



EMPLOYMENT TRIBUNALS

Claimant: Miss H Kalaya

Respondent: Wimbledon Broadway Specsavers Limited

Heard at: London South (Croydon)

Before: Employment Judge Martin

On: 15 November 2019

Representation:
For the Claimant: In person
For the Respondent: Mr Orlando Holloway of Counsel

PRELIMINARY HEARING RESERVED JUDGMENT

The Claimant's claim is struck out on the basis that it has no reasonable prospect of success

RESERVED REASONS

1. This hearing follows a preliminary hearing conducted by Employment Judge Crosfill on 25 September 2019. The issues for this hearing were whether the Claimant's claim should be struck out on the basis it had no reasonable prospect of success or in the alternative whether a deposit should be ordered as a precondition of continuing with her claim on the basis it has little reasonable prospect of success.. The Respondent's submissions on this is that the claim as pleaded does not show a cause of action.
2. In advance of the hearing the Claimant sent an email to the Tribunal asking to be given permission to record the hearing as she had trouble due to medical conditions in concentrating and taking notes in the hearing. She had recorded a previous hearing as a reasonable adjustment. The Claimant was accompanied by Mrs Carr and the Tribunal provided a note pad. Mrs Carr was happy to make notes on the Claimant's behalf and the Claimant said she was happy with this arrangement and made no further request to record proceedings.

3. During the hearing the Claimant made constant reference to her previous four claims which had been heard by Employment Judge Crosfill over nine days with a reserved judgment being handed down earlier this year. The Claimant's claims of discrimination failed and her claim for constructive unfair dismissal succeeded. These claims dealt with matters up to and including the termination of her employment with the Respondent. Judge Crosfill conducted a hearing on 25 September 2019 in relation to remedy for the unfair dismissal claim immediately followed by a case management hearing in relation to this claim. The order ("the order") following this hearing was sent to the parties on 6 November 2019.
4. The order was very detailed. In this order Judge Crosfill set out clearly the issues that there were with her claim form and gave the Claimant the opportunity to set out her claim detailing precisely what information was required.
5. The order stated:

"We started by exploring the issues in the fourth claim. The Claimant explained that she was alleging that grievance appeal outcome and process that took place after the termination of her employment amounted to unlawful discrimination. When I sought to explore what exactly she complained of she said that she considered that she was subjected to the following two detriments:

- 2.1 the findings in the grievance; and***
- 2.2 the process that was followed.***

The Claimant indicated that she was bringing direct discrimination claims. She did not suggest that she had ever met the person who conducted the grievance process and she knew nothing about her. I tried to explore why the Claimant has categorised the decision which she may well disagree with as discriminatory. I pointed out that the tribunal which heard her original claims did not find many of her allegations proven. That would be no basis for alleging discrimination. A person does not discriminate by doing their level best to ascertain the truth of past events just because they reach the wrong conclusions. I invite the Claimant to reflect upon that.

I asked which protected characteristic she relied upon element of her claim. The Claimant was somewhat vague essentially suggesting that she relied upon every characteristic that she had. I consider that the Claimant's claim was unclear in many material respects. I was mindful that there had been a wholesale failure to properly identify the issues in the previous claims. This had made case management and the decision-making process extremely difficult.

We discussed the fact that the Claimant may face an uphill battle in establishing that any finding in the disciplinary appeal was 'because of' any protected characteristic rather than simply wrong. We further discussed the difficulties the Claimant might face given the fact that we had rejected her version of events in numerous matters. Our findings of fact may be binding on any further tribunal. I stress that any views I express here are entirely provisional.

I have ordered the Claimant to provide further information in respect of her case. In particular I have asked her to spell out the facts which she says she will establish which would be sufficient for a tribunal to draw an inference of discrimination. The Claimant should understand that it is generally not enough simply to establish a difference in status (having a protected characteristic) and a difference in treatment. She would need to establish some fact from which a tribunal could properly infer that

difference in status played a part in the decision she objects to. Given that the Respondent seeks an order striking out all of the claims it is essential that the Claimant gives thought to how she will invite a tribunal to infer that any act of discrimination has taken place.

