EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss S Stoedinova	**v**	**Secretary of State for Health & Social Care**

Heard at: Watford **On**: 22 March 2019

Before: Employment Judge McNeill QC

Appearances

For the Claimant:
For the Respondent:

JUDGMENT

1. The claimant's claim for indirect discrimination is struck out.

2. The claimant's allegations numbers, 3, 4. subject to unhealthy working environment, 5, 7 but only reinduction and training, 10,13, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27 and 28 are struck out as alleged protected disclosures on the basis that the claimant has no reasonable prospect of succeeding that those matters amount to qualifying disclosures within the meaning of Section 43b of the Employment Rights Act 1996. Allegation 23 is an allegation in relation to detriment insofar as it amounts to an allegation for protected disclosure it is struck out.

3. The balance of the claimant's claims are permitted to proceed subject to the claimant confirming that any allegation of victimisation before 25 May 2017 is not pursued.

4. This matter before me is on a preliminary hearing in which the respondents are replying to strike out the claimant's claims and the alternative they are applying for a deposit order. This is under rules 37 and 39 of the Employment Tribunal Rules of Procedure.

5. The claimant brought claims for direct race discrimination, harassment and victimisation and also for indirect race discrimination. The protected

characteristic relied on his race, in particular, being of Bulgarian national origin. There are also whistle blowing detriment claims.

6. There was a hearing before Employment Judge Snelson in June 2018. At that hearing it was determined amongst other things that there would be this preliminary hearing to determine such issues at the Tribunal would in due course direct and there was a notice of preliminary hearing dated 9 October 2018 in which the Regional Employment Judge Byrne directed that this preliminary hearing should consider the respondent's application, which I am told was made at the hearing in front of Employment Judge Snelson, to strike out the claim or alternatively a deposit order on the basis they have no reasonable prospect of success and to consider whether any of the claims which the Tribunal has no jurisdiction to consider because they are out of time, and if so, whether the time should be extended, as set out in the amended response.

7. Employment Judge Snelson, in his observations, at the end of his Orders, encouraged a proportionate approach to be taken in this case, and also emphasised the importance of restricting the claims to the strongest allegations for the benefit of all. It is noted that the claimant agreed and assured the Judge that she envisaged a short list in each schedule. In fact, what has been provided as three schedules, still with numerous allegations, some of which in substance at least overlap, although they relate to different dates. There are still numerous allegations, there are 28 allegations of protected disclosures and whilst I have some sympathy for the claimant who is representing herself in these difficult claims, it does make it difficult to focus on what really needs to be set out in order for her to claims to proceed.

8. The respondent submits that the claimant's claims should all be struck out as she realistically recognises Mrs Fafris this is a high hurdle and a draconian thing to strike out claims when there has been no hearing. She has to show that there is no reasonable prospect of these claims succeeding. Whether a factual dispute, it is accepted by the respondent in this case, that it must be assumed that they will be resolved in the claimant's favour. I shouldn't undertake any preliminary evaluation of the facts.

9. Much of todays' hearing has been taken up in trying to understand the claims which the claimant brings.

10. I am going to start with the claims for direct discrimination, harassment and victimisation. The respondents principal challenge for this claim was that there was a lack of any arguable connection between the claimants claims and the claimant's national origin which is Bulgarian. In terms of the direct discrimination claim, the respondent relied on the principal which came from Madarassi that it was not enough to show unfavourable treatment and a difference in race. Similarly, in relation to harassment, it was submitted that there must be some discernible link between the claimant's treatment and her race and the respondent submitted that there was just not enough here to indicate that such a claim had any reasonable prospect of success.

11. The claimant explained to me that she believed her treatment, or believes her treatment was connected to disclosures she made about the respondent's practices which she considered wrong. In Bulgaria, she told me, it is practice to say if there is any wrongdoing in the work place, she said she was asked by those she worked with about the practices in Bulgaria. She was told that it was not the culture here to disclose alleged wrongdoing in the way that she had. She said she was segregated, meaning that she was excluded after she had made her disclosures and she gave a particular example of when a matter was referred to HR and indeed referred externally and she was not included in the discussions and correspondence, but that was simply one example. I have to take into account the direct race discrimination should, save in exceptional circumstances, where a claim is obviously hopeless, be allowed to proceed to a full hearing. That is because often it is not clear whether inferences of discrimination should be drawn until all of the evidence is heard and tested. I accept in this case that sometimes, language has been used which is not particularly helpful. For example, one of the allegations of discrimination, number 19, refers to aggravated damages which is not an act of discrimination but I have taken into account that English is not the claimant's first language and I really have to look at the substance of the matters here.

12. Having heard what the claimant says, it seems to me that there is enough here for her to at least to have an arguable claim. I don't in any way judge the merits of that particular claim but she has persuaded me that there is at least enough there than I cannot find that this is a case which should be struck out has having no reasonable prospect for success, and that applies to both the direct discrimination and the harassment claims. Similarly, I don't find that they have little reasonable prospect of success. Again, I make it clear to the claimant that I think her claims are going to succeed but I am not going to strike them out as having no or little reasonable prospects of success.

