



EMPLOYMENT TRIBUNALS

Claimant: N
Respondent: (1) O
(2) P
(3) Q
(4) R

PRELIMINARY HEARING

Heard at: London Central On: 21 January 2020
Before: Employment Judge Elliott

Appearances

For the claimant: Ms R Canneti, counsel
For the first respondent: Mr D Reade, one of Her Majesty's counsel
For the remaining respondents: Mr J Cohen, one of Her Majesty's counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

1. The claim against R2 is struck out upon the claimant's concession that it is not a legal entity.
2. The victimisation claim against R3 and R4 in respect of pay is struck out as having no reasonable prospect of success.
3. The the claim for victimisation against R3 and R4 for failing to adhere to the harassment policy continues to the full merits hearing.
4. The claim the victimisation against R3 and R4 in respect of the instructions to external counsel is subject to the payment of a deposit of £200 and a separate deposit order is made.

REASONS

1. By a claim form presented on 21 October 2019 the claimant brings claims of sexual harassment and victimisation.

2. The respondents defend the claims. The first respondent is separately represented from the second, third and fourth respondents.

The issues for this preliminary hearing

3. On 14 January 2020 the second, third and fourth respondents (afterwards referred to as R2, R3 and R4) applied for a strike out of the claim against them on grounds that the claim has no reasonable prospect of success (Rule 37 Employment Tribunal Rules of Procedure 2013).
4. In the alternative Rs 2 – 4 seek a deposit order on grounds that the claim has little reasonable prospect of success, Rule 39.

Documents and witness evidence.

5. I had written submissions from the claimant and from R2 - R4 to which counsel spoke.
6. I had a witness statement from R4.
7. The tribunal heard evidence from the claimant under Rule 39(2) as to her ability to pay any deposit ordered, in the event that it became necessary to consider this.
8. There were two claims, firstly liability on the part of P for O's actions (vicarious liability) and a claim for victimisation by Q and R. During the hearing the claimant, by her counsel, confirmed that she does not claim vicarious liability for the actions of the first respondent against the second, third and fourth respondents.

Relevant findings

9. R1 is no longer a member of the R2 Chambers. R2 in common with other sets of Chambers, is not a legal entity in itself. It is the "banner" or collective under which a number of barristers conduct their practice, by sharing accommodation, expenses and administration. It is a collection of independent self-employed practitioners. The claimant's counsel conceded that it was not a legal entity but did not have instructions to withdraw against R2.
10. The case concerns the claimant's engagement by the first respondent. She also contends that she was engaged by R2, R3 or R4 individually or collectively.

The Chambers' Constitution

11. The Constitution of Chambers was at tab A of tab 16 of the bundle from Rs 2 - 4. Paragraph 40 provides as follows:

Except as provided in Article 40.1, [not applicable in this case] a person shall be eligible for membership of Chambers only if he/she is a barrister who intends to supply legal services as a barrister in independent practice within the meaning of the Code of Conduct.

12. The Code of Conduct in this case means the Code of Conduct of the Bar of England and Wales as defined in clause 5.7 of the Constitution/Articles of Association.
13. Paragraph 56 provides that “*All staff shall be employed by the Head of Chambers acting for and on behalf of all members*”. The claimant’s counsel conceded that it was not a legal entity but did not have instructions to withdraw against R2. I find based on this provision that the Heads of Chambers (R3 and R4) act for and on behalf of the members in this respect, the members are the principals and the Heads of Chambers are the agents.
14. R3 and 4 said that the claimant was not employed by them. The claimant’s pleaded case at paragraphs 5 – 7 of her ET1 Grounds of Complaint was that she was interviewed by R1 and it was R1 who offered her the job. She did not claim that R3 or R4 were present at the interview.

The victimisation claims against Rs 2 - 4

15. There were three assertions of victimisation set out in the ET1 from paragraphs 55 to 62. These were (a) victimisation in respect of pay; (b) victimisation in respect of the failure to adhere to R2’s harassment policy and (c) victimisation in respect of instructions to external counsel, namely the investigator of the claimant’s complaint.

