



EMPLOYMENT TRIBUNALS

Claimant: Dr L Reynolds
Respondent: London School of Hygiene and Tropical Medicine

Heard at: London Central (in private) **On:** 3 September 2019
Before: Employment Judge Elliott

Appearances

For the claimant: In person
For the respondent: Ms B Criddle, counsel

JUDGMENT ON PRELIMINARY HEARING

1. The judgment of the tribunal is on that in claim 2202348/2019 the claims described in the document attached to the ET1 as Allegations 6 and 7 are struck out as having no reasonable prospect of success together with the whistleblowing element of Allegations 2 and 3.
2. The sex discrimination claims contained within Allegations 2 and 3 continue.

REASONS

The issue for this hearing

- (1) This decision should be read in conjunction with the Case Management Order of the same date, 3 September 2019, which sets out the relevant background and is not repeated here.
- (2) The issue for this hearing was whether to strike out parts of claim number 2202348/2019.

The respondent's strike out application in case number 2202348/2019

- (3) On 19 July 2019 the respondent made an application to strike out any parts of the second claim that had been the subject of the amendment decision on the first claim 2205737/2018. The second claim 2202348/2019 was issued on 29 April 2019. This is the first case management hearing in relation to this claim.

The jurisdictional boxes ticked by the claimant in that claim were age discrimination, sex discrimination (including equal pay) and arrears of pay. She referred to her first claim.

- (4) The respondent's case was that where claim 2 had been the subject of a decision on the amendment application in claim 1, it had no reasonable prospect of success or was an abuse of process as they said the claimant was attempting to reopen issues and claims that had already been considered and decided upon by the tribunal.
- (5) The claimant brings claims of harassment and victimisation. In addition the claimant attached to claim 2 her amendment application of 19 December 2018 in the first claim and relied on this.
- (6) I asked counsel for her position in relation to Judge Walker's case management order which was an amendment application and an Order and not a Judgment. The respondent's point was not that this was res judicata. The respondent said that Judge Walker had determined certain issues which were determinative of the second claim. The respondent said that the matters could not be relitigated or alternatively it showed no reasonable prospects of success under Rule 37.
- (7) The respondent said that in claim 2 the claimant had ticked the boxes for sex, age and arrears of pay and "another type of claim" being harassment and victimisation. The respondent said that the harassment and victimisations claims were new and they accepted that those claims were "in".
- (8) The claimant referred to claim 1 and her amendment application where she said that the decision on her amendment of 19 December 2018 was pending. The ET1 was issued on 29 April 2019 and the decision of Judge Walker was sent to the parties on 16 May 2019. The claimant said that if her leave was refused, this claim contained the following types of claim: Fixed Term Employees, sex and/or age discrimination, whistleblowing detriment, part-time workers, harassment and victimisation on matters prior to the events complaint of in this ET1.
- (9) The respondent said that the claimant was seeking to "resurrect" the amendment application by bringing claim 2.
- (10) The respondent took me to Judge Walker's decision on the 7 Allegations, now relied upon in claim 2.
- (11) Allegation 1 was accepted as an existing claim and live claim.
- (12) Allegation 2 was a complaint about a promotion initially granted and withdrawn. Judge Walker said it was a new matter and she set out the time limit and said there was nothing continuing about it. The date range was from 2011 to 2013. It was put as whistleblowing, sex and age discrimination. Judge Walker sought to identify the disclosures but found this difficult as she considered the claim "vague".

- (13) The amendment was not permitted as it was a claim which was found to be old, vague and wide ranging and it was not a continuing act. They were all said to be out of time. The respondent said that Judge Walker had decided the issue of time against the claimant and the claimant cannot now reopen that issues in a second claim, she is estopped from doing so. In any event, the fact that it was said to be out of time and on the whistleblowing time was so vague, showed it had no reasonable prospect of success and should be struck out.
- (14) Allegation 3: This was about being excluded from a promotion process by the lack of a line manger when the claimant ceased a 0.75 FTE post. The whistleblowing claim was based on the same matters as above and was considered too imprecise to allow an amendment. Judge Walker said that the clamant was clear that from November 2011 she knew the respondent was not providing her with a line manager and it was now about 7 years out of date and was not a continuing act. It was said to be significantly out of time.
- (15) Allegations 4 and 5: the respondent accepted that these are claims already within claim 1 and remain live.
- (16) Allegation 6: This related to being singled out for redundancy when there was said to be no genuine redundancy. Judge Walker said that the claimant accepted in relation to that part of the claim that there was no protected act and could not therefore be a victimisation claim. The respondent said therefore there could be no reasonable prospect of success.
- (17) Allegation 7: The same submission was made as in relation to Allegation 6. This was a victimisation claim and the claimant accepted before Judge Walker that there was no protected act that predated the detrimental treatment and appeared to be a misunderstanding of the legal term victimisation. The respondent said this could not have reasonable prospects of success.
- (18) Judge Walker again referred to the claimant's misunderstanding of the terminology "victimisation". She went on to consider whether it could be harassment rather than victimisation. After considering section 26 (decision paragraph 62) she could not see a link to a protected characteristic. The respondent therefore said there was no reasonable prospect of success.
- (19) I relation to claim 2, the respondent said the claimant appended the amendment application on which there was a decision by Judge Walker and on which the issue of time had been determined on Allegations 2 and 3 so that the claimant cannot reopen it.
- (20) On Allegations 2, 3, 6 and 7 there was said to be no reasonable prospects of success.
- (21) The respondent accepted that the parts of claim 2 that are "in" are victimisation in relation to the handling of the grievance process and the removal of her name from a door. Those are the only parts of the claim that the respondent accepts are "in". The respondent also accepted that allegations 1, 4 and 5 are "in" as they already form part of claim 1. Allegation 1 is that the claimant is entitled to

be regarded as a permanent employee (FTE Regulations), Allegation 4 is indirect disability discrimination in relation to promotion guidance and Allegation 5 direct sex discrimination for contracting her with fewer hours than Dr Yeo.

