



EMPLOYMENT TRIBUNALS

Claimant

Ms R Thomas

v

Respondent

Expansys UK Limited

Heard at: Cambridge (by Cloud Video Platform) **On:** 19 October 2020

Before: Employment Judge Finlay (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr O Isaacs, Counsel

JUDGMENT on PRELIMINARY HEARING

The complaints of

1. direct discrimination because of race;
2. direct discrimination because of sex;
3. harassment; and
4. victimisation

are struck out under Rule 37(1)(a) on the basis that none of them has any reasonable prospect of success.

ORDER

The Respondent's application for a Deposit Order in respect of the Claimant's complaint of unfair dismissal is refused.

REASONS

Introduction

1. This claim had come before me on 23 March 2020. I did not have access to the full case file today, but from memory, 23 March 2020 was to be the first day of the Final Hearing. However, it had been converted into a Telephone Case Management Hearing due to the onset of the Coronavirus restrictions.

2. On 20 March 2020, the Respondent had applied to strike out the complaints of discrimination and for a deposit order in respect of the complaint of unfair dismissal. On 23 March 2020, I listed those applications for hearing at the Preliminary Hearing today and I also relisted the Final Hearing for four days in March 2021.
3. The Hearing today was listed to be heard by Cloud Video Platform (CVP). However, the Claimant (who appeared in person) was not able to access the CVP and attended by telephone. She was content for the Hearing to proceed on this basis.
4. Mr Isaacs for the Respondent offered to disable his camera so that he was in the same position as the Claimant. This was done, such that I could hear, but not see, the parties. This situation would have been reviewed had a member of the public requested access to the Hearing, but this did not happen.

History of claim

5. The history is that the Claimant presented her claim in April 2017. It was accompanied by, or followed shortly afterwards by, two documents: one entitled "In-depth reasons of my claim" and the other entitled "Claimant's Chronology". I was not provided with the full version of the former, but the Claimant had included extracts which she referred to me. The latter document was included in the Bundle before me at pages 16 to 39.
6. The first Preliminary Hearing took place on 3 May 2017. Having heard from the Claimant and Counsel on behalf of the Respondent, the Employment Judge considered that the claim as it then stood contained a complaint about unfair dismissal and a complaint about that dismissal being either an act of race discrimination or sex discrimination. In addition, the Employment Judge noted that the Claimant had made a reference to harassment and victimisation on her claim form. The Claimant was ordered to provide further particulars setting out the basis on which she contended that her dismissal was an act of race discrimination and / or sex discrimination and setting out the basis upon which she contended that her dismissal was victimisation and / or harassment. Specifically, the Claimant was ordered to explain the nature of the protected acts on which she relied if alleging victimisation. Similarly, she was ordered to explain the basis on which she said that she was harassed, specifying the protected characteristic to which the alleged harassment related. The Employment Judge determined that the Claimant did not need to make an application to amend her claim in order to bring complaints of harassment and victimisation.
7. The Claimant then did provide further and better particulars running to some 60 pages. This document was in two parts, the first relating to the dismissal which was included in full within the Bundle before me. The second part related to other claims which the Claimant wished to bring

including claims of age and disability discrimination and also complaints of discrimination relating to incidents prior to her dismissal.

8. There was then a further Preliminary Hearing on 4 January 2019. This Preliminary Hearing was listed to consider the Claimant's application to amend her claim to include the additional complaints referred to in the previous paragraphs, an application by the Respondent to strike out the claim or to make a Deposit Order and an application by the Claimant to strike out the response. The application to amend the claim failed such that the complaints before the Tribunal are as set out in paragraphs 10 – 14 of the Case Management Orders of 4 January 2019. Those are the complaints of unfair dismissal (s.98 of the Employment Rights Act 1996), direct sex discrimination, direct race discrimination, harassment and victimisation.
9. The Respondent's application to strike out the claims of discrimination also failed. The Employment Judge pointed out that he could find nothing in the 60 page further and better particulars which supported those complaints and no apparent protected act to support a claim of victimisation. There was nothing in the Claimant's claims or in her further and better particulars providing any basis for a finding that the dismissal was an act of race or sex discrimination nor harassment related to sex or race or an act of victimisation because of a protected act. He stated that those complaints were merely asserted without any supporting evidence which would not provide a reasonable prospect of success. For those reasons, he made Deposit Orders in respect of the four discrimination complaints.
10. Finally, and for the sake of completeness, I note that the Claimant's application to strike out the response also failed.
11. In October 2019, the parties exchanged witness statements. The Claimant has provided a witness statement from herself and six other witness statements from friends and family. Somewhat remarkably, the Claimant's witness statement does not mention her dismissal at all. Similarly, the statements of her friends and family do not refer to the act of dismissal and it would appear that none of those other witnesses have any direct first-hand knowledge of the Claimant's dismissal. Notably, those witness statements from the Claimant's witnesses do not suggest that at any point, the Claimant told her friends and family that she was the victim of any sex or race discrimination. This is consistent with the other documents before me and it would appear that the Claimant did not allege to the Respondent that she had been the victim of sex or race discrimination until she commenced this litigation. For the most part, the Claimant's witness statement repeats her narrative about a catalogue of events which occurred during her employment between 2014 and June 2016. These events are described by the Claimant as allegations of harassment, bullying and victimisation, but what is lacking in the witness statement, as in the claim form and other documents, is any connection between those events and the Claimant's sex or race. The Claimant does

not explain why she considers that those events (or indeed her dismissal) relate to or were actioned because of her sex or race.

12. It is this lack of detail which led the Respondent to make its second application to strike out the complaints of discrimination. The Respondent acknowledged that this was an unusual step, but considered it justified in the light of the witness statements produced by the Claimant. In brief, the Respondent contended that based on the pleadings, the other documentation provided by the Claimant and her witness statements, the complaints of discrimination could not possibly succeed.
13. The Respondent provided witness statements from Mr Clive Capp, the Dismissing Manager and Mr Stephen Vincent, who would have heard an Appeal by the Claimant. Mr Capp's witness statement deals with the process leading up to the Claimant's dismissal and the thought processes behind his decision to dismiss. He has also provided a supplemental statement in response to additional documentation disclosed by the Claimant.
14. The response can be summarised from the Grounds of Resistance and Mr Capp's first statement. The Respondent's case is that the Claimant was dismissed for a reason relating to her conduct, which is a potentially fair reason under s.98 of the Employment Rights Act 1996. In a nutshell, one of the Claimant's colleagues by the name of Tom raised a grievance against her arising from an incident which was said to have taken place on 31 May 2016. The Respondent's case is that the Claimant declined to engage in the investigatory process with the result that she received a final written warning for her failure to do so on 13 June 2016. It is common ground that she did not appeal that final written warning. The Claimant was then off sick from 14 June 2016 for work related stress and did not return to work. The Respondent's case is that the Claimant failed to engage with the Respondent during her absence such that on 21 September 2016 she was invited to a disciplinary hearing due to lack of communication and co-operation during her absence and lack of communication and co-operation with regard to the substance of her colleague's grievance. The Respondent says that the Claimant failed to attend this disciplinary hearing and failed either to provide evidence to say that she was unfit to do so, or to allow the Respondent to obtain such evidence. The Respondent says that it then conducted the hearing in the Claimant's absence and found the charges against the Claimant proven. Taking into account the final written warning, the Respondent dismissed the Claimant.
15. The Claimant's submitted a written response to the applications made by the Respondent in March 2020. This response comprised a nine page document plus 12 appendices being extracts from previous documents submitted by her and extracts from two cases (Anyanwu v South Bank Student Union and Commission for Racial Equality [2001] UK HL14 and Chesterton v Nurmohamed [2017] EWCA Civ 314. All of those documents were included within the papers before me. The salient points are that the

Claimant asserted that her dismissal was unfair because there was no fair process followed and because there was not an independent and impartial person assigned to hear and to Chair the disciplinary and appeal meetings. In relation to the complaints of discrimination, the Claimant referred back to the previous incidents already referred to but did also give details of two protected acts relied on in support of her claim of victimisation, being a witness statement provided for an incident which took place with another employee of Asian heritage and the raising of issues of work in what she described as her grievance to HR made on 2 June 2016. Again, there is a dearth of information or evidence relating to any connection between the treatment afforded to the Claimant in her dismissal and before and her sex or race. There is also a lack of information or evidence to suggest any cause or connection between the protected acts and the dismissal.

The Claimant's case

16. The Claimant is a litigant in person. She has had the benefit of legal advice throughout the process on what she describes as a 'piecemeal' basis, but it is apparent that a number of the documents including the claim form and her witness statement were written by her.
17. It is extremely difficult to discern the full detail of the Claimant's case from the pleadings, her other documents or the witness statements. It is, however, not unusual for an unrepresented party to struggle to articulate their case in pleadings, particularly where complex technical matters such as discrimination are involved. The Tribunal does not expect the same level of pleading from an unrepresented party as from a party represented by experienced legal advisors.
18. For these reasons, I spent a considerable amount of time trying to get to the bottom of the precise nature of the Claimant's complaints. In all, she spoke for well over an hour and answered my questions willingly and openly. From what she told me, added to what I had read, I was able to identify the grounds for complaints and summarise them as follows.

The Claimant's dismissal

19. The Claimant told me that she believes that her dismissal was unfair for a number of reasons. Those reasons are:
 - 19.1 Mr Capp was not an appropriate person to conduct a disciplinary hearing against her. This is for two reasons: firstly, he is related to the proprietor of the business and therefore cannot be independent or impartial; secondly, he had called her a liar in February 2016. I add here that the Claimant accepts that she did not complain about Mr Capp's appointment at the time, although she says that she was unwell and apparently overwhelmed with what was happening to her.

- 19.2 The Claimant's dismissal was unfair because of all of the things which happened to her up to June 2016.
- 19.3 The final written warning (and hence the dismissal) was based upon a complete fabrication. There was no incident on 31 May 2016 involving her and her colleague Tom. I would add that it would appear that there was an incident between the two but the Claimant believes that it took place on 2 June 2016 and not 31 May 2016.
- 19.4 The Claimant was bombarded with communications from the Respondent.
- 19.5 The Respondent should have waited until the Claimant was fit enough to attend a disciplinary hearing.
- 19.6 The Respondent should have given the Claimant more time to prepare her grounds of appeal.
- 19.7 It was unfair that the Claimant had been dismissed for matters relating to the investigation of Tom's grievance whereas her own grievance (made to Jessica in HR on 2 June 2016) had not been investigated by the Respondent at all.
20. I asked the Claimant specifically why she believed that Mr Capp had taken the decision to dismiss her. She was very clear in her answer. The reason she gave is that Mr Capp was aware of the incompetence of the Claimant's colleagues Tom and Chris and was also aware that the Claimant would expose that incompetence to senior management. The Respondent is the result of a merger between two separate companies and Mr Capp, Tom and Chris are from the same side of that merger. Mr Capp was effectively looking after his former colleagues with whom he had good relationships and was seeking to ensure that their incompetence would not be revealed by the Claimant.
21. I asked the Claimant whether she believed Mr Capp would have dismissed someone threatening to expose the incompetence of Tom and Chris had that person been Caucasian and / or male. She said that that person would not have been dismissed. I questioned how Mr Capp could then have achieved his objective of covering up the incompetence of Tom and Chris if a person threatening to expose them had not been dismissed. The Claimant was not able to explain this to me.
22. I asked the Claimant whether there was anything else, apart from the fact that Chris and Tom are male and / or Caucasian, which led the Claimant to believe that the Claimant's sex or race was a motivating factor in Mr Capp's decision to dismiss her. What the Claimant said was that 'maybe' they had all taken a dislike to her because of her afro Caribbean ethnicity or 'maybe' they did not like her culture. In relation to her sex, the Claimant said that Mr Capp was always close to the males. His relationships were with those from the other company (to the merger) who were 90% male.

23. Turning to the complaint of victimisation and protected acts, the Claimant's case is that there were three protected acts, or perhaps more correctly that there were three series of protected acts. The first is the numerous complaints she says that she made to her colleague Chris throughout her employment, both in writing and oral. These were complaints about the way in which her colleagues were treating her, but the Claimant acknowledged that she did not say in those complaints that she believed that her colleagues' behaviour was related to her sex or her race.
24. The second series of protected acts commenced with her meeting with Jessica in HR on 2 June followed by an email to Jessica on 8 June and a letter of 10 June. In her response to the Respondent's application, the Claimant had included an extract from her notes of the meeting with Jessica on 2 June. Those notes do refer to harassment, bullying and victimisation, but not specifically in relation to sex or race. The email and letter make no reference to sex or race.
25. The third protected act relied on is the statement to HR referred to above. This was made on 8 August 2014 and was at page 214 in the Bundle before me. It appears to have been a witness statement made by the Claimant commenting on the behaviour of a colleague who may or may not have been of Asian ethnicity – the Claimant did not know. It is extremely difficult to see how this statement could constitute a protected act for the purposes of a victimisation claim and the Claimant has not given any reason as to why the Respondent should dismiss her for making this statement, two years later.

Application to strike out

26. Considering whether to strike out a complaint under Rule 37 is a two stage process. Firstly, I must conclude that the complaint has no reasonable prospect of success and secondly, I must consider whether to exercise the discretion to strike it out – the rule is of a permissive nature.
27. For a party to establish that the other party's case has no reasonable prospect of success is a very high bar. The Tribunal should only strike out a claim on this basis in exceptional cases, particularly where the complaints are of discrimination. There is a public interest in having allegations of discrimination heard.
28. In considering the application, I have looked at the Claimant's case at its absolute highest and assumed that any factual dispute would be resolved in favour of the Claimant. I have been conscious throughout that the Claimant is a litigant in person and as such, is not expected to produce pleadings or indeed a witness statement of the same quality of a party represented by experienced legal professionals. I have also taken into account that from 14 June 2016 onwards, the Claimant was not well, suffering from work related stress. She remains unwell to this day.

29. Nevertheless, I have concluded that the complaints of discrimination have no reasonable prospect of success. I have looked beyond the witness statements and indeed the other documents provided by the Claimant and considered carefully what she told me today. Whilst it is correct to say that discrimination is rarely overt and direct and is often subconscious, the Claimant is not able to point to anything beyond a difference in race and sex to support her contention that her protected characteristics were either the reason for her dismissal or related to the alleged harassment. It is not enough for the Claimant to say that 'maybe' the Respondent took against her because of her ethnicity or culture. It is not enough for her simply to say that her colleagues such as Chris and Tom are Caucasian and male. There must be something else, however small, beyond the difference in race and / or sex. I have asked myself whether, on the Claimant's case at its highest and resolving any factual disputes in her favour, there is enough for the Tribunal to reverse the burden of prove, but there simply is not. It is not as if the Claimant had complained of race or sex discrimination at any point before these proceedings. She may have been the victim of unfair treatment at work and her dismissal may well have been unfair, but there is nothing upon which a Tribunal could form a prima facie case of discrimination on the basis of race or sex had occurred.
30. I also consider it appropriate to exercise my discretion to strike out the claims. The claim was presented in April 2017 and the Claimant has had over three years in which to explain why she considers her treatment was due to race or sex. She has not done so, despite hundreds of pages of documents.
31. The Respondent's application therefore succeeds, and the complaints of discrimination are struck out.

Application for a deposit order – complaint of unfair dismissal

32. In considering whether to order a deposit, the first question is whether the complaint has little reasonable prospect of success. On the basis of the claim form, witness statements and other documents, I consider that it does not. However, the Claimant has been able to explain her case in far more detail to me today and there are a number of matters which would need to be considered by the Tribunal in determining whether or not the dismissal was fair under s.98 of the Employment Rights Act 1996, as set out in paragraph 19 above. There is clearly material upon which a Tribunal could conclude that a dismissal was unfair. Taking into account what she told today, I cannot conclude that this complaint has little reasonable prospect of success. I have therefore refused the application for a deposit.

Case Number: 3300166/2017

Employment Judge Finlay

Date: 1 November 2020

Sent to the parties on:

16/11/2020

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For the Tribunal Office