An inference is a conclusion or finding that is itself based upon other matters that have been established. A common example is where the following primary facts are established: a man ran from a building at night holding an empty petrol can and a lighter and the building bursts into flames shortly thereafter, it may be inferred that the man is responsible. Inferences in discrimination cases cannot be drawn on a hunch, a belief or gut reaction but must be supported by primary facts”.

3 The order went on to make the following orders:

“Further Information

4 *The Claimant shall by no later than 1 November 2019 write to the Tribunal and the Respondent providing the following further information about her case.*

The detriment(s) relied upon

4.1 *The Claimant shall identify which aspects of the procedure or process followed during the grievance appeal process she says amounted to a detriment for the purposes of any claim. She shall say who is responsible for each matter she complains of and shall state the date upon which each act or omission (failure to act) took place.*

4.2 *If the Claimant says that some conclusion reached during the grievance appeal process amounted to a detriment she shall precisely identify the conclusion or conclusions she relies upon.*

The protected characteristics relied upon

4.3 *in respect of each detriment the Claimant shall state which protected characteristic or characteristics she will rely upon.*

Causes of action

4.4 *In the course of the hearing the Claimant did not suggest that her claims include any causes of action other than direct discrimination claims brought under Section 13 and 39 of the Equality Act 2010 (the Claimant is referred to the Tribunals liability decision for an explanation of what must be established for such a claim to succeed). The Claimant must state whether she agrees that all her claims are brought under those sections or, if not where in her claim form other claims are brought. The Claimant does not have permission to amend her claim form unless a tribunal grants her such permission.*

Facts from which an inference of discrimination might be drawn.

4.5 *The Claimant must in respect of each claim that she brings set out clearly and concisely the facts that she says that she will establish from which any inference of discrimination could be drawn”.*

5 The Claimant provided a document in response to this order entitled ‘Claimant’s submissions’ which is discussed further below.

6 The Respondent was ordered to set out its submissions in writing and send them to the Claimant no later than 7 November 2019. Unfortunately, due to a communication problem between Counsel and his instructing solicitors this document had not been sent in advance. To ensure that the Claimant was not prejudiced by this I adjourned the hearing for 30 minutes for her to read the document and consider its contents. The Claimant said that she found it difficult to read the document and I suggested that Mrs Carr could read it to her. Mrs Carr agreed to read it out to her if that is what the Claimant wanted. The Claimant said she was happy to proceed on this basis and confirmed when I asked her that she was ready to continue with the hearing. I offered the Claimant several breaks during the hearing particularly when she became emotional however she said she was happy to proceed.

Submissions

7 Mr Holloway gave his submissions to the Tribunal and in summary they are that the Claimant's particulars of claim in this claim do not disclose a discrimination claim. The history of the previous claims was set out and noted that the only references to discrimination in the current claim related to matters which had already been adjudicated on in the judgment of Judge Crosfill. The Respondent referred to the three-page particulars of claim and submitted that all matters save for the grievance appeal process and outcome (which was given on 24 October 2018 shortly before the previous hearing) had been dealt with in the previous hearing. It was submitted that at its best, the Claimant's claim was that the grievance appeal officer covered up acts of others but that this was not the same as a fresh claim of discrimination and that as pleaded there was no prospect of success.

8 The Respondent referred to the previous case management discussion on this claim in which the Claimant told Judge Crosfill that the detriments were the grievance finding and the grievance process followed. It was submitted that she was unable to articulate what she meant by this and was not able to identify the allegations of discrimination save for ticking all boxes of discrimination in the original ET1. This resulted in Judge Crosfill not deciding the Respondent's application to strike out at that hearing but instead making the detailed orders as referred to above and listing this hearing to give the Claimant another chance to set out her claim.

9 The Respondent handed up three authorities:

- *Ezsias v North Glamorgan NHS Trust* [2007] EWCA Civ 330
- *Anyanwu and Anor v South Bank Student Union and anor* [2001] UKHL/14
- *Chandock v Tirkey* [2015] UKEAT/190/14

10 The Claimant was given the opportunity to consider her position in an adjournment before giving submissions and replying to the Respondent's submissions. Unfortunately the Claimant's oral submissions were not focused on the issue I had to determine and focused instead on her previous claims and how, notwithstanding the judgment in those claims, she felt she had been discriminated against by the Respondent during her employment and that the Tribunal had made the wrong decision.

11 During the hearing I made it clear to the Claimant that I was not considering anything to do with her previous four claims and that my consideration was limited only to the claim before me and her pleading in relation to that claim. The Claimant clearly did

not understand this as after the hearing she sent me by email several large attachments which were predominately transcripts of the previous four claims and other documents also relating to those claims. As they were not relevant to my consideration, they were not read.

- 12 In order to ensure that the Claimant had the opportunity to focus on the issue before me, I directed the Claimant to show me where in her particulars of claim and submissions she made allegations of discrimination in relation the grievance appeal outcome and grievance appeal process and how she said that her written document complied with the orders in the order made by Judge Crosfill. The Claimant took me to various parts of these documents however none of these parts related to the grievance appeal process.
- 13 For example, the Claimant referred to a Scott schedule she prepared for the previous claims and again referred to matters that predated the termination of her employment which had already been dealt with in the previous hearing and judgment. The Claimant referred to a document she provided the Tribunal on the morning of this hearing on page 3 paragraph 15. This relates to a Subject Access Request the Claimant made and did not relate to the issues in this claim. The Claimant said that the Tribunal was misled in the previous hearing about what had happened. I reminded the Claimant that I was not dealing with the previous claims but only this claim.
- 14 The Claimant also referred to page 4 paragraph 20 of her email to the Tribunal sent on the morning of the hearing. This refers to allegations that the Respondent failed to follow the ACAS Code of Grievance and Disciplinary procedures. But does not relate this to any act of discrimination or to any protected characteristic.

Conclusions

- 15 The Claimant's claim is set out in section 8 of her claim form. The Claimant has ticked discrimination on the grounds of age, race, disability, sex and religion or belief together with money claims. The narrative for all types of claim is not clear and is unfocused. In relation to her claims, the claimant refers to matters that were the subject of pervious claims and other matters that are entirely unrelated to her employment.
- 16 Despite the efforts of Employment Judge Crosfill at the previous hearing and his very detailed and helpful order, the Claimant did not answer the questions required to be answered in her written document and despite my best efforts in this hearing I am no clearer as to what her claim is. I took particular note of the case of Chandock v Tirkey in which it was held that ***"The formal claim, which must be set out in the ET1 is not an initial document free to be augmented by whatever the parties choose to add or subtract. It sets out the essential case to which a respondent is required to respond. An approach whereby a "claim" or "case" is to be understood as being far wider than as set out in the ET1 or ET3 defeats the purpose of permitting or denying amendments. An employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings"***.
- 17 My focus has been on what the Claimant has pleaded in her ET1 together with the documents she produced in response to the order of Judge Crosfill. The importance of how a claim is pleaded cannot be underestimated. The Claimant has been given

several opportunities to explain her claim for discrimination and despite this has not done so.

18 I find that there is no discernable cause of action identified despite my best efforts and those of Judge Crosfill. I am mindful that it is the exception rather than the norm that discrimination claims are struck out at a preliminary hearing, however I consider this to be one of the exceptional cases where it is appropriate to strike the Claimant's claim out as having no reasonable prospect of success.

Employment Judge Martin

Date: 25 November 2019