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THE EMPLOYMENT TRIBUNALS

Claimant: **Mr M French**

Respondent: **1) Aquatronic Group Management Plc**
2) SVC Technical Limited

Heard at: **East London Hearing Centre**

On: **Monday 15 July 2019**

Before: **Employment Judge Russell**

Representation
Claimant: **In Person**
1st Respondent: **Mr D Brown (Counsel)**
2nd Respondent **Miss N Owen (Counsel)**

JUDGMENT

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

2. **All complaints of sex discrimination against the Second Respondent are struck out as they have no reasonable prospect of success.**

3. **The Claimant shall pay to the First Respondent costs assessed in the sum of £600.**

4. **The Second Respondent's application for costs is refused.**

REASONS

1 The matter comes before me today on the Respondents' applications 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. 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 Whilst cases should not generally be struck out where there are relevant disputes of facts to be determined, this is not always the case. In **Ahir v British Airways Plc** [2017] EWCA Civ 1392 CA, Underhill LJ held at paragraph 16 that:

> **"Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of**

> **judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '*little* reasonable prospect of success'."**

8 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.

9 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.

10 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 Matrix

11 The Claimant brings complaints of sex discrimination against each Respondent in a claim form presented on 21 March 2019. The Second Respondent is an employment agency providing temporary workers to its clients. The Claimant was supplied by the Second Respondent, an employment agency, to work as an accounts assistant for the First Respondent during the period 6 December 2018 to 21 December 2018. On 17 December 2018, the Claimant was offered a 12-month contract of direct employment by the First Respondent. The Claimant's case is that on 20 December 2018 he was approached by the accounts supervisor (Emily) and finance manager (Barbara) and was accused of leaving five minutes early the previous day. He denied the allegation and suggested that in future he take a photograph of the time on the computers to avoid confusion. Later the same day, he was called to a meeting with the Finance Director (Minerva), further questioned and repeated his suggested resolution to enable them to move on and get on with their jobs. Later that afternoon, the Minerva terminated the Claimant's assignment and withdrew the offer of a direct 12-month contract. The Claimant says that he was treated less favourably than Emily as there was no investigation, no disciplinary process and Emily's word was believed over his. Further, his case is that the Second Respondent failed to investigate his grievance and sided with the First Respondent, again treating him less favourably than Emily.

12 In its Response, the First Respondent accepts that it offered the Claimant a fixed term contract, that Emily and Barbara spoke to the Claimant on 20 December 2018 about leaving early. The Claimant denied leaving early, reacted aggressively and suggested that he would take a photograph of his computer clock every day to prove that he was not leaving early. There was also a disagreement about when the Claimant would take his daily lunch break. The matter was escalated to the Finance

Director, she met the Claimant whose attitude was dismissive, suggesting that the meeting be brought to an end as everyone 'had better things to do'. The Finance Director decided that the Claimant was unsuitable for the work, called him to a meeting, withdrew the offer of a fixed term contract and terminated his temporary assignment through the Second Respondent.

13 The Second Respondent's case is that it was notified by the First Respondent that it no longer required the Claimant's service. The Second Respondent terminated his assignment with immediate effect. The Claimant subsequently sought to raise a grievance with the Second Respondent, the HR director (Roz) investigated and told the Claimant that he must raise his grievance with the First Respondent, she offered to meet with him to discuss his concerns. The Claimant did not accept the offer of a meeting.

14 At today's hearing, the Claimant's position was that the Respondents had not disputed the facts of his case. In discussion, all agreed that there was a disagreement between the Claimant and Emily in the office when discussing whether he left five minutes early the previous day. Today, the Claimant described the discussion as "pathetic". There is no dispute that the offer of the 12-month contract was withdrawn and that the agency assignment ended. There may be some dispute as to the reason why this happened. The Claimant's case is that he was dismissed for leaving early because the First Respondent accepted Emily's account of the disagreement and did not accept his denial. The First Respondent's case is that the contract offer was withdrawn and the temporary assignment terminated because of the Claimant's reaction to the discussion about time-keeping. The Claimant accepted that the Second Respondent had investigated the withdrawal of the contract but asserted that it had not investigated his allegation of sex discrimination.

Submissions

15 On behalf of the First Respondent, Mr Brown made the following submissions:

(1) Emily is not a true comparator for the purposes of section 23 as her circumstances are materially different. She was directly employed by the First Respondent and was not facing an allegation of poor-timekeeping.

(2) The Claimant was not dismissed for poor timekeeping but his reaction when his manager, and subsequently Finance Director, tried to discuss their concerns with him.

(3) There was no need for a disciplinary procedure or grievance investigation because the Claimant was an agency worker. In any event, the reasonableness of an employer's conduct does not cast any light on whether there has been less favourable treatment. As confirmed in **Bahl v Law Society** [2004] EWCA Civ 1070: "**It cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."**

(4) The Tribunal should have regard to paragraph 52 of the Judgment of Employment Judge Ross in a claim brought by the Claimant against a

different employer, Informa UK Limited, as evidence of the Claimant's means to pay a deposit order.

16 For the Second Respondent, Miss Owen submitted that:

(1) This was a decision taken by a client and the Second Respondent could not investigate further than it had. The Claimant had not co-operated in their attempts to investigate as he had not accepted the offer of a meeting. Irrespective of gender, there was no more that the Second Respondent could do.

(2) It is not enough to show a difference in treatment and difference in protected characteristic. The Claimant's case is only that Emily was believed and he was not. The claim is bound to fail as Emily is not a proper comparator – she was not an accounts assistant, was not a temporary worker, was not spoken to about timekeeping and did not raise a grievance.

17 In response, the Claimant made the following submissions:

(1) In his claim against the First Respondent, he says that there are no disputed facts. Emily was believed, he was not; this is enough for the burden of proof to pass.

(2) Liability in this case is proven because there was no process followed. It must happen that women in the finance team are late or leave early but they are not dismissed.

(3) As there is no dispute over the facts, what is important and how his case will succeed is how the First Respondent's conduct made him feel. In support of this submission, he relied upon **Carolina Gomes v Henworth Limited t/a Winkworth Estate Agents.** This is a Judgment of an Employment Tribunal sitting at Watford in February 2017 which upheld complaints of direct discrimination and harassment because of age.

(4) In failing to investigate his allegation of discrimination, the Second Respondent is in breach of its duty of care to him as an agency worker and are supporting the First Respondent in its act of discrimination.

(5) It is an error of law to treat him differently from Emily simply because he was an agency worker. A hypothetical comparator of a male employee who alleged sex discrimination would have had their grievance investigated.

(6) The Respondents' applications for deposit orders are an attempt to extort money from him, in line with the conduct of the Tribunal in the Ross Judgment. When asked if he wanted to give more evidence about his means, the Claimant stated only that he could keep this dragging on and would take it as far as possible if the Tribunal continued to ignore the law and that told me to "do as you please".

18 During the course of submissions, I was taken to various contemporaneous emails, statements and file notes made by the First Respondent in connection with the time keeping dispute and withdrawal of the fixed-term contract offer, as well as contemporaneous emails between the Claimant and the Second Respondent in connection with its investigation into his complaint. The Claimant disagrees with the conclusions and reasons relied upon by the Respondents but does not challenge the accuracy of the contemporaneous documents themselves.

Conclusions

19 There is really only one dispute of fact in this case – was the reason for termination of the assignment and withdrawal of the fixed-term contract because the Claimant left early or because of his inappropriate reaction to attempts to discuss his timekeeping? To some extent, the dispute is not material to the prospects of success. The Claimant accepts that he told Emily that he would take a photograph of the time on his computer as proof in future and that he told the Finance Director that they should get on with their jobs, following which he was dismissed. This is consistent with the First Respondent's case and the contemporaneous documents. Nevertheless, I reminded myself that for the purposes of a strike out, I should take the Claimant's case at its highest and not conduct a "mini-trial" of disputed issues. I have therefore proceeded on the basis that the Claimant will show that the reason for termination and the withdrawn offer was the fact that he left five minutes early on 19 December 2018, that the First Respondent did not carry out any investigation or disciplinary process but simply preferred the evidence of Emily.

20 I am satisfied that there are no reasonable prospects of the Claimant proving that Emily is an appropriate comparator for the purposes of the Equality Act 2010. She was an employee of the First Respondent, whereas the Claimant was a temporary worker supplied through an agency. Emily was the Claimant's supervisor and had authority to speak to him about time-keeping concerns; he reported to her as an accounts assistant. Emily was not accused of leaving early as the Claimant was. There is no proper comparison at law between the Claimant and Emily.

21 I considered in the alternative the prospects of success for the claims if the Claimant were to rely upon a hypothetical comparator. This would be a female agency worker, some weeks into a temporary assignment but offered a fixed term employment contract, who was then accused by her line manager of leaving early and disagreed with her line manager in the way described by the Claimant. Would such a comparator have been treated differently? The Claimant advances no case to suggest that there is any reasonable prospect that she would. I prefer the submissions of Mr Brown that the failure to follow any procedure for the Claimant, even assuming that it was unreasonable in the circumstances, is not sufficient evidence to infer that such a female comparator would be treated differently.

22 Contrary to the Claimant's submission, the mere fact that Emily was believed and he was not, is not sufficient to shift the burden of proof. The Claimant is equally 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, the Claimant's case is no more than a difference in treatment and a difference in protected characteristic. It 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.

23 As for the claim against the Second Respondent, it was telling that the Claimant relied upon a hypothetical comparator was also male but an employee as opposed to an agency worker. I accept Miss Owen's submission that the Claimant appeared to advance his case on employment status and not sex.

