



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

and

Respondent

Q & R

Consero London Limited

PRELIMINARY HEARING

HELD AT London South

ON 4 November 2019

EMPLOYMENT JUDGE BALOGUN

Appearances

For Q: Mr T Welch, Counsel

For R: Mr F McCrombie, Counsel

For Respondent: Mr R Barratt, Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUE

Case No: 2302142/2018 – Claimant Q

1. The Claim of sexual harassment is struck out as it is out of time and there are no just and equitable reasons to extend time.
2. The victimisation claim relating to the alleged protected act at paragraph 30.3 of the original particulars of claim is struck out on grounds that it has no reasonable prospect of success.
3. All other claims can proceed
4. The Claimant is granted leave to amend her claim to add:
 - a. automatic unfair dismissal pursuant to 103A Employment Rights Act 1996 (ERA);
 - b. detriment pursuant to 47B ERA;
 - c. post-employment victimisation pursuant to section 27 Equality Act 2010 (EqA); and
 - d. a claim that the dismissal amounted to direct discrimination pursuant to section 13 EqA.

5. All other amendment requests are refused.

Case No: 2304476/2018 – Claimant R

6. The Respondent's application for strike out of the direct discrimination claim or, in the alternative, a deposit order is refused.

REASONS

Claimant Q

1. By a claim form presented on 7 June 2018, the Claimant brings complaints of unfair dismissal; direct sex discrimination; sexual harassment; and victimisation against the Respondent. All claims are resisted.
2. This was hearing to consider the Respondent's application for strike out of the sexual harassment, direct discrimination and victimisation claims, as set out at paragraphs 4-6 of the Grounds of Resistance, on grounds that they have no reasonable prospect of success or alternatively, a deposit order on grounds that they have little reasonable prospect of success.
3. On 10 August 2018, the Claimant applied to amend her claim to add allegations of automatic unfair dismissal (*whistleblowing*); whistleblowing detriment and post termination victimisation. At the same time, she applied to add an additional Respondent to the proceedings. Amended particulars of claim were attached to the application. For the first time, at this hearing, the Claimant applied to add the dismissal as an act of both sexual harassment and direct discrimination. The Respondent objected to all of the amendments.

The Claims

Sexual Harassment

4. The Claimant says that on or around 11.4.17 she complained to the Respondent about being sexual harassed by a third-party client (SA) while attending SA's premises while carrying out her role as Property Manager. She alleges that the Respondent made light of this, its Operations Director (JL) saying: "*dirty bastard, we all know that its just the way that lot are*". She says that notwithstanding her complaint, on 23 December 2017, she was required by the Respondent to attend SA's premises again and on that occasion was subjected to further harassment. The Claimant says that on 11 January 2018, she made a further complaint to the Respondent about being groped by SA.
5. The Claimant contends that the Respondent sexually harassed her by its reaction to her complaints, in that it trivialised them and failed to take adequate steps safeguard her after the first incident.

Direct Discrimination

6. The Claimant contends that the Respondent treated her less favourably than male colleagues by implementing a policy requiring female employees to be accompanied by a male when visiting properties owned or occupied by its clients. She says that the policy was announced on 11 January 2018 and that she made known to the Respondent that she objected to it on the basis that it was discriminatory.

Victimisation

7. The Claimant contends that she was victimised by the Respondent for making the above complaints about sexual harassment; giving information to the police about a sexual assault by SA against her colleague, JC; and for objecting to the Respondent's new policy of female accompaniment as discriminatory. The detriments alleged are dismissal; accusing the Claimant of faking sickness; and refusing her enhanced sick pay.

The Issues

8. The issues I have to consider at this hearing are set out below:
 - a. Are the sexual harassment and direct discrimination claims out of time?
 - b. Are the claims of sexual harassment and victimisation misconceived?
 - c. Should the above claims be struck out or a deposit order made?
 - d. Should the Claimant be allowed to amend her claim to include complaints of automatic unfair dismissal; whistleblowing detriment: post-employment victimisation and direct discrimination and harassment relating to the dismissal?

The Law

9. Under Rule 37 of the Employment Tribunal Procedural Rules 2013 (the Rules), the Tribunal has the power to strike out all or part of a claim on grounds that "...it has no reasonable prospect of success".
10. Under Rule 39, The Tribunal may make require a party to pay a deposit not exceeding £1000 as a condition of continuing to advance an allegation or argument on grounds that it has "*little reasonable prospect of success*".
11. Section 123 of the Equality Act 2010 provides that a discrimination complaint must be presented after the end of 3 months starting with the act complained of or such other period as the tribunal considers just and equitable.
12. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period and failure to do something is to be treated as occurring when the person in question decided on it.

Submissions

13. The parties provided written submissions, which were spoken to. I was also referred to a number of authorities. The submissions have been taken into account and are referred to below, as appropriate.

