EMPLOYMENT TRIBUNALS

at an Open Attended Preliminary Hearing

Claimant: Mrs S F Simmons

Respondent: Virgin Media Ltd

Heard at: Nottingham

On: Monday 19 August 2019

Before: Employment Judge Hutchinson (sitting alone)

Representation
Claimant: In person
Supported by Mrs Elizabeth Doughty, friend
Respondent: Mr J Bryan of Counsel

JUDGMENT

The Employment Judge gave judgment as follows:

1. The claims of direct sex discrimination and harassment are struck out.

2. The hearing listed for 13, 15 and 16 January 2020 is cancelled.

REASONS

Introduction

1. The Claimant presented her claim to the tribunal on 25 September 2018. She had been employed as a Sales Adviser since 1 March 2013 and was still employed at the date of this hearing. She has been off work though since July 2017 suffering from depression and anxiety.

2. Her claims are under the Equality Act 2010 and are of;
   - direct discrimination
   - harassment

   She relies on the protected characteristic of her sex.

3. The claim relates to WhatsApp messages posted in a group comprising her work colleagues. The Respondent denies that they were discriminatory.

4. At a preliminary hearing conducted by myself on 7 May 2019, I decided that there should be a preliminary hearing to consider;

    4.1 whether any of the claims made by the Claimant are out of time and if they are, whether it would be just and equitable to extend time;
    4.2 whether the claims or any of them should be struck out because they have no reasonable prospect of success;
    4.3 whether a deposit order should be made on the grounds that some of the allegations or arguments the Claimant has made have little reasonable prospect of success;
    4.4 if the matter can proceed, to decide whether the Claimant's application to add a party to the proceedings should be granted.

5. We agreed at the start of the proceedings that I should deal with the strike out/deposit order first before I go on to consider the other two matters.

The hearing today

6. The Claimant was assisted by her friend, Mrs Elizabeth Doughty, and the Respondent was represented by Mr J Bryan of Counsel. I had before me a bundle of documents that had been prepared by the Respondent and, where I refer to page numbers, it is from that bundle. I did not hear any evidence. I heard submissions from Mr Bryan and then submissions made by Mrs Doughty and Mrs Simmons.

The facts

7. This is an unusual case in that there is no dispute about the facts between the Claimant and the Respondent.

8. The Claimant has been off sick suffering from depression and anxiety since July 2017.

9. On 9 August 2017, she raised a grievance about her colleague, Mr Mark-Hill. It was not an allegation of discrimination but concerned his attitude and behaviour towards her.

10. Both Mr Mark-Hill and the Claimant are members of a WhatsApp group and on 12 February 2018, Mr Mark-Hill made two posts. The first comprised a 'joke' about a 'suicidal identical twin' and a further 'joke' about a 'baby that had jaundice'. The full script of the said 'jokes' are set out in the grounds of complaint at pages 10 and 11 of the bundle.

11. The Claimant had attended a grievance meeting on 7 February 2018 and had been asked to supply further information. When she supplied this further information on 26 February 2018 (pages 26 – 27), she also said;

"*I will also forward you some comments that Ian has made on the WhatsApp group chat which I deem to be of an inappropriate nature. I believe that Ian's actions are divisive and not of the standard that I would expect from a fellow employee."*

12. She did not say that the jokes were discriminatory.

13. On 14 March 2018, she received notification of her grievance outcome. This is at pages 32 – 36. This related to the grievance she had raised on 9 August 2017 She was told in the outcome letter that Mr Smith, who had been dealing with the original grievance, had not received the details about this complaint and that he could not consider it as part of his grievance response. He did tell her of her right of appeal.

14. On 12 April 2018, Mr Mark-Hill posted two further 'jokes' about an 'air freshener' and 'gingernuts'. Again, these posts are set in the Claimant's complaint to the employment tribunal which is at page 11.

15. Mrs Simmons appealed against the grievance outcome in an email of 22 March 2018 (page 37) and then brought the Respondent's attention to the second two 'jokes' on 25 April 2018 (pages 38 – 39).

16. A Grievance appeal meeting was held on 2 May 2018. The hearing was conducted by Drew Lewis, Regional Manager and the notes of the meeting are at pages 41 – 44. The meeting she described the messages as being "offensive". On 10 May 2018. Mrs Simmons wrote to Mr. Lewis about the messages saying that they were "*degrading to women*". She said that the 'jokes' were "*directed at the expense of women and are unacceptable communications in the workplace*" (page 45).

17. Mr. Lewis wrote to the Claimant on 11 May 2018 saying that the WhatsApp messages could not form part of the grievance as it was now at the appeal stage. He said that the four messages that had now been sent could be investigated and could be treated as a grievance. The Claimant agreed to this course of action on 14 May 2018 (pages 60 – 61).

18. On 17 May 2018, the Claimant received the outcome in respect of her grievance appeal from Mr Lewis (pages 66 – 72). None of her complaints that had originally been made had been upheld. In this letter he referred to the WhatsApp messages dated 26 February 2018 and 12 April 2018. He confirmed that these messages would be dealt with as a separate grievance. These were to be dealt with by Richard Smith, Retail Store Manager.

19. On 15 June 2018, the Claimant attended a grievance hearing. The notes of that meeting are at pages 78-81. In the meeting the claimant described the messages as being "inappropriate". She described herself as being the only female and only person with ginger hair and that she had been offended by the "gingernut" joke. On 17 July 2018 she received the outcome of her grievance in respect of the WhatsApp messages from Richard Smith, Store Manager. He found in respect of the WhatsApp messages that whilst they were inappropriate and offensive that she may have been offended by the posts. He was satisfied

that they were not aimed at the Claimant and were not discriminatory because they did not relate to her sex (pages 84 – 88).

20. On 24 July 2018, the Claimant appealed against this decision (page 89) and, after attending a hearing on 29 August 2018 (pages 98 – 100), she received the outcome in respect of that grievance appeal on 14 September 2018 from Ashleigh Laidler, Regional Manager (pages 102 – 104). She also agreed that the 'jokes' were offensive and inappropriate but she did not feel that the messages were aimed at Mrs Simmons and was satisfied that they were not discriminatory and she did not uphold the appeal (pages 102 – 104).

<u>The law</u>

21. The power to strike out a claim is given to the tribunal under rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). Rule 37 provides:

"*(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;

…"

22. If I do not strike the claim out, Mr Bryan asks that I make an order under rule 39 of the Rules, which provides:

"*(1) Where at a preliminary hearing (under rule 53) the 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 ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*"

23. The test requires me to make an assessment of the prospects of success. The primary contention of the Respondent is that the claims have no reasonable prospect of success and so should be struck out.

24. It is a well-established principle that a case of discrimination should not be struck out where the relevant facts are in dispute.

25. In considering whether to strike out or make a deposit order I must refer myself to the appropriate provisions in the Equality Act 2010 ("EqA").

26. Section 13 EqA provides:

"*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*"

27. The claim of harassment is made under section 26 EqA and provides:

"*(1) A person (A) harasses another (B) if -*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effective of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

28. Mr Bryan also referred me to the case of ***Mr F Ahmed v The Cardinal Hume Academies [UKEAT/0196/18/RN)***.

29. Mr Bryan also submitted that an assessment of the claims' prospects must take into account that the Respondent has, he says, a strong "*reasonable steps"* defence. The relevant provision is in section 109 EqA which provides:

"*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

…

(4) In proceeding against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment, it is a defence for B to show that B took all reasonable steps to prevent A -

(a) from doing that thing, or

(b) from doing anything of that description".

My conclusions

30. In this case, unusually, the relevant facts are not in dispute. I am satisfied that the 'jokes' were inappropriate. As Miss Laidler said in her grievance appeal outcome, they "*should not have been posted on the WhatsApp group*" *and I can also understand that you may have been offended when you read such material*'.

31. I am also satisfied that they could not be described as being aimed at Mrs Simmons or at the expense of women in general.

32. As the Claimant was not the only recipient and the message was sent to a group including men, there is no prospect that a tribunal could find that this amounted to less favourable treatment because everyone received the same joke.

33. I am satisfied that on any interpretation of the 'jokes', the Claimant wILL not be able to establish that they were made because of her sex or anyone else's. There is no reference to gender and so not only is it unlikely that she can establish less favourable treatment but also, she will not be able to establish any causal connection between the treatment and her gender. In the circumstances her claims of direct sex discrimination have therefore no reasonable prospect of success

34. I am also satisfied that the 'jokes' could not amount to harassment. A tribunal would have to take a real-world view of the conduct in the round and as Mr Burns says that although "*distasteful*", the jokes did not objectively cross the high threshold of violating Mrs Simmons' dignity nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for Mrs Simmons. I am satisfied that the Claimant will not have any reasonable prospect of success of establishing any prima facie case of sexual harassment in this case.

35. The claims are struck out therefore under the provisions of rule 37 of the Rules.

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Employment Judge Hutchinson

Date 1 October 2019

JUDGMENT SENT TO THE PARTIES ON

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