- (22) The claimant said on Allegation 2 there was a mistake of fact by Judge Walker who thought that the triggering point in relation to knowing about a detriment was in 2012 and the claimant said it was 30 May 2018 the date of the redundancy consultation.
- (23) The claimant said that Judge Walker had misunderstood her to be a medical doctor and not a chartered accountant with a doctorate and this related to her disclosures. The claimant said she had met the tests under section 43B(1). She said she could show chapter and verse from her academic papers but she had not done so in her pleadings.
- (24) On Allegation 3: the claimant said she did not know what flowed from not being given a line manager and matters did not crystallise until the summer of 2018. She said it was a continuing act.
- (25) Allegations 6 and 7: The claimant said that the respondent had a new policy on harassment and bullying which they introduced, she thought in 2018. In her ET1 box 8.2 point 1, on harassment, she said she thought the conduct she relied upon was prohibited by their policy. She said that on victimisation an explanation was necessary and she felt she was being punished for using the tribunal system. The ET1 in case 1 was referred to but she accepted that she did not state the link between the ET1 and any detrimental action or her whistleblowing matters.
- (26) In response, the respondent said in relation to Allegation 2 that the claimant had not appealed the decision of Judge Walker so the time point stood. On Allegation 3 her complaint differed and on Allegations 6 and 7, the protected act post dated the detriments relied upon.

The relevant law on strike out

- (27) Rule 37 of the Employment Tribunal Rules of Procedure 2013 deals with strike out as follows:
 - (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;*
 - (b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
 - (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
 - (d) *that it has not been actively pursued;*
 - (e) *that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).*
 - (2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

Decision on strike out application

- (28) The respondent accepted that in relation to claim 2, that so far as there was cross reference with the claimant's amendment application of 19 December 2018, Allegations 1, 4 and 5 were live claims as were victimisation claims in relation to the handling of the grievance process and the removal of her name from a door.
- (29) The allegations in dispute were 2, 3, 6 and 7.
- (30) In relation to Allegations 6 and 7 to the extent that they are victimisation claims, the claimant at this hearing relied upon her first claim as the protected act. She did not say so in terms, in her second claim but she did refer to her first claim and I find that there is enough, as she is not expected to adopt the same standards as if she were legally qualified or represented, to regard this as the protected act. The difficulty for the claimant is that she relies upon factual matters that predated the presentation of her first ET1 as they are all matters that she sought to include by way of amendment to her first claim and which was refused.
- (31) On Allegations 2 and 3 the respondent said that Judge Walker had already ruled on the time point on these allegations. The claimant said in relation to Allegation 2 there was a mistake of fact by Judge Walker who thought that the triggering point in relation to knowing about a detriment was in 2012 and the claimant said it was 30 May 2018 the date of the redundancy consultation.
- (32) Judge Walker properly applied the task before her on an amendment application. The test before me is different. I was mindful of the fact that no evidence was taken on 4 April 2019. Judge Walker made a Case Management Order on amendment. It is not a judgment. I consider that the time point requires a testing on the facts and I declined to strike this out as having no reasonable prospect of success. It is too draconian a measure in such circumstances.
- (33) The position is similar in relation to Allegation 3 because Judge Walker said that the claimant was clear that from November 2011 she knew that she did not have a line manager. Judge Walker could not see how it could be a continuing act, but that argument does not appear to have been put before the tribunal on 4 April 2019. For the same reasons I have given in relation to Allegation 2, I am concerned to strike this out when no evidence was taken and the continuing act point was not argued. The claimant sought to argue it today. I decline to strike this out as having no reasonable prospect of success.
- (34) It is on sex discrimination that I decline to strike out. The claimant confirmed that she does not pursue an age discrimination claim allegations 2 and 3.
- (35) I strike out the whistleblowing claim on the basis that the disclosures are not identified sufficiently to show a valid whistleblowing claim and I adopt Judge Walker's reasoning on this.
- (36) I strike out Allegations 6 and 7 as having no reasonable prospect of success for two reasons: firstly I adopt the reasoning of Judge Walker on those issues and

the fact that the claimant acknowledged before Judge Walker that there was no protected act and that she had misunderstood the legal term “victimisation”. My second reason is that by relying on her ET1 in claim 1 as a protected act, which she is entitled to do, she is nevertheless relying on factual matters that predated that ET1. For those reasons I strike out Allegations 6 and 7 as having no reasonable prospect of success.

Employment Judge Elliott

3 September 2019

Sent to the parties on:

04/09/2019

For the Tribunal:

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