



EMPLOYMENT TRIBUNALS

Claimant: Mrs F Emmanuel

Respondent: NACRO

PRELIMINARY HEARING

Heard at: Croydon

On: 7/2/2020

Before: Employment Judge Wright

Appearances

For the claimant: Ms W Godwins – legal assistant

For the respondents: Mr M Shephard - counsel

JUDGMENT

- (1) This hearing was listed to hear and determine the respondent's application for a strike out of the claimant's claim. Or, in the alternative, for a deposit order to be made. The case was not allocated to a Judge and as such, it started late. In view of that, judgment was reserved.
- (2) At the start of the hearing, Mr Shephard raised the issue of an absence of a list of issues. In response to that, Ms Godwins stated that the further particulars which the claimant provided further to the Order of Acting Regional Employment Judge Davies of 27/9/2019, on 28/10/2019 were in effect the list of issues which she wished to rely upon. Mr Shephard made his application based upon that.
- (3) The Tribunal was not provided with a copy of the claimant's further particulars and confirmed that it was working from the respondent's reply (under cover of its email dated 28/11/2019). The parties did not provide any documents for the Tribunal's consideration.
- (4) The claimant was legally represented at the time she presented the ET1. Her solicitors came off the record on 17/10/2019 and the claimant informed the Tribunal she was no longer legally represented on 30/1/2019. Ms Godwins' firm went on the record on 29/1/2020. There was no application for this hearing to be postponed. Nor was there an application for the further particulars which were

provided to be amended. There was no application to amend the pleaded claim. In light of that, the Tribunal had to determine the application based upon the claim as pleaded, as further particularised and based upon the respondent's reply to the claimant's further particulars.

- (5) The ET1 presented on 22/6/2019 contains a section entitled 'automatic unfair dismissal' (paragraphs 39-44). It is not clear what form of automatic unfair dismissal is relied upon. Automatic unfair dismissal was not referred to in the claimant's list of claims in paragraph 4 of the ET1. The respondent in its response denied the claimant had asserted a statutory right and said the claimant had failed to particularise which statutory right she asserted under s.104 (4) of the Employment Rights Act 1996 (ERA). There is no automatic unfair dismissal claim referred to in the further particulars.
- (6) The claimant, also, whilst she was unrepresented wrote to the respondent (not to the Tribunal) on 28/10/2019 stating that she was enclosing her further particulars and that she was withdrawing her claim for automatically unfair dismissal.
- (7) Irrespective of this, there is no automatic unfair dismissal claim set out in the further particulars which Ms Godwins confirmed amounted to the list of issues which the claimant wished to rely upon. The Tribunal therefore finds there is no claim of automatic unfair dismissal as a result of asserting a statutory right extant before it. The claimant purported to withdraw that claim and did not include it in her further particulars.
- (8) It is understood, although it is not expressly stated that the claimant pursues a claim that she was unfairly dismissed as a result of making a protected disclosure under s. 103A ERA and separately that she was subjected to detriments (not including dismissal) as a result of making protected disclosures under s. 47B ERA.
- (9) In her ET1, the claimant states that the protected disclosure was her grievance. Mr Shephard said the claimant raised her grievance after employment terminated on 26/3/2019 and therefore, any detriments during the claimant's employment and the dismissal, cannot have done on the ground that the claimant made a protected disclosure.
- (10) The claimant in the further particulars, when referring to the detriment for having made a protected disclosure referred to a disclosure to Ms Clydesdale on 24/9/2019. Mr Shephard again takes the point that this event post-dates the dismissal. Ms Godwins said in respect this was a simple error in the date and the reference should be to 24/9/2018. The difficulty with this, is that it is not a further particular of the claimant's public interest disclosure (PID) claim, as pleaded in her ET1. It appears to be a confluence of the claimant's pleaded PID claim in the further particulars and the automatic unfair dismissal claim (which the claimant indicated to the respondent that she was withdrawing) in the ET1 and the automatically unfair dismissal claim did not refer to a meeting in September 2018. In the ET1 the alleged disclosure was given the grievance on 26/3/2019 in relation to the PID claim.

- (11) In the absence of any application to amend, the Tribunal finds that the PID claim as originally pleaded has no reasonable prospects of success as the grievance post-dated the dismissal. She cannot therefore, as pleaded been subjected to a detriment of bullying, etc., during the course of her employment as a result of having raised a grievance. The further particulars pleaded do not relate to the claimant's pleaded PID claim and therefore, they cannot be relied upon further to that claim.
- (12) The PID claim is therefore dismissed.
- (13) In respect of the claimant's claims of race discrimination, she relies upon the protected characteristic of race (s.9 Equality Act 2020 (EQA)). In her further particulars, the claimant states her race is Black Nigerian African and she relies upon her race and ethnic origin.
- (14) The ground of complaint is detriment and dismissal under s. 39(2)(c) and (d) EQA for harassment she relies upon s.40 EQA.
- (15) The prohibited conduct is: direct discrimination (s.13); harassment (s.26) and victimisation (s.27 EQA).
- (16) In the main, the respondent's application in relation to the discrimination claims is that the claimant cannot establish a prima facie case of discrimination. The respondent says taking the claimant's case at its highest, it appears to set out no more than a difference in a protected characteristic and there is not the 'something more' as required per Madarassy v Nomura International plc [2007] EWCA Civ 33. The respondent's case is that the discrimination claims should be struck out on this basis.
- (17) The respondent then went onto highlight in the ET1 and further particulars, examples of where it says the claimant is inconsistent (where for example dates differ, one example being that in paragraph 3.12 the claimant says her six-month probation review meeting was held on 12/12/2018, with the allegation that she was not allowed to speak at that meeting; contrasted with paragraph 4.7, when making the same allegation, the claimant says the meeting was in October 2018). The respondent also says this impacts upon the claimant's credibility.
- (18) Besides the fact that the claimant's ET1 was poorly pleaded (hence the previous direction for the respondent to provide details of the additional information it required from the claimant and for her to respond), the further particulars are carelessly produced. It is not clear whether the claimant had the assistance of her representative when they were drafted and at this hearing she referred to suffering from a frozen shoulder, had been hospitalised and was suffering from depression (the respondent did not take issue with this, although there was no medical evidence provided). It would have served the overriding objective more appropriately if the claimant had requested more time to provide her further particulars and then produced them more diligently, by reference to her original ET1. The claimant's list of issues will need to be carefully drafted and any existing errors should be removed.

- (19) The Tribunal has some sympathy with the respondent's position, although it cannot be said that it does not know what case it is to answer. It may be that the claimant will not be able to discharge the *prima facie* burden of proof which is placed upon her at the final hearing. It is not however possible to say at this stage, her claims have no reasonable prospects of success. The Tribunal is mindful of the authority of Anyanwu v South Bank Students' Union 2001 ICR 391 and of the guidance that it is a matter of public interest that discrimination cases are not struck out, unless it is obvious they will not succeed. Discrimination cases are often highly fact sensitive and there is here, different versions of events pleaded, that will require further and full examination. The Tribunal panel determining the claims at the final hearing will need to hear the evidence, see that evidence tested and to have reference to the documents.
- (20) For example, in respect of the victimisation claim, this Tribunal is simply not in a position to say whether or not, without hearing the evidence, the claimant did a protected act at a meeting in October 2018. She says she did. The respondent denies she did. It is not possible to say based upon the stance the parties have taken, whether or not there was a protected act. If there was a protected act, there is then the further consideration of whether the respondent subjected the claimant to a detriment because of that protected act. This is not something which can be assessed at this stage.
- (21) That is not to say that the Tribunal is of the view the claims will ultimately be successful. It cannot however, based upon the submissions made at this hearing, find that the discrimination claims have no or even little reasonable prospect of success (in view of that finding no deposit is ordered). The claimant having provided further particulars, may wish to revisit the claim as further particularised and to firstly ensure that it has been correctly particularised and secondly, whether she wishes to pursue all of her claims. The claimant does not have to pursue all of the claims she originally pleaded and she may wish to consider her position (documents having already been exchanged) after witness statements are exchanged.

Employment Judge Wright

7/2/2020