



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Duncan Ndegwa

**Respondents:**

1. Vista Care Limited
2. Mr Mark Watts
3. Ms Emma Macavoy
4. Ms Carlene Perkins

**Heard at:** Birmingham      **On:** 7 January 2020

**Before:** Employment Judge Coghlin QC (sitting alone)

## **Appearances**

For the claimant: In person

For the respondent: Ms Reece (employment advisor)

## **JUDGMENT**

- (1) The claimant's claim of victimisation contrary to section 27 Equality Act 2010 is struck out as having no reasonable prospects of success.
- (2) The respondent's applications (a) to strike out the claimant's other claims and (b) (in the alternative) for a deposit order are rejected.

## **REASONS**

### **The issues**

1. The ET1 was not drafted with legal assistance and the claims were not clearly identified. We spent a good deal of time clarifying these. The respondent accepts that the claims as set out below, and as clarified today, are pleaded in the ET1.
  
2. The claimant brings claims of direct race, age and sex discrimination, and harassment related to race, age and sex. For the purpose of his race discrimination case the claimant describes his race as black or black African. He also complains that he was subjected to detriments because he made protected disclosures, and victimisation for having done a protected act. The various acts of detriment relevant to these claims are as set out below. In each case, unless otherwise stated, each act of detriment is relied on for the purpose of each of these types of claim.

No	Alleged act	Date	Individual decision-maker identified by C	Type of unlawful conduct alleged
1.	Dismissal	20.11.18	Emma Macavoy	All
2.	Suspension without pay	7.11.18 to 20.11.18	Emma Macavoy	All
3.	Failure to convene a grievance hearing after the claimant had submitted a grievance by email on 7.11.18	7.11.18 onwards	Not clear	All
4.	Failure to convene a disciplinary hearing prior to dismissing the claimant	Up to 20.11.18	Emma Macavoy	All
5.	Mark Watts refusing to allow the claimant to attend SCIPP training on 13.11.18	Up to 13.11.18	Mark Watts	Detriment for making a protected disclosure only
6.	Failing to provide details of the reason for dismissal and the evidence relied on in dismissing	20.11.18 onwards	Emma Macavoy	All
7.	Carlene Perkins procuring that witnesses give false evidence against the claimant	November 2018	Carlene Perkins	
8.	Carlene Perkins bullying the claimant by frequently:-  (i) being cold to the claimant during handover  (ii) making a noise or other disturbance preventing claimant from being able to conduct a	Between 7.9.18 and 6.11.18	Carlene Perkins	Direct sex discrimination, harassment related to sex and detriment for making a protected disclosure only

No	Alleged act	Date	Individual decision-maker identified by C	Type of unlawful conduct alleged
	proper handover with the team  (iii) turning up late to her morning shift when the claimant had been was working the previous night shift			
9.	Carlene Perkins creating a false alarm by telling the claimant that a service user might be dying when this was not true	6.11.18	Carlene Perkins	Direct sex discrimination, harassment related to sex and detriment for making a protected disclosure only
10.	Failing to pay the claimant his pay in lieu of notice	20.11.18 onwards	Mark Watts	All

3. The claims are brought against Vista Care Limited as the claimant's employer. He has also named three individual respondents, Mr Watts, Ms Macavoy and Ms Perkins. The claims against these individuals are pursued in relation to the detriments where the relevant individual has been named by the claimant as the relevant decision-maker identified. This is indicated in the table above.
4. The claimant also brings complaints of wrongful dismissal (breach of contract) and failure to pay him in respect of accrued but untaken holiday, and of unfair dismissal by reason of having made a protected disclosure (s103A of the Employment Rights Act 1996).

### **The respondent's application to strike out: merits**

5. The respondent applied to strike out the claimant's claims on different grounds. First, it is said that the claims lack reasonable prospects of success. The proper approach to such applications was summarised by Mitting J in **Mechkarov v Citibank NA** [2016] ICR 1121 at [14]:

"(1) only in the clearest case should a discrimination claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

Victimisation

6. The respondent first says that the claimant's claim of victimisation under s27 of the Equality Act 2010 has no reasonable prospect of success since he did not do a protected act. The protected act on which the claimant relies is an email which he sent on 7 November 2018 to Emma Macavoy which read in full as follows:

Hi Emma,

If its OK with you, am able to meet you on 13/11/2018 after SCIP dtraining.

As I informed you over the phone yesterday, I wish to raise the following concerns relating to a very chaotic PM shift handover of 06/11/2018. The concerned parties had intentionally ganged up to bully and harass me.

In brief, I turned up for shift and Alex Jaworska opened the door for me.

When I reached the dining room, Carlene Parkins stood up and proceeded to the kitchen. In an unusual manner, Alex followed her into the kitchen and they started murmuring. All over sudden Chris Carter picked-up the pager and asked me to go and observe JS. Because the pager didn't alarm, I paused and asked him what was happening with JS. Chris started shouting at me and I was ordered to go and look after JS without any details. When I entered JS room, he was OK and his seizure equipment was in normal operation. When I came back downstairs, I asked Chris why he was misleading me about JS well-being.

At this juncture, Carlene stormed in aggressively and started shouting at me alluding that I should learn to do what am being instructed of. When I challenged her about her incorrect assertion, she stopped shouting.

When I realised that I was dealing with a well orchestrated scheme, I asked who the PM shift leader was. Alex who was staring at me responded with unpleasant tone that she has been in charge. Subsequently, she informed me that she has instructed Chris to do handover for herself.

In the interest of resident welfare, I de-escalated and prevented more shouting by advising Alex and Carlene to leave the building so that I could carry on with my duties. After locking the door, I came back and found Chris performing PM finance balance check.

I waited calmly for him to complete the task. Thereafter, he put the finance folder in the cabinet and picked up the handover file. He threw it on the table and told me to read the handover notes for myself. I asked him what about service users well-being handovers. His response was that I should not worry about them.

While going through the handover notes, I noticed JS lunch box menu was different from the one I have been preparing. I requested Chris to show me how to prepare this new menu in the right way but he refused. He shouted at me by telling me that I could have asked Carlene. I looked at him and asked him why he was being rude to me. He told me to shut up because I don't know what am doing.

Further he started threatening to send me home and a dismissal.

- You will have realised that I wasn't able to do JS lunch box because I wasn't familiar with the stated menu. Will give you more details about this during our meeting.

- I wasn't able to complete some house night duties due to lack of proper handover regarding service user's well-being. Give you more details about this during our meeting.
- I also wish to discuss with you about Carlene unprofessionalism in the morning of 6/11/2018 and similar occasions.
- I also want to discuss with you about Carlene attempt to discredit me through the management under pretext.

While sending this note, am aware there will be a lot of fabrication that will be brought to your attention on the above stated facts.

I look forward into hearing from you accordingly.

Thanks.

Duncan

7. The claimant's case is that this communication amounted to a protected act within the meaning of section 27(2)(d) of the Equality Act 2010 ("the Act") in that it contained an express or implied allegation that there had been a contravention of the Act. In my judgment this argument has no reasonable prospect of success. The email makes no mention of any sort of any kind of discrimination or any other breach of the Act. There is certainly nothing express, and equally I cannot detect anything approaching an implied allegation of a breach of the Act. I asked the claimant to explain whether there was any aspect of it which might plausibly be read as such an allegation, express or implied, and he was unable to do so.
8. This email being the only alleged protected act relied on by the claimant, I consider that his claim of victimisation under s27 of the Equality Act has no reasonable prospect of success, and I strike it out.

#### Protected disclosure

9. The respondent similarly argued that the claims based on the making of a protected disclosure failed on similar grounds. The protected disclosure relied on by the claimant is a letter to Emma Macavoy dated 6 September 2018 (at pages 1 to 3 of the bundle prepared by the respondent for the preliminary hearing). This letter concerns the claimant's dissatisfaction with the conduct of a colleague of his, David Oguntuase.
10. It is possible that not all of the contents of this letter would constitute a protected disclosure. But it seems to me that in respect of certain parts of the letter, at least, the claimant has a reasonably strong case for saying that they constitute a protected

disclosure (or disclosures). The claimant makes allegations that Mr Oguntuase among other things was asleep on duty during times when he should have been awake, leading to him inaccurately recording residents' movements; that Mr Oguntuase had indeed "manipulated" hand-over notes; and that Mr Oguntuase was either holding onto keys or locking them away so that others including the claimant and residents would be unable to escape the premises in the event of an emergency.

11. The claimant in my view has a reasonable prospect of establishing at trial that this letter contained a protected disclosure or disclosures, in that the information which he disclosed in the letter tended in his reasonable belief to show (1) either that Mr Oguntuase had failed to comply with a legal obligation or that the safety of an individual had been, was being or was likely to be endangered; and (2) that the disclosure of such matters, which related after all to the safety of vulnerable residents, was in the public interest.
12. Accordingly I do not accept the respondent's contention that the whistleblowing claims have little or no reasonable prospect of success by reason of the lack of a protected disclosure.

#### Discrimination and whistleblowing detriment – causation

13. The claimant's claim is advanced on a broad front. He alleges that, in most cases, the detrimental treatment to which he says he was subjected amounted to race, sex and age discrimination, as well as a detriment because he had made a protected disclosure and victimisation contrary to s27 of the Equality Act 2010.
14. When taken in turn to each individual allegation, the struggled to articulate how he would persuade the tribunal at trial to conclude that his treatment was materially influenced by any particular protected characteristic.
15. However, I bear in mind that in a complex discrimination claim discrimination may emerge not just from a consideration of individual allegations but from the entire picture. It is necessary for the tribunal to adopt a holistic rather than fragmentary approach: to look not only at the detail of the various individual acts of discrimination but also to step back and look at matters in the round. The claimant here alleges a series of acts, including being suspended within a day of making a protected disclosure, and then being dismissed without any disciplinary hearing taking place (the

respondent says that this happened because the claimant did not respond to correspondence, but that seems to me to be a fact sensitive issue). He points to what he says is a disparity in treatment in that among other things the complaints against him were acted on whereas his own complaint was not. He points (in allegation 8) to conduct by Carlene Perkins the nature of and reasons for which are inherently sensitive to the evidence which would emerge at trial.

16. The respondent places considerable weight on the fact that certain of the individuals who the claimant says are responsible for taking discriminatory decisions against him share one or other of his relevant protected characteristics. This is a point which might or might not assist the respondent at trial, but it is not one to which I can safely attach much weight for the purposes of a strike out or deposit application. Indeed section 24(1) of the Equality Act 2010, entitled “irrelevance of alleged discriminator’s characteristic”, provides that “For the purpose of establishing a contravention of this Act by virtue of section 13(1), it does not matter whether A has the protected characteristic.” I was not addressed on this provision and am aware of no case law on its precise effect. But at the very least it serves as a salutary reminder that individuals can and do discriminate against others on the ground of protected characteristics which they themselves share.
17. Overall I am not satisfied that the claimant’s claims have either little or no reasonable prospect of success.

**Application to strike out: Unreasonable conduct**

18. The respondent also sought to strike out the claim on the basis of the claimant’s unreasonable conduct, and/or that the claimant was not actively pursuing his case.
19. The respondent relied (at paragraphs 29 to 31 of its written submissions) on the claimant’s conduct during his employment, before these proceedings were issued. This cannot amount to unreasonable conduct of the proceedings within the meaning of rule 37(1)(b) of the 2013 ET Rules of Procedure and so do not assist the respondent in its application.
20. The respondent also relies on matters relating to the claimant’s alleged lack of engagement with settlement discussions via ACAS. I reject this argument for three reasons. First, the claimant is not obliged to engage with ACAS and I am in no position

to say that he acted unreasonably if he did not do so. Second, steps taken (or not taken) to settle through ACAS are confidential and without prejudice, and should not be relied on by the other party. And third, I am not satisfied that any such discussions via ACAS amounted to conduct of the tribunal proceedings within the meaning of r37(1)(b).

21. Next, the respondent relies on the fact that the claimant “chose to give” incorrect contact details in his ET1 and that he thereby “manipulated the tribunal” into listing the case in Birmingham rather than Nottingham. The claimant says that the ET1 was drafted by someone other than himself, and I have no reason to doubt this; in any event I struggle to see how this would have been a matter of deliberate choice on the part of the claimant as the respondent alleges, and the theory of deliberate manipulation postulated by the respondent is far-fetched.

22. The high-water mark of this part of the respondent’s strike out application is that the claimant failed to attend the previous preliminary hearing (PH). He applied for the PH to be postponed on grounds of ill health but when asked to do so by the tribunal he did not respond, and simply failed to attend. I am prepared to assume for this purpose that this conduct was unreasonable on the part of the claimant. But I do not accept that it is sufficiently grave to justify striking his claim out. That would be a disproportionate sanction. A fair trial is still possible. I decline to strike out the case on this basis. Nor do I think that the claimant’s conduct in that regard supports a conclusion that he is not actively pursuing the litigation.

### **Conclusion**

23. I therefore strike out the claimant’s claim of victimisation (s27 Equality Act 2010). I decline to strike out any other part of the claim, and I make no deposit order.

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**Employment Judge Coghlin**  
**24 January 2020**

Sent to the parties on:

