Reserved judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
	AND
Ms M Glogowska	F A Gill Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Birmingham **ON** 25th September 2020

EMPLOYMENT JUDGE A Richardson

Representation
For the Claimant: Ms R Carrington, Lay Representative
For the Respondent: Mr A Johnston, Counsel

JUDGMENT

The judgment of the Tribunal is that

The Claimant's claims of discrimination under Ss13, 26 and 27 because of her race (Polish) have no reasonable prospect of success and are struck out under Rule 37 ET (Constitution & Rules of Procedure) Reg 2013 Schedule 1.

REASONS

Background and Issues

1. The claimant was employed as a general assistant by the respondent company, a meat manufacturer from 12th March 2012. In 2013 a Ms Fudali, a Polish national, became her supervisor. The claimant alleged that she was bullied and harassed by Ms Fudali because the claimant is Polish and has poor English language skills. Claims are brought under S13 (direct discrimination), S26 (harassment) and S27 (victimisation) of Equality Act 2010. The claimant also claimed holiday pay.
2. The claims were listed for an open preliminary hearing on 7th February 2020 to determine whether any of the claims were filed out of time. I conducted the preliminary hearing and found that there was no time issue in respect of holiday pay. I extended time on a just and equitable basis for the claims to be heard. I ordered further information to be provided by the claimant in relation to her claims of discrimination. A further case management preliminary hearing was conducted by EJ Gaskell on 15th May 2020. Holiday pay issues had been resolved and dismissed on 15th May 2020.
3. On 15th May 2020 EJ Gaskell order a Preliminary Hearing to be heard on 25th September 2020. The issues to be determined were:

(1) Whether the claimant's claims or any part of them should be struck out as having no reasonable

prospect of success;

(2) In the alternative whether as a condition of continuing with the claims or any part of them, the Claimant should be ordered to pay a deposit not exceeding £1000 on the grounds that the claims have little reasonable prospect of success.

Proceedings, evidence and submissions

4. The Hearing was conducted by the parties attending by video conference (CVP). It was held in public with the Judge sitting in open court within the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not possible in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and it was in accordance with the overriding objective to do so.
5. The proceedings were conducted with the assistance of an interpreter in Polish who was sworn in at the commencement of the Hearing.
6. The claimant submitted a witness statement which was taken at its highest for the purposes of this Preliminary Hearing without the need for the claimant to give oral evidence. The respondent submitted a bundle of documents and written submissions. I also I received a witness statement bundle (claimant's evidence).
7. The claimant's representative, Ms Carrington, complained that she had received an electronic copy of the respondent's hearing bundle today, on the morning of the Hearing. The respondent had in fact sent it to her the day before; a copy of the Mr Johnston's submissions had been sent to her today. Ms Carrington complained that not only had she had insufficient time to read the documents but also she could not print them out because her printer was not working and because she had insufficient time to read the documents. She could not read them on the screen and at the same time participate in the hearing, because she only had one screen; she therefore required a hard copy of the bundle.
8. We adjourned for 40 minutes to allow Ms Carrington to print out the bundle as she said she would attempt to get her printer working. At the appointed time of 11.30am Ms Carrington confirmed she had not been able to print out or read either the bundle or the authority of **Nikolova**. In fact she complained again she had still not received the respondent's bundle.
9. Mr Johnston confirmed that the hearing bundle remained identical to the bundle of documents that the claimant already had in her possession for a previous hearing and that the only difference between that previous bundle and the present bundle, was the lack of an earlier case management order to which no reference would need to be made today. It was explained to Ms Carrington that she did in fact already have a hard copy of the documents contained in the latest bundle.
10. Ms Carrington agreed that she had the earlier bundle excluding EJ Woffenden's case management order and also confirmed she would attempt to print out the respondent's submissions and also the authority supplied by Mr Johnston.
11. I explained the issues before me in this Hearing to Ms Carrington and explained the course that the proceedings would follow - which was that I would hear Mr Johnston's submissions first. We would then adjourn for lunch and I would hear Ms Carrington's submissions after lunch. I proposed to give her additional time to read the authority and to prepare her submissions.
12. We adjourned again to allow Ms Carrington to read the respondent's authority **Nikolova M&P Enterprises London Ltd UKEAT/0293/15/DM.**
13. On reconvening the hearing at 12.23pm Ms Carrington confirmed that she had read all that she needed to.
14. Mr Johnston's submissions were in writing and I do not repeat them here. After I heard Mr Johnston's submissions I gave Ms Carrington the opportunity to check and confirm that she had noted all that she needed of Mr Johnston's submissions and to seek clarification on any issue which she did. Ms Carrington queried a passing reference made by Mr Johnston to a S19 claim. As that is not pleaded, I suggested that Ms Carrington should focus on preparing her submissions.
15. Ms Carrington requested an hour for lunch and an additional 40 minutes to prepare her submissions. We adjourned at about 1.05pm and reconvened the hearing at 2.45pm.
16. Having accepted the claimant's witness statement at its highest for the purposes of this Hearing, I do not set out Ms Carrington's recital of the incidents of alleged bullying/harassment contained in Ms Glogowska's witness statement.
17. Ms Carrington's additional submissions can be summarised as follows:

17.1 **Nikolova** cannot be compared to the claimant's case because Ms Nikolova was of a different nationality and did a different job to the claimant. What happed to Ms Nikolova was different to what had happed to the claimant.

17.2 Ms Fudali bullied and discriminated against other people of all nationalities and even new starters with the company. After an hour on their first morning at work, some left and did not return.

17.3 There were about ten Polish people and about 15 English people and a Romanian cleaner working for the respondent company. Ms Fudali discriminated against anybody she felt could not defend themselves.

17.4 Ms Fudali victimised all people from different countries but would bully Polish people because she knew that all Polish people could not speak English and could not defend themselves in English.

17.5 A worker has rights to employment and protection from unlawful discrimination and whistleblowing. And every time the claimant complained to management about the treatment she received from Ms Fudali, she was treated worse.

17.6 Ms Fudali did not just harass the claimant – she harassed all workers and even new workers. Anyone who spoke good English would not be harassed. Ms Fudali picked on people with a poor knowledge of English and exploited their lack of English language, assisted by her colleague Ms Licel Bateman. Ms Carrington submitted *"[Ms Fudali] bullied anyone who had a weak temperament or were not physically able to defend themselves; if they were weak, quietly spoken, or they didn't have a good knowledge of English, any nationality, but mostly she picked on the Polish nationals because she knew their weakness in English."*

Law

18. A concise statement of the applicable law is as follows.

18.1 **Rule 37(1)(a)** of **The Employment Tribunal Rules of Procedure** ("the ET Rules") provides:

(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

18.2 **Rule 39(1)** of the ET Rules provides:

(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.

18.3 On the question of strike out I was referred to several well-known authorities including:

Anyanwu v South Bank Students' Union [2001] IRLR 405; HL) which established that the power to strike out a claim under **Rule 37** should only be exercised in rare circumstances and claims should not, as a general principle, be struck out on this ground where the central facts are in dispute. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances.

QDOS Consulting Ltd v Swanson [2002] IRLR 688 EAT): strike out ought only to be ordered "in the most obvious and plain cases" (per Judge Serota QC)

Mechkarov v Citibank N ILEAT/0495/11: five principles to be taken into consideration on a strike out application (Mitting J):

> "(1) only in the clearest case should a discrimination claim be struck out;
> (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) the Claimant's case must ordinarily be taken at its highest;
> (4) if the Claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out, and
> (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

19. **Section 13(1)** of the **Equality Act 2010** (**"EqA"**) (direct discrimination) provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than a treats or would treat others.

20. **Section 26(1)** and **(4)** of the **EqA** (harassment) provide:

(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.

…

(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.

21. **Section 27(1)-(3)** of the **EqA** (victimisation) provide:
(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

22. I remind myself of the burden of proof under **Section 136(1) – (3) EqA 2010** and **Madarassy v Nomura International plc [2007] IRLR 246, CA:** The Claimant must prove facts from which a Tribunal could conclude, in the absence of an adequate explanation, that the Respondent committed a contravention of the Act.
23. I also remind myself that mere unreasonable treatment is not enough to establish a prima facie case that the employee was treated less favourably because of the protected characteristic: **Law Society and others v Bahl [2003] IRLR 640, EAT**

Conclusions

24. In reaching my conclusions I have taken into account the authorities referred to above**.**
25. Having read the claimant's witness statement which, for the purposes of this Hearing, has been taken at its highest, it is clear that the claimant describes in her witness statement, in the words of Mr Johnstone, some deeply unpleasant treatment which is undoubtedly on her evidence akin to bullying.
26. The claimant's evidence is that she was treated inappropriately and unkindly by her supervisor without any appropriate timely intervention by the company's more senior management. The claimant cited many incidents of bullying by Ms Fudali or her assistants (all of whom were Polish nationals), and lack of action by management in ensuring its staff were treated with dignity and respect.
27. However the claimant does not explain in her witness statement why she believes she was treated this way. In her further and better particulars dated 15th March 2020 the claimant states that the claimant was chosen for mistreatment by Ms Fudali because the claimant could not speak English very well. She states that Ms Fudali "*chose[s]) week [sic] people to harass, discriminate and victimise. From the beginning she always chose weak people who could not defend themselves. English employees were treated with respect and Polish people who could not defend themselves were treated the worst".* In her submissions set out in summary above, we see that the claimant believed that she was treated in this way by Ms Fudali because of her poor English language skills and for this reason she could not defend herself.
28. Dealing first with the question of direct discrimination because the claimant is Polish, it is clear from her submissions that the perpetrator of the alleged discriminatory treatment, Ms Fudali, treated many staff of racial backgrounds including English, Bulgarian, and Polish in the same was she treated the claimant. The claimant's own case is that the treatment she received from Ms Fudali was because she had poor English language skills. Some Polish workers were not mistreated by Ms Fudali – the claimant herself claims that all workers with poor English language skills or who were of a quiet disposition and did not or could not stick up for themselves, whether or not Polish and indeed including some English workers, were treated by Ms Fudali in the same way that Ms Fudali treated the claimant.

29. In the circumstances the claimant has not established a protected characteristic for the purposes of the Equality Act 2010 in respect of S13 direct discrimination and therefore cannot establish a comparator for the purposes of S13; she cannot establish that any mistreatment she received was in respect of her nationality. It was in respect of her language skill in English. That is the case the claimant put forward.
30. The same principal applies to the claimant's allegations of harassment under S26 Equality Act. The claimant's own case is that her mistreatment by Ms Fudali was because of the claimant's lack of ability to speak English, not because she is Polish. Not all of the respondent's Polish employees were unable to speak English. Not all of the respondent's Polish employees were mistreated, only those, along with other nationalities including English staff, with poor English language skills or were of a quiet disposition, were subjected to Ms Fudali's management style. The criterion for Ms Fudali's treatment of staff was not their nationality but their ability to speak English.
31. In respect of S13 and S26 claims therefore, the claimant has not come close and, it appears, will not come close to establishing that the reason for the treatment she received from Ms Fudali was because she was Polish. I find that on the basis of the pleadings, including further information submitted, the claimant's amended witness statement and the supporting statements of other witnesses, she has no reasonable prospect of success in establishing her complaints of direct discrimination and harassment were because she is Polish when she herself says the reason it was because she does not have good English language skills. The unreasonable treatment which the claimant recounts in graphic detail is not discrimination unless it occurs because Fucale's of a protected characteristic of the claimant. Inability to speak good English is not a protected characteristic.
32. I find that this is one of the rare cases where the claimant's claim should be struck out because it has no reasonable prospect of success. It is plain that the claimant's complaints cannot succeed. The claimant has not adduced any evidence which would enable a Tribunal to conclude that in the absence of any other explanation the treatment of the claimant was because of her race. Her own evidence is that it was not because of her race but her lack of English language skills. The claimant's claim is, in essence, misconceived.
33. With regard to the victimisation complaint, the claimant relies on two acts of alleged victimisation. The first protected act was made by letter addressed to a director on 19th December 2018 when the claimant complained of Ms Fudali and another Polish member of staff, M Pienkeiwicz bullying her. The alleged first act of victimisation was however two months before, on 12th/15th October 2018. On this occasion the claimant was assured that an independent interpreter in Polish would be available for a meeting with management on 15th October, but in the event, at the meeting, another Polish employee, Ms Kaplinska, in whom the claimant had no confidence, was present to translate. As the alleged act of victimisation predates the protected act, this claim cannot be made out.
34. The second alleged act of victimisation occurred when the claimant had been informed that her Christmas 2018 parcel from the respondent was available for her to collect. The claimant asked a friend to phone the respondent to ask if a friend could collect the parcel for her. The respondent agreed but the claimant did not receive the Christmas parcel. No further explanation/evidence is given.
35. There is no evidence that the respondent refused to hand over the claimant's Christmas parcel to her agent, or if it did, why. There is no evidence whether the claimant's agent turned up at all to collect the parcel; or whether the agent collected the parcel but acting in his or her own interests, took the Christmas parcel and did not deliver it to the claimant. In the circumstances the claimant has not established that the respondent has victimised the claimant.
36. In summary, and very much bearing in mind the clear guidance in **Anyanwu** that it is in a very rare case that a claim of discrimination under the Equality Act 2010 will be struck out, I conclude that each one of the claimant's claims has no reasonable prospect of success and this is one of those rare occasions when a discrimination claim should be struck out. For all the reasons above, I find that the claimant has no reasonable prospect of success in establishing her complaints. The application to strike out under Rule 37 succeeds. The claimant's claims are dismissed.

Employment Judge A Richardson
Signed on 26th October 2020