



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mrs Boakye-Amankwah

Royal Mail Group Ltd

HELD AT London South

ON 4 September 2019

EMPLOYMENT JUDGE PHILLIPS

Appearances

For Claimant: In person

For Respondent: Ms Anamau, Solicitor

JUDGMENT

The Respondent's application to strike out the Claimant's claim is dismissed.

REASONS

1. The Claimant started work with the Respondent on 3rd March 2008. She remains employed by the Respondent as a postal worker based at the Barnes and Mortlake Delivery Office. The Claimant, by her form ET1, presented on 08 May 2018, brings claims of racial harassment and direct race discrimination, arising out a single incident of verbal harassment experienced by the Claimant from a public customer on 23 December 2017, when the Claimant was working in the Barnes and Mortlake Delivery Office. While attempting to resolve the customer's complaint that post had not been delivered, the Claimant reported to her manager having heard the customer remark as they were leaving the office, "you have come here from a third world country, coming to work here".
2. The Claimant asserts (1) that the Respondent is liable for the incident of harassment; and (2) has directly discriminated against her on the grounds of

colour by treating her report of the incident differently and less favourably when compared to a white colleague. The Claimant says that a white colleague who made a similar complaint was treated differently and more favourably. The Respondent says that with regard to the second matter, the comparator relied upon by the Claimant is not a true comparator because there was a material difference in circumstances between her case and that of the Claimant, in that (1) the abuse received was more serious and involved being shouted at; and (2) occurred at the Customer's premises and not at the delivery office. The Respondent denies in any event that any differences in treatment were due to the Claimant's race. As far as the first matter is concerned, the Respondent says that s 40 of the Equality Act 2010 was repealed in 2013 and as such the Tribunal does not have jurisdiction to hear this ground of complaint.

Brief procedural history

3. There was a Case Management Hearing on 14 August 2019 before EJ Nash. At the hearing EJ Nash considered that the Claimant's allegations or arguments that the Respondent subjected her to direct discrimination on the ground of her race or was responsible for the third party harassment had little reasonable prospect of success and the Claimant was ordered (by Order dated 30 August) to pay a deposit of £300 by 4 September 2018 in order to be able to continue to bring both her claims of (1) third party harassment and (2) alleged unfavourable treatment by the Respondent in the way in which it handled her report.
4. The Claimant has paid that deposit. The Claimant was also ordered at the CMH on 14 August, on or before 25 September to provide further details of her complaint as to how and why she says that the Respondent's treatment of her complaint was because of or on the grounds of her race.
5. The Respondent was given permission at the 14 August CMH to serve an amended ET3, if advised, not later than 16 October. An Amended ET3 was duly filed on 16 October. The Tribunal indicated that depending on the outcome of the deposit order, it might then be necessary to apply for a further CMH if the case was to proceed. On 25 September the Claimant requested an extension of time as she was "exploring attempting to resolve the claim".
6. The Respondent by email on 1 October 2018 made a number of further applications and asked for a further preliminary hearing to be listed. The email raised a number of matters, namely (1) the alleged failure of the Claimant to provide the further particulars ordered by 25 September; (2) that the Claimant's extension of time request was rejected; (3) suggested that the second ground of claim identified above [para 8 of the deposit order] was a new unpleaded claim and was out of time; (4) suggested that there was a material difference between the Claimant's comparator and her own case. In the light of these matters, they made a number of applications, that:

- a. the Claimant's claim for race discrimination should be struck out because the Tribunal does not have jurisdiction to hear it;
 - b. the Claimant's claim for race discrimination should be struck out on the ground it has no reasonable prospect of success;
 - c. the Claimant should be ordered to pay a deposit order of up to £1,000 in order to continue with the proceedings, under Rule 39 Employment Tribunal Rules.
7. On 4 October, the Claimant sent in an email to the Tribunal and the Respondent's solicitors, setting out the detailed factual background to her complaint and making clear that she wanted a letter sent to the customer who had abused her. On 9 October 2018, the Claimant sent to the Respondent a copy of a letter sent by the Barnes and Mortlake Delivery Office to a member of the public on 7 July 2017 which admonished the owner of the address for subjecting a postal worker in Barnes "to unacceptable abusive behaviour whilst delivering a packet" to the address. The letter reminded the owner that they were required to respect staff and stated that if such behavior continued consideration would have to be given to suspending their mail deliveries.
8. On 08 May 2019, the case was listed for a Closed Preliminary Hearing of 1 hour on 4 September 2019 to deal with the three outstanding applications raised by the Respondent on 1 October 2018.

Jurisdiction / time limits points

9. The first of the Respondent's outstanding applications from 1 October 2018, was that the Tribunal had no jurisdiction to hear the Claimant's race discrimination claim, which as I understood it, was put on the basis that it related to the second element of the Claimant's claim, which had not been raised before and so was out of time. I also raised the question of the time limits points raised by the Respondent in the Amended ET3 at paragraphs 22 to 34. The Claimant said these had been dealt with at the CMC hearing on 14 August but there was no record of this on the file or in the CMS Summary; Ms Anamau had not herself been present at that hearing, so was not in a position to confirm this. In the light of this, as these time issue points also appeared to be outstanding, there did not seem to be any point in hearing the detail of the Respondent's submission on the "new" claim being out of time, in the absence of clarity on these other matters. I therefore made an Order that on or before 20 September 2019, the Respondent confirm in writing to the Tribunal and the Claimant, whether they wished to pursue all or any time limit points and if they did, that these be put in writing on or before that date. I ordered that the Claimant respond to this, if appropriate, on or before 11 October, whereupon I indicated I would make a determination of this jurisdictional point on the papers.

Strike out and deposit order applications

10. These two applications related to whether the Claimant's claim for race discrimination should be struck out on the ground it has no reasonable prospect of success and / or whether the Claimant should be ordered to pay a deposit order of up to £1,000 in order to continue with the proceedings, under Rule 39 Employment Tribunal Rules. As far as the alleged responsibility for the third party harassment claim was concerned, Ms Anamau submitted that this had no prospect or no reasonable prospect of success because it was clearly outside the Respondent's control and had not been repeated conduct. There was no legal liability for this. Further, a number of recommendations had been made after the incident was raised by the Claimant, which had been complied with. As far as the second element of the complaint was concerned, namely that the Claimant had been treated differently and less favourably than a white colleague in similar circumstances, Ms Anamau said that the Claimant was relying on the wrong comparator as the circumstances of the white colleague who had been harassed were materially different: the abuse was worse and the incident happened on the customer's premises. Therefore she said there was no evidence that the Claimant was treated differently and that if she was, that it was on the grounds of her race.
11. The Claimant responded that the comparator's circumstances were not materially different and there was different treatment; in the incident involving her white colleague a letter was sent by Royal Mail to the alleged harasser warning them about their conduct but this had not happened in her case. She said even if a dog is loose or a hedge is overgrown, Royal Mail will write a letter but they didn't do so in her case. She suggested that if such a letter had been sent, she would have felt much more supported and valued and would most likely not have brought this complaint. In the circumstances she believed the reason for this difference was that she was black, although she also suggested it might be have been because the alleged harasser on her case was elderly, famous and white.

Conclusion on the Strike out and deposit order case

12. It seemed to me that, as presented to me, these applications amounted to the Respondent trying to have a second bite of the cherry, as both these arguments appeared to have already had been advanced in respect of both elements of the claim at the August 2018 CMH before EJ Nash. That appears from her reasons in the Deposit Order, where she refers to both elements. Although a deposit order is not a judgment and so cannot be reconsidered under Rule 70, such orders can be varied, suspended or set aside under Rule 29, if it is in the interest of justice to do so. Other than the information about the comparator that had been submitted, there did not appear to be any material differences or change of circumstances since the August 2018 decision by EJ Nash. I saw no reason to vary EJ Nash's original assessment of the circumstances or her Order. Further, as far as the challenge to the comparator's circumstances being material difference was concerned, in my judgment, this was matter of fact that

could only be assessed after hearing evidence and could not be dealt with simply as matter of submissions. On that basis, these applications do not succeed.

The late service of the Further and Better Particulars

13. This was also raised by Ms Anamau. These were due by 28 September but had been served effectively piecemeal via two emails in early October. Accepting that the Claimant was late in serving these, I noted this was in the context of her having asked for an extension of time to try and resolve matters. I was satisfied that the two emails of 4 and 9 October amounted to compliance with the Order for Further and Better Particulars.
14. In the circumstances, I directed that, subject to my determination on the time limits / jurisdictional point, it was appropriate to now put in place a timetable to ensure the fair and efficient hearing of this claim, as per the separate CMH Orders and Directions.

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Employment Judge Phillips
4 September 2019, London South
Date and place of Order