



EMPLOYMENT TRIBUNALS

Claimant **Mrs N Chadha**
Represented by **In person**
Respondent **Awill Hersi**
Represented by **Mr S Reyes (Solicitor)**

Employment Judge Brown

Open Preliminary Hearing held on 15 July 2020 by CVP

JUDGMENT

- 1. The claim is rejected under r12(1)(e) ET Rules of Procedure 2013.**

REASONS

1. This Open Preliminary Hearing was conducted remotely by CVP videolink. Members of the public could attend but none did.
2. The Hearing was listed to decide the following issues:
 - a. Whether the claim should be rejected under rule 12 of the Tribunal's Rules of Procedure on the grounds that the name of the Respondent on the claim form is not the same as the name of the Respondent on the early conciliation certificate.
 - b. Whether the claim should be struck out under rule 37 on the grounds that it has no reasonable prospect of success, or made the subject of a deposit order under rule 39 on the grounds that it has little reasonable prospect of success.

3. The Claimant brings a claim of sexual harassment. The Claimant is a sales assistant in Poundland. Her claim form states, "On 3rd November there was a [queue] of people I rang bell my manager Awill Hersi and my colleague came to serve customers. After queue got cleared by manager Awill Hersitold me Nidhi you should be Quick further to this I asked him I said, Am I not quick he replied looking at my back bottom. You are Quick there."
4. The Respondent to the claim is stated on the claim form as Mr Hersi, with Poundland Limited appearing as the address of the Respondent directly below. The Respondent on the ECC certificate is shown as Poundland Limited. The Employment Judge who vetted the file did not make any decision about the difference between the names of the Respondents shown there. No question of reconsideration of a decision therefore arises

The Parties Submissions – Respondents' Names Different

5. The Respondent contended that the claim should be rejected under *Rule 12 ET Rules of Procedure 2013*. It said that the Respondents' names were different in the claim form and the ACAS EC certificate, contrary to *Rule 12(1)(f) ET Rules of Procedure 2013*. The Respondent said that the difference was not minor and it was in the interests of justice to reject the claim, *rule 12(2A) ET Rules of Procedure 2013*.
6. The Respondent said that, unlike *Chard v Trowbridge Office Cleaning Services Ltd* UKEAT/0254/16, Mr Hersi was not the managing director and majority shareholder of the limited company, conducting the running of the company on a day-to-day basis. Mr Hersi was simply one manager in a very large company and was not, effectively, the company itself.
7. Ms Chadha told me that she intended to bring her claim against Poundland, not against Mr Hersi.
8. She said there was a minor difference between the two names and that it was in the interests of justice for the claim to proceed, as she had suffered real injury to her feelings and the claim should not be excluded on a technicality.

Relevant Law

9. *Rule 12 ET Rules of Procedure 2013* provides:

"12(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim or part of it may be,

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.”

10. In *Giny v SNA Transport Ltd* UKEAT/0317/16, the claimant mistakenly informed ACAS that the name of the prospective respondent was Mr S N Ahmed, and it was his name that appeared on the EC certificate. The claim form set out the correct name of the respondent, SNA Transport Ltd, of which Mr Ahmed was the sole director. The correct address appeared in both documents. An employment judge rejected the claim under r 12(2A), holding that the error was not a minor one. That decision was upheld by the EAT. The EAT held that on the facts of the case, there was no error of law on the part of the employment judge in deciding that the difference in names was not minor.

11. However, in *Chard v Trowbridge Office Cleaning Services Ltd* UKEAT/0254/16 (4 July 2017, unreported) the EAT reached a different conclusion. In *Chard* an employment judge rejected the claim because the name of the prospective respondent on the EC certificate was incorrectly described as 'Allister Belcher', an individual, whereas the name on the claim form was correctly described as 'Trowbridge Office Cleaning Services Ltd'. Mr Belcher was the managing director and majority shareholder of the limited company, and conducted the running of the company on a day-to-day basis. In practical terms, he was the company. In the EAT Kerr J concluded on the facts that it was 'incontestable' that the error was minor and that the interests of justice did not require the claim to be rejected. Kerr J said that, whilst the decision whether an error is minor is a matter of fact and judgment for a tribunal, when approaching this task tribunals should place 'considerable emphasis' on the overriding objective, in particular that aspect of dealing with cases fairly and justly which consists of 'avoiding unnecessary formality and seeking flexibility in the proceedings'. Kerr J said, 'the reference to avoiding formality and seeking flexibility does not just mean avoiding an intimidating formal atmosphere during hearings; it includes the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented' (para 63).

Discussion and Decision

12. Ms Chadha told me that she intended to bring her claim against Poundland, not against Mr Hersi.
13. In this case, on the face of the claim form, the Claimant could well have been bringing her claim against Mr Hersi personally. She complained specifically about her conduct towards her.
14. On the facts of the claim, Mr Hersi and/or Poundland could have been respondents in their own right, ss109 & 110 EQA 2010.
15. It was not in despite that Mr Hersi was simply one manager in a large company. Unlike *Chard v Trowbridge Office Cleaning Services Ltd* UAEAT/0254/16, Mr Hersi was not the managing director and majority shareholder of the limited company, conducting the running of the company on a day-to-day basis. He was not, in practical terms, the company.
16. Mr Hersi and Poundland were therefore not essentially the same entity, albeit that Poundland could be vicariously liable for Mr Hersi's actions as its employee.
17. I considered whether the error was minor and whether the interests of justice did not require the claim to be rejected. I did place considerable emphasis on the overriding objective, in particular that aspect of dealing with cases fairly and justly which consists of 'avoiding unnecessary formality and seeking flexibility in the proceedings'.
18. I took into account that avoiding formality and seeking flexibility does not just mean avoiding an intimidating formal atmosphere during hearings; it includes the need to avoid elevating form over substance in procedural matters, especially where parties are unrepresented.
19. However, in this case, I did not consider that this was a minor error. There was a substantial difference between the Respondents' names on the claim form and ACAS EC certificate. The Claimant named Mr Hersi individually on the claim and complained about his conduct towards her. The claim could easily be understood as against Mr Hersi, and not Poundland. Poundland might have a defence to the claim, but Mr Hersi could still be liable individually, s110 EqA 2010. Mr Hersi was a different legal person to Poundland and was not, in practical terms, the company.
20. Given all this, I considered that it was in the interests of justice to reject the claim. *Rule 12(1)&(2A) Et Rules of Procedure 2013* require a claim to be rejected if the names of the respondents on the ACAS EC certificate and the claim form are different, unless the

error is minor and it is not in the interests of justice to reject the claim.

Strike Out / Deposit Order

21. The Respondent also contended that the claim had no, or little, reasonable prospect of success, and so should be struck out or made the subject of a deposit order.
22. I went on to consider that contention, if I was wrong to consider that the claim should be rejected.
23. Mr Reyes, for the Respondent, argued that the Claimant's allegation was illogical and did not make sense as form of sexual harassment.
24. He contended that there was no reasonable prospect of the Tribunal finding that the statutory words of s26 *EqA 2010* were satisfied in this case.
25. The Claimant told me that, previously, Mr Hersi had told her that she needed to go on a diet.
26. She said that she understood that, "You are quick there", was a reference to her large body size and therefore amounted to sex harassment.
27. The Claimant told me that Mr Hersi had originally said that she was not quick at serving customers. She said that managers often talked about needing to be quick at serving customers.
28. I asked the Claimant whether she was alleging that "quick", or "you are quick" had any connotations, in everyday speech, with body shape or sex. She confirmed that she was not alleging that. She asked, rhetorically, what else Mr Hersi could have meant. She said, as she had done in her claim form, that he looked at her body, when saying "you are quick there".

Relevant Law

29. An Employment Judge has power to strike out a claim on the ground that it has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37*. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said:

“The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word ‘no’ because it shows that the test is not whether the Claimant’s claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recensions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect”.

30. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126 ; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46.

31. Discrimination cases should only be struck out in the very clearest circumstances, *Anyanwu v Southbank Student’s Union* [2001] IRLR 305 House of Lords.

32. S26 EqA 2010 provides: “**26 Harassment**

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of—
 - (i) violating B's dignity, or
 - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- (2) A also harasses B if—
 - (a) A engages in unwanted conduct of a sexual nature, and
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b).
- (3) A also harasses B if—
 - (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
 - (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
 - (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.
- (5) The relevant protected characteristics are—

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.”

Discussion and Decision

33. I considered the Claimant’s claim and took it at its highest.
34. The Claimant told me that, previously, Mr Hersi had told her that she needed to go on a diet. She said that the words “You are quick there” was therefore a reference to her large body size and amounted to sex harassment under *s26 Equality Act 2010*.
35. The Claimant makes one allegation against Mr Hersi. The allegation is of a single sentence, said on one occasion, accompanied by looking at the Claimant’s body.
36. The Claimant does not dispute that, during the exchange between the Claimant and Mr Hersi, Mr Hersi originally used the word “quick” to refer to her speed at serving customers. She told me that the word “quick” was used regularly in the store, in that context.
37. I therefore asked the Claimant whether she was alleging that “quick” had any other connotations, in every day speech, with body shape, or sex. She confirmed that she was not alleging this. She asked, rhetorically, what else Mr Hersi could have meant. She said that he looked at her body when saying the words.
38. The Claimant’s allegation did not make sense. Mr Hersi’ alleged words, on their own, had no relation to sex and were not of a sexual nature. Nor, indeed, did they have any apparent connection to large body size.
39. The Claimant is therefore alleging that Mr Hersi looked at the Claimant’s body and said a single sentence which did not make logical sense as a comment on her body. The words he allegedly used had no overt, or, in the circumstances, potentially implied, reference to large body shape, or sex.
40. On those facts, I considered that the allegation had no reasonable prospect of success as an allegation of sex harassment.
41. I considered that there was no reasonable prospect of a Tribunal deciding that the alleged conduct related to a relevant protected characteristic, or amounted to conduct of a sexual nature.

42. I also considered that there was little reasonable prospect of success in the Claimant contending that the alleged conduct had the purpose or effect of creating the prohibited environment under s26 EqA 2010. "Purpose" refers to the alleged perpetrator's intention. From the words described by the Claimant, there was no such apparent intention. For the conduct to have the prohibited effect, whether it is reasonable for the conduct to have that effect must be taken into account. For the purposes of this Hearing, I assumed that the Claimant did perceive to conduct to have had the prohibited effect. However, I considered that there was no reasonable prospect of a tribunal concluding that it was reasonable for it to have had that effect, for the same reasons as I have set out above.

43. I would have struck the claim out, as having no reasonable prospect of success, had I not already decided that it should be rejected.

Employment Judge Brown

London Central 15 July 2020

20 July 2020

Date sent to parties

For the Tribunal Office
