



EMPLOYMENT TRIBUNALS
London Central Region

Claimant: Ms A A Kostrova

Respondents: (1). McDermott International Inc
(2). CB&I UK LTD

Before: Employment Judge Mr J S Burns

Representation

Claimant: In person

Respondent: Ms A Horsman (Solicitor)

JUDGMENT

1. The name of the First Respondent is changed so it reads as above.
2. The claim under the equality term is dismissed on withdrawal by the Claimant.
3. The remainder of the claims are struck out under Rule 37(1)(a) of the 2013 Rules
4. The full merits hearing on 27 to 30 September 2021 is cancelled.

REASONS

1. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46.
2. The Claimant claimed direct sex and age discrimination in relation to the decision to end her assignment with the Second Respondent on 2/10/2020. She claimed direct sex discrimination in relation to the remuneration she received during her assignment. Her named comparator in this regard is Niraj Vajir.
3. I was referred to documents in a joint bundle and received written and oral submissions from Ms Horsman and then oral submissions from the Claimant.
4. The Respondents' application to strike-out was made many months ago and was delayed further at the previous hearing on 29 March 2021 so that further disclosure could take place, which has now occurred. The Claimant raised further issues about disclosure at the beginning of the hearing before me but was unable to clearly identify any specific missing document.
5. I am satisfied by Ms Horsman's explanation that the Respondents have given full disclosure. I feel sure that the documents I have considered accurately reflect the relevant dealings between the parties and would be the same documents which would be determinative of the issues, if this case proceeded to a full merits hearing.

Basic facts

6. I have taken the Claimant's case at its highest but basically the main facts are not in dispute, and they are as follows.
7. The Second Respondent which is a subsidiary of the First Respondent, provided the work which the Claimant from 27/5/2019 carried out as a Grade 1 administrator in the pay department.

8. She appears to have been a hard worker and conscientious.
9. However, in the course of her work she had to obtain time-sheets from other employees and workers, who in some cases were slow in sending them to her.
10. She persistently wrote emails to these persons demanding compliance. Some of these people and particularly those in positions more senior to the Claimant, found the tone of the Claimant's emails to be peremptory and rude and did not like being addressed in this manner.
11. The Claimant's manager, Richard Gray, asked the Claimant to moderate the tone of her emails. For example, he wrote to her in May 2020 "*Please be professional in how you communicate with these guys*". The Claimant did not agree with or heed this advice.
12. The Claimant style of communicating with Mr Gray was also found by him to be unprofessional and inappropriate, for example in relation to a pay-increase which she wanted but which he was unable to offer in July 2020, and when Mr Gray asked Claimant (who had been working from home during the pandemic lockdowns) to start working 2 days a week in the office in September 2020. The Claimant ignored this instruction and then resisted it in terms which Mr Gray found to be terse and abrupt, and lacking the normal courtesies which should be observed in a professional environment..
13. After months of escalating difficulties of this kind, Mr Gray contacted HR and said that he wanted to bring the Claimant's assignment to an end because of her unprofessional conduct and lack of team work, and this was then carried out in a summary manner in early October 2020.
14. The Claimant complains that before her assignment was terminated, she was paid less than a man namely Niraj Vajir, who also worked as an agency worker for the Second Respondent. It is not in dispute that the Claimant and Mr Vajir were at Grade 1 and Grade 5 respectively and that they had different job descriptions and that Mr Vajir as a more highly graded worker, was paid on a higher pay scale.

Summary of relevant law

15. A Tribunal may strike out a claim under Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that it is "scandalous or vexatious or has no reasonable prospect of success".
16. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. See Ezsias v North Glamorgan NHS Trust [2007] IRLR 603. Hence it is only in an exceptional case that it will be appropriate to strike out a claim on this ground, where the issue to be decided is dependent on conflicting evidence; However, the question is whether the claims have a realistic as opposed to a fanciful prospect of success.
17. Discrimination claims can and should be struck out where the allegations are implausible and there are no facts indicative of unlawful discrimination; see for example ABN AMRO Management Services Ltd v Hogben [2009] UKEAT/0266/09/DM at p. 15;
18. Where there is no meaningful dispute on the facts, there is no good reason why discrimination complaints should proceed to a futile hearing. See Anyanwu v South Bank Student's Union [2001] IRLR 305 at p.39
19. In respect of discrimination claims, it is open to the Tribunal to conclude that there is no material which could possibly give rise to an inference of discrimination where none has been identified. Per Mr Justice Langstaff in Chandhok and anor v Tirkey UKEAT/0190/14 at p. 20

20. Some factual disputes does not bar strike-out. Per Mr Justice Mitting in Patel v Lloyds Pharmacy Ltd UKEAT/0418/12 at p.19-20:- *“Neither Anywanwu nor Maurice Kay LJ’s observations (in Eszias) however, require an Employment Judge to refrain from striking out a hopeless case merely because there are unresolved factual issues within it. In such a case I believe that the correct approach is that which I have adopted, namely to take the Claimant’s case at its reasonable highest and then to decide whether it can succeed. There is a further possibility that discrimination cases are, by their nature, so sensitive and for the individuals concerned and society as a whole, so important, that they should be allowed to proceed simply because on the Micawber principle something might turn up... In my judgment...in a case that otherwise has no reasonable prospect of success it cannot be right to allow it to proceed simply on the basis that “something might turn up.” That is the position here. It is theoretically possible that in response to skilled cross- examination (the Respondent’s witnesses) might fall over themselves and admit to discrimination for an inadmissible reason. If there is a proposition that such a possibility requires a case to proceed then every...discrimination case that turns to any extent upon the oral evidence, in response to cross-examination, of employer’s witnesses must be allowed to proceed. I do not believe that there is such a principle.”*

Conclusion

21. The Claimant has not shown a "prima facie" case of discrimination.
22. The Claimant’s own pleadings make it clear that the Claimant’s age and sex discrimination claims are speculative, and that she believes her assignment may have been terminated for numerous reasons.
23. There is no evidential basis for the Claimant’s claims against the Respondents.
24. Even if the Claimant could establish a prima facie case of discrimination, there is substantial objective evidence which I have summarised above to support conclusively the Respondent’s non-discriminatory explanation.
25. It is inevitable that if the case proceeded to a final hearing the Tribunal would conclude that the reason for the termination of the Claimants assignment was neither her gender or age but rather her mode of communication, particularly by email, which was found to be unprofessional not only by her manager but by other colleagues over a prolonged period; and that the reason she was paid less than her comparator was not her gender but rather the fact that the comparator held a job at Grade 5 whereas the Claimant was at Grade 1, and each were paid according to their grade.
26. The Claimant’s claims for age and sex discrimination have no reasonable prospect of success.
27. It would be futile and not in the Claimant’s own interests for this matter to proceed further.

J S Burns Employment Judge
London Central
2/9/2021
For Secretary of the Tribunals
Date sent to parties;03/09/2021