Conclusions

14. My conclusions in relation to the issues identified are as follows:

Application to Amend

15. I have dealt with this issue first as it may have some bearing on the other issues. In considering the application, I have had regard to the principles in Selkent Bus Co Ltd v Moore ICR 836, EAT, in particular, the balance of prejudice between the parties.

Automatic Unfair Dismissal – 103A Employment Rights Act (ERA)(whistleblowing) and detriment – 47B

16. The Claimant seeks to add a claim that she was dismissed for making a protected disclosure and that she was treated unfavourably for the same reason. The disclosures relied upon are the same as the protected acts for the purposes of the victimisation complaint and the 47B detriments are those pleaded in respect of the victimisation claim.

17. I consider that the balance of prejudice is in the Claimant's favour and I do not accept the Respondent's submission that it will suffer severe prejudice because of the cost and stress of defending a weak claim. Firstly, I cannot accept the assertion that the claim is weak on its face. Secondly, the amendment amounts to a re-labelling of facts already pleaded so any additional cost to the Respondent is likely to be minimal given that the evidence will, to all intents and purposes, be the same as for victimisation. The detriment to the Claimant on the other hand in not allowing the amendment would be to deprive her of the opportunity to pursue a potentially arguable claim. The amendment is allowed.

Post Employment Victimisation

18. This is in relation to the matters at 32.1 and 32.2 of the draft amended particulars of claim. The matters at 32.1 are in time and whilst that is not the case in respect of those at 32.2, the Respondent has not asserted that there is any specific prejudice. In regards to the general prejudice of having to meet an additional claim, this can be mitigated by the Respondent being given an opportunity to file an amended response. The amendment is allowed.

Direct Discrimination and Harassment

19. These applications were made at the hearing and they are to include the dismissal as an act of direct discrimination and harassment. Under the heading "Unfair Dismissal", paragraph 32.1 of the original particulars of claim reads: "*the reason or principal reason for the Claimant's dismissal was that she is a woman and unable to work in client properties alone*". From the wording, it is reasonable to interpret this as an allegation of a discriminatory dismissal based on sex. The amendment therefore amounts to a re-labelling of alleged facts already pleaded and is allowed.

20. In relation to the allegation of dismissal as harassment, this is more than a re-labelling exercise. It is a new claim. The allegation does not appear in the original particulars. Neither does it appear in the amended particulars of claim or indeed, in the Claimant's Skeleton Argument prepared for the purpose of this hearing. The first time it was raised was during my deliberations, after I called the parties back for clarification on the amendment relating to dismissal. It was at that point that the application was made. No reasons were given for not making the application at an earlier stage. It seems to me that this was a tactical and artificial application made as an afterthought to overcome the

Respondent's submissions on the time points in respect of the existing harassment claims. If this amendment were granted, it would allow the Claimant to treat the dismissal as the last act in a series of continuous acts of harassment, making it less likely that the existing allegations would be struck out at a preliminary stage. The Respondent will be prejudiced by this in that it will be deprived of a potential strike out point and have to deal with a claim that it otherwise would not have done, making, what is already likely to be a lengthy hearing, even longer. The prejudice to the Claimant will be less as she will still be able to pursue her dismissal as a claim of direct discrimination as well as one of unfair dismissal. For these reasons, the amendment is refused.

Application to add Robert Osborne as Respondent

21. The application to add RO was made based on him being the person alleged to have committed the acts of victimisation. Having considered the Respondent's objections and the balance of prejudice between the parties, I have decided to reject the application. In doing so, I have taken into account the following factors:
- a. The Claimant has not gone through ACAS early conciliation in respect of RO and no explanation has been provided for not including him in the proceedings from the outset.
 - b. The Respondent is not relying on the statutory defence to discrimination and will therefore be vicariously liable for any findings of discrimination by RO;
 - c. There is no suggestion that the Respondent will be unable to satisfy any award of damages the Tribunal may make;
 - d. RO will be a witness in the proceedings. (If this should change at any point, the application may be reconsidered)
 - e. In terms of the balance of prejudice, RO is likely to be prejudiced if the amendment is granted because of the burden of potential personal liability for discrimination. On the other hand, the refusal of the application will have a minimal effect on the Claimant's case, for the reasons stated at b-d.

Are the Sexual Harassment complaints out of time

22. According to the particulars of claim, the alleged unwanted conduct occurred on 11 April 2017 and 23 December 2017. The claim was presented on 7 June 2018 and the EC certificate issued on 25 May 2018. Therefore, any acts predating 26 January 2018 were out of time. The question that then arises is whether I should exercise my discretion to extend time. The burden is on the Claimant to satisfy the Tribunal that there are reasons why the Tribunal should exercise its discretion to extend time. No evidence was presented as to why it would be just and equitable to extend time. In the absence of such explanation and given the importance of time limits and the principle of finality of litigation, the Respondent would be prejudiced by having to meet a claim out of time for no discernible reason. In all the circumstances, I have decided not to extend time. The sexual harassment claims are therefore struck out.

Are the direct sex discrimination claims in time

23. The Respondent submitted that the act of alleged less favourable treatment i.e. the implementation of a discriminatory policy that females be accompanied was a proposal in or around 15.1.18 which was never implemented and so the Claimant was never

subjected to treatment. Alternatively, it argues that it was a one-off act so cannot be said to be continuous. The Claimant's case is that the policy was implemented and continued up until her dismissal, which on her case occurred on 9.3.18 and on the Respondent's case 3.4.18. On either of those dates the claim would be in time. The time point cannot be determined until the factual dispute relating to the implementation of the policy is resolved, which can only be done at the full merits hearing. Also, as the claim has now been amended to include an allegation that the dismissal was an act of direct discrimination, there is also an arguable point that the acts are continuous. For these reasons, the application to strike out the direct discrimination claim is refused, as is the application for a deposit order.

Victimisation

24. The Respondent submitted that this claim has no reasonable prospect of success as the Claimant has not pleaded any matter that could constitute a protected act for the purposes of section 27(2) EqA. The protected acts relied upon are at paragraph 30 of the original particulars of claim. The Claimant relies on section 27(2)(c) EqA and contends that the matters set out amount to: "*doing any other thing for the purpose of or in connection with this Act*". It was further submitted that 27(2)(c) should be given a broad interpretation and the cases: Aziz v Trinity Street Taxis Ltd & Ors [542 C] and The National Probation Service for England v Kirby [para 35] were cited as authority for this.
25. In relation to the first protected act – "*objecting to the Respondent's discriminatory policy of requiring female employees to be accompanied by male employees when visiting client properties*", there is an arguable case that this falls within 27(2)(c). Whether it in fact does is a matter that should be left for the full tribunal to determine.
26. The second protected act relates to the 2 complaints of sexual harassment by SA. These complaints relate to the actions of a third party and as is clear from Unite the Union v Nailard [2017] ICR 121 and more recently Bessong v Pennine Care NHS Foundation Trust, UKEAT/0247/18/JOJ, an employer cannot be vicariously liable for acts of harassment done by a third party. I am bound by those authorities and there is no basis for me interpreting 26(1) EqA as including a complaint of third-party harassment as I have been invited to do by the Claimant's counsel.
27. However, the situation is somewhat different under section 26(3) EqA. It was common ground that the statement: "*A and another (my emphasis) person engages in unwanted conduct of a sexual nature...*" can include conduct by a third party. An employer's liability for harassment arises under 26(3)(c) if: "*because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*"
28. It was submitted for the Claimant that complaining about sexual harassment was a rejection of that harassment by the Claimant. Neither party presented any authorities on what is meant by rejection for these purposes and it seems to me that this is a matter very much open for debate. The determination of that issue will in turn determine whether the second protected act falls within s. 27(2)(c). I am therefore not prepared to say that these arguments have no or little reasonable prospect of success and they can proceed to full hearing for determination.
29. On the third protected act: "*gave information to the police relating to the Sexual Assault of JC*", I am satisfied that this does not fall within 26(3)(c). Giving information to the police about a sexual assault suffered by somebody other than the Claimant cannot, by

any stretch of the English language, amount to a rejection of the conduct by the Claimant. This does not amount to a protected act for the purposes of 27(2)(c). I therefore find that any victimisation claim based on this has no reasonable prospect of success and is struck out.

Claimant R

30. By a claim form presented on 14 December 2018, the Claimant complains of direct discrimination; sexual harassment, victimisation and public interest disclosure detriment against the Respondent. All claims are resisted.
31. In its ET3 response, the Respondent applied for the claim of direct discrimination to be struck out on grounds that it had no reasonable prospects of success. This was on the basis that the Claimant had not alleged any specific incidents of less favourable treatment nor explained how such treatment was because of her sex.
32. It is correct that incidents of less favourable treatment have not been set out under the paragraph dealing with direct discrimination in the particulars of claim. However, Mr McCrombie, Counsel for the Claimant, clarified at the hearing that the incidents of less favourable treatment were the same acts set out at paragraphs 38 of the particulars under the heading harassment. The explanation as to why these are related to sex is provided at paragraph 37 where the Claimant contends that a male employee who had complained about a serious crime by an important client would not have been subjected to the same treatment. In the circumstances, I cannot say that the claim has no reasonable prospect of success, nor can I say that it has little reasonable prospect of success. The application is therefore refused.

Employment Judge Balogun
Date: 17 December 2019