



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE BALOGUN
BETWEEN:

Miss S Messi

Claimant

And

Susan Mann (R1)
Pia Dekkers (R2)
Paul Gaff (R3)
Lesley Ryan (R4)
Diana Pizzey (R5)
Olivier Nicolay (R6)
Chanel Limited (R7)
Christina Ibraheem (R8)
Rebecca Bragg (R9)

Respondents

ON: 27 January 2020

Appearances:

For the Claimant: No attendance
For the Respondent: Mrs Lydia Edgar, Solicitor

JUDGMENT ON PRELIMINARY ISSUE

1. All claims against: R1, R4, R5, R6, R7, R8 and R9 are struck out pursuant to Rule 37 of the Employment Tribunal Procedural Rules 2013 on grounds that they have no reasonable prospects of success and/or are an abuse of process.
2. All claims against R2 and R3, save for those referred to at paragraph 3 below, are struck out on grounds that they have no reasonable prospects of success and/or are an abuse of process.
3. The allegations of harassment, direct discrimination and victimisation against R3 and R4; that they prohibited the Claimant from attending the Christmas Party in 2018 and lied that the Christmas party was in November 2018 is subject to a deposit order, a copy

of which accompanies this Judgment.

REASONS

1. This claim is the last of a number of consolidated claims presented between October 2017 and November 2018.
2. On 17 January 2020, the Claimant applied for a postponement of this hearing on grounds that she was due to have oral surgery. The application was refused by acting Regional Employment Judge Davies on grounds that she had failed to provide sufficient documentary proof of the appointment and the date it was arranged. The Claimant did not attend the hearing or make written representations and it therefore proceeded in her absence.
3. By a claim form presented on 23 November 2018, the claimant complains of racial harassment, direct race discrimination and victimisation. Although she also ticked the box for disability discrimination, no allegations of this are contained in the claim form or indeed, in the further and better particulars she provided subsequently.
4. The claim is pursued against 9 Respondents – 1 corporate entity (not the Claimant's employer) and 8 individuals. The Claimant was employed by Croydon Logistics Limited (CLL), which is a Respondent in claim 3 (2300962/2017)
5. As the complaints required further clarification, the Claimant was ordered to provide further and better particulars of her claim. She has done so but the Respondent contends that these are inadequate.
6. The purpose of this preliminary hearing was to consider the Respondent's application for the claims to be struck out on grounds that: i) they are out of time; ii) they have no reasonable prospects of success; iii) they are an abuse of process (*Henderson v Henderson*).
7. I heard oral submissions from Mrs Edgar, Solicitor, on behalf of the Respondents. I was also provided with a Bundle A – Pleadings and a Bundle B – Individual Respondent's Evidence.

The Law

8. Rule 37 of the Employment Tribunal Rules of Procedure 2013 provide that; at any stage of the proceedings, either of its own motion 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 not reasonable prospect of success
 - b. that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent has been scandalous, unreasonable or vexatious;
 - c. for non compliance with any of these Rules or with an order of the Tribunal;
 - d. that it has not been actively pursued;
 - e. that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)

Conclusions

9. Having considered the submissions and reviewed the supporting documents, I have reached the following conclusions in relation to each of the Respondents:

R1 – Susan Mann

10. R1 was the Interim Data Lawyer engaged as a contractor by CLL. She left their employ on 26.6.18. I am told that her involvement in this case was to manage 3 of the SARs (Subject Access Requests) raised by the Claimant. She was also the liaison person with the Information Commissioner's office, with whom the Claimant had raised a complaint against CLL.
11. There are two allegations in the claim form against R1. The first is that she is one of a number of listed individuals who falsely alleged that the tone of the Claimant's emails were aggressive and that she had harassed and threatened them. The second is that she breached confidentiality and did not comply with data protection obligations.
12. In relation to the first allegation, in her further particulars, the Claimant simply repeats the allegation without provided specific details, such as when the alleged false allegation was made; how it was made (orally or in writing) and to whom. The allegation is too general to be of evidential value. In relation to the second allegation, the Respondent says that these matters have been considered by the Information Commissioner and R1 was exonerated. In those circumstances, the Claimant is unlikely to meet the evidential burden of showing facts from which the Tribunal could conclude discrimination. I find that the claims against R1 have no reasonable prospect of success and they are struck out.

R2 - Pia Dekkers

13. R2 is the HR Director of CLL. I am told that she became involved in this matter from February 2018 when she engaged with the Claimant on her return to work and scheduled a return to work meeting on 18 February 2018.
14. There are 4 allegations against R2. The first is that she too falsely alleged that the Claimant was aggressive in her role, that the tone of her emails were aggressive and that she (the Claimant) harassed and threatened her. The second is that on 17.9.18, the Claimant sent an email to R2 requesting her staff discount letter and that R2 put her "out of office" on. The third is that R2 made an unlawful deduction from the Claimant's wages when she was off work because of the snow and the fourth is that R2 prevented the Claimant from attending the Christmas party and lied about the date of the party.
15. Taking each of those in turn, on the first matter, there are insufficient particulars provided. On the second matter, it is highly unlikely that the Claimant will be able to show facts from which the Tribunal could conclude that switching on "out of office" amounts to racial harassment, direct discrimination or victimisation. On the third matter, the Claimant made an unlawful deductions complaint in relation to this issue in Claim 3 and that was dismissed on withdrawal on 2 July 2018. Her attempt to now revive the matter as a victimisation allegation is an abuse of process. In any event, it does not appear in the ET1 but is raised for the first time in the further particulars. In order to pursue that complaint, the Claimant would have to have applied to amend her claim, which she has not done. All of these claims are struck out as having no reasonable

prospect of success and/or as an abuse of process.

16. Turning finally to the fourth matter, CLL accepts that the Claimant was prevented from attending the staff Christmas lunch, albeit it says that decision was made by R3 and not R2. Nevertheless, based on the limited information before me, I cannot say that R2 did not influence that decision. In its ET3, the Respondents say that the decision to exclude the Claimant from the Christmas lunch was taken because the Claimant was prevented from attending the workplace due to the impact of her unacceptable conduct and communications on other members of staff. If the final tribunal accepts the Respondent's explanation, then they will most likely find that its actions were not victimisation. Hence, whilst I consider this particular allegation to be weak, I am not able to say that it has no reasonable prospects of success. I do say, however, that it has little reasonable prospects of success and that the Claimant should pay a deposit as a condition of being able to pursue it. The deposit is dealt with in a separate order.

R3 - Paul Gaff

17. R3 is the in-house lawyer for CLL. His role in this matter was to hear the Claimant's grievance appeal and as part of that process, he decided that she should be dismissed with effect from 16 March 2018.
18. The allegations against R3 are firstly, the alleged false allegations against the Claimant of aggressive behaviour, referred to above in relation to R1 and R2 and secondly, the allegation relating to exclusion from the Christmas lunch, referred to above in relation to R2.
19. In relation to the first allegation, I have been taken to a letter from R3 to the Claimant dated 16.3.18 in which he states: "*Often the language and tone of your communications are aggressive and threatening. Some other members of staff have expressed concern and anxiety regarding your communications and behaviour....*" My reading of this is that it amounts to a statement of opinion/perception of the way in which the Claimant communicated. Whilst the Claimant may not agree with it, I consider it is unlikely that she will be able to establish that it is not genuine or that it amounts to direct discrimination, harassment or victimisation.
20. Further, in Claim 3, the Claimant raises a victimisation allegation against CLL relating to R3's letter of 16.3.18 so she could have added R3 as a Respondent and brought this claim at that time. She would have been well aware of that possibility as she had named 4 individual Respondent's in Claim 2. Also, at the case management hearing on 17 May 2018, at which the issues in the earlier claims were identified and agreed, the Claimant was legally represented and so could have asked to amend her claim at that point, if she felt there was a claim to be made against R3 personally.
21. The case of Henderson v Henderson (1843) 3 Hare 100, 67 ER 313 (*Henderson v Henderson*) is the leading authority for the proposition that where a given matter becomes the subject of litigation, the Court requires a party to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same party to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest. Failure to do so amounts to abuse of process rendering the new claim liable to strike out. I am satisfied, in the absence of any explanation to the contrary, that the Claimant could have brought the

first allegation against R3 as part of Claim 3 and that bringing it now is an abuse of process. This allegation is therefore struck out.

22. In relation to the second allegation, for the reasons cited in relation to R2, I consider that this allegation has little reasonable prospect of success and that a deposit order should be made.

R4 - Leslie Ryan

23. I am told that R4 is Deputy Head of HR and is employed by CLL. She became involved in this matter in December 2017 after the grievance investigation and her role was to be the sole contact for the Claimant on her return to work and on any issues relating to her benefits.
24. The single allegation against R4 in the ET1 is that she was one of the individuals who made false allegations about the Claimant being aggressive. I have been shown an email from R4 to the Claimant dated 9 February 2018 in which she says: "*The tone of your emails remains aggressive and threatening.....*". There is no other basis for the Claimant's allegation either in the ET1 or the further particulars. As above, this is an expression of opinion/perception and a full tribunal is unlikely to find that it amounts to direct discrimination, harassment or victimisation. I consider this allegation to have no reasonable prospect of success and it is struck out.

R5 – Diana Pizzy

25. R5 is the Head of Financial Accounts at CLL and was the Claimant's direct line manager. Although she is cited as a respondent, there are no allegations against her anywhere in the ET1. Allegations first appear in the further particulars. The first allegation is that R5 victimised the Claimant by making an unlawful deduction from her wages when she was off because of the snow – the same allegation levied against R2. Another allegation is that R5 tried to invite her to a meeting on short notice in order to extend her probation. As these are new allegations and no application to amend the claim has been received, they cannot proceed. The claim against R5 is therefore struck out.

R6 Olivier Nicolay

26. R6 is the managing director of Chanel Ltd. Chanel Ltd owns CLL but they are separate entities. I am told that R6 played no role in any of the issues being pursued. There are no allegations against him in the ET1 or indeed any reference to him at all. In her further particulars, the Claimant contends that R6 made all the decisions and refused to acknowledge her grievance. Again, these are new allegations, not in the claim form and therefore require an application to amend. No such application has been received. The claim against R6 is struck out.

R7 – Chanel Ltd

27. As already mentioned, R7 owns CLL. There is no legal nexus between the Claimant and R7. It was not her employer, so vicarious liability does not apply. The Claimant would have been aware of this as, by agreement, R7 was removed as a Respondent in Claim 3 on that basis. It was submitted by Mrs Edgar that the Claimant has only brought R7 back into the picture in order to cause reputational harm and I suspect that may be the case. The claim is an abuse of process. It is struck out for that reason and because it has no

reasonable prospects of success.

R8 – Christina Ibraheem

28. R8 was Interim Legal Counsel at CLL, providing maternity cover. R8 investigated and determined the Claimant's grievance. I have been taken to documents which show that the matter was determined on 11.12.17 and that the Claimant provided her comments on 12.12.17. R8 left CLL on 2.3.18. There are no allegations against R8 in the ET1 or in the further particulars provided by the Claimant. Any potential claims should have been brought as part of Claim 3 and at this point are significantly out of time. This is an abuse of process. The claim against R8 is struck out.

R9 – Rebecca Bragg

29. I am told that R9 is a junior member of the HR team of CLL and that her sole role in this matter was as a minute taker at the Claimant's return to work interview on 15 February 2018. There are no allegations against R9 in the ET1. R9 is mentioned in passing in the further particulars but no specific allegations are made. Any potential allegations, if genuine, should have been made as part of claim 3 and at this point are significantly out of time. This is an abuse of process. The claim against R9 is struck out.

Judgment

30. All claims against R1, R4, R5, R6, R8 and R9 are struck out. All claims against R2 and R3 are struck out save for the allegation of harassment, direct discrimination and victimisation relating to attendance at the Christmas lunch, which can proceed subject to the payment of a deposit pursuant to the terms of the deposit order accompanying this judgment.

Employment Judge Balogun
Date: 28 January 2020