



EMPLOYMENT TRIBUNALS

Claimant: Mr G Abercrombie

Respondent: B & M Retail Ltd

PRELIMINARY HEARING

Heard at: Liverpool (remote hearing in public by video CVP)

On: 18 January 2021

Before: Judge Brian Doyle (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr S Brochwicz-Lewinski, of counsel

RESERVED JUDGMENT

1. The Tribunal concludes that the claimant's allegations numbered 24, 28 and 30-36 have no reasonable prospect of success and they are ordered to be struck out.
2. The remaining allegations are not made the subject of a deposit order and they may proceed to the final hearing in accordance with the case management orders made below.

REASONS

Introduction

1. This is a preliminary hearing held in public via the CVP video conference technology.
2. The purpose of the preliminary hearing is to determine as a preliminary issue the respondent's application of 9 September 2020 [92-99] as to whether the Tribunal should strike out all or any part of the claim under rule 37 on the ground that it has no reasonable prospect of success; or, alternatively, whether a deposit order

should be made under rule 39 where the Tribunal considers that any specific allegation or argument in the claim has little reasonable prospect of success.

3. The Tribunal had before it the following documents: (1) a preliminary hearing bundle of some 414 pages plus index (reference to which appears in square brackets above and below); (2) counsel's written submissions on behalf of the respondent; and (3) an annotated bundle of authorities.

Earlier case management

4. The claim has already been the subject of earlier case management hearings on 12 June 2020 (Employment Judge Aspinall) [41-52], 11 September 2020 (Employment Judge Horne) [401-413] and 8 January 2021 (Employment Judge Barker). The preliminary issues could not be determined by Judge Barker for reasons of procedural fairness and fell to this Tribunal to determine.
5. The substance of the claim [15-26] and the essence of the respondent's response [27-37] to it may be gleaned from the case management summary and orders resulting from the earlier preliminary hearings.
6. The claim was presented on 5 March 2020 [15-26], following Acas early conciliation between 17 February 2020 and 3 March 2020 [14]. It arose from the claimant's employment by the respondent as a Learning & Development Field Trainer between 1 May 2019 and 4 December 2019. As originally presented, the claim contained complaints of unfair dismissal, and of sex and sexual orientation discrimination.
7. On 11 March 2020 the Tribunal required the claimant to provide further particulars of the discrimination complaints. He provided such particulars on 6 May 2020. He provided a Scott Schedule of his complaints on 9 July 2020 [53-55], to which the respondent provided a counter-schedule on 5 August 2020 [56-81]. In turn, that resulted in the claimant providing an amended Scott Schedule on 7 August 2020 [82-91].
8. The complaint of unfair dismissal was struck out by Employment Judge Allen on 4 May 2020 [40], following a strike out warning of 11 March 2020 [3-4], as the claimant had insufficient continuity of employment upon which to bring such a complaint.

The claim

9. Considerable clarification of the claim resulted from Judge Horne's case management on 11 September 2020.
10. As summarised by Judge Horne, without objection by the parties, the claimant's case is that, from the second day of his employment, he was sexually harassed by Mr John Paddock, the Programme Delivery Manager. Mr Paddock's behaviour culminated in an incident at an induction training event on 26 September 2019. According to the claimant, Mr Paddock allegedly put his arm round him and made a remark that they would make "beautiful babies" together. The claimant says that he

“stayed professional” and “kept Mr Paddock at arm’s length”, and that this rejection caused Mr Paddock’s attitude towards him to change. Mr Paddock allegedly gave false information to Anna Woods, Head of Apprenticeship Operations and Development, which caused her to manage the claimant differently. On 3 December 2019, the claimant raised a concern about “escalating issues at work” in an email to Human Resources. The following day, Ms Woods dismissed the claimant, citing a breakdown in the relationship between the claimant and Mr Paddock, and a loss of trust and confidence. The claimant raised a grievance, which was not upheld. He appealed unsuccessfully. He contends that his dismissal was motivated by the fact that he had e-mailed Human Resources about his difficulties with Mr Paddock.

11. Judge Horne had rationalised the complaints in tabular form as amounting to 32 separate matters, listed as 1-39, but omitting 5, 7, 10, 13, 29, 37 and 38 in the numbering sequence [405-407]. It was also established definitively that the complaints arose exhaustively either as complaints of harassment (section 26 Equality Act 2010) or as complaints of victimisation (section 27 Equality Act 2010). The protected characteristic relied upon is that of sex (and not sexual orientation). The claimant does not rely upon associative discrimination or discrimination by perception.
12. On 9 October 2020, following reflection and as a result of Judge Horne’s case management orders, the claimant withdrew 3 of the complaints (allegations 19, 22 and 39) and he amended or clarified 4 others (allegations 17, 18, 24 and 28) [414].

Sections 26 and 27 Equality Act 2010

13. It will be helpful here to set out the provisions of section 26 and section 27 of the Equality Act 2010 upon which the claimant exclusively relies.
14. So far as harassment is concerned, section 26(1) provides that 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.
15. Section 26(2) provides that 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 section 26(1)(b).
16. Section 26(3) provides that A also harasses B if—(a) A or another person engages in unwanted conduct of a sexual nature or that is related to sex, (b) the conduct has the purpose or effect referred to in section 26(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.
17. In deciding whether conduct has the effect referred to in section 26(1)(b), section 26(4) provides that 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. For present purposes, sex is a relevant protected characteristic (section 26(5)).

18. Drawing upon the commentary in *Harvey*, the Tribunal notes that section 26(1) is a general definition of harassment, reflecting the requirements of the Equal Treatment Directive. It is qualified by both subjective and objective elements in section 26(4). Section 26(2) and (3) contain two other forms of harassment which are specific to sex discrimination. The obligation on an employer not to harass an employee derives from section 40(1).
19. The formula “related to” used in section 26(1)(a) is a deliberate change from the previous formula “because of” under before the Equality Act 2010. It has, and should be given, a broad interpretation. The conduct complained of does not have to be because of the protected characteristic in question. See paragraph 7.9 of the Equality Code of Practice.
20. The question of whether there is harassment is to be considered in the light of all the circumstances. Yet the Tribunal must always consider the “related to” question. If it finds that the alleged harassment was related to a protected characteristic, it will need to make clear on what grounds it so concludes.
21. If the claimant's subjective view, as required by section 26(4)(a), is not established on the facts, the Tribunal need go no further. If it appears to the Tribunal that it was not reasonable for the conduct to have the claimed effect, as required by section 26 (4)(c), that too will end the necessary inquiry.
22. No justification for harassment is possible and no comparator is needed. However, conduct shall be regarded as having the required effect only if, having regard to all the circumstances, including in particular the perception of the victim, it should reasonably be considered as having that effect. The fact that the claimant is peculiarly sensitive to the treatment accorded him or her does not necessarily mean that harassment will be shown to exist.
23. Harassment does not require that the protected characteristic in issue cannot be shared by both perpetrator and victim. If a male employee treats another male in a sexually abusive fashion this can be unlawful discrimination in circumstances where he would not have treated a female colleague in the same way. However, harassment is a form of discrimination and not all objectionable conduct (such as bullying) will readily fall within it.
24. So far as victimisation is concerned, section 27(1) provides that 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. A protected act includes (a) bringing proceedings under the Act; (b) giving evidence or information in connection with proceedings under the Act; (c) doing any other thing for the purposes of or in connection with the Act; (d) making an allegation (whether or not express) that A or another person has contravened this Act (section 27(2)).

Rules 37 and 39

25. Rule 37(1)(a) provides that 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 on the ground that it has no reasonable prospect of success. A claim may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
26. Again, drawing upon the commentary in *Harvey*, the case law on rule 37 establishes that a striking out order should not normally be made when material facts are still in issue. A Tribunal should be particularly loath to strike out cases concerning discrimination, but there are no formal categories in which striking out is not permitted at all. The Tribunal should not hold a lengthy trial within a trial, involving extended cross-examination of the claimant, and should not order a strike out if matters of fact remain in contention. The operation of rule 37 requires a two-stage test: (1) has one of the grounds for strike-out been established on the facts; (2) if it has, is it just to proceed to a strike-out in all the circumstances (including whether other, lesser measures might suffice)? Rule 37 is permissive, not mandatory.
27. Caution is to be exercised in handling a strike-out application where the claimant is a litigant in person and the pleading is (or has been) imprecise. The draconian nature of such an order must be kept in mind, along with the requirement of no such prospects, not just that success is thought unlikely. The proper approach is to take the allegations in the claimant's case (as amended) at their highest. If there remain disputed facts, there should not be a strike-out unless the allegations can be conclusively disproved as demonstratively untrue. In doing so the tribunal should not conduct a "mini-trial".
28. So far as is relevant for immediate purposes, rule 39(1) provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring the claimant to pay a deposit.
29. The case law under rule 39 establishes that the test for the ordering of a deposit is that the party has "little reasonable prospect of success" (as opposed to the test for striking out which is that there is "no reasonable prospect of success"). Where there remain significant conflicts of fact, it may be preferable for the Tribunal to proceed to a hearing of the merits rather than conduct a mini-trial at preliminary stage to determine whether to make a deposit order (which might frustrate the point of the rule, which is to avoid delay and expense).

Submissions

30. The respondent's counsel addressed his written submissions and took the Tribunal to the familiar authorities. The Tribunal does not reproduce those submissions here, but incorporates them by reference. The Tribunal is grateful to counsel for his assistance in providing a framework for deciding the preliminary issue.

31. Understandably, the claimant as a litigant in person was less able to focus his submissions on the preliminary task, which had a narrower focus than that which the claimant adopted in seeking to present evidence and to argue the merits of his claim. At the suggestion of the Tribunal, the claimant rested his case in the final analysis upon the claim itself and the allegations that had emerged from the case management process. The claimant was not thereby disadvantaged.

Authorities

32. The authorities put before the Tribunal, which had been helpfully annotated by counsel, and which the Tribunal has considered, were as follows: *Van Rensberg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07 EAT; *North Glamorgan NHS Trust v Ezsias* [2007] IRLR 603 CA; *CLFIS UK Ltd v Reynolds* [2015] IRLR 562 CA; *Mechkarov v Citibank NA* [2016] ICR 1121 EAT; *Ahir v British Airways plc* (18 July 2017) CA; *Hemdan v Ishmail* [2017] IRLR 228 EAT; *Morgan v DHL Services Ltd* UKEAT/0246/19 EAT; and *Royal Mail Group Ltd v Jhuti* [2020] IRLR 129 UKSC.

Discussion and conclusion

33. The Tribunal now turns to consider the allegations in turn. It adopts the table, description and numbering of allegations as set out by Judge Horne [405-407].

34. Allegations 1-4 and 6 (there are no allegations 5 or 7) rely upon section 26(2) and relate to store induction events at Runcorn, Wolverhampton and Nottingham on 2 May 2019, 14 May 2019, 12 June 2019, 18 June 2019 and 17 July 2019. It is alleged that Mr Paddock said in front of new colleagues (or managers or deputy managers) that the claimant was handsome, dressed beautifully, should be a model, and had won the Women's Premier League as a football manager. The claimant asserts that this is unwanted conduct of a sexual nature, having the purpose or effect of violating his dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

35. The Tribunal is unable to conclude as a matter of preliminary consideration that, if established in evidence and following legal argument, these allegations could not potentially amount to unwanted conduct of a sexual nature, having the purpose or effect required. It is not possible to say at this point in the proceedings that these allegations have little or no reasonable prospect of success such that they should be struck out or be made the subject of a deposit order. That is not to say that they will necessarily succeed or that other objections might be taken to them (such as time limitation).

36. Allegations 8 and 9 involve alleged late changes to the claimant's schedule on 7 and 9 August 2019. The claimant relies upon section 26(3). Allegations 14-18 as amended (there is no allegation 13) are also allegations of less favourable treatment falling under section 26(3), as are allegations 23, 25, 26 and 27. Each allegation is relatively self-contained. They will require a finding of fact to be made in each instance as to whether what alleged actually happened.

37. The Tribunal considers that these allegations, if established in evidence, could potentially amount to harassment, unless the respondent can put forward an ostensible and innocent explanation for what occurred (which it appears it *might* be able to do). The claimant's allegations here (as pleaded) are just sufficient to ground a complaint of harassment by Mr Paddock. That requires the claimant to establish that Mr Paddock had engaged in unwanted conduct of a sexual nature or that is related to sex and that such conduct had the required purpose or effect. He might be able to do so, as based upon allegations 1-4 and 6 (above) and allegations 11-12 and 20 (below). However, he will also need to establish that, because of the claimant's rejection of or submission to the conduct, Mr Paddock treated the claimant less favourably than he would treat the claimant if the claimant had not rejected or submitted to the conduct.
38. The Tribunal cannot say before trial that these allegations have little or no reasonable prospect of success such that they should be struck out or be made the subject of a deposit order.
39. Allegation 11 (there is no allegation 10) is that at a store induction on 26 September 2019 Mr Paddock put his arm around the claimant in front of 40 new colleagues and 5 managers. In the Tribunal's view, this allegation cannot properly be read in isolation from allegation 12 of the same date in which it is asserted that Mr Paddock said to the audience: "Don't you think Graham [the claimant] and I would have beautiful babies if we were rolling around in a sleeping bag together?" Allegation 20 is of a similar character.
40. In respect of these allegations, the claimant relies on section 26(2) and the sexual nature of the conduct. The point is an arguable one. It is not possible to say at this point in the proceedings that these allegations have little or no reasonable prospect of success such that they should be struck out or be made the subject of a deposit order. That is not to say that they will succeed or that other objections might be taken to them (such as time limitation).
41. Allegation 21 relies on section 26(1). It is alleged that Mr Paddock told the claimant a story of approaching a man in a sexual manner and bragging about how easy it was. It is asserted that Mr Paddock would not have conducted himself towards the claimant in that way if the claimant had been a woman. That requires the claimant to be able to show that Mr Paddock thereby harassed him by engaging in unwanted conduct related to a relevant protected characteristic (here that must be that the claimant is a man and not a woman) and that the conduct had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
42. The point is an arguable one. It is not possible to say at a preliminary hearing that it has little or no reasonable prospect of success.
43. Allegations 24 and 28, as amended, rely upon section 26(3) and are directed at Ms Woods rather than at Mr Paddock.
44. The Tribunal considers that these allegations, even if established in evidence, could not potentially amount to harassment of the claimant by Ms Woods. It

matters not whether the respondent might be able to put forward an ostensible and innocent explanation for what occurred (which it appears it *might* be able to do). The claimant's allegations here (as pleaded) are insufficient to ground a complaint of harassment by Ms Woods. That requires the claimant to establish that Mr Paddock had engaged in unwanted conduct of a sexual nature or that is related to sex and that such conduct had the required purpose or effect. He might be able to do so, as based upon allegations 1-4 and 6 (above) and allegations 11-12 and 20 (below). However, he will also need to establish that, because of the claimant's rejection of or submission to the conduct of Mr Paddock, Ms Woods treated the claimant less favourably than he would treat the claimant if the claimant had not rejected or submitted to the conduct. That connection appears to be missing in the claimant's pleaded case.

45. The Tribunal concludes that these allegations (24 and 28) have no reasonable prospect of success such that they should be struck out.

46. That leaves a group of allegations (30-36) that rely upon victimisation contrary to section 27. The issue here is whether there was a protected act and, if so, what was it? The alleged protected act is said to be the sending of an email on 3 December 2019 that appears at [338] of the preliminary hearing bundle. It is difficult to see how that email even begins to fall within the definition of a protected act in section 27(2). It makes no reference to discrimination or harassment or the Equality Act and it makes no specific allegations at all. Moreover, the claimant makes no post-termination complaints of unlawful discrimination or harassment in his claim.

47. The Tribunal concludes that these allegations (30-36) have no reasonable prospect of success such that they should be struck out.

CASE MANAGEMENT ORDERS

1. The claim is already listed for a final hearing of **5 days at Liverpool on 2-6 August 2021** in accordance with Employment Judge Horne's case management orders of 11 September 2021.
2. The following case management orders are intended to supplement Judge Horne's orders.

Schedule of Loss

3. The claimant must by **15 February 2021** send to the respondent and the Tribunal a document setting out how much compensation for lost earnings or other losses he is claiming and how the amount has been calculated. This is called a Schedule of Loss.
4. If the claimant has been dismissed and wants to be reinstated or re-engaged, the Schedule of Loss must say so.

Documents

5. By **15 March 2021** the respondent must send the claimant copies of all documents relevant to the issues as now refined.
6. By **22 March 2021** the claimant must send the respondent copies of any other documents relevant to those issues. This includes documents relevant to financial losses and injury to feelings.
7. Documents includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.

File of documents

8. By **26 April 2021**, the claimant and the respondent must agree which documents are going to be used at the hearing.
9. The respondent must prepare a file of those documents with an index and page numbers. They must send a hard copy to the claimant by **10 May 2021**.
10. The file should contain:
 - a. The claim and response forms, any changes or additions to them, and any relevant tribunal orders. Put these at the front of the file.
 - b. Other documents or parts of documents that are going to be used at the hearing. Put these in date order.
11. The claimant and the respondent must both bring a copy of the file to the hearing for their own use.
12. The respondent must bring four more copies of the file to the hearing for the Tribunal to use by 9.30 am on the first morning.

Witness statements

13. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.
14. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.
15. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include any evidence about financial losses and any

other remedy the claimant is asking for. If the witness statement refers to a document in the file it should give the page number.

16. At the hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.
17. The claimant and the respondent must send each other copies of all their witness statements by **28 June 2021**.
18. The claimant and the respondent must both bring copies of all the witness statements to the hearing for their own use.
19. The respondent must bring four more copies of the witness statements to the hearing for the Tribunal to use by 9.30 am on the first morning.

Checklist

Date	Order	✓
15 February 2021	Schedule of Loss	
15 March 2021	Respondent's documents	
22 March 2021	Claimant's documents	
26 April 2021 10 May 2021	File of documents	
28 June 2021	Witness statements	

Hearing preparation

20. By **12 July 2021**, the claimant and the respondent must both write to the Tribunal to confirm that they are ready for the hearing or, if not, to explain why.
21. The respondent must prepare and try to agree:
 - a. a neutral chronology, listing the key events and when they happened. The chronology should refer to page numbers from the file;
 - b. a list of people involved in key events and their job titles;
 - c. a list of the key documents in the file, with the page numbers, that the Tribunal needs to read at the start of the hearing;
 - d. a consolidated table of remaining allegations;
 - e. an updated list of issues.
22. By **19 July 2021**, the respondent must send copies to the claimant.
23. The respondent must bring three copies to the hearing for the Tribunal to use.

Variation of dates

24. The parties may agree to vary a date in any order by up to **14 days** without the Tribunal's permission, but not if this would affect the hearing date.

About these orders

25. These orders were not made at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order for doing something.

26. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

27. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Writing to the Tribunal

28. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

29. All judgments and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

Judge Brian Doyle
DATE: 22 January 2021

RESERVED JUDGMENT
SENT TO THE PARTIES ON

3 February 2021

FOR THE TRIBUNAL OFFICE