13. In relation to time limits, I accept the respondent's submission that times are not often specifically indicated as they might be, but when looked at, these allegations as a whole, it is clear that the claimant's claim relates to a pattern of treatment by management in a number of respects during the short period when she was employed by the respondent under a fixed term contract between 10 April 2017 and 3 June 2018. Again, I am not giving a view on the merits of the case but it seems to me reasonably arguable that there is some common thread running through what she alleges and I do not find that these are matters which have no or little reasonable prospect of success.

14. The same considerations apply to the harassment claim and I am not going to repeat my reasoning so the direct discrimination claim and the harassment are permitted to proceed.

15. In relation to victimisation, it is common ground that the first protected act was on 20 May 2017 and the claimant very sensibly accepts that she cannot

complain of victimisation before that date. After 20 May 2017, again it will be a matter for the full Tribunal to decide after hearing the evidence whether the claimant makes out the treatment alleged amounted to detrimental treatment and if so whether it is linked with the protected act. Again, I don't find that a claim as no or little reasonable prospect of success and the same considerations apply in relation to limitation.

16. In short, subject to the claimant accepting that she can't claim for victimisation before 20 May 2017 the race discrimination claims will proceed.

17. I then come to the indirect discrimination claim. In relation to this I do accept the respondent's submission that this claim is misconceived as a claim and the claimant has described the provision criterion of practice that she relies on as posing an upside down CRST structure where lower rank staff manage higher rank staff. The claimant being a member of higher rank staff. The difficulty for the claimant in this particular case is that part of indirect discrimination, you have to show that your racial group has been placed at a disadvantage and what the claimant says is, well for Bulgarians its always higher rank staff who manage lower rank staff. She then says well it is disadvantageous for higher rank staff for she was to be managed by lower rank staff. I can accept for these purposes the obvious disadvantage of a higher rank member of staff being managed by a lower rank member of staff. Again, that is a matter of fact that the Tribunal will have to hear evidence about, but I cannot accept that there is any reasonable argument that such practice disproportionately disadvantages people of Bulgarian national origin. It is normal practice in any organisation that lower rank staff are managed by higher ranked staff and employees, whatever their race, would be disadvantaged by the practice described by the claimant.

18. The argument of disproportionate disadvantage to those of Bulgarian national origin I therefore find has no reasonable prospect of success. So the indirect discrimination claim will not proceed, it is struck out.

19. I then come to the whistleblowing claims and quite a lot of time was spent with me going through the various allegations with the claimant. She explained to me by reference to each of the 28 alleged public interest disclosures which she relied on, why she said that those fell within the provisions of Section 43b of the Employment Rights Act.

20. In terms of the strike out application, the focus has been entirely on whether these allegations or disclosures in fact amount to protected disclosures. It hasn't been suggested if they do amount to disclosures within Section 43b that I should strike out because there is no link with the detriment. So, I am not going to go through them one by one.

21. In relation to some of the matters, I find that if the claimant makes out the facts, there is a reasonable prospect that she will establish that those were qualifying disclosures within Section 43b. In particular, they are the alleged disclosures which relate to alleged unacceptable practices and malpractices

by the Trust which might lead or were leading to a waste of public money. In particular, the Cambridge NHS Trust, not reporting data to the relevant department and all of these are matters which the claimant says she disclosed. The creation of unrealistic key performance indicators for Trusts, using corrupt data, using unfounded methodologies or modelling to pressurise Trusts to deliver an undeliverable amount of money, Trust's not identifying overseas visitors because it was not in their financial interest to do so. That the claimant was told by Dave Poweth that she should delay a report because a Trust hadn't been punished enough and that Trusts were not charging overseas visitors in accordance with applicable regulations. In relation to all of those matters, it is, I find reasonably arguable that they are matters which she reasonably believed were in the public interest and indeed, intended to show that a person had failed or was likely to fail to comply with a legal obligation, or that the health and safety for individuals had most likely to be endangered. And F, that information intending to show any matter following within any of the proceedings paragraphs has been, or is likely to be deliberately concealed. Those seem to me, potentially, to be the relevant provisions.

22. In relation to the allegations about the claimant's own treatment and indeed internal employment matters, I find that there is no reasonable prospect of establishing a reasonable believe that those matters were in the public interest. The claimant says that these matters are in the public interest because they are about managing management practices in a public sector organisation. If that was sufficient to meet the public interest test, any complaint about treatment in employment in the public sector could be said to involve raising matters which were in the public interest. I do not accept that the public interest goes that far, and I apply the same reasoning to matters that the claimant raised about her own treatment and matters which she raised about other internal employment practices, such as the lack of work from home policy. In relation to some of those matters, it is also difficult to see how they would fall into section 43b, 1 a-f. I have in particular the allegation about a lack of working from home policy. I therefore strike out the following alleged disclosures:

    22.1 Allegation 3,
    22.2 Allegation 4 – but subject to
    22.3 Allegation 5
    22.4 Allegation 7 but only in relation to the induction and training allegation.
    22.5 Allegation 10
    22.6 Allegation 13
    22.7 Allegations 16, 17, 18, 19, 20, 21 and 22
    22.8 Allegations 24, 25, 26, 27 and 28

23. In relation to 23, it seemed to me that was essentially an allegation of detriment, rather than an allegation of a disclosure, so far as it is relied on as an allegation of a disclosure it is struck out.

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Employment Judge McNeill

Approved: 9 April 2019

Sent to the parties on: .....16/4/19...

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For the Tribunal Office

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.