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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr M French**

Respondent: **Bioline Agrosciences Limited**

Heard at: **East London Hearing Centre**

On: **Monday 15 July 2019**

Before: **Employment Judge Russell**

Representation
Claimant: **In Person**
Respondent: **Mr G Miller (Legal Executive)**

JUDGMENT

1. **All complaints of sex discrimination are struck out as they have no reasonable prospect of success.**

2. **The complaint of breach of contract is struck out as it has no reasonable prospect of success.**

REASONS

1 The matter comes before me today on the Respondent's application for an Order either to strike out the claims or to require the Claimant to pay a deposit in respect of his complaints of direct sex discrimination and breach of contract. The Claimant resists both applications.

Law

2 Rule 37 of the Employment Tribunal Rules of Procedure 2013 provides that 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 grounds that it is scandalous, vexatious or has no reasonable prospect of success.

3 Rule 39 provides that where a 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 to pay a deposit not exceeding £1000 as a condition of continuing to advise that allegation or argument.

4 The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, **Balls v Downham Market High School & College** [2011] IRLR 217 EAT where Lady Smith held:

> **"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral submissions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".**

5 A case shall not be struck out where there are relevant issues of fact to be determined. It may be seen that the test to strike out imposes a very high threshold. The Claimants case should at its highest.

6 Those occasions on which a strike out should succeed before the full facts of the case have been established are rare, particularly so where the claim is one of discrimination as the Tribunal will be required to consider why the employer acted as it did, evaluating the evidence and drawing any necessary inferences particularly as it is unusual in discrimination claims to find direct evidence. Nevertheless, as Langstaff P held in **Chandhok v Tirkey** UKEAT/0190/14/KN at paragraph 20, this is not a blanket ban. There may still be occasions when a claim can properly be struck out – where, for instance, there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in **Madarassy v Nomura** [2007] ICR 867) indicate only a possibility of discrimination and are not, without more, sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent has committed an unlawful act of discrimination.

7 Section 13 of the Equality Act 2010 provides that a person discriminates against another if because of a protected characteristic that person treats the other less favourably than they treat or would treat others. Sex is a protected characteristic.

8 Section 23 of the Equality Act 2010 requires that in a complaint of direct discrimination under section 13, there must be no material difference between the circumstances relating to each case. In other words, the circumstances of the Claimant and an actual or hypothetical comparator.

9 Section 136 of the Equality Act deals with the burden of proof and provides that where a Claimant proves primary facts from which the Tribunal could conclude in the absence of other explanation that there has been an act of discrimination, the burden will pass to the Respondent to show that the protected characteristic played no part whatsoever in their reason for acting. As set out above, guidance on the application of the burden of proof was given in **Madarassy.**

Factual Background

10 The Claimant's complaint is brought in a claim form presented to the Tribunal on 21 March 2019. The Claimant was employed as an assistant accountant from 2 January 2019 to 11 January 2019. He was asked to sign a contract of employment. The Claimant asked that a clause dealing with lay off and short-term working be removed. The Respondent refused. The Claimant's case is that he was then called into the office of his manager and Head of Finance, Rebecca, where he again expressed his disagreement with the lay-off clause in the contract. The Claimant asserts that Rebecca was unhappy and decided to dismiss him verbally without following any process. The Claimant says that he sought to raise a grievance against this injustice through HR, that his grievance was ignored and HR did not investigate the matter at all but instantly took Rebecca's side without even considering his grievance. The Claimant says that this is an act of direct discrimination. He relies upon an actual comparator, his manager Rebecca, essentially that her word was taken over is and his concerns were not even investigated. The breach of contract is both the failure to give notice in writing and to pay one month's notice; both are terms in the written contract.

11 In its Response to the claim, the Respondent accepts that there was a disagreement about the lay-off clause in the proposed contract, that the Claimant was dismissed without a disciplinary procedure being followed and that he did try to raise a grievance in which he argued that his dismissal was a breach of contract. The Respondent's case is that the Claimant was dismissed with oral notice with one day's pay, that the written contract had not been signed and so was not breached such that there was no grievance to be investigated.

12 The proposed written contract was included in the bundle. It was not signed.

13 As may be seen, this is not a case in which there is any dispute about the primary facts. In any event, I remind myself to take the Claimant's case at its highest.

Submissions

14 On behalf of the Respondent, Mr Miller made three broad points:

(1) The claim is misconceived. There is no discrimination by the mere fact of dismissal without procedure or failing to progress a grievance.

(2) The comparator must have no material differences. The Claimant relies upon Rebecca, his female manager, as his comparator. Her circumstances are materially different and do not satisfy the requirements of section 23 – she was the Claimant's manager, had not refused to agree a contract term, had not been dismissed or raised a grievance. The Claimant has not asserted that a hypothetical female would have been differently nor is there any evidence from which should a conclusion could be reached. There are no facts from which the Tribunal could properly infer that dismissal and the lack of a grievance investigation were due to the Claimant's sex.

