



EMPLOYMENT TRIBUNALS

Claimant: Mr D Williams

Respondent: Cheshire West and Chester Borough Council

Heard at: Liverpool

On: 7 October 2019

Before: Employment Judge Aspinall (sitting alone)

REPRESENTATION:

Claimant: Mr Mehta, claimant's stepfather, solicitor

Respondent: Mr Kenward, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that

The respondent's application to strike out the claimant's race and sex discrimination claims fails.

REASONS

Claim and Issues

1. In a claim form received on 25 January 2019 the claimant complained that he had been discriminated against on the grounds of his race and or sex contrary to Sections 13, 39, 26, 40 and 108 Equality Act 2010. The claims are resisted by the respondent.
2. At a case management hearing on 15 April 2019 Employment Judge Horne listed a preliminary hearing to consider the following issues:
 - (a) Whether the complaints of race and sex discrimination should be struck out on the ground that it had no reasonable prospect of success under Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 and
 - (b) Whether the events of September to December 2016 are part of “conduct extending over a period” for the purposes of section 123 Equality Act 2010 and if they are not
 - (c) Whether it would be just and equitable under section 123 (1)(b) to extend time.

Background

3. The claimant was employed as a social worker from 4 August 2014 until his resignation in January 2017. He is male and was the only black person in his team.
4. His claim is that he was discriminated against from February 2016 to December 2016 during his employment and that he was discriminated against, post termination of his employment, on 3 December 2018.
5. The claimant confirmed in a case management hearing on 15 April 2019 that the less favourable treatment of which he complains is:

Less favourable treatment during employment February to December 2016

The claimant was supported by the respondent in a course of study at Chester University for a professional qualification in social work. He was investigated for plagiarism in a piece of coursework. He informed his line manager of the university’s plagiarism investigation.

- a. He was offered a promotion but it was withdrawn following the provision of a reference by his line manager Helen Roberts referring to the respondent’s own investigation into his alleged plagiarism
- b. He was castigated and criticised for decisions he made in his role by a manager, Carmel Cameron acting either on her own or on the instruction of another manager, Amanda Jones.
- c. He was given inadequate supervision in his work from February 2016 onwards.
- d. From October 2016 – 17 November 2016 he was given an excessive caseload in both number and complexity.

- e. The respondent instigated disciplinary action against him on or around 2 November 2016 for misconduct arising out of work he did with 5 families.
- f. Debbie Murphy in the respondent's HR team indicated in a meeting shortly before Christmas 2016 that she would "drop" the investigation she was conducting into a grievance brought by the claimant.
- g. The respondent referred the claimant's alleged misconduct to the Health and Care Professions Council (HCPC) on 2 December 2016.

Less favourable treatment post termination of employment 3 December 2018

- h. The claimant says that post termination of his employment he suffered one further act of less favourable treatment on 3 December 2018. He had been required to attend a 5 day HCPC tribunal hearing to determine his fitness to practice. One of the hearing days was 3 December 2018. He says on 3 December 2018 HCPC's barrister made contact with one of the respondent's legal team. The claimant does not know to whom the barrister spoke. The barrister was discussing issues relating to disclosure for the purposes of the tribunal; hearing. He contends that the HCPC barrister was "taking instructions" from the respondent. **He says the act of less favourable treatment is that the respondent ought to have realised, following that discussion, that the allegations against him could not be substantiated and that the respondent ought to have conceded there was insufficient evidence on which to proceed.** He says failure to make that concession was influenced by Carmel Cameron or Amanda Jones or Debbie Murphy and was motivated by his sex and or race.

Proceedings at the Preliminary Hearing

6. The Tribunal heard evidence from the claimant. The claimant said that there was correspondence between the respondent and the HCPC and that the respondent was providing information and evidence to HCPC "right up to the final hearing". He said the respondent was "actively involved" in the HCPC case, that they were "working with the HCPC" in the case against him. He said that there was some information that the respondent hadn't provided even in the run up to the final hearing. It was his view that the degree of involvement and decisions made by the respondent as to which information to provide and which not to provide influenced the HCPC decision as to whether or not to proceed with the case, "information came from the respondent to substantiate it or not".
7. The respondent did not call any witnesses. Its case was put in cross examination of the claimant, in the documents and in written submissions.
8. There was a bundle of documents of 243 pages.
9. The Tribunal heard submissions from both parties. The respondent's Counsel spoke to and handed up written submissions. They had been shared with the claimant. The claimant's representative made oral submissions.

Relevant Law

10. The Employment Tribunal Constitution and Rules of Procedure Regulations 2013 SI 1237/2013 provide at Rule 37 that at any stage of the proceedings on the application of a party the Tribunal may strike out all or part of a claim on the basis that it has no reasonable prospect of success.
11. Section 108 Equality Act 2010 provides that a person (A) must not discriminate against another (B) if the discrimination arises out of and is closely connected to a relationship which used to exist between them, and conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene the Equality Act 2010.
12. Section 123 Equality Act 2010 provides in relation to time limits that proceedings on a complaint within section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. For the purposes of section 123 conduct extending over a period is to be treated as done at the end of the period.

The Issues

The post termination issue

13. What is the *less favourable treatment* the claimant complains of on 3 December 2018. Is this post termination of employment treatment “closely connected” with the employment and if so, is there *no reasonable prospect of success* in the post termination discrimination part of the claim ?

The “conduct extending over a period” issue

14. Is the less favourable treatment on 3 December 2018 “conduct extending over a period” for the purposes of s123 Equality Act 2010 when taken with the less favourable treatment of February to December 2016 ? and if not,

The time issue

15. Are the events of February to December 2016 out of time and if so should time be extended on the ground that it would be just and equitable to allow the claimant to bring these claims late.

Analysis

The post termination issue

16. *The less favourable treatment* that the claimant complains of is that the respondent ought to have realised, following a discussion (between Counsel for the HCPC and someone from the respondent’s legal team), that the

allegations against him could not be substantiated and that the respondent ought to have conceded there was insufficient evidence on which to proceed.

17. It was submitted by Counsel for the respondent that the claimant's position is based on a series of "quantum leaps". The first being that it was the respondent who spoke to the HCPC's barrister. The second quantum leap submitted is that the conversation should have led to the withdrawal of the case against the claimant. The third quantum leap is that the failure to formally concede was influenced by Carmel Cameron, Amanda Jones and or Debbie Murphy. The respondent says this is a quantum leap because the claimant has lead no evidence to suggest that any of those people spoke to the respondent's barrister. The fourth quantum leap is that the failure to concede the case was motivated by the claimant's sex or race.
18. The *no reasonable prospect of success* test is a high test. In *A v B and another 2011 ICR D9* the Court of Appeal held that an employment tribunal had been wrong to strike out a claim of discrimination as there was a "more than fanciful" prospect that the employer would not be able to discharge the reverse burden of proof.
19. In *Anyanwu and Another v South Bank Student Union and Another and Commission for Racial Equality [2001] UKHL 14* a case which addressed an appeal against a strike out application of race discrimination claims brought under s33 of the Race Relations Act 1976, Lord Steyn at paragraph 24 underlined "*the importance of not striking out such claims.....except in the most obvious and plainest cases*". He continued, "*Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other then bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.*"
20. In this case there is a direct factual dispute as to whether or not a phone call took place between the respondent and the HCPC barrister on 3 December 2018 and as to the parties and content of that telephone call. There is a need for factual finding on the existence of that call, the parties to it and the nature and content of that call and any outcomes that flowed from it.
21. Lord Hope in *Anyanwu* added "*the risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The Tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence*"
22. In some cases the assessment on strike out can be made on the documents alone. In *Shestak v The Royal College of Nursing and others UKEAT/0270/08* the EAT set out that where the facts sought to be established are totally and inexplicably inconsistent with undisputed contemporaneous documentation it may be appropriate to strike out. This is not one of those cases.
23. The documentation showed the relationship of instruction between HCPC and Kingsley Napley Solicitors, and the solicitor's instruction of a barrister (identity

unknown) at the HCPC hearing. This documentation refuted the suggestion that the barrister was instructed in the legal sense of *acting for* or taking instructions from the respondent. The claimant accepted that the barrister was not instructed in the sense of legally employed by the respondent but the claimant continued to assert that the respondent was “working with” the HCPC against him.

24. The respondent accepted that two of its employees, Ms Debbie Murphy and Ms Carmel Cameron, two of the managers against whom the claimant alleges discrimination, attended the HCPC hearing on 3 December 2018. It conceded that there was conversation between them and the HCPC barrister. This Tribunal can make no finding as to the significance, if any, of their attendance at the hearing or the content of any conversations they may have had by telephone or in person with the HCPC or its barrister. The document bundle did not include the final outcome of the HCPC hearing. Documentation alone in this case as presented does not make it appropriate to strike out the claim.
25. Applying *Anyanwu* there would be a risk of injustice to the claimant if his claim for post termination of employment discrimination was struck out at this preliminary stage. The respondent called no witness today. In *Odukoya v Wandle Housing Association Limited UKEAT/0093/15* it was made clear that it was not satisfactory for a Tribunal “to accept major parts of the respondent’s case without a trial at which the respondent’s witnesses would be heard and cross examined about it”. The claimant is entitled to cross examine witnesses, if called, particularly Carmel Cameron, Amanda Jones and Debbie Murphy.
26. It will be difficult for the claimant to persuade a tribunal that it was the respondent’s failure to concede the case against him that led to the case against him continuing, when the HCPC is an independent body and the case against the claimant was heard by a panel of three members.
27. The respondent will be put to cost in having to continue to defend the allegation, to incur time cost and financial cost in doing so. In suitable cases an application for strike out may save time expense and anxiety to all parties, but in cases that are heavily fact sensitive the circumstances in which a claim will be struck out are likely to be rare. *Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108 EAT.* .

