HC

EMPLOYMENT TRIBUNALS

Claimant: **Umut Baz**

Respondent: **General Dental Council**

Heard at: **London Central Employment Tribunal** **On: 26 February 2020**

Before: **Employment Judge H Clark (sitting alone)**

Representation

Claimant: Did not attend and was not represented

Respondent: Ms K Newton - Counsel

JUDGMENT FOLLOWING OPEN PRELIMINARY HEARING

It is the judgment of the Tribunal that the Claimant's claims of sexual orientation discrimination have no reasonable prospects of success and should be struck out.

REASONS

1. By a Claim Form presented on 17 June 2019, the Claimant made a claim for sexual orientation discrimination arising out of her practice as a dental nurse. The Respondent is the regulatory body for dental professionals. The alleged acts of discrimination concern the handling of complaints made to the Respondent both by and against the Claimant. This Open Preliminary Hearing (OPH) was listed to consider the Respondent's application to strike out the Claimant's claims or, alternatively to order deposits to be paid.

2. Directions were made for this hearing by EJ Joffe at a preliminary hearing on 13 November 2019. The parties were ordered to send each other any documents on which they intended to rely at the OPH by 17 January 2020, any witness statements by 12 February 2020, that skeleton arguments/written submissions should be exchanged by 19 February 2020 and the Respondent was to send the Claimant a copy of the bundle of documents by 19 February 2020.

The Proceedings

3. On 18 February 2020 the Claimant applied for a postponement of this hearing

on the basis that she was abroad looking after an Aunt who has Alzheimers' disease. The Respondent objected to the application and pointed out that there had been no evidence provided as to when the Claimant left the country or when she was due to return. No medical was provided to support her need to care for her Aunt. The Claimant's application was refused on 20 February 2020 on the basis that details of the medical needs of her Aunt had not been provided or why cover could not be secured in her absence. The Claimant responded by email dated 25 February 2020 expressing her dissatisfaction with the refusal of her application, suggesting it breached her Article 6 ECHR rights and that she would not be attending the hearing. Regional Employment Judge Wade confirmed to both parties on 25 February 2020 that the OPH would be going ahead the following day.

4. For the purpose of this hearing the Tribunal heard oral submissions from Ms Newton on behalf of the Respondent and was taken to the relevant parts of a bundle of documents prepared for this hearing by the Respondent. The Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Rules) permit the Tribunal to conduct a hearing in the absence of a party. In doing so, the Tribunal will take into account any documents on the file submitted by the Claimant, including the Claim Form. The Claimant did not provide a witness statement, documents or any written submissions pursuant to EJ Joffe's order.

5. Following this Preliminary Hearing, by letter dated 27 February 2020, the Respondent wrote to the Tribunal to correct an oral submission made at the hearing, to the effect that the documents attached to Capstick's letter dated 15 March 2019 (the "closing application") were not sent to the Claimant with the letter.

The Claimant's access to the bundle of documents

6. There was correspondence between the parties and with the Tribunal on 25 February 2020 concerning the Claimant's access to the bundle of documents. The Claimant suggested that she had been unable to access the bundle of documents, which had been placed by the Respondent on a secure Share Site on or about 19 February 2020. This is how the Respondent routinely delivers documents, which potentially contain sensitive personal or medical data. The Respondent suggests that the Claimant is familiar with this delivery method given her involvement in regulatory complaints (which are all dealt with in this way). The Respondent uploaded the majority of documents which are contained in the bundle on 31 January 2020. The Claimant informed the Respondent by email on 31 January 2020 that she would "*happily use these documents at various different legal areas…"* and did not suggest she was unable to access them. The Respondent has provided a screen shot from the Share Site indicating that the Claimant viewed the documents twice on 31 January 2020 and downloaded some of them (in unpaginated form) on the same date. The Claimant claims to have posted hard copy documents to the Respondent on 27 January 2020, which the Respondent has never received. Solicitors on behalf of the Respondent asked for any proof of postage from the Claimant in order that they could make inquiries as to their whereabouts, but no such proof has been provided.

7. The Claimant indicated by email to the Respondent dated 31 January 2020 that she would not receive emails for the next 3 – 4 weeks at least. On 14 February 2020 an attempt to contact the Claimant securely by post (Special Delivery), had

not been successful, as the Claimant did not collect the documents sent from the Post Office. This is why the Respondent has not arranged an alternative form of delivery of the bundle to the Claimant. The Tribunal is satisfied that the Claimant has had access to the majority of documents for this hearing on the Share Site since 31 January 2020 in unpaginated form and that she viewed and downloaded some of them. She has only suggested otherwise since the refusal of her postponement request. In so far as she has not viewed the full paginated bundle, that was her choice. The Respondent's skeleton argument and authorities were uploaded onto the share site on 21 February 2020.