24 The Claimant is a litigant in person and before taking the draconian step of striking out his claim, I considered in the alternative a hypothetical female comparator. There is no dispute that the decisions to withdraw the contract offer and terminated the assignment were taken by the First Respondent, its client. Nor is there any dispute that the Second Respondent did try to investigate and that the Claimant refused an invitation to attend a meeting. This is consistent with the incontrovertible contemporaneous documents. There is no reasonable prospect of the Claimant showing that a hypothetical female agency worker in such circumstances would have had any complaint investigated more fully. For those reasons, I also strike out the claims against the Second Respondent.

Costs

25 Having given Judgment with oral reasons on the applications to strike out, Mr Brown indicated that he wished to make an application for the First Respondent's costs. The Claimant interrupted and asked whether he could leave hearing. I explained the importance of staying to resist the application. The Claimant declined and said that he would appeal, complain about me and have me struck off. The complaint appeared to be that I gave Judgment some 20 minutes later than I had anticipated due to the time taken properly to reach my decision. I told the Claimant that was a matter for him to decide but encouraged him to stay to resist the intimated costs application in any event. The Claimant refused and left the hearing. I was satisfied that the Claimant knew that the application was going to be made and the consequences of leaving and decided that it was appropriate to hear the application in the Claimant's absence.

26 Mr Brown seeks the First Respondent's costs of today's hearing in the sum of £600, which he submitted was a modest amount. Mr Brown relied upon an email sent to the Claimant on 28 June 2019 in which those acting for the First Respondent clearly set out the weaknesses in the claim, including a clear explanation about the appropriate comparator, and gave a warning that if the hearing proceeded, costs would be sought.

27 Rule 76 of the Employment Tribunal Rules of Procedure 2013 provides that:

> "**(1) A tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that:**
>
> **(a) a party or that party's representative has acted vexatiously, abusively,**

disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success."

28 The making of a costs order therefore requires a two-stage approach: has the threshold been passed and, if so, is a costs order appropriate. Costs do not follow the event in the Tribunal and the Tribunal may have regard to the paying party's ability to pay.

29 The lead authority in deciding whether to award costs in the Employment Tribunal is **Yerrakalva v Barnsley Metropolitan Borough Council** [2011] EWCA CIV 1255, in particular the judgment of Mummery LJ. The Tribunal should consider the whole picture of what has happened in the case and ask whether there had been unreasonable conduct by the relevant party in bringing or defending the case. If so, it should identify the conduct, what was unreasonable about it and the effect it had. The Tribunal should also take into account any criticisms made of the other party's conduct and its effect on the costs incurred.

30 I accept Mr Brown's submission that my finding that the claims had no reasonable prospect of success is sufficient to the pass the threshold for a costs order in rule 76(1)(b). The issue is whether I should exercise my discretion to do so in the circumstances of this case.

31 As set out above, the Claimant was invited to make representations as to his means in the first part of this hearing in connection with possible deposit orders. Mr Brown relied again upon paragraph 52 of the Ross Judgment which records that as of 15 March 2019, the Claimant had a permanent job, earning £27,000 per annum (approximately £1900 net per month) and £21,000 in savings. As also set out above, the Claimant declined to provide any additional information about means.

32 The costs warning given to the Claimant was clear and appropriately expressed. It should have caused him to reflect upon the merit of his claims and whether or not to proceed. The claims have been struck out as lacking reasonable prospects of success in large part due to the comparator problem set out in the costs warning. The costs sought are only for this hearing, a hearing which could and should have been avoided if the Claimant had given proper thought to the legal basis of his claim. Even if the evidence of means given by the Claimant in March 2019 is now four months old, the Claimant has declined the opportunity to provide further evidence. In all of the circumstances, I am satisfied therefore that it is appropriate to order the Claimant to pay the First Respondent's costs assessed in the sum of £600.

33 Miss Owen made an application for the Second Respondent's costs of today's hearing, also relying on rule 76(1)(b) and the strike out of the claims as having no reasonable prospects of success. I accept that the threshold for costs has been passed and I must exercise my discretion as to whether or not to make a costs order in favour of the Second Respondent.

34 Unlike the First Respondent, the Second Respondent did not send the Claimant a costs warning before this hearing. Miss Owens attempted to persuade me that the weaknesses in his claim should have been so obvious to the Claimant that no warning was required. However, the Claimant is a litigant in person and the absence of

a proper warning which would cause a reasonable party to pause and think is a relevant factor. The Claimant's claim and working relationship with the Respondents was different and the effect of that difference upon the merits was not explained to the Claimant. The overlap of the cases, as Miss Owens put it, was not so great that no further costs warning was replied. Furthermore, Miss Owens is not able to identify the sum sought for today's hearing, stating only that it is unlikely to be more than that claimed by Mr Brown. It is not appropriate for the Tribunal to "guesstimate" a costs figure and I decline to do so. The Second Respondent's application for costs is refused.

Employment Judge Russell

REASONS SENT TO THE PARTIES ON

13 August 2019