(3) The claim is not genuine. Mr Miller relies upon a Judgment of

Employment Judge Ross in another claim brought by the Claimant against a former employer, Informa UK Limited, in which certain of his claims were struck out or made subject to a deposit order. Mr Miller says that it is the Claimants modus operandi to bring discrimination claims in relation to treatment with which he disagrees.

15 In response, the Claimant made the following broad points:

(1) The Ross Judgment in his claim against Informa is currently the subject of an appeal and therefore it is not safe to rely upon it at all. Moreover, it is an act of corruption and distortion by Employment Judge Ross and the Employment Tribunal which he has referred to the SFO, who are investigating his complaint. The Claimant tells me that if I find against him today, I will also be referred to the SFO to answer similar allegations of fraud and corruption.

(2) The Respondent has presented no defence, instead they have agreed with the evidence and facts that he has presented: namely, he was not dismissed following any process, there was no adherence to the ACAS Code and no investigation of his grievance. The mere fact that these events occurred is sufficient to shift the burden of proof and there can be no dispute, he says, that Rebecca was treated more favourably and she is female. He submitted that his claim is therefore bound to succeed.

(3) The Claimant's belief that he had been discriminated against was sufficient for his claim to succeed. In support of this submission, he relied upon **Carolina Gomes v Henworth Limited t/a Winkworth Estate Agents.** The Claimant did not have a copy of this authority but I was able to find it on-line; it is a Judgment of an Employment Tribunal sitting at Watford in February 2017 which upheld complaints of direct discrimination and harassment because of age.

Conclusions

16 In reaching my conclusions on whether this claim has no or little reasonable prospects of success, I attach no weight to the Ross Judgment in the Claimant's earlier claim against Informa. It relates to a different employment and a different set of facts. As the Claimant submits, the fact that he may or may not have been discriminated against by one employer does not assist me in deciding whether or not he has reasonable prospects of showing discrimination by this employer.

17 There is no dispute between the parties on the facts which are said to give rise to the claims; the Claimant correctly asserts that he was dismissed without any procedure followed, orally and with only one day's notice pay and that his grievance was not investigated.

18 Dealing first with the breach of contract claim, the Claimant's own case is that there was a dispute about one of the terms of the contract which he now seeks to rely upon. The parties had not reached an agreement at the date of dismissal and the contract was not signed. The breach of contract claim has no reasonable prospects of success as the contract upon which it is based was not concluded.

19 As for the discrimination claim, I accept Mr Miller's submission that Rebecca cannot be a comparator within the definition of section 23. She was the Claimant's manager and had not refused to agree to a term in the proposed contract of employment after nine days of employment. Rebecca had not been dismissed and had not raised a grievance. Her circumstances are not the same or not materially different. Insofar as the Claimant relies upon Rebecca as the comparator, the claim is doomed to failure on the law. Moreover, even if Rebecca were a proper comparator, I do not accept the Claimant's submission that burden of proof has passed to the Respondent because she was believed and the Claimant dismissed. This is no more than an assertion of a difference in treatment and difference in protected characteristic. Applying **Madarassy,** this indicates only the possibility of discrimination. The Claimant has advanced no case as to why this is linked to his gender other than the fact that Rebecca is female. The claim is fundamentally misconceived and flawed as a matter of law and has no reasonable prospect of success.

20 The Claimant is a litigant in person and I considered in the alternative whether or not his claim would have reasonable prospects if he were allowed to rely upon a hypothetical comparator. Such a hypothetical comparator would be a female employee who was dismissed after a very short period of employment, having refused to agree to a term in the proposed contract of employment and subsequently raising a grievance based upon the disputed contract. I do not accept the Claimant's submission that the failure to follow the ACAS Code is sufficient of itself to shift the burden of proof or indeed to ensure that his claim succeeds. The uplift upon which he relies is to any remedy once liability on a relevant claim has been established; it is not a free standing legal right in itself. I do not consider that there are any reasonable prospects of persuading a Tribunal that such a hypothetical female comparator would have been afforded an ACAS compliant disciplinary procedure nor an investigation into their post-termination grievance about a contract which they had not accepted.

21 Finally, the Claimant is wrong when he submits that his belief that he has been discriminated against is sufficient for the claim to succeed. The **Gomes** case, which is not binding upon me in any event, involved complaints of direct discrimination and harassment. Whilst the perception of the complainant is a relevant factor in the statutory definition of harassment, it is not a relevant factor in the statutory definition of direct discrimination. In the circumstances, I derive no assistance from the **Gomes** case and instead apply the approach mandated in **Madarassy.** Even taking the Claimant's case at its highest, assuming that everything he asserts is proved in due course, this is one of the rare cases when it can be said that the complaint of sex discrimination has no reasonable prospect of success and should be struck out.

Employment Judge Russell

REASONS SENT TO THE PARTIES ON

13 August 2019

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