8. The Claimant's recent correspondence with the Tribunal suggests that she is disillusioned with the Tribunal process and is proposing to refer the case to the Court of Appeal, alongside preparing a case against the Respondent in the County Court.

The Issues

9. This hearing was listed to consider the following preliminary issues, as set out in the Respondent's letter to the Tribunal dated 20 December 2019:

    9.1 Whether the Tribunal has jurisdiction under section 53 of the Equality Act 2010 to hear the Claimant's complaints about other persons registered by the Respondent.
    9.2 Whether the Claimant's claims of direct sexual orientation discrimination have no reasonable prospects of success and should be struck out.
    9.3 Whether the Claimant's claims of direct sexual orientation discrimination have little reasonable prospects and a deposit should be ordered.
    9.4 Whether any of the Claimant's claims should be struck out on the basis they are out of time.

10. Prior to the hearing, the Respondent abandoned their contention that the Tribunal had no jurisdiction to hear the Claimant's claims under section 53 of the Equality Act 2010. Its primary case is that the Claimant's case has no reasonable prospects of success. Either the allegations of less favourable treatment are demonstrably wrong or, there is no evidence from which an inference could be drawn that the Claimant's treatment was because of her sexual orientation. The Respondent suggests that there are clear non-discriminatory reasons for the Claimant's treatment, supported by contemporaneous documentation.

The Law

11. The Tribunal's power to strike out a claim or part of it is derived from rule 37 of the 2013 Rules where a claim has "*no reasonable prospects of success*". It is a draconian power, since it deprives a party of the opportunity to have issues fully aired in the Tribunal. It is well established that a Tribunal should be slow to strike out a discrimination claim (*Anyanwu v South Bank Student Union [2001] ICR 391*). Discrimination claims are fact sensitive and often turn on what inferences it is appropriate to draw from primary evidence. This can be too nuanced an exercise to perform at a preliminary hearing on limited evidence. However, that is not to say that a discrimination claim or assertion which is prima facie implausible should never be struck out. Lord Hope stated at paragraph 39 of *Anyanwu* that: "*The time*

and resources of the Employment Tribunals should not to [be] taken up by having to hear evidence in cases that are bound to fail."

12. Lord Hope's observation in *Anyanwu* was noted in the Court of Appeal case of *Ahir v British Airways Plc* [2016] EWCA 1846, to which the Tribunal was referred. In the judgment of Lord Justice Underhill it was stated:

"*Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involved a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgement, and I am not sure that that exercise is assisted by attempting to gloss the well understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between "exceptional" and "most exceptional" circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be little reasonable prospects of success."*

13. At paragraph 19 of *Ahir* it was further stated that: "*the whole problem with strike out is that the appellant has no chance to explore what may lie beneath the surface, in particular, by obtaining further disclosure and/or by cross examination of the relevant witnesses*. *I am very alive to that. However, in a case of this kind, where there is an ostensibly innocent sequence of events leading to the act complained of, there must be some burden on a Claimant to say what reasoning he or she has to suppose that things are not what they seem and to identify what he or she believes was, or at least may have been, the real story, albeit (as I emphasise) that they are not yet in a position to prove it."*

14. The Tribunal also has the power to order a deposit be paid not exceeding £1,000 under rule 39 of the 2013 Rules as a condition for a party advancing an allegation or argument, which has "*little reasonable prospect of success*". Before the Tribunal makes a deposit order it is obliged to make a reasonable enquiry into a Claimant's means or ability to pay an order when deciding on the amount of the deposit. Deposit orders should not be set at such a high rate that it is a barrier to a Claimant seeking justice but enough that a Claimant reflects on whether to pursue a particular allegation.

The Allegations of Discrimination

15. The allegations of direct discrimination which an Employment Tribunal would ultimately have to determine were set out at the preliminary hearing on 13 November 2019. There are nine allegations relating to 2 complaints made to Respondent. The Respondent is a statutory body, which is governed by the Dentists Act 1984 and is responsible for the regulation of dentists and associated professionals, such as the Claimant. The first five allegations relate to a complaint

made by the Claimant in 2016 about a dental hygienist with whom she worked and the last four relate to a complaint brought by a dentist against the Claimant in 2017.

