EMPLOYMENT TRIBUNALS

Claimant: **Ms M. Din**

Respondent: **Yorkshire Ambulance Services NHS Trust**

PUBLIC PRELIMINARY HEARING

Heard at: **Leeds via CVP** **On:** **28 September 2021**

Before: **Employment Judge Shepherd**

Appearances

For the Claimant: In person

For the Respondent: Mr Sangha, Counsel

JUDGMENT

1. The respondent's application for costs is refused.

2.The email of 20 May 2020 and the meeting on 14 December 2020 are without prejudice and the parties cannot refer to these in any oral or documentary evidence

3. The respondent's application to strike out the claims is refused.

DEPOSIT ORDER

I consider that the complaints brought by the Claimant of race discrimination and constructive unfair dismissal have little reasonable prospect of success and the Claimant is ordered to pay a deposit of **£150** by **24 October 2021** as a condition of being permitted to continue to advance her claims.

I have had regard to information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

Respondent's application for costs

1. The respondent's application for costs was made on the sole basis of the claimant's non-compliance with the previous Case Management Orders. The claimant is a litigant in person, she has attempted to comply with the orders. She admits being confused and having misunderstood matters. She refers to her dyslexia and anxiety.

2. The responses the claimant made to the case management orders have not been clear but there is evidence of her making attempts to comply. I do not accept that the claimant has acted unreasonably and the application for costs is refused.

Allegations 7 and 8 – without prejudice

3. With regard to the without prejudice issues in respect of allegation 7 and 8. I accept these were genuine attempts to resolve the disputes between the parties. It is clear that there were disputes that could result in litigation. The negotiations were between the senior members of the respondents HR department and included the claimant's trade union representative. It was the trade union representative who made the first approach in respect of the discussions that led to the email at allegation 7. He approached the respondent and indicated that the claimant would be prepared to go away for the right package. Clearly a negotiation with the intention of seeking to resolve the disputes.

4. The claimant said that the email at allegation 7 and the meeting on 14 December 2020 were threatening and intimidatory.

5. Clearly, any discussion to resolve disputes will inevitably involve some pressure on the parties involved and in negotiations there will be a requirement to give ground on both sides. However, these were perfectly proper negotiations and there was no unambiguous impropriety shown and they should not be referred to in any final hearing.

6. I heard no evidence of threats to the claimant. The without prejudice discussions cannot be referred to. I make the order that the parties' statements and any documentary evidence cannot refer to the email of 20 May 2020 or the meeting on 14 December 2020.

The respondent's application to strike out the claims

7. The respondent's application is on the basis that the claims have no reasonable prospect of success. I am concerned about the basis on which these claims are brought. There are numerous appellate cases that establish that the bare facts of a difference in status and a difference in treatment are not sufficient material from which a Tribunal could conclude that the respondent has committed an act of discrimination.

8. The claimant's evidence was difficult to follow. She indicated that there may be some comparators but at this stage they largely unclear. In Anyanwu and another v South Bank Students' Union and another 2001 ICR 391, the House of Lords highlighted the importance of not striking out discrimination claims except in the most

obvious cases as they are generally fact sensitive and require a full examination to make a proper determination. In this case I am concerned that the claimant will not be able to establish any facts from which the Tribunal could conclude that there was unfavourable treatment because of her race or victimisation because the claimant had done a protected act. I am not prepared to strike out the claims as having no reasonable prospect of success.

Deposit order application

9. Under Rule 39, where a Tribunal at a preliminary hearing considers that any allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring the party to pay a deposit of not more than £1000 as a condition of continuing to advance that allegation or argument. Rule 39(2) requires the Tribunal to make reasonable enquiries about the party's ability to pay the deposit and to have regard to that when deciding the amount of the deposit.

10. The threshold for making a deposit order, "little reasonable prospect of success", is lower than that for striking out a claim, but the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the essential facts. The Tribunal is entitled to take into account not only the purely legal issues, but also the likelihood of the party being able to establish the facts essential to his or her case, and in doing so, to reach a provisional view as to the credibility of the assertions being put forward: see: *Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07.

11. The Claimant has little reasonable prospect of proving facts from which the Tribunal could conclude, in the absence of an adequate explanation, that any of the things she complains of were less favourable treatment because of race or were victimisation for doing a protected act. For the most part, she simply asserts that her race was the reason and says that she believes it was. She does not give any evidence or explanation at all and she does not identify any white person in a comparable situation who was or would have been treated better. During the oral hearing she referred to some comparators. She said there were white employees with long-term sickness issues who had not been treated the way the claimant had been treated. However, it was not at all clear that they were in the same material circumstances as the claimant.

12. The claimant referred to a female staff member who had come back from maternity leave and had new role especially created for her. She said that no other returning females were given this option. This does not appear to be a comparator in the same material circumstances as the claimant and does not provide persuasive evidence that any treatment of the claimant was by reason of race.

13. The claimant refers to bullying and harassment throughout her employment and refers to her Pakistani heritage. However, she has not provided anything more than a bare assertion that there was treatment on grounds of her race. Both the direct discrimination and victimisation claims rely on inferences which are unlikely to be drawn.

14. I consider that the discrimination claims and the constructive unfair dismissal claim have little reasonable prospect of success. Without allegation 7 and 8, which are dependent on the without prejudice content, the constructive dismissal claim relies on the discrimination allegations and, once allegation 7 and 8 are taken out, allegation 6 was in respect of issues four months before her resignation.

15. I referred the claimant to a number of appellate judgments such as Madarassy v Normura International plc [2007] EWCA 33 in which the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: “They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

16. In the case of Strathclyde Regional Council v Zafar [1998] IRLR 36 the House of Lords held that mere unreasonable treatment by the employer “casts no light whatsoever” to the question of whether he has treated the employee “unfavourably”.

17. In Law Society and others v Bahl [2003] IRLR 640 the Employment Appeal Tribunal agreed that mere unreasonableness is not enough. Elias J commented that “all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory.

18. Taking those matters into account I consider that £150 is a sum that the Claimant has a realistic prospect of being able to pay, but which will have the necessary effect of giving pause for thought about pursuing these complaints, in circumstances where an Employment Judge has indicated that they appear to have little reasonable prospect of success.

19. As I explained to the Claimant, she must note that if she pays the deposit and loses the claims for the reasons I have identified in this order, not only will she lose the deposits, but, more importantly, she is at much greater risk of having to pay some or all of the Respondent’s legal costs.

20. If the claimant does pay the deposit and continue with the claims then a further preliminary hearing for case management purposes will then be listed.

Employment Judge Shepherd
29 September 2021

Sent to the parties on:
04 October 2021