EMPLOYMENT TRIBUNALS

Claimant: Mrs C Browne

Respondent: Brighton & Sussex University Hospital NHS Trust

Heard at: Bristol (by video) **On:** 16 November 2020

Before: Employment Judge O'Rourke

Representation
Claimant: Mr Ibekwe – lay representative
Respondent: Mr Kibling - counsel

PRELIMINARY HEARING JUDGMENT

Subject to Rule 37(1)(a) of the Employment Tribunal's Rules of Procedure 2013, the Claimant's claim of victimisation has no reasonable prospects of success and is therefore struck out.

REASONS

Background and Issues

1. The Claimant, a black woman, is employed by the Respondent and has been for ten years, latterly as a ward manager. She is a member of a local Black and Minority Ethnic (BME) network, which she describes as '*an anti-racist organisation and membership which is tasked to protect the rights, interests and welfare of its membership'* [14].

2. On 8 July 2019, an article was published in the Health Service Journal (HSJ), which reported comments made by the Respondent's chief executive, Marianne Griffiths, at an HSJ-organised event, which the Claimant considered an act of victimisation, hence this claim.

3. The Respondent applied for the claim to be struck out, as having no reasonable prospects of success, or, in the alternative for a deposit order to be made.

4. While the particulars of claim, but not the claim form had named Ms Griffiths as a second respondent and a subsequent application was made to add her as a respondent, Mr Ibekwe confirmed, at this hearing that such an application was no longer pursued. This was on the basis of an assurance from Mr Kibling that the existing respondent, the Trust, would accept all such liability as may be found in this matter for any acts of Ms Griffiths and has not and will not seek to rely on any statutory defence, such as contained in ss.109-111 of the Equality Act 2010 (EqA).

5. Mr Ibekwe also confirmed that he no longer sought to rely on past reference to the EU Race Directive, restricting his submissions to the EqA.

6. Finally, there was no dispute (at least for the purposes of this hearing) that applying **EBR Attridge LLP v Coleman [2010] ICR 242 UKEAT**, there could be, in principle, a claim of associative victimisation, based, as the Claimant asserted, on protected acts carried out by other members of her BME group.

7. The issue for me, therefore, to decide is whether there are no reasonable prospects, or in the alternative, little reasonable prospects of the Claimant establishing whether:

    a. There is a causal link between the protected acts and any detriment said to have been suffered by her; and

    b. Did the Claimant, in fact, suffer a detriment?

The Law

8. Section 27(1) EqA states:

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) ….

9. I was referred to various authorities by both representatives, to which I shall refer below, as I consider necessary and relevant.

The Facts and Submissions

10. I received written submissions and heard oral submissions from both parties.

11. By way of background to this matter, it was common ground that various Employment Tribunal claims have been brought against the Respondent by members of the BME group. Mr Kibling made particular reference to claims brought by a Dr Lyfar-Cisse, which included claims of discrimination, which had been unsuccessful, although Mr Ibekwe said that not all the Doctor's claim had been unsuccessful and in any event, other discrimination claims, by other members of the Group, were pending in the Tribunal.

12. The HSJ article stated the following (in relation to a meeting of chief executives that Ms Griffiths had attended):

'This year's top chief executive roundtable looked at these difficult issues around diversity and inclusion – and what the NHS and those at the top of organisations within it can do to create a more diverse leadership, which reflects the communities it serves.

Difficult situation

But the session started with Marianne Griffiths, chief executive of both Western Sussex Hospitals Foundation Trust and Brighton and Sussex University Hospitals Trust, talking about the very difficult situation she had inherited at BSUH where relations with some of its BME workforce were very poor – she said she had not realised the extent of "the damage done" to the organisation. This had been long-standing and toxic, with what she described as "sticking plaster" solutions in place and had led to a number of employment tribunal cases.

How do we challenge our staff when they make those comments? Do we reflect the community we serve or do we challenge the community we serve? I think we have a responsibility to challenge some of that.

When Ms Griffiths was appointed nearly three years ago, she decided to address the issues and asked Yvonne Coghill, director of implementation for the Workforce Racial Equality Standard, for assistance. She found there were issues which were not being addressed around inequalities but there was almost an "extremist, very anti-organisational" BME structure which excluded anyone who was LGBT and did not really like anyone who was not Christian.

But there was also a need to lead from the front: the trust had to do some "brave things" which led to employment tribunals but was a signal to the organisation that they were taking the issues seriously. She set up a board-led network structure – not just for BME staff but also those who were LGBT. The trust also set up a "celebrating culture" event, reverse mentoring schemes and recruitment panels which better reflect the trust. Support and practical advice is being given to people who are short-listed but not appointed – something which is known to be an issue with BME staff. This had culminated in a much improved Care Quality Commission report which had recognised how the trust's culture had moved on.'

13. The Claimant asserted, in her particulars of claim that Ms Griffiths '*made the offending pronouncement or announcement or assertions (as the case may be) which is or are targeted against/towards the Claimant and its members (membership) and which constitute an act/action of racial*

victimisation as an anti-discrimination group. The essence of the publication reaffirmed or reasserted the Respondents' intent/intentions to victimise and to continue to victimise the Claimant and its collective membership because of or for matters arising from its anti-racist activities/efforts/initiatives. In essence, the Respondents reaffirmed by that publication, their intent to stifle the Claimant and its collective members/membership and to nullify its effectiveness by all means necessary and at all costs.' [18 - 3.8].

14. I summarise the Respondent's submissions as follows:

    a. While there is a general caution against striking out discrimination claims, a more pragmatic approach has more recently been advocated, as summarised by Underhill LJ in **Ahir v British Airways plc [2017] EWCA Civ 1392**, stressing that Tribunals should consider the 'inherent implausibility' of a claimant's case. There are no disputed facts in this case, requiring findings at a full hearing.

    b. It is accepted, for the purposes of this hearing only that the past claims and complaints of discrimination brought by BME group members could constitute protected acts and that the Claimant could, by virtue of her membership of the Group, be associated with those protected acts, but it not accepted, by way of causation that such protected acts lead to her being subjected to any detriment.

    c. It is inherently implausible that the Claimant will be able to show that the Respondent (in the person of Ms Griffiths) victimised her, by virtue of the reported comments in the HSJ, particularly as Ms Griffiths, in particular, made no mention of the Claimant, or any member of the BME group. The references she did make were clearly in relation to Dr Lyfar-Cisse's claims.

    d. Importantly, any alleged detriment must be causally linked to protected acts carried out by the Claimant, even by association. It should be noted that the Claimant has not, herself, brought any claims.

    e. The Claimant has not suffered any detriment. She is not claiming injury to feelings and seeking only nominal damages and a recommendation. Applying the test in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL ICR 337**, an unjustified sense of grievance could not amount to a detriment. It is an objective test for a tribunal to find that '*by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.'*

    f. The claim is not really about the Claimant, but has in fact been pleaded in relation to the BME group. If in fact, however, the Claimant was correct in her claim, every member of the BME group (of approximately 500 persons) could bring such a claim.

15. I summarise the Claimant's submissions as follows:

    a. The Claimant does not, herself, have had to carry out a protected act, but can rely, by association, on complaints and claims of discrimination brought by other members of the BME group.

    b. The Claimant has suffered detriment – the entire message of the article was not a threat, but a promise of action to be taken against BME staff, unless they '*toed the line'*. The Respondent knows that she is a member of the Group and is chair of its 'action group'. This, therefore, is a message to her. It was also insulting to BME staff.

    c. This was a presentation by the CEO, no less, in a conference of other CEOs, labelling the Claimant and others as extremist and anti-organisational and promising to '*lead from the front'* and do '*brave things'*.

    d. There are factual matters in dispute which cannot be resolved without further disclosure and evidence from Ms Griffiths and therefore a full hearing is required.

    e. While, currently, no award for injury to feelings is sought, that is an issue than can be subject to amendment, although for the Claimant's purposes, a declaration is sufficient, which, in the unlikely event of the Respondent conceding to such, the Claimant would walk away.

Findings

16. Reliance on Protected Acts by Association. It is clear from the submissions that the Claimant can seek to rely, by association, on the protected acts of others in the BME group.

17. Causation for the statements made by Ms Griffiths. I find that the content of what Ms Griffiths said was clearly motivated by her experiences of dealing with complaints and claims from members of the BME group and I do so for the following reasons:

    a. She referred to '*a number of employment tribunal cases'*, which, undoubtedly, will have included those of Dr Lyfar-Cisse, as there were multiple such claims, at least one of which reached the EAT and which, at least largely, were unsuccessful. She referred to challenging '*those comments'* that implicitly discriminated against other staff and Dr Lyfar-Cisse had been accused of precisely such comments, of an apparently homophobic nature.

    b. Her comment as to the existence of an *"extremist, very anti-organisational" BME structure which excluded anyone who was LGBT and did not really like anyone who was not Christian.*.' is highly likely to have referred to the BME group.

c. The '*brave things'* she refers to are clearly linked to defending employment tribunal cases, apparently predominantly brought by BME group members.

18. Detriment. I do not, however, consider that as a consequence, applying **Shamoon** that the Claimant has suffered detriment and I do so for the following reasons:

a. The Claimant has not sought to bring any other claim against the Respondent, nor even intimated that she has grounds to bring one. I have no reason to find, however that were she in the future to consider that she might have grounds for such a claim that she would be in any way intimidated or deterred from bringing one – indeed the alleged threats by Ms Griffiths in the article have not prevented her from bringing this victimisation claim. The Claimant is clearly not therefore deterred, or intimidated in any way by what Ms Griffiths said.

b. For a chief executive to be debarred effectively from stating her policy for the handling of race relations in her NHS Trust, would have an entirely chilling effect on both her free speech and her ability to manage. An employer is perfectly entitled to state that they have a duty to balance the rights of one minority group against another and that in their view, they consider one of those groups to be adopting an extremist stand-point.

c. An employer is also entitled to state that if presented with Tribunal claims that they consider unmerited, it is their policy to defend against such claims.

d. Of course, if either the Trust or Ms Griffiths were to make statements that constituted harassment of any particular protected characteristic, or to carry out actions that might constitute discrimination, then persons with such characteristics will be perfectly at liberty to contest such actions in this tribunal and, as stated, all the background evidence indicates that both the Claimant and the BME group are well capable of doing so.

e. I don't agree that there remain contested facts in this matter. The article (the contents of which are not in dispute) speaks for itself and even if, following any further disclosure and potentially witness evidence from Ms Griffiths, further information was forthcoming, the Claimant is fixed with her reaction to the article. It is the contents of that article about which she is complaining and nothing else. What Ms Griffiths is reported as saying is the reason for this claim.

f. I don't consider, therefore, objectively that the Claimant can reasonably assert, in all the circumstances that the article is to her detriment.

Conclusion

19. For these reasons, therefore, I find that the Claimant has no reasonable prospect of satisfying a Tribunal on this latter point, as to detriment and that therefore her claim of victimisation should be struck out.

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Employment Judge O'Rourke

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Date: 19 November 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....26 November 2020.....

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FOR THE TRIBUNAL OFFICE