16. The Claimant's allegations of unfavourable treatment are said to be because of her sexual orientation, which she defined at the preliminary hearing as being a "gay guy". The complaint she made against a dental hygienist concerned derogatory comments allegedly made by the hygienist to the Claimant which could be characterised as harassment related to sexual orientation. In summary, the Respondent successfully invited Case Examiners to review their decision to refer the hygienist to the Professional Conduct Committee of the Respondent in light of difficulties with the evidence (the Claimant's witnesses' reluctance to give evidence at a hearing and concerns about the Claimant's credibility). The Claimant refers to this invitation to review as a "closing application", which was was an application under Rule 6E of the General Dental Council (Fitness to Practice) Rules 2006. The complaint against the Claimant by a dentist related to, amongst other things, the Claimant's allegedly falsifying or altering a DBS check and misappropriating funds from the dental practice as a result.

17. The treatment by the Respondent of which the Claimant complains are in relation to the Claimant's complaint against the hygienist, as follows:

    17.1 Delayed the case for two years, i.e. took two years to close the complaint;
    17.2 Failed to contact the Claimant to obtain her account;
    17.3 In the closing application on 15 March 2019, said that the Claimant's witnesses did not wish to participate despite the fact that one (HK) had not been contacted and the other (ZS) had said he was willing to provide a witness statement;
    17.4 In the closing application said that the Claimant was not credible and deliberately based that assertion on what it knew to be untrue information. The information which the Claimant says was untrue was that [the dentist] had to unannounced CQC inspections when the Claimant says both inspections were announced.
    17.5 When the Claimant brought a complaint about the caseworker on this case, released confidential information about the Claimant to their Solicitors, which information was referred to in a letter by the solicitors in or around April or May 2019.

    In relation to the complaint against the Claimant, the allegations are that the Respondent:

    17.6 Kept the case open from October 2017 until now, despite its published guidelines saying that it aims to resolve complaints within 4 to 6 months.
    17.7 Failed to inform the Claimant that there was an investigation against her between October 2017 in October 2018;
    17.8 In October 2018 given the Claimant a reason for keeping the complaint open longer which the Claimant says is untrue, the information being that the Respondent had contacted HMCTS for more information and was awaiting a response;
    17.9 Failed to update the Claimant about the progress of the complaint on a regular basis at all.

18. Taking the Claimant's individual complaints in turn, the Respondent made the following points supported by contemporaneous documentation contained in the Tribunal bundle:

18.1 Delayed the case for two years, i.e. took two years to close the complaint;

The factual basis for this allegation is a matter of record. The Respondent has set out in detail the chronology relating to the Claimant's complaint against the hygienist from paragraphs 19 to 44 of the amended Response Form. The complaint was submitted on 17 September 2016, but it was initially considered that the complaint was not such as to amount to allegations that the hygienist's fitness to practice was impaired. The Claimant's request that the Respondent review that decision was successful and the complaint was referred to the Respondent's Case Examiners, who, in January 2018, recommended a referral to the Respondent's Professional Conduct Committee. In the course of preparing the case for the Professional Conduct Committee, the Respondent discovered information which potentially affected the Claimant's credibility as a witness and applied for disclosure of documents from the Metropolitan Police in the Wandsworth County Court. The disclosure order was made and the Claimant's application to have the order set aside were dismissed in May 2019. The Rule 6E application was made on 15 March 2019 by the Respondent's then Solicitors, Capsticks. The Respondent's Solicitors informed the Claimant that they were planning to request the Case Examiners reconsider their recommendation on 28 March 2019 and she was invited to provide her comments, which she did on 29 March 2019. On 19 June 2019 the Claimant was informed that the Case Examiners had decided that the case should no longer be referred to the Respondent's Practice Committee.

18.2 Failed to contact the Claimant to obtain her account;

This allegation is set out in the Claimant's Claim Form as follows: *First of all, the defendant has NEVER EVER obtained any information from the claimant. The defendant did not seek the claimant's witness statement, the claimant did not sign any witness statement, the defendant has never even spoken to the claimant*." This allegation is not sustainable, as the Claimant was contacted on a number of occasions to obtain her account. The complaint itself contained the Claimant's account. On 20 October 2016 in the course of the Respondent's initial contact with her, the Claimant was asked for an written evidence she had and then on 21 November 2016 she was asked for further information. She was asked for her comments on the hygienist's own account on 5 September 2017, which she provided on 7 September 2017. She was asked for further details about allegedly racist remarks by email dated 24 October 2017 When the complaint was referred to the Respondent's Practice Committee, the Claimant was invited to assist in the preparation of a witness statement (by letter dated 2 March 2018) and she was interviewed for this purpose on 14 March 2018. A six page witness statement was produced for the Claimant. She provided six pages of

comments on the "closing application" on 29 March 2019.