Closely connected

28. The claimant’s submission is that there was continuous contextual discrimination against the claimant by the respondent. The claimant submitted that the same people who were “controlling” his work were also “controlling” the HCPC. The claimant said that the influence of the respondent over the HCPC was inappropriate and amounted to discrimination against the claimant.
29. Counsel for the respondent submitted that the events of 3 December 2018 were not sufficiently closely connected with the employment to meet the test for discrimination in relationships that have ended in section 108 Equality Act 2010.

Section 108 provides that the act of discrimination must arise out of the relationship and be closely connected to it.

30. There is a significant and silent gap in the case as currently presented between the respondent referring the claimant's case to the HCPC on 2 December 2016 and the hearing on 3 December 2018. The bundle of documents revealed that the claimant prepared his submissions to the HCPC and sent them in May 2017. Evidence and factual findings are needed to resolve the issue of how closely connected the alleged act of discrimination on 3 December 2018 was with the employment relationship which had ended on 7 January 2017.
31. The extent to which the less favourable treatment on 3 December 2018 is "closely connected" to the employment relationship will fall for determination by the Tribunal at final hearing.
32. In conclusion the post termination of employment claim as put by the claimant at this preliminary stage is fact sensitive. It has little reasonable prospect of success but that is not the same as saying it has no reasonable prospect of success. It is not struck out at this stage.
33. The claimant has some hurdles to cross if he is to succeed at final hearing. He will need evidence from which facts can be found as to the existence of the phone call on 3 December 2018, the parties to it, the content of it and outcomes that flowed from it. He will also have to address at final hearing the respondent's position that the events of 3 December 2018 were not closely connected with his employment. He will also have to answer the argument that the HCPC was an independent decision making tribunal and that the decision as to whether or not to proceed with the hearing and the case against him was the HCPC's and not it's barrister's nor the respondent's. Should the burden of proof be reversed at final hearing the respondent's position is that it has a non discriminatory reason for any treatment that the claimant alleges he suffered. Its reason is the admitted plagiarism by the claimant and the contested disciplinary allegations in relation to the five families, which it says lead to it referring the claimant to the HCPC.

The "conduct extending over a period" issue

34. Could the December 2018 telephone call be the last in a series of acts extending over a period of time from September 2016 to December 2018 ?
35. The respondent referred to the Court of Appeal's decision in *Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548* which said that the test to be applied at the preliminary hearing stage is that the claimant must establish a prima facie case and that the Tribunal must ask itself whether the complaints were capable of being part of an act extending over a period. The first line of the claimant's grounds of complaint in his claim for reads "On 3 December 2018 the Council took me to HCPC to get me struck off". At line 3 it continues..."before then I was subjected to a disciplinary process". The claimant contends from the outset that the two are related.

36. The claimant's representative submitted that the matter must be looked at in context and that there was continuous contextual discrimination going on. It was submitted that the claimant has witnesses to bring to the full hearing who will testify that the claimant was discriminated against, bullied and harassed in the way in which the respondent engaged with the HCPC during the two years from referral which it took the HCPC to bring the claimant to its hearing.
37. The claimant submitted that to strike out the claim would be to deny continuous contextual discrimination in the form of the influence of the respondent over the HCPC; the same people who were in fact controlling the HCPC hearing were those who controlled his work, had disciplined him and had referred the claimant to HCPC, Carmel Cameron and Debbie Murphy. The submissions referred to in this paragraph 37 are noted but not accepted. The Tribunal records that the claimant's case was set out in the schedule to the case management order made on 15 April 2019. It records

*“here is a **complete list** (emphasis added) of the ways in which the claimant says the respondent treated less favourably that it treated or would treat others”.*

The Schedule lists acts of less favourable treatment from February to 2 December 2016 in paragraph 4. At paragraph 5 it lists harassment between October 2016 and 17 November 2016. At paragraph 6 it recites the section 108 complaint occurring on 3rd December 2018. The claimant's current submission of “continuous contextual discrimination” in so far as it seeks to expand the list of acts complained of to include new complaints between 2 December 2016 and 3 December 2018 is not accepted.

38. It was submitted by the claimant that the information that the respondent's witnesses provided to the HCPC about the claimant was false. The Claim Form recites “the tribunal (HCPC) made observations on the credibility of the Council's witnesses”. The claimant submitted that the content of evidence given by Debbie Murphy at the HCPC hearing was a cause for concern. He alleged, in closing submissions, that Debbie Murphy referred to audits carried out by Carmel Cameron but the claimant says Carmel Cameron did not carry out audits of his work. The final outcome of the HCPC hearing was not included in the documents before the Tribunal. This submission is accepted in so far as the events of 3 December 2018, as set out in paragraph 6 of the Schedule to the Case Management Order of 15 April 2019 contains allegations which fall for determination at final hearing and which will require evidence to be heard and factual findings to be made.
39. There is also a need for factual findings about the communications if any between the respondent and HCPC during the period from referral of the claimant on 2 December 2016 until the hearing on 3 December 2018. The claimant will need to substantiate the “continuous contextual discrimination” which it says was taking place and which it says lead to the respondent controlling the HCPC.

40. On the submissions before the Tribunal and the content of the claim form the claimant establishes a prima facie case that the events of September to December 2016, in particular the instigation of internal disciplinary proceedings and the referral to the HCPC on 2 December 2016, *are capable*, at this preliminary stage of forming part of an act or acts of discrimination extending over a period of time. This part of the claim is not struck out.
41. The Tribunal cannot make a determination of the extent to which any acts are linked or constitute an ongoing state of affairs without first having resolved the factual dispute as to whether or not the 3 December 2018 call took place, and if it did, between whom and what was said. Whether or not the acts of February to 2 December 2016 and the section 108 complaint from 3 December 2018 are conduct extending over a period is a matter for determination at the final hearing.
42. Counsel for the respondent submitted that the ACAS Certificate obtained on 23 January 2019 should not afford the claimant a “free pass to bring proceedings about any unrelated matter. *Compass Group UK & Ireland Limited v Morgan [2017] ICR 73*. At final hearing the Tribunal will need to consider which acts complained of have been properly conciliated.

The time issue

43. If the telephone call of December 2018 is not part of the respondent’s conduct extending over a period of time then the events of February to December 2016 are out of time. The respondent describes them as “hopelessly” out of time.
44. It is common ground that the claimant had raised discrimination in his grievance on 6 November 2016. He uses “discrimination” as a sub heading and he refers to “legal action I contemplate moving forwards” in his first grievance letter. He was off sick from 7 November 2016.
45. He brought a second grievance on 21 November 2016 which does not refer to race or sex but he says he is being “singled out” for disciplinary investigation and that there is a “witch hunt” against him.
46. The claimant contacted ACAS on 3 December 2016 and received an ACAS Early Conciliation Certificate R204852/16/20 on 14 December 2016. He had advice from ACAS and considered bringing a tribunal claim for discrimination as “one potential option”.
47. The claimant resigned on 7 January 2017. He worked in alternate roles in January 2017 and applied for a new role as a recruitment consultant and started that new role on 4 April 2017. The last act of discrimination complained of during this period is the referral of his case to HCPC on 2 December 2016. This was confirmed at case management discussion on 15 April 2019 and recorded in the Schedule to the Case Management Order of 15 April 2019. The claimant presented his claim to the Tribunal on 25 January 2019.

48. The acts complained of fall into two distinct time periods; discrimination during employment between February and 2 December 2016 and the discrimination post employment under section 108 complaint relating specifically to events on 3 December 2018. Separate deposit orders are made in relation to each of those two complaints. If the section 108 complaint fails then the claimant will need to persuade the Tribunal to extend time for him in bringing the discrimination during employment claims.
49. Whether or not to extend time is a matter for determination at the final hearing. Given the extent of delay in bringing the claims for discrimination during employment; the last act complained of was on 2 December 2016 and the Claim Form was presented on 25 January 2019 and in light of the chronology of events set out in paragraphs 44 to 48 above there would appear to be little reasonable prospect of success in the application to extend time. It will be for the claimant to convince the Tribunal that it would be just and equitable to extend time.

Conclusion

50. The claimant's post termination claim, taken at its highest, has little reasonable prospect of success for the reasons set out above. Taking his case at its highest, the claimant has little reasonable prospect of success in establishing conduct extending over a period of time, for the reasons set out above. There is little reasonable prospect of success in the claimant achieving an extension of time for the reasons set out above.
51. Strike out in discrimination cases is rare, especially in cases that are highly fact sensitive. This case is fact sensitive. There is high public interest, to use the words of Lord Steyn in *Anyanwu* in not prejudging this issue. The claims are not struck out but deposit orders are made.

Employment Judge Aspinall
Date: 13 November 2019

Case Number: 2401593/2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
19 November 2019

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.