Victimisation in respect of pay

16. The claimant’s case at paragraph 56 of her ET1 was that the victimisation “*included difficulties with getting paid after I raised the initial complaint to [R2]...*”. She claimed she had to send a number of emails to ensure she got paid and was informed that she might not receive payment for work completed on 12 July 2019 and 22 July 2019 until as late as September 2019. She said she had to send a number of emails requesting for this to be remedied and that this victimisation occurred between 23 July 2019 and 30 July 2019 and was done by R2.
17. I was taken to the relevant documents in the respondents’ bundle. Pages 187 and 188 were the invoices in question dated 12 and 22 July 2019. They were invoices for PA services to R1. At page 181 there was an email dated 29 July 2019 from the claimant to the administration person at Chambers chasing payment of these two invoices. She said that she provided two invoices one on 16 July 2019 and the other on 23 July 2019 and she asked when they could be paid. The reply on 30 July 2019, page 180, said: “*I had arranged BACS payment last week but has there are two different bank accounts on the invoices, my manager didn’t release payment until I reconfirm bank account.*” The claimant very swiftly confirmed her bank account information.
18. It is clear that the two invoices showed different account numbers so this had to be clarified before the invoices could be paid. I accept the submission of Rs 2 – 4, that these documents speak for themselves. The reason the claimant had to chase that payment was because of the discrepancy in the account numbers that she had given. In submissions the claimant’s counsel said she did not take issue

with this. I find that the claimant has no reasonable prospect of success on a victimisation claim on this issue and it is struck out.

Victimisation in respect of the failure to adhere to the Harassment Policy

19. The complaint is to failure to follow the Harassment Policy was that the claimant was not contacted by R2's manager as per the policy, she was not given details for the Equality and Diversity Committee, she was not advised to raise a formal complaint to that Committee and that an external investigator was appointed rather than an independent member of Chambers. She also complained that her request to be accompanied and to have a recorded copy of her interview was "*not initially formally confirmed*".

20. The case for Rs 2 – 4 was that the claimant did not have the benefit of the Harassment Policy. The policy was at page 191 of the respondents' bundle which set out a section headed "*The Scope of the Policy*". It said:

"This policy applies to all those working in and providing services to Chambers, including members and employees of Chambers, pupils and mini pupils, IT contractors and cleaning staff. It applies to all your professional/work-related interactions with others. The policy applies to:

- *all premises where Chambers business is conducted;*
- *all Chambers-related activities performed at any other site away from Chambers; and*
- *any social, business or other functions (including social media) where conduct or comments may have an effect on Chambers or relationships within Chambers."*

21. For Rs 2 - 4 it was submitted that says it applied because R1 was a member of Chambers and a complaint about R1 is caught by the policy because it is about a member of Chambers in a professional capacity. The claimant submitted that on a strike out application such as this, the tribunal should take the claimant's case at its highest. I find that it is open to argument and interpretation that the claimant was involved in Chambers-related activities including those performed at sites away from Chambers in that she was assisting R1 with his professional work related duties. The policy includes within its scope IT contractors and cleaning staff who will not be members of Chambers. I make no firm finding of fact on this issue, but consider that the scope of the policy is open to such an argument and/or interpretation, such that the claimant would have the benefit of it. I am unable to find that the claimant has little or no reasonable prospect of establishing that she had the benefit of the policy.

22. It was hard to understand the claimant's case as to why the appointment of an external investigator was a detriment to her, it not being in dispute that it was a QC from another set of Chambers, specialising in discrimination law. It is far more common in discrimination cases for claimants to complain that the internal investigator is biased and it is often claimed that notwithstanding the wording of the policy, there should have been an external investigator to provide more independence. An internal investigator will inevitably know and have had dealings with persons involved with the investigation. The detriment was put as the departure from procedure being such as to exacerbate the claimant's health

symptoms. There may be medical evidence that the claimant wishes to rely upon making such a causal connection in relation to this and the other departures from policy that she relies upon. There would need to be a finding of fact, for example as to whether she was not initially afforded a right to be accompanied and if so why and similarly with her request for a recording.

23. To the extent that the tribunal will need to consider the extent and scope of section 109 Equality Act, the claimant's case is that the precise arrangements need to be considered. Although it is R2 – 4's case that the claimant was interviewed and engaged purely by R1, there may need to be some further factual enquiry, for example why her payment arrangements were being made through Chambers. The claimant also asserts that being sent the Harassment Policy showed a nexus between herself and Rs 2 – 4.
24. For these reasons I am unable to say that the claimant has little or no reasonable prospect of success on her complaint that the policy was not adhered to and I decline to strike it out or order that a deposit be paid.

Victimisation in respect of the instructions to external counsel

25. Paragraph 60 of ET1 the claimant complained that R3 and R4, in giving instructions to the external investigator in paragraph 15 of the Terms of Reference (bundle page 206). This concerned confidentiality and said: "*At the outset of any investigation meetings please remind all participants of the need for confidentiality and that the information they provide will be kept confidential so far as possible, but may to be need to be provided to [C] and [R1], and on a need-to-know basis with other members of Chambers.*"
26. The claimant complained in paragraph 60 of the ET1 that R1 had instructed two leading employment QCs to assist him and that this made the proceedings exceptionally difficult as she says she had to provide written objections whenever she disagreed with the requests for information from R1 and his advisors. She said that R1 and his advisors could repeatedly request information and request a draft copy of the investigation findings. She said that this led her to feeling overwhelmed and ill.
27. Paragraph 15 of the Terms of Reference is evenly drafted in that it says that information may need to be provided to the claimant and R1. It does not provide an exclusive right only for R1 to be afforded information and not the claimant and to this extent it is hard to see how this is a detriment to the claimant.
28. The claimant also complained that at paragraph 8 of the Terms of Reference the external investigator was given liberty to adopt whatever procedure she considered appropriate.
29. I accept the claimant's submission that it is a high test to strike out a discrimination claim. It may be that the complaint goes to the issue of departing from the precise words of the Harassment Policy. I have found it hard to see how the claimant suffered a detriment under clause 15 but taking account of the authorities I have decided that it has little rather than no reasonable prospect of

success and I order that a deposit be paid as a condition of continuing to advance that allegation or argument.

30. In making that decision I have considered the claimant's ability to pay a deposit. This was based on her evidence to the tribunal upon which I make the following findings. The claimant has been a law student. Her degree has not yet been awarded as there is further work to be done and marked. She is unfit for work as shown by the medical certificate in section 4 page 3 of her bundle. She is a single mother and has a dependent child. She does not run a car. She lives in rented accommodation and her rent is taken care of by Universal Credit (UC). Her income is from UC and Child Benefit. UC provides for £300 per month for herself and £200 per month for her son. She is therefore living on £500 per month. She is in receipt of Legal Aid in these proceedings. She has no savings. She submits that any deposit should only relate to the UC income for herself and not for her son.
31. Taking account of her ability to pay, I order that a deposit of £200 be paid as a condition of advancing the allegation or argument of victimisation in relation to the instructions to external counsel as the investigator of her complaint. A separate Deposit Order will be sent and as the claimant is legally represented by solicitors and counsel, no doubt she will be advised of the potential costs consequences of this Deposit Order. The claimant should read carefully the notes to the Deposit Order.

The relevant law

32. The relevant law is found in Rules 37 and 39 of the Employment Tribunal Rules of Procedures 2013.

Rule 37

(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;*
(b) *that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;*

Rule 39

(1) *Where at a preliminary hearing ...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.*

(2) *The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

33. Rs 2 - 4 rely on the almost identical test for summary judgment under CPR Part 24:

It is certainly the case that under both rules, where there are significant differences between the parties so far as factual issues are concerned, the court is in no position to conduct a mini-trial: see per Lord Woolf MR in Swain v Hillman [2001] 1 All ER 91 at 95 in relation to CPR 24 . However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost

and delay of trying an issue the outcome of which is inevitable: see the note at 24.2.3 in Civil Procedure (Autumn 2002) Vol 1 p.467 and Three Rivers DC v Bank of England (No.3) [2001] UKHL/16, [2001] 2 All ER 513 per Lord Hope of Craighead at paragraph [95].

34. Section 109 of the Equality Act 2010 provides for liability of employers and principals. It states that:

- (1) *Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
- (2) *Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

35. In ***Anyanwu v South Bank Students' Union 2001 ICR 391*** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. It may be necessary to determine whether discrimination is to be inferred.

36. Similar views were expressed in ***Chandhok v Tirkey 2015 IRLR 195***, EAT, where Langstaff J reiterated (at paragraphs 19 - 20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be '*sparing and cautious*'.

Conclusions

37. It was conceded by the claimant that R2 is not a legal entity and for that reason I strike out claim against R2 as it is not a legal entity against which a claim can be pursued or in respect of which any judgment could be enforced.

38. For the reasons set out above the claim for victimisation in respect of pay is struck out as having no reasonable prospect of success.

39. For the reasons set out above the claim for victimisation for failing to adhere to the harassment policy continues to the full merits hearing.

40. For the reasons set out above, the claim the victimisation in respect of the instructions to external counsel is subject to the payment of a deposit of £200.

Employment Judge Elliott

11 February 2020

Sent to the parties on:

18/02/2020

For the Tribunal: