



EMPLOYMENT TRIBUNALS

Claimant: Ms S Rudd

Respondent: Great Bowery (UK) Ltd

Heard at: London Central (in private) by CVP **On:** 8 February 2021

Before: Employment Judge Nicolle (sitting alone)

Appearances

For the Claimant: Mr T Perry of Counsel

For the Respondent: Ms M Tutian of Counsel.

JUDGMENT

1. The claim for detriments on grounds of making alleged protected disclosure(s) is struck out Under Rule 37 (1) (a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules) on the basis that it has no reasonable prospect of success.
2. Whilst the application for a strike out was confined to detriments on account of protected disclosures and not dismissal being automatically unfair under S.103A of the Employment Rights Act 1996 (the ERA) the parties agreed that the basis of the strike out above meant that this claim could not be pursued and is therefore dismissed.
3. The claims for direct sex discrimination under S.13 Equality Act 2010 (the EQA) and harassment under S.26 of the EQA are dismissed on withdrawal.

The Hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.
5. In accordance with Rule 46, the Tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended the hearing.
6. The parties and were able to hear what the Tribunal heard.
7. The participants were told that it is an offence to record the proceedings.
8. From a technical perspective, there were no major difficulties.
9. There was a bundle comprising 622 pages. This was either viewed in physical or electronic format, but all participants had access to all the documents.

REASONS

1. Oral reasons were given to the parties during the hearing, but the Claimant has subsequently requested written reasons.
2. This is an application brought by the Respondent for the strike out, or in the alternative, the continuation of certain elements of the year claims being conditional on the payment of deposits.
3. By way of background the Claimant was employed as an agent by the Respondent from 1 June 2018 until her resignation with effect on 13 October

2020. She presented claim forms on 24 July 2020 and 16 October 2020. Those claim forms have been consolidated.

4. I conducted a Closed Preliminary Hearing dealing with case management issues on 7 December 2020. The Respondent requested a subsequent Open Preliminary Hearing to consider applications for the strike out of the claims for indirect sex discrimination and detriments on account of alleged protected disclosures.
5. Ms Tutian in her skeleton arguments said that victimisation should have been included. There was an initial discussion between Ms Tuitan, Mr Perry and me during which it was agreed that it would be consistent with the overriding objective and proportionality if the question of victimisation was considered in conjunction with the other matters and I preceded on that basis.

Relevant background

6. The Claimant because of the pandemic was placed on furlough leave. She signed a letter dated 31 March 2020, which she says was signed under duress, setting out the terms of the furlough. The Claimant then raised a grievance on 8 April 2020. This included the contention that she believed her having been placed on furlough was an act of victimisation primarily by Thu Nguyen and based on age discrimination. She did not mention sex discrimination at that point.
7. The Claimant attended a grievance hearing on 24 April 2020 and in a letter dated 1 July 2020 she was advised that it had been rejected. The Claimant then appealed against the grievance outcome in a letter of 13 July 2020. She had a grievance appeal hearing on 28 July 2020 and received an outcome rejecting her appeal in a letter dated 11 August 2020. The letter said that she had offered no evidence of age discrimination but had suggested sex discrimination for the first time at the appeal hearing.
8. On 30 September 2020, the Claimant was advised that her position had been provisionally identified as at risk of redundancy following the application of a selection matrix based on what the Respondent says were relevant criteria.

9. The Claimant resigned in an email dated 13 October 2020 saying that there had been a breach of the implied term of trust and confidence and that her redundancy was a result of her having made a discrimination claim and having made a protected disclosure to the ICO regarding alleged breaches of GDPR and she considered this to be victimisation.

The Relevant Law

10. The parties were broadly in agreement as to the applicable law both for strike out applications and deposits. Ms Tuitan referred me to the well-established principles in relation to strike out under Rule 37(1) on the basis that a case has no reasonable prospect of success. She referred to Mechkarov v Citibank NA [2016] ICR 1121 as authority for it should only being in the clearest case that a discrimination case should be struck out and that a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.
11. Mr Perry referred to Ezsias v North Glamorgan NHS Trust [2007] IRLR 603 and the extremely well known passage in Anyanwu v South Bank Students' Union [2001] IRLR305, HL per Lord Steyn at para 24 to the effect that it should be only in the most obvious and plainest cases that discrimination claim should be struck out and that such cases are generally fact sensitive.
12. He argued that tribunals should be reluctant to strike claims out other than in the clearest cases and he referred to Citibank to include that a claimant's case must ordinarily be taken at its highest.
13. The parties also referred the principles in respect of deposit orders, but these are well known and there is no need for me to set them out.

Conclusions

14. I will address the individual elements of the claim sequentially.

Indirect sex discrimination under S.19 of the EQA

15. The Respondent says that there is no evidentiary basis to support the Claimant's allegation that it applied a provision, criterion or practice (PCP) of furloughing staff in the Photography Division who had children to her. The Respondent says that say choices were made based on financial forecasts. They say that the Claimant has failed to identify any particular disadvantage she contends she suffered.
16. This is disputed by Mr Perry; he says the case should be taken at its highest level. He points to various remarks made which potentially evidence discriminatory practice on account of sex to include during the grievance investigation meeting on 17 June 2020 Ms Nguyen allegedly referring to staff having children as having been furloughed and an earlier email on 9 March 2020 saying about the Claimant "If she is looking after her kids then she is unable to work this affects us all".
17. I took into account the fact that the Claimant's initial grievance related to age but not sex. Nevertheless, I am not satisfied that the claim of indirect sex discrimination has no reasonable prospect of success and neither am I satisfied that it has little reasonable prospect of success which would justify my making its continuation conditional on a deposit order. I reach this decision for the following reasons:
- a) The claim of indirect sex discrimination whilst arguably not particularised as well as it could be with the benefit of full legal representation, nevertheless in my view is clear in so far as the Claimant contends that there was a practice of the Respondent disadvantaging those who were homeworking and/or looking after children in its decisions regarding furlough.
 - b) There had been a recent history of the Claimant being involved in discussions regarding whether she could work from home or be required to attend the office.
 - c) The remarks allegedly made pertaining to where those homeworking are looking after children whilst not necessarily indicative of any antipathy of the Respondent and its managers towards those working from home.
18. The basis of this element of the Claimant does therefore in my view pass the relatively low threshold for a case to have a reasonable prospect of success to avoid a deposit and therefore no reasonable prospect of success to avoid the more draconian strike out of this element of the claim.
19. Therefore, I order no deposit and no strike out in relation to indirect sex discrimination.

Victimisation under s. 27 of the EQA

20. The victimisation complaint is at least in part predicated on the first Tribunal complaint being a protected act. Ms Tuitan acknowledges that the Claimant had undertaken protected acts but disputes that the Claimant was subject to any detriment or that her proposed redundancy and ultimate constructive dismissal claim was in any way connected with such protected acts.
21. Whilst I accept that the Claimant has hurdles to overcome in demonstrating any causative link between alleged protected acts and her redundancy, I am nevertheless not sufficiently persuaded that the claim has no reasonable, or indeed little reasonable, prospect of success which would justify my either striking it out or making its continuation conditional on a deposit order.
22. In reaching this decision I am also mindful of the fact that the claim of victimisation is part of a wider claim to include constructive unfair and wrongful dismissal which by necessity would proceed in any event. I am not persuaded that the victimisation element of that claim is sufficiently distinct, and likely to result in significant additional evidence, time or legal argument, that it would be of any real benefit even if I were of the view that it had no or alternatively little reasonable prospect of success for it to be struck out or its continuation conditional on the payment of a deposit.

Protected disclosure detriment claim

23. I discussed with Counsel the implications of a decision that element of the detriments claim detriment which is not subject to an application for a strike out or a deposit order, namely that the Claimant's dismissal was automatically unfair on as being causatively linked to her having made protected disclosures.
24. Ms Tuitan argues that for various reasons that the claim should be struck out. She says that there was no disclosure of information, at best it was the making of allegations.
25. Mr Perry refers to Kilrairie v London Borough of [2018] IRLR 846 which he says caveats the well-known decision in Cavendish Munro Professional Risks Management Ltd v Gelduld [2010] ICR 325 to the effect one must look at the background in which a purported disclosure was made. He says information was provided amongst the allegations made.

26. Ms Tuitan says that the Claimant could have no reasonable belief that the alleged disclosures tended to show a breach of a relevant legal obligation and further that such disclosures were not in the public interest. She says that this was simply a private workplace dispute. Mr Perry says that the disclosures regarding alleged bullying were wider than matters specific to the Claimant but rather a more general culture of bullying.
27. Having considered the pleadings, the submissions and relevant pages in the bundle I was taken to, I have decided that this element of the claim has no reasonable prospect of success and therefore I strike out the claim of the Claimant suffering detriments on grounds of her having made protected disclosures. I make this decision for the reasons set out below.
28. I consider that the matters relied on as being qualifying protective disclosures do not fall within the categories as identified under s.43 in the ERA. First, I am not sufficiently satisfied that they involve the provision of information rather than more general allegations.
29. More significantly I do not consider that there can be any reasonable prospect, and indeed no reasonable prospect, of establishing that the allegations and/or information depending on how that is categorised constitute matters which would engage the public interest requirement. These are in my view matters of a purely private nature relating to a grievance raised by the Claimant regarding the alleged approach of her manager. This therefore constitutes a private workplace dispute rather than a matter where there can be any reasonable prospect it would be found to engage the relevant legal protection.
30. Therefore, this element of the claim is struck out pursuant to Rule 37(1) (a) on the basis that it has no reasonable prospect of success.
31. For the avoidance of doubt the claims for constructive unfair and wrongful dismissal (breach of contract), indirect sex discrimination and victimisation under S.27 of the EQA proceed to a full merits hearing.

Employment Judge Nicolle _____

4 March 2021

Sent to the parties on:

05/03/2021

For the Tribunal: