



THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

Mrs M V Sanderson

AND

(1) Boehringer-Ingelheim UK

(2) Ashfield Healthcare Limited

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: North Shields Hearing Centre **On:** Thursday 25 January 2018

Before: Employment Judge Johnson

Appearances

For the Claimant: Mr R Owen, CAB

For the First Respondent: Ms S Atwal, Solicitor

For the Second Respondent: Mr S Purnell of Counsel

REASONS

- 1) This matter came before me this morning by way of Public Preliminary Hearing to consider applications made by the respondents to strike out some of the claimant's complaints on the grounds that they are out of time and have no reasonable prospect of success. Alternatively, application was made for the claimant to be ordered to pay a deposit as a condition of being permitted to continue with some of those claims, on the ground that they have little reasonable prospect of success.
- 2) The claimant was until Tuesday 23 January, acting in person, but since then has had the benefit of assistance from Mr Richard Owen of the local Citizens Advice Bureau. The first respondent was represented by its solicitor Ms Atwal and the second respondent by Mr Purnell of Counsel. There was an agreed bundle of

documents marked R1, comprising an A4 ring binder containing 281 pages of documents. The claimant had prepared a detailed and lengthy witness statement. There was also a witness statement from Ms Sharon Coil of the first respondent. Neither the claimant nor Ms Coil were required to give evidence at today's hearing.

- 3) By claim form presented on 20 October 2017, the claimant brought complaints against both respondents, alleging unlawful age discrimination, unfair constructive dismissal and breach of contract (failure to pay notice pay). Both respondents defended all of the claims.
- 4) The first issue to be decided today, was exactly who was the claimant's employer at the relevant time. It was acknowledged by all parties that the complaint of unfair dismissal could only be brought against the claimant's employer at the time of her resignation. Page 71 in the bundle is a 13 page "Contract of Employment" between the claimant and the second respondent. It shows that the claimant's employment with the second respondent commenced on 19 September 2011. The claimant is employed as a "medical sales representative". The relevant paragraph states:-
 - 4.1 You are employed as a medical sales representative. For your initial assignment you will be known to the client as "Territory Business Manager" and report to a Client Report Manager. Due to the nature of the company's business, client demand and changes in business requirements, the company may need to transfer you at anytime during the course of your employment to different teams, job roles, duties and/or territories.
 - 4.2 The company reserves the right to allocate you from time to time to such team, job role, duties or territory as it shall in its absolute discretion determine and vary the area covered by such territory.
 - 4.3 The company reserves the right to transfer your employment to another company within the United Drug Group of companies and/or to second you to such a company or other company/organisation.
- 5) That contract of employment contains all of the information required to be included by Section 1 of the Employment Rights Act 1996. In particular, at paragraph 12 it refers to policies and procedures and at paragraph 15 to disciplinary and grievance procedures. It is clearly and obviously a contract of employment between the claimant and the second respondent.
- 6) The nature of the second respondent's business is such that it employs representatives to market and sell products from the pharmaceutical industry to the primary care market (usually medical practitioners). The claimant was assigned to the first respondent, on whose behalf she was responsible for selling "Pradaxa" (a cardio vascular medicine) to the primary care market. The claimant's salary was paid by the second respondent, who also paid the claimant any bonus entitlement required under the terms of her contract.

- 7) After being given time by the Tribunal to consider the contents of the contract and to discuss those contents with the claimant, Mr Owen on behalf of the claimant quite properly conceded that the claimant was at all material times an employee of the second respondent. Accordingly her complaint of unfair dismissal could only succeed against the second respondent and could never succeed against the first respondent. Mr Owen confirmed that the claimant would agree to her complaint of unfair dismissal against the first respondent being withdrawn and dismissed on that basis.
- 8) The claimant's entitlement to Notice Pay again could only be brought against her employer, the second respondent. So far as it exists, the claimant's claim of breach of contract against the first respondent is also dismissed upon withdrawal by the claimant.
- 9) The remaining claims are of unlawful age discrimination. In simple terms, the claimant alleges that she was subjected to an assessment process, failed that assessment process and was placed on a Personal Improvement Programme (PIP), the implementation of which she claims amounted to unlawful age discrimination. It was common ground that the implementation and application of the assessments and the PIP were all carried out by the first respondent. The claimant alleges that she failed the assessments, whereas all of the younger employees passed the assessment. As a result, the claimant as the older employee was placed on a PIP, when none of the younger employees were. Furthermore, the claimant alleges that the first respondent embarked on a process of recruitment which was designed to recruit employees younger than her.
- 10) The claimant's complaints of age discrimination against her employer, the second respondent, are that she raised a formal grievance with the second respondent about the first respondent's discriminatory conduct and that her grievance was unreasonably delayed, not reasonably investigated and that its outcome (including her appeal) were biased. The claimant alleges that this conduct by the second respondent also amounts to unlawful age discrimination.
- 11) It was acknowledged by the claimant that the implementation of the PIP by the first respondent, following her failed assessment, took place on 3 November 2016. There are no allegations of unlawful age discrimination against the first respondent which are said to have taken place after that date, although the claimant does allege that she remained on the PIP from that date until she resigned on 14 June 2017.
- 12) During that time, the claimant continued to receive her full salary and continued to be paid the bonuses which she had earned. It was part of the claimant's case that the first respondent's assessment of her must have been biased, because she continued to achieve her sales targets and be paid the appropriate bonuses. Those were of course paid by the second respondent.
- 13) The claimant and Mr Owen were today unable to clarify exactly what type of age discrimination was said to be involved on the part of the first respondent. If all of

the sales representatives were required to undertake the assessment, then that requirement could not be an act of direct discrimination. It was then suggested that the implementation of the assessment process amounted to indirect discrimination against the older employees. Neither the claimant nor Mr Owen were able to identify any part of the assessment process which amounted to a provision criterion or practice which placed older people at any particular disadvantage, nor could the claimant explain how she personally was placed at any disadvantage. Her position was simply that, she, as an older member of the sales team, failed the assessments, whilst all of the younger employees managed to pass them. The claimant`s position was that she genuinely believed that the first respondent was seeking to remove from its sales team all of the older and more experienced members of staff and to replace them with younger sales people. I respectfully drew the claimant`s and Mr Owen`s attention to paragraph 14 of the claimant`s contract of employment with the second respondent, which states:-

- “14.1 It is a fundamental condition of your employment that you at all times satisfy the client to whose project you are assigned by the company from time to time (“The client”). The success of the company’s business relies upon employees building and maintaining successful working relationships with clients. In the event that the client is dissatisfied with you or your services and request that you be removed from their project, the company shall be entitled to withdraw you immediately from that project and exercise its right to suspend you on full pay.
- 14.3 The company cannot guarantee that it will be in a position to redeploy you in circumstances that you are removed from a client project. You acknowledge and accept that the company cannot continue to employ you indefinitely and until an alternative position arises on another team. You confirm that you will actively cooperate with the company’s efforts to redeploy you in such circumstances but understand that where there is no alternative position available, the company may take action to bring your employment to an end for some other substantial reason.”

It was put to the claimant and Mr Owen that if the first respondent was dissatisfied with the claimant for any reason whatsoever, then it could simply invite the second respondents to remove her from the assignment with the first respondent. There would be no need for the first respondent to go through a convoluted assessment process, the purpose of which (as alleged by the claimant) was to remove the claimant and/or any other older employees. The claimant alleges in her witness statement that between April 2016 and October 2016, she failed to achieve the required score of 2.8 out of 4, in three sales assessment exercises. The claimant alleges that the first respondent’s manager, Mr Cameron Brown accused her of having a “mental block” as the reason why she kept failing the assessments. The claimant interprets the phrase “mental block” as degrading, in that it infers that there was something wrong with her brain, that she could not learn and that she was “too old to function”.

- 14) The claimant further alleges that, having failed the assessments, the first respondent failed to provide her with “adequate support”, so as to ensure that she was given further assistance and training to help her pass the next assessment. The claimant alleges that this lack of support amounted to unlawful age discrimination. Neither the claimant nor Mr Owen was able to confirm that any younger persons who failed the assessment were given more support than the claimant. Neither the claimant nor Mr Owen could identify any provision criterion or practice involved in the process which placed her at a particular disadvantage when compared to persons from a different age group.
- 15) It was accepted on behalf of the claimant that the last act or incident of alleged discrimination placed in November 2016 when the first respondent placed the claimant on the PIP. In accordance with Section 123 of the Equality Act 2010, any complaint of unlawful age discrimination against the first respondent must therefore have been presented to the Employment Tribunal before the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. The claimant`s witness statement contains no evidence about why it would be just and equitable for time to be extended. The claimant`s explanation was simply that she had pursued a grievance with the second respondent (raised on 3 March 2017) and did not contemplate the issue of proceedings until the outcome of that grievance and the outcome of her appeal against the dismissal of the grievance. The claimant acknowledges that she had the benefit of access to legal advice and representation throughout that process.
- 16) The claims of unlawful age discrimination against the second respondent relate to its handling of the claimant`s grievance, which was raised on 11 March 2017. The claimant alleges that, because her complaint relates to age discrimination, the second respondent`s failure to properly investigate the grievance and to deal with it promptly and in an unbiased manner, amounted to victimisation on the grounds of her age. The claimant received the outcome of the grievance on 10 April 2017. She appealed on 15 April 2017 and received the outcome of her appeal on 10 May 2017. The three month time limit for the presentation of the claim form (or at least commencing the ACAS Early Conciliation Procedure) therefore expired on 18 August 2017.
- 17) The claimant commenced ACAS early conciliation on 29 August 2017. The claim form was presented on 20th October 2017 following the issue of the ACAS early conciliation certificate on 13 October 2017.
- 18) It is accepted by Mr Owen and the claimant that all of the claims of unlawful age discrimination, against both the first and second respondents, are out of time. It is therefore for the claimant to satisfy the Tribunal that it would be just and equitable for time to be extended. This is not one of those cases where there is alleged to have been any kind of obstacle placed before the claimant which either prevented or contributed towards the prevention of her presenting her claim form within the stipulated time limit. It is accepted that the claimant had access to legal advice and assistance and indeed obtained legal advice and assistance whilst the grievance process and the appeal were on-going. This is not a case where there is a crucial core of disputed fact which the Employment

Tribunal would have to resolve in order to determine the claims of unlawful age discrimination. The claims of unlawful discrimination turn upon whether the claimant could persuade the Employment Tribunal to infer from those undisputed facts that, in the absence of a satisfactory explanation from the respondents, they amounted to acts of unlawful age discrimination. I cannot see how any such inference could be drawn from any of the facts set out by the claimant and agreed by the respondent. All of the first respondent's sales staff underwent the assessments. The claimant failed – others did not. The fact that most of the others were of a different, younger age group than the claimant, does not mean that the process was designed to ensure that the claimant, or older people, failed the assessment. The first respondent maintains that the products which it sells are complex and require specific knowledge and training. The assessment process was designed to measure and develop the selling skills of all of the sales representatives, including the claimant. The claimant has been unable to direct the Tribunal towards any evidence to support her contention that age had anything to do with her ability to pass the assessment. The major factor in the first respondent's assessment of the claimant's capabilities related to her attitude towards the assessments themselves and an alleged failure to listen to and engage adequately with customers. The claimant's contention that the process was designed to enable the first respondent to remove her from her position is quite simply, fanciful. There was no need for the first respondent to embark on such a procedure when it simply could have requested the second respondent to remove the claimant and the second respondent would have been entitled to do so under the provisions of clause 14 of the contract of employment.

- 19) Mr Purnell directed me towards the decision of the Court of Appeal in **Ahir –v- British Airways Plc**, in which reference is made to the well known decisions of the House of Lords in **Anyanwu –v- South Bank Student Union** and the Court of Appeal in **Ezsias –v- North Glamorgan NHS Trust**, as authority for proposition that, contrary to the general principle that discrimination cases should not be struck out before a full hearing, there will always be those cases where the Employment Tribunal are satisfied that there is indeed no reasonable prospect of the facts necessary for liability being established.

“There must be some burden on a claimant to say what reason he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit that they are not yet in a position to prove it.” (**Ahir –v- British Airways Plc**)

The claimant's case that the first respondent had embarked upon a procedure which was designed to “set her up to fail” and eventually have her removed, is not only speculative but highly implausible. I am satisfied that, on the face of it, there is a straightforward and well documented explanation from the first respondent for what occurred. I cannot see any prospect of the claimant being able to prove otherwise. The claimant's claims against the first respondent have no reasonable prospect of success. That lack of any prospect of success is a factor which I take into account when deciding whether it would be just and equitable to allow those claims to proceed, when they are clearly out of time. In the absence of any meaningful explanation from the claimant as to why it would

be just and equitable to allow them to proceed, I cannot see how justice or equity demand that they should be allowed to proceed. The claims of unlawful age discrimination against the first respondent are out of time and have no reasonable prospect of success. They are dismissed.

- 20) The same applies to the claims of unlawful discrimination against the second respondent. The last act relied upon is the rejection of her appeal against the grievance outcome, which occurred on 11 May 2017. The claims are therefore out of time. The claims against the second respondent of unlawful age discrimination relate to its handling of the grievance. Those grounds also form the basis of the alleged fundamental breach of contract by the second respondent, which led the claimant to resign on 14 June 2017. The claimant will be permitted to pursue those points as part of her complaint of unfair constructive dismissal and breach of contract, against the second respondent. The claimant wishes to pursue a complaint that, because her grievance related to age discrimination against the first respondent, and the second respondent failed to properly deal with that grievance, then that amounted to victimisation contrary to victimisation, contrary to Section 27 of the Equality Act 2010. Whilst the grievance itself may well have been a protected act, I see no prospect of the claimant being able to persuade the Employment Tribunal that the manner in which the grievance was handled by the second respondent was in some way influenced by the fact that the grievance contained a complaint of unlawful age discrimination against the first respondent. The claims of unlawful age discrimination against the second respondent are out of time and have no reasonable prospect of success. It would not be just and equitable for time to be extended. Those claims are dismissed.

EMPLOYMENT JUDGE JOHNSON

**REASONS SIGNED BY EMPLOYMENT
JUDGE ON
13 February 2018**