18.3 In the closing application on 15 March 2019, said that the Claimant's witnesses did not wish to participate despite the fact that one (HK) had not been contacted and the other (ZS) had said he was willing to provide a witness statement;

Witness statements were prepared for both the Claimant's supporting witnesses. ZS signed a witness statement which supported the Claimant's account, however, when further information was requested from ZS by letter dated 12 July 2018, followed up on 17 July 2018, ZS indicated that he could not attend a hearing. He suggested that if changes were needed to his witness statement he could sign them and send back the amended statement. He explained he would be happy to assist with the case as long as it didn't cost him more time and stress. It was pointed out to ZS in an email dated 9 August 2018 that changes to his witness statement could not be made without speaking to him about this. No response was received. This was followed up by a further email dated 20 August 2018. Finally, the Respondent sent an email dated 6 September 2018 which explained to him that if he was not willing to assist the Respondent, it was unlikely that the Respondent would be able to rely on his witness statement. The Respondent made it clear that ZS could potentially give evidence by Skype or telephone, but if they didn't hear from him by 12 September 2018, it would be assumed that he was no longer willing to assist in relation to the investigation. No further contact was received from ZS. The Respondent had similar difficulties with HK, albeit he did not sign a witness statement, although he provided the substance of his account in an email dated 23 May 2018. The Respondent's attempts to obtain evidence from him followed a similar pattern to that with ZS, with his explaining by email dated 18 July 2018 that he would be happy to provide a witness statement but did not want to attend a hearing. HK also expressed frustration that he had spoken to a different member of staff initially and did not want to go through the whole process again. The exchange of emails culminated in an email in similar terms to that sent to ZS, also dated 6 September 2018, to which HK did not reply. It was quite clear from the documentation, that HK had been contacted contrary to the allegation of unfavourable treatment.

18.4 In the closing application said that the Claimant was not credible and deliberately based that assertion on what it knew to be untrue information. The information which the Claimant says was untrue was that [the complainant] had two unannounced CQC inspections when the Claimant says both inspections were announced.

In the course of the Respondent's investigations of the Claimant's complaint, information was uncovered which the Respondent reasonably believed might affect the Claimant's credibility. These were that the Claimant had made very serious criminal allegations (in relation to possession of indecent images of children) against a dentist, which the Police had concluded were false and that the Claimant had "*a substantial history of making unsubstantiated complaints, wasting police time and*

making vexatious civil complaints." The Claimant was given a verbal harassment warning under caution by DC Has-Jorie on 8 December 2017 (albeit such a warning did not constitute an admission or acceptance of the allegation by the Claimant.) A General Civil Restraint Order was made against the Claimant on 16 May 2016 lasting two years. In addition, complaints made by the Claimant against the same dentist to the CQC and NHS had not been supported by subsequent inspections by those bodies. The Respondent concluded that these matters could potentially affect the Claimant's credibility. The Respondent agrees that the CQC inspections were announced and suggests this was a simple typing or administrative error and was corrected both the Claimant herself and then clarified by Capsticks in their response at the time.

18.5 When the Claimant brought a complaint about the caseworker on this case, released confidential information about the Claimant to their Solicitors which information was referred to in a letter by the Solicitors in or around April or May 2019.

The Claimant has not provided any details of what confidential information she says has been released or provided the precise date of the letter in which it was alleged to have been contained, notwithstanding a request for her to do so in the amended Response Form. The registrant was provided with a copy of the complaint, as would be required in the interests of natural justice. The Respondent denies that it has released any confidential information to the case worker.

18.6 Kept the case open from October 2017 until now, despite its published guidelines saying that it aims to resolve the complaint within 4 to 6 months.

It is right that the complaint against the Claimant remains open, however, there are two primary reasons for the delay. The first relates to the complainant's initial unwillingness to provide consent for information to be released (at the behest of the police) and then when the Respondent decided it was in the public interest for the complaint to be investigated notwithstanding the absence of consent from the complainant, due to the ongoing police investigation. It is clear from a letter to the complainant dated 8 November 2017 that the investigation into the complaint was put on hold pending the police investigation. On 30 April 2018 the complainant was informed that the criminal investigation had been closed in relation to the theft charge (the police considered there was insufficient evidence for a criminal charge). The DBS matters were ongoing. On 11 October 2018 the complainant was asked for consent to enable the information provided to be used. This was not forthcoming, so the Respondent took the decision to take over the complaint itself. The Respondent has chased the Metropolitan police for any charging decision on the falsification of the DBS checks (on 26 November 2018, 3 December 2018, 10 June 2019, 7 August 2019, 21 August 2019 and 31 January 2020). On 31 January 2020 a response was received from the Co-ordinator of Met Operations stating that the matter was still being investigated and inviting contact for an update in 3 weeks' time.

