Workers Regulations

37. The complaint in relation to this head of claim appears to relate to allegation 10 only. It is agreed the Claimant was a part-time worker. The determination of this issue or complaint will depend upon findings of fact made by the tribunal. It is not therefore appropriate to strike out this part of the case nor to order a deposit.

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Employment Judge Ahmed
Date: 10 January 2019

JUDGMENT SENT TO THE PARTIES ON

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