18.7 Failed to inform the Claimant that there was an investigation against her between October 2017 in October 2018;

This factual allegation is accepted by the Respondent. The reason the Claimant was not informed that there was an investigation against her, was because the complainant did not provide consent for information to be released. The complainant was asked not to do so by the police, so as not to prejudice the police investigation. The Respondent verified this with the police at the time. It was not until 2 November 2018 that the Respondent decided to continue with the case on the grounds of public interest and the Claimant was informed. On 26 November 2018 DBS informed the Respondent that the Claimant had made three amendments to the relevant DBS certificate, allegedly at the behest of her employer. The issue had been passed to the police, who are still investigating the allegation.

18.8 In October 2018 given the Claimant a reason for keeping the complaint open longer which the Claimant says is untrue, the information being that the Respondent had contacted HMCTS for more information and was awaiting a response;

The reason the Respondent has been unable to progress the complaint against the Claimant is due to the police investigation. It is denied that false reasons have been given to the Claimant. The Respondent was also investigating the Civil Restraint Order and a committal order against the Claimant (which was subsequently set aside) in a civil case between the Claimant and Singapore Airlines. Evidence of both these orders were contained in the Tribunal bundle.

18.9 Failed to update the Claimant about the progress of the complaint on a regular basis at all.

This factual allegation is denied by the Respondent, albeit the complaint has not been progressed due to the continuing police investigation. The Respondent relies on its correspondence with the Claimant on 13 November 2018, 19 November 2018, 26 November 2018, 6 December 2018, 26 June 2019 and 7 August 2019.

19. The Respondent has provided contemporaneous documentation in support of its above submissions. The Claimant has not challenged the accuracy or provenance of these documents (notwithstanding the fact that she has had access to these documents within these proceedings). The Tribunal's task in determining whether any of the above actions or decisions might have been tainted by unlawful discrimination has been made more difficult by the Claimant's failure to attend the hearing or provide any documents or written submissions. The latter would be unaffected by her stated absence from the jurisdiction. The Claimant has not referred the Tribunal to any evidence, whether express or more nuanced, from which a Tribunal could infer that her treatment by the Respondent was influenced by the fact that she is a gay guy. Instead, the Tribunal has been provided with cogent explanations for the Respondent's actions in dealing with both the

Claimant's complaint against her hygienist colleague and for the delays in progressing the complaint against the Claimant, which were started by a dentist with whom she worked and were then taken over by the Respondent.

20. Both complaints processes have been very lengthy, which is unsatisfactory for all the participants, including the Claimant, regardless of the merits of the complaints. Whether the processes have taken longer than they ought to have done is not a question for this Tribunal, but, even if they did, for the Claimant to succeed in her discrimination claim, the Tribunal would need to be satisfied that the reason for that (or, say, the initial mistaken reference to an "unannounced" rather than an "announced" inspection) was related to the Claimant's sexual orientation. Not only is there no such evidence, the Claimant has not made assertions which, if proven with evidence, could lead a Tribunal to reach that conclusion. It is safe to assume that if the Claimant had documentary evidence which might suggest that the Respondent's motivation was discriminatory, it would have been provided to the Tribunal. No such documentation has been produced in the three months since the last hearing.

21. One assertion which the Claimant has made within these proceedings, which she asks the Tribunal to conclude was an act of direct sexual orientation discrimination is that the Respondent failed to "*contact her and obtain her account"* in her complaint against the hygienist. That is so demonstrably inaccurate in the face of the documents in the bundle outlined above, that it supports the Respondent's own concerns in the first complaint about the Claimant's credibility. The Claimant's general credibility would clearly be relevant to the Employment Tribunal, so the fact she has made manifestly inaccurate assertions in the course of the proceedings, is bound to further diminish her prospects of success. The Claimant has had eight months since presenting her claim to set out what has led to her to suspect or believe that her sexual orientation has impacted on the Respondent's conduct of these complaints, but she has not done so.

22. In circumstances where the Respondent has outlined *"an ostensibly innocent sequence of events"* which the Claimant has not challenged or put forward any positive case that the reason for her treatment was her sexual orientation, beyond a bald assertion, the Tribunal is satisfied that she has no reasonable prospects of establishing her allegations of direct discrimination. The Tribunal reaches this conclusion notwithstanding the extreme caution which must quite properly be exercised in the dismissal of a discrimination claim without hearing oral evidence.

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Employment Judge Clark
Dated: 4 March 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

05/